Confronting Discrimination and Inequality in China

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Today's girl child is tomorrow's older woman worker, and it is her opportunities and experiences now that will shape her ability to obtain and maintain decent work throughout her adult life, and enjoy security and protection in her old age. If girls, compared to boys, face negative cultural attitudes and practices and discrimination from birth, they will grow up to be women with greater constraints and few choices and opportunities.

I. INTRODUCTION

To understand gender inequality, it is important to be attentive to the connections between the various spheres of diverse women's activities across different periods in their lives — from girlhood to old age. Yet legal rights are usually framed to address specific moments in time and regard harms or exclusions experienced with respect to discrete places and acts. Such a narrow approach to legal rights makes them less responsive to the broad array of historical, social, and economic sources of inequality and exclusion that are often systemic and embedded in societal structures. The challenge for those who seek to use a discourse of equality rights, therefore, is that of insisting on the necessity of linking individual instances of exclusion and harm to the larger patterns of inequality over time and across the public and private spheres of our lives.

In this article, I endeavour to broaden the lens through which we explore inequality in women's lives across an historical and spatial trajectory. I adopt a life cycle approach that examines how one's treatment as a girl impacts upon one's life chances as a woman, and how the reproduction of the human family operates as an ever-present source of joy and constraint in women's lives. This broader lens of inquiry across time and social structures is then applied back to law through the concept of systemic discrimination. I suggest that the kernels of a more expansive legal approach to inequality can be found in the concept of systemic discrimination.
Although early anti-discrimination laws in many countries focused on prohibiting overt, intentional, group-based differential treatment, the deeply embedded social and systemic dimensions of discrimination are being increasingly recognized. No longer is the mission of anti-discrimination law simply retroactive state-ordered redress for sexist, racist or other discriminatory conduct that is perpetrated by individuals and rooted in stereotypes about social groups; rather, systems, structures, institutional policies and practices have also come under legal scrutiny. Inequality and social exclusion are not discrete, individual problems; they are systemically reproduced over time and across generations. Moreover, inequality and exclusion are linked to the socio-structural interdependence of different spheres of human engagement, such as the family, the household and the workplace. Integral to the concept of systemic discrimination, therefore, is recognition of the relational and dynamic dimensions of inequality. This expansive approach to discrimination provides important insights into the nature and reproduction of inequality throughout girls' and women's lives. Thus, this article begins with a discussion of the emergence of the concept of systemic discrimination, focusing on its articulation in Canadian law. I then consider the insights to be derived from an expansive life cycle approach to gender inequality, drawing on work in the domain of international development. I conclude by highlighting a few of the strategic implications that flow from connecting the emerging legal concept of systemic discrimination to a life cycle approach to gender inequality.

II. LEGAL RECOGNITION OF SYSTEMIC DISCRIMINATION

The concept of systemic discrimination was recognized in Canadian equality law in the late 20th century. In a series of cases involving workplace discrimination, the courts steadily expanded the legal meaning of discrimination to embrace both intentional and effects-based discrimination, as well as to acknowledge the individual and collective, institutional and structural dimensions of discrimination. Early legal understandings of discrimination focused on the overt unfair treatment or exclusion of individuals because of their membership in a particular group. Legal discrimination occurred when individuals were accorded harmful differential treatment, based on their sex, race, national or ethnic origin, or religion. More recently, such direct discrimination based on mental or physical disability, sexual orientation, social condition or age has also been prohibited in anti-discrimination laws. This direct, unfair and disparate treatment of an individual based on stereotypes, prejudices, and ignorance about his or her group continues to be an important form of discrimination. The legal concept of discrimination, however, has been expanded beyond direct and intentional differential treatment.

(i) Adverse Effect Discrimination

Adverse effect discrimination or disparate impact discrimination recognizes that discrimination may occur when a rule, standard or policy that, while neutral on its face
and applying equally to all individuals, has disproportionately harmful effects upon some groups in society. For example, a requirement that store clerks work on Saturdays was held to discriminate against Seventh Day Adventist employees who observe their religious day of rest and worship on Saturday. Height and weight requirements for police officers were held to have discriminatory effects on women and certain ethnic minorities. Standardized workplace testing has also been found to have discriminatory effects. Adverse effect discrimination may also arise when a particular category or classification disproportionately affects particular groups. For example, migrant workers may be disproportionately made up of racial minorities; domestic workers may be disproportionately women and racial minorities. Adverse effect discrimination is more difficult to prove because it requires courts and tribunals to assess quantitative dimensions, including statistical disparities, as well as qualitative inequities, based on experiential accounts of exclusion and marginalization.

Legal recognition of adverse effect or disparate impact discrimination represents a major shift in anti-discrimination law and opens up the possibility of challenging the apparently neutral background norms of society. As Nitya Iyer notes, “The particular set of social characteristics of the dominant social identity and its ideology constitute the invisible background norm against which categorizations of difference are made.” Problems of discrimination are recognized as the result of institutional practices, policies and social norms, rather than acts of aberrant anti-social individuals. Moreover, the inequalities experienced by women, ethnic, racial and religious minorities, persons with disabilities, and the economically disadvantaged are recognized as being linked to social rather than biological factors. It is the social, not the biological significance of pregnancy, for example, that makes it a liability in the workplace or society. It is the social construction of difference, rather than the differences themselves, that leads to unfair exclusions and treatment. Martha Minow suggests that “[F]ocusing on the relationship or matrix in which difference is created may offer people the chance to acknowledge difference and not locate it in another who then is unequal, but instead in the relationship used to define that ‘difference’.” In other words, “there is no normal person or position which is itself free from being different.”

Developing a legal theory of equality that does not presume a world of abstractly similar individuals requires that group-based differences be taken into account. These group-based differences are linked predominantly to social experiences and life circumstances — diversities that exist independently of particular institutional policies, practices or rules. For example, women seeking access to a particular job, workplace or opportunity, arrive with life experiences, biological differences, educational backgrounds, social constraints, household work responsibilities and future expectations shaped by gender, class, race, religion, and so on. Adverse effect discrimination requires that these differences not be a source of disadvantage in accessing jobs and opportunities. It prompts us to examine, therefore, the intersection between realities inside and
outside specific institutional contexts. In the employment context, it broadens the lens of inquiry beyond the strict parameters of the workplace to the family, household, community, nation, and world—from the past, to the present, and into the future.

Of further significance in cases of adverse effect discrimination are the remedial consequences. In adverse effect discrimination cases, two remedial options exist. First, the apparently neutral rule or policy may be abolished or changed for everyone to eliminate the inequitable effects. For example, a standardized test may be revised or abolished. It is important, as a first step towards remedying adverse effect discrimination, that the validity of the standards, rules or policies, be scrutinized and only left in place if they are necessary. It is only after this scrutiny of the rule or policy itself that a second remedial option emerges—reasonable accommodation to secure the inclusion of those detrimentally affected by the adverse effects of apparently neutral practices and policies.

The doctrine of reasonable accommodation is of critical importance to modern legal conceptions of anti-discrimination. It requires that employers, educational institutions, service providers, and governments provide differential treatment to particular groups with specific needs and circumstances to secure equality of outcomes. It mandates, therefore, the accommodation of differences rather than equal treatment as a pathway to inclusion and fair results. Indeed, it has been widely acknowledged that, in a society characterized by significant diversity among individuals and groups, "the accommodation of differences... is the essence of true equality." Rather than requiring that everyone assimilate and accept dominant norms, reasonable accommodation endorses inclusion even in the face of difference. In anti-discrimination law, accommodation is required to the point of undue hardship, determined by factors such as: "financial cost, disruption of a collective agreement, problems of morale of other employees, [and] interchangeability of work force and facilities." In the Canadian context, it has been elaborated to include both substantive and procedural dimensions.

(ii) Systemic Discrimination

The concept of systemic discrimination builds upon legal recognition of adverse effect or disparate impact discrimination but expands the analysis further by examining how specific policies, standards and practices, as well as attitudes and prejudices, combine to create institutionalized and even structural problems of inequality. Employing a systemic lens goes beyond a focus on discrete instances of discrimination to highlight the accumulated effects of institutional policies, social practices, and socio-structural realities in addition to the continued dynamics of prejudice, entrenched exclusion and marginalization over time. In a pathbreaking report on equality in employment, Justice Rosalie Abella recognized the phenomenon of systemic discrimination as a structural and institutional problem that combines direct and adverse effect discrimination. In a subsequent Supreme Court of Canada case involving systemic sex discrimination...
against women seeking non-traditional jobs in the railway industry, Chief Justice Dickson wrote:

...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. 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."[...]. To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.\^18

Systemic discrimination, therefore, creates a mutually reinforcing relationship between direct and indirect (or adverse effect) discrimination; effects-based exclusions reinforce the discriminatory attitudes and beliefs and thereby prompt continued direct discrimination. The phenomenon is dynamic and relational, and inequality is institutionally reproduced. It is self-perpetuating, and built upon overlapping layers of exclusion and discrimination; exclusion at one level is connected to exclusion at a previous level. Moreover, exclusion, discrimination and unfair treatment in the workplace are intimately connected to group-based patterns of disadvantage, stereotyping, inequities and marginalization outside of the workplace. Both reinforce and justify each other, legitimating social and structural inequality as inevitable and natural.

In terms of remedies, Justice Abella perhaps put it best when she explained that, "[s]ystemic discrimination requires systemic remedies."\^19 From a law reform perspective, legal recognition of systemic discrimination brings into question the adequacy of traditional instrumental and retroactive forms of legal regulation that focus on individual misconduct and discrete instances of discrimination. Early anti-discrimination laws in Canada enumerated prohibited discriminatory conduct subject to a retroactive complaints-based process. If an individual woman believed that she had experienced discrimination in the hiring or promotion process, she could file a complaint with a provincial or federal human rights commission. The human rights commission would then investigate her complaint and pursue it on her behalf before a human rights tribunal and the courts if necessary. The resulting remedy would be to provide her access to the job or promotion, in addition to compensation for losses incurred. Of note is the individual and retroactive character of the remedy.

In contrast, a systemic approach to remedies rejects the adequacy of retroactive individual complaints and instead puts in place proactive and systemic remedies and raises questions about broader macro-economic and socio-structural public policies. In the Canadian context, efforts to develop proactive systemic approaches have included
legislated employment and pay equity schemes. At the federal level, for example, Canada introduced the Employment Equity Act in 1985. The Act states that its purpose:

...is to correct conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

The legislation requires all federally-regulated employers to do a proactive assessment of any systemic barriers to access in their workplaces for the four targeted groups – women, persons with disabilities, Aboriginal peoples and visible minorities. It also required the development of an action plan for remedying identified systemic problems, including a clear articulation of goals and a timetable for their accomplishment. Legislated pay equity provides another important example of a shift in regulatory strategy away from a retroactive complaints-based model towards a proactive, systemic approach.

Legal recognition of systemic discrimination, therefore, represents an important concept that broadens the legal inquiry beyond individual instances of discrimination to examine proactively and systematically the institutionalized dimensions of group-based patterns of discrimination. While it tends to focus on specific social contexts (e.g., workplaces, schools, universities), it also raises important questions about the ways in which institutional exclusions are linked to inequalities experienced in other spheres of life and past histories of exclusion or inequity. For example, workplace inequalities may be connected to inequities in family, household and community life or differential educational opportunities. Recognizing inter-sectoral factors that change over time makes it useful to consider how the concept of systemic discrimination might be linked to an emerging approach to international development that focuses on poverty and inequality across an individual’s life cycle.

III. GENDER INEQUALITY ACROSS THE LIFE CYCLE: EXPANDING THE HISTORICAL AND SPATIAL TRAJECTORIES

In the domain of international development and human rights, there has been a growing interest in what has been called a “life cycle” or “life course” approach. Such an approach highlights the importance of understanding “critical periods” during an individual’s life cycle, given that such periods have impacts on other periods in the life cycle and even have intergenerational effects. This approach has been described as focusing “on the trajectories of individuals through life and on how key life events and transitions affect these trajectories.” Thus, a life cycle framework examines:
• The participation (and non-participation) of individuals in the institutions of society over their lives; and

• The interchanges of resources between the individual and those institutions. The institutions of society include market, family, community organizations, and government programs. Resources include stocks and flows of money, time, services, information and skills.\textsuperscript{26}

In affirming the relevance of a life cycle approach to the International Labour Organization's efforts to eliminate poverty through decent work initiatives, Juan Somavia notes that a life cycle approach "helps us to connect directly with... realities and the interconnectedness of people's needs. People experience life in an integrated way."\textsuperscript{27} An approach that connects different spheres of activity in an individual's life also resonates with the longstanding concerns of feminist scholars of linking the public and the private domains.\textsuperscript{28}

Three dimensions of this framework are of particular significance. First, it recognizes the importance of taking into account cumulative effects over time. Second, it highlights the intersections between different domains, social structures and contexts in an individual's life. Third, by highlighting the relational and systemic dimensions of inequality, it allows for attentiveness to diversity between women, and the intersectional effects of inequalities linked to race, national or ethnic origin, religion, sexual orientation, disability, language, and economic status.\textsuperscript{29}

Both the historical and the intersectional dimensions of a life cycle approach are critical to our understanding of systemic gender inequality. Applying a life cycle approach to girls' and women's rights underscores, for example, the pivotal importance of the socio-cultural valuation of the girl child to the possibility of positive life prospects of any girl or woman in a given society, regardless of economic condition, and throughout her own lifetime.\textsuperscript{30} As Lin Lean Lim notes, "[e]quality between women and men and the elimination of discrimination is a fundamental right throughout all stages of life — from childhood to old age."\textsuperscript{31} The intergenerational effects of this early discrimination, deeply embedded in societal norms and values, make certain a recurrent cycle of gender inequality, as disempowered girls grow up into disempowered women. As noted in a recent UNICEF report, "[g]ender equality means that girls and boys have equal access to food, healthcare, education and opportunities."\textsuperscript{32} The UNICEF Report also highlights what it calls the "double dividend" of gender equality. The affirmation of women's rights not only ameliorates women's lives; it is also critical to the promotion of children's rights, particularly girls' rights:

By upholding women's rights, societies also protect girl children and female adolescents... Evidence has shown that women whose rights are fulfilled are more likely to ensure that girls have access to adequate nutrition, health care, education and protection from harm.\textsuperscript{33}
Peering further ahead in a young girl's life cycle, we can see that if she is denied equal educational opportunities, it will no doubt have a significant impact on her employment opportunities later in life. In this regard, the United Nations Population Fund, in developing a life cycle approach aimed at empowerment throughout life, underlines a number of critical messages for specific stages of life, including encouraging "governments to promote universal and non-gender discriminatory education for girls and boys." A fundamental strategy for advancing women's equality in employment has been that of securing equitable access to educational opportunities. Not only does this require full access to educational domains traditionally dominated by men, but it requires fair treatment, the elimination of gender-based stereotyping, and protections against sexual or other forms of harassment.

Gender-based employment discrimination (which reduces access to good jobs and equitable compensation) also has a critical impact on the risk of poverty in elderly women's lives. In their study *The Dynamics of Women's Poverty in Canada*, Clarence Lochhead and Katherine Scott confirm the heightened risk of poverty among elderly women and its connection to the quality and duration of women's working lives. Many regions of the world are facing a rapidly aging population, and given that women consistently outlive men, the effects of discrimination throughout the life cycle will have a direct impact on the prevalence of poverty and exclusion among elderly women.

Finally, a life cycle approach acknowledges that women's diverse life experiences in one domain have critical effects in other contexts. Thus, women's family and household responsibilities, for example, have a significant impact on their employment opportunities — the public and private lives of women are intricately interwoven. Another stage in the life cycle in which women face socio-structural barriers to true equality and inclusion, therefore, is the extended period in adulthood when commitments to family life and the workplace are in conflict. Enduring socio-cultural conceptions of gender roles with respect to child-bearing and rearing may shed light on why closing the gender gap has been a challenge worldwide. In Asia, for example, young women are outperforming their male counterparts in the education system, but are finding it harder to enter the labour market and compete successfully with men once they are working. This experience can be common across social and economic strata, but poverty and economic exclusion render certain women more vulnerable to ongoing and future poverty at this crucial stage.

Thus, a life cycle approach compels us to focus on the relational nature of gender inequality and exclusion, both within a woman's lifetime, and across the spheres of her life. As noted in an important report by UNICEF that affirmed women's equality as a necessary condition for children's rights, "[w]omen need influence in decision-making in three spheres — household, workplace and political sphere." Remaining cognizant of the implications of this approach will allow more effective responses in policy and law to the complex realities of inequality.
IV. CONCLUSION: RETHINKING LEGAL STRATEGIES

What is the significance of a life cycle approach to the development of strategies for securing effective gender equality? Does it assist us in developing creative and effective policies that will have a positive impact on securing girls' and women's rights in countries around the world? And what are the links between an expansive legal definition of discrimination — illustrated by the concept of systemic discrimination and the historical, structural, systemic and intersectoral dimensions of life cycle approaches? No doubt, the lessons to be learnt from combining a systemic discrimination analysis with a life cycle approach will vary depending on the specificity of the historical, political, cultural and economic contexts. Nevertheless, a few general conclusions may be advanced.

First, it is critically important to insist upon a broad and expansive definition of discrimination — one that embraces both direct, intentional discrimination as well as effects-based, indirect discrimination. Effective channels for investigating, adjudicating and redressing discrimination are also of utmost importance.

The lessons of systemic discrimination and a life cycle perspective on problems of exclusion and unfair treatment, however, teach us that grafting a retroactive discrimination complaints procedure onto complex, intersectoral and structural problems of systemic inequality will only address a small part of the problem. Too often legal regimes tend to presume the legitimacy and the fairness of the underlying institutional status quo — focusing exclusively on aberrant individual conduct, or discrete rules or policies that are discriminatory. Beyond individual remedies, a second conclusion is the need for broader systemic strategies to address problems of inequality that affect large numbers of women in particular industries, social institutions and workplaces. Some of these should be initiated at the institutional level — through a proactive assessment of barriers and obstacles to equality — and the initiation of new policies and changes in social practices. Of particular significance at the institutional level is attentiveness to the way in which obligations, responsibilities, and life chances in one sphere of life impact upon equitable treatment in other spheres of activity. Equal rights require the redesigning of institutional policies to take these factors into account, or the development of policies of reasonable accommodation to ensure inclusion in the face of difference. The development of systemic responses to systemic discrimination should also take into account diverse girls' and women's lives, recognizing how multiple and intersecting forms of discrimination and exclusion affect diverse communities in different ways.

A third conclusion is derived from the insights of life cycle approaches to social policy. Given the historical and spatial trajectories of systemic inequality, it is necessary to think about gender equality in more macro public policy terms that transcend specific institutions or discrete spheres of activity. A more expansive approach is necessary in the face of social realities of inequality that span generations, intersect both private and public spheres, and are embedded in law, political economy, institutional policies,
customs and traditions. It also underscores the importance of pursuing multiple reform strategies – from the formal political channels of law reform to diverse forms of resistance to inequality in everyday life.

ENDNOTES


2. As Kim Lane Schepple has noted, "the set of events giving rise to the lawsuit and the legal statement of facts usually focuses narrowly on what made those events happen" rather than exploring the larger context through "wide-angle descriptions." Kim Lane Schepple, "Foreward: Telling Stories" (1989) 87 Michigan L. Rev. 2073 at 2094-2095 & 2096.


11. Ibid.

12. Similar theoretical developments have occurred in Canadian constitutional equality jurisprudence in which courts have endorsed the concept of substantive equality, rejecting the more narrow conception of formal equality, that focused on the equal treatment of individuals regardless of the social reality of group-based differences; see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88.


14. See, e.g., *Griggs*, supra note 4 at 431 where the United States Supreme Court outlines that the defendant must demonstrate the business necessity and job relatedness of an employment policy once the plaintiff has made out a *prima facie* case of disparate impact.
Employment Equity Act, S.C. 1995, c. 44.  
Ibid., s.2.  
The Federal Contractors Program for Employment Equity was implemented 1 October 1986 and applies to provincially regulated employers with a workforce of 100 or more employees.  
Ibid.  
See, for e.g. Susan B. Boyd, ed., Challenging the Public/Private Divide: Feminism, Law, and Public Policy (Toronto: University of Toronto Press, 1997). In the context of China, see Barbara Entwistle & Gail E. Henderson, eds. Re-Drawing Boundaries: Work, Households, and Gender in China (Berkeley: University of California Press, 2000).  
See Lim Lean Lim, supra, note 1 at 83 & 87.  
Ibid at 86.  
Ibid.  
Clarence Lochhead & Katherine Scott, *The Dynamics of Women's Poverty in Canada* (Ottawa: Status of Women Canada, 2000). Some scholars have articulated concerns that a life cycle approach that focuses on labour force preparation and attachment does not resonate with the lives of women who are not active labour force participants. See, Orla O'Connor & Mary Murphy, "Developmental welfare state, the life cycle and gender" (Dublin: NDP Gender Equality Unit) (Draft report online at: http://www.ndpgenderequality.ie/newproj/newproj_17.html.)


*ibid.* at 2.

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