

FROM INDIVIDUAL TO GROUP ?  
IMPLICATIONS OF NICOLA LACEY'S PAPER IN THE LIGHT OF THINKING  
OF A NEW SOUTH AFRICAN CONSTITUTION.

Ms. Lacey's paper collates the effects of laws relating to gender and racist discrimination. In this regard she refers to both the Race Relations Act and the Sex Discrimination Act. She examines and evaluates the remedies and effective enforcement thereof available in anti-discrimination legislation to persons so injured. This she does by first looking at the feminist critique of anti-discrimination legislation and relating same to the realm of racism.

Generally stated Ms Lacey's conclusions are that:

*FOUNDATIONS OF ANTI-DISCR. LEG. & ITS DISCONCEPTION.*

FIRSTLY, the very definition and interpretation of anti-discrimination legislation lends the frustration of the intention of the individual litigant who has suffered from discrimination. This is due to several factors, all of which are connected to the misdirected assumptions that are made by courts in interpreting this form of legislation. These are;

a) That such legislation is founded on the doctrine of equal opportunity. This is the assumption that there are equal choices open to individuals to participate in any of society's activities. These are seen available to both the disadvantaged group (which the said legislation purports to protect) and its more fortunate counterpart.

b) That the occurrence of discrimination is abnormal. Whereas, she contends (and correctly so) the reverse is true. Discrimination is a product of society's development and an existing integral part of its normative values. However the courts' view of abnormality, will justify rulings that will only have a bearing on individual litigants. This leads to the supposition that lawsuits arising from discrimination have to be carried out by individual litigants

c) That the standard to be employed by courts to test "normal" <sup>behaviour</sup> behaviour is based on the model of the white male. Thus the standard by which courts are compelled by law to translate the needs of the individual litigant is based on the model of the needs of the average white male. This does not necessarily relate to the intended needs of the plaintiff in question.

d) That actions not specified as discrimination in terms of the legislation are legitimate even though they do in fact amount to discrimination.

CRITICISMS

SECONDLY, Ms. Lacey thereafter states the criticisms of critical legal theory and feminism in terms of the above assumptions. She states further that the same would apply to racism as it does to sexism. She suggests that this is the reason why the nature of anti-discrimination legislation resultantly has little effect as being a deterrent factor in stamping out discrimination, or for that matter in providing solutions for those who have suffered injury arising from discrimination.

Criticisms by the critical legal theorists and feminists on anti-discriminatory legislation are to wit:

a. Present legislation cannot be sufficiently redeemed due to the fact of the under-representation of the disadvantaged groups in the law-making structures themselves.

b. It thus shall continue to be a white male domain and shall continue to reflect those values.

*c. The doctrine of equal opportunity does not reflect the existing condition of being disadvantaged.*

THIRDLY, Ms Lacey recommends that in view of the above it would appear that the best remedy for this would be by replacing individual with group rights in situations arising out of discrimination. This she feels would be an appropriate response of the law to the scepticism of women and people of colour. A scepticism created by the inability of the law to attend to the problems of discrimination effectively.

The types of group rights, she has categorised as: CAPITALS.

a) Cultural: These are rights which accrue to persons of a certain language, ethnic, racial, and religious grouping. In the UK the existence of this rights has already been made available to individual persons by reason of their membership to a certain grouping.

b) Remedial: These are rights which focus on socio-economic advantage (or the lack of it), and the subject of her analysis in this paper.

*\*d. There exists the category of deeds unanticipated by legislation which are discriminatory*

ADVANTAGES:

collate = compare, contrast, correlate, equate, liken,  
match, relate, sort. 1

ego: <sup>id</sup> individuality, mind, persona, personality, psyche,  
ego = id. self, soul, spirit.

nicola lacey

FROM INDIVIDUAL TO GROUP?

Feminist perspectives of anti-discriminatory law

BY 10:30 should be completed.  
12:30 " complete Barry de V.  
2:30 " " Presidency.

rel. b/n feminist and anti-racist approaches

1. problems of sex discrimination law - inadequacy of available remedies

tribunal cases etc

lack of legal aid for

APPLY to race discrimination as well

*Assumptions:*

Underlying notion of equality of opportunity

① legal commitment to formal equality >>>> insufficient guarantee to fair treatment. Problems of the --- nature of the judiciary/tribunal in the hearing of such a case.

② The implication of the individual complaint

- makes comparison continuously b/n racism remedies and those applied to feminism as ineffective.

- normality of what is complained against.

- comparative aspects of antidiscriminatory law.

③ Problems of symmetry *In draft §111 Windsor the point is to here.*  
operates by way of decategorisation instead of categorisation ie drafting of this legislation.  
stress existence of same rts not to be discriminated against. framed in terms of *difference* and not *disadvantage*  
p10.

p23.

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responses of the law to the scepticism of women and blacks possible

the one canvassed by writer-

framework from which remedy possible

should be group as opposed to the individual.

>>>> legislature area of focus <<<

TYPES of group rights.

1. Cultural: (Rt. to be different) these accrue to persons of a certain language, ethnic, racial, and religious grouping.

existence of this right - to person by reason of their membership to a certain grouping. UK law.

2. Remedial: (Variant of affirmative action): focus on socio-economic advantage (or lack of it)

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a) That such legislation assumes that there is equal opportunity between the disadvantaged group (which the said legislation purports to protect) and its more fortunate counterpart. Thus the standard by which courts are compelled by law to translate the needs of the individual litigant is based on the model of the needs of the average white male. This does not necessarily relate to the intended needs of the plaintiff in question. *Move text to presumption of symmetry. Ass # 3.*

b) That the occurrence of discrimination is abnormal. This leads to the supposition that lawsuits arising from discrimination have to be carried out by individual litigants. Whereas, she contends the reverse is true. Discrimination is a product of society's development and an existing integral part of its normative values.

This she states

*(c) Problems of symmetry ass # 3.*

*\* To this end she looks @ the Race Relations Act and Sex Discrimination Act.*

*d) Ass # f: That treatment / actions not mentioned in the Acts are legitimate even if they are in fact discriminatory.*

# GROUP RIGHTS.

FEMINISM & ANTI-RACISM  
compared as sources  
of Group Rts.

nicola lacey

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ADVANTAGES of this approach:

DRAFT 1. As is Voetstoot

1. Procedural advantages to be reaped from a claim under the class action:-i) besides the solidarity factor.

-ii) wider relevance of the decision thereby effectiveness protected for the group and not just the interpretation accruing to an individual decision.

2. direct and overt legal recognition of discrimination. Politicises the legal process in a positive way.

DISADVANTAGES of this approach:

1. Addition of a group of rights to an otherwise unmodified structure of individual enforcement.

2. In the light of structures of individual rights being left in place, does this have any substantial effects on the status of group rights?

Does it not instead create competition b/n different groups?

3. Unger's school of thought (Superliberalism) Argues that the fixation of boundaries in terms of legal forms particularly in the avenue of entrenched rights is dangerous and oppressive.

there are no GROUP rights in other words *there are no groups.*

4. Group fragmentation and the diversity of the individual's interests. So that remedy obtained for the group may not be representative of all members of the group. Case of overlapping groups in competition with each other.

#### *The Dangers of Group Rights.*

Without agreeing with Roberto Mangabeira Unger, cautions against the usage of the concept of GROUP rights in certain instances. Eg the dangers that flow from the manner by which the racist societies themselves have used them.

*Plusalen v monolithic groups.*

#### GROUPS, LAW AND POLITICS.

Concludes by stating that

(A)

*The question of usage of political forum as opposed to courts of competent jurisdiction.*

Approach of the suggestions made in the foregoing have to take this into account. practical suggestions in support of this

- Constitutional courts. With accompanying training of judges et al as the legal solution.

*Yes. Why not.*

DRAFT 2

- governmental institutions.

Compromise would be that cts make a finding that group right has been violated. Then refer issue to govttal/quasi-govttal institution with effective enforcement powers.

More Yes. in SA.

(B)

*Towards the fulfillment of egalitarian pluralism.*

this is means a commitment to disadvantaged based groups, at large. Be these in any other sphere and may include classes, et al. Not necessary in the instance of SA.

(C)

left wing skepticism - abandonment of the legal process as an avenue of social struggle on the basis of the irreducible nature of oppression to be found there. A "neo-marxist" perspective.

admonishes against this.

Govt. Institutions.

Cts basis of analysis.

Groups constitutionally being  
religious }  
social }  
political }  
cultural }  
women }

Ref. made to Govt. Courts.

Absolute Res

1. To life;

SECRET

stored temp. in  
scrap.

Move Text:

- ① Select
- ② Press

- ① Delete Text.
- ② Move white to where you want to move text.
- ③ Press insert key.

Cancel.

Mask Belr.

CROXLEY  
SCRIPT

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2. direct and overt legal recognition of discrimination. Politicises the legal process in a positive way.

DISADVANTAGES of this approach:

1. system of group rights + unmodified structure of individual enforcement = marginalise racism and sexism.

PP