

# Legal Protection versus Legal Consciousness on Rights: The Changing Perspective in Law and Society Research

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**Abstract:** The changing Perspective in Law and Society Research: From Legal Protection into Legal Consciousness Muhammad Helmy Hakim Abstract This article discusses the important role of historical, cultural, social, and attitudinal aspects in the study of law. There has been a shift from instrumental law to constitutive law. While instrumental law considers law beyond the social and cultural spheres, constitutive law integrally embraces law, politics, ideology, and action. Legal consciousness is an important asset for marginalised people who are at high risk of discriminative treatments in occupational and social life. Not only will they be legally aware of their rights and obligations at work, they will have adequate knowledge of where and how to name, blame, and claim in case mistreatment do occur. Legally proficient will allow them build legal protection which is not adequately provided by the authorized bodies.

## 1 INTRODUCTION

Nowadays, many countries in the world have established a complex system and structure of laws and institutions to protect the interest of the people, particularly the marginalised ones in the employment sector. This legal protection model has a broader significance and impact in legal theory. It also initiates, reflects and structures assumptions in dominant research paradigms in law and society. Even this model and its critique have been applied to other areas of law in wider coverages. (Bumiller, 1987)

From the legal protection model perspective, the law is an authoritative and effective instrument that offers victims with a tool to force perpetrators to comply with legal rules. This model assumes that those who have suffered injuries will recognize their harms, and invoke the law through litigation or reconciliation. In brief, they assume that those in the protected class are able and convinced to bear these burdens. (Bumiller, 1987) This kind of strategy is called as litigious policies, (Burke, 2002) or complaint-driven enforcement model, ((Organization), 2001) where the enforcement relies on individuals bringing their rights of action. However, strategies of equal protection may

inadequately deliver the burdens imposed on marginalised people because they accept the authoritative discourse of law rather than inquiring the compatibility of legal rules with their legal conception.

The proponents of legal consciousness argue that litigation is only one of the many avenues that disputants have in their catalogue of choices. Although the judiciary is believed to monopolize the enforcement of legal norms, it is not the only source of normative messages and legal practices in society. Courts are not even the prominent institutions that handle the majority of legal conflicts and neither occupies the centre of legal life. On the contrary, only a minimal fraction of disputes that we can label as legal has entered the judiciary. From that number, it is really difficult to know how many are actually resolved through litigious judiciary process. (Gomez, 2007) Over thirty years ago, Galanter et.al pointed out that very few cases of dispute were resolved through courts. (Bliss Cartwright, 1974) (Galanter, 1975) This minimal resolution was even smaller than the number of cases the court was supposed to deal with, the fraction of which was much smaller than the actual cases of dispute. (Galanter, 1983) (Galanter, 1986) (Galanter, 1987)

As a matter of fact, it is now trite to recapitulate that the modern justice system through aggressive

prosecution and legislation of punitive laws against batterers, has failed to respond adequately to crime in general, and to marginalised people in particular. (Hagel, 1977) Many researches showed that a strong legal protection really makes a difference, but they also displayed that even in the United States of America where legal protection is strong, the rights of some victims are not afforded. (Report, 2001).

However, despite the widespread adoption and adaptation of legal protection, the implementation of such protection and its impact on victims have not been widely studied. In other words, this kind of research might be considered as the bottom-up approach, which is commonly defined in sociology of law literature as the study of critical legal consciousness.

This study will provide a brief review of two bodies of research concerning the interconnection and intersection of law and social issues. First, this paper reviews the changing perspective of law and society research from an instrumental view of law to the view of law as an integral part of society. This more expansive view of the role of law in society has led to the legal consciousness. Next, it reviews some of the innovative work of legal consciousness scholarship in the study of law and society. In a broader aim, this paper will critically assess the adequacy of legal theory to protect, serve and deliver the interest of socially and economically disadvantaged people in fighting for their right and fortunes.

## 2 INSTRUMENTAL AND CONSTITUTIVE PERSPECTIVES

There has been a shift in the law and society research to comprehend the rule of law in post-modern epoch from instrumental to constitutive perspective especially in the United States in the last forty decades. The former treats law as a separate entity and thus autonomous from society and social life, while the latter identifies and recognizes the existence of different competing forces that contribute in shaping social life and normative system. Constitutive perspective puts law in the interconnection to, and embeddedness in different other fields to allow holistic consideration of law-influencing cultural and social aspects.

Sarat and Kearns introduced these two different instrumental and constitutive perspectives in this area of socio-legal research. (Kearns, 1995) Although these two perspectives are in similar way favouring

law in studying society, they hold opposing views by which law affects society: whether by imposing external sanctions or by shaping internal meanings. However, subsequently, they are likely to fail to notice the variety of ways in which society responds to law, occasionally by ignoring, reconstructing, or using it in unusual and unanticipated ways.

These two perspectives, that is, the instrumental and constitutive, represent two basic views of the dynamic relationship between law and society. Instrumentalist scholars, which see law as different from, and acting on society, focus on legal norms, legal rules, and legal actors. This separation has been an attempt to make out the power of law as an engineering tool for creating or supporting social change.

On the other hand, instrumentalist tries to “... search for the conditions under which law is effective, that is, when legislation or judicial decisions can be counted on to guide behaviour or produce social changes in desired and recommended ways.” (Kearns, 1995) In short, the instrumentalism emphasizes sharp distinction between legal standards on the one hand, and non-legal human activities, on the other. It then hypothesizes the effectiveness of the legal standard upon society.

On the other hand, the constitutive perspective assumes that social life is run and operates orderly through with the rule of law. In other words, “law shapes society from the inside out, by providing the principal categories that make social life seem natural, normal, cohesive, and coherent.” (Kearns, 1995)

## 3 SCHEINGOLD IS AGAINST THE INSTRUMENTALISM

To begin with, beyond the deficiency and the advantage of instrumentalism, many social scholars contend against it. For instance, Scheingold argues against the idea of instrumentalism which assumes that legal standard with litigation and courts decisions can result in an effective social change. (Scheingold, 2007) He proposes that declaration of rights from courts has been the focus of a great number of law reformers. Effective declaration realizes these rights which lead to equivalently meaningful change. Put in different words, “the *myth of rights* is directly related to litigation, rights, and remedies with social change.” (Scheingold, 2007) The underlying ideology is that “the American political order indeed takes similar

patterns of rights and obligations specified in the Constitution.” (Scheingold, 2007)

Different from scholars supporting the idea of instrumentalism in approaching law in practical arena, Scheingold proposes the legal paradigm which views human interaction largely about rules and rights which dominates the ideology of the myth of rights, and mischaracterizes the interplay of legal, political and social forces. Surely these views have, at least until lately, dominated the literature on law and politics in the United States.

As a matter of fact, Scheingold rejects the myth of rights and, he further proposes the constitutive understanding of law and legal mobilization as he moves from the myth of rights into his discussion of the political significance of the ideology of rights. He puts forward the concept of the politics of rights that “the politics of rights implies a much more comprehensive assessment which includes but transcends the simple straight-line projection from judicial decision to compliance.” (Scheingold, 2007)

Scheingold is likely sceptical of the emphasis on litigation as a tool for redistributing power. He notes the tendency of law and politics to reinforce the status quo, embedded as they are in the existing power structures. Nevertheless, he asserts that the ideology of rights can play a significant role in mobilizing action. “The myth of rights provides political ideals [which] influence the behaviour of government and private citizens. The politics of rights is, in short, concerned with the interplay between ideology and socio-political action in American politics.” (Scheingold, 2007)

It is the recognition of the relationship between law, politics, ideology and action that characterizes the constitutive view of law and society. Sarat and Kearns highlight that constitutive perspective of law decline the instrumentalist picture of law as outside to social practices. They attempt to draw the way legal power and legal forms exist in social relations. Constitutive perspective claims that instrumentalism brings about a falsified impression of the role of law in everyday life. By centering on law as a distinct engineering tool or efforts of law to change behaviour, instrumentalists diverts attention from the deep, often invisible, but pervasive effects of legal concepts on social practices. (Sarat, 1990).

#### 4 BUMILLER REFUSES LEGAL PROTECTION MODEL

In opposition to Scheingold, Bumiller shows the seeming failure of anti-discrimination doctrine. (Bumiller, 1988) She contradicts the instrumental concept of law and on the contrary examines the individual attitudes and behaviour which can serve to oppose the apparent goal of civil rights legislation and litigation. She states that the traditional model of legal protection, which supposes law to be a powerful tool to end discriminatory practices, is flawed. Why? because it fails to take into account the way individual actions and attitudes are influenced by law.

Bumiller takes a firm stand that the view the primacy of the legal order produces the illusion that law is a source of power and authority disconnected from other power structures in society. In fact, the deep logic of the law does not reflect the complex social reality of discrimination in society, but rather restricts and reshifts legal resolution to social problems appropriate for litigation. (Bumiller, 1988)

Bumiller argues that the 1964 US Act of Civil Rights, and the subsequent legislation generally have failed to rectify earlier forms of discrimination, injustice, and inequality for marginalized people. She notes that the traditional wisdom generally attributes these failures to inadequate resources, entrenched cultural biases, and the slow progress in attaining real economic and social gains. On the contrary, Bumiller says that the model of legal protection that forms the basis for civil rights law itself unfortunately discourages social victims from helping and emancipating themselves in oppressive conditions.

Bumiller even further argues that protective legislation may serve to perpetuate patterns of behaviour (among both victims and perpetrators) that maintain discriminatory practices. Modern law is said to embody and reproduce a socially constructed, dehumanized victim. Bumiller further proposes that there is a current proliferation of antidiscrimination strategies. This proliferation is seen as a coherent extension of the universalization of rights, which is itself a by-product of the civil rights model of legal protection. She concludes that “by including all groups, it further dilutes the benefits received by the historically most disadvantaged groups.” (Bumiller, 1988)

Bumiller refuses the traditional model of legal protection. In contrast, he relies on stories and experiences told by victims of discrimination to explore the complications of anti-discrimination law. In order to better understand the relationship between law and social change, she proposes and creates a

paradigm for legal consciousness research by opposing the perspectives and experiences of individuals against the traditional instrumentalist view of legal protection especially on civil rights. Bumiller's position on the role of law deduces from Foucault's explanation of law and social control. She notes that Foucault's conception of law and ideology moves us away from the traditional view of anti-discrimination law as a command which is directed at its perpetrators to acknowledgement of the law as a form of knowledge and power that shapes its subjects. The Foucault's stance on law brings up the inquiry of how law practices its authority on victims and creates victims views of themselves and their position in conceptualizing the notion and entity of rights. (Bumiller, 1988)

The essential claim of the constitutive approach as proposed by Bumiller to the study of law is the assertion that "law exercises its power by less obvious means than can be discerned from formal and visible decision making in court." (Bumiller, 1988) In this point, Bumiller detects evidence of the mutual and dynamic nature of law as constitutive of social relations and the importance of examining the gap between legal doctrine and law in everyday life. She indeed affirms the power of legal ideas and concepts to influence social relationships even in the absence of a legal claim. She points out that the introduction of legal themes may shape behaviour at all stages of the conflict –from its creation to its settlement. The situation is gradually metamorphosed by formally the introduction of law, even if the parties do not talk to lawyers or take the case to a legal forum. (Comaroff, 1985)

The theoretical change from the instrumental view of law to the constitutive view of law leads scholarship toward an acknowledgement of the importance of investigating and analysing the ways that law comes out of, and is constituted by specific historical, cultural, social situations and attitudes. The emerging view of law from very sociological perspective fertilizes the development of socio-legal research of law in latest decades.

The change in the understanding of the meaning of law needs a significant change in the way of the study toward the dynamic relationship between law and society, from an initial focus on institutions to individuals; from the text of law to the law of text (McVeigh, 1991) to better understand human legal behaviour in everyday life. To be committed to this perspective, Bumiller maintains the importance of exploring and cultivating empirical data from individual subjects about their thoughts and experiences with law. "An important premise of her

perspective on this field of socio-legal research, therefore, is that neither the potentialities nor the troubles deriving from social conflict can be fully understood outside the changes of an individual life." (Comaroff, 1985)

It is appropriately to note that constitutive studies of law have extended to the understanding that law is more than a set of rules and procedures which are rigidly defined in the book of law. Rather, law constitutes a belief system which is imbedded in, and perpetuates a certain power structure. It is the study of law as a set of beliefs, and the significances of those beliefs that forms the basis of legal consciousness research.

## 5 DISCOURSE OF LEGAL CONSCIOUSNESS

Legal consciousness has been an important topic in socio-legal research because it represents the intersection of law as an institutional force and individuals as legal agents. Traditionally, the sociological notion of law has been related with the social legitimacy of law which finally is rooted in individuals' belief in and adoption of legal order. This point brings the social basis into very important account on law-making and law enforcement. (Unger, 1995) However, this initial traditional conceptualization of legal consciousness which emphasizes of official power by individuals has later on moved away into the notions of justice and rights that people convey in their minds and practice in their every-day life. Hence, scholars have begun to investigate whether and why people invoke the law in disputes, (Merry, 1992) or in social movements aimed at broader social change. (Merry, 1990)

Merry, a prominent legal anthropologist, defines consciousness as people's conception of the natural and normal method of work accomplishment, habitual patterns of talk and action, and common sense in understanding of the world. (Merry, 1990) Further she asserts that consciousness is not only the realm of "deliberate, intentional action but also that of habitual action and practice." (Merry, 1990)

In line to Merry's contention, Ewick and Silbey define consciousness as the part of a reciprocal process through the patterned, stabilized, and objectified meanings given by individuals to their world. In this frame, the already institutionalized meaning becomes part of the material and discursive systems to constitute, limit and constrain the making

of new meanings in future time. (Silbey, 1998) Nielsen puts the idea proposed by Ewick and Silbey as the way by which law works in its logic and system. (Nielsen, 1995) In other words, legal consciousness refers to the way people think about, internalize, interpret and bring the law into practice in everyday activity. This includes the prevailing norms, day-by-day practices, and commonly adopted and adapted ways of legal problem solving. Put differently, this end results directly from legally- and ideologically-related experiences. (Nielsen, 1995)

In relation to the notion of consciousness, Max Weber in his classical work, has introduced “the subjective meaning-complex of action” which can be implemented to the intersection of social agency and legal consciousness. (Weber, 1946) Opposed to Marx, Weber contends that in a mutual scheme, culture can influence agency, while agency can interchangeably influence culture. Weber describes the subjective interpretation of action as an effect to understand human behaviour in terms of “the concepts of collective entities.” (Weber, 1946) This suggests that for Weber, a dual character of consciousness and action in which thoughts or concepts “have a meaning in the minds of individual persons, partly as of something actually existing, partly as something with normative authority.” (Weber, 1946)

It is important to note that consciousness is subjective. It is the product of an interaction between the observer and the observed. (Merry, 1990) Jean Comaroff defines consciousness as “inherent in the daily-life practical constitution and is integrated in the process in which external social and cultural factors have constituted the subject.” (Comaroff, 1985) Consciousness may appear in subtle and different ways of how people act and speak and what their utterance contain. (Comaroff, 1991; Comaroff, 1991) This becomes an integrated part of practical knowledge to which people refer when doing things.

The construct of consciousness is in fact much more dynamic and complicated than a mere social entity. This “type of social practice” (Silbey, 1998) assigns such meanings to social structures, which is not an end. The assigned meaning will undergo further refinement, reproduction, and development along individual experience that occurs within the social structures by which one’s life is defined. Of equal importance, consciousness develops and changes over times with contradictory experiences. People question what they are doing and shift directions if it appears that their way of acting either is not working or contradicts what happens to them. (Merry, 1990)

Time has played an important role in the process of individual’s consciousness changes. One’s consciousness is likely to change along with their experience in social process. Such this change in consciousness constitutes a great interaction of social and structural entities. Comprehension about how consciousness changes will help a systematic discussion of legal consciousness. Nielsen asserts that consciousness, is simultaneously created and communicated; it is contingent, meaning that it changes based on the knowledge and experiences of individuals, as well as context. (Nielsen, 2009)

Legal consciousness refers to “how people understand and use the law” and “participate in legality construction process.” (Merry, 1990; Silbey, 1998) Recently many legal consciousness studies have merely emphasized on law conceptualization and its impacts on the individuals’ daily lives. (Larson, 2004) They reveal the dynamic nature of legal consciousness concept, while to considerable extent paying less attention to social-cultural contexts in structuring and framing socio-legal behaviour. These studies argue that it is not the external enforcement that counts in legal consciousness establishment, but rather, it is an internally learned process through which individuals gain their legal consciousness.

They are in active engagement to form their individual specific legal consciousness. First, social consciousness becomes the foundation of individual legal consciousness. Second, with legal experiences and reactions they develop their legal consciousness. The dynamic nature of legal consciousness construct and its socially related process are manifested in words or actions, a multifaceted, contradictory, and variable legal consciousness.” (Silbey, 1995)

Establishment of legal consciousness especially at the phase of law-making and law enforcement does not stand alone. Different aspects play a typical and distinctive role in the establishment of legal consciousness. They are, among others, that is, the perceptions of law-making bodies, the court system, law enforcement and other “meanings, sources of authority, and cultural practices commonly recognized as legal.” (Silbey, 1998) As it is common in other schemas, legality is not exclusively inherent in individual's ideas and attitudes. To be always vital, individuals and groups have to continually produce, work, invoke, and deploy it.” (Silbey, 1998) As suggested by some legal consciousness studies, legal idea may be pushed and pulled, which implies the texture of law in our everyday existence in order to construct legality. (Barclay, 2003)

Law may be pulled to construct and restrict what people may select, act and decide. The restriction is elaborated into the fixedly elaborated regulations, conduct-prohibition codes, and social norms. They are all by choice designed to reserve the already arranged power and order. Through their familiarity with these codes, lay people will use them to adopt, adapt, and obey the formal regulations. Such this acceptance by the people has opened a way for the law to shape the everyday life of the people and rule some courses of action without which they would have been taken otherwise. In this way, law has created quasi natural, normal, cohesive, and coherent society based on the principal categories.” (Kearns, 1995)

At the same time, law may be pushed by individuals’ own readings of law.” This kind of dynamic process has influenced and enriched the variants of legality. In this perspective, law indeed dynamically develops; evolves, and to be adapted. Through legality context in daily life, ordinary people contribute to shape and assign meaning to an “abstract but binding form.” (Barclay, 2003) The legality enacted every day in turn, will result in the establishment of a theory for legal, institutional, and social changes. Any decision that may have impacts on the law will result in new meaning and a new legal claim. Therefore, while it restricts what action individuals may have taken, opportunities of redefinition of and challenge against the restraints are widely open. (Silbey, 1998)

With legality, individuals may also anticipate on the vast resources of the state by mobilizing the law. The accumulated of individual’s needs for legal system is likely to result in great effects on other people through the creation of new legal rights and novel legal claims. (Zemans, n.d.) Thus, in spite of the fact that law has colonized everyday existence through oppression and inequality, legality provides a means of resistance. (March, 1995; Kearns, 1995; Merry, 1995; Merry, 1995) Legal consciousness studies have revealed that the law provides schemes and frames to construct the meaning of what people have experienced. (Silbey, 1992; Merry, 1990)

Using the existing legal concepts and resources, people assign and restructure such meaning to their disputes with their neighbours, their family, even with their experiences with street harassment. (Merry, 1990) Studies of legal consciousness deals with “how, where, and with what effect law is produced and reproduced in and through commonplace social interactions within neighbourhoods, workplaces, families, schools, community organizations, publics, and the like.” (Silbey, 1998) This view of law is a

more recent idea that attempts to bring law into more practical level at everyday life.

## 6 CONCLUDING REMARKS

Considering the important role of historical, cultural, social, and attitudinal aspects in the study of law, there has been a shift from instrumental law to constitutive law. While instrumental law considers law beyond the social and cultural spheres, on the other hand, constitutive law integrally embraces and put law, politics, ideology, and action into a dynamic relationship.

Along the line of the notion discussed previously, it is quite that legal consciousness is an important asset for marginalised people who are at high risk of discriminative treatments in social, political and occupational life. Not only will they be legally aware of their rights and obligations at works, they will have adequate knowledge of where and how to name, blame, and claim in case mistreatment do occur. Being legally proficient will allow them build legal protection which is not adequately provided by the authorized bodies.

This shift of comprehending legal consciousness has to be followed hand in hand by the political and academic treatment of law in a more practical level. The later point is in equal important to respond the emerging sociological perspective of law that views law socially constructed.

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