

Book Review

INCLUSIVE EQUALITY: RELATIONAL DIMENSIONS OF SYSTEMIC DISCRIMINATION IN CANADA, by Colleen Sheppard¹

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IF YOU ASKED AN EQUALITY ACTIVIST or critical scholar to describe the Supreme Court of Canada's equality jurisprudence, the likely answer would be something along the lines of "bewildering, contradictory, fractured, and despair-inducing." There have been moments of relief—for example, an auspicious beginning in *Andrews v Law Society of British Columbia*³ and a short-lived consensus with respect to the doctrinal formulation of equality in *Law v Canada (Minister of Employment and Immigration)*.⁴ Overall, however, the equality case law provides a complicated and difficult legacy. In *Inclusive Equality*, Professor Colleen Sheppard does not set out to untangle or expose the doctrinal contradictions, although she does some of that along her way. Rather, her aim is optimistically creative: to articulate a new concept of equality—namely, inclusive equality—that synthesizes the key insights of constitutional equality and statutory anti-discrimination jurisprudence, incorporating revised methodological approaches and new theoretical commitments. Moreover, she elaborates how her concept of inclusive equality can shift our gaze away from courtroom battles and can facilitate efforts to instill equality norms by means other than litigation.

Most would agree that the endorsement in our *Canadian Charter of Rights and Freedoms*⁵ jurisprudence of substantive rather than formal equality is one of

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1. (Montreal: McGill-Queen's University Press, 2010) 256 pages.
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 3. [1989] 1 SCR 143.
 4. [1999] 1 SCR 147.
 5. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

its most significant and positive achievements. The divisions and contradictions alluded to above arise over the question of what substantive equality means and requires in specific cases. Indeed, much critique is taken up with pointing out how courts have failed to live up to their commitment to substantive equality and with lamenting the return to formal equality analysis. Sheppard shares those views but takes us back a step—not to formal equality and not to a rejection of substantive equality but to a reconsideration of the latter's adequacy. She argues that the concept of substantive equality, in addition to offering too little guidance to decision makers, falls short of grappling with the structures and processes that reproduce inequalities. Hence, Sheppard identifies a need to build on our jurisprudential foundations to devise a new, expanded concept of equality.

Sheppard turns to this ambitious task quickly. The opening chapter of *Inclusive Equality* concerns statutory responses to discrimination and inequality. She starts by noting the historical background of pervasive inequalities that became the subject of comprehensive statutory legal reform efforts in Canada only in the aftermath World War II. She does not provide a detailed history of legal developments. Her focus, rather, is on major conceptual shifts in the understanding of inequalities. In particular, Sheppard focuses on the shift from viewing inequalities as consequences of natural forces beyond the reach of law or beyond the responsibility of society or governments, to viewing them as socially constructed—the products of relationships, attitudes, and practices. This latter realization, she emphasizes, poses immense challenges to law and policy. A sophisticated grasp of the relation between law and social change is necessary. Understanding is also required of the interplay between large-scale global factors, societal and institutional norms, and individual values, actions, and beliefs.

Sheppard distills from our statutory anti-discrimination jurisprudence important insights that arise from grappling with this challenge: the proposition that discrimination is often the adverse effect of neutral rules and policies rather than the work of individual “bad apples”; the recognition of the phenomenon of systemic discrimination; the development of more complex, programmatic, and preventive remedies; and the emergence of an understanding of the complicated interplay between overlapping and intersecting identities and social disadvantage. In giving this overview, Sheppard also renders more precise a key distinction for her delineation of inclusive equality—namely that between adverse effects and systemic discrimination. She notes that courts too often equate the two, thereby failing to give full play to the systemic dimension in diagnosing inequalities. Systemic discrimination encompasses both adverse and direct effects as well

as deeply rooted attitudes, cultural norms, practices, and processes. In sum, in the introductory chapter, Sheppard both identifies and clarifies valuable achievements in this area of Canadian law. In particular, she highlights an emphatically relational, socially-embedded understanding of inequality and a conceptual vocabulary—including the notions of adverse effects and systemic discrimination—to aid us in addressing specific inequalities.

Chapter two similarly engages in a synthesizing and clarifying analysis, this time with respect to constitutional equality jurisprudence. Sheppard highlights the positive achievements in this area, in particular the rejection of formal equality in favour of a substantive conception that focuses on adverse effects and unequal outcomes rather than simply on differential treatment. She also examines recurrent doctrinal problems that have undermined the effectiveness of the jurisprudence, namely a rigid, technical notion of equality's comparative framework; an unresolved tension between equality narratives that focus on group dimensions of disadvantage and those that focus on dimensions that take individual dignity-harms as their touchstone; and the failure to keep pace with shifting understandings of the nature and role of the state.

Chapter two also provides us with the book's key contribution—its elaboration of the concept of inclusive equality. Sheppard argues that inclusive equality builds on the judicial commitment to substantive equality—articulated largely in terms of attention to unequal effects and outcomes—and adds to it a distinct focus on processes, both systemic and structural, of inclusion and exclusion in social, institutional, and political decision-making practices. This focus on processes and relationships, Sheppard proposes, arises out of concepts of systemic discrimination that, although present in our current jurisprudence, need to be given a more explicit and central role. Sheppard's conception of inclusive equality—with its substantive as well as procedural/relational dimensions—is particularly crucial to the task of crafting remedies and responses that are transformative rather than merely corrective. Such remedies and responses engage with those features of our current arrangements that reproduce and sustain inequalities over time.⁶

Sheppard ends chapter two on a practical note, with a revision of current equality doctrine that both simplifies and expands the existing framework in order to reflect her conception of inclusive equality. The revision reconfigures the work that conceptions of substantive equality do in terms of two inquiries—the

6. Nancy Fraser makes a similar point using the distinction between affirmative and transformative remedies for injustice. *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (New York: Routledge, 1997) ch 1.

first into types of harmful effects and the second into the degree of harm. A third inquiry adds the lens of inclusion and directs analysis at “exclusionary processes and structural/systemic dimensions of harm.”⁷

The third chapter takes up the methodological implications of Sheppard’s inclusive equality framework. Again, she synthesizes, reworks, and expands existing approaches. She notes the jurisprudential commitment to contextualization but argues for a more nuanced methodology that engages fully with micro-, meso-, and macro-levels of contextual analysis. The micro-level of analysis makes space for the experiential knowledge of those claiming equality harms. Drawing on feminist theory, Sheppard notes the difficult questions about voice, authenticity, and essentialism that attend reliance on experiential knowledge. She advises that these concerns can be countered by knowledge drawn from contextual analysis at the meso- and macro-levels. The meso-level of analysis looks at institutional processes and social relations and is crucial to the remedial effectiveness of an inclusive equality analysis. Through such analysis, we gain understanding not simply of the harms of inequality but of the ways in which it is reproduced over time despite corrective measures aimed at outcomes and effects. The macro-level directs our gaze to larger structural and ideological features such as the shift in political rationalities from welfare liberalism to neo-liberalism in the last decades of the twentieth century. Examination of the macro-level aids our understanding of micro-level experiences and the seeming intractability of exclusionary meso-level processes. It also ensures that remedies take account of both the dangers and opportunities presented by larger historical and socio-economic changes.

Chapters two and three provide us with a map for equality law that retools old concepts, methods, and achievements. The map also sharpens our sense of why these past approaches are important and supplements them with a set of additional inquiries and new benchmarks targeted at exclusionary norms, social relations, and processes. The fourth chapter is a case study of sexual harassment that puts Sheppard’s framework to work, reinforcing the more abstract and methodological points made in the preceding chapters. Chapters five and six discuss two theoretical commitments—conceptions of caring and principles of democracy—that Sheppard argues should explicitly shape and inform equality concepts and anti-discrimination law. The chapter on caring draws on well-known feminist literature focused on normative and ethical dimensions of relations of care. The salience of this literature to theories of equality lies in its illumination of the profoundly relational character of caring, its embrace of social interdependencies, and its sophistication in navigating the distinction between

7. *Supra* note 1 at 63.

caring relations that oppress and those that nurture growth and equality. Thus this literature offers a set of useful tools and concepts for analyzing the relational and systemic nature of inequalities and for crafting more positive, inclusive processes and relationships. As well, a focus on caring encourages us to enlarge our horizons beyond the individual and beyond those that we resemble in order to include distinctly different “others” in conceptions of our community.

Chapter six envisions a role for democratic principles that is similar to the role of theories of caring. Sheppard notes that while debates on the meaning and import of democracy are many and diverse, “the fundamental starting point” of democratic theory is “a normative acceptance of the basic idea of equality.”⁸ Sheppard relies centrally on Iris Marion Young’s conception of “communicative democracy.”⁹ Young’s work focuses on institutional and political processes of deliberation and on the structural constraints that inhibit and prevent full participation in democratic societies. Thus it provides a close fit with Sheppard’s main point that equality concepts need to expand to encompass more direct attention to exclusionary processes at the meso-level of institutional and social relations and to systemic and structural impediments to equality. Indeed, Sheppard argues forcefully that democratic principles need to be extended into the private sphere and that more democracy in workplaces, families, corporations, educational institutions, and other civil society associations generally produces more equality. As in the case of theories of care, Sheppard is attuned to the problems that democracy presents for equality. Here those problems take the form of formal and functional exclusions and of majoritarian denials of minority views and rights. In discussing mechanisms and approaches that can resolve these problems, Sheppard reinforces the point that by linking equality to democracy, equality becomes a more transformative concept. In short, a focus on democracy demands that we attend to decision-making processes and practices rather than simply to adverse effects and substantive outcomes.

Sheppard’s vision of inclusive equality is ambitious in its reach. It requires the energy and will to restructure relations and practices that many of us view as normal, unobjectionable, and even virtuous, as in the case of market relations premised on self-interest. Sheppard concludes her book with a short chapter

8. *Ibid* at 119.

9. *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 40. Although Young locates her conception of democracy within the model of deliberative democracy, she prefers the term communicative democracy because too often the term deliberation connotes “the primacy of argument, dispassionateness, and order in communication,” qualities that can exclude from participation persons from less privileged segments of society (*ibid*).

that identifies three dimensions that are crucial to the restructuring process. The first is the reinforcement of the agency of equality claimants. The trajectory of much equality analysis tends to foreground harm and victimization to the point of reducing claimants to their injuries and foreclosing rather than enhancing democracy and self-government.¹⁰ Sheppard draws on Kathryn Abrams' notion of "partial agency," which respects the capacities for action and freedom of individuals while at the same time acknowledging structural aspects of their subordination.¹¹ The second dimension is the promotion of solidarity, a feature that flows logically from Sheppard's emphasis on caring and that is a focal point in social movement activism around equality issues. The third dimension is the requirement that public responsibility for equality be sustained and embraced rather than diminished.

Who is this book for and in what directions does it point? *Inclusive Equality's* natural audience is equality activists both inside and outside of law, judges, and the curious public, as well as teachers, scholars, and students in the fields of law and socio-legal studies. The book is written in a clear, accessible style. Charts and diagrams are used to summarize complex, multi-layered arguments. Where legal doctrine needs to be explained in order to make a practical or theoretical point, it is done in a way that all can understand. Sheppard's development of the concept of inclusive equality is carefully grounded in both jurisprudence and theoretical literature. The conceptual, strategic, and doctrinal pieces fit together, and concerns are anticipated and explained. *Inclusive Equality* could easily form the basis of a seminar in equality and anti-discrimination law. The chapters are short and succinct. In a classroom, the chapters could be supplemented with cases that illustrate the main points and theoretical readings that expand on the foundations of Sheppard's concept of inclusive equality. *Inclusive Equality* challenges both mainstream and critical orthodoxies—in particular, the assumption that substantive equality provides the best possible doctrinal rendering of legal equality norms. Finally, the book is not tightly tied to a specific moment in the development of equality jurisprudence, thus avoiding the risk of becoming immediately dated.

Inclusive Equality also provides a direction for strategic litigation and a framework for factum writing that is attentive to precedent while at the same time marking out a path through some of the more exasperating and recurrent

10. See Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at 27.

11. "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" (1995) 95 Colum L Rev 304.

tensions in the jurisprudence. It pushes us to think more imaginatively and more concretely about remedies, drawing on our particular knowledge and experiences at home and work. In addition, *Inclusive Equality* looks outside the courtroom and underlines the salience of localized institutional strategies to achieving equality, offering direct and helpful guidance on such efforts. Thus it is a useful and inspiring resource for persons concerned with equity and equality issues in workplaces, public and private institutions, and community organizations.

Perhaps *Inclusive Equality's* most compelling feature is that it is such an optimistic and hopeful book. It is animated by a commitment to justice, by a belief that inequalities are social artifacts that can be undone by social activism, and by a firm conviction that lawyers can assist in this broad transformative social process. As such, it is a refreshing antidote to the tendency in legal academic circles to allow case law to circumscribe our possibilities for achieving justice and equality in the wider fields of life and politics.