

"Less Than Equal - Women's Experience of Citizenship"

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Professor Elisabeth G. Sledziewsky has written: 'Modern doctrine attributes . . . the universal and abstract nature of (human) rights . . . to man and woman indifferently . . . This refusal to sexualise the definition of the citizen also confirms the latent power of a sexist scheme of things, which automatically masculinizes all social and political responsibilities'.

She argues that no real democracy is possible if the question of equality is not posed as a political precondition. 'Only the introduction of participation quotas imposing equal representation of the sexes in all decision - making authorities can make women's active participation in the polis effective and irreversible. If democracy is to acknowledge the difference of the sexes, it has no other response to suggest than this: the human race is twofold, debates and decisions must be the acts of men and women, otherwise they cannot be the acts of the human race as it is'.

This implies the recognition of the differences between men and women 'in order to prevent them from the outset from working in favour of inequality.

Nations differ substantially in their constitutional arrangements and their domestic legal procedures. Like New Zealand, Australia has no formal constitution, it has no Charter of Rights such as the Canadians have. No Bill of Rights overrides other legislation, and the Human Rights Commissions has recommendatory power only. The Electoral Act has given all citizens the right to vote and to stand at elections. That is an achievement of formal equality. But when have women ever been represented 'on equal terms with men'?

Key judicial institutions in domestic environments have reported on the effects of such inequality. The Law Reform Commission in Australia stated: 'The equal participation of women in political institutions and the legislative process is clearly essential if laws are to give equal weight to the concerns, needs and perspectives of women. Not only does the relative absence of women from positions of political power help undermine the serious consideration of women's claims to equality, but legislation is the only means of effecting change in the law quickly and directly'.

The rights of an Australian citizen are not contained in any one statement. Neither the Australian Citizenship Act 1948, nor the Australian Constitution set out comprehensively the rights of Australian citizens. There is no bill of rights in the Australian Constitution, although a few particular rights are stated. Instead, the rights of Australian citizens are found in Commonwealth and State laws, and the common law developed by the courts. For instance, the Commonwealth Sex Discrimination Act 1984 and the Human Rights and Equal Opportunity Act 1986 protect certain rights.

Australia is currently ranked 14th in terms of the numbers of women in the federal Parliament: The lower House has 33 out of 147, or 22.4%, and the Upper House has 25 out of 76, or 32.9%. Australia lags behind Vietnam, the Seychelles, Mozambique, Austria, Cuba and Argentina, but does better than the global average of 12.7%, and the figures of 4870 out of 41709 (38,297 where the gender is known), world wide as of the end of June 1999.

I do not believe that domestic legislation in Australia offers any real possibility for delivering equality in political representation. But I do believe that Australia, and every other country that is a signatory to the United Nations Covenant on Civil and Political Rights (ICCPR), and the Optional Protocol to that Covenant, and to the Convention on the Elimination of All Forms of Discrimination Against Women, has obligations in international law for equal representation. Further, since the obligations of the ICCPR and Protocol are "immediately enforceable", that it is a government's obligation, and does not rest on the whim for quotas of one or other patriarchal political party.

In international law, States are legally accountable for breaches of international instruments that are attributable or imputable to the States. There are three distinct theories of government accountability: government agency, government complicity by failure to act, and government responsibility for the unequal application of the law. All three are at issue here.

Rebecca Cook writes: "If a state facilitates, conditions, accommodates, tolerates, justifies, or excuses private denials of women's rights, the state will bear responsibility. The state will be responsible not directly for the private acts, but for its own lack of diligence to prevent, control, correct, or discipline such private acts through its own executive, legislative, or judicial organs." The state just has to be acting in a permissive capacity.

Article 38 of the Statute of the International Court of Justice sets down three major and two subsidiary sources of international law. The three major sources are international Conventions, international custom as evidence of general practice accepted as law, and general principles of law recognised by civilised nations. According to Article 38, subsidiary sources of international law are judicial decisions of the domestic courts and the teachings of the most highly qualified publicists of the various nations. These sources are described, in an irony that is not lost on me, as 'hard' and 'soft' law.

Australia has signed the key relevant Conventions. It is not a difficult exercise to locate these paragraphs in different Articles that are at issue in this challenge.

Article 3 of the ICCPR reads: 'The States Parties to the present Covenant undertake to ensure the *equal right of men and women* to the enjoyment of all civil and political rights set forth in the Covenant'.

Article 26 reads: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any

discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

In addition to the equality guarantees of Articles 2(1) and 26 of the ICCPR, Article 3 requires the States Parties 'to undertake to ensure the *equal right of men and women* (my emphasis) to the enjoyment of all . . . political rights set forth in the Covenant'.

Article 25 requires that 'every citizen shall have *the right and the opportunity, without any distinction . . . on the basis of sex, and without unreasonable restrictions:* (my emphasis)

a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

b) To vote and to be elected at genuine periodic elections;

c) To have access, on general terms of equality, to public service in his (sic) country'.

The Convention articles are one thing, interpretation of them is another. For the moment, while I am pursuing the sources of international law that might be applicable to this question, I'll assemble the sources before turning to interpretative commentary.

Not surprisingly, there are a number of Articles of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which are relevant. Article 1 states: 'For the purposes of the present Convention, the term "discrimination against women" shall mean *any distinction, exclusion or restriction* made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or *exercise by women . . . on a basis of equality* (my emphasis) of men and women, of human rights and fundamental freedoms in the political . . . field'.

In Article 2(d) States Parties undertake: 'To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation'. Both local and central government and their elected representatives are 'public authorities and institutions'.

Article 3 guarantees that: 'States Parties shall take . . . in particular in the political field, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms *on a basis of equality with men* (my emphasis).

Article 4 is the effective affirmative action clause. It reads: 'Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination'.

Article 7(b) reads: 'States Parties shall . . . in particular . . . ensure to *women, on equal terms with men, the right* (my emphasis) . . . to participate in the formulation of

government policy and the implementation thereof and to hold public office and perform all functions at all levels of government'. This Article is of particular importance to us in the context of the communication from the UNHRC in Broeks v The Netherlands, namely that the rights guaranteed in CEDAW were effectively details of the rights guaranteed in Articles 2 and 26 of the ICCPR.

For good measure I include Article 8: 'States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations'.

The two key terms for investigation were 'equality' and 'discrimination'. The Oxford English Dictionary entry on 'equality' suggests : "equal: the same in number, evenly balanced. M.E. f. L. *aequalis* (*aequus* even): equality: condition of being equal." Equality in the Aristotelian tradition, and adopted in law, has been 'formal equality'. Formal equality involves gender neutral treatment, the principle of treating everyone the same. Discrimination is overt, such as denying women the right to vote or to stand for public office, or excluding them from entry into different professions.

Paul Hunt explains: 'Formal equality has serious limitations, it assumes that by removing gendered legal barriers, men and women of similar talent and motivation will enjoy the same opportunities and achieve the same successes. Further formal equality treats discrimination as if it were an aberration which can be eliminated by extending the same rights and entitlements to all. Formal equality is blind to entrenched structural inequalities, it ignores actual social and economic disparities between groups and individuals. By constructing standards which appear to be neutral, it embodies a set of particular needs and experiences which derive from a socially privileged group. In this way formal equality may actually reinforce inequality'.

The model of formal equality uses a male standard of equality and renders women copies of their male counterparts. Thus women are forced to argue either that they are the same as men and should be treated the same, that they are different but should be treated as if they were the same, or that they are different and should be accorded special treatment.

Hilary Charlesworth argues that the norm of nondiscrimination contained in both the Human Rights Covenants is to place women in the same position as men in the public sphere. The activities of the Commission on the Status of Women generally have also been informed by the same approach. Thus the international prohibition on sex discrimination promises equality to women who attempt to conform to a male model, and offers little to those who do not. She contends that the measure of equality in (CEDAW) Article 1 is still a male one. And the discrimination it prohibits is confined to accepted human rights and fundamental freedoms. If these rights and freedoms can be shown to be defined in a gendered way, access to them will be unlikely to promote any real form of equality.

If my argument was to be confined to the language of the Covenants, that might have been the end of it. But Covenants are the coathangers for further articles of human rights garb. The UNHRC is authorised to make General Comments under Article 40 (4) of the ICCPR. It has used this power to develop a jurisprudence of the Articles of the ICCPR and to improve the quality of reporting under it. General Comments are perceived by the UNHRC to be a source expanding on and clarifying the protections of the Covenant.

The UNHRC General Comment on discrimination in 1989 refers to CEDAW Article 1 and adapts the same concept. 'The Committee believes that the term discrimination as used in the Covenant, should be understood to imply any distinction, exclusion, restriction or preference on the grounds of sex etc. which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms'. In 1990 the Chairman of the United Nations Human Rights Committee, Justice Rajsoomer Lallah, described the General Comments as 'gradually acquiring an authoritative character as representing generally acceptable standards'.

On non - discrimination the Committee stated that: 'The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. As long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant'.

In respect of Article 2(2) the Committee stated that the grounds of discrimination mentioned 'are not exhaustive'. They continued: 'De facto discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible'.

"Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved."

Finally the General Comment describes systemic discrimination as 'a complex of directly and /or indirectly discriminatory (or subordinating) practices which operate to produce general . . . disadvantage for a particular group'. The Committee also directs that 'when reporting on Articles 2 (1), 3 and 36 of the Covenant states' parties usually cite provisions of their Constitution or Equal Opportunities Laws with respect to equality of persons. While such information is of course useful the Committee wishes to know if

there remain any problems of discrimination in fact which may be practised both by public authorities, by the community or by private persons or bodies. The committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination'.

This General Comment makes it clear that a discriminatory intention is not necessary to establish direct or indirect discrimination. It doesn't matter whether discrimination is conscious or unconscious, intended or unintended.

The expert commentators in international law agree that meanings do evolve, and the meanings of 'equality' and 'discrimination' are no exception. Through the General comments of the UNHRC we have now been introduced to indirect or systemic discrimination. CEDAW has no specific reference to systemic discrimination but it does recognise the political environment providing for it. Article 5 (a) obliges signatories to take appropriate measures to 'modify . . . the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

The Australian Law Reform Commission have written that 'gender bias should be regarded as a form of discrimination, systemic in nature which prevents women from enjoying full equality before the law, equality under the law, equal protection of the law and equal benefit of the law'. Further, they explain: 'The concept of equality must be able to promote understanding of how the disadvantages suffered by women are created and maintained. It must be capable of exposing the relationship between social inequality and the law'.

This concept of equality is known as 'substantive equality'. Substantive equality demands an examination of the actual conditions experienced by groups and individuals and it requires the elimination of discriminatory structural barriers. Paul Hunt has illustrated the difference with a very clear example. 'The difference between formal and substantive equality is neatly illustrated by the removal of the apartheid laws in South Africa. Formal equality requires nothing more than the repeal of apartheid discriminatory laws and the prohibition of direct discrimination on the grounds of race. It ignores actual social and economic conditions which continue to structure land, education and so on, on a racial basis. In contrast substantive equality mandates the removal of apartheid's discriminatory laws, the prohibition of direct discrimination and the eradication of social, economic and political barriers impeding access to land, education and other services'.

As a source, whatever the debate is about meaning, the Covenants are concrete. Other sources in terms of international human rights law have both a selective and illusive quality. In customary international law states are seen to consent to the creation and application of international legal rules in terms of their general practice. Customary consent is not usually explicit, but evidence includes resolutions and recommendations of international conferences and public interest organisations, and the declarations of states.

What is more, the 'customary' behaviour of men towards women in a religious, ethnic or 'normal' context, is generally used to defeat any calls for women's human rights that would inconvenience 'customary', 'normal' male behaviour, whether of individuals, or collectively protected by the patriarchal state. Andrew Byrnes comments: 'A failure to be aware of and raise issues of gender can result in a distorted picture of patterns of human rights abuses, and can lead to an androcentric definition of substantive norms . . . Quite simply, if you are not looking for something (or at least aware that it might exist), then your chances of finding it are significantly reduced. The importance of being aware that sex and gender may be significant, asking what the position of women is and whether that is reflected in universal norms and taken into account in designing responses to human rights abuses has been demonstrated time and time again. However, it appears that too often, this dimension of a situation is not explored thoroughly, and such examination as there is limited to relatively formalistic invocation of androcentric standards of non - discrimination'.

After Covenants and customs we need to look at 'soft' law. So what has Australia signed on to in terms of soft law? Not surprisingly, there are now two decades of resolutions, recommendations and Platforms of Action from UN World Conferences on Women in Mexico City (1975), Copenhagen (1980), Nairobi (1985), and Beijing (1995). Typical of the language of these documents is paragraph 86 of The Nairobi Forward Looking Strategies For the Advancement of Women: "Governments and political parties should intensify efforts to stimulate and ensure equality of participation by women in all national and local legislative bodies and to achieve equity in the appointment, election and promotion of women to high posts in executive, legislative and judiciary branches in these bodies."

This language has not been limited to the Women's Conferences and Commissions. The UN World Conference on Human Rights in Vienna in 1993, the UN Social Development Conference in Copenhagen in 1995, and the UN Conference on Environment and Development in Rio de Janeiro in 1992 have carried similar statements. In the Objectives proposed for national Governments the Earth Summit endorsed the following: 'To increase the proportion of women decision makers', and to take active steps to implement 'policies and establish plans to increase the proportion of women involved as decision makers'.

The Vienna Declaration and Programme of Action of the World Conference on Human Rights 'deeply concerned by various forms of discrimination and violence, to which women continue to be exposed all over the world' stated that 'the full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community'.

Some government's vote for these declarations and resolutions in a cynical and cavalier fashion, because they are seemingly non obligatory. This is not the approach of the

Australian government. I have been fortunate in a number of forums to have had the experience of representation, and to watch the process for myself. If Australia doesn't agree with a paragraph, they don't vote for it. If they don't agree with a platform of action or similar at any stage, they enter reservations on specific paragraphs, or reject the whole. Their behaviour in international forums is exactly the same, no matter how soft the resulting resolutions or communiqué might be, and regardless of the nature of the forum.

Key 'subsidiary sources of international law, the judicial decisions of domestic courts' contain judgements on the issue of substantive equality. Here again we find theoretical dispute among the expert commentators in international law about the status of international and domestic law. In the New Zealand context, we find an evolution and transition in practice. The dualist theory in law envisages domestic law in the national legal system as being superior to international law which can be enforced only if it is incorporated into the domestic law. According to the monist theory, both are binding, and arise out of one system of law, but international law is superior.

In the Netherlands Covenant provisions are frequently invoked before the domestic Courts. As early as 1982, 34 judgements by the Courts referred to provisions, growing to 45 in 1984 and 58 in 1986. In Norway and Sweden the Covenants are regularly a legal standard for the Courts. They are used to fuel legal arguments and support decisions before the Courts, and the Courts have cited Covenants to guide interpretations of domestic statutes.

In New Zealand Covenants have finally been used to determine the application of a domestic statute. This took some time. The general theoretical position had been that international *treaty* standards were not directly enforceable in New Zealand Courts, while customary international law was part of the common law, and therefore 'directly enforceable'. This was particularly so if the terms of the statute which were in conflict with the international treaty standards were clear and unambiguous. In 1981 the New Zealand Courts declared: 'if the terms of the domestic legislation are clear and unambiguous they must be given effect in our courts whether (or not) they carry out New Zealand's international obligations'.

This basic position was reaffirmed in 1991. However the Court commented that it was increasingly recognised that 'even though Treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation, will do their best to conform with the subject matter in the policy of the legislation to see that their decisions are consistent with our international obligations'.

In the case of Tavita v. The Minister of Immigration the government's main line of argument was that the Minister and the Department were entitled to ignore the international instruments. The judgement said: 'That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window dressing . . . The law as to the bearing on domestic law of international human rights and instruments is undergoing evolution . . . The Balliol

Statement of 1992 (has a) reference to the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights . . . New Zealand's accession to the Optional Protocol . . . is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it . . . Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them'.

In reference to our next source of international law, precedents have established the relevance of decisions on the concept of 'equality' from similar jurisdictions. The most important of these judgements is from the Canadian legal system. The equality provisions in the Canadian Charter are designed to protect those groups who suffer social, political and legal disadvantage. Andrews v. Law Society of British Columbia contested s.15 of the Canadian Charter: 'everyone is equal before and under the law and has equal protection and benefit of the law'. In addition to the meaning of equality, the court examined what was meant by non-discrimination.

First, the Court established that if a barrier is affecting certain groups in a disproportionately negative way it is a signal that the practices that lead to the adverse impact may be discriminatory. Secondly the Court defined discrimination as 'a distinction whether intentional or not, but based on grounds relating to personal characteristics of individual or group which has the effect of imposing burdens, obligations or disadvantages on such individual group not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other members of society'. This was more than a question of formal equality.

In this concept, equality is 'ameliorative', looking to the reality of people's lives and what discrimination actually does to them. It doesn't matter if its the result of innocently motivated practices or systems. The intention is not the point. The outcome is the measuring rod.

The Canadian NGO, the Women's Legal Education and Action Fund (LEAF) made legal submissions to the Court in Andrews. LEAF argued that under s.15 equality should be understood as a matter of socially created, systematic, historical, and cumulative, advantage and disadvantage. Women suffer from social subordination, systematic abuse, and deprivation of social power, resources and respect, because we are women. Due to social inequality, women are not in the same situation as men. We cannot be treated as identical.

Justice McIntyre, writing for the majority in the judgement, noted that identical treatment may frequently produce serious inequality. 'To approach the ideal of full equality', the judgement says, 'the main consideration must be the impact of the law on the individual or group concerned. Consideration must be given to the content of the law, to its purpose and its impact upon those to whom it applies and also upon those whom it

excludes from its application'. It continues: 'the promotion of equality entails a promotion of a society in which all are secure in the knowledge they are recognised at law as human beings equally deserving of concern and respect and consideration. It has a large remedial component'.

The test adopted by the Court in Andrews determines discrimination in terms of disadvantage. If a person is a member of a persistently disadvantaged group and can show that a law, policy or behaviour maintains or worsens that disadvantage, it is discriminatory. No comparator is required. The requirement is to look at women as they are located in the real world in order to determine whether any systemic abuse and deprivation of power that women experience is due to their place in the sexual hierarchy.

When a policy or action appears gender neutral but has different effects on men and women that are unreasonable, the result is gender discrimination. Indirect discrimination is disguised in policies and practices which appear to apply to all persons equally.

Let's return to the Covenant guarantees. The ICCPR requires Australia 'to undertake to ensure the equal right of men and women to the enjoyment of all political rights'. CEDAW requires Australia to 'ensure to women, on equal terms with men, the right to participate in the formulation of government policy and its implementation and to hold public office and perform all functions at all levels of government'.

In the context of Article 1 of CEDAW, and the UNHRC General Comment on discrimination, and all the sources referred to, as well as the practice of Australia in the soft law forums, I don't believe an argument confining the definition of equality to formal equality can be sustained. If there continues to be, in the numbers of women elected to political office, distinctions, exclusions, restrictions and preferences on the grounds of sex, the effect of which is to nullify or impair the recognition, enjoyment and exercise of all rights and freedoms by all women, there is an active discrimination. This is called systemic discrimination.

We can bring the test suggested by LEAF to the situation in Australia . Can the lack of representation of women in Parliament, be understood as a matter of socially created systematic historical and cumulative advantage and disadvantage? Has there been an historical philosophy and experience of politics as an interaction and competition between men, with men cast as the rational political actors with the masculine qualities of leadership? Yes. Is there a lack of a well developed body of intellectual opinion and literature advocating women's participation in decision making? Yes. Is there evidence of institutionalised gender discrimination in public policy? Yes. Is there an implicit discrimination within the dominant male culture of established political parties? Yes. Are there traditional male assumptions regarding the selection system, the electoral system, constituency work, the timing, duration and location of meetings? Yes. Is there a patronage system in government appointments? Yes. Is there sexist language and behaviour in the House? Yes. Are women politicians treated differently from their male

colleagues in the media? Yes. Are women disadvantaged by their dual roles? Yes. Have women ever held political office on equal terms with men? No.

The test is then: can international human rights law, in particular ICCPR and CEDAW, support and deliver *substantive* equality. The answer must be yes if the test is based on powerlessness, exclusion, and disadvantage rather than on sameness and difference.

The important point is that it is the government's responsibility to solve the breach. Where the UNHRC issues 'General Comments', CEDAW issues 'General Recommendations' in its Annual Report. General Recommendation No. 5 states: "Taking note that . . . there is still a need for action to be taken to implement fully the Convention by introducing measures to promote de facto equality between men and women, . . . the Committee recommends that States parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and enjoyment'. Every article of the key documents on human rights begins with the words 'States parties' and then describes the obligation imposed on the state. However if the states' actors are always overwhelmingly men, this presents major obstacles in operationalizing those rights.

The advent of democracy based on equal representation will mean . . . a turning point in the democratic construction process. Equal participation by female citizens in the affairs of the polis will henceforth be considered a sine qua non of the completion of democracy. A democracy with out equal representation of women will no longer be seen as an imperfect democracy, but as no democracy at all.

The law is there and so are the mechanisms and what is missing is the political will. I situate women in their own reality. We are, universally, half of human kind. We are guaranteed equal rights to participate in political and civil life. Nowhere do we experience this equality in reality.

To refuse our participation with men on equal terms in political representation is a fundamental and universal breach of human rights, and a denial of full citizenship.