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# FROM CONSTITUTIONAL RIGHTS TO 'REAL' RIGHTS — "R-I-I-G-HTS FO-OR-WA-ARD HO"!?

by  
H.J. Glasbeek\*

**\*\* Some notes to start off a discussion of Dworkin's claim that judicial review is America's "Most Distinctive and Valuable Contribution to Democratic Theory".**

*Historical evidence speaks with a single voice on the relation between political freedom and a free market. I know of no example in time or place of a society that has been marked by a large measure of political freedom, and that has not also used something comparable to a free market to organize the bulk of economic activity.*

*Because we live in a largely free society, we tend to forget how limited is the span of time and the part of the globe for which there has ever been anything like political freedom: the typical state of mankind is tyranny, servitude, and misery. The nineteenth century and early twentieth century in the Western world stand out as striking exceptions to the general trend of historical development. Political freedom in this instance clearly came along with a free market and the development of capitalist institutions. So did political freedom in the golden age of Greece and in the early days of the Roman era.*

*History suggests only that capitalism is a necessary condition for political freedom. Clearly it is not a sufficient condition.*

*Milton Friedman*

## **I. Pros and Cons of the Politics of Judicial Review**

### *(a) Protection from Capricious Governments*

The principal argument made in support of the entrenchment of a constitutional set of legal and political rights is that it means

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\*\* These notes are just that: notes. They form part of work-in-progress. My colleague Judy Fudge and I are preparing a paper which will attempt to evaluate what we perceive to be a distinctive movement towards the embracement of the politics of the discourse of rights. Our hypothesis is that, in Canada, this movement has been given impetus by the politics of constitutional litigation, whereas in England the need to support this kind of progressive politics has led to demands for constitutionally entrenched rights. The paper which we hope to produce will overlap with the submission I made at the Access to Justice Symposium, although we expect it to deal much more detailedly with the politics of rights' discourse as advocated by Hunt, Bartholemew, Laclau, Mouffe, et al, that is, with the matters addressed in a preliminary, sketchy way at the end of these notes.

that Canadians will no longer be at the mercy of the caprices of governments, state institutions and/or government functionaries. The courts will impose a check on unbridled power by reinforcing the legal and political rights which *now* have been declared to be fundamental. Previously, these same norms were part of our polity but were not enforceable in this way. While they had developed from modest beginnings to a relative state of richness and maturity, this had not happened in any systematic way and there was no guarantee that they would continue to be enlarged rather than diminished. They had been part of our political culture and, as super-structural things, remained malleable in the hands of governments, their agencies and institutions. Now they are no longer to be subject to political whimsy. People can no longer be pushed around just because they have different political or religious convictions. Courts will protect us from the leaden-weight of conventional values and the primitive mob instincts which sway governments from time to time. They even may be able to perfect the political and legal freedoms to which the constitutional document says we are entitled as a matter of right. Judges, armed with interpretative powers, may be able to give scope to the constitutionally enunciated norms in such a way as to enable citizens to enjoy a more meaningful political participatory political life. Our courts can, and might, interpret our newly entrenched norms to give us a richer, deeper democratic polity. A contrary set of arguments, however, has been given voice.

*(b) Democratic Institutions Versus the Courts*

No matter how little we think of our existing democratic institutions, they are intended to be democratic. It is true that it took us some time to become as democratic as we are. Full-blown adult suffrage, which gave the vote to all sexes and all races, only became a reality after World War II. Indeed, we only have had a universal franchise since 1960 when status Indians living on the reserve became eligible to vote in federal elections. But, today, every Canadian has voting rights, independent of gender, race or wealth. Governments are elected at the municipal, provincial and federal levels. Between them they have plenary powers. These can be used to restrain the would-be bullies in our society who might be in a position to exercise dominium over others because of their private wealth and strength. To ensure that other actors and agencies do not overwhelm citizens, we have made our army, police forces and public sector bureaucracies formally accountable to our elected governments. We have a relatively educated citizenry. We understand that it is to be kept informed. Many formal requirements of disclosure have been imposed on governments. In addition, there are strong conventions which require that public sector actors be accountable to the public whose servants they are deemed to be. There are formal legal rules and traditions which forbid cynical self-dealing by public officials.

While all too often the forms are better than the execution, the intent is plain: the legal and political institutions are aimed at furthering democratic practices. In addition, our developing sensitivity for the plight of those who live differently, look different, are physically differently equipped or have different customs and beliefs, gradually has led us to impose obligations on both governments and private sector actors, forcing them to deal more equitably in respect of differences. Given these positive developments, all of which have been the outcomes of our electoral mechanisms and public sphere activities, why would we entrust our future to an appointed, electorally unaccountable institution such as the judiciary which has never produced any analogous results? One of the answers to this question is that the judiciary will now do better and that it is not as unaccountable as it seems.

*(c) The Failed Promises of Democratic Institutions*

We have a right to expect, it is said, that courts will discipline themselves by abiding by professionally developed methods of reasoning. But the strength of this argument is diluted by the very logic which underpinned the entrenchment of the *Charter*. Constitutional judicial review has been chosen as a means to further our political developments precisely because the judiciary is not, as such, subject to the electorate, to any particular lobby group, or to governmental influence. While it remains true that judicial decisions may be reversed by parliaments, this can only be done in extreme circumstances. The use of the 'notwithstanding' clause will put politicians at risk. By contrast, its invocation will not impose any loss on the judiciary as an institution or on the judges as individuals. If the term 'institutional autonomy' means anything at all, it has most weight when it is applied to the institution which we call the judiciary. The idea, then, that the development of participatory democracy should be left to this institution which is not, in any serious way, subject to the discipline of democratic politics smacks of the bizarre.

If one adds to this the fact that, traditionally, judges have supported the views and beliefs of the dominant classes which, very often, they have spent a lifetime serving before they were appointed to the bench and, perhaps more importantly, that historically they have had a deep disregard for the rights of workers and their collectives, the argument against judicial review becomes quite persuasive. After all, the nature, scope and extent of the legal and political rights and freedoms to which the courts have to give life are ill-defined. Much will depend on how the judges use their discretion and, therefore, on their value system.

All of this negativism is countered by two arguments. The first is that the institutions of liberal democracy, such as electoral and group interest politics and a responsible government which has ultimate control over enforcement agencies, are in a state of catatonia or, worse, have been co-opted by anti-democratic forces. Participatory politics isn't. People have insufficient access to, and

increasingly are losing confidence in, the system. The rich and powerful, however, are assured of access. This is leading to an erosion of political pluralism, to the undermining of legal freedoms and rights. In theory, our institutions are democratic; in practice, they are not. We have nothing to lose, this argument goes, by trying to add something to the mix. The second argument is the flip-side of this crudely manufactured coin. It is that, while the courts, in the past, even in the immediate past, may have been incoherent, unimaginative and/or illiberal, armed — as they are — with a new mandate, they are capable of being the vanguard of a political and legal revolution. They will take the largely undefined rights (or the unfilled balloons, as Peter Russell has called them so felicitously), and give them meanings (or the air) which will enhance democratic practices in Canada.

In theory, the negative view should have more sway because it does not rely, at least not as much as does the rosy view of the potential of judicial review, on leaps of faith based on ahistorical and, indeed, antihistorical premises. But, this is only a debating point. A better way to test the competing views is by looking at outcomes. This requires qualitative judgments to be made. Necessarily these will be coloured by the starting positions of the evaluators. While the results in some cases have been positive, to me it seems self-evident that, as yet, the results of judicial review have not deepened Canada's democratic institutions and practices.

*(d) A Preliminary Assessment of the Outcomes of Judicial Review*

There is no particular reason to believe that Canadians now have more in the way of concrete free speech rights than they did before the *Charter of Rights and Freedoms* was enshrined. We have no more right to public space in which to express our views than we had. The owners of the mass media have given up none of the virtual monopoly they have been able to exercise for such a long time over the dissemination of news and opinion. Indeed, there may be a greater concentration than there ever was, giving us, the people, less freedom to express our opinions in reality than we had before. On the other hand, it is true that some censoring boards have been curtailed and that nazis have been able to get much mileage out of their attacks on restrictive legislation which seeks to inhibit the propagation of hatred. Eventually they lost, but it is hard to know whether Canadians gained much by having the legislation upheld. In the meanwhile, the corporate sector has been able to establish that commercial speech is to be protected by the *Charter of Rights and Freedoms* as much as any other kind of expression. It is also to be remembered that, in *Lavigne*, the National Citizens Coalition has been able to raise serious doubt as to whether a trade union can raise funds for political purposes, a right which (like the 'prohibition of hate' legislation) was never challenged before the advent of the *Charter*. While, in my view, the National Citizens Coalition, in the end, will lose that case, its unfavourable ideological impact is not to be underestimated. Unions

have been forced to justify a political right which had been taken for granted for years and, more importantly, they have been pressured to use anti-working class arguments to justify their right to preserve something which should be an unquestioned right in any mature democratic society. In the *Lavigne* case, the union told the court that collective bargaining was merely an aspect of buying and selling, not unlike the purchase of paper clips and stationery.

Similarly, there is no evidence that Canadians today enjoy more freedom of religion than they did before. At least one group of people whose sincerely held religious beliefs dictated that their children should undergo a non-conformist school experience were not able to use the *Charter of Rights and Freedoms* to guarantee that kind of education for their children. On the other hand, courts have entertained the claims of corporations that they too should be allowed to promote religious freedom. This has enabled the corporate sector to attack laws designed to stop Sunday shopping. Even more surprising is that the corporations have had a measure of success. By comparison, unions which have sought to use the Charter to protect themselves from governmental intervention with their hard-won strike and picketing rights, as well as unions which have sought to enhance their existing strike and free speech rights, have failed. So far they have put such issues before the Supreme Court of Canada seven times and have lost seven times (Glasbeek 1989, 1990, Beatty, 1991).

On the legal rights' front (ss. 8-14), the courts have produced good language about the need to safeguard the integrity of the administration of justice. In terms of results, it has meant increased procedural protections for the rights of suspected people. They are to be treated with respect by the executive and by the judicial system, even if this means that the prosecution of some clearly guilty people may fail. Evidence obtained by force, duress or unacceptable trickery may be rejected. Many suspects have been able to raise defences they otherwise may not have had. The right not to be subjected to unreasonable searches and seizures has been given more teeth. For example, suspects cannot be forced to give up documentation of their affairs without judicial-like sanction. Violation of this rule is said to constitute an unacceptable incursion into privacy. Suspects are guaranteed the right to legal counsel and the right not to suffer undue delays has been given concrete effect. Decisions have been handed down which decree that accused people should not have to disprove their guilt in any serious way whatsoever.

In the sense that these restrictions on the use of state power might be teaching our enforcement agencies to be more civil and, perhaps, to be more efficient, these are positive developments. It is hard to say much more about them. The way in which the decisions are made may be consonant with what the public would like to see, although there is not much evidence that the public was unhappy with the control exercised over the police forces before the coming of the *Charter*. On a more concrete level, it is not clear that truly innocent people were previously convicted and that now, in similar

circumstances, they are acquitted. Nor is it true that because some obviously guilty people now are acquitted that we are a better Canada or that now less people are subjected to our 'discipline and punish' system. Canada now jails more people per 100,000 than at any other time in its history. The overwhelming number of people in jail belong to the same classes as they always have: the underclasses and the marginal working classes. Moreover, more people are under state and state-delegated scrutiny and supervision than at any other time in our history. Inasmuch as constructive murder has fallen by the wayside or maximum penalties have been declared unconstitutional, it is far from clear that sentences will be lessened (Mandel). That is, better manners at the dining table do not necessarily mean better food on it.

In any event, as Fudge has shown, there also have been roll-backs on the legal rights' front (Fudge, 1989). Women have seen some of the benefits furnished by rape shield laws, which they had won by dint of legislative struggles, watered down by the courts who used the *Charter* to restore the objectionable rules they had created in the first place. The judges' argument, of course, is that the accused, as an individual, requires protection from the state. In a similar way, arguments about legal equality in respect of legal rights has led the systemic oppression of women to be ignored as the criminal law has been altered to do away with unequal treatment of young males and young females in sex offence cases.

As a consequence of what is at best an equivocal set of outcomes from the perspective of those who are optimistic about the potential of the politics of judicial review, there has been a notable change in position as they hang on to their hopes. There are two discernible strands to their modified arguments in support of constitutional rights' litigation.

## **II. Individualization and Decontextualization by the Politics of Judicial Review**

### *(a) Constitutional Litigation as a Force for Mobilization*

Political activities around judicial review, even if enriched legal and political rights are not the direct result of these activities, do further political emancipation. They help make people aware of the extent of their oppression, of their lack of rights. The denial of an obviously rightful claim by a court can have a consciousness-raising effect, especially if the court is imprudent enough to dismiss the claim in a crude and ugly way, as too often is the case in sexual assault cases. Moreover, the bringing of an action of this kind requires the formation of an organization; networks need to be established to raise money; a lot of pamphleteering is undertaken and demonstrations are organized. The bringing of an action around a particular concrete instance helps focus attention on existing inequalities and disadvantages. In short, the constitutional enforcement of rights through litigation is peddled as a useful organizational and mobilizing device. This kind of argument, however, is plagued by difficulties.

(b) *Liberal Ideology and the Judiciary*

A quintessential feature of the politics of judicial review is the particularity of the forum in which it takes place, namely, a court. The processes are adversarial; the forms of argumentation limited. One of the positive aspects is supposed to be that rationality, rather than power or majoritarianism, provides the criteria for dispute settlement. But, this also is the down-side of the scheme. The objective facts which have led to the denial of rights in respect of which the disadvantaged of the world complain are the results of historical changes in material conditions in a class-divided society. Generally, the nature of legal discourse draws a sharp demarcation line between, on the one hand, the kinds of claims which may be made in court and, on the other hand, the class relations and historical developments which created the context for the claims in issue. This is relatively easy to illustrate.

(i) *Fault and the Fact of Insurance*

In negligence cases, based as they are on fault principles, it is well-known to every practitioner and, indeed, to every judge in this country, that there is little point in bringing an action on behalf of an injured person unless the defendant is extremely rich or insured. Usually, individuals cannot pay compensation to the extent required to make good even a relatively non-serious loss. Private insurance is a *sine qua non* of the fault system. But, if it were known to the public or, more especially, to the lay triers of fact, that an insurance company was to pay for the losses of the plaintiff, there would be pressure to find the defendant at fault, regardless of whether or not the principles of fault warranted that. Judges have frequently admitted that they give in to this pressure when they sit as triers of law and of fact. But, the basis of the fault-based system is that we are entitled to ask injured people to suffer hurt unless *they* can find *someone* who was at fault. We want *individuals* to be made personally responsible for their conduct so that they, and all of us, will learn from their experience. Making them pay damages when they deserve to do so is the way to achieve this purpose. The fact of insurance, however, means that a faulty defendant is not held personally responsible in any serious way because most of the costs of his/her fault becomes a collectivized responsibility. The individualistic basis for the retention of the fault system would be delegitimated if this were known. The judiciary has done its best to obscure this reality which *it* comprehends fully. The fact that either party is insured may not be mentioned in open court, certainly not before a lay trier of fact. It is true that appellate courts (including the Supreme Court of Canada) frequently refer to the importance of insurance and, indeed, to the fact that the fault system never achieves its objective of individualizing blame, but trial courts never are supposed to let it influence their decision-making: they are to hold fast to the idea that individual behaviour and individual traits are at the centre of the dispute. If the artificiality of the



argument is obvious, its intent is equally obvious; the idea is to reify the creed of individualism, a legal individualism, one which makes no reference to personal wealth or to class position. *De jure* equality of individuals is what the law is all about; material conditions are of no interest to the courts who administer the common law, that is, the non-legislative legal system.

(ii) *Labour and Corporate Personality*

A similar example is provided by the way in which corporations are treated when litigants. The fact that a corporation is, by any kind of non-legal definition (that is, by reference to any criteria which accept reality), a collective, is completely ignored by the law. For the law, the corporation is an individual, just like any other human being. This means that when an individual consumer is being sued by Bell Corporation the court deals with the case as if it were private contractual matter between legal equals. Could anything be more absurd? This legal distortion has particular importance in labour relations law, that is, in *the* site of conflict.

Unionized workers who want to persuade their employer to give them better conditions cannot withhold their labour in concert, that is, strike, during the life of a collective agreement. Liberal democracy being what it is, there is an equivalent restriction on employers who want to have their workers accept different conditions during the life of a collective agreement. They cannot resort to a halt in production, that is, to a lock-out to achieve this aim. Stability, then, is to reign, but not to such an extent that individual rights are unduly abrogated. An employee can terminate a contract of employment at any time, even if bound by a collective agreement, provided she gives adequate notice of her intention to do so. After all, it is an *individual's* fundamental right to determine whether or not she will contract with any other individual. *A fortiori*, says the law, an employer, as an *individual*, can terminate a contract of employment at any time, even while bound by a collective agreement, provided it gives adequate notice of its intention to do so. The operative words are "it" and "its". The right of individuals to end contracts belongs to corporations as well as to human employers. Gone is the real-world notion that an employer, especially a corporate employer, is a collectivity of inorganic and organic assets. That is, while for collective bargaining law it is essential that an employer is seen to be the counterpart of the union, thereby treating each as collectives with, legally-speaking, equal collective rights, this starting point is ignored when a corporate employer purports to act like one of its single, individual employees. Formal equivalence arguments posited on the precept that all individuals (an expression which includes corporations) are *de jure* equals have been permitted to erode the promise that something like true countervailing power has been given to workers by legal policies which legitimate trade unionism. The concrete outcome is that a corporation can always threaten to leave in order to persuade its workers to give it a better deal; the union and its worker members

do not have that legal right. It means that employers can always refuse to continue to invest or to invest anew, just like any employee can refuse to continue to sell her property, her labour power. But employees in concert can only do so under tightly controlled conditions, for narrow economic purposes. Employers can do it at any time, for any purpose. The capital strike for political purposes by a corporation (a collective in the real world) is legally supported; a workers' strike for political purposes is legally denied.

*(c) Individualization/Decontextualization and the Public/Private Distinction under the Charter*

The *Charter of Rights and Freedoms* embeds this creed of the individualization and decontextualization of disputes. When courts are to deal with the Charter, the key to their starting position is to be that, because all human beings are, as a matter of law, equal sovereign actors, none are in a position to oppress any other by dint of their privileged legal status, whatever they might be able to do to each other by reason of their wealth. Under the *Charter of Rights and Freedoms* the assumption is that, for the purposes of constitutional rights, the state is the only potential oppressor of individuals and that, therefore, the *Charter* ought not to apply to the exploitation, oppression and discrimination of some private sector actors by other private sector actors. Embedded in the *Charter*, then, is a full replication of the classless society approach developed by the judiciary over time, an approach which cements the power of the ruling class by pretending it does not exist. Inasmuch as the *Charter of Rights and Freedoms* purports to provide otherwise, as it does by dint of the inclusion of section 1, this is only a mild form of mediation. Giving litigants permission to show that attempted breaches of their constitutional rights by governments are not to be tolerated because they would not be acceptable as reasonable limits on the freedoms and rights to be protected in a free and democratic society does give litigants an opportunity to put evidence and argumentation about class and history before a court. But, it is only the state which has to justify its curtailment of rights and freedoms, never the private sector. This is also true when section 15 requires the state to show that its activity does not exacerbate historically constructed discrimination. This makes the vaunted equality provision much more problematic than its boosters would like it to be.

It is the state's worsening or maintenance of inequality which will be the issue; it is not the creation of such inequality by private economic activities which will be the focus of criticism. The state may not worsen privately created inequality directly, unless it has an 'acceptable' reason for doing so. This is new. The state may seek to alleviate privately created inequality. This is not new. Governments always had this power for doing "good" but now such endeavours can be challenged as unwarranted state interventions with private rights. In short, inasmuch as materially constructed exploitation and discrimination are to be the objects of attention

of judicial review, they will only be so in an attenuated way. And, because it is the state which is the object of attention and not the private sector actors, *any* private sector actor can call the state to the bar. This last point leads to a second and most telling argument against the proponents of the politics of judicial review.

*(d) Charter Rights as Movie Tickets — Equally Available to All*

It is precisely because rights claimable under an entrenched *Charter of Rights and Freedoms* are cast as abstract rights, that is, as rights which are divorced from class and history and which are to be imbued by the spirit of individual liberalism, that they are available to all individuals in our society. It is this which explains many of the results which must stick in the craw of proponents of a Charter-type document, results which indicate that some capitalists and, indeed capitalism itself, have profited enormously from the politics of judicial review in Canada, although that was not the declared intention. A quick survey of some decided cases makes this plain.

Capitalists, in corporate guises, have been able to make successful claims that, as sovereign individuals, like all other atomized individuals, they are entitled to enjoy the political right of freedom of expression. Corporations must be permitted to speak. It follows that they should be permitted to speak about politics. When the National Citizens Coalition established that the government's attempt to control electoral spending could not justify putting fetters on corporate advocacy advertising, it cemented the otherwise frail legal basis for the vote-clinching splurge of pro-Free Trade Agreement advertising undertaken by big business in the crucial last stages of the 1988 federal election campaign. One of the consequences of the consummation of the Free Trade deal has been an ever deepening deregulated polity, one in which the creation of social and economic welfare is increasingly entrusted to private ordering. Private greed and individualism are stars whose place has become more fixed in the firmament of our political economy.

Our courts also have held that no firm line can be drawn between political speech and economic speech and that, therefore, both should be protected by the *Charter*. There is some irony in this as the liberal state prides itself on the logic of the separation of the political from the economic spheres. But, when it comes to the right to gabble to peddle goods, this logic has had to take a back-seat. Advertising the superior values of one type of toilet paper over another is constitutionally as privileged as an essay on the inequity of the skewed wealth distribution which allows 20% of Canadians to live in poverty, or no less worthy of protection than a speech and march to protest the repugnant nature of governmental decisions which cause Canadians to be sent to defend U.S. imperial interests in the Middle-East. This judicial approach to the meaning of freedom of expression has had a plethora of effects, all of them adverse.

It is going to become increasingly difficult to regulate advertising. The tobacco industry is about to test this proposition. Even if, in

the end, the regulators win this and like cases, the *Charter* arguments will have had an adverse, inhibiting effect. Where the private sectors have the potential to bring down government regulatory schemes by use of the *Charter*, governments tend to 'wait and see', to hesitate, before they regulate and enforce. For instance, Ontario's government is fighting in court to defend its right to prosecute efficiently as corporations argue that strict liability offences violate the *Charter*. The government may well win these cases in the end, although Ontario's Court of Appeal already has found in favour of corporations in two such cases. In the meanwhile, governments are chary of enforcing their own laws and are prone to 'clean-up' existing regulatory schemes, just in case they might be challengeable under the *Charter* (Ison 1985). The marketeers are given a boost.

To return to the thrust of this sub-section, all of this means that the rampant deceptive nature of advertising is unlikely to be brought under further control. The idea that we all must buy things in order to be better people and that consumerism is the key to the creation of more welfare will be furthered by every trick in the trade. Advertising will become even more important than it already is to the news media. As it is, 50% of our newspapers are filled with advertisements of one kind or another and 80% of all newspaper revenues are obtained from advertising (Glasbeek, 1986). The news and opinions disseminated by our free speech-espousing media can be expected to become ever more narrow in focus. Even more than already is the case — and this will be hard to achieve — publishers and editors and broadcasters will strive not to print the kind of news and opinions which do not harmonize with their advertising clienteles' values and needs. In short, the developments in freedom of speech fought for by the corporate sector are leading to a lessening of the public space available for expression by us, the masses, rather than an increase. The scope of the abstract right of freedom of speech has been expanded; the potential for exercising the right *concretely*, if anything, has been diminished.

This is made even worse by the fact that the already high degree of newspaper and media concentration is increasing. The almost incestuous and pervasive interlocks between the media and other big business corporations were well-documented by Clement some time ago. It may be getting worse. It is not at all surprising, then, that some of the *Charter* challenges to the regulation of competition by government have emanated from the news media industries. Southam, a corporation, was able to convince the Supreme Court of Canada that regulators who wanted to discharge their responsibility to prevent and punish anti-competitive practices should do so subject to efficiency-impairing fetters. The argument of the Court in *Hunter v. Southam Inc.* was that this protective shield claimed by the corporation should be granted lest the privacy of its soulless non-existing body be unjustifiedly disturbed. While the practical impact of this decision was watered down by a subsequent decision (*Thomson Newspaper Ltd.*), its ideological effect has not been diminished. At another level, the *Competition Act*, whose stated

purpose is to contain the levels of corporate concentration within acceptable bounds, has been attacked by corporate actors who employed the *Charter of Rights and Freedoms* to do so. The claim of the corporate sector has been that the pristine right of an individual to trade is imperilled by the statute. So far, the corporations have had more success in making these kinds of *Charter* arguments than labour has had. In one remarkable case, a judge at first instance held that corporate mergers are protected exercises of the freedom of association and cannot be interfered with by pro-competition regulators. Even if, in due course, these decisions are overturned, as is likely, and the very weak *Competition Act* is returned to its former non-existing glory, the regulators will have been taught a lesson they will not forget: they are to be extremely chary in their use of the limited powers they have been given by the state to control private capital's ambitions.

Corporations also have been able to use arguments which mere mortals believe to deal with a quintessentially human characteristic, namely, the freedom to practise a religion. Now, it is not true, of course, that corporations have developed an interest in religious beliefs. They have made clever use of the other-worldly, abstract, nature of the *Charter* to claim that they, as righteous citizens, need to be free from any government regulation in order to support the religious needs of their shareholders, employees and customers. They have been able to attack rules which forbid doing business on any particular day. This is what the Sunday shopping case law is all about: it reflects capital's desire to be able to sell goods at every possible moment of every day. Courts have bought this bag of goods. Add to this the judicial finding in favour of the National Citizens Coalition which gave corporations the unbridled right to advocate politically and the paradox of the politics of judicial review in Canada is manifest. The courts, by their decisions so far, have helped to reinforce a political and economic climate in which governments' activities and decisions increasingly reflect the ethos of greed and individualistic opportunism. This *Charter*-supported ethos inhibits any enriched exercise of political rights.

Here a reassessment of labour's fate under the *Charter* is apposite. Again, the bare results, as such, do not matter as much as the nature of the cases which have come forward and the political culture which the decisions promote. As to the results, Weiler has pointed out that, in many cases, boards and courts have rejected attacks on collective bargaining law made by private actors who tried to use the *Charter of Rights and Freedoms* to undermine the legislative scheme. The *status quo*, more often than not, he points out, has been left intact. And, inasmuch as labour has been spectacularly unsuccessful before the Supreme Court of Canada, it is true to say, as he does, that labour has not actually lost any legal rights that it did have; Canadian workers never have had an unrestricted right to strike or to picket. Apologists for the *Charter*, such as Weiler, therefore, argue that what this case law demonstrates is that courts are showing an admirable amount of deference and

restraint. They are leaving the nuts and bolts of the legislative schemes undisturbed and rarely interfere with majoritarian decision-making by governments which set out to curb existing labour powers. But, this is an obtuse analysis.

The proponents of the politics of judicial review place a great deal of emphasis on the educative and mobilizing effects of constitutional rights' claims. The highest court in the land has said emphatically that the right to strike is not a basic one, but that the right to engage in trade is. What labour has been told repeatedly by the Supreme Court of Canada is that the freedom to associate has been granted only to advance individualistic political rights, not those of a collectivity, and that the right to communicate on behalf of the working classes can be, and should be, subjected to the unfettered right of individuals to trade. The autonomous, sovereign individual, not labour as a class, is to be the bearer of rights and freedoms. And, inasmuch as these rights are undermined, only the state is to be prevented from interfering with those individualistic rights. That is, in this sphere, as in all others, the aim has been to boost the liberal ideal of *de jure* equal individuals, regardless of class and history. This was exactly what courts did in the pre-*Charter* days when liberals who portrayed themselves as labour-friendly scholars, people like Weiler, castigated them for their incompetence, obdurateness and anti-working class biases. Now this approach has been given more kudos: it is offered as an integral feature of our efforts to breathe life into our fundamental rights and freedoms. Instrumentally and ideologically this helps the dominant groups in our society, not the disadvantaged ones.

(e) *The Effect of Having to Legitimate all Judicial Decisions*

For those who believe, as Dworkin does, that judicial review is capable of making a major contribution to democratic practices, it is essential that the judiciary's decisions be seen as being handed down by an institution which is above the fray, untouched and untouchable by existing political institutions which do not deliver the goods. The judges are to make pronouncements about rights and freedoms, regardless of the views of political power-brokers. By itself this may not lead to needed changes. Institutionally, courts cannot give life to their decisions directly; the allocation of resources by governments may be needed to have their principled views implemented. A holding that someone should get the same benefit as another, or even a better one, might cause a government to redress the wrong which the court has identified. On the other hand, it might cause a government to abolish the award of the benefit altogether.

What the proponents of the politics of judicial review are looking for from courts, then, are *declarations* which support the liberal ideals of political emancipation and equality. The impact of pronouncements depends on the legitimacy of the declarants. For judicial declarations to be able to shape and mould social relations they will have to be seen as coming from an institution whose

legitimacy will give those declarations a privileged political status and, therefore, special resonance. The idea is that elected politicians should have to pay heed and that activists who work on behalf of the targets of discrimination, or the repressed, or the unwarrantedly differently treated, will be armed with powerful and hard-to-resist political ammunition, namely, the language of universally accepted rights.

From this vantage point it becomes understandable how constitutional rights' proponents scour the pronouncements of the appellate courts for favourable sounding statements and how, even if the result in a particular case looks like a defeat for their clienteles and/or their causes, a decision can be hailed as a victory because it contains some nice sounding language. Michael Mandel has made this point tellingly. He offers the story of the Cruise-testing case. The decision gave constitutional sanction to Americans to test their deadly weapons over Canadian soil. Yet, the case was treated by those who opposed the missile testing in court as a triumph because the Supreme Court of Canada had suggested that it had the power to review executive decision-making by governments, even though it also said that it was not likely to exercise this power often and certainly not in the case before it. One of the lawyers who had sought to use the courts to stop the Cruise flying over Canada said: "It's a bad day for peace, but a great day for civil liberties" (Mandel, 1983).

This approach to judicial review creates a problem. If the judges' decisions and language are to be used as means to further progressive politics, constitutional rights' proponents cannot afford to disparage the judiciary when it reaches results and/or uses language which are adverse to the democratic project. The legitimacy of the judiciary cannot be undermined. If good results and language have to be celebrated and given political effect, bad results and bad language will be hard to attack, except in the judicial forum where judges may politely, and in a decidedly 'non-political' (i.e. legal) fashion, be asked to change their legal minds. The manifest difficulty this creates for democratic advances is linked to yet another.

While some judicial readings of the *Charter* have raised the hopes of its progressive proponents, there already are many bad results and much bad language coming out of the courts. In particular, as seen, *Charter* decisions have enhanced the naturalness and the worthwhileness of the politically isolated, wealth maximizing individual; the value systems which accompany commodification, commercialism and consumerism have been given a boost; anti-collectivism and patriarchy have been endorsed. Now, as the politics of judicial review require that the results, ideas and language which emanate from the judiciary when it is cloaked in its constitutional garb be supported, the values propagated by the courts may well further persuade the subjugated in our society to accept, as natural, the norms and values which already assist the dominant classes in fortifying their position. That is, regressive values which already are internalized may be fortified. To repeat: not all results and

declarations coming out of the courts interpreting the *Charter* are regressive but, to use the language of the rights' discourse debates, the politics of counter-hegemonic thrust, based on the launching pad of judicial review, may often backfire. It is, at least in part, helping to embed the very conditions which it is supposed to undermine.

This perspective on what may be happening as a result of the political fights structured around constitutionally entrenched rights and freedoms in Canada dovetails with the observation of Maureen Cain. The terrain of struggle of constitutional rights' politics is the legal forum, one in which lawyers play the leading parts. She characterizes lawyers as conceptive ideologists. They are given a highly politically charged dispute about rights to deal with and reconceptualize it in order to fight it legally. In the process, they deradicalize the struggle. Examples of this abound. In *Lavigne* it was the oppressed — the workers and their unions — who had to argue that the collectivist activity in which they had been forced to engage because of the exploitive nature of the private ownership of wealth was private activity, not different in kind to the private commercial activity which creates the very harm they have to ward-off. A similar scenario unfolded in *Tomen*, the schoolteachers' case which involved the question of whether female teachers should be entitled to retain their exclusive union to overcome historical discrimination. The women relied on this feminist argument but also on one which characterized their union activities as private ones. Thus far, they have won on the latter point.

(f) *The connection between Friedmanites and constitutional rights' proponents*

What is clear is that judicial review, so far, has done much to re-emphasise the social centrality of the political-economic individual, to diminish the significance of class and history as bases for decision-making, to reinforce the precept that the state is the real locus of oppression and that economic freedoms of the liberal, Adam Smith-type, are sacrosanct. That is, in many ways, the impetus of judicial review under Canada's *Charter of Rights and Freedoms* has been to drive towards a perfection of a view of the world which the likes of Milton Friedman espouse.

Friedman argues that economic freedom is as fundamental to freedom in its cosmic sense as political-civil rights' types of freedom. He goes so far as to say that economic freedom, that is, the individual right to trade with a minimum of interference from other private actors and, especially from the state, is a pre-requisite for the achievement of freedom writ large. He is careful enough, however, to note that economic freedom, by itself, cannot ever be enough to produce freedom in its larger sense. More is needed. Curiously, it is at this point that the proponents of the politics of judicial review pick up the gauntlet left lying around by the Milton Friedmanites.



Positively, the judicial review politicians seek to perfect existing liberal norms. The emphasis here is on 'existing'; after all, no one doubted that these norms were accepted in Canada prior to the coming of the *Charter of Rights and Freedoms*. In 1977, Hogg had noted that "[i]t is a fact, however, that in Canada — as in the United Kingdom, Australia and New Zealand — civil liberties are better respected than in most other countries" and McIntyre J. was quoted as saying: "If you had gone to the ordinary layman in the street ten years before the *Charter* was even spoken about, listed the rights that we were going to have and ask him if he was in favour of it, he would have been horrified to think that he didn't already have those rights." The quest, then, is to deepen the extant liberal norms of freedom. What is notable is that this goal is not being pursued at the expense of existing liberal *economic* freedoms. These are not being challenged as such. While the results of judicial review in Canada which have led to the increased protection of commercial rights undoubtedly are regretted in the circles of rights' proponents, the premises of economic freedom, of a liberal market economy, are not challenged by them in courts. The constitutional rights' terrain of struggle does not provide an opportunity for doing this, as it separates the private from the public sphere. On the other side of the coin, market precepts — unchallenged under the *Charter* — insist that individualistic economic freedom is an important individualistic political freedom. In the result, the ease of phrasing a claim to this kind of freedom as a political freedom for the purposes of a constitutional document such as the *Charter of Rights and Freedoms* has permitted capitalists to go to courts to seek to boost the scope and legitimacy of their individualistic free trade rights.

In this context, it is hard to see how judicial rights' proponents can believe that their efforts to perfect liberal political rights will lead to a better, more participatory democracy. That belief only can be held with sincerity by them if, like Friedman, they think that a classical free market economy is consonant with a democratic polity, maybe even a necessary aspect of it. This is passing strange. After all, it may be hard to achieve a truer democracy, one based on greater equality in participation, if wealth distorts political decision-making power. Here it is interesting to note that Milton Friedman's own analysis admits that one cannot have both egalitarianism and liberalism. Hayek, another respected proponent of the primacy of liberal economic freedoms to a society which aspires to achieve true freedom, was even more forthright than Friedman when he wrote that "we must face the fact that the preservation of individual freedom is incompatible with the full satisfaction of our views of distributive justice" (Hayek, 1949, p. 22).

This recognition of the limits of a liberal economic society by its advocates is necessitated because capitalism has never delivered anything but stark inequality. It is for this reason that the state has been required to intervene to redistribute wealth and income occasionally, and it is primarily for this reason that the state is seen as the site of unfreedom by capitalists. The maldistribution

of wealth found in modern capitalism may permit liberal norms to hold political sway, but it does not favour equality in their actual exercise. Attempts to redress this are characterized as violations of those same liberal norms.

As Offe and Wiesental have noted, under feudalism the main political struggle was to change the political norms, that is, to find a way to make all people equal in the eyes of the law, so that the rigidified inequalities acceptable to feudalism would come to be seen as intolerable. This revolution was achieved as capitalist relations of production replaced feudalism. Every individual was now seen as being in the same legal-political position as any other to maximize her economic opportunities. Socio-economic inequality was no longer mandated by the legal-political norms. It could only be justified if it was the result of individual merit, or uncontrollable factors, such as luck. If, as always has been the case, huge inequalities existed which could not be justified or explained on these bases, something had to be wrong. This is where we are.

All of this suggests that what a well-known 19th century sociologist once said might be true. Marx argued that liberal capitalist thinkers turn reality upside down. The problem is not that our liberal civil rights are impoverished because an arrogant, autonomous state will not let them flourish, but rather that they are confined 'n cribbed because capitalism will not permit them to flower to full bloom. C.B. McPherson has argued that Friedman is just wrong when he says that economic freedom is a prerequisite for liberal democratic rights. Rather a measure of liberal democratic rights was necessary to the development and establishment of capitalist relations of production. Under capitalism, true democracy and freedom is never possible because the system entails the subjugation of the masses to the will of the propertied. This kind of non-liberal or, better, anti-liberal, perspective is supported by our socio-economic circumstances. After all, inequality is deepening at the same time as legal-political liberalism is enjoying more state support than ever before.

Fighting on the civil libertarian rights' front, then, might not be the most sensible way to go. Perhaps the overthrow of capitalist relations of productions should be the objective of democrats, of freedom fighters. Engagement in a politics which deepens the separation of the private from the public, the economic from the political, may be precisely the wrong kind of politics because it reinforces the disjuncture between the superstructural legal-political sphere and the basic socio-economic one. The politics of judicial review might have to be rejected because it is the kind of politics which embeds these fissures.

### **III. From Constitutional Rights to the Politics of Rights Writ Large**

#### *(a) The logic of the politics of rights' discourse*

Many progressive intellectuals are sensitive to the kernels of truth to be found in the above arguments. But, rather than confront them and deal with the possibility that the politics of rights are filled

with danger, many of them tend to shift the ground of the debate, opting for a different kind of rights' strategy.

As it is becoming clear that constitutional rights' fights and litigation tactics simply are not bringing the results hoped-for, progressive scholars who had anticipated better returns are modifying their position. People like Hunt and Bartholomew continue to think that there might be *some* profit in constitutional rights' fights but, given the uncertainty of this, they no longer put all their eggs in that basket. The contention becomes that the constitutional rights' struggles both directly support, and are ideologically suggestive of, the positive possibilities of a larger kind of rights' politics. Constitutional fights and litigation are not the only way in which rights can or ought to be claimed. Rights also have a moral aspect, one which resonates with the way people think about their lives, their experiences and their oppressions.

Rights are hegemonic in nature because the subordinated classes have internalized the rights' discourse of the dominant classes. If a claim can be couched in the language of a hegemonic right, therefore, the claim is more likely to find an echo amongst the depressed and oppressed groups, making it easier to engage them in the political action necessary to bring about a change of polity. The idea is to engage in counter-hegemonic struggles. A claim based on hegemonic rights is, by definition, compatible with the dominant culture of the day and, thus, potentially, must be respected by the ruling class. This can lead to the mediation of existing conditions and might even have transformative capacity. So goes the theory.

### *(b) Social movements*

This theory is to be implemented primarily, it seems, by relying on what are generically referred to as the new social movements. The social movements of today seem to be new in the sense that, unlike those of the late 19th and the early 20th century, they do not seem to be as intent on obtaining power through the state in order to change the social and economic relations of the political economy. Rather, they draw on those aspects of the movements of the '60's and '70's which had in them the elements of the politics of identity. Kaufman and Epstein suggest that the new social movements attempt to change values and beliefs by engaging in a different kind of politics, by emphasising certain anti-state aspirations, rather than by engaging in the more traditional politics of social movements of both the immediate and more distant past which sought to obtain power through gaining control over the public domain.

New social movements are characterized by their opposition to a number of forms of subordination, such as racism, sexism, classism and heterosexism. They seem to reflect the desire to come to grips with the fragmentation of our social reality, a reality which can no longer be described by the 'simple' theoretical paradigm of years

gone by of conflict between the ruling class and the ruled, that is, the paradigm of class analysis.

The cleavages between people based on sexual preferences, gender, colour, creed, and so forth, are becoming ever more obvious and constitute a powerful argument for a politics of culture and identity. The logic of that argument is that of commentators, such as Laclau and Mouffe, who have criticised the notion of a unitary subject, that is, of a single identity which can serve as the basis for political activity. This approach is reflected in both the literature and daily politics. The moral rights'/new social movements' theoreticians reveal a positive bias for movements with a specific constituency such as women, gays and lesbians, people of colour, and the like. On the other hand, it needs to be noted that new social movements also include large-scale, less focussed groupings such as environmentalists, the peace movement, the anti-nuclear activists, all of which tend to appeal to a broader notion of social responsibility than do the movements which act on behalf of separate cultures, values and identities.

This is a rude and crude way to describe the sophisticated scholarship which deals with the new social movements/rights discourse theories. But, here the point is that, despite its many refinements, the literature leaves a number of questions unanswered.

It appears that the new social movements rights' discourse theories start off on the assumption that there is no one particularly privileged theoretical way of looking at the world. It is true that many of the rights' discourse scholars, including Laclau, Mouffe, Hunt and Bartholomew realize that there is a dominant scheme — capitalism — which inhibits true democracy from developing. But, this acknowledgement is not all that satisfying given the kinds of prescriptions their writings offer. The strategies of moral rights' claims they advocate will not necessarily lead to a different set of relations of production. In a very real sense, the proponents of moral rights' claims, primarily to be pushed forward by the new social movements, replicate some of the difficulties created for progressive politics by the *Charter of Rights and Freedoms*.

(c) *Moral Rights' Claims — Replication of the Judicial Review Problem?*

We saw that many difficulties for *Charter* politics stemmed from the fact that the claim to a constitutionally embedded abstract right and freedom can be made by anyone and, in the result, the dominant class may be able to reinforce its control over social and economic relationships. This is the clear and present danger of the politics of judicial review. In the same way, the problem of identifying why one cultural group or identity, or one set of values and aspirations, is 'better' than any other, permits any group to classify itself as a social movement which can make a moral right claim as validly as any other self-defining group. Why is one movement's moral rights' claim better than another's? How is one to distinguish a group of women and men who espouse traditional family values

from a group which proposes reproductive choice and independence for women? The argument of progressive moral rights' discourse proponents, then, must be that there is a valid way in which to determine which new social movements are to be promoted and which ones are not. Inherent in their argument there must be a notion of a hierarchy of values, aspirations, cultural and identity claims. Yet, no criteria to devise such a hierarchy seem to be provided, except that democracy, equality, liberty and justice must be enhanced.

Perhaps the argument is that the mere fact that there is a need to establish an acceptable hierarchy is in itself conducive to progressive politics because the issues will have to be brought out into the open and to be fought about. If that is the claim, it is hard to see why rights' discourse politics is very different from any other kind of politics, that is, why it is that it has any particular significance.

If the contention is that to cast claims in terms of 'rights' is a good strategy then all the theorizing on offer is beside the point. There is nothing new in the argument that hoisting the rulers on their own petard, to stick them with their own hypocrisies, is a good tactic. Indeed, it provides progressives with a sensible defence for their participation in the more limited constitutional rights' litigation politics. But, as seen, the use of that tactic in that sphere may be back-firing or, at least, misfiring. Some strategies lead to wins, others to losses. This is obvious, but it is a point worth making because, if the politics of moral rights' discourse is merely about strategies, they are strategies with an Achilles heel. They tend to downplay the importance of struggles at the site of production.

The point being made is not that class theory explains everything in our society. The proposition that everything turns around the struggles which arise over the ownership of the means of production is not a useful way to attack the problems of systemic inequality and discrimination. Oppressions on the basis of race, nationality, ethnicity and sex are not mere proxies for the oppressions which arise from the exercise of power by the owners of the means of production. For instance, feminist scholarship has established that patriarchy has a history which antedates capitalism. The nature of the relationship of class and patriarchy (or race) remains a subject of much debate, but there is no a priori reason to attach more importance to class than to, say, patriarchy, in the formulation of an explanatory theory of how social relations are constructed and, therefore, as to what strategies are to be preferred over others to do away with existing forms of repression (Parr). From this perspective, the open-ended nature of the arguments offered by the politics of rights' discourse theoreticians is not a failing. It can be seen as an acknowledgment of the fact that there is no easy way to determine what rights' claims ought to have preference over any other. All that should be expected from these people is a recognition that, for strategies to be effective, it is crucial to develop an understanding of what is at the relevant time most central to

the power struggles between the advantaged and the disadvantaged. As Adamson, Briskin and McPail put it when they sought to identify how power was working itself out in various terrains of contest — class, race, gender and sexual orientation —

[t]he relative strength and import of these relations to groups, individuals, and political practices is determined within the context of particular historical conjunctures. This means that the prioritizing of issues, a necessity to successful political struggle, must not occur on the basis of abstract principle . . . , *but rather in relation to material, economic, political, and ideological conditions.* (p. 109)(My emphasis).

The social movements' and political rights discourse theorists are sensitive to this point in principle. But, in fact, their writings do show a preference, albeit a negative one: they pay little heed to the potential for transformative struggle in the workplace. This could be justified on the basis that, at this point of our history, the working class, as such, is not to be seen as the natural agency to bring about necessary radical change. But, if this is the argument, it should be made in full. The logic of capitalist relations of production points to working class struggles as a crucial element of any transformative project. Yet, in general, the politics of rights' discourse literature does not seem to see the force of this point. Indeed, it not only rejects the idea that class theory should enjoy a privileged position but tends to frown upon classism. In the result, some obviously important material conditions seem to be ignored. This is fraught with peril for the transformative project they support.

*(d) Contemporary facts and the politics of rights' discourse*

Despite all the new technologies, despite all the arguments that soon there will be no proletariat left at all, there are in fact more people working now than at any other time in our history. Moreover, they work for longer hours, get less pay and have less job security than they did even a short 10 years ago.

The cornerstone of the post-war arrangements in advanced industrialized countries, the notion of a family wage, has gone by the wayside, although the ideology which sustains it and which it spawns, persists. There is a crisis of distribution as it is now openly acknowledged that the male, well-paid unionized worker can not bring home sufficient to provide for the family. (Acker) Women, children and elderly people are being driven into the work-for-wages workforce at an accelerating rate, looking for full-time jobs with lowly developed skills and getting only part-time employment without benefit packages. Workers who once had relatively well-paying secure jobs are losing them or are under threat of losing them. They seek to hang on to their privileges. They often feel upset by environmental and anti-war politics, precisely because their livelihood and security are being affected. Pre-existing racism and sexism are nourished in this milieu and are exploited by capitalism. Chasms are deepened between working-class peoples.

As Sivanandan argued, there are material reasons for the increase in fragmentation to which the new social movements and rights' discourse theorists are so sensitive. It seems somewhat peculiar, therefore, he notes, to seek to transform political life by not confronting the economic structures which enable the economically powerful to exploit the differences directly. To wage the kind of struggle he advocates successfully, it is necessary to have the many fragments of oppressed people identify what they have in common. Their relationship to the work-for-wages sphere may be a most important link. Acceptance of this elemental fact might provide the new social movements and rights' discourse proponents with a possible way to deal with the question which troubles them, namely: why is there any reason to believe that making moral rights' claims on a variety of unconnected fronts will lead to progressive, let alone transformative, politics?

It might have been reasonable to expect that the new social movements' and moral rights' theorists would embrace the notion that the struggles they advocate should be led by the working classes. After all, much of the counter-hegemonic theorists' work is derived from, and is justified by reference to, Gramsci. Yet, Gramsci had made it clear that the counter-hegemonic struggles he envisaged needed leadership and that the working classes were the natural leaders of connected struggles. This aspect of his theory seems to have disappeared from the new social movements' and moral rights' theorists' arguments. At best, working class struggles are seen by them as just another form of social movement, certainly not a privileged one.

*(e) The apparent futility of old-time class struggle*

The cold-shouldering of working class politics is understandable. The working classes, especially in North America, have been led by a trade unionism which certainly has not sought to challenge dominant groups and has done much to continue the suppression of the culture, identity, values and aspirations of differently placed groups in our society. Further, the union movement has not been in the forefront of anti-war movements, nor of struggles to relieve the plight of the third world workers, and it has often set its face against environmentalism. Given all this, the idea that the working classes are to provide leadership for true change must ring hollow. Further, the collapse of working socialism in the eastern block only leads to a deepening of the belief that class warfare, in its marxian sense, is not worth fighting. All of this is exacerbated by the fact that there seems to be little support even for unionism of the kind which we have had in North America. Further, respected socialist thinkers, such as Przeworski, have mounted impressive arguments to show that the ideals of socialism may be unattainable.

He points out that governments which came to power as socialist governments always have had, and will have, difficulty in maintaining a commitment to a socialist agenda. Firstly, they have to deal with the potential of a capital strike. This trims their sails.

Secondly, there is a limit to nationalization projects, precisely because it is hard for those governments to see how to use the expropriated assets in a competitive setting which spans the globe, a difficulty which looms particularly large in their view because of the potential capital strikes which might be launched to avert nationalization in the first place. Thirdly, it is difficult to rule electorally without the approval of some segments of the population which do not belong to the working classes. When in power, therefore, would-be socialist parties very quickly become parties which govern on behalf of the whole of the electorate, blunting their socialist ideals. Fourthly, even if the difficulties of a capital strike and its impact can be overcome somehow, there is yet another problem: how will workers who have been endowed with job security and a good social security net be given the necessary incentives to produce enough welfare for the nation to run at a sufficiently generous, bountiful level to warrant its maintenance? Fifthly, even if all these difficulties are overcome, it still does not mean that wage labour can be or will be abolished. And, even if it is, there is nothing in the scheme itself which suggests that the freed citizenry will behave in a truly socialistic fashion, that is, without engaging in unacceptable discriminations and oppressions.

These are formidable points and they suggest that support for a political project based on the achievement of socialism by wresting control over the state away from the ruling class, given its difficulties and dangers, is not a worthwhile project, particularly as the establishment of socialism will not necessarily do away with patriarchy or racism, even though much of its supporting net will have been removed.

From these perspectives, the attraction of the politics of social movements and of rights' discourse to change values in respect of identity and culture is enhanced. After all, some positive results can be obtained by fighting on these fronts. But, this line of argumentation ignores the brute realities of our life and at least one important theoretical understanding. Here I take up an argument offered by Ellen Meiksins Wood.

She argues that capital is not inherently discriminatory, although it is inherently fragmenting. It makes use of patriarchal discrimination; it exploits racial differentiation. But, it does so because it is a way of covering up the fact that capitalism always creates inequality and under-classes. Justifications are provided by treating patriarchy, sexism and racism as discrete spheres and as separate causes for the establishment of classes of disadvantaged, oppressed, repressed and under-classes. Capitalism is capable of accepting a lot of mediation of these ugly discriminations without losing any of its powers. Other means of justifying the exploitation and the extraction of surplus value may have to be found, but the system is quite inventive.

Now, social movements, and the making of moral rights' claims, may help to soften uglier features of, say, gender and race discrimination. At the end of the day, however, this kind of politics



of transformation is likely to leave capitalism intact. As long as there is no direct attempt at doing away with capitalist relations of production, people will remain unfree and unequal. The social and economic inequality which capitalism mandates will not be obviated.

*(f) The blind spots of the politics of rights: class and law*

The problem left by the politics of judicial review have emerged again. Freedoms of a civil libertarian kind can, and might, be better ensconced if the social movements do find (to use Laclau's term) some "equivalences", if they manage not to run in opposite directions. This is not guaranteed, just as the politics of judicial review are failing to ensure that only progress, democracy and equality-pursuing actors will use the *Charter* to positive effect. Still, progress might be made and, if it is, the norms of liberal capital democracy of a politically and legally equal society will be abided by better than they are at the moment. But, how will this translate into greater social and economic equality?

Presumably the arguments that political rights of the disadvantaged gain more resonance through counter-hegemonic struggles, the oppressed and repressed will seek to use their political rights' claims to get concrete rights. After all, the reason these movements exist and can mobilize people is that the lack of socio-economic equality is hurting them. Their fight to enrich the existing norms of civil rights, it must be hoped, will lead to an attack on the economic system which exploits fragmentation.

This scenario is plausible and it is appealing because it starts off by recognizing that political and civil oppression and discrimination lead to material deprivations which must be addressed. Further, social movements of one kind or another are always forming and re-forming. The impetus is there and the rights' discourse theorists gain credibility by giving intellectual support to spontaneous political activities. Yet, difficulties remain. First, and to repeat, the theorizing is abstract in nature; there is nothing in it which explains why the various social movements should coalesce. In the absence of coherent, solidaristic politics, each grouping may be forced to pursue its own interests, perhaps at the expense of other equally disadvantaged people. Second, and relatedly, precisely because the centrality of class is not only denied by the rights' discourse advocates but seemingly considered less important than issues of, say, gender, race or social orientation, it may well be that individual social movements informed by an approach which eschews classism only can make advances by exploiting other groups. For example, male workers may feel pressured into opposing women's rights both in relation to job rights and in their efforts to make the problematic of the family as a discrete, private sphere, a site of struggle. Or, unionists under attack may allow themselves to be co-opted by xenophobic groups who want to treat immigrants

and ethnic minorities in an unacceptable way. That is, fighting for material needs on the basis of identity and culture, without a wholistic theory, may well perpetuate fragmentation. If, as a matter of theory, class analysis is not an acceptable framework, relegating it to the bottom of the hierarchy of relations may have serious adverse effects at a time when capitalism can exploit the fragmentation of the working classes more efficiently than at any other time this century. Third, a point which brings us back to the constitutional litigation of rights. The political discourse of rights takes off where the arguments about constitutional rights end and, therefore, the fact that the litigation route has not proved all that successful is not seen as a serious obstacle by the theorists. But, should they be so sanguine?

Capitalism has become more and more effective in its quest to split the economic from the political, the private from the public. As the first part of this paper shows, law has played a prominent part in the development of a politics which allows an enrichment of abstract civil, individual rights, while tolerating an ever-deepening inequality in socio-economic conditions (Glasbeek & Mandel). Now, the social movements which are to make the counter-hegemonic rights' claims do not simply want their civil rights recognized. They want to be able to enforce them concretely. The most obvious way to do that in the modern capitalist state is to obtain positive legal declarations which can be legally enforced. Litigation strategies are not theoretically essential to the politics of rights but, practically speaking, they will be central to them. If law, particularly in its constitutional rights' garb, is as integral to the hegemony of capital as this paper posits, the social movements' rights' discourse advocates have a grave problem. Much of the political agitation they want to promote will take place in the legal domain. The strategy of counter-hegemony may founder on the hegemonic block created by law.

In sum, the politics of the new social movements' and moral rights' theorists — advocated for the most part by intellectuals of the left — may, like the politics of judicial review, be the politics of despair. The politics they propose are appealing because of their sensitivity to identity and culture and their respect for self-determination. They are principled, laudable politics. But, they tend to overlook class theory too much. It is easy to be sympathetic to this blind spot, because, right now, the overthrow of right wing governments in England, the U.S.A. and Canada, let alone of capitalism itself, seems so difficult. Yet, the struggles their theorizing supports may be limited in their effectiveness because of this and because there is nothing to show how the barbed-wire hurdle of capitalist law can be cleared. The expression 'movements' which they like so much is significant. It should be remembered that while movement can be forward, it can also be lateral, circular or backward.

**Some of the case law relied on for the summary of outcomes of judicial review**

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*Re Public Service Employees Relations Act (Alta)* [1987], 1 S.C.R. 313  
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*Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573  
*Newfoundland Association of Public Employees v. Attorney-General for Newfoundland and Chafe*, [1988] 2 S.C.R. 204  
*British Columbia Government Employees' Union v. Attorney-General for British Columbia*, [1988] 2 S.C.R. 214  
*Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367  
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