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Reducing Group-based Inequalities in a Legally Plural World

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Table of Contents

Reducing Group-based Inequalities in a Legally Plural World

Abstract

We live in a world characterized by multiple, overlapping and plural normative orders embracing formal and informal legal regimes, customs and practices. Legal protections for equality and protections against discrimination are found in a plurality of legal instruments, including international, regional, national, state and municipal human rights documents and institutional codes of conduct. Moreover, formal equality rights operate in social and cultural contexts that are deeply influenced by the customs, norms and social practices of everyday life. In assessing how law may be used to reduce group-based inequalities, therefore, it is critical to examine the interaction between different sources of formal human rights protection and diverse, overlapping and coexisting social and cultural orders – or regimes of informal law. 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 and interactions between a plurality of legal orders (both formal and informal) illuminates how strategic reliance on different sources of protection may advance the effective enjoyment of the right to equality. In this paper, I highlight how the plurality of law affects equality rights in institutional, community and global contexts.

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Reducing Group-based Inequalities in a Legally Plural World

By Colleen Sheppard[1]

1. Introduction

We live in a world characterized by multiple, overlapping and plural legal orders embracing formal and informal legal regimes, customs and practices. Legal protections for equality and protections against discrimination are found in a plurality of legal instruments, including international, regional, national, state and municipal human rights documents and institutional codes of conduct. Moreover, formal equality rights operate in social and cultural contexts that are deeply influenced by the customs, norms and social practices of everyday life. In assessing how law may be used to reduce group-based inequalities, therefore, it is critical to examine the interaction between different sources of formal human rights protection and diverse, overlapping and coexisting social and cultural orders – or regimes of informal law. 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 and interactions between a plurality of legal orders (both formal and informal) illuminates how strategic reliance on different sources of protection may advance the effective enjoyment of the right to equality.

In this paper, I highlight three lenses for examining the influences of a plurality of formal and informal legal orders on equality rights, drawing predominantly on the Canadian experience. 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, to be effective, anti-discrimination law must address institutional relationships, practices, norms, policies, and cultures within the mainstream institutions of society. We cannot assume that a formal legal command not to discriminate will operate effectively to reduce group-based inequalities because the exclusions and harms of discrimination are often embedded in seemingly neutral institutional practices, policies and norms. We need to assess, therefore, how formal anti-discrimination law may be relied upon to raise questions about, and change, institutional cultures of exclusion and the inequitable distribution of societal privileges. Using law in this way is a much more complex process than the traditional, retroactive, command and control paradigm of legal intervention. It is a process that occurs outside the formal channels of law enforcement; it engages internal institutional change-makers rather than simply external lawmakers.

The second lens is a community one – focusing on how equality rights affect minority ethnic, religious, language, and indigenous communities that operate in "semi-autonomous spheres" separate from the mainstream institutions of the majority (Falk Moore 1978: 54). Two key questions arise with respect to this second lens. Firstly, to what extent does the advancement of group-based equality rights require greater

[1] The author would like to thank Sarah Goldbaum, a Human Rights Student Fellow at the Centre for Human Rights and Legal Pluralism, McGill University, for her research assistance on this paper.

legal recognition of collective autonomy and self-governance? Second, how do state-based equality rights protections affect communities governed by informal laws based on custom, tradition, and religion, particularly with respect to vulnerable individuals and groups within minority communities?

The third lens examines the growing importance of international protections to struggles for equality at the local and domestic level. Increasingly, courts and tribunals are turning to international human rights law to assist in their interpretation and application of domestic laws. Moreover, in an era of increased global communication, we are witnessing new patterns of international solidarity and local engagement with international norms. In this "globalization from below" (Appadurai 2001: 38), there is a growing reliance by civil society organizations and community-based groups on formal human rights norms emanating from multiple sources, ranging from international covenants and conventions to local codes of conduct. International sources of equality rights reinforce the normative starting point of domestic engagement with litigation, law reform and social transformation. When local laws do not provide sufficient protection, recourse to protections included in international human rights laws can be of significant strategic importance. Similarly, where political will is lacking, the effects of international norms may be important for obtaining legal and policy change. It is useful, then, to reflect upon how a plurality of sources of law is used strategically to reinforce equality.

2. The First Lens: Institutional and Systemic Contexts

The first wave of legal reform to advance equality rights in the post World War II era in Canada 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 subsequently sexual orientation and social condition) in specific contexts, including employment, housing, education and services normally offered to the public (Tarnopolsky & Pentney 2001). 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 or indirect discrimination (Sheppard 2001). 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, the concept of systemic or structural discrimination also emerged (Abella 1984; Sturm 2001). Systemic discrimination concerns discrimination that is not limited to a discrete or individual incident, but is instead a widespread problem within society generally or within specific societal institutions. It encompasses both direct and adverse effects discrimination and it is reproduced in the institutional and social relations of everyday life. 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 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.

A growing recognition of systemic discrimination prompted a rethinking of the legal regulation of equality. It became apparent that a retroactive, individual complaints-driven approach to remedying discrete acts of discrimination was insufficient for problems of discrimination and exclusion that are deeply embedded in institutions, structures and systems (Sturm 2001; Abella 1984). As a result, a number of proactive policy initiatives, such as affirmative action, employment equity, contract compliance, procurement policies and pay equity, were introduced in many jurisdictions (Kennedy-Dubourdieu 2006). While some of these proactive measures have produced important results, they continue to be quite limited and often very poorly enforced (Agócs 2002). Moreover, these proactive initiatives are often grafted onto an unchallenged institutional status quo – thus failing to address the underlying sources of exclusion and inequality. For example, affirmative action will secure access most effectively for the most privileged members of historically underrepresented minority groups because it is those individuals who can best assimilate into dominant societal institutions. The institutional policies and practices tied to historical exclusions are not revisited or revised; instead exceptional individuals from minority communities gain expedited access. The kind of social and institutional transformation required to address the underlying causes of systemic and structural inequities has not occurred in the wake of proactive anti-discrimination initiatives. Remedying 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 (Merry 1988; Falk Moore 1978; Macdonald 1998). As Sally Engle Merry describes it, “state law both constitutes and is constituted by” other normative orders (Merry 1988: 883). Her work also examines facilitative law “that functions not by imposing obligations but by providing individuals with facilities for realizing their wishes through conferring legal powers on them...” (Merry 1988: 885). 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” (Teubner 1983: 283). Increasingly, there is recognition of the hybridity of legal systems, embracing both state and non-state legal regimes (Berman 2007). To stop the reproduction of exclusion and inequality embedded in the non-state law of institutions – that is in the structures, relationships, traditions and practices of social and institutional life – we need to analyse how formal laws affect or fail to affect the social and institutional decision-making, policies and practices.

Susan Sturm’s important work on structural discrimination explores how the legal norm of equality affects decision-making processes in the workplace. She suggests that one of the most effective ways to implement anti-discrimination protections is to integrate them into day-to-day employment policies, practices and decision-making processes. According to Sturm, “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” (Sturm 2003: 7). She explores the role of law in terms of its function in creating “occasions for analysis, reflection, relationship building, boundary negotiations and institution building” (Sturm 2003: 7). Such an

integrated approach to enforcing anti-discrimination norms is considered particularly important with regard to systemic or structural discrimination, which is not easily redressed through retroactive complaints processes that tend to focus on discrete and severe incidents of discrimination. From this more pluralist perspective, the legal norm of equality is subject to interpretation and application by numerous institutional actors; legal interpretation and enforcement are not the exclusive domain of lawyers and adjudicators. Indeed, legal norms will be most effectively enforced when they form the normative backdrop for institutional decision-making. In such a context, anti-discrimination law operates indirectly as facilitative law. Law enforcement does not simply refer to formal, state-based processes. Rather, legal norms and principles become embedded in the institutional culture and practice of everyday life.

While this vision suggests that the public law norms of equality may infuse institutional practice and decision-making in multiple and myriad ways, in many cases, the opposite occurs. Rather than transformative public law norms being incorporated into institutional cultures and decisions, institutions resist and reassert traditional and exclusionary practices and norms. 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” (Kreiger 2000: 484). Capture refers to the subtle ways in which traditional norms and values resist new directions in law and public policy. Backlash occurs when there is open, vocal and direct rejection of legal reforms. For example, affirmative action initiatives may be rejected as unfair forms of reverse discrimination. Or pay equity reforms may be challenged as impermissible interference with the free market. Thus, 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. For those concerned with advancing the equality goals included in anti-discrimination laws and policy initiatives, it is necessary to be aware of the risks of institutional resistance, and to take it into account in implementation strategies. 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. (Blackett & Sheppard 2003). Student democracy is another mechanism for hearing the voices of those with less power in the institutional structures in which we live. There remains much work to be done in thinking about how to use law to restructure institutional relationships towards more equitable and democratic participation (Young 2000).

3. The Second Lens: Customs, Traditions and Self-Governance

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 (Berman 2007: 1171). 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 and public spaces, law may also advance group-based equality by giving legal recognition to the traditions, customs and laws of minority communities. Group-based equality may be enhanced, therefore, when formal state law takes into account, validates, or endorses the separate institutions and practices of minority communities. In the Canadian context, this connection has been recognized most clearly in relation to indigenous peoples and minority linguistic communities (Sheppard 2006). It has also arisen in more controversial ways with respect to religious communities and religious-based family arbitration (Schachar 2004-5).

In terms of indigenous peoples, James Anaya maintains that self-determination is integrally linked to the idea that all peoples are equally "entitled to control their own destinies" (Anaya 2004: 97). Greater political autonomy through self-governance and self-determination, therefore "tear[s] at the legacies of empire, discrimination, suppression of democratic participation and cultural suffocation" (Anaya 2004: 97). 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 (Napoleon 2005). Support for the legal pluralism inherent in self-governance, therefore, provides a structural means to advance group-based equality. It gives oppressed communities greater political and legal control over their destinies. While constitutional and international law have been the focus of legal claims to self-government by indigenous communities in Canada, recognition of autonomous indigenous legal orders has also been implicit in some private law contexts. For example, dating back to the late 1800s, there have been judicial decisions affirming the legality of marriages and adoptions carried out pursuant to indigenous legal regimes (Borrows 2002: 4).[2]

More recently, Aboriginal peoples in Canada have turned to constitutional protections and international law to assert their right to self-governance. Since 1982, Aboriginal rights have been accorded express constitutional protection (Constitution Act, 1982, s. 35).[3] The scope and meaning of these constitutional rights have been the subject of extensive debate and litigation. To date, Canadian courts have taken a case-by-case and piecemeal approach to aboriginal rights, affirming the right to engage in the traditional practices and customs that characterized pre-colonial indigenous life.[4] Such an approach appears to be somewhat limited and inadequately cognizant of the need to redress the deleterious legacy of colonization. It has, however, provided concrete benefits in some cases. The courts, moreover, have been reluctant to endorse a full right to self-government, given the potential impact on non-Aboriginal

[2] For an early decision recognizing the validity of a marriage between a Cree woman and non-Cree man, conducted in accordance with Cree customary law, see Connolly v. Woolrich and Johnson (1867) 17 R.J.Q. 75 (Q.S.C.), affirmed [1869] 1 Revue légale 253 (C.A.).

[3] The Constitution Act, 1982, provides:

- 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[4] Early leading cases on the constitutional interpretation of Aboriginal rights include: *R. v. Sparrow,* [1990] 1 S.C.R. 1075; *R. v. Van der Peet,* [1996] 2 S.C.R. 507. See also Borrows (1997).

communities. At the international level, both the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights affirm the right of self-determination for peoples. (Anaya 2004) Canada is a signatory to both, as well as the Optional Protocol of the Covenant on Civil and Political Rights. Aboriginal communities in Canada have used the Optional Protocol to claim rights to self-determination in the international arena.[5] Indigenous communities in Canada have also engaged in global efforts to protect the rights of indigenous communities around the world, including participation in the drafting of the *Declaration on the Rights of Indigenous Peoples* (UN GA Resolution 61/295, 13 September 2007).[6]

Minority linguistic communities in Canada have also sought to ensure the survival of their language through separate cultural, social and educational institutions. Educational policy has been a critical strategic terrain in this regard. 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. The importance of the historical and contextual realities of specific struggles is highlighted by this story. Whereas in the United States, one of the most important civil rights struggles of the 20th century revolved around efforts to integrate racially segregated public schools, in the Canadian context, forced integration into English public schools for the francophone minorities would have spelt assimilation and the demise of their communities (Sheppard 1990). Indeed, up until the 1970s, there were legal reforms that undermined the rights of francophone minority groups outside Quebec by eliminating French-language public schools. (Behiels 2005) These anti-French policies deeply damaged the survival of the French language outside Quebec. When constitutional protection for minority language education was finally entrenched in the Constitution in 1982, there was a significant risk that the constitutional reforms were too little and too late.[7] Nevertheless, courts have accorded a generous interpretation to minority linguistic education rights, recognizing the urgency of securing vibrant French-language schools.[8] Despite efforts by the judiciary to give a broad interpretation to these language rights, assimilation continues to pose a significant challenge to the survival of francophone minority linguistic communities outside Quebec.

Thus, francophone minority linguistic communities in Canada have tried to advance equality by maintaining separate institutions rather than being integrated into majoritarian institutions. This choice of equality through separation parallels the efforts of many indigenous communities to reduce group-based inequalities through separate autonomous institutions. Of significance in the minority language education cases is judicial recognition that protecting the rights of a linguistic minority requires an affirmation of a right (where numbers warrant) to participate in the management and control of minority language education (*Mahe v. Alberta* [1990] 1 S.C.R. 342). Participation is considered essential to ensure that the needs, concerns and interests of the linguistic minority are reflected in educational policy decisions. The Supreme Court of Canada has recognized that "the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority" (*Mahe*: 372). In a subsequent decision, the

[5] See *Lubicon Lake Band v. Canada, Communication No. 167/1984* (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).
[6] Canada was one of four countries to vote against the resolution. The others included the United States, Australia and New Zealand.
[7] See *Canadian Charter of Rights and Freedoms*, Section 23.
[8] See, for e.g. *Mahe v. Alberta* [1990] 1 S.C.R. 342; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3; *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3.

Court added, "Empowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns."(*Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 at para. 45). Thus, although the minority language education context addresses schooling exclusively, it reinforces the idea that self-governance, affirmed and protected through law, may be a critical pathway to equality.

While self-governance is an important and promising strategy for advancing substantive group-based equality, 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 (Iyer 1993; Harris 1980; Tully 1995). 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 conflict and dissent within the community? Moreover, how do we insure that more vulnerable individuals within the community are adequately protected? (Napoleon 2005; Narain 2001; Schachar 2001) 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 state-based human rights (Kymlicka 2001; Berman 2007). Increasingly, courts are also navigating the complex waters of the intersections between customary law and human rights. In some cases, state-based equality rights protections provide necessary protection from inequitable community-based customs or practices (Narain 2001). In other cases, customary law is being interpreted and applied to advance human rights (Amoah 2009). In an important South African example, elders in the community had interpreted traditional customs to allow a young woman to assume a leadership role – a conclusion that was contested in court by a young man who believed he was entitled to become the community's chief. In the ensuing legal challenge, the courts deferred to the elders' dynamic interpretation of their customary law – an interpretation that embraced gender equality (*Shilubana and Others v. Nwamitwa*, [2008] ZACC 9).

4. The Third Lens: Multiple Sources of Formal Law

One final lens through which to examine legal plurality and equality rights focuses on the multiple sources of formal legal protection for group-based equality, ranging from municipal codes of conduct, national laws and international 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. Beyond this vertical and formal reliance on international law, the rise of international conventions and declarations on human rights has also nurtured a robust global movement of civil society organizations. 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 (Appadurai 2001: 39). Arjun Appadurai, who describes the emergence of transnational networks of solidarity as "globalization from below", suggests that it contributes to new forms of global democratic engagement (Appadurai 2001: 42). 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 (Merry 2006).

To illustrate this final lens, it is useful to highlight three examples where the plurality of law has functioned to enhance the promotion of equality rights. The first entails reliance by the Canadian Supreme Court on international human rights norms in interpreting domestic immigration policy and practice. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, a Jamaican woman who was residing illegally in Canada was facing deportation. During her time in Canada, she had given birth to four children, all of whom were Canadian citizens by virtue of their birth in Canada. The Supreme Court of Canada stayed her deportation because the immigration official failed to take into account the impact of her pending deportation on the best interests of her children as required under the *Convention on the Rights of the Child*, to which Canada is a signatory. Thus, the protection of children's rights at the international level was used to reinforce their protection domestically. The plurality of laws protecting children helped to secure their protection and to protect a vulnerable racialized mother facing deportation from Canada.

The second example involves a complaint against the Canadian government under the Optional Protocol of the International Covenant on Civil and Political Rights. An indigenous woman, Sandra Lovelace, lost her status as a Maliseet Indian pursuant to federal legislation upon marriage to a non-Indian man.[9] Indigenous men did not face any loss of their Indian status upon marriage to non-Indian women. The federal law, in effect, imposed a patrilineal approach to Indian status in Canada. An earlier challenge in Canadian courts had failed at the Supreme Court of Canada (Attorney General of Canada v. Lavell, [1974] S.C.R. 1349). Accordingly, Lovelace was allowed to proceed with her complaint before the Human Rights Committee set up under the Optional Protocol. The Committee concluded that Canada was in violation of the Covenant, focusing on minority rights, and her entitlement to continue to be part of her minority community. One of the adjudicators also concluded that the provisions discriminated against Indian women. Reforms were made to eliminate the most overt discrimination, and to reinstate women who had lost their status into their communities. The legislative reforms, however, have not addressed all of the problems linked to this historical denial of rights to indigenous women, their children and grandchildren in Canada and legal challenges continue.[10]

Beyond the critical role of litigation that engages with legal protections from a plurality of sources, organizations of civil society are increasingly drawing on multiple sources of law in their advocacy and work for social change. A third example, therefore, is reliance on international protections for women's rights by civil society organizations working through global solidarity networks to address violence against women in Canada. In her work on promoting safe and secure urban environments for women, Carolyn Andrew 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" (Andrew 2008: 20). 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. Bringing women's urban safety into the international arena, not only puts the issue of gender and security in everyday life on the agenda of the global community, but also enhances its legitimacy as a pressing social issue in the eyes of local authorities.[11] The Stolen Sisters campaign of

[9] Sandra Lovelace v. Canada (adopted on 30 July 1981 at the Committee's thirteenth session). Communication No. 24/1977, reproduced in Human Rights Committee 1981 Report to the General Assembly, Annex XVIII; Selected Decisions, Vol. I, pp. 83 et seq.

[10] See *McIvor v. Canada (Registrar of Indian & Northern Affairs)* 2009 BCCA 153. See also, R. L. et al. v. Canada, Communication No. 358/1989, U.N. Doc. CCPR/C/43/D/358/1989 at 16 (1991).

[11] See http://www.femmesetvilles.org/english/index_en.htm.

Amnesty International provides another important example of efforts to forge global solidarity to raise awareness about violence against indigenous women in Canada as a human rights abuse.[12] Despite the difficulties civil society organizations face in securing long-term financial support, there is widespread consensus about the importance of developing links between local social movements on a global scale. 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.

5. Conclusion

There is little doubt that we live in an era of legal hybridity characterized by a plurality of intersecting and overlapping legal regimes. Human rights laws, however, including anti-discrimination and equality rights have often been understood as creating universal norms that should effectively trump local laws, practices and customs. Legal plurality, from this perspective, is in tension with the universalism of human rights. It is this vision of legal plurality as oppositional to equality that I have tried to interrogate in this article. Rather than viewing legal plurality as a threat to equality in all instances, the plurality of law can also be understood as an important resource for enhancing the effective implementation of group-based equality in some contexts. Building upon an enlarged vision of law that embraces both formal state-based and informal non-stated based laws, legal plurality may operate to promote the more effective enjoyment of equality in three ways.

First, the informal law of social institutions must be taken into account in developing effective mechanisms for implementing equality norms. When group-based inequalities in the mainstream institutions of society are embedded in systemic and structural norms, traditions and practices that are reproduced, entrenched and legitimated over time, it is necessary to develop regulatory approaches that transform institutional relationships and processes of decision-making. Reducing group-based inequalities requires institutional transformation – a change in institutional cultures and practices. It is not enough to provide retroactive relief to isolated individuals who manage to pull together the resources, evidence and strength to contest discrimination. More transformative, proactive and preventive strategies are needed that grapple with both the positive and negative dimensions of informal institutional law.

Second, group-based equality may be advanced in some contexts by legal affirmations of cultural and community autonomy and self-governance. Allowing local communities to govern their own lives in ways that respect their traditions, customs and practices has been closely linked to aspirations for substantive equality and respect. Ensuring equitable representation and the protection of vulnerable individuals within minority communities are necessary corollaries to self-governance as a pathway to equality.

Third, when group-based equalities are recognized in multiple and overlapping sources of formal law, legal plurality reinforces the pursuit of equality. A plurality of sources of law has been successfully used in the formal processes of adjudication. The interplay between local, regional and international legal regimes has also nurtured new global social movements around issues of common concern, influencing mobilization strategies, political struggles and social transformation.

[12] See http://www.amnesty.ca/campaigns/resources/amr2000304.pdf

Asserting the right to equality and inclusion, therefore, engages both law and politics. And the key actors in the political struggle for equality are the myriad groups and organizations of civil society.

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