

Engaging Acker: A Socio-Legal Approach to Understanding Systemic Discrimination

WORK IN PROGRESS

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Abstract

It is generally accepted that the law has the power to give meaning to social realities and produce subjectivities. As indicated by Sheppard (2013, p. 103), one of the greatest challenges therein is the notion of systemic discrimination, which is “embedded in processes, practices, norms and relationships that reproduce and accentuate inequality”. These bear a significant resemblance to Joan Acker’s notion of the gendered organization (1990, 1992a, 1992b) and the processes by which organizations become such.

This study is very much a work in progress and is being done in two parts. The first is a close examination of the evolution of our understanding of systemic discrimination and systemic remedies in law, using a socio-legal approach, to identify critical junctures. The second part of the study is a ‘layering’ of Joan Acker’s gendering processes on these junctures. It will engage Poststructuralist feminist theory to problematize both text and interpretation, along with the socio-political context in which the texts were written. The aim is to better understand how systemic discrimination and systemic remedies are understood within Canadian jurisprudence, with an eye toward emancipatory change.

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Social scientists have long argued that phenomena, such as systemic discrimination, must be understood within their wider socio-political-legal contexts if we are to understand them and create change (Lorbiecki and Jack, 2000; Prasad, 2005). The law, in particular, has been described as “the collective expression of the public will” (Abella, 1984, p.7), and it is generally accepted that it has the power to give meaning to *social realities* and produce *subjectivities* (McGill and Kirkup, 2013). As indicated by Sheppard one of the greatest challenges therein is the notion of systemic discrimination, which is “*embedded in processes, practices, norms and relationships* that reproduce and accentuate inequality” (2013, p. 103).

Social realities and subjectivities, embedded in processes, practices, norms and relationships, bear a significant resemblance to Joan Acker’s notion of the gendered organization (1990, 1992a, 1992b) and the processes by which organizations become such, collectively identified as the process of ‘gendering’. Joan Acker’s work on the gendered organization is widely recognized as one of the more compelling, “systematic attempt(s) to bring together the findings of research on the perpetuation of gender inequality in organizations and social institutions” (Britton, 2000, p. 429). There is considerable published work that engages some or all of Acker’s gendering processes to better understand why organizations become, and remain, gendered (see Lewis and Morgan, 1994; Britton, 1997; Benschop and Doorewaard, 1998b; Dye and Mills, 2012). I suggest that Acker’s work can also be helpful when applied to the concept of systemic discrimination. More specifically, that Joan Acker’s framework of gendering processes (1990, 1992a, 1992b) can provide insight into the legal understanding of systemic discrimination and the remedies required to address it. The current study attempts to engage Acker’s gendering processes, defined more broadly as systemic discrimination processes, at critical junctures in our understanding of systemic discrimination at law. The identification of critical junctures is important for temporal and contextual understanding of the processes at work.

Systemic Discrimination in Canada Law

The first part of this study required a close examination of the evolution of our understanding of systemic discrimination and systemic remedies in law. A socio-legal (SLS) approach was taken as “SLS takes an external approach to law, it does not usually accept the way things are, rather stands at a distance to question the status quo” (Berard, 2015, p. 629). Rather than simply recounting the history of the concept, this review was a critical analysis of the literature with the aim of deconstructing our current understanding of systemic discrimination and systemic remedies. A three-pronged search for literature on systemic discrimination in the Canadian context, published within the last twenty years, was conducted. First, a search was conducted using electronic databases. More specifically, Academic Search Premier and Business Search Premier were searched using key terms, ‘systemic discrimination’ and ‘employment’. Second, a search of legal commentaries was conducted through the Canadian legal database, CanLII (www.canlii.org) using the search parameters previously mentioned. Finally, the sources of the articles found in the first two searches were scanned to discover other relevant sources.

In total, 12 articles were chosen for analysis. Each of the selected articles was read closely to identify important junctures in the conceptualisation of systemic discrimination. This close reading of the academic literature revealed generally agreed upon turning points in the history of the understanding and application of the concept of systemic discrimination and systemic remedies in law. Although

social constructions in and of themselves, theorists argue that by understanding forces for change at each of these junctures, we can facilitate change (Weedon, 1993; Van Dijk, 1993; Prasad, 2005). In all, five critical junctures in Canadian jurisprudence around systemic discrimination were identified. These were all signalled by significant pieces of legislation or cases that somehow changed the trajectory of how systemic discrimination was understood in law. It is at these junctures, as described below, that Joan Acker's processes will be explored.

Critical Junctures

1984: *Equality in Employment: A Royal Commission Report (Abella, 1984)*

In June of 1983, the Canadian Government established the Royal Commission on Equality in Employment. The terms of reference of the Commission outline the mandate as, "the inquiry into the most efficient, effective, and equitable means of promoting employment opportunities for and eliminating systemic discrimination against four designated groups: women, native people, disabled persons, and visible minorities" (Abella, 1984, p. ii). The resultant report, *Equality in Employment: A Royal Commission Report*, was published in 1984 and became known as '*The Abella Report*' after Commissioner, Judge Rosalie Silberman Abella.

Readings of the literature on systemic discrimination in the Canadian context are replete with mentions of the 1984 Abella Report. Indeed, it is rare to see an academic article or case in this area that does not reference it. It has been heralded as "... a landmark that fundamentally influenced the fields of employment and human rights law, jurisprudence, and public policy" (Agocs, 2014, p. 13).

1987: *Canadian National Railway v Canada (HRC) (Action Travail)* [1987] 1 SCR 1114

Touted as a "landmark Supreme Court of Canada decision," (Agocs, 2014, p. 22) *Canadian National Railway v Canada (HRC)* is arguably the most often cited case in regard to systemic discrimination in Canada. Also known as the *Travail des Femmes* case, the literature indicates that it was here that the highest court in Canada recognized the concept of systemic discrimination (Beck, 2002; Sheppard, 2013), suggesting a legitimacy not previously held. This case is also noted as the point the court outlined the purpose of an employment equity program – not as a remedial tool but as a prospective tool, thus preventing the same barriers from limiting the opportunities of those in the protected groups in the future. It concluded that "a purposive, approach to remedies was necessary to cure systemic discrimination" (Brodsky, Day and Kelly, 2017, p. 11).

1996: *Amendments to the Employment Equity Act and the Canadian Human Rights Act*

According to Agocs (2014) the next critical juncture came in 1996, when amendments made to the Employment Equity Act and the Canadian Human Rights Act came into effect. The amendments are credited with giving "the CHRC the mandate to monitor and enforce compliance with both acts" (Agocs, 2014, p. 306-307). It is suggested that these amendments also led to greater awareness of systemic discrimination and organizations' responsibilities in regard to this type of discrimination (Beck, 2008; Agocs, 2014; Anand, 2014). According to Anand, "the new act added the federal public service and aimed to increase the obligations of employers, strengthen enforcement mechanisms, and improve the employers' monitoring, consultation, and reporting" (2014, p. 55), through the development of a new audit-based equity system (Beck, 2002). It was thought that a new, more rigorous program of oversight would bring change.

1999: *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union (Meiorin)* [1999] 3 SCR 3 SCC 48

The next turning point identified in the literature is the 1999 case known as *Meiorin*. In this highly-cited case, a female fire fighter was fired for being unable to pass one of four fitness tests adopted three years after the commencement of her employment. The union representing her argued that the aerobic test constituted discrimination on the basis of sex. The case went to the Supreme Court of Canada where, ultimately, it was ordered that Ms. Meiorin be reinstated and compensated for lost wages. A new test to determine whether a discriminatory standard is justifiable was developed, strengthening the requirement of employers to show that “it is impossible to accommodate those harmed by it without undue hardship” (Brodsky, Day and Kelly, 2017, p. 9).

References to *Meiorin* are plentiful, most often for its clear articulation of the concepts of a Bona Fide Occupational Requirement (BFOR) and duty to accommodate, as well as the test necessary to establish whether prima facie discrimination has occurred (Sheppard, 2013). This oft cited case has been called “transformational” (Brodsky, Day and Kelly, 2017) and, according to Pothier, “is still the leading authority on the issue of where the duty to accommodate fits into a discrimination analysis” (2010, p. 25).

2014: *Grange v. Toronto (City)* [2014] HRTO 633

The final juncture, as identified in the literature, is identified as *Grange v Toronto (City)* (2014). In this case, Ms. Grange filed an application under s 34 of the Human Rights code alleging systemic discrimination in employment on the bases of race, colour, ancestry, place of origin, ethnic origin and sex. Instead of presenting one serious incident of discrimination, “she alleges that for a period of approximately 10 years, she experienced a series of incidents which, when considered in the full context of her employment experience, will be found to be indicative of systemic racial and gender discrimination” (*Grange*, 2014, 21).

The central issue here is the timeliness of the complaint, which is restricted in the Code to one year. The respondent argued a lack of timeliness and applied to have the complaint dismissed on that basis. In an interim decision, the Court failed to dismiss on this basis and found that a series of events need not be encapsulated within the one-year limit as “systemic discrimination in the workplace can manifest as a series of seemingly disparate events arising from an invisible (to some) yet ubiquitous institutional culture” (*Grange*, 2014, 28).

Engaging Acker

The notion of organizations as gendered is not new (Benschop and Doorewaard, 1998a; Collinson and Hearn, 1994; Ferguson, 1984; Mills and Tancred, 1992), and an increasing number of researchers have been drawn to Joan Acker’s (1990, 1992a, b) notion of the “gendered organization” as one of the more promising frameworks for analysis of the gendering of organizations. Drawing directly on the work of Acker, gendering is defined as, “advantage and disadvantage, exploitation and control, action and emotion, meaning and identity, [that] are patterned through and in terms of distinction between male and female, masculine and feminine” (1990, p. 146). This gendering is created and perpetuated by a set of five interrelated gendering processes.

- Gendering practices/structures
- Gendering cultures
- Gendering interactions
- Internal gender constructions
- Creating and conceptualising social structures

Acker's (1990, 1992 a, b) framework has been widely cited (Britton, 1997; Rutherford, 2001; Olsen and Walker 2003; Hultin and Szulkin, 2003; Dye and Helms Mills, 2005) and variously applied (Britton, 1997; Benschop and Doorewaard, 1998, Lewis and Morgan, 1994). Most often, the focus has been on single process sets, as applied to one or more organizations. Rather than applying some or all of the gendering processes to a single organization, this study looks at Canadian jurisprudence and Acker's framework more broadly. Poststructuralist feminist theory will be used to problematize both text and interpretation, along with the socio-political context in which the texts were written. The aim is to better understand how systemic discrimination and systemic remedies are understood within Canadian jurisprudence, with an eye toward emancipatory change.

A modified version of Joan Acker's framework of gendering processes will be applied at each of the junctures identified. These junctures represent significant events that altered the way systemic discrimination and systemic remedies are presented and engaged in Canadian law. If we believe that the law truly is the "the collective expression of the public will," (Abella, 1984, p.7) and has the power to give meaning to *social realities* and produce *subjectivities* (McGill and Kirkup, 2013), then analysis at these critical junctures should prove insightful.

Although this analysis is ongoing, and it is too early for conclusions, anecdotal evidence suggests that Joan Acker's framework of gendering processes is appropriate for use in this way. For example, the Abella Report's suggested reliance on statistics to ascertain the existence of systemic discrimination fits neatly within Joan Acker's first set of processes – gendering practices/structures. Similarly, the Report's suggested changes to legislation and subsequent integration of employment equity rules and reporting fits within Joan Acker's fifth set of processes – Creating and Conceptualizing Social Structures. Acker defines these as a dominant set of structures and processes that come to characterize organizational arrangements, which are manifest in "material forms in written work rules, labor contracts, managerial directives, and other documentary tools for running large organizations" (Acker, 1990, p. 147). Other examples include the legal test for systemic discrimination established in the *Meioron Case* which requires an organization to act 'honestly' and 'in good faith' and the reference to discrimination via "seemingly disparate events arising from an invisible (to some) yet ubiquitous institutional culture" in *Grange v Toronto (City)* (2014).

Further Development of the Paper

This paper is very much a work-in-progress. I anticipate moving forward in the following way:

1. Adaptation of Joan Acker's framework for use in studying systemic discrimination more broadly
2. Critical discourse analysis to study the cases and legislation at the core of each juncture, through Acker's framework.
3. Determination of additional texts to be analyzed
4. Analysis and writing
 - a. A theoretical paper on the use of Acker's framework in this way
 - b. An empirical paper about systemic discrimination in Canadian jurisprudence

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