

How Can the Law Help Reduce Group-Based Inequalities?

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Colleen Sheppard

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Centre for Research on Inequality, Human Security and Ethnicity, CRISE
Oxford Department of International Development,
Queen Elizabeth House
University of Oxford, 3 Mansfield Road, OX1 3TB
Tel: +44 1865 281810; Fax: +44 1865 281801

www.crise.ox.ac.uk

REDUCING GROUP-BASED INEQUALITIES IN A LEGALLY PLURAL WORLD

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COLLEEN SHEPPARD, RESEARCH DIRECTOR AND ASSOCIATE PROFESSOR,
CENTRE FOR HUMAN RIGHTS AND LEGAL PLURALISM, FACULTY OF LAW, MCGILL UNIVERSITY

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I. INTRODUCTION

We live in a world characterized by multiple, overlapping and plural legal orders, embracing both formal and informal legal regimes. Legal protections for equality and anti-discrimination are also found in a plurality of legal instruments, including international, regional, national, state and municipal human rights documents and institutional codes of conduct. It is important, therefore, to explore how formal human rights protections aimed at reducing group-based inequalities intersect and interact with diverse, overlapping and co-existing legal regimes. Such an exploration provides important insights into systemic, structural and social obstacles to effective enforcement of formal anti-discrimination and equality rights protections -- obstacles institutionalized and embedded in both official and unofficial law and custom. Moreover, an appreciation of the intersections, overlap, and métissage between a plurality of legal orders illuminates how strategic reliance on different legal norms may advance the effective enjoyment of the right to equality.

In this article, I highlight three lenses through which we may explore the influences of a plurality of legal orders on equality rights. The first lens is an institutional one – focusing

on mainstream and dominant societal institutions such as the workplace and educational institutions. Building upon the concept of systemic or structural discrimination, it highlights how anti-discrimination law must address institutional relationships, practices, norms, policies, and cultures. The second lens is a community one – focusing on how anti-discrimination laws affect minority ethnic, religious, language, and indigenous communities that operate in “semi-autonomous spheres.”¹ To what extent do group-based equality rights require greater autonomy and self-governance, and how do state-based anti-discrimination protections operate in communities governed by informal laws based on custom, tradition, and religion? The third lens examines intersecting sources of formal law, highlighting how individuals, community-based groups and civil society organizations engage in transnational coalitions around issues of common concern. In this “globalization from below,”² there is a growing reliance on human rights norms emanating from multiple sources, ranging from international covenants and conventions to local codes of conduct. It is useful to reflect upon how a plurality of sources of law is used strategically to reinforce legal claims to equality.

II. INSTITUTIONAL AND SYSTEMIC CONTEXTS

The first wave of legal reform to advance equality rights in the post World War II era was premised upon an instrumentalist vision of law. Legislators and government policy-makers enacted anti-discrimination laws which prohibited discrimination based on specific grounds, such as race, national or ethnic origin, sex, religion, disability (and

¹ Sally Falk Moore, “Law and Social Change: the Semi-autonomous Social Field as an Appropriate Subject of Study” in *Law as Process*, (London: Routledge, 1978) 54

² Arjun Appadurai, (Winter 2002) 14 *Public Culture* 21-43 (2001) 13 *Environment and Urbanization* 23 at 38.

subsequently sexual orientation and social condition) in specific contexts, including employment, housing, education and services normally offered to the public. Individuals who experienced discrimination were entitled to file a complaint with government-funded commissions and seek redress retroactively. Such a system was based on the assumption that discrimination was generally exceptional or aberrant in society, caused by individual behaviour based on discriminatory attitudes and negative stereotypes about certain groups in society. However, by the 1980s, the underlying premises of this regulatory model were being questioned. Tribunals, courts and legislators had begun to identify adverse effects discrimination, or disparate impact or indirect discrimination.³ Such discrimination occurred as a result of the negative effects of apparently neutral institutional rules, policies and practices. Adjudicators recognized that discrimination could occur even in the absence of an overt intent to discriminate – when policies, rules, or practices developed for the dominant majority groups in society had detrimental effects on the life chances, opportunities and well-being of minorities and women.

Building upon legal recognition of adverse effects discrimination, growing understanding of the institutionalized, structural and pervasive nature of systemic discrimination prompted a rethinking of the legal regulation of equality. It became apparent that a retroactive, individual complaints-driven approach to remedying discrimination was insufficient to the extent that inequality and exclusion were institutional and systemic

³Colleen Sheppard, “Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*” (2001) 46 McGill L.J. 533.

problems.⁴ Proactive approaches such as affirmative action, employment equity, contract compliance, procurement policies and pay equity were legislated in some jurisdictions.⁵ While some of these proactive measures have produced important results, they continue to be quite limited and often very poorly enforced.⁶ Remediating the institutionalized dimensions of exclusion and discrimination, therefore, presents an ongoing challenge for those committed to advancing equality rights in the mainstream institutions of everyday life.

It is in confronting this challenge that the lens of legal pluralism becomes very instructive for it teaches us to be attentive to how formal anti-discrimination protections must operate in institutional contexts governed by a complex array of rules, norms, customs, traditions, and practices. Scholars of legal pluralism have highlighted important ways in which formal and informal normative orders intersect and interact.⁷ As Sally Engle Merry describes it, “state law both constitutes and is constituted by” other normative orders.⁸ Her work also examines facilitative law “that functions not by imposing obligations but by providing individuals with facilities for realizing their wishes through

⁴See Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach” (2001) 101 Columbia Law Review. Available at SSRN: <http://ssrn.com/abstract=244407> See also, Rosalie Silberman Abella, *Report of the Commission on Equality in Employment* (Ottawa: Ministry of Supply and Services, 1984) [Abella Report].

⁵ Elaine Kennedy-Dubourdieu ed. *Race and Inequality: World Perspectives on Affirmative Action* (Ashgate Press: 2006).

⁶ Carol Agócs, editor, *Workplace Equality: International Perspectives on Legislation, Policy and Practice*, The Hague: Kluwer Law International, 2002.

⁷ Sally Engle Merry, “Legal Pluralism” (1988) 22 Law & Soc’y Rev. 869. See also, S. Falk Moore, *supra*, note 1; Paul Schiff Berman, “Global Legal Pluralism” (2007) 80 Southern Cal. L.Rev. 1155. For an analysis of legal pluralism and equality rights, see Colleen Sheppard, “Equality Rights and Institutional Change: Insights from Canada and the United States” (1998) 15 Arizona Journal of International & Comparative Law 143.

⁸ Merry, *Ibid.* at 883.

conferring legal powers on them...”⁹ Gunther Teubner has also explored what he calls “policies of proceduralization;” whereby the “legal system concerns itself with providing the structural premises for self-regulation within other social subsystems.”¹⁰ Similarly, Susan Sturm’s important work on structural discrimination analyzes how “Legal norms play the role of opening spaces for ongoing engagement about current practice in relation to aspirations that have been identified to be of public significance.”¹¹ She explores the role of law in institutionalizing “occasions for analysis, reflection, relationship building, boundary negotiations and institution building.”¹²

Beyond the insights of scholars who imagine ways in which equality norms may be operationalized within existing institutional processes and policies, a cautionary note is struck by others. Linda Hamilton Kreiger, for example, documents socio-legal institutional resistance to the transformative agenda of anti-discrimination laws, including the phenomena of what she calls capture and backlash.¹³ Pre-existing social and institutional norms persist and may even be inadvertently reinforced in the face of challenges to their validity or fairness by state-based equality rights initiatives. Indeed, one of the most difficult dimensions of systemic discrimination is its tendency to be reinforced over time. Inequitable privileges mean that those who enjoy such privileges

⁹ *Ibid.* at 885.

¹⁰ Gunther Teubner, “Substantive and Reflexive Elements in Modern Law” (1983) 17 *Law & Soc. Rev.* 239 at 274.

¹¹ Susan Sturm, “Owen Fiss, Equality Theory, and Judicial Role” (2003) *Issues in Legal Scholarship: The Origins and Fate of Antisubordination Theory* (Berkeley Electronic Press), article 18. See also, Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990).

¹² Sturm, *Ibid.* at 7.

¹³ Linda Hamilton Kreiger, “Afterword: Socio-Legal Backlash” (2000) 21 *Berkeley J. of Em. & Lab. L.* 476 at 484 (examining resistance to the implementation of disability rights protections in the United States.) See also, Mary Douglas, *How Institutions Think* (Syracuse: Syracuse University Press, 1986).

have access to more resources and support and consequently often perform better – thereby seemingly justifying the initial inequitable distribution of privileges. The cyclical and relational dimensions of systemic inequalities are difficult to reverse. The difficulty of reducing institutionalized group-based inequalities, however, should not prevent us from developing new approaches and strategies that take these systemic realities into account.

Some of the most promising strategies contest traditional channels of institutionalized power and privilege by insisting that anti-discrimination law empower those situated at the bottom of organizational hierarchies. Developing safe mechanisms for enhancing more participatory forms of governance within mainstream societal institutions such as workplaces and educational institutions is one critically important strategy. Imagining how to use state-based legal norms to move in this direction is a further challenge.

Autonomous trade unions have been one important vehicle for enhancing democratic participation of workers and promoting more equitable workplaces.¹⁴ Student democracy is another mechanism for hearing the voices of those with less power in the institutional structures in which we live. Yet there remains much work to be done in thinking about how to use law to restructure institutional relationships towards more equitable and democratic participation.¹⁵

¹⁴ See Adelle Blackett & Colleen Sheppard, “Collective Bargaining and Equality: Making Connections” (2003) 142 *International Labour Review* 419.

III. CUSTOMS, TRADITIONS AND SELF-GOVERNING COMMUNITIES

Another important way of thinking about legal pluralism and equality concerns self-governing communities within larger state structures. Indeed, early work on legal pluralism emerged from the observations of legal anthropologists regarding the persistence of customary legal regimes following the imposition of colonial rule.¹⁶ While *statutory* anti-discrimination laws have tended to focus on ensuring the integration of individuals from socially-disadvantaged groups into mainstream institutions, such as workplaces, educational institutions, public spaces, there is an important strand of *constitutional* and *international* law that recognizes a connection between equality and autonomous self-governance. In the Canadian context, this connection has been recognized most clearly in relation to indigenous peoples and minority linguistic communities.¹⁷ It has also arisen in more controversial ways with respect to religious communities and religious-based family arbitration.¹⁸

In terms of indigenous peoples, equality and self-governance, James Anaya explains:

(S)elf-determination is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies. Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation and cultural suffocation.¹⁹

¹⁵ See Iris Marion Young, *Inclusion and Democracy* (N.Y.: Oxford University Press, 2000).

¹⁶ Paul Schiff Berman, "Global Legal Pluralism" (2007) 80 Southern Cal. L.R. 1155 at 1171.

¹⁷ For an overview of Canadian constitutional protections for group-based rights, see Colleen Sheppard, "Constitutional Recognition of Diversity in Canada" (2006) 26 Vermont L. Rev. 463.

¹⁸ For a discussion of the Sharia law debate in Ontario, see Ayelet Schachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, (2004-5) 50 McGill L.J. 49.

¹⁹ S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 75; quoted in Val Napoleon, "Aboriginal Self Determination: Individual Self and Collective Selves" (2005) 29 Atlantis 1 at 2.

From this perspective, equality rights for oppressed indigenous communities are integrally linked to providing separate political spaces that will allow them to govern themselves pursuant to their own laws, traditions and customs. Legal pluralism provides a structural means to advance group-based equality. It gives oppressed communities greater political and legal control over their destinies.

In a similar vein, minority linguistic communities in Canada have sought to ensure the survival of their language through separate educational institutions. Understanding that integration into the majority language educational system would spell assimilation, there has been a long and continuing struggle for publicly-funded French language schools outside of Quebec. Of significance in this regard is judicial recognition that linguistic minority education should be managed and controlled by parents from the community.²⁰

Using self governance mechanisms to advance substantive group-based equality is an important and promising strategy. Yet, it also presents significant challenges, complexities and difficulties. First, it is necessary to delineate the legal boundaries of the group – a task which risks resulting in the congealing of group-based identities and the construction of categories of essentialist and homogeneous group difference.²¹ Second, according legal recognition to semi-autonomous communities raises complex and difficult questions about representation of the community. Who speaks for the group and what should we do in the face of internal conflict and dissent within the community?

²⁰ *Mahe v. Alberta* [1990] 1 S.C.R. 342 [*Mahe*].

²¹ See Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity* (1993) 19 Queen's L.J. 179 (1993), Angela Harris, *Race and Essentialism in Feminist Legal Theory*, (1980) 42 Stan.

Moreover, how do we insure that more vulnerable individuals within the community are adequately protected?²² Numerous scholars are endeavouring to understand how to advance group-based claims for autonomy and self-government while being attentive to the risks of a divergence between community-based religious or cultural norms and customs and state-based human rights.²³ Increasingly, courts are navigating the complex waters of customary law and human rights.²⁴

IV. CIVIL SOCIETY AND GLOBAL SOCIAL MOVEMENTS

One final lens through which to examine legal plurality focuses on the emergence of transnational networks of solidarity and the shifting reliance on multiple sources of legal protection, ranging from local codes of conduct, national laws and international

L. Rev. 581; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 11.

²² For a discussion of Aboriginal women, see Val Napoleon, “Indigenous Discourse: Gender, Identity and Community (2007) online at Faculty of Law, University of Alberta. On questions of religious communities and gender equality, see Vrinda Narain, *Gender and Community – Muslim Women’s Rights in India* (Toronto: Univ. of Toronto Press, 2001); Ayelet Schachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001); Beverley Baines & Ruth Rubio-Marín, eds. *The Gender of Constitutional Jurisprudence* (Cambridge: Cambridge Univ. Press, 2005).

²³ See, for example, the contributions of Will Kymlicka, *Finding our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: University of Toronto Press, 1998); *Ethnicity and Group Rights* (Will Kymlicka & Ian Shapiro eds., New York: New York University Press, 1997); *The Rights of Minority Cultures* (Will Kymlicka ed., Oxford: Oxford University Press, 1995); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989). Will Kymlicka, *Politics in the Vernacular – Nationalism, Multiculturalism & Citizenship* (Oxford: Oxford University Press, 2001). See also, Susan Williams, “Democratic Theory, Feminist Theory, and Constitutionalism: Models of Equality and the Challenge of Multiculturalism,” Conference Presentation, International Feminist Constitutionalism Conference, Queen’s University, Kingston, 2009 (abstract available online)

²⁴ A review of developments in South Africa was provided by Jewel Amoah, “Equality Rights for the Girl Child under the South African Constitution Watch GRACE grow: African Customary Law in the Constitutional Garden” Conference Presentation, International Feminist Constitutionalism Conference, Queen’s University, Kingston, 2009 (abstract available online) (discussing the case *Shilubana and Others v. Nwamitwa*, [2008] ZACC 9).

conventions. International and regional human rights conventions are often raised in litigation to reinforce claims for equality at the national, provincial/state, or municipal level. Indeed, judges increasingly rely on international human rights norms as interpretive aids in domestic litigation. Yet, beyond this vertical and formal reliance on multiple sources of law, transnational convergence of human rights norms promotes “horizontal learning” between those engaged in struggles for social justice and enhances their recognition by local governments and institutions.²⁵ Arjun Appadurai, who describes this phenomenon as “globalization from below,” suggests that it contributes to new forms of global democratic engagement.²⁶ Sally Engle Merry refers to the “vernacularization of international human rights concepts” – a paradoxical process drawing on universal human rights norms, but reshaping them to resonate with the local cultural framework.²⁷

To highlight a Canadian example, Caroline Andrew has examined the local-global connections of women’s groups seeking to secure safe and secure urban environments for women.²⁸ She outlines how women’s organizations use “global links in their local or municipal work, the links to the global being a resource in local activity.”²⁹ Indeed, once an issue gains recognition at the global level, local authorities are much more inclined to acknowledge the importance of the issues and concerns in their own communities. An international conference on women’s urban safety held in Montreal in May 2002,

²⁵ Appadurai, *supra*, note 2 at 39.

²⁶ *Ibid*, at 42. Appadurai refers to this bottom-up democratic engagement as “deep democracy.”

²⁷ Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle” (2006) 108 *American Anthropologist* 33.

²⁸ Carolyn Andrew, “Women in Cities International: A Case Study in Knowledge Transfer”, Seminar Presentation, Faculty of Law, McGill University (2008) (Centre on Governance, School of Political Studies, University of Ottawa – forthcoming in *Geoforum*).

therefore, not only put the issue of gender and security in everyday life on the agenda of the global community, but also enhanced its legitimacy as pressing social issues in the eyes of local authorities. In the aftermath of the conference, there were numerous networking and policy initiatives; however, Andrew underscores the difficulty of sustaining international engagement, given the lack of resources and precarity of project-based funding.³⁰ Nevertheless, she endorses the importance of developing links between local social movements on a global scale.

From a legal perspective, it is important to reflect upon the role of global social movements and the community-based and non-governmental organizations that sustain them. Beyond their critical role in test case litigation that engages with legal protections from multiple sources and contexts, the organizations of civil society have a major role to play in reducing group-based inequalities through the structural initiatives outlined above. And in so doing, they are increasingly developing global connections that impact upon the strategies and approaches they use in their local work. In thinking about the role of law in reducing group-based inequalities, therefore, it is critical to examine how law is being used in multiple, creative and diverse ways, globally and locally by social actors seeking to foster a more equitable and inclusive world.

²⁹ *Supra* at 20.

³⁰ Appadurai speaks of the problematic effects of a “politics of projectization”, *supra*, note 2 at 40.