

‘Equality before the Law’: A Barrier to Access to Justice?

By Lucia Noyce*

And now what of the special principle of so-called equality before the law? All it means is that the machinery of the law should make no distinctions which are not already made by the law to be applied. If the law grants political rights to men only, not women, to citizens only, not aliens, to members of a given race or religion only, not to members of other religions or races, then the principle of equality before the law is fully upheld if in concrete cases the judicial authorities decide that a woman, an alien, or the member of some particular religion or race, has no political rights. This principle has scarcely anything to do with equality any longer. It merely states that the law should be applied as is meant to be applied. It is the principle of legality or legitimacy which is by nature inherent in every legal order, regardless of whether this order is just or unjust.

- Hans Kelsen, *Pure Theory of Law*¹

INTRODUCTION

Fundamental to the existence of ‘access to justice’ is the idea that all individuals enjoy ‘equality before the law’. This concept has proven elusive to define, and difficult to achieve. Despite this reality it is nonetheless presented as an essential foundation of the administration of justice and as a necessary element for justice to be legitimate and to be seen to be so. There is ample evidence, however, that ‘equality before the law’ is not at play in our justice system. Discrimination endemic in society based upon gender and race in particular, can be seen as manifested at both the policing and judicial processes. This paper will approach the concept of ‘equality before the law’ in the context of these manifestations of discrimination, specifically in the context of policing and the courts.

I. 'EQUALITY BEFORE THE LAW'

According to the Department of Foreign Affairs and Trade (DFAT), in Australia's legal system '[a]ll people – Australians and non-Australians alike – are treated equally before the law,'² with 'safeguards exist[ing] to ensure that people are not treated arbitrarily or unfairly by government or officials.'³ These two concepts identified – arbitrariness and unfairness – are antithetical qualities of any structure seeking to ensure 'equality before the law'. Davison and Devins refer to this conception of 'equality before the law' as the 'anti-discrimination principle'. They note that 'equality has often been characterized as the elimination of formal legal barriers of exclusion based on immutable characteristics such as race and gender.'⁴ In its Bench Book for judicial officers on 'Equality before the Law', the Judicial Commission of New South Wales instructs:

*Judicial officers must treat all parties fairly regardless of gender, ethnicity, disability, sexuality, age, religious affiliation, socio-economic background, size or nature of family, literacy level or any other such characteristic.*⁵

It adds greater nuance by noting that 'equality' does not mean the 'same treatment', as the same treatment of those in differing situations of empowerment would itself be a form of indirect discrimination.⁶ This broaches on another conception of equality, that of the 'sameness' approach. This approach defines 'equal before the law' as an exercise of gender and race-neutral practices, which does not recognize the equitable function of the law.⁷ This approach, which could be seen to amount to formal equality, does not provide substantive equality:

*The 'law is sexist' [or racist] claim assumes that a corrective could be made to a biased vision and that this corrective suggests that a law suffers from a problem of perception which can be put right such that all legal subjects are treated equally.*⁸

This argument is also illustrated by what some contend is the conceptual contradiction of 'equality before the law' if understood prima facie by the meaning of the words alone.⁹ As previously noted, applying the law exactly the same way in every case, despite comparative difference or disadvantage, could in fact have undesirable outcomes, leading to the contradictory situation noted by Kelson where there can be "equality before the law even if there is by no means equality in the law."¹⁰ This

suggests that as a guarantee of justice and fairness, the concept of 'equality before the law' is of itself an insufficient protection.

Conceptualizing 'equality before the law' also raises the question: equality by whose standards? There is a danger, due to traditional composition of law-makers and law enforcers, that the litmus test for equality before the law and other social institutions is that which would provide equality should society be a homogenised one composed of 'the white male.'¹¹ As Gould comments, 'they [white males] have become the baseline against which they themselves measure all other groups, but more importantly they have become the baseline against which criminality has been constructed.'¹² Conceptualizing equality consequently further requires a critique of the dominant cultural force behind lawmaking and how this has implications for those not a part of this dominant group – in particular, non-dominant gender and race groups.

Gender, race and policing

This is particularly evident in the exercise of judicial discretion and policing discretion. As the first point of contact, with the justice system, and indeed if budgetary allowance is any indication, the more widespread point of contact¹³, the police in large part decide who is at the receiving end of the 'long arm of the law'.

This 'long arm' may not reach all proportionally. For example, in a 2001 study of the policing of Indigenous Australians, Chris Cunneen identified a key causal factor of the existence of distrust between the police and many Indigenous Australian women, which was the curious combination of the over-policing of public order offenses and the under-policing of domestic violence offenses.¹⁴ This perception is supported by the findings of the Royal Commission into Aboriginal Deaths in Custody, which reported on the large-scale perception amongst Indigenous Australian women that the police were indifferent to acts of violence against them.

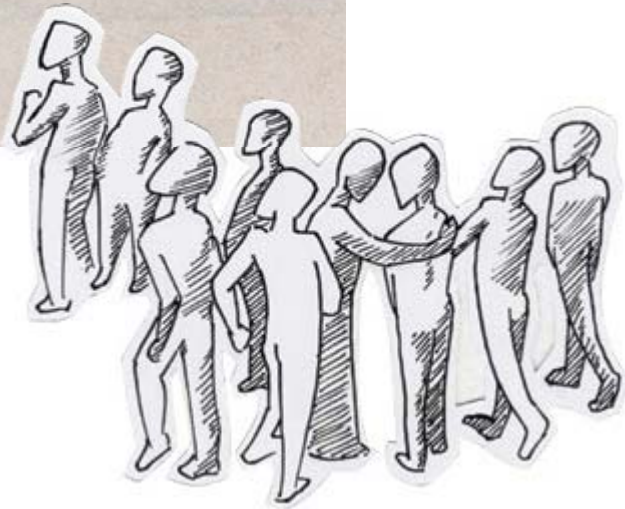
This experience of the law has multiple troubling consequences. The Royal Commission found that, as a consequence of this perception, some Aboriginal women reported a reluctance to report crimes for fear of police violence.¹⁵ One woman in Cape York was quoted as saying, "If a white women gets bashed or raped here, the police do something. When it's us they laugh."¹⁶

Statistics support this perception of the high proportion

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of police interaction with Indigenous Australians. The Royal Commission found that on average, 50% of women in police custody at any given time were Indigenous, despite only comprising 2% of the overall female population.¹⁷ They were also 58% more likely to be held in custody than non-Indigenous women, whilst comparatively, Indigenous men were 28% more likely to be held in custody than non-Indigenous men.¹⁸ The Royal Commission found that Indigenous Australians as a whole were found to be 27 times more likely to be detained than those of non-Indigenous background; 43 times more likely in Western Australia.¹⁹ Two-thirds of those detentions were for drunkenness and other public order offenses.²⁰

The police act as the gatekeepers of the criminal justice system; as the findings of the Royal Commission demonstrate, the discretion to charge in terms of the type of crimes, and the persons to pursue unfortunately can lead to minority groups disproportionately being the subject of their purview. This power, however, does not exist in a vacuum. There is an obvious ‘direct line of institutional intervention’ that begins with the discretionary powers of the police at arrest and can be seen to continue through the court system itself.²¹

II. GENDER, RACE AND THE COURTS

The overwhelming police focus on summary offenses can be seen furthermore in the court system. The majority of

criminal adjudication in Australia takes place in the Lower Courts, comprising 97.5 per cent of criminal cases heard between 2008-2009, with similar statistics for 2010.²² Jury trials occur in only approximately 1% of criminal cases.²³ Therefore, they do not ‘adjudicate guilt or innocence’ but rather make ‘procedural decisions that are not final in nature.’²⁴ This means that ‘the legal standards which are to apply can afford to be much less strict and demanding.’²⁵ This dichotomy is referred to by McBarnet as the ‘two-tiers of justice’:

The law has created two tiers of justice, one which is geared in its ideology and generality at least to the structures of legality, and one which, quite simply and explicitly, is not. The principles of one strand have remained as the dominant image of the law and as the rhetoric of justice, but the existence of the other allows the legal system to deal with the vast majority of offenders in a way which flouts the principles of justice legally.²⁶

While the streamlining of the process of summary offences can be seen at the macro level to serve the

interests of justice by providing quick and cheap processes, there are troubling considerations in relation to how this affects minorities. For example, the lower courts hear the the kinds of public order offenses which Aboriginal Australians are disproportionately detained for. The bail process demonstrates how this can work to the great disadvantage of marginalised groups.

Bail hearings are concerned with applying a necessary amount of coercion in order to ensure the accused will appear for future proceedings. In NSW, under s 32 (1) (a) of *The Bail Act 1978* (NSW), the police and Courts are required to consider a number of factors before making the rebuttable presumption in favour of bail. These include family and community ties, criminal history, residence and employment.²⁷

*Those who score badly in terms of such explicit legal criteria – who in short, are socially and economically marginal – are bad risks. . . Should we be surprised that it is Aborigines, unemployed, homeless, etc. who are disproportionately incarcerated prior to trial?*²⁸

This process further entrenches the disenfranchisement of such groups, by placing more strict conditions on those individuals who do not accord with the perceived hallmarks of civic responsibility. Strict bail conditions make it more difficult to obtain employment, which has trickle on affects for the ability to secure residence and maintain relationships. It ignores the demographical nature of the crimes themselves, and furthermore demonstrates how the criminal justice system contributes to the effects of institutionalisation in trapping such individuals in a cycle of crime and imprisonment.

III. CONCLUSION

The resulting question that remains to be answered is how to reconcile the conceptual inconsistencies of ‘equality before the law’ itself with the inconsistencies evident in its practical exercise. It would be overly pithy to conclude that the dialectic between the two is simply a self-fulfilling prophecy doomed to fail. Ultimately, efforts to achieve a non-discriminatory justice system are not purely conceptual in nature. What is evident, however, is that the concept of ‘equality before the law’ does not operate as an adequate safeguard for the equal treatment of either women, racial minorities or other marginalized groups in the justice system. This in turn manifests as a barrier to fair and equal access to justice for certain members of our society.



REFERENCES

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1. Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange, 1967), quoted in Alfonso Ruiz Miguel, 'Equality before the Law and Precedent', (1997) 10(4) *Ratio Juris* 372.
2. Department of Foreign Affairs and Trade, *About Australia: Legal System* (2012) <http://www.dfat.gov.au/facts/legal_system.html>.
3. *Ibid.*
4. Davison M Douglas and Neal Devins, 'Introduction' in Neal Devins and Davison M Douglas (eds), *Redefining Equality* (Oxford University Press, 1998) 4.
5. Judicial Commission of New South Wales, *Equality Before the Law Benchbook* 1103 [1.1].
6. *Ibid.*; see also Bob Hepple, *Equality: The New Legal Framework* (Hart, 2011).
7. Amanda Burgess-Proctor, 'Intersections of Race, Class, Gender and Crime: Future Directions for Feminist Criminology' (2006) 1 *Feminist Criminology* 1, 27.
8. K Daly, 'Criminal Law and Justice System Practices as Racist, White and Racialized' (1994) 51 *Washington and Lee Law Review* 431, 439.
9. Miguel, above n 1, 372.
10. Kelsen, above n 1.
11. Catherine A MacKinnon, 'Reflection on Sex Equality under Law' (1991) 100 *Yale Law Journal* 1281, 1289.
12. Larry Gould, 'Privilege and the Construction of Crime' in Criminology and Criminal Justice Collective of Northern Arizona University (eds), *Investigating Difference: Human and Cultural Relations in Criminal Justice* (Prentice Hall, 2009) 24.
13. R Hogg, 'Policing and Penalty' in Kerry Carrington and Barry Morris (ed), *Politics, Prisons and Punishment – Royal Commissions and 'Reforms'* [1991] *Journal for Social Justice Studies* 21.
14. Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).
15. *Ibid.* 161.
16. *Ibid.*
17. *Ibid.* 165; see also Hogg, above n 13.
18. *Ibid.*
19. Hogg, above n 13, 3.
20. *Ibid.*
21. Hogg, above n 13, 16.
22. David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5th ed, 2012) 143.
23. Hogg, above n 13, 8.
24. *Ibid.* 10.
25. *Ibid.*
26. Doreen J McBarnet, *Conviction: Law, the State, and the Construction of Justice* (Humanities Press, 1981), quoted in Brown et al, above n 23, 154. See also Doreen J McBarnet, 'Magistrates' Courts and the Ideology of Justice' (1981) 8 *British Journal of Law and Society* 181.
27. *Bail Act 1978* (NSW) s 32 (1)(a).
28. Hogg, above n 13, 7.