David Weissbrodt, Fionnuala Ni Aoláin, Joan Fitzpatrick, and Frank Newman, International Human Rights: Law, Policy, and Process (4th ed. 2006)

CHAPTER 5: INDIVIDUAL COMPLAINTS PROCEDURES UNDER INTERNATIONAL HUMAN RIGHTS TREATIES

A. INTRODUCTION

Chapter 4 has outlined that once a government has ratified a human rights treaty, it must comply with the treaty norms and procedures of implementation. This chapter focuses on another important procedure for treaty implementation, namely, individual complaint mechanisms. The U.N. has promulgated four significant human rights treaties that are in force and in which States parties have agreed to submit to individual complaints procedures. Those treaties include: the Covenant on Civil and Political Rights (Optional Protocol); the Convention on the Elimination of All Forms of Racial Discrimination (Article 14); the Convention on the Elimination of All Forms of Discrimination Against Women (Optional Protocol); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 22). The Covenant on Economic, Social and Cultural Rights does not have an individual complaints mechanism associated with it. The Committee on Economic, Social and Cultural Rights has, however, recommended the adoption of such a complaints procedure. The Convention on the Rights of the Child has a reporting system (Article 43) but no individual complaint procedure. An individual complaints procedure allows individuals who have experienced human rights violations to bring their complaints to the relevant treaty body, and if all the procedural hurdles for admissibility are surmounted, to gain an individual determination of the merits of their complaint, and a determination of responsibility of the state.

This chapter will focus principally upon the individual complaint procedure established by the Covenant on Civil and Political Rights (Article 41 & Optional Protocol), and under the Convention on the Elimination of All Forms of Discrimination Against Women (Optional Protocol). Many of the observations in this chapter also apply to other treaties with individual complaint mechanisms. The chapter begins with a discussion of the Civil and Political Covenant procedures, followed by an examination of those used by the Committee on the Elimination of All Forms of Discrimination. We then examine the application of the individual complaints procedure to a hypothetical case from Norway. The substantive rights under examination include the non-discrimination provision of the International Covenant on Civil and Political Rights -- Article 26 --, and Articles 4 (the use of temporary special measures),

Article 7 (non-discrimination in public office), and Article 8 (non-discrimination in representation) set out in the Convention on the Elimination of all Forms of Discrimination Against Women.

The chapter further provides examples of the difficult balance to be struck between protecting the rights of all persons equally and ensuring that human rights law takes sufficient account of historic and deeply entrenched discriminations. These structural inequalities which may have been faced by particular groups operate as a bar to the full realization of their rights in a contemporary setting.

The chapter also seeks to provoke an engagement with the issue of women's rights broadly defined. Ensuring equality and non-discrimination for women remains an ongoing challenge for states and for the international system alike. Despite progress since the adoption of the Universal Declaration on Human Rights, in many states women continue to experience exclusion, violence, as well as deeply entrenched formal and informal discrimination. This chapter will survey a number of these issues examining the rights of women focusing on the role and status of women in public life, based on a hypothetical problem from Norway. The chapter will review international standards for ensuring the equal participation of men and women in the public sphere with a specific emphasis on political participation. A critical issue will be to examine and identify the kinds of legal measures that can be taken to ameliorate the status of women. The chapter will also highlight obstacles, both formal and informal, to change the status and profile of women in public life with evident application to other public and private spheres.

B QUESTIONS

This chapter begins with a description of a hypothetical factual scenario. Students will be asked to assess which international forum may be most appropriate for seeking an individual remedy. Students will also be asked to consider what rights violations, if any, are implicated by the facts outlined. In order to provide an instructional and procedural context for discussion, students are asked to engage in a role playing exercise in which they serve either as members of the Human Rights Committee, members of the Committee on the Elimination of All Forms of Discrimination, representatives of the applicants, or representatives of the Norwegian Government. A wide range of countries should be represented in the membership of the relevant committee. Some Human Rights Committee members will argue that the legal provisions of the Norwegian Equality Act as well as other legal measures taken to advance women's participation in public life violate Article 26 of the Covenant and will seek to persuade the Norwegian Government to eliminate them. Some members

of the Committee on the Elimination of Discrimination will argue that Article 4 of the Convention applies to the Norwegian Equality Act, and will argue that the state should go further in its domestic legal measures.

The Norwegian Government's representatives will argue that the legal provisions, do not constitute a violation of the equality protections of either the Civil and Political Covenant on Civil and Political Rights or the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention). In the context of the Women's Convention the government will also assert that the relevant legislation and measures following constitute temporary special measures which are specifically allowed by Article 4 of the Women's Convention.

In the world wide comparisons of gender equality, the Nordic countries are regularly placed at the top of the country ranking lists. Norway has been one of the leading countries in this respect. As early as the 1970s came the first attempt to regulate the gender composition of public boards and commissions. The Norwegian Parliament adopted Gender Equality Act in 1981. The Act was intended by the government as a practical instrument for supporting and realizing de facto gender equality. Section 21 of the Act required that governing boards, counsels, and committees appointed by a public body be composed of at least 40% of each gender. The Local Government Act of September 1992, also has analogous provisions on gender representation on committees that are elected by city of municipal authorities. Also during the 1990s statutes favored the appointment of women to influential public positions. In recognition of the difficulties in this sphere and to have long term societal impact, reserved seats were introduced for female students in higher technical education in the late 1990s. In 1999, the first proposal to regulate representation on the boards of private companies was introduced. By 2004 the Norwegian Parliament required private companies to have 40% women appointed to their management boards. Political participation of women has also come under governmental scrutiny. In part to encourage the political participation of women, the major political parties have almost universally moved to a system of quotas. The principal rule among the major political parties is now that women and men shall be represented by at least 40%, on party lists for election to public office.

In light of that background information consider the following hypothetical cases.

Olav Teigen is a member of Norwegian Labour Party (Det norske Arbeiderpartiet). He has been an active and faithful party member for twenty years. He retired in September 2004 from his law practice in Bergen (the second largest city in Norway) and wished to devote his time to public life, and

specifically to a career in politics. He sought to have his name included on the Labour Party List in his local political constituency, making him eligible for selection as a candidate in the Norwegian parliamentary elections, and to run for political office in the Parliament (Stortinget). He was unsuccessful in this regard. Mr. Teigen believes that he was significantly disadvantaged in this political process because the Labour Party internal rules require that 40% of the candidates selected for party electoral lists must be women. He feels that because far greater numbers of men sought political nomination, it created unequal competition for the number of list spaces available to qualified male candidates. He also contends that his curriculum vitae and experience were considerably wider than any of the women selected for the party list. He contends that he has been subject to discrimination on the basis of sex, and wishes to challenge the party list system.

Kristi Peterson is an active member of the Norwegian Progress Party (Fremskrittspartiet). She was selected in September 2004 for the party's electoral lists, and stood for election in the constituency of Finnemark (a county in the extreme northeast of Norway which returns 5 seats to the national parliament) during the September 2005 elections. Ms. Peterson was not successful in her election attempt. She was very personally disappointed by the outcome, particularly because in the constituency of Finnemark no women were elected to parliament. She feels that she was personally disadvantaged because a number of her political opponents ran electoral campaigns that focused on gender differences, with an emphasis on the frailty of the female candidates, and the incompatibility of their family commitments with serving in public office. Ms. Peterson is of the view that the structure of the electoral process, and the lack of mandatory positive measures in parliamentary elections, specifically quotas for women constitutes a violation of Article 7 of the Women's Convention. She believes that in order to overcome historic discriminations for women in the public sphere substantial positive measures have to be taken and the Norwegian Government is not going far enough. Her view is that the failure of the Norwegian Government to take special measures to augment the representation of women in Parliament violates its international treaty obligations.

Assume that both Mr. Teigen and Ms. Peterson have exhausted all the relevant legal remedies available to them in Norway, and that both wish to take an individual complaint against Norway alleging breach of its international human rights obligations.

Consider the following questions in this regard.

1. As the legal representatives Mr. Teigen and Ms. Peterson, which international forum provides the best potential remedy for their respective complaints?

a. Is it possible that submitting each claim to a different treaty venue could produce a differing result based on differing treaty standards? If so, how?

b. Which violations of the International Covenant on Civil and Political Rights (Civil and Political) and which violations of the International Convention on the Elimination of All Forms of Discrimination are implicated by the facts outlined above?

[Consider the following questions which might be considered by the Human Rights Committee or by the Committee on the Elimination of All Forms of Discrimination, in examining these cases:]

2. Does it violate international human rights norms to establish quotas to support or encourage the participation of women in public life?

3. Under the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, does Norway have a legal basis to justify preferential treatment on the Party List system?

a. Is Norway required by Article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women to establish quotas for parliamentary representation?

b. How does the Convention on the Elimination on Discrimination justify the need for temporary special measures as outlined in Article 4? How does one reconcile the costs to particular individuals (specifically men) which may arise from the application of Article 4?

c. Are temporary special measures in violation of the international norms on equality?

d. How do different legal instruments (declarations, treaties, and judgments of other human rights bodies) articulate the non-discrimination requirements of international human rights law? Has there been a progressive change over time in the meaning of equality?

4. Why has the United States not ratified the Women's Convention?

a. Is the Bush administration's views on the political participation of women compatible with its views on the signing of the Women's Convention?

b. Why would it be in the US interest to ratify the Women's Convention?

5. Gender mainstreaming has been the primary mechanism deployed at the United Nations to respond to the requirements of the Bejing Platform for Action. Has it worked? If not, why not?

6. Are the implementation of Women's Rights inherently different from other kinds of rights? If not, why is the Women's Convention subject to so many reservations?

a. Are reservations to Article 2 of the Women's Convention compatible with the "object and purpose" of the treaty?

b. Why have these reservations been accepted by States' parties?

c. Are the views of the Committee on the Elimination of Discrimination Against Women (CEDAW) on these kinds of reservations binding?

d. How would you respond to states who have entered and not changed fundamental reservations to Article 2 and Article 16 of the Women's Convention?

7. Can international human rights norms effect and change the kinds of cultural and religious beliefs that lead to sexism and discrimination?

9. Should the international community expect countries with varying civil, political, economic, social, and cultural traditions to respect human rights standards in the same way? Is there room for diversity in the arena of women's rights?

10. How does violence against women affect political participation rights? Do you have to protect against violence first before moving to implement participatory rights?

C. INDIVIDUAL COMPLAINT PROCEDURES

1. The Civil and Political Covenant's Human Rights Committee

Article 28 of the Covenant establishes a Committee of 18 members, "persons of high moral character and recognized competence in the field of human rights" who are nationals of State parties but serve as independent experts. Article 31 requires that the Committee not include more than one national from any State party. In addition, "consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of

civilization and of the principal legal systems." In 2006 the elected members were from the following countries:

Argentina	France		Lebanon
Australia	Germany		Mauritius
Canada	India		Poland
Chile	Ireland		Tunisia
Colombia	Italy	United	Kingdom
Finland	Japan	United	States

All State parties convene every two years to elect half of the Committee, from candidates nominated by governments. Each member serves four years and may be re-elected.

Article 41 of the Covenant empowers the Committee to receive and consider complaints from one State party that another State party is not fulfilling obligations under the Covenant. No complaints have been filed as of the publication of this book.

Under the Covenant's First Optional Protocol the Committee may hear complaints from individuals subject to the jurisdiction of a State party to the Protocol who claim to be victims of violations of rights prescribed by the Covenant.

2. Human Rights Committee: Consideration of Communications Under the First Optional Protocol

In addition to the reporting and examination mechanism through which the Human Rights Committee implements the Civil and Political Covenant, the First Optional Protocol to the Covenant contains a mechanism whereby the Committee considers communications from individuals alleging Covenant violations by States parties. The Protocol grants authority to reach views on the merits, but the Committee does not issue judgments. Rather, it forwards its views to the individual and State party concerned. The Committee has, however, published views on some of the communications it has evaluated. The Optional Protocol is reproduced in Selected International Human Rights Instruments at 46. The following materials discuss the Committee's procedures under the Optional Protocol.

* * * * *

a. Committee Procedures

Report of the Human Rights Committee, 55 U.N. GAOR Supp. (No. 40), vol. I at 75, U.N. Doc. A/55/40 (2000):
. . .

CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL

529. Individuals who claim that any of their rights under the International Covenant on Civil and Political Rights have been violated by a State party, and who have exhausted all available domestic remedies, may submit written communications to the Human Rights Committee for consideration under the Optional Protocol. No communication can be considered unless it concerns a State party to the Covenant that has recognized the competence of the Committee by becoming a party to the Optional Protocol. Of the 145 States that have ratified, acceded or succeeded to the Covenant, 95 have accepted the Committee's competence to deal with individual complaints by becoming parties to the Optional Protocol . . .. Moreover, under article 12 (2) of the Optional Protocol the Committee is still considering communications from two States parties (Jamaica and Trinidad and Tobago) that have denounced the Optional Protocol, such communications having been registered before denunciation took effect.

530. Consideration of communications under the Optional Protocol is confidential and takes place in closed meetings (art. 5, para. 3, of the Optional Protocol). Under rule 96 of the rules of procedure, all working documents issued for the Committee are confidential unless the Committee decides otherwise. However, the author of a communication and the State party concerned may make public any submissions or information bearing on the proceedings unless the Committee has requested the parties to respect confidentiality. The Committee's final decisions (Views, decisions declaring a communication inadmissible, decisions to discontinue a communication) are made public; the name(s) of the author(s) is(are) disclosed unless the Committee decides otherwise.

A. Progress of work

531. The Committee started its work under the Optional Protocol at its second session, in 1977. Since then, 936 communications concerning 65 States parties have been registered for consideration by the Committee, including 63 placed before it during the period covered by the present report (1 August 1999-30 July 2000).

532. The status of the 936 communications registered for consideration by the Human Rights Committee so far is as follows:

(a) Concluded by Views under article 5, paragraph 4, of the Optional Protocol: 346, including 268 in which violations of the Covenant were found;
(b) Declared inadmissible: 283;
(c) Discontinued or withdrawn: 134;
(d) Not yet concluded: 173 of which 28 have been declared admissible.

533. In addition, the secretariat of the Committee receives large numbers of communications in respect of which the authors are advised that further information would be needed before their communications could be registered for consideration by the Committee. The authors of a considerable number of additional communications have been informed that their cases will not be submitted to the Committee, as they fall clearly outside the scope of the Covenant or appear to be frivolous. Other cases, not yet registered, are mentioned in section B below, together with the Committee's comments on this situation. . . .

536. Under the Committee's rules of procedure, in force as of 1 August 1997, the Committee will as a rule decide on the admissibility and merits of a communication together in order to expedite its work under the Optional Protocol. Only in exceptional circumstances will the Committee request a State party to address admissibility only. A State party which has received a request for information on admissibility and merits may within two months apply for the communication to be rejected as inadmissible. Such a request, however, will not absolve the State party from the requirement to submit information on the merits within the set time limit unless the Committee, its Working Group or its designated Special Rapporteur decides to extend the time for submission of information on the merits until after the Committee has ruled on admissibility. In the period under review, the Committee, acting through its Special Rapporteur on new communications, decided in several cases to deal first with the admissibility of the communication. Communications received before the new rules of procedure came into force will be dealt with under the old rules, according to which admissibility is considered at the first stage.

537. During the period under review, two communications were declared admissible for examination on the merits. Decisions declaring communications admissible are not normally published by the Committee. . . . Procedural decisions were adopted in a number of pending cases (under article 4 of the Optional Protocol or under rules 86 and 91 of the Committee's rules of procedure). The Committee requested the secretariat to take action in other pending cases. . . .

539. As the Committee has stated in previous reports, the increasing number of States parties to the Optional Protocol and better public awareness of the

procedure have led to a growth in the number of communications submitted to the Committee. . . .

542. The essence of the problem is that:
(a) The number of communications continues to increase in absolute terms;
(b) The number of Professional staff dealing with communications has decreased in each of the last four years;
(c) While this reduced staff has continued to process cases (of ever-increasing complexity) so that a sufficient number is available for the Committee's consideration at every session, the overall result has been an increase in the backlog of unprocessed communications;
(d) An increasing number of cases are being submitted in languages which are not within the competence of the available Professional staff, in particular Russian; the secondment to the staff for six months of a Russian speaker has improved but by no means eliminated the backlog.

543. There has been at the same time a further reduction in the ability of staff to find resources to support the Committee's programme for follow-up on cases where violations have been found: there are now 268 such cases where follow-up is desirable. . . .

C. Approaches to considering communications under the Optional Protocol

1. Special Rapporteur on new communications

546. At its thirty-fifth session, the Committee decided to designate a Special Rapporteur to process new communications as they were received, i.e. between sessions of the Committee. At the Committee's sixty-fifth session in March 1999, Mr. Kretzmer was designated Special Rapporteur. In the period covered by the present report, the Special Rapporteur transmitted 49 new communications to the States parties concerned under rule 91 of the Committee's rules of procedure, requesting information or observations relevant to the questions of admissibility and merits. In 11 cases, the Special Rapporteur issued requests for interim measures of protection pursuant to rule 86 of the Committee's rules of procedure. The competence of the Special Rapporteur to issue, and if necessary to withdraw, requests for interim measures under rule 86 of the rules of procedure is described in the 1997 annual report (A/52/40, vol. I, para. 467).

2. Competence of the Working Group on Communications

547. At its thirty-sixth session, the Committee decided to authorize the Working Group on Communications to adopt decisions declaring communications admissible when all five members so agreed. Failing such agreement, the

Working Group would refer the matter to the Committee. It could also do so whenever it believed that the Committee itself should decide the question of admissibility. While the Working Group could not adopt decisions declaring communications inadmissible, it might make recommendations in that respect to the Committee. . . .

D. Individual opinions

549. In its work under the Optional Protocol, the Committee strives to arrive at its decisions by consensus. However, pursuant to rule 94, paragraph 4, of the Committee's rules of procedure, members can add their individual concurring or dissenting opinions to the Committee's Views. Pursuant to rule 92, paragraph 3, members can append their individual opinions to the Committee's decisions declaring communications inadmissible. . . .

553. The following summary reflects further developments concerning issues considered
during the period covered by the present report.

1. Procedural issues

(a) Reservations to the Optional Protocol

554. In case No. 845/1999 (Kennedy v. Trinidad and Tobago), the Committee had to decide on the validity of a reservation made by Trinidad and Tobago upon its re-accession to the Optional Protocol on 26 May 1998. In the wording of the reservation the Human Rights Committee "shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith".

555. After having examined the reasons for the reservation, and recalling its General Comment No. 24 concerning reservations, the Committee concluded that it "cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol" (annex XI, sect. A, para. 6.7).* Four members of the Committee appended a dissenting opinion.

(b) Standing of the author (Optional Protocol, art. 1)

556. Under article 1 of the Optional Protocol, the Committee can only consider communications from individuals who claim to be victims of a violation of the Covenant. When the person presenting the communication to the Committee cannot claim to be or duly to represent a victim of a violation of a Covenant right, the communication is inadmissible under the Optional Protocol. . . . "The Committee has always taken a wide view of the right of alleged victims to be represented by counsel in submitting communications under the Optional Protocol. However, counsel acting on behalf of victims of alleged violations must show that they have real authorization from the victims (or their immediate family) to act on their behalf, that there were circumstances which prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the alleged victim it is fair to assume that the victim did indeed authorize counsel to proceed with a communication to the Human Rights Committee" (annex X, sect. C, para. 6.3)

(c) Inadmissibility ratione temporis (Optional Protocol, art. 1)

557. Under article 1 of the Optional Protocol, the Committee may only receive communications concerning alleged violations of the Covenant which occurred after the entry into force of the Covenant and the Optional Protocol for the State party concerned, unless continuing effects exist which in themselves constitute a violation of a Covenant right. . . .

(d) Claim not substantiated (Optional Protocol, art. 2)

558. Article 2 of the Optional Protocol provides that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration".

559. Although an author does not need to prove the alleged violation at the admissibility stage, he must submit sufficient evidence substantiating his allegation for purposes of admissibility. A "claim" is, therefore, not just an allegation, but an allegation supported by a certain amount of substantiating evidence. In cases where the Committee finds that the author has failed to substantiate a claim for purposes of admissibility, the Committee has held the communication inadmissible, in accordance with rule 90 (b) of its rules of procedure. . . .

(e) Claims not compatible with the provisions of the Covenant (Optional Protocol, art. 3)

561. Communications must raise an issue concerning the application of the Covenant. Despite previous attempts to explain that the Committee cannot function under the Optional Protocol as an appellate body where the issue is one of domestic law, some communications continue to be based on such a misapprehension; such cases, as well as those where the facts presented do not raise issues under the articles of the Covenant invoked by the author, are declared inadmissible under article 3 of the Optional Protocol as incompatible with the provisions of the Covenant. . . .

(f) The requirement of exhaustion of domestic remedies (Optional Protocol, art. 5, para. 2 (b))

563. Pursuant to article 5, paragraph 2 (b), of the Optional Protocol, the Committee shall not consider any communication unless it has ascertained that the author has exhausted all available domestic remedies. However, the Committee has already established that the rule of exhaustion applies only to the extent that those remedies are effective and available. The State party is required to give "details of the remedies which it submitted had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective" (case No. 4/1977 (Torres Ramírez v. Uruguay)). The rule also provides that the Committee is not precluded from examining a communication if it is established that the application of the remedies in question is unreasonably prolonged. In certain cases, a State party may waive before the Committee the requirement of exhaustion of domestic remedies.

(g) Interim measures under rule 86

565. Under rule 86 of the Committee's rules of procedure, the Committee may, after receipt of a communication and before adopting its Views, request a State party to take interim measures in order to avoid irreparable damage to the victim of the alleged violations. The Committee continues to apply this rule on suitable occasions, mostly in cases submitted by or on behalf of persons who have been sentenced to death and are awaiting execution and who claim that they were denied a fair trial. In view of the urgency of the communications, the Committee has requested the States parties concerned not to carry out the death sentences while the cases are under consideration. Stays of execution have specifically been granted in this connection. Rule 86 has also been applied in other circumstances, for instance in cases of imminent deportation or extradition which may involve or expose the author to a real risk of violation of rights protected by the Covenant. . . .

2. Substantive issues

566. Under the Optional Protocol, the Committee bases its Views on all written information made available by the parties. This implies that if a State party does not provide an answer to an author's allegations, the Committee will give due weight to an author's uncontested allegations as long as they are substantiated. . . .

F. Remedies called for under the Committee's Views

593. After the Committee has made a finding on the merits - its "Views" under article 5, paragraph 4, of the Optional Protocol - of a violation of a provision of the Covenant, it proceeds to ask the State party to take appropriate steps to remedy the violation, such as commutation of sentence, release, or providing adequate compensation for the violations suffered. When recommending a remedy, the Committee observes that: "Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views."

594. The Committee's recommendation in case No. 780/1997 (Laptsevich v. Belarus) is a new step towards more specific pronouncements on the remedy, in referring to the amount of compensation.

595. The compliance by States with these requests for information is monitored by the Committee through its follow-up procedure, as described in chapter VI of the present report.

VI. FOLLOW-UP ACTIVITIES UNDER THE OPTIONAL PROTOCOL

596. From its seventh session, in 1979, to its sixty-ninth, in July 2000, the Human Rights Committee has adopted 346 Views on communications received and considered under the Optional Protocol. The Committee found violations in 268 of them.

597. During its thirty-ninth session (July 1990), the Committee established a procedure whereby it could monitor the follow-up to its Views under article 5, paragraph 4, and it created the mandate of Special Rapporteur for the follow-up on Views (A/45/40, annex XI). From the Committee's sixty-fifth session, Mr. Fausto Pocar was Special Rapporteur for the follow-up on Views. At the sixty-

eighth session, Ms. Christine Chanet assumed the duties of Special Rapporteur for the follow-up on Views.

598. The Special Rapporteur began to request follow-up information from States parties in 1991. Follow-up information has been systematically requested in respect of all Views with a finding of a violation of the Covenant. At the beginning of the Committee's sixty-ninth session, follow-up information had been received in respect of 180 Views. No information had been received in respect of 74 Views. In five cases, the deadline for receipt of follow-up information had not yet expired. In two cases no follow-up reply was required. In many instances, the Secretariat has also received information from authors to the effect that the Committee's Views had not been implemented. Conversely, in some rare instances, the author of a communication has informed the Committee that the State party had given effect to the Committee's recommendations, although the State party had not itself provided that information.

599. Attempts to categorize follow-up replies are necessarily imprecise. Roughly 30 per cent of the replies received could be considered satisfactory in that they display the State party's willingness to implement the Committee's Views or to offer the applicant an appropriate remedy. Other replies cannot be considered satisfactory because they either do not address the Committee's recommendations at all or merely relate to one aspect of them. Certain replies simply indicate that the victim has failed to file a claim for compensation within statutory deadlines and that no compensation can therefore be paid to the victim.

600. The remainder of the replies either explicitly challenge the Committee's findings, on either factual or legal grounds, constitute much-belated submissions on the merits of the case, promise an investigation of the matter considered by the Committee or indicate that the State party will not, for one reason or another, give effect to the Committee's recommendations. . . .

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As mentioned above in its 2000 report, the Human Rights Committee created a formal follow-up procedure in 1990 to urge compliance with its decisions adopted under the Optional Protocol. It appointed Dr. Janos Fodor as the first Special Rapporteur for the Follow-Up on Views with responsibility for communicating with States parties and victims and monitoring compliance with its decisions. In 1993, Dr. Fodor was succeeded by Mr. Andreas Mavrommatis. In 1999, Mr. Fausto Pocar was designated as Special Rapporteur for the follow-up on views and in March 2000 Ms. Christine Chanet was asked to take that role..

In 1994, the Committee sought to increase the effectiveness of the follow-up procedure by endowing the Special Rapporteur with authority to conduct on-site fact-finding missions and, in 1995, the first on-site investigative mission took place in Jamaica. Following the Special Rapporteur's visit, the Jamaican Government agreed to comply with several Committee rulings that called for criminal sentences other than the death penalty. Beginning in 1995, the Committee sought to increase awareness of its follow-up efforts by including in its Annual Report a "black list" identifying all States parties that fail to cooperate with follow-up activities. See Markus G. Schmidt, Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform, 41 Int'l Comp. L. Q. 645, 650-53 (1992); Markus G. Schmidt, Portée et suivi des constatations du Comité des droits de l'homme, Remarks at the Colloquium of the Faculty of Law at the University of Montpellier (Mar. 6-7, 1995). Where insufficient or no follow-up information has been provided by a State party, the Committee regularly seeks information from the State during the examination of that State party's periodic report under article 40 of the Covenant. Recent examples include the Russian Federation, Suriname, Colombia, the Dominican Republic and the Czech Republic. See Committee on the Elimination of Racial Discrimination Follow-Up Procedure of the Human Rights Committee and the Committee Against Torture CERD/C/67/FU/1, 7 June 2005.

b. Committee Jurisprudence

Although adjudicative remedies are treated extensively in chapters 11-14, infra, this subsection discusses the Human Rights Committee's adjudicative functions as an important component of implementing the Civil and Political Covenant. The following materials focus on the Committee's interpretation of Articles 6, 7 and 26 of the Covenant.

Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 128-35 (1993) (footnotes omitted):

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Fifty-first session) concerning Communication No. 414/1990 at 2-6, U.N. Doc. CCPR/C/51/D/414/1990 (1994) (made public by decision of the Human Rights Committee):

Submitted by: Primo José Essono Mika Miha
Victim: The author
State party: Equatorial Guinea
Date of communication: 28 May 1990 (initial submission)
Date of adoption of Views: 8 July 1994 . . .

Adopts its Views under Article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Primo José Essono Mika Miha, a citizen of Equatorial Guinea born in 1940. . . . The Optional Protocol entered into force for Equatorial Guinea on 25 December 1987.

The facts as presented by the author:

2.1 The author is a former official of past governments of the Republic of Equatorial Guinea. . . . After the election and the installation of President Macias, the author resigned from his post and left the country together with his family for Spain, where he requested political asylum.

2.2 After the death of President Macias, the author returned to his country and took up [a government position]. In 1982, he once again left the country and sought refuge in Spain, as he feared persecution at the hands of the clan of Mongomo, to which Obiang Nguema (who had replaced President Macias) belongs.

2.3 On an unspecified date in the summer of 1988, the author returned to Equatorial Guinea, so as to actively support the activities of the opposition party (Partido de Progreso) of which he is a member. . . . [H]e was abducted by members of the security forces in a street of Malabo, the country's capital. He claims that he was handcuffed, blind-folded, and that a handkerchief was pushed into his mouth in order to silence him. He was told that President Obiang had ordered his arrest, but no further explanations were given . . ..

2.4 After his arrest, the author was detained on board of a ship and allegedly deprived of food and drink for one week. He was then transferred to the prison of Bata on the mainland where he allegedly was tortured for two days. . . .

2.5 The author does not specify the nature of the injuries sustained during torture but claims that he was subsequently kept in detention for well over one month without any medical assistance. . . .

2.7 As to the requirement of exhaustion of domestic remedies, the author submits that such judicial remedies as exist in Equatorial Guinea are totally ineffective. According to the author, the judiciary is directly controlled by President Obiang Nguema himself . . ..

The State party's observations:

4.1 . . . [T]he State party challenges the admissibility of the communication, arguing that it violates elemental norms of international law and constitutes an interference into domestic affairs of Equatorial Guinea . . ..

4.2 In this context, the State party explains that the author voluntarily relinquished his Equatorial-Guinean citizenship in 1982 and instead opted for Spanish nationality. . . .

The Committee's admissibility decision:

5.1 . . . [The Committee] dismissed the State party's contention that the author was not subjected to its jurisdiction . . . and further noted that the State party's acceptance of the Committee's competence under the Optional Protocol implied that considerations of domestic policy could not be advanced to prevent the Committee from considering claims from individuals subject to the State party's jurisdiction. . . .

5.4 On 16 October 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under [article] 7 . . . of the Covenant.

Examination of the merits: . . .

6.2 The Committee notes with regret and concern that the State party has not cooperated with it as far as the provision of information on the substance of the author's claims is concerned. . . . Accordingly, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.3 The Committee has noted the State party's contention that the Communication constitutes an interference into its domestic affairs. The Committee strongly rejects the State party's argument and recalls that when ratifying the Optional Protocol, the State party accepted the Committee's competence to consider complaints from individuals subject to the State party's jurisdiction.

6.4 The author has claimed, and the State party has not refuted, that he was deprived of food and water for several days after his arrest . . ., tortured during two days after his transfer to the prison of Bata, and left without medical assistance for several weeks thereafter. The author has given a detailed account of the treatment he was subjected to and submitted copies of medical reports that support his conclusion. On the basis of this information, the Committee concludes that he was subjected to torture at the prison of Bata, in violation of article 7; it further observes that the deprivation of food and water . . . , as well as the denial of medical attention after the ill-treatment . . . amounts to cruel and inhuman treatment within the meaning of article 7 . . ..

8. Under article 2 of the Covenant, the State party is under an obligation to provide Mr. Mika Miha with an appropriate remedy, including appropriate compensation for the treatment to which he has been subjected.

9. The Committee would wish to receive information, within 90 days, on any measures taken by the State party in respect of the Committee's views.

NOTES AND QUESTIONS

1. Do you think the Optional Protocol provides an adequate procedure for implementing rights prescribed in the Covenant?

2. Does it make a difference that the Committee expresses 'views' rather than binding legal judgements?

3. How can a body such as the Committee get governments to adhere to its requirements and decisions? The Human Rights Committee has adopted measures to follow up compliance by states with its views on individual communications, in recognition that compliance has been a problem.. What further efforts would you suggest?

3. As of September 2006, 147 states had ratified the Covenant on Civil and Political Rights but only 98 had also ratified the First Optional Protocol.

4.

5. Article 12 of the First Optional Protocol to the Civil and Political Covenant permits a government to withdraw from the application of the Optional Protocol as to communications submitted three months after the date the U.N. receives notification. Similarly, Article 41(2) of the Covenant permits a government to withdraw authorization from the Human Rights Committee to consider future complaints by other governments. There is no provision, however, in the Covenant for withdrawal or denunciation of the entire treaty. The Human Rights Committee has determined that once a government has ratified the Covenant it may not denounce or withdraw its obligations under the treaty. Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 61st session, 1997).

6. For additional reading, see Fionnuala Ni Aoláin, The Emergence of Diversity, 19 Fordham Int'l L.J. 101 (1995); The UN Human Rights Treaty System in the 21st Century (Anne F. Bayefsky ed., 2001); Alfred de Zayas, Petitioning the United Nations (remarks to a panel of the ASIL, April 2001); Alfred de Zayas, Jacob Th. Möller, & Torkel Opsahl, U.N. Centre for Human

Rights Geneva, Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee (1990 ed.); Human Rights Committee, Selected Decisions under the Optional Protocol -- Volume 2 (Seventeenth to thirty-second sessions), U.N. Doc. CCPR/C/OP/2 (1990); Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions), U.N. Doc. CCPR/C/OP/1 (1985); Manfred Nowak, U.N. Human Rights Committee: Survey of Decisions Given Up Till July 1990, 10 Hum. Rts. L.J. 139 (1990); Egon Schwelb, The International Measures of Implementation of the International Covenant on Civil and Political Rights and the Optional Protocol, 12 Tex. Int'l L.J. 141 (1977).

3. The Committee on the Elimination of All Forms of Discrimination Against Women

Article 17 of the Convention establishes a Committee of 23 individuals, "of high moral standing and competence in the field covered by the Convention" who are nationals of State parties but serve as independent experts. Article 17 requires that in selecting members consideration is given "to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems." In 2006 the elected members were from the following countries:

Algeria	Brasil	Italy	Phillippines
Bangladesh	Egypt	Jamaica	Portugal
Benin	France	Japan	Republic of Korea
China	Germany	Malaysia	Romania
Croatia	Ghana	Mauritius	Singapore
Cuba	Hungary		Netherlands

All State parties convene every two years to elect half of the Committee, from candidates nominated by governments. Each member serves four years and may be re-elected.

Article 18 of the Convention requires States to submit Reports to the Committee within one year when the treaty comes into force and thereafter at four year intervals outlining the legislative, judicial, administrative and other measures that the state has take to give effect to the Treaty.

Under the Convention's Optional Protocol the Committee may hear complaints from individuals or groups of individuals subject to the jurisdiction of a State party to the Protocol who claim to be victims of violations of rights prescribed by the Convention.

2. Committee on the Elimination of All Forms of Discrimination Against Women: Consideration of Communications Under the First Optional Protocol

In a important decision, the United Nations General Assembly, acting without a vote adopted on October 6, 1999 a 21 Article Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. When a state ratifies the Optional Protocol, it recognizes the competence of the Committee on the Elimination of All Forms of Discrimination Against Women, to receive and consider complaints from individuals and groups within its jurisdiction. The Protocol contains two procedures: (1) A communications procedure which allows individual women, or groups of women, to submit claims that their rights have been violated. The Protocol sets out the criteria which have to be met for a claim to be considered by the Committee. (2) The Protocol also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights. In both cases, the State must be a party to the Convention and to the Protocol. The Protocol includes an "opt-out" clause, allowing states up to ratification or accession to declare that they do not accept the inquiry procedure. Article 17 of the Protocol explicitly provides that no reservations may be entered on its terms. The Optional Protocol entered into force on 22 December 2000.

* * * * *

a. Committee Procedures

NOTES AND QUESTIONS

1. As of August 2006, 184 states had ratified the Convention on the Elimination of All Forms of Discrimination Against Women. There were 79 state parties to the Optional Protocol on the Convention on the Elimination of All Forms of Discrimination Against Women. The United States has signed the Convention (17 July 1980) but not ratified it.

2. The Convention on the Elimination of All Forms of Discrimination Against Women has been subject to significant reservations by many states. The Convention provides that ratification can take place subject to reservations, provided that the these reservations are compatible with the object and purpose of the Convention. A number of states have entered reservations on the grounds that particular articles are not compatible with national law, tradition, religion or culture. Some reservations are drawn so widely that their effects are not limited to particular provisions of the Convention. The CEDAW has expressed its concerns about the number of reservations to the Treaty and in particular

reservations by states on Article 2 and 16. The Committee has taken the view that neither traditional, religious or cultural practices not incompatible domestic law can justify violations of the Convention. In this context the Committee has made a statement on reservations, calling on states to re-examine their self-imposed limitations and to seek full compliance with all the principles of the Convention. See Report of the Committee on the Elimination of Discrimination Against Women (1998) (GA A/53/38/ Rev.1)

3. For further additional information on reservations to the Women's Convention , see:

4. Compare and contrast the Convention on the Elimination of Discrimination's individual complaint procedures with those of the Human Rights Committee.

5. The body charged with monitoring, implementing, and enforcing the Economic, Social and Cultural Covenant is the Economic and Social Council (ECOSOC), which has delegated its responsibility to the Committee on Economic, Social and Cultural Rights. Substantive discussions have been underway

6. For general reading, see:

P.R. Ghandhi, The Human Rights Committee And The Right Of Individual Communication: Law And Practice (1998);

Lawyers Committee For Human Rights, The Human Rights Committee: A Guide For NGOS (1997);

Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1991);

Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (1993) (discussing the Covenant by article);

Michael O'Flaherty, Human Rights and the UN: Practice Before the Treaty Bodies (1996).

D. THE SITUATION IN NORWAY

1. The Social and Legal Context in Norway

Norway is a western democratic state with a solid national and international record for its protection of human rights, and a reputation for its commitment to rights enforcement.

* * * * *

Eva-Maria Svennson, Contemporary Challenges in Nordic Gender Equality Policies and Law Working Paper (2006) (footnotes omitted): . . . The Nordic countries, particularly Sweden, are well-known throughout the world as leading countries concerning gender equality policy. . . .

In this paper, some contemporary challenges for Nordic gender equality policy and law are pointed out. But first, I will briefly describe the Nordic (equality) model and Nordic gender equality policy and law. The Nordic model is described as a combination of two models, the liberal and the communitarian.. . .

Nordic equality stands at a Crossroads, as argued in an anthology 2004. Equality is a main characteristic in Nordic democracy both as an issue of social and economic equality and gender equality . The entirely idea of democracy, with its legitimacy from equal and participating citizens, is put under pressure . . . .

Challenges for democracy in the 21st century are, according to the report, the internationalisation of economy, the interplay between democracy and economy, several levels of governing through (new) political bodies, a new media landscape with increasing capability to spread information and communication, changes in public sector as well as concerning activity in political and popular movements. These challenges also address and influence the understanding of the notion equality and the relation between the government and the citizens.

The Nordic equality model has its historical roots in the nation state formation based on egalitarian and communitarian elements. 'The Scandinavian aura' sometimes hovering the Nordic countries, may be defined as "welfare state, gender equality, and common legal heritage". . . .The present understanding of Nordic equality is however a product of a little less than hundred years of progressive social policy, called social engineering. The 'Nordic model' usually connotes distributive justice and a substantive notion of equality. Faith in the state's ability to promote (social) equality and gender equality through legislation has been virtually unwavering . . ..

The state is understood as good and almost the same as the society and the citizens have trust in the state. The progressive social policy and equality policy

are based on economic growth, progressive welfare and educational policies as well as presence of women in policy and in labour force. And the values are solidarity, progress and equality, both economic, social and gender. These shared values are understood as demanding homogenity and based on the ideology of sameness.The society has been understood as a homogeneous one and issues related to multiculturalism and pluralism have only recently come onto the agenda. In fact, for Sweden the image of the homogeneous society is not corresponding to the truth. Immigration has been extensive since the1950s and today (2004) every ninth person is born in another country than Sweden (1,1 million).

Approximately 20 % of the population are immigrants of the first or second generation. But the image still is one of a homogeneous society. The aim for immigration policy has been integration. Progressive welfare and educational policies have been important factors in achieving a relatively equal society.

The notion of equality is ambiguous. In international feminist research the notion of equality has been criticised as individualistic and too limited to affect structural inequalities and to deal with a social wrong. Furthermore, it has been criticised as giving protection against the state and not against (more) powerful individuals. Equality is also understood formally instead of substantivelyThis understanding of equality, a formal equality of individuals, is connected to justice as it is understood in both classical liberalism (and to the Aristotelian formulation ”like cases should be treated alike and unlike cases unlike”) and modern liberalism. (Formal) justice is based on (formal) equality among members included in certain classes or categories. ”Such a principle provides no answer to questions of what cases should be regarded as alike or unlike or which differences are morally and legally relevant”, and ”(a) moral criticism of substantial justice is not possible on the basis of such formally equal justice”, as expressed by Nousiainen with reference to Westerman. The international feminist critique of the notion of equality and its connection to justice is primarily directed towards a tradition, here called the liberal model, and the suggested solutions to deal with inequalities between men and women have common features with a tradition in this paper called the policy model. The two ideological models are of course simplifications. In this context they are used as starting-points for an analysis of Nordic gender equality policy and law. They are not descriptions of contemporary societies. The purpose with the models is to illustrate two contradictory ways of understanding equality in order to understand the ambiguous character of equality. They can also serve as tools to analyse the difference between (gender equality) policy and law.

In the Nordic context, equality (both social, economic and gender equality) is less the achievement of a resolute equality policy and legal reform than a result

of extensive welfare policies, such as collective labour market negotiations and redistributive social and regional policies, aiming at the reduction of differences and social inequalities. But at the same time, the welfare policy is based on self-supporting individuals deeply rooted in the labour market and consequently on a model of the dual-breadwinner family. And, what is more, in the Nordic setting, the rights discourse easily turns into a discourse on responsibilities.

The Nordic equality model is a mixture between the two models, the liberal and the policy model, and embraces two equality discourses, formal equality on the one side and substantive equality on the other. When it comes to social and economic equality it is less achieved through a specific equality discourse than progressive welfare and social policies. The notion of equality is less used than notions of egalitarian distributive justice and solidarity. The discourse known as the equality discourse is primarily a liberal discourse and both formal equality and the more recently developed notion substantive equality emerge from the liberal tradition, I would say, even if the substantive equality has much in common with progressive welfare and social policies.

* * * * *

Hege Skjeie & Mari Teigen, Political Constructions of Gender Equality: Travelling Towards ... a Gender Balanced Society? 13 Nordic Journal of Women's Studies 187-97 (2005)

In worldwide comparisons of gender equality, the Nordic countries are regularly placed at the top of the country ranking lists. Yet, in all these ''best practice'' countries, patterns of strong institutional male dominance tend to persist, as large-scale national surveys have shown . . .

Gender quotas have played a prominent role in Norwegian gender equality policies - probably more so than in the other Nordic countries . . . A diverse set pf (re)distributive regulations have over the past 30 years been put in place. National laws regulate the gender composition of publicly appointed boards and committees at state and municipal level as well as the gender composition of the boards of public and private companies. In five out of the seven major political parties, internal regulations set guidelines for the gender composition of party bodies and party electoral lists. All these quota regulations are phrased as minimal rules for gender balance. They do not impose a literal balance—a 50%-50% distribution of women and men - but rather a form of adjustable/flexible gender balance thresholds of 40%–60%.

Contradictory tendencies inform the formulation of Norwegian gender equality policy. Firstly, proponents for gender balance regulations advocate radical for gender balance regulations advocate radical redistributive measures, but they do

this mainly with the support of a rhetoric underscoring consensual gradualism and shared societal projects and values —that is, . . . the gender equality journey. Secondly, political arguments in favour of gender balance rarely reflect upon the justice/ injustice embedded in or expressed through gender-skewed participation per se, but rather tend to promote gender balance with reference to the ‘‘greater good’’ the balanced participation will create.In official gender equality rhetoric, allusions to travelling and utility arguments combine to form a particular appeasement strategy—they represent a ‘‘catch-all’’ rhetoric which hides more fundamental contestations over gender balance policies. Thirdly, both state and party-initiated quota policies are strictly limited to gender only. No measures have been introduced to secure participation from for instance ethnic minorities in party politics, on public boards and committees or in work places, for that matter. Quite the reverse; in this respect institutional targets or methods to achieve “fair representation” . . . have been explicitly rejected by the government. Generally speaking, policies for achieving gender balance do not stress other important aspect of balanced participation. . . .

In the context of 1980s elaborations on Nordic state feminism, Helga Hernes outlined three major—observationally based—arguments for participatory demands . . . She distinguished between the democratic right to participation (the justice argument), an argument about women’s important contributions (the resource argument), and an argument about conflicting gender-structured political interests (the interest argument). In actual political debate, all three kinds of arguments were often intertwined . . . As Marian Sawer has observed, arguments about justice regularly need to be supplemented by utility arguments to convert power holders to the cause . . . An analysis of party political conceptualizations, which included interviews with members of Parliamnet and the then world famously mediated Women’s Cabinet headed by Gro Harlem Brundtland, revealed the importance of a ‘‘rhetoric of difference’’ supporting internal party quota policies and gender sensitive nomination politics in Norway . . . This rhetoric primarily stressed women’s and men’s different contributions to political life, based on different (gendered) perspectives and experiences. The inclusion of women was thought to challenge and change established political priorities within all the major political parties (although in somewhat different, party-specific ways).

In the first attempts to regulate the gender composition of public boards and commission in the late 1970's, one major argument from the committee preparing the legislation was that women would contribute to a broader representation of ‘‘the public point of view” . . . Next was an argument about the just distribution of these influential positions. When reserved seats for female students were introduced in higher technical education in Norway in the late 1990s, women were held to provide a new, and much needed, focus on

communication skills and user-friendliness. . . . equality initiatives directed towards the private sector of the economy in the 1990's were supported by arguments for profit. They stressed how a continuing neglect of competent women hurt businesses as they were not able to realize their full profit potential. When the first proposal to regulate the boards of private companies was presented, in 1999, the ministry in charge made use of all three main types of arguments. . . .

The combination of travel allusions and utility talk in arguments about gender equality tends to distort the rights basis of equality claims. This happens regardless of how women's rights to equality are secured transnationally as human rights. CEDAW . . . make it clear that it is the obligation of the state to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, and to pursue a policy which realizes the principle of equality in practice. This includes an obligation to take all appropriate measures to eliminate cultural and social patterns, prejudices and practices which are based on the idea of the inferiority or the superiority of either of the sexes. Equal participatory rights are core rights in the Women's Convention.

How do participatory rights relate to actual political measures/state initiatives to secure gender balanced distributions in different societal arenas? Can such measures be thought of as genuinely participatory, or are they mainly reparative?

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2. The Norwegian Gender Equality Act (Amended by the Act of 14 June 2002 No. 21 (in force from 1 July 2002 pursuant to the resolution of 14 June 2002 No. 535)

Section 1. The purpose of the Act
This Act shall promote gender equality and aims in particular at improving the position of women.
Women and men shall be given equal opportunities in education, employment and cultural and professional advancement. . . .
Section 2. The scope of the Act
This Act shall apply to all areas, except for the internal affairs of religious communities. . . .

Section 3. General clause
Direct or indirect differential treatment of women and men is not permitted. The term "direct differential treatment" shall mean actions that

1) discriminate between women and men because they are of different sexes,
2) place a woman in a worse position than that in which she otherwise would have been because of pregnancy or childbirth, or place a woman or a man in a worse position than that in which the person concerned otherwise would have been because of her or his exercise of rights to take leave of absence that are reserved for one of the sexes.

The term "indirect differential treatment" shall mean any apparently gender-neutral action that in fact has the effect of placing one of the sexes in a worse position than the other.

In certain cases, however, indirect differential treatment is permitted if the action has an objective purpose that is independent of gender, and the means that is chosen is suitable, necessary and is not a disproportionate intervention in relation to the said purpose.

Section 3a. Affirmative action in favour of one of the sexes

Different treatment that promotes gender equality in conformity with the purpose of this Act is not a contravention of section 3. The same applies to special rights and rules regarding measures that are intended to protect women in connection with pregnancy, childbirth and breastfeeding.

The King may prescribe further provisions as to which types of different treatment are permitted in pursuance of this Act, including provisions regarding affirmative action in favour of men in connection with the education and care of children.

. . .

Section 8. Associations

An association shall be open to women and men on equal terms when
1) membership of the association is of significance for the individual member's opportunities for work or professional advancement, or
2) the object of the association is essentially to contribute to the solution of general social problems.

The provisions of the first paragraph shall not apply to associations where the main object is to promote the special interests of one of the sexes.

Section 8a. Sexual harassment

No person may subject another person to sexual harassment.

The term "sexual harassment" shall mean unwanted sexual attention that is

offensive to the object of such attention. Sexual harassment is considered to be differential treatment on account of gender.
. . .

Section 10. Enforcement of the Act

The King will appoint a Gender Equality Ombud and a board - the Gender Equality Board of Appeals - to assist in the implementation of this Act. Subject to such limitations as derive from section 2, second paragraph, the sphere of activity of the Ombud and the Board of Appeals shall comprise all private enterprise and public administrative and commercial activity. The Ombud will be appointed by the King for a term of six years at a time.

The Board of Appeals shall consist of seven members with personal deputies. Two of the members and their deputies shall be appointed on the recommendation of the Norwegian Federation of Trade Unions and the Norwegian Employers' Confederation respectively.

The King will appoint the chairperson and deputy chairperson, one of whom shall fulfil the conditions prescribed for judges.

* * * * *

Committee on the Elimination of All Forms of Discrimination Against Women, Consideration of Reports submitted by State parties under Article 18 of the Convention of All Forms of Discrimination Against Women, Sixth Periodic Report of States Parties Norway CEDAW/C/NOR/6 (2002)

This is Norway's sixth periodic report to the UN on the implementation in Norway of the UN Convention on the Elimination of All Forms of Discrimination against Women. The report covers the period 1998-2001, and was completed in May 2002.

. . .

In autumn 2001 the Ministry of Children and Family Affairs asked all the other ministries for contributions to the report in their fields. In addition, about 30 women's NGOs and other groups that work with women's and gender issues were asked for their views. The ministry on the basis of the material it had received then prepared the first draft of the report. The draft was presented at a public consultation meeting to which the above-mentioned NGOs and groups had been invited. This provided us with valuable input that was incorporated into the final report.

. . .

PART I Legislation, Structure of Gender Equality, and Basic Rights

Article 2b. The Gender Equality Act

The Act amending the Gender Equality Act was passed by the Norwegian parliament (the Storting) on April 29, 2002. The Act will be given royal assent before the summer. Most of the changes are expected to take effect immediately upon royal assent, but certain provisions will not enter into force until the end of the year. This applies to changes that affect private- and public-sector businesses, such as section 1a, third to fifth paragraphs, and amendments to the Local Government Act and the Accounting Act respectively, all of which concern the duty to include a statement on gender equality status, measures, etc. in their annual reports, etc.

The Scope of this Responsibility

The Gender Equality Act previously required that public authorities should promote gender equality in all sectors of society. The duty is both sharpened and extended with the Act passed on April 29, 2002, and it now also applies to the private sector. Employers and employees and their organisations are instructed to promote gender equality within their activities and their areas of responsibility.

The duty to work for gender equality implies a demand on public authorities; employers and organisations not simply to avoid discrimination but to actively implement concrete steps to promote gender equality. Activities in this regard should be both planned and focused.

The changes in the Gender Equality Act are a further advancement of the principles of the United Nations Convention on Women, with regard to the duty of its participants actively to promote gender equality and to eliminate every form of discrimination between women and men.

. . .

Affirmative action and education

The rules regarding access to affirmative action in relation to admission to work related education are, with the amendments made, commensurate with the regulations at large. Although the law, in the area of education, previously only gave access to a moderate quota system, it can now employ a radical quota system.

Among other things, the change is based on the desire to combat gender segregation in the labour market, which must be seen in connection with the wage differences between men and women.

The change is in line with the Women's Convention, wherein access to a radical quota system is available when the purpose is to further real gender equality.

Sexual Harassment

Sexual harassment has widespread negative consequences for the individual as well as for the entire working- or educational environment in which the harassment is taking place. The government aims at combating this problem. A new provision on sexual harassment has therefore been added to the Gender Equality Act. The provision contains a general prohibition against sexual harassment stating that sexual harassment constitutes discrimination on the basis of gender. The prohibition shall pertain to all areas of society and shall be enforced by the courts.

In addition to a general prohibition against sexual harassment, employers, organisations and educational institutions are charged with a responsibility to prevent and bring to an end sexual harassment. The standard of evaluation set by this protection rule shall be based on whether or not the responsible party has done enough to prevent sexual harassment from taking place within his/her area of responsibility. The standard of evaluation is not on whether or not sexual harassment has occurred in a particular case. This protection rule is to be enforced by the Gender Equality Ombudsman and the Gender Equality Board of Appeals. The provision will supplement existing regulations in the Act relating to workers protection and working environment.

Article 2c. National Bodies dealing with Gender Equality

The Ministry of Children and Family Affairs is the ministry responsible for gender equality issues in Norway.

The Gender Equality Ombudsman and the Gender Equality Board of Appeals enforce the Gender Equality Act. One of the most important aspects of the Act is the establishment of an Ombudsman as a specific and independent control body to ensure compliance. The existence of a body that deals with complaints on gender discrimination free of charge makes it easier for the public to file such complaints.

The number of complaints received by the Ombudsman has steadily increased since the mid-1990s. This trend continued in 2001 as the Ombudsman registered

a total of 337 cases, compared to 266 cases in 2000. In addition to the written cases, the Ombudsman gives extensive legal counselling based on telephone inquiries, of which there were 525 in 2001. This is an increase from 2000, when the Ombudsman responded to 417 telephone inquiries.

. . .
In 34% of the cases reported in 2001, the Gender Equality Ombudsman concluded that a violation of the Act had occurred. In 37% of the cases, the conclusion of the Ombudsman was the opposite. In 13% of the cases, the Ombudsman found questionable circumstances, but did not explicitly state that a violation of the Act had occurred. The remaining cases were closed without their factual aspects being debated and without reaching a conclusion. Most of these cases were closed because the parties involved came to an agreement before the case was concluded.

Women brought about 50% of the 2001 cases. Men brought 30% of the cases, whereas different organisations raised the remainder, either on behalf of individuals or because they asked questions of a more general character. In some cases the Ombudsman also independently initiated investigation.
. . .
Article 4.1 On Special Measures for Advancing Gender Equality; Affirmative Action

Reference is made to the theme specific reports under Article 7 about political representation in the electoral organs; Article 10 on education, and Article 11 on working life. What is accounted for here are some general experiences with special measures to promote de facto equality, and in particular on the corpus of regulations and results when it comes to gender representation in governing boards, working groups, counsels and committees, etc. and in executive bodies in private enterprises.

Quota systems - the rights of preference for the under-represented gender - have been a much-discussed tool in gender equality work. The Norwegian Gender Equality Act is open to this, to the advantage of women - both radical and moderate quota criteria. Following a change in the law in 1995 the Act was also opened up to advantage men, but this is limited to working positions in the caring sector and the teaching of children. Only moderate, not radical, quota systems have earlier been allowed in relation to initiatives in education, but after re-examination of the Gender Equality Act in the spring, this limitation was removed.
However, research into the results of such initiatives shows only small direct results from such schemes, both when it comes to concrete redistribution of educational places, and in the same way, when it comes to effects on

recruitment and reallocation of jobs in working life. An additional point with regard to educational choices is that the results have often been short time as the number of the underrepresented sex frequently have fallen after some years have passed. It might appear that what is most effective for educational and working life is a longer-term view and better planning of equality work over time - possibly with a clear quantification of long-term goals of more balanced gender distribution.

On the other hand, when it comes to the distribution of positions that to a greater degree are perceived as implying a form of representation - not primarily a personal benefit as educational places and a certain job - the quota system of regulations has been less controversial and more effective in terms of its results. The Gender Equality Act §21 (adopted in 1981) states that governing boards, counsels, committees, etc. appointed by a public body shall be composed of at least 40% of each gender. Where there is a committee composed of only two or three members, both genders should be represented. Equivalent regulations apply to deputy board members. Exceptions can however be made under such special circumstances as make it unreasonable to fulfil the demand. The issue must be placed before the Ministry of Children and Family Affairs in order to have a dispensation authorised. During 1999 and 2000 the proportion of women in such committees was on average 41%. There are however still systematic differences, depending upon the subject and mandate of the committee, and only 25% of the leaders were women (2000).

The Local Government Act of September 25, 1992, §§36-38 also has analogous provisions on gender representation on committees that are elected by city- or municipal authorities, and the same applies to counties. Statistics are not available. There is a high degree of consent about the necessity of these law regulations in Norway today.

In relation to the revision of the Gender Equality Act . . . there has been discussion about introducing gender quotas for executive bodies in private enterprises. The percentage of women on the executive boards of firms listed on the stock exchange in 2000 was 6.4%. A change in the Gender Equality Act has still however not been proposed. Instead, on March 7, 2002, the government passed a resolution aimed at rising the number of women in the executive bodies of the enterprises. The proposal contains a demand that there should be at least 40% of members of both genders in the executive boards of all public joint stock companies ("public companies limited by shares"), state enterprises, specially-legislated state corporations, and public/state limited companies. . . .

Article 7a Elections and Elected Bodies

Previously the voting attendance of women was lower than that of men. Gradually this gender disparity diminished, and during the parliamentary elections in 1985 women and men's participation became equal. During the elections in 1997, women's participation was higher than that of men. In addition, a remarkably big difference in numbers arose between young women and young men. While 70% of the women in the 18- to 21-year-old age group voted, only 50% of men in the same age group did. Participation in the age groups above age 30 was fairly equal.

During the 1970s women became an important group in elected political assemblies as well.
The use of quotas by political parties was an important factor in this development. This came about through the use of different quota systems. Most of the parties have gradually adopted rules governing the composition of internal party organs and for the party's representation in public office. The principal rule among these parties is that women and men shall each be represented by at least 40%. The Elections Act does not contain any stipulation as to gender representation. Parties without quota regulations significantly reduce the overall percentage of women in political assemblies.

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NOTES AND QUESTIONS

1. For general reading on gender equality in the Nordic states, see:

Eva-Marie Svensson, Anu Pylkkanen & Johanna Niemi-Kiesilainen, Nordic Equality at a Crossroads, Feminist Legal Studies Coping with Difference(2004);

Mari Teigen, Documenting Discrimination: A Study of Recruitment Cases Brought to the Norwegian Gender Equality Ombud 6 Gender work & Organization 91 (1999);

Richard E. Matland, Institutional Variables Affecting Female Representation in National Legislatures: The Case of Norway 55 Journal of Politics 737 (2005);

Marian Sawer, Parliamentary Representation of Women: From Discourses of Justice to Strategies of Accountability 4 International Political Science Rev. 361 (2000).

2. There exists a significant Norwegian legal structure to oversee and promote gender equality. This consists of a three-tiered structure involving: the Ministry of Children and Family Affairs, the Center for Gender Equality and the Gender Equality Ombud. The Ministry generally formulates government policy on gender equality. It also plays a co-ordinating role in mainstreaming gender equality across all the ministries of the Norwegian government. The Center for Gender Equality is a free standing and independent institution which has a "watchdog" role for gender issues across Norwegian society. In addition to its advocacy role it functions as a resource base and research provider for the state, non-governmental organizations and individuals. The Gender Equality Ombud was created as the body responsible for legally enforcing the 1978 Norwegian Gender Equality Act.

2. Equality - A Perspective from the United States

Grutter v. Bollinger, 539 U.S. 306 (2003) (some citations and footnotes omitted):

The University of Michigan Law School (Law School), one of the Nation's top law schools, follows an official admissions policy that seeks to achieve student body diversity through compliance with Regents of Univ. of Cal. v. Bakke, 1438 U.S. 265 . Focusing on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant will contribute to Law School life and diversity, and the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score. Additionally, officials must look

beyond grades and scores to so-called "soft variables," such as recommenders' enthusiasm, the quality of the undergraduate institution and the applicant's essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for "substantial weight," but it does reaffirm the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers. By enrolling a "critical mass" of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession.

When the Law School denied admission to petitioner Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, she filed this suit, alleging that respondents had discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981; that she was rejected because the Law School uses race as a "predominant" factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race. The District Court found the Law School's use of race as an admissions factor unlawful. The Sixth Circuit reversed, holding that Justice Powell's opinion in Bakke was binding precedent establishing diversity as a compelling state interest, and that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was virtually identical to the Harvard admissions program described approvingly by Justice Powell and appended to his Bakke opinion.
. . .

Justice O'Connor delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.
The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." App. 110. More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." Ibid.

In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School.. . . Nor does a low score automatically disqualify an applicant.. . . Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. . . . So-called " 'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution.". . .

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." . . . The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." . . . The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." . . . By enrolling a " 'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." . . .

. . .

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application.

. . .

Since this Court's splintered decision in Bakke, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.. . . We therefore

discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Bakke, 438 U.S., at 289—290. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." Id., at 299. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in " 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' " as an unlawful interest in racial balancing. Id., at 306—307. Second, Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." Id., at 310. Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal." Id., at 306, 310.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." Id., at 311. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." Id., at 312, 314. Justice Powell emphasized that nothing less than the " 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." Id., at 313 . . . In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." . . . Both "tradition and experience lend support to the view that the contribution of diversity is substantial." . . .

Justice Powell was, however, careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." Id., at 314. For Justice Powell, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify the use of race. Id., at 315. Rather, "[t]he diversity that

furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Ibid.
. . .

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." Brief for Respondents Bollinger et al. i. In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.
. . .
The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. . . .

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.. . . In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: . . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U.S., at 318—319.
As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students.". . . The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." . . . That would amount to outright racial balancing, which is patently unconstitutional. . . . Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law

School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races.". . .

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as Amici Curiae 5; Brief for General Motors Corp. as Amicus Curiae 3—4. . . .

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. . . .
Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.. . .
Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . .

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts.". . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.
. . .
Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." . . . The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' … th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." . . .

Since Bakke, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs.

That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.. . . To be narrowly tailored, a race-conscious admissions program cannot use a quota system–it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." . . . Instead, a university may consider race or ethnicity only as a " 'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." . . . In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.". . . .

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. . . . Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. . . . Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. . . .

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." . . . Quotas " 'impose a fixed number or percentage which must be attained, or which cannot be exceeded,' . . . and "insulate the individual from comparison with all other candidates for the available seats.". . . In contrast, "a permissible goal … require[s] only a good-faith effort … to come within a range demarcated by the goal itself," . . . and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants," . . .

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized

consideration in the context of a race-conscious admissions program is paramount.. . .

NOTES AND QUESTIONS

1. Do you agree that there is a substantial difference between a 'permissible goal' and a quota? Does the permissibility of the former and the exclusion of the latter weaken or make no impact upon the achievement of diverse university student bodies?

2.

3.

E. INTERNATIONAL STANDARDS AND COMPARATIVE APPROACHES

1. Equality for Men and Women in International Legal Contexts

A number of international courts, tribunals and other bodies have articulated their views on the appropriate understanding of and legal enforcement of equality rights for women. Moreover the question of equality in the national context raises substantial questions about the depth and substance of gender equality in the international institutions promoting such reforms. The extracts in this section reflects on these pronouncements and tensions.

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Gender Equality Architecture and UN Reforms, submission to the UN Secretary-General's High Level Panel on System-wide coherence. Submitted by the Center for Women's Global Leadership (CWGL) and the Women's Environment and Development Organization (July 2006)
. . .

Introduction: In the last decade, efforts to make the development, human rights and peace/security 'mainstreams' work for women have resulted in impressive gains as well as staggering failures. In the 10 years since the adoption of the Beijing Platform for Action (PFA), a number of strategic partnerships forged between women's movements and policy reformers have placed equity and women's human rights at the heart of global debates in areas such as the International Criminal Court, Security Council Resolution 1325 on women, peace and security, and in the Millennium Project Task Force on Gender Equality. In some regions, women have made striking gains in elections to local

and national government bodies, and in entering public institutions; girls' access to primary education has increased and women are entering the labor force in larger numbers; access to contraception is much more widespread; gender equality has been mainstreamed in some countries into law reform processes and statistical measures; and violence against women has been recognized as a human rights issue and made a crime in many countries.

However, gains for women's rights are facing growing resistance in many places and too often positive examples are the exception rather than the norm. They usually occur because an individual, a network, an organizational champion, or a unique confluence of 'push' factors is responsive and receptive to change. Even then, these changes only come about when women's rights advocates invest extraordinary interest, time and effort and, where required, take significant risks. For instance, it took nearly five years of advocacy by women with support of a small number of donors to get Burundi women included at the peace table and, at the eleventh hour, it was the advocacy of Nelson Mandela that made it finally happen. This ad hoc approach, which too often requires highlevel intervention, is not effective in producing consistent positive outcomes to support gender equality and women's human rights. . . .
Current state of Gender Equality and Gender Mainstreaming at the UN: The present phase of UN reform provides an opportunity to take gender equality from the realm of rhetoric to thepractice of reality. Most women's rights advocates agree that the normative frameworks for gender equality and women's human rights – legal frameworks, constitutional guarantees for equality, and gender equality policies – have advanced considerably in many countries as well as within the UN system. However, the lack of implementation and accountability repeatedly undermines these commitments.

"Gender Mainstreaming", promoted widely in the UN after the Beijing Fourth World Conference on Women, was transformatory in its conception. But it has been extremely limited in its implementation. Gender mainstreaming has often only been reluctantly adopted by "mainstream" agencies because top leadership has not adequately supported this agenda; it has too often become a policy of "add women and stir" without questioning basic assumptions, or ways of working. It has been implemented in an organizational context of hierarchy and agenda setting that has not prioritized women's rights and where women's units usually have limited authority to initiate or monitor gender equality work, and no authority to hold people and programs accountable.

Gender mainstreaming is sometimes even misused to simply mean including men as well as women,rather than bringing transformational change in gender power relations. At best, it has meant such things as adopting a gender policy, creating a gender unit to work on organizational programs, mandatory gender training, and increasing the number of women staff and managers. In the worst cases, gender mainstreaming has been used to stop funding women's work and/or to dismantle many of the institutional mechanisms such as the women's units and advisors created to promote women in development, in the name of integration. Both national and international institutions have had this experience.

. . .

The UN system is replete with examples of structures and personnel mandated to do gender equality work that are under-resourced and under-prioritized. They constantly must fight an uphill battle as a result of their low place in organizational hierarchies, small size, limited mandate, and the lack of autonomy and connection to key constituencies. Currently, there are several under-resourcedagencies focused exclusively on women's issues (United Nations Development Fund for Women (UNIFEM), International Research and Training Institute for the Advancement of Women (INSTRAW), the Secretary-General's Special Advisor on Gender Issues (OSAGI), and the Division for the Advancement of Women (DAW)). For example, UNIFEM, the only unit with a (limited) field presence, is a fund, not an independent operational agency, that reports to the UNDP administrator, which means that it doesn't have a seat at high-level decision making tables. Gender units – from OSAGI to those in the specialized agencies – have limited ability to provide critical feedback or speak out on gender equality performance; too often these special advisor or gender focal points in the UN are used to defend the status quo rather than change it. Their limited budgets, their limited access to decision-making, and their limited terms of reference do not position them as critical players in their own entities.

Other larger agencies, including UNDP, UNFPA, UNICEF, UNESCO, the High Commissioners for human rights and refugees and others, sometimes do important work on gender equality, but it is only a part of their mandate, and often receives low priority. According to a 2002 UNIFEM/UNDP scan, of the 1300 UN staff who have gender equality in their terms of reference, nearly 1000 of these are gender focal points that are relatively junior, have little substantive expertise, no budgets, and who deal with gender as one element of a large portfolio. In other words, these structures are designed to fail or falter.

Funding for gender equality work within both mainstream agencies and women's specific mechanisms such as UNIFEM is grossly inadequate for the task at hand. In 2002, UNIFEM's resources totaled $36 million. In comparison,

UNFPA's budget for the same year was $373 million; the Office of the High Commissioner for Human Rights' budget was $64 million and UNAIDS' budget was $92 million. UNICEF's budget in the same year totaled $1,454 million. The message is clear: investment in women is of the lowest order. Most mainstream agencies cannot even track how much money they spend on women rights and the achievement of gender equality.

With decades of experience and in view of the challenges ahead, there is ample knowledge of how the UN system can be better organized and structured to facilitate positive change for women and families. Currently there are a variety of options that are being discussed. We see some as a backward step, such as the absorption of UNIFEM into a larger agency such as UNDP, while others would bring only cosmetic change, such as simply combining current mandates, activities and budgets of UNIFEM, DAW, OSAGI and INSTRAW. These we reject.

We believe that the current system is no longer acceptable. Therefore, we have focused on the approaches that have the greatest potential to bring about coherence and positive systemic change. Our preferred approach would be the creation of a well-resourcedindependent entity with normative, operational and oversight capacity, a universal country presence and led by an Under-Secretary General. An alternative approach would be thecreation of a specialized coordinating body with similar functions, drawing on the UNAIDS model.

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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
E/C.12/2005/4

. . .

General comment No. 16 (2005)
The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)

Introduction

1. The equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognized under international law and enshrined in the main international human rights instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects human rights that are fundamental to the dignity of every person. In particular, article 3

of this Covenant provides for the equal right of men and women to the enjoyment of the rights it articulates. This provision is founded on Article 1, paragraph 3, of the United Nations Charter and article 2 of the Universal Declaration of Human Rights.
Except for the reference to ICESCR, it is identical to article 3 of the International Covenant on Civil and Political Rights (ICCPR), which was drafted at the same time.

2. The travaux préparatoires state that article 3 was included in the Covenant, as well as in ICCPR, to indicate that beyond a prohibition of discrimination, "the same rights should be expressly recognized for men and women on an equal footing and suitable measures should be taken to ensure that women had the opportunity to exercise their rights …. Moreover, even if article 3 overlapped with article 2, paragraph 2, it was still necessary to reaffirm the equality . . . rights between men and women. That fundamental principle, which was enshrined in the Charter of the United Nations, must be constantly emphasized, especially as there were still many prejudices preventing its full application".Unlike article 26 of ICCPR, articles 3 and 2, paragraph 2, of ICESCR are not stand-alone provisions, but should be read in conjunction with each specific right guaranteed under part III of the Covenant.

3. Article 2, paragraph 2, of ICESCR provides for a guarantee of non-discrimination on the basis of sex among other grounds. This provision, and the guarantee of equal enjoyment of rights by men and women in article 3, are integrally related and mutually reinforcing. Moreover, the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.

4. The Committee on Economic, Social and Cultural Rights (CESCR) has taken particular note of factors negatively affecting the equal right of men and women to the enjoyment of economic, social and cultural rights in many of its general comments, including those on the right to adequate housing, the right to adequate food,3 the right to education,4 the right to the highest attainable standard of health, and the right to water. The Committee also routinely requests information on the equal enjoyment by men and women of the rights guaranteed under the Covenant in its list of issues in relation to States parties' reports and during its dialogue with States parties.

5. Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin,

property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.

I. CONCEPTUAL FRAMEWORK

A. Equality

6. The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.

7. The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience. . . .

8. Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are, prima facie, gender-neutral. In implementing article 3, States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.. . .

NOTES

1. For a thorough review of the failure of donors to prioritize and highlight women's rights and equality work see UNIFEM Assessment: A/60/62 - E2005/10; UNDP Evaluation of Gender Mainstreaming, available at http://www.undp.org/eo/documents/EO_GenderMainstreaming.pdf

2. For general reading on the cultural barriers to equality see

Ann Elizabeth Mayer, Cultural Pluralism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience;

Religious Fundamentalism and the Human Rights of Women (Courtney W. Howland, ed. 1999);

Faith and Freedom: Women's Human Rights in the Muslim World (Mahknaz Afkhami ed. 1995); Maulana Nahiduddin Khan, Women in Islamic Shari'ah (1995).

3. United Nations Security Council Resolution 1325, which is concerned with the role of women in conflict and post-conflict situations, specifically calls for the integration of gender perspectives into post-conflict processes. The resolution stresses the importance of women's participation in peace building and conflict resolution. In that context, it calls for measures that ensure the protection of and respect for women and girls, particularly as they relate to constitutions, the electoral system, police and the judiciary. (Adopted by the Security Council at its 4213th meeting, 31 October 2000). See also, Special Session of the United Nations General Assembly, Women 2000: Gender Equality, Development and Peace for the Twenty-First Centuary A/S-23/10/Rev.1

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a. International Treaty and "Soft Law" Standards

The following readings concern the international standards, both soft and hard law, that exist to prohibit discrimination against women in the public sphere.

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.:

2. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status . . .

3. 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 present Covenant.

. . .

25. Every citizen shall have the right and the opportunity, without any of the distinctions
mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or indirectly through freely chosen representatives;
(b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

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Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations General Assembly, December 18, 1979, entered into force September 3, 1981.

Article I

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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) 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;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women.

Article 4
1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 7 States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

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European Convention on Human Rights

Article 14
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
* * * * *

Convention on the Political Rights of Women, 193 U.N.T.S. 135, entered into force July 7, 1954

The Contracting Parties,
Desiring to implement the principle of equality of rights for men and women contained in the Charter of the United Nations,

Recognizing that everyone has the right to take part in the government of his country directly or indirectly through freely chosen representatives, and has the right to equal access to public service in his country, and desiring to equalize the status of men and women in the enjoyment and exercise of political rights, in accordance with the provisions of the Charter of the United Nations and of the Universal Declaration of Human Rights,

Having resolved to conclude a Convention for this purpose,
Hereby agree as hereinafter provided:
Article I
Women shall be entitled to vote in all elections on equal terms with men, without any discrimination.
Article II
Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination.
Article III
Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.

* * * * *

General Assembly Resolution on Women and Political Participation, G.A. Res. A/RES/58/142 (2003) . . . .

1. Urges States:
(a) To promote and protect the right of women to associate freely, express their views publicly, openly debate political policy and petition and participate in their Government at all levels, including in the formulation and implementation of government policy, on equal terms with men;
(b) To eliminate laws, regulations and practices that in a discriminatory manner prevent or restrict women from participating in the political process, and to implement positive measures that would accelerate the achievement of equality between men and women; . . .
(d) To counter, as appropriate, negative societal attitudes about women's capacity to participate equally in the political process that contribute to the low proportion of women among political decision makers at the local, national and international levels; . . .
(f) To review the differential impact of their electoral systems on the political

representation of women in elected bodies and to adjust or reform those systems where appropriate;
i) To identify and propose more women candidates for senior and decision making positions in the United Nations system and for appointment or election to intergovernmental expert and treaty bodies, and to encourage more women to apply for those positions; . . .
(l) To ensure that measures to reconcile family and professional life apply equally to women and men, bearing in mind that the sharing of family responsibilities between women and men creates an enabling environment for women's political participation;

2. Invites Governments, as well as the private sector, non-governmental organizations and other civil society actors:
(a) To develop mechanisms and training programmes that encourage women to participate in the electoral process and improve women's capacity to cast informed votes in free and fair elections;
(b) To encourage political parties to remove all barriers that directly or indirectly discriminate against the participation of women, in order to ensure that women have the right to participate fully at all levels of decision-making in all internal policy-making structures and nominating processes and in the leadership of political parties on equal terms with men;
(c) To encourage political parties to actively seek qualified women candidates, to provide training in conducting campaigns, public speaking, fundraising and parliamentary procedure and to include qualified women and men on their party lists for elective office, where such lists exist;
(d) To strive to ensure that information about candidates, political party platforms, voting procedures, including voter registration, and electoral law is available to women on an equal basis with men;
(e) To support initiatives, including public-private partnerships and exchange programmes, to expand women's political skills, which include imparting or enhancing skills on how to vote, advocate, manage and govern, run for public office and serve as elected and appointed officials; . . .

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Inter-American Convention on the Granting of Political Rights of Women, 1438 U.N.T.S. 63, entered into force March 17, 1949

Article 1

The High Contracting Parties agree that the right to Vote and to be elected to national office shall not be denied or abridged or reason of sex.

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Beijing Platform for Action, Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Add.1 (1995) . . .

G. Women in power and decision-making

181. The Universal Declaration of Human Rights states that everyone has the right to take part in the Government of his/her country. The empowerment and autonomy of women and the improvement of women's social, economic and political status is essential for the achievement of both transparent and accountable government and administration and sustainable development in all areas of life. The power relations that prevent women from leading fulfilling lives operate at many levels of society, from the most personal to the highly public. Achieving the goal of equal participation of women and men in decision-making will provide a balance that more accurately reflects the composition of society and is needed in order to strengthen democracy and promote its proper functioning. Equality in political decision-making performs a leverage function without which it is highly unlikely that a real integration of the equality dimension in government policy-making is feasible. In this respect, women's equal participation in political life plays a pivotal role in the general process of the advancement of women. Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account. Without the active participation of women and the incorporation of women's perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved.

182. Despite the widespread movement towards democratization in most countries, women are largely underrepresented at most levels of government, especially in ministerial and other executive bodies, and have made little progress in attaining political power in legislative bodies or in achieving the target endorsed by the Economic and Social Council of having 30 per cent women in positions at decision-making levels by 1995. Globally, only 10 per cent of the members of legislative bodies and a lower percentage of ministerial positions are now held by women. Indeed, some countries, including those that are undergoing fundamental political, economic and social changes, have seen a significant decrease in the number of women represented in legislative bodies. Although women make up at least half of the electorate in almost all countries and have attained the right to vote and hold office in almost all States Members of the United Nations, women continue to be seriously underrepresented as candidates for public office. The traditional working patterns of many political parties and government structures continue to be barriers to women's participation in public life. Women may be discouraged from seeking political office by discriminatory attitudes and practices, family and child-care

responsibilities, and the high cost of seeking and holding public office. Women in politics and decision-making positions in Governments and legislative bodies contribute to redefining political priorities, placing new items on the political agenda that reflect and address women's gender-specific concerns, values and experiences, and providing new perspectives on mainstream political issues.

183. Women have demonstrated considerable leadership in community and informal organizations, as well as in public office. However, socialization and negative stereotyping of women and men, including stereotyping through the media, reinforces the tendency for political decision-making to remain the domain of men. Likewise, the underrepresentation of women in decision-making positions in the areas of art, culture, sports, the media, education, religion and the law have prevented women from having a significant impact on many key institutions.

184. Owing to their limited access to the traditional avenues to power, such as the decision-making bodies of political parties, employer organizations and trade unions, women have gained access to power through alternative structures, particularly in the non-governmental organization sector. Through non-governmental organizations and grass-roots organizations, women have been able to articulate their interests and concerns and have placed women's issues on the national, regional and international agendas. . . .

Actions to be taken By Governments:

a. Commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, inter alia, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions;

b. Take measures, including, where appropriate, in electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men;

c. Protect and promote the equal rights of women and men to engage in political activities and to freedom of association, including membership in political parties and trade unions;

d. Review the differential impact of electoral systems on the political representation of women in elected bodies and consider, where appropriate, the adjustment or reform of those systems.

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NOTES

1. In 2000, the Council of Europe opened a new Protocol additional to the European Convention for signature to States Parties. The Protocol is premised on the need to further promote the equality of all persons through a more thorough articulation of the prohibitions on discrimination. The Protocol affirms that the principle of non-discrimination does not prevent States Parties from taking measures that promote full and effective equality, provided that "there is an objective and reasonable justification for those measures".

2. The UN General Assembly resolution was sponsored by the Bush Administration. It was adopted ith 110 co-sponsors.

3. The United Nations Millennium Development Goals (General Assembly Resolution 55/2) identifies Goal #3, "to promote gender equality and empower women". Specifically the goal seeks to "eliminate gender disparity in primary and secondary education preferably by 2005, and at all levels by 2015."

4. European Council Regulation 975/99 of 29 April 1999 lays down the requirements for implementing co-operation operations which seek to develop and consolidate democracy and the rule of law in third states. Article 2 of the regulation states that in order for European states to assist in the process of democratization, such support will involve: . . .
e) promoting the participation of people in the decision making process at national, regional and local level in particular by promoting the equal protection of men and women in civil society, in economic life an din politics;
f) . . . [P]reparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process . . .

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b. Quotas - In Theory and Practice

Drude Dahlerup, Comparative Studies of Electoral Gender Quotas, Paper presented at International Idea Workshop, Lima Peru 23-23 February 2003.

Comparative Analysis of Gender Quotas: A New Research Agenda

The number of countries that have introduced some type of quota system is much larger than expected. Although highly controversial, electoral gender quotas are now being introduced at an amazing speed all over the world (see www.quotaproject.org). Having gathered data on quotas globally, it is time to establish a new research agenda to compare quota systems.

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Under what conditions do quotas contribute to the empowerment of women? When do gender quotas lead to unintended negative effects like stigmatization and marginalization?

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The introduction of effective quota systems represents a change in public equality policy, from ‘equal opportunities’ to ‘equality of results’. Quota systems thus represent a break with the widespread gradualism in equality policies. Seen in this perspective, the history of the Scandinavian countries can no longer be considered a model for obtaining equal political representation around the globe.

Why Scandinavian is No Longer the Model

For many years feminist organizations throughout the world have viewed the Scandinavian
countries, Denmark, Finland, Norway and Sweden, as a model for women’s equality. One key factor has been the very high representation that women have enjoyed in parliaments and local councils in these countries, especially since the 1970s.

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This extraordinarily high level of representation, seen in a global perspective, has led to the question: how did you come that far? What can we learn from the Scandinavian experience? As Nordic researchers we have tried to answer these questions by pointing to structural changes in these countries, such as secularization, the strength of social-democratic parties and the development of an extended welfare state, women’s entrance into the labour market in large numbers in the 1960s, the educational boom of the 1960s, and the electoral system. Strategic factors are also seen as important, especially the various strategies employed by women’s organizations in the Nordic states in order to raise women’s political representation. I will, however, argue that the Scandinavian experience cannot be considered a model today, because it took 80 years to get that far. Today, the women of the world are not willing to wait that long. The introduction of electoral quotas is a symbol of their impatience, as well as an often efficient tool for increasing female representation. A very good example is South Africa, where the introduction of quotas by the African National Congress (ANC) resulted in female representation in this new democracy jumping to an international high of about 30 percent.

Different Quota Systems

Even if constitutional amendments and new electoral laws may seem more commanding, it is not at all evident that they are more efficient when it comes to implementation than party quotas. It all depends on the actual rules and the possible sanctions for non-compliance, and on the general opportunity structure of the country for quotas. A distinction must be made between quotas for: (a) the pool of potential candidates; (b) the actual nominees; and (c) the elected. There are examples of quota requirements on all three levels, but most quota systems relate to (b). Here, the crucial question relates to where, for instance, the required 40 percent of women are placed on the lists or in the districts with real chances of election. The partly unsuccessful 'women's short lists' in England provide an example of the employment of quotas on the first level, which broadens the pool from which the selection committee or the primary may chose. 'Reserved seats for women' is a different quota system, in which certain seats are set aside, as in Uganda, for instance, where certain regional seats are reserved for women. The electoral quota for women may be constitutional (as in Nepal, the Philippines and Uganda), legislative (as in many parts of Latin America and, for example, in Belgium, Bosnia–Herzegovina, Serbia and Sudan) or it may take the form of a political party quota. In some countries, numerous political parties apply some type of quotas, such as in Argentina, Bolivia, Ecuador, Germany, Italy, Norway and Sweden. But in many other countries only one or two parties have opted to use quotas. If the leading party in a country uses quotas, however, like the ANC in South Africa, this may have a substantial effect on the overall representation of women. Yet, most political parties around the world do not employ any kind of quota system at all. Gender quotas may apply to the number of female candidates proposed by a party for election, or they may take the form of reserved seats in the legislature. In some countries, quotas apply to minorities based on regional, ethnic, linguistic or religious cleavages. Almost all political systems apply some kind of geographical quota to ensure a minimum representation for densely populated areas, islands and the like. That type of quota is usually not considered as controversial as gender quotas.

Quotas work differently under different electoral systems. Quotas are most easily introduced in proportional representation (PR) systems and other multi-list systems. Also several majority systems have introduced quota provisions, as the Electoral Quotas for Women website shows. But even in a PR system, because of the few candidates elected, small parties and parties in small constituencies have difficulties implementing quotas without controversial central interference in the usual prerogatives of the local party organization to select their own candidates.

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Quotas are very controversial, yet several countries around the world, including such diverse ones as Argentina, Bosnia, France, South Africa, Sweden and Uganda, have recently introduced gender quotas in public elections. An electoral gender quota system sets up a quantitative prescription for the minimum representation of either sex, such as 40 percent. Sweden's 'every second a women' and 'parité' (France, Belgium) are other names for quota systems. In political life, quotas have often engendered vehement debate. Research on quotas so far has tended to concentrate on these debates and on the actual decision-making process. These discursive controversies are also an essential part of the present research project, but, in addition, an emphasis is being placed on the too often neglected aspect of the troublesome implementation of quotas and on the consequences of introducing quotas. From studies of single countries, we know that a decision to introduce a requirement of a minimum of, for instance, 30 percent of each gender on the electoral lists does not automatically lead to women getting 30 percent of the seats. Thus, by comparing the use of quotas in many similar and different political systems, it is possible to illuminate whether and under what conditions quotas can be considered an equal policy measure that contributes to the stated goal: equal political citizenship of women. Introducing quotas is always highly controversial, yet the debates are often confused and only understandable if the hidden assumptions about women and women's position are scrutinized. This makes it possible to see why quotas for some are seen as discrimination and a violation of the principle of fairness, while others consider them to be compensation for the structural barriers that prevent fair competition. The idea of quotas is frequently in conflict with other notions like the prevailing discourse of fairness and competence, and the idea of individualism. However, quotas are seen as an efficient measure to attain 'real' equality, that is, equality of results.

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Today, we see a worldwide increase in the political representation of women, but the regional differences are immense (the world average is 15 percent in 2003 according to the IPU).

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Quotas touch on the discussion of why female representation is important. Three arguments can be found today as well as in the campaigns for suffrage:
• women represent half of the population and hence have the right to half of the seats (the justice argument);
• women have different experiences (biological or socially constructed) that

ought to be represented (the experience argument); and
• women and men have partly conflicting interests and thus men cannot represent women (the interest group argument).
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Gretchen Bauer, 'The Hand that Stirs the Pot Can Also Run the Country'; Electing Women to Parliament in Namibia 42 Journal of Modern African Studies 479 (2004)

Namibia is defined in Article 1 of its constitution as a sovereign, secular, democratic republic. Its government comprises the typical three branches, with a popularly elected president who is both head of state and head of the executive, and an appointed prime minister (Erasmus 2000: 86–9). Shortly after independence the country was divided into thirteen geographic regions, each with a governor and council. Regional council elections are held every six years under a first-past-the-post electoral system. Local authorities, which vary in size, are elected every five years under a party list, proportional representation electoral system .... The national legislature is a bicameral parliament. The National Assembly has 72 members elected every five years under a closed list, proportional representation electoral system, and six non-voting members appointed by the president. The National Council has 26 members, with two members elected from each of the 13 regional councils. The National Assembly is the principal legislative authority in Namibia with the power to make and repeal laws (though Cabinet initiates bills). The National Council has the power to recommend legislation on matters of regional concern, though it has never done so, serving primarily as a house of review . . .

Since independence in 1990, six elections have been held in Namibia. . . .
In Namibia's first National Assembly, created out of the Constituent Assembly, six of the 72 voting MPs (8.3%) were women. The second National Assembly in 1995 had nine women MPs (12.5%, with two added in 1996 for a term total of 15.3%), and the third in 2000 had 18 women MPs (25%). In 2002 and 2003, three more women MPs were added to the third National Assembly when two Swapo members and one UDF member resigned. Thus, as of mid-2003, 21 members (29.2%) were women. Local authority elections brought large numbers of women into local councils – 31.5% in 1992 and 41.3% in 1998 – and into leadership positions as mayors and deputy mayors. At the regional level, however, electoral outcomes have been very different. Only three of 95 regional councillors elected in the 1992 regional council elections (3.2%) were women, and only four of 102 councillors elected in 1998 (3.9%). As a result,

very few women are represented in the National Council . . . Except for the regional level then, the number of elected women in Namibia has grown steadily since independence. Indeed, at the national level Namibia is ranked seventeenth worldwide in terms of the representation of women in a lower or single house of parliament – the basis upon which most such comparisons are made . . .

Women are also represented in increasing numbers at the ministerial and deputy ministerial level. To what can these gains be attributed ?

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To a large extent Namibia's impressive local and national results can be attributed to the choice of electoral system and the use of quotas. This is in keeping with experience elsewhere that indicates that the factors most conducive to bringing more women into political office are a specific type of electoral system and, more importantly, some form of quota. Indeed, according to a broad literature, unfavourable contextual factors can be overcome to a great extent by the use of particular electoral systems and different types of quotas. . .

Moreover, altering electoral systems and imposing quotas can be relatively easily accomplished. As Gray (2003: 55) notes: 'unlike other strategies to increase the level of women's legislative representation, such as changing political culture and the level of economic development, institutional structures are relatively easy to change'. Those countries that have the highest representation of women in their national legislatures, the Scandinavian countries with over 35% representation, use a proportional representation (PR) electoral system and some form of party-based quota now or in the past.6 Since Rwanda's October 2003 elections, 48.8% of members of the national legislature are women, in part due to reserved seats mandated by a new constitution. Similarly in Uganda, where district-based reserved seats for women are used, 25% of national legislators are women. In South Africa, with 30% women in its National Assembly, a PR electoral system is used alongside a one-third gender quota on the part of the ruling African National Congress and some smaller parties . . . In Argentina, where 31% of the members of the Chamber of Deputies are women, a national electoral quota has been in place since 1991, alongside a closed list PR electoral system.. . . In general, proportional representation electoral systems are more favourable towards women than plurality-majority systems. Quotas, meanwhile, are generally of two kinds: those that are written into constitutions or introduced through national legislation, and those that are applied by political parties . . .

Not all PR electoral systems are the same, and certain factors help to further enhance women's representation. These include closed party lists, higher

district or party magnitude, and high electoral thresholds. In a closed list PR electoral system, the party determines the rank ordering of candidates on the party list, and women's names cannot be removed from the list or moved downward by voters during an election, as experience has shown will happen with an open list system. District magnitude refers to the number of seats per district.. . .

The most advantageous system for women is one in which the entire country is one electoral district. Finally, higher electoral thresholds favour women. . . Overwhelmingly, parties tend to have male leaders and party leaders inevitably take the first few slots on the list. ' Gender-based electoral quotas are meant to bring more women into politics and may take various forms. In general, quotas for women require that women constitute 'a certain number or percentage of the members of a body, whether it is a candidate list, a parliamentary assembly, a committee, or a government'. . .. Today, according to Dahlerup. . . 'quota systems aim at ensuring that women constitute at least a ''critical minority'' of 30 or 40%'. ...[I]n many places 'the use of gender quotas in parties' internal candidate-selection rules has proved to be one of the most important and successful means for getting more women into office'. Namibia's experience replicates that elsewhere with electoral systems and quotas.

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F. WOMEN'S RIGHTS ARE HUMAN RIGHTS