

53. Legal rights as instruments for challenging inequality

Celestine Nyamu Musembi

This contribution discusses the possibilities and limits of using legal rights to challenge inequality. Between two extremes – an optimistic liberal legalist ideal of law as neutral, and a sceptical dismissal of law as an instrument of domination – the article discusses insights drawn from writings on law and power. Legal rights can be effective in challenging inequality if they are deployed as counter-hegemonic strategies, are entwined with movement-building, are aware of the risks of piecemeal litigation, take account of broader normative bases for rights claims beyond narrow formal legal rights, and do not underestimate the transformative potential of legal rights at a symbolic, cultural level.

Legal rights tend to be viewed in liberal democracies as the default instrument for redressing patterns of inequality. In the liberal democratic ideal of the 'rule of law', rights are depicted as the rational regulator of the exercise of power, so that rule-defined behaviour is entrenched, rather than the interests of particular groups or individuals. Beyond the pages of legal theory and in the minds of social change activists including public interest lawyers, the idea of law as justice, in particular justice for the subordinated, has become something of an 'implicit popular jurisprudence' (Simon, 2004, p. 27; Calmore, 1999, p. 1936), whether consciously or subconsciously (Kostiner, 2003, p. 361).

A sceptical view denies altogether the possibility of engaging legal strategies to fight inequality, charging that far from being a neutral regulator of power, law is the very medium in which inequality is encoded and sanctioned. In Marxist thought, for instance, law's formal egalitarianism serves only to mask and deepen substantive inequalities, presenting the narrow interests of the dominant class as 'hold[ing] good for all' (Marx, excerpted in McLellan, 1977, p. 200). Law is only independent of unequal material conditions 'in the imagination of the ideologist' (Marx, excerpted in McLellan, 1977, p. 201). A similarly deterministic view of law as domination is expressed in radical feminism (MacKinnon, 1987).

Lying between the liberal legalist ideal and the Marxist dismissal of law and rights as domination are a range of views which call attention to the possibilities and limits of legal rights in challenging inequality. These writings on the relationship between law and power make the point that while there is no denying that legal orders do embody asymmetrical power relations, law should not be viewed simply as an instrument of domination. Rather it should be seen as an ideological force. The relationship between law and power is paradoxical: law is centrally implicated in the production of hegemony, but it can and does facilitate resistance, by becoming the vehicle through which something that had apparently congealed into hegemony is challenged and subjected to open contestation (Hirsch and Lazarus-Black, 1994; Hunt, 1990). While law is centrally implicated in skewing the distribution of resources, it also plays a role in efforts to make distribution fairer (Kennedy, 1991). These writings demonstrate that law does constrain the actions of the dominant groups and enable popular struggles, albeit in limited instances (Thompson, 1975) 'at the very perimeter of what the authorities are obliged to permit or unable to prevent' (Scott, 1985).

Rights as counter-hegemonic strategies

Rights will be effective in challenging inequality when they are deployed as 'counter-hegemonic' strategies (Hunt, 1990, p. 312).

While goals such as the concrete redistribution of resources are important, rights struggles must go beyond these to engage at the virtual level of thoughts, ideas and assumptions. Rights struggles serve as counter-hegemonic strategies when they engage in the long-term process of challenging the dominant hegemony and articulating an alternative to it. Engaging at this level makes it possible to expose and challenge 'biases that are deeply ingrained in the general social consciousness' (Kostiner, 2003, p. 342) and which feed inequality.

Sally Engle Merry (2006) illustrates the power of generating an alternative hegemony, drawing from a campaign against domestic violence in Hawaii. The advocates deliberately employed the term 'battering', reframing the issue as being about a crime rather than simply part of the reality of intimate relationships. This reframing articulated an alternative hegemony which forced a change in the law and in the attitude of law enforcement.

A legal strategy to challenge inequality should not naively treat legal rights as 'accomplished social facts or moral imperatives', but rather as 'political resources of unknown value in the hands of those who want to alter the course of public policy' (Stryker, 2007, p. 77, citing Scheingold, 2004, pp. 6–7).

Rights as movement-building

Legal strategy needs to be closely entwined with building a social movement, or else risk becoming abstract and failing to consolidate its gains in real life (Stryker, 2007, pp. 77–8, 88; Handler, 1978). The lawyers involved must 'work *with* and not just *for* the client community'. Lessons have also been learned on the advantages of collective over individual litigation in terms of movement-building. In contexts where the legal framework provides for it, class action or public interest litigation accomplishes this more effectively than individual cases. Data drawn from US Supreme Court decisions in Title VII (employment discrimination) cases showed that women were more likely to win in a class action than in individual suits (Stryker, 2007, pp. 82, 88). With publicity, even small victories are likely to translate into greater opportunities for mobilizing diversely situated citizens into a social movement (McCann, 1998, pp. 99–100). Even high-profile losses can have a positive effect on mobilization (Abel, 1995, pp. 25–43).

Inherent risk in piecemeal legal victories

In some instances, a law or regulation may confer tangible and immediate benefits to individuals in subordinated groups, yet rest on stereotypes of that subordinated group. Examples include indigenous peoples attempting to fit an idealized narrative so as to win land claims (Clifford, 1988; Robins, 2001); reprieve for female prisoners only, citing child-care justifications, thus reinforcing stereotypical gender roles (Cusack, 2013); and welfare benefits which transform claimants into 'suplicants', pitied but not entitled (Hunt, 1990, p. 311). In these instances, rights-claiming confers immediate benefits while solidifying and legitimizing the very ideology the subordinated are trying to resist. A legal rights strategy therefore calls for reflection on when piecemeal legal victories have the potential to contribute towards transformation, and when they risk reinforcing subordinate status.

Legal rights and their relation to entitlements

In some contexts, custom and religion may confer certain entitlements. One example is the protection of a spouse's undocumented rights to customary land. A narrow view of rights, as only formal legal rights, denies the possibility that these customary entitlements could play a role in mounting an internal challenge to unequal social relations. A broader view enables the aggrieved to articulate the injustice in terms that resonate with the context of norms that they have to live in (Musembi, 2013). Sally Engle Merry makes a similar point about 'layering' the bases for rights claims: people may take on a rights framing for their claim, but that does not mean that they abandon other bases for entitlement, such as a duty of care owed by their kin (Merry, 2006, p. 180).

Thinking broadly about entitlements multiplies the options and sites for rights claiming. It would enable advocates to maximize their use of forums that attract less social stigma, such as religious courts (Hirsch, 1998) and customary forums (Nyamu-Musembi, 2002). Informal spaces and seemingly humdrum administrative spaces (such as municipal housing authorities; see WLSA, 1995) all become sites for rights claims that challenge inequality.

Legality in relation to legitimacy

Ideally, the effectiveness of legal rights as a strategy for challenging inequality is enhanced when those rights resonate with existing social norms. Formal legality on its own inevitably proves to be an ineffective tool in the hands of the subordinated. However, legality and legitimacy do not always overlap. In some instances, establishing a claim in formal law is indispensable in boosting the social bargaining position of the subordinated person or group. Non-discrimination laws, for instance, can serve to embolden those who might be opposed to inequality but fail to speak up because the cost of positive deviance (or 'norm entrepreneurship') is too high, as was the case with civil rights laws in the USA (Sunstein, 1996, p. 2043). Law can and does challenge inequality by playing an expressive function, radiating messages about desirable social norms (Sunstein, 1996).

Conclusion

A review of the scholarship suggests that there is reason to be sceptical about the effectiveness of legal rights, certainly as the primary instrument for challenging inequality (McCann, 1998; Stryker, 2007). However, any assessment of whether legal rights are an effective instrument to challenge inequality must be multidimensional (Stryker, 2007, p. 75). Assessments that only take account of the instrumental (such as whether a specific court decision led to desegregation; see Rosenberg, 1991) will miss out on the subtle restructuring of power relations at the cultural or symbolic level. Securing 2 acres of land through participating in an MST¹ land occupation might not radically transform someone's economic prospects in rural Brazil, but its symbolic value against the backdrop of a long history of disenfranchisement through the twinning of land ownership with political power should not be underestimated (Navarro, 2005). An exclusively instrumental assessment also underestimates what rights subjectivity might do for the transformation of personal and collective identity that is necessary to galvanize and sustain a social movement (Williams, 1991; Kostiner, 2003).

Note

1. MST (Portuguese Movimento dos Trabalhadores Rurais Sem Terra) refers to a movement of the landless poor in Brazil, who acquire land through a combination of physical occupation and litigation.

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■ **Celestine Nyamu Musembi** (Kenya) is a senior lecturer at the University of Nairobi, School of Law and a former research fellow at the Institute of Development Studies (IDS), Brighton, UK.