INCLUSIVE EQUALITY

The Relational Dimensions of Systemic Discrimination in Canada

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INCLUSIVE EQUALITY

Preface

I was born at the end of the "baby boom" era. My mother worked in the home, while my father worked long hours outside the home. My mother had worked as a nurse before having a family and my father was a doctor – professions steeped in egalitarianism and humanism. My admiration for their commitment to social change, community involvement, and optimism about the human spirit continues to deepen as they get older, advocating for same sex marriage in their church, fundraising for HIV-AIDS in Africa, working for Amnesty International, and assisting in refugee sponsorship.

My mother had six children between 1952 and 1962. We were all girls. "All girls?" I would be asked. "Yes, all girls." "No brothers?" "No brothers." "Oh, your poor father!" was the standard remark. "Oh no," I would reply, "on the contrary. He is very lucky."

Somewhere deep inside I felt the need to resist the suggestion that my father could have felt the least bit unhappy by the arrival of any one of his beaming baby daughters; and my father always agreed with me. Although I did not analyze it at the time, in retrospect, I think my response was connected to a very important principle of equality rights – respect – and a recognition that we have to hold on to it, reassert it, and voice it whenever it risks being eroded or undermined, even in the seemingly insignificant small events that make up our lives. So that persistent and patterned response of empathy towards my "poor" father sparked a commitment to girls' and women's rights that I have held onto ever since.

Having five sisters taught me about sisterhood in an immediate and tangible way. But what echoes most in my mind is my older

sisters singing loudly to announce a meeting of the sisters, "Calling all Girls! Calling all Girls!" The strength of our voices and the assertion of the right to take up space and plan together remind me of the power and energy of girls. My sisters – Jan Sheppard Kutcher, Wendy Sheppard, Dale Sheppard, Robyn Sheppard, and Dawn Sheppard – taught me the values of feminism, even as a little girl. They continue to give me unconditional support. Special thanks to Dale Sheppard for suggesting the cover artwork – a children's mural project, done as part of the Art Gallery of Nova Scotia Summer School of the Arts.

I am now a mother of a son and daughter. And as I watch my son grow older, I have strengthened faith in boys and realize the importance of including them in the processes of social change. In my daughter I hear a strong and emerging voice for social justice. Nicolas and Kara definitely slowed down this book. Yet their presence has made my work much more profound, giving me new insights and deepening my commitment to contributing in some small way to making a better world for the generations yet to come. I am constantly in awe of all they know.

I wish to express my deep appreciation to my research students at the Faculty of Law, McGill University. My engagement with research and scholarship on equality rights has been enriched by their knowledge, insights, and energy. Thanks first to Monika Rahman, who played an invaluable role in helping me to complete this project, providing critical support during the final editing, research, and publication process. She is a brilliant student who is truly a colleague. My sincere thanks as well to the many other students whose work was so important to the journey of this book: Helen Nowak, Yasmina Benihoud, Mercy Mutale, Emilia Ordolis, Alison Gray, Pauline Grégoire, Andrew Unger, Mallory Cook, and Jameela Jeeroburkhan.

I also wish to thank the McGill Faculty of Law and the Centre for Human Rights and Legal Pluralism for providing me with collegial and institutional support for this project. Special thanks to my colleagues Vrinda Narain and Adelle Blackett and to the two anonymous reviewers whose comments helped me to improve the final manuscript. I also greatly appreciated the editorial insights and assistance of Leila Marshy and Joan McGilvray of McGill-Queen's University Press.

This book project is an effort to synthesize and integrate much of my thinking and scholarship regarding equality and discrimination developed over a number of years. Some of the concepts and ideas in chapter 1 were discussed in "Of Forest Fires and Systemic Discrimination:

A Review of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,*" (2001) 46 McGill L.J. 533, and in "Grounds of Discrimination: Towards an Inclusive and Contextual Approach," (2001) 80 Canadian Bar Review 893 (also published in *Les 25 ans de la Charte québécoise,* Yvon Blais, 2000). Chapter 2 draws on previous scholarship in the constitutional domain, including "Constitutional Recognition of Diversity in Canada," (2006) 30 Vermont L. Rev. 463; "Constitutional Equality and Shifting Conceptions of the Role of the State: Obstacles and Possibilities," (2006) 33 Supreme Court L. R. (2d) 251; also published in Sanda Rodgers, Sheila McIntyre and Mary Eberts eds. *Strategizing Systemic Inequality Claims: Equality Rights and the Charter* (Toronto: Lexis-Nexis, 2006) 251-68 and "Inclusive Equality and New Forms of Social Governance," (2004) 24 Supreme Court Law Review (2d) 1.

Chapter 3 builds upon ideas that I developed with Sarah Westphal in our article "Narratives, Law and the Relational Context: Exploring Stories of Violence in Young Women's Lives," (2000) 15 Wisconsin Women's Law Journal 335. It is also based on research done during my year visiting the Centre de recherché en droit publique at the Université de Montréal, including a presentation of my research published as a book chapter: "Theorizing the Context of Justice," in Ysolde Gendreau ed. *Developing Law with Doctrine* (Thémis: Université de Montréal, 2006), 31-57. The ideas on solidarity in chapter 7 were first developed in "The Promise and Practice of Protecting Human Rights: Reflections on the *Quebec Charter of Human Rights and Freedoms,*" in N. Kasirer and R. MacDonald eds., *Mélanges Paul-André Crépeau,* (Éditions Yvon Blais: 1997) 641-78. I am grateful for permission from Yvon Blais to use a few shorts excerpts from that chapter.

Two chapters are edited, revised and updated versions of previously published articles, including: "Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment," (1995) 3 Canadian Labour and Employment Law Journal 249 (reproduced in chapter 4, with the kind permission of Lancaster House), and "Caring in Human Relations and Legal Approaches to Equality," (1993) 2 National Journal of Constitutional Law 305.

The financial support of the Social Sciences and Humanities Research Council provided important resources for this project for which I am most grateful. This book is the final output of my research grant on *Substantive Equality: Rethinking Rights, Relationships and Remedies.* This project also benefit from financial support from the

McGill Faculty of Law and from a Scholarly Publications Grant from the Canadian Federation for the Humanities.

Finally, I wish to thank my husband, Derek Jones, from whom I have learned much about the richness and complexities of human identities – of the overlapping injustices linked to race, class, social privilege, labels, cultural determinism, and chance. In his insistence on truth and his unwavering commitment to a justice based on unbounded humanitarian principles, he has had a profound effect on my thinking about equality.

Contents

INCLUSIVE EQUALITY

Introduction

Justice means children with full bellies sleeping in warm beds under clean sheets.

Mari Matsuda[1]

I have often reflected upon the wisdom of Mari Matsuda's words, which remind us of the importance of articulating the meaning of human rights concepts in concrete, everyday terms. For if we cannot translate the rhetoric of justice, democracy, human rights and equality into the concrete contexts of everyday injustices, we will not be able to build upon these norms to effect social change. And optimistically, that is the purpose of this book: to engage the reader in thinking about how the legal norm of equality may assist us in understanding and remedying the continued realities of social inequality and exclusion.

In modern society, equality is widely endorsed as an ideal that underscores the essential fundamental dignity of the individual. It is also understood that inequality persists and is linked to discrimination against members of certain groups in society, including women, racialized communities, Aboriginal peoples, persons with disabilities, religious minorities, sexual minorities, the elderly, children and socially marginalized groups (such as welfare recipients).[2] Group-based patterns of inequality that have long and continuing histories make clear that the ideal of equality has not yet been realized; for some groups, it may even be growing more distant. While philosophers, social theorists, and community activists have long been concerned with problems of inequality, the emergence of more comprehensive protection, in the form of a legal right to equality in Canadian law, is of relatively recent vintage. As in other domains, concepts in law are dynamic and the legal meaning of equality has continued to evolve and expand.

Beyond a commitment to generating new thinking and ideas about the legal meaning of equality rights, this book grew out of a concern with access to justice in the human rights domain. Access to justice, in its fullest sense, does not simply mean access to legal tribunals, procedures, and courts.[3] Rather, it is concerned with ensuring the effective realization of equality rights, preferably through prevention of discrimination and social exclusion. While it is important to articulate expansive legal concepts in the courtroom and in human rights tribunal settings, it is also critical to think about how our understanding of equality impacts upon our social relations in everyday life. In the multicultural communities in which most of us live, issues of social identity, group rights, inclusion, and exclusion are present at the interstices of everyday life. Cultural, ethnic, language, sexual, racial, physical, and religious differences are experienced in the public and often in the private spaces of our lives.

What significance do legal equality norms have to mediating choices, decisions, policies, and actions at work, at school, or in the community? In this book, I argue that to secure greater equality, it is critical to examine both the inequitable *substantive outcomes* in various social contexts as well as unfairness and exclusions in the *structures, processes, relationships, and norms* that constitute the institutional contexts of our daily lives. Examining inequality through a substantive, procedural, and relational lens provides essential insights into the dynamic reproduction of inequality and exclusion over time. It reveals how some institutional relationships reinforce and accentuate inequality, whereas others hold the potential to promote greater inclusion and equality. The legal right to equality, therefore, in addition to being informed by a concern with substantive outcomes, must be attentive to promoting inclusion in the decision-making processes of everyday life.

Inclusive equality embraces a vision in which cycles of exclusion are broken as a result of the transformative processes of institutional and social change. Such processes occur at many levels, including the individual, institutional and societal. Most immediately, an inclusive equality approach demands that we ask ourselves what power we have as individuals to contest and resist exclusion and marginalization, either in our own lives or in the lives of those around us. It also requires an assessment of how individual and group agency is constrained by social, economic, and political institutional and cultural forces. Individual and group agency as well as social solidarity in

everyday contexts are critical precursors to equality. Moreover, legal norms infuse and shape social and systemic relationships and practices. The right to equality, if it is to flourish in our society, must be normatively embedded in the nature and quality of the everyday relationships that constitute our lives. Although governments, courts, and legislatures have a critical role to play and fundamental responsibilities to promote equitable social relations, it is not sufficient to proclaim equality from above: it must be built from below. Thus, our willingness and capacity to re-imagine and re-invent relationships, institutional cultures, and social governance practices will be central to whether, how, and when inclusive equality emerges.

To lay the groundwork for developing the concept of inclusive equality, I begin by reviewing legal developments regarding the protection against discrimination in Canada. Chapter 1 traces changing understandings of the social problem of inequality and explores how these shifts affect legal developments regarding the legal meaning of discrimination, culminating in legal recognition of systemic discrimination. What becomes apparent from even a cursory review of Canadian history is the failure of judges and legislators to perceive discrimination as a problem for many decades following Confederation in 1867. Explicitly discriminatory government policies and laws provide the backdrop for judicial refusals to acknowledge discrimination as a civil wrong. It was only in the wake of World War II that public law was revised to eliminate the most egregious forms of state-legislated discrimination. Gradually, as well, discrimination in the institutions of everyday life was also recognized as a social problem. It was viewed, however, as an isolated, exceptional phenomenon involving the direct differential treatment of individuals based on unfounded negative stereotypes about the group(s) to which the individual belonged. The legal response was to prohibit discriminatory differential treatment and exclusion. Thus the first major development in equality rights law was the rise of anti-discrimination legislation that extended statutory protection against discrimination to the domains of employment, public services, and housing.[4]

While it was and remains important to protect individuals from discriminatory acts motivated by unfounded derogatory, group-based stereotypes, the more systemic complexion of inequality was increasingly acknowledged beginning in the 1970s. In the mid-1980s, the Supreme Court of Canada recognized that a seemingly

neutral employment policy that was not intended to cause discrimination could nonetheless constitute a form of "adverse effect discrimination."[5] In so doing, the Court signaled the need to question the apparent neutrality of dominant social norms and institutional practices. Indeed, identification of adverse effect discrimination led to the further recognition of systemic discrimination, which can be understood as discrimination that is pervasive and institutionalized in patterns and practices of social exclusion and disadvantaging. While often associated with adverse effect or indirect discrimination and the inequalities hidden at the interstices of dominant norms, systemic discrimination may also involve direct discrimination that is both widely tolerated and institutionalized.

The cumulative and overlapping systemic effects of direct and indirect discrimination were described in a landmark equality rights case involving women seeking blue-collar jobs in the Canadian National Railway Company. Chief Justice Dickson explained that, "systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination."[6] He went on to emphasize that the "discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example that women 'just can't do the job'."[7]

As understandings of discrimination expanded to embrace institutionalized and systemic policies and practices, the need for alternative legal strategies emerged. Beginning in the 1980s, therefore, a series of proactive legislative initiatives aimed at identifying and preventing discrimination were enacted, including the federal *Employment Equity Act*,[8] the federal contract compliance program,[9] and provincial initiatives on legislated pay equity.[10]

The 1980s also witnessed the constitutional entrenchment of equality rights in the *Canadian Charter of Rights and Freedoms*.[11] Though framed more broadly as equality rights, they also included specific protection against grounds-based discrimination. Inspired by the expansive interpretations of discrimination in the statutory domain (where both direct and adverse effect discrimination had been recognized), the Supreme Court soundly rejected earlier formal conceptions of legal equality and endorsed an effects-based conception of substantive equality.[12] Chapter 2, therefore, explores some of

the key dimensions of the constitutionalization of equality rights. It begins with a review of the doctrinal emergence of the concept of substantive equality, a concept that was to be informed by purposive and contextual interpretive methodologies. To discern whether or not similar treatment is consistent with equality, judges elaborated an effects-based analysis attentive to histories of social disadvantaging within specific historically subordinated groups and informed by an overarching concern with respect for human dignity.

The constitutional reforms of the 1980s also included express recognition of Aboriginal and linguistic minority rights and affirmed multiculturalism and gender equality as important interpretive principles.[13] These provisions were also closely linked to emerging theories of substantive equality and raised complex questions about constitutional recognition of collective, community, and group-based rights.

Chapter 2 also examines how shifting conceptions of the role of the state affect legal equality rights. A classical liberal vision of the state is well-aligned, conceptually speaking, with formal equality. Governments can comply with a constitutional mandate of equality simply by according equal treatment to all individuals or by treating likes alike. They do not have any positive rights obligations but are bound only by a negative rights vision that dictates non-interference by the state in the private sphere.

The regulatory state of the twentieth century, however, goes far beyond the classical liberal vision of government. Indeed, the post-World War II Keynesian social welfare state ushered in a much more interventionist and instrumental role for government that extended to securing the conditions of individual social, physical, and economic well-being. Such a positive rights vision resonates with the underlying egalitarian assumptions of substantive equality. And yet, by the mid-1970s and into the 1980s, the Keynesian social welfare state in Canada was beginning to unravel as emerging ideologies of neo-liberalism undermined support for the redistributive state.[14]

It was also at this time that courts and tribunals began interpreting and applying statutory and constitutional equality rights. How did these shifting understandings of the role of government and public policy affect legal interpretation and the socio-economic challenges of inequality? While initially the courts appeared to endorse a substantive vision of equality even as the Keynesian welfare state was being restructured, it has been suggested that subsequent interpretations of

equality reflected the influences of neo-liberalism and in some cases resulted in a retreat to a discourse of formal equality.[15]

Furthermore, regulatory and public policy approaches continue to evolve. It has been observed that some governments, while sensitive to the neo-liberal critique of big government, have not seen privatization and deregulation as the solution. In the wake of 9/11 and growing concerns about public security, and most recently in the face of a global economic crisis, it is widely acknowledged that government intervention is necessary and in need of expansion.[16] One compromise between a social welfare state and the privatized, free market non-interventionist state of neo-liberalism/neo-conservatism has been described by Anthony Giddens as the "third way."[17] He advocated shifting from a *social welfare* to a *social investment* state, a state that invests in the human and social capital of children and citizens: in education, retraining, community networks, and fostering partnerships with diverse communities. He further articulated new forms of governance built upon innovative *public-private partnership models*.[18] These new public policy directions, representing something of a hybrid between the social welfare and the neo-liberal state, have important implications for equality rights.[19] Challenging some of the fundamental premises of substantive equality, they require new thinking about the legal definitions and application of anti-discrimination protections and equality rights.

The challenges of understanding constitutional equality in a world characterized by shifting conceptions of the role of the state reinforces the importance of developing theories of equality that are attentive to institutional processes, power imbalances, exclusion and inclusion. Whereas formal equality in law was premised on a straightforward procedural rule of equal treatment or the similar treatment of those who are similarly situated, substantive equality is based on the idea of equal outcomes or results. The concept of substantive equality, however, raises significant questions about relative degrees of inequality. What effects or outcomes must be equal in a society where inequality is pervasive? How do we decide what satisfies the requirement of equitable outcomes? Judicial assessments of this question have necessarily been deeply subjective. While it is essential to evaluate the concrete effects of substantive inequality in society, I suggest that we need to supplement this analysis with a more explicit revisiting of process issues. Thus, inclusive equality emphasizes both the substantive and procedural dimensions of equality rights.