NO SHADOWS IN THE FOG: PERSONAL REFLECTIONS ON THE WORKING TO MAKE THE PROMISE OF EQUALITY A LIVED REALITY

Melina Buckley*

The pursuit of substantive equality is an ongoing struggle. I imagine the struggle for equality as a long journey, a road marked by forks, turning points and dead ends. I imagine many of us setting out on this journey, working in our own ways, alone and together; creating a dense network of pathways to our shared aspirational goals. This journey is to an unknown place, a land of full substantive equality for all, but there are numerous way stations en route where one can stop and assess the road travelled and the road ahead; to pause and perhaps to enjoy a small success, a reassurance that we are on a correct track.

These way stations can sometimes take the form of a deliberately created space and time to assess the journey's progress. These spaces can be well-planned and multi-faceted initiatives, such as the national forum entitled *Transforming Women's Future: Equality Right in the New Century* hosted by West Coast Legal Education and Action Fund in 1999 as part of its achieving equality in the new millennium initiative.[1] They can be stand alone publications containing multiple diverse perspectives such as this special volume of the University of New Brunswick Law Journal on the theme of *the promise of substantive equality: are we there yet?* They can also be generated at critical moments in the development of an equality-seeking legal strategy or triggered in a more impromptu fashion.

I experienced an unexpected way station during a recent appeal. A line of reflection about where we are was triggered for me by a comment made by Mr. Justice Donald of the British Columbia Court of Appeal in the course of a hearing on the constitutionality of hearing fees charged by the provincial government to the plaintiff for a day in court, fees that escalate substantially for longer trials.[2] Sharon Matthews Q.C. and I were representing the Canadian Bar Association - BC Branch as an intervenor in this matter. Our constitutional arguments were largely premised

---

* Melina Buckley is an associate with Camp, Fiorante, Matthews & Mogerman.

[1] The national forum contributed to the publication of *Transforming Women's Future: A Guide to Equality Rights Theory and Action* (M. Buckley, ed., West Coast LEAF, 2001) online: <http://www.westcoastleaf.org/index.php?pageID= 23 &parentid =22> [The Guidebook in English or Le Guide en francais]

[2] *Vilardell v Dunham,* 2013 BCCA 65, BCJ No 243.

on the constitutional norm of substantive equality and we had brought evidence regarding the adverse impact of the fees on certain groups, which amounted to, said we, a denial of equal access to justice.

The provincial Crown took the position that we could not argue equality rights because there was no pleading that the hearing day fees infringed s. 15 of the *Canadian Charter of Rights and Freedoms.* Mr. Justice Donald rejected this view and in clear and unguarded terms described his sympathy to the parties "just not wanting to go down that road." I paraphrase his comments here in a manner that I hope does them justice. He said something to the effect, that it came as no surprise to him that the Canadian Bar Association had stayed clear of framing a s. 15 argument given the "fog" that is s. 15 jurisprudence with its "countless ups and downs, twists and turns, and ins and outs." My jaw dropped (I hope not too noticeably) to hear such an apt description from the bench of the murky, gloomy miasma that characterizes the majority of s. 15 jurisprudence. Then I started to ponder the implications of foggy, impenetrable s. 15 analyses, and its impact on some of the equality work outside of the courtroom that has engaged me over the past few years.

THERE ARE NO SHADOWS IN THE FOG

All government institutions have the responsibility to respect, promote and fulfill constitutional rights and civil society institutions have an important role in encouraging and monitoring the full implementation of rights. Lawyers often focus on the role of courts in declaring rights and remedying rights violations. Courts, however, play a small, residual but still vital role in ensuring progress toward achieving substantive equality through legal means. Clear judicial pronouncements on the meaning and extent of equality rights norms not only regulate the specific matter before the court, these pronouncements cast strong shadows within which other legal change strategies can flourish, and where successful, can result in the actual enjoyment of equality extending well beyond the scope of the originating judgment.

My use of the term "shadow" in this context finds its origin in an oft-cited article by Robert Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce".[3] Mnookin and Kornhauser introduced an alternative way of conceptualizing divorce law: law operating not by imposing order from above in the courtroom but rather, by providing a framework within which parties to a marriage can gain the assistance required to negotiate post-dissolution rights and responsibilities. Similarly, substantive equality norms serve as legal shadowing, delineating the space within which equality-building work can take place. Legal

[3] Robert Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950.

shadows cast indirect light, shading rather than determining outcomes outside of the courtroom. The clarity of the legal norm correlates to its power to guide dialogue, negotiation and reform. I recognize that this definition of shadow does not comport with the laws of physics in a strict sense, but it is consistent with our understanding of what is meant by bargaining, or in this case equality-seeking, in the shadow of the law.

One example of clearly delineated substantive equality norms originates in the Supreme Court of Canada's decision on the extent of the duty to accommodate under human rights legislation in a case brought by Tawney Meiorin who challenged the validity of a mode of fitness testing required of forest firefighters.[4] The Court's decision in that case cast a long ultra-sharp legal shadow encouraging the proactive development of more inclusive, equal workplaces and the provision of public services.[5] I am hard-pressed to identify a comparable delineation of substantive equality rights norms in the Supreme Court of Canada's s. 15 jurisprudence. This is not to say this body of case law offers no assistance, there are shiny bits here and there, positive outcomes, strong turns of phrase (often in *obiter*) which litigators can and do weave together to craft substantive equality rights arguments. Certainly the Court has steadfastly described s. 15 as a substantive equality provision from its first decision in *Andrews*[6] to its latest decisions. Nevertheless, the fact is that this jurisprudence when viewed as a whole can be aptly described as a "fog" and a dense one at that. There are no shadows in the fog and this absence of shadows is detrimental to the shared goal of achieving substantive equality. Murky substantive equality rights norms disempower equality-rights seekers in the same measure that crystalline norms empower us to do this work.

In the courtroom, equality-seekers rarely have a an unfettered choice of legal framework, generally speaking their claims need to be based on either s. 15 or provisions in human rights legislation. Substantive equality rights norms flow back and forth between these two regimes, as enlarged by to some extent by equality doctrines developed under international and comparative equality rights law. Equality-seekers engaged in negotiating in the shadow of the law have greater flexibility in choice of normative order. As I reflect on my recent work, I realize that my colleagues and I rarely summon up s. 15 jurisprudence as the primary shelter for our efforts. I will illustrate my point through a brief description of the approach taken in two initiatives: a joint Canadian Bar Association-Nepal Bar Association project developing a guide to implementing constitutional equality rights under the

---

[4] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, SCJ No 46.

[5] I discuss the impact of this decision in greater detail in M. Buckley, "*Law v. Meiorin:* Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the Charter" in Fay Faraday, Margaret Denike, & M. Kate Stephenson , eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Irwin Law, 2006), 179-206, at 187-192.

[6] *Law Society of British Columbia v. Andrews,* [1989] 1 SCR 143, SCJ No 46.

new Nepali constitution and the Missing Women Commission of Inquiry in British Columbia.

IMPLEMENTING CONSTITUTIONAL EQUALITY RIGHTS IN NEPAL

The people of Nepal have been engaged in a period of constitution making since 2007.[7] The Canadian and Nepali Bar Associations developed and implemented a joint project from 2008 to 2011 to support democratic and constitutional developments in Nepal. One aspect of this larger Developing Democracy in Nepal initiative involved working with members of the Bar, the Constituent Assembly and civil society organizations to promote the adoption of strong equality-promoting constitutional provisions and proactive plans for implementation. I was a member of the team of Nepali and Canadian experts providing technical support to this initiative from 2008 to 2010.

One facet of this initiative a series of workshops on implementing constitutional equality rights with a focus on gender equality. The idea was to gather together key ideas, strategic options and specific examples employed in other countries as a starting point for facilitated dialogue within Nepal. The material developed for this purpose and refined through a collaborative workshop process was collated into a manual and resources designed to foster ongoing dialogue and action.[8] It was anticipated that these materials would inform the development of plans to implement constitutional equality rights, enhance capacity for implementation and assist in building human rights institutions and practice at this critical phase in Nepali history. As one of the resource people charged with gathering the key ideas, options and examples to share with our Nepali colleagues, I found this initiative to be an important opportunity to reflect on what lessons we might have to share from our own uncertain Canadian path toward achieving substantive equality.

What were the points to be highlighted from our journey thus far? A first critical point was that the right to equality be should recognized in the constitution in unequivocal terms that impose positive obligations on governmental actors. Constitutions matter but constitutional words are not self-executing: they do not come about simply because they are promised in a document. Even powerful words

---

[7] Nepal is currently governed by the Interim Constitution of 2007. An elected Constituent Assembly was originally scheduled to present a new constitution for ratification in May 2010. This task remains incomplete despite several extensions.

[8] *Implementing Constitutional Rights: Training Kit.* The kit includes a *Workbook*, a CD-ROM containing resources and facilitation guides and a discussion paper entitled *From Words of Promise to Lived Reality: Implementing Constitutional Equality Rights* (Kathmandu: Nepal Bar Association, October 2011). [*From Words of Promise to Lived Reality*]

without action remain merely an intention or a promise. This key idea was described in these words:

> The constitutional right to equality is a bridge or a legal tool to be employed to diminish and eventually erase the gap between the promise of equality and experience of inequality and to create a situation in which all can flourish in the lived reality of equality.[9]

The easy part, as it turned out, was to describe the roles and responsibilities of legislatures, executives, specialized human rights bodies, the courts, and civil society organizations in implementing equality rights.[10] We had a lot to say about action plans, indicators and monitoring.[11]

Looking back at this work in the context of this reflection, it is not surprising that few of the lessons we chose to share emanated from the s. 15 jurisprudence. Yes, we described the way *Charter* jurisprudence has repudiated formal equality and embraced substantive equality. When it came time to describing substantive equality norms and linking them to the achievement of lived equality for women, all of our examples came from the international legal order. We talked about how the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)[12] particularizes women's constitutional equality rights and it can serve as the "shadow" within which to negotiate the meaning of women's equality in Nepal including in setting of goals in the implementation plan. Beyond the delineation of the abstract categories of various forms of discrimination (adverse effects, multiple or intersecting, systemic) there was little inspiration to be found in the s. 15 jurisprudence that gave concrete meaning to the concept of substantive equality taking into account the actual living conditions of various groups of women with an emphasis on the most disadvantaged and marginalized.

REVIEWING POLICE CONDUCT IN AN EQUALITY RIGHTS FRAMEWORK

Section 15 jurisprudence turned out to be similarly unhelpful in developing a robust legal framework for the review of police conduct. The government of British Columbia established the Missing Women Commission of Inquiry in September 2010 with a central mandate to investigate and make findings of fact with respect to police investigations of cases of women reported missing from the Downtown Eastside of the city of Vancouver from January 1997 to February 2002 and to make

---

[9] *From Words of Promise to Lived Reality, supra* note 8 at 1.

[10] *From Words of Promise to Lived Reality, supra* note 8 at 17-34.

[11] *From Words of Promise to Lived Reality, supra* note 8 at 4, 14-16, 35-36. See also the *Workbook* and CD ROM of resources that are in this kit.

[12] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1 UNTS 1249 at 13, (entered into force 3 September 1981).

recommendations for the improvement of the initiation and conduct of missing women and suspected multiple homicides.[13] While the Inquiry centered largely on the horrendous crimes committed by serial killer Robert Pickton, it also acknowledged that the tragedy of missing and murdered women is one of the epic proportions that extends far beyond the deeds of one man and the time and place limitations of its terms of reference. The Commission released its report to the public on December 17, 2012.[14] I served as policy counsel to the inquiry with primary responsibility for the study commission aspects of the inquiry (as distinct from the formal hearings) and write from the perspective of one closely connected to this work.

Two of the focal points of the Commission's work were to study, understand and make findings of fact concerning the context of the missing and murdered women's lives and to review the police conduct within an equality rights framework. The report demonstrates, at least in these two respects, the operation of the shadow of substantive equality rights norms in a non-judicial forum.

Volume I of the Commission Report is entitled *The Women, Their Lives and the Framework of the Inquiry: Setting the Context for Understanding and Change*. It contains an overview of the international, national and provincial dimensions of the crisis of missing and murdered women[15] and brief portraits of the 67 women included within the Commission's fact-finding mandate.[16] The context of women's lives and deaths is reviewed under four main headings: the Downtown Eastside community, conditions of marginalization and vulnerability, the disproportionate number of Aboriginal women victims, and the survival sex trade.[17]

The Commission made a number of findings of fact based on this evidence:

> The missing and murdered women were members of one of the most marginalized groups in Canadian society. As a group, these women shared the experience of one or more disadvantaging social and economic factors: violence, poverty, addiction, racism, mental health issues, intergenerational impact of residential schools and so on. A disproportionate number of the women were Aboriginal; this is sadly consistent with the broader provincial and Canadian trend of Aboriginal

[13] The full terms of reference can be viewed online: <http://www.missingwomeninquiry.ca/terms-of-reference/>

[14] Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry.* Wally T. Oppal Commissioner (Vancouver: Missing Women Commission of Inquiry, November 19, 2012). Online: <http://www.missingwomeninquiry.ca/obtain-report/>. [*Forsaken*]

[15] *Forsaken, Volume I,* at 14-30.

[16] *Forsaken, Volume I,* at 32-76.

[17] *Forsaken, Volume I,* at 78-112.

> women being vulnerable of to all forms of violence, including a higher risk of going missing in circumstances likely involving foul play. The women's life stories, also profiled in the first volume, show that while not every woman had experienced each of these marginalizing conditions, most had experienced several of them.[18]

More specifically, the Commission found that a number of conditions contributed to the women's vulnerability to violence: grossly inadequate housing, food insecurity, health issues and inadequate access to healthcare, extreme poverty, and drug dependency.[19] The women's lives were structured to a large extent by drug addiction and the horrible consequences of drug sickness, and the Commission concluded that "withdrawal in itself posed additional safety risks."[20] The report notes that "there are symbiotic relationships between poverty, drug addiction and the survival sex trade."[21]

The Commission recognized in unflinching terms that the women's marginalized status meant that they were seen as "nobodies" by much of society and that their devalued, precarious social status made them the target of predators, like poor women across Canada and around the world.[22] This recognition inevitably leads to the question of whether the women's marginalized status also had an impact on the police investigations. This was one of the most contested questions before the Commission and it was answered in the affirmative. One of the report's main findings is that systemic bias played a role in the police failures.[23]

While the finding of bias has garnered headlines, little attention has been paid to the rationale for that conclusion. Volume I elaborates the Commission's approach to reviewing police actions within an equality rights framework.[24] Section 15 jurisprudence provides a conceptual foundation for these legal duties anchored as they are in the general definitions of substantive equality and a recognition of adverse effects and systemic discrimination. The contextualized norms needed to guide the equality analysis vis-à-vis police duties are derived mainly from US Department of Justice policy[25] and international human rights law both of which

---

[18] *Forsaken: Volume IIA,* at 1.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid,* at 2.

[23] *Forsaken: Volume IIB* at 217-238, 289-290.

[24] *Forsaken: Volume I,* at 114-127.

[25] United States Department of Justice, Civil Rights Division, *Investigation of the New Orleans Police Department* (Washington: Department of Justice, 2011), at 31-32. [*USDOJ*].

incorporate the notion of a proactive duty to protect women from violence. The Commission also relies on the judgment of the Ontario Superior Court in the *Jane Doe Case,* [26] which did create a very effective shadow for incorporating substantive equality norms into police conduct in sexual assault cases.[27]

Aside from the *Jane Doe Case*, the Commission had to look further afield for more refined substantive equality norms relevant to it mandate. The US Department of Justice's definition of discriminatory policy was developed for the purpose of reviewing US police forces' compliance with the US Constitution and federal civil rights law and specifically recognizes that discriminatory policing is manifested in the under-investigation and under-enforcement of crimes of violence against women.[28] The Commission also relied heavily on the more advanced international legal norms that emphasize the requirement that governments and governmental actors including police forces demonstrate "due diligence" in taking sufficient measures to respond to this violence against women and girls.[29] Under international law, the due diligence standard refers to the standard of care required of States to prevent, investigate, punish and provide remedies for acts of violence regardless of whether these are committed by State or non-State actors.

The standard of due diligence has been considered and applied by numerous courts as a practical tool allowing them to assess whether the state has met its human rights obligations to protect women from violence committed by both private and state actors. The Commission undertook a review of this international jurisprudence[30] and summarized this research in its report. The Commission concluded:

> While the requirements of due diligence depends on a case-by-case analysis, the courts have nonetheless provided some general guidelines. The obligation on state authorities includes several clear duties:
>
> - The duty to investigate promptly and effectively

[26] *Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al,* (1998) 39 OR (3d) 487, OJ No 2681, Ont Ct J (Gen Div). The Court found that the police had violated Jane Doe's constitutional rights to equality and her right to physical security and had failed in their duty to protect her and other women in her position. The Court held that Jane Doe was not simply discriminated against as a woman by the individual officers involved in the case but that systemic bias existed within the police force, which adversely impacted all women.

[27] See also the Commission's discussion of the role the *Jane Doe* case played in structuring a change process centered on an external audit of the Toronto police service's conduct of sexual assault investigations. *Forsaken: Volume III,* at 59.

[28] USDOJ at 43-50.

[29] *Forsaken: Volume I,* at 123-127.

[30] Missing Women Commission of Inquiry, *Violence Against Women: Evolving Canadian and International Legal Standards on Police Duties to Protect and Investigate* (Vancouver: Missing Women Commission of Inquiry, 2012), at 38-68.

- The duty to take effective judicial action
- The duty to take adequate prevention measures, and
- Heightened duty owed to particularly vulnerable groups.[31]

It is the substantive equality norms developed under US and international law that provided the framework for the Commission's findings and recommendations. The report includes fourteen recommendations designated as "equality-promoting measures."[32] They are aimed at further translating equality norms into police practices so as to contribute to the increased safety of marginalized and vulnerable women.

The Missing Women Commission of Inquiry has completed its work. The terrain of action has shifted to a whole set of individuals, institutions and organizations with the responsibility to implement the Commission's recommendations. Only time will tell whether the contextualization of the police failures in the reality of the missing and murdered women's lives and the framing of the failures within a substantive equality norms assists in creating the required space for the community-police dialogue required to effect real change. From my perspective, the Commission will achieve a measure of success if becomes a shadow within which women's equality can be advanced in concrete ways leading to enhanced safety for the most vulnerable women and girls in our communities.

CONCLUSION

My recent experiences with constitution-making in Nepal and the Missing Women Commission of Inquiry in British Columbia have underscored the foggy quality of all but the most basic elements of s. 15 jurisprudence and its consequent lack of utility as to shelter and inform equality-seekers working in the shadow of the law. Much work lies ahead in creating substantive equality norms in the context of *Charter* litigation. Creative approaches such as those fostered by the Women's Court of Canada[33] and other feminist legal judgment projects that allow greater space for imaginative legal analysis are one important path for getting unstuck from current s. 15 jurisprudence with its "countless ups and downs, twists and turns, and ins and outs." I am in no way arguing for abandoning the powerful words of constitutional equality – we need to reimagine and reinvigorate it. In the mean time we can rely on the shadows offered by substantive equality norms developed under alternate legal orders as briefly described in this reflection.

---

[31] *Forsaken: Volume I,* at 125.

[32] *Forsaken: Volume III,* at 56-85.

[33] For more information see online: <http://womenscourt.ca/>

Mr. Justice Donald did just that in rendering his judgment in the hearing day fee case mentioned at the outset. Without the benefit of s. 15 he was able to craft reasons that were sensitive to the unequal impact of fees on disadvantaged groups and the potential impact on a right of access to the courts. He said: "It has been demonstrated that the burden of hearing fees falls most heavily on women in family litigation, Aboriginal persons, those with disabilities and recent immigrants."[34] His solution to the constitutional dilemma was to read in a wider exemption into the Court rules to ensure that all individual who could not afford the hearing day fees would still have their day(s) in court. Just as importantly, he gave direction that proactive steps should be taken by advising litigants of the availability of the exemption so that it does not deter litigants and obstruct access.[35] The decision was not all that we had hoped for in terms of a broader recognition of the right of equal access to justice as a new 'shadow' for equality seeking work on this front. Crucially, it did not address many of the constitutional arguments concerning the invalidity of hearing fees *per se* upon which the trial judge had based his finding of unconstitutionality. The decision does, however, bring us one step closer to a lived reality of equality in this small dimension of the much larger agenda for equal access to justice. And this is a moment or way station to stop, reflect and celebrate a small victory.

[34] *Vilardell v Dunham,* 2013 BCCA 65, at para 39.

[35] *Ibid* at paras 39-40.