

Fighting Complacency and Retrogression: Re-Awakening Gender Equality Activism

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Abstract.

New Zealand enjoys an impressive reputation for gender equality. It was the first self-governing nation to grant women's suffrage in 1893 and scores highly in international indexes such as the World Economic Forum's Global Gender Gap at seventh of 136 countries. In recent political history women held the top four constitutional positions: Prime Minister, Governor General, Attorney-General and Chief Justice, for a short period of time. Yet as feminist academic Prue Hyman (2010) notes, New Zealand has moved from a relatively equal society to one of its most unequal in terms of earnings and income. This paper explores the recent mobilisation of feminist civil society and female-dominated trade unions in New Zealand who are beginning to collectively advocate and litigate on human rights such as equal pay. They are using the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to harness their frustration, benchmark progress and hold the State party to account for implementation of women's rights and to prevent retrogression. The paper explores the re-awakening of women's activism around social and economic rights in a nation with a strong self-regard for its international reputation in progressing gender equality. The paper uses data collected from New Zealand's seven periodic reports to the Committee on the Elimination of Discrimination Against Women and the Committee's concluding observations and responses to successive governments in relation to Article 11, relating to equal pay and pay equity. It analyses the ebbs and flows of political will and explores the patterns of complacency, frustration and now mobilisation by women's civil society groups who are pressing the case for women's human rights.

Introduction

This paper addresses in general terms the role of civil society in advancing human rights both conceptually and in practice. In particular, it examines the revival of women's civil society activism around women's rights as human rights in New Zealand.

The role of civil society- theoretical approaches

The role of civil society in advancing human rights is critical to the legitimacy of human rights and to the strength and efficacy of their promotion and protection both globally and domestically. Civil society has a significant role in the monitoring of the implementation of human rights on the ground. But Moyn (2010) reminds us that the drama of human rights is comparatively recent and he says they emerged in the 1970s "seemingly from nowhere" (p.3). At the time there were almost no non-governmental organisations.¹ Women's non-governmental organisations in particular then are fairly recent advocates using the language of human rights to advance women's rights, in spite of an exploding domestic and international women's movement in the 1970s.

At a conceptual level, some scholars have positioned civil society as agents of public activism. For example, Amartya Sen in his *Elements of a Theory of Human Rights*, states that the relevance of human rights do not lie exclusively in determining coercive legal rules. If human rights are powerful moral claims then different avenues exist for promoting these claims. He says monitoring and other activist support, such as that undertaken by Human Rights Watch or Amnesty can help to advance the effective reach of acknowledged human rights. Sen states:

...The conceptual understanding of human rights....can benefit substantially from considering the reasoning that moves activists and the range and effectiveness of practical actions they undertake, including recognition, monitoring and agitation, in addition to legislation.²

Other scholars traversing the growth of human rights over the past 65 years regard civil society's role as a catalyst for human rights activity or as a movement impacting on State

¹ Moyn, S. (2010). *The last utopia: human rights in history*. The Belknap Press of Harvard University, Cambridge, Massachusetts.

² Sen, A. (2004). Elements of a theory of human rights. *Philosophy and Public Affairs*. 32(4) 315-356, p. 356.

parties, domestically and globally. Moyn (2010) notes that history shows human rights have stood a better chance when social activism has surged from below and helped refresh legal agendas.

The role of civil society- institutional momentum

Moving from theory to practice, there is increasingly involvement of civil society in the institutionalisation of human rights through the United Nations human rights treaty body reporting framework. As an example, let us take the Universal Periodic Review, both a mechanism and a process by which the United Nations reviews every state's record challenges.³ The Human Rights Council resolution 5/1 (18 June 2007) that created the UPR states that it should 'ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions....'⁴ And elsewhere stakeholders include, inter alia, NGOs, national human rights institutions, human rights defenders, academic institutions and research institutes and regional organisations, as well as civil society representatives. Civil society, therefore, has a constitutional validity in the UPR.

It also has a significant role in the UPR process prior to the country review in Geneva, and afterwards. For example, consultations with stakeholders including civil society organisations (CSOs) in the preparation of a country's national report is described by the Commonwealth Secretariat as a "key component of success" (Sen, 2009). In the New Zealand context in the second round of UPR just completed women's civil society organisations, for example, wrote stakeholder reports prior to the interactive dialogue in Geneva on New Zealand's performance, attended UPR Info's workshop with permanent representatives of other countries in Geneva, observed the UPR working session both in Geneva and by webcast. They also advocated to other State parties by suggesting questions and recommendations that could be put to New Zealand when it was under review.

An indicator of the effectiveness of this last activity is the close correlation between Ireland's recommendation to New Zealand during the UPR, and a recommendation made to permanent representatives of State parties at the Geneva UPR Info workshop by an umbrella women's civil society group from New Zealand. The group, the CEDAW Coalition of New Zealand

³ Sen, P. (2009). (Eds.) Universal Periodic Review: Towards best practice. Commonwealth Secretariat, United Kingdom. P. 55.

⁴ See para 3(m) of the Annex to Human Rights Council Resolution 5/1. Institution-building of the United Nations Human Rights Council.

NGOs, representing over 25 women's organisations, had recommended orally and in its stakeholder report:

*.... that the Universal Periodic Review strongly urged the State Party, New Zealand, to develop with civil society involvement an Action Plan for New Zealand women with authentic targets and strong accountabilities. The plan must target violence against women, pay inequality and pay inequity, the status of Māori and Pacific women, and the importance of welfare and employment-related reforms on the lives of women and their families. The status of disabled women must also be addressed.*⁵

Ireland, in the summary of proceedings of the review process recommended to the New Zealand Government:

*Develop, in partnership with civil society, a national action plan for women with defined targets, to address issues such as violence against women, pay inequality, the situation of Maori and Pacific women, and women with disabilities.*⁶

After the Geneva dialogue with New Zealand, civil society organisations including women's groups engaged in awareness-raising activities with their own groups, attended a roundtable held by the New Zealand Human Rights Commission with Ministry of Justice and Ministry of Foreign Affairs and Trade, and wrote to the New Zealand Government urging the government's acceptance of specific recommendations. The New Zealand Government has now formally responded to the recommendations and civil society is advocating to influence domestic political policies in a national election year, the 2014 General Election. Conceptually and institutionally then, civil society is integral to human rights implementation.

Gender equality- the New Zealand experience

Women's civil society organisations have been some of the most vibrant, well-organised, visible and active advocates and monitors of human rights in New Zealand in the past 50 years. However, the past decade has been characterised by ebbs and flows of women's civil society activism. Only now can it be claimed that there appears to be a revitalisation of women's civil society advancing women's rights using the human rights treaty body framework and the courts.

⁵ CEDAW Coalition of New Zealand NGOs submission to the Universal Periodic Review, 2014.

⁶ United Nations Human Rights Council (2014) Draft Report of the Working Group on the Universal Periodic review, New Zealand. 27 January-7 February. A/HRC/WG.6/18/L.1

Historically, New Zealand enjoys an impressive reputation for gender equality. It was the first self-governing nation to grant women's suffrage in 1893 and scores highly in international indexes such as the World Economic Forum's Global Gender Gap at sixth of 135 countries. In recent political history (2002-2005) women held the top four constitutional positions: Prime Minister Hon Helen Clark (1999-2008) Governor General Dame Silvia Cartwright, Attorney General Hon. Margaret Wilson and Chief Justice, Dame Sian Elias for a short period of time. Only one remains today, the Chief Justice. However, this historical reputation and the country's pervasive national self-regard as an equal and fair society disguises the revisionism and complacency that followed the Clark government's loss to a National-led government in 2008. Much of this centred on the perception that because Helen Clark, now the Administrator of the United Nations Development Programme, was a women's issues supporter, men were somehow being side-lined. Her style of leadership saw her rely on a "kitchen cabinet" style that involved several close female aides and this cultivated the mythology that women had made it and that gender inequality in positions of political power had been addressed.

New Zealand's self-image as a human rights leader is also at odds with New Zealand's variable record in implementing some of the 'harder' gender equality issues. At least three women's systemic rights issues impede the progress of gender equality:

- closing the gender pay gap,
- eliminating violence against women,
- and preventing systemic discrimination in employment, health services, and education for Māori (indigenous women).

These are recurring features in the nation's human rights landscape and women's civil society is largely positioning itself around these issues and women's sexual and reproductive health, plus female representation and participation in politics, the public and private spheres.

The fluctuating fortunes of women's civil society in New Zealand more recently can be attributed to a number of global and domestic features. First, New Zealand like many other countries is caught in what the World Economic Forum⁷ has called ever-tightening restrictions on civil society particularly the more general decline in funding available for advocacy, rights-based activities or causes that challenge the status quo. The Forum also

⁷ World Economic Forum (2013). The Future Role of Civil Society <http://www.weforum.org/reports/future-role-civil-society>

talks about subtle administrative restrictions. A not so subtle restriction in New Zealand with a profound impact on civil society organisations is de-registration as a charity. Charitable status has beneficial taxation implications and encourages donations and has under-pinned the vigour of many civil society organisations working on women's issues for many years.

One of New Zealand's oldest women's groups, the 120 year old National Council of Women (NCWNZ), representing at least 65,000 women and a strong and persistent voice on women's rights nationally and internationally, lost its charitable status in 2010. It was de-registered supposedly because advocacy, while allowed, must be additional or secondary to the main purpose of a charity (relief of poverty, advancing education or religion, benefitting the community)⁸ and it was considered that the NZNCW's main purpose was advocating for changes in the law, policy or decisions of the government relating to women. The umbrella organisation represents 30 organisations affiliated at national level and a further 40 at local level with 22 branches throughout the country. Its functions are to represent and promote the interests of New Zealand women through research, discussion and action. The Council, for example, has been involved most consistently in engagement with the United Nations Committee on the Elimination of Discrimination Against Women in New Zealand's seven periodic reports under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). After a long and public fight, the National Council of women was re-registered by a new Charities Board in 2013 and is now litigating in the High Court to regain two years' worth of tax imposed when it was de-registered. The fight over charitable status distracted one of the strongest voices for women in the country and seriously impacted on its financial resources. The State's administrative restrictions through the charities' legislation, and the general decline attributed by the State to hard times induced by the global financial crisis in public funding for advocacy groups, was an assault on collective social movement. It impacted on NGO co-ordination and knowledge-sharing and reduced philanthropic and public donations.

However, while women's activism took a hit, there is evidence it is again on the rise again in New Zealand and is broadly coalescing around economic, social and cultural rights to address a widening inequality in income and earnings, with large groups of women such as 40,000 carers working in the aged care and disability sectors earn barely the minimum wage, NZ \$14.75 cents, significantly less than what is regarded as a 'living wage' at NZ\$18.40.

⁸ S13 (1) (b) Charities Act 2005. www.legislation.govt.nz

The rise of women's activism on equal pay.

In a project funded by the New Zealand Law Foundation, researchers have analysed the impact of New Zealand's ratification of CEDAW as it relates to closing the gender pay gap.⁹ It is clearly demonstrated in this analysis that women's civil society has used CEDAW and the reporting process over the years to keep the international human rights community aware of pay equality and equity. There is a demonstrated renaissance of interest in the ways civil society is using human rights treaty body framework to leverage and pressure the State party.

Equal pay is a fundamental tenet of gender equality. The Universal Declaration of Human Rights 23(2) states: *Everyone, without any discrimination or distinction of any kind, has the right to equal pay for equal work.* It is referred to in the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Arts. 3 and 7a) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 11 reads:

State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (d)...the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

Various International Labour Organisation (ILO) Conventions such as ILO C100, Equal Remuneration Convention and ILO C111, Discrimination (Employment and Occupation) Convention also specify equal pay and pay equity obligations. Both the treaties on racial discrimination, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and on the rights of disabled people, the Convention on the Rights of Persons with Disabilities (CRPD), also refer to equal pay. New Zealand has ratified all of these conventions since the late 1960s.

What are New Zealand's obligations under such treaties? The Office of the United Nations High Commissioner for Human Rights states that the obligations are often expressed under three headings: to respect, which means refraining from the interference with the enjoyment

⁹" Assessing the Impact of New Zealand's Ratification and State Receptivity of the Major Human Rights Treaties" is a three year project involving researchers from the Auckland University of Technology (AUT), the University of Waikato and the New Zealand Human Rights Commission. The author of this paper leads the research project.

of the right; to protect, which means preventing others from interfering with the right, and to fulfil, which requires the State party to adopt appropriate measures towards the full realization of the right. In several human rights treaties such as ICESCR (Art. 2(1) the concept of “progressive realization” is referred to as a core aspect of States’ obligations in relation to economic, social and cultural rights. This means the State taking appropriate measures towards the full realisation of rights such as equal pay and employment rights by all appropriate means including legislation “to the maximum of its available resources”.

While this means that a State’s compliance with the obligation is assessed in the light of financial and other resources, a lack of resources cannot justify inaction or indefinite postponement of implementation. This is particularly so when discrimination exists. The Committee on Economic, Social and Cultural Rights (2009) has said, “failure to remove differential treatment on the basis of a lack of available funds is not an objective and reasonable justification unless every effort has been made to use all resources that are at a State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority”. And despite the incrementalism inherent in the idea of progressive realisation, the High Commissioner for Human Rights indicates that States must also take immediate action, irrespective of the resources they have, in relation to some rights. The High Commissioner has listed Art. 7(a) (i) *Equal remuneration for work of equal value without distinction of any kind*, as one example.

The Committee is also categorical about retrogression and says that States should not allow the existing protection of economic, social and cultural rights to deteriorate unless there are strong justifications for a retrogressive measure. CEDAW committees have noted regression on equal pay in three of New Zealand’s seven periodic reports under that treaty, including the two most recent reports.¹⁰

New Zealand has weak, existing equal pay legislation, the Equal Pay Act 1972, and feminist academic Prue Hyman has looked at the painfully slow history of equal pay implementation in New Zealand.¹¹ In what might be a record for retrogressive legislation impacting on the implementation of a fundamental human right- equal pay for work of equal value- New Zealand repealed, after only three months, the Employment Equity Act 1990. The short-lived

¹⁰ McGregor, J. (2014). The human rights framework and equal pay for low paid female carers in New Zealand. *New Zealand Employment Relations Journal* 38(2), 4-16

¹¹ Hyman, P. (2008). Pay equity and equal employment opportunity in New Zealand- developments 2008/2010 and evaluation. *New Zealand Journal of Employment Relations*, 33(3), 1-15.

legislation repealed by an incoming conservative government was meant to complement the Equal Pay Act 1972 and provided a means of delivering equal pay for women compared to work of equal value performed primarily by men. Twelve equal pay claims that were registered under the commission apparatus established by the legislation, lapsed. Dismantling of equal pay machinery by conservative governments is a familiar pattern in New Zealand. In 2009 a new National-led government closed the Pay and Employment Equity Unit in the Department of Labour and discontinued two job evaluations- for social workers and special education support workers, claiming they were unaffordable in the current economic and fiscal environment. Retrogression is a feature of women's economic rights in New Zealand.

The gender pay gap has remained virtually static in the last decade at around 13 per cent difference between men's and women's average hourly ordinary time earnings as measured by the New Zealand Income Survey. There is considerable variability by industry sector. Since 2000 the pay divide has widened by 80 cents for women across all industries so that now they earn on average \$3.90 an hour less than men. Women in finance, however, earn \$18 or less an hour and 24 public service departments of 29 have gender pay gaps of 10 per cent or more. Eight of these, including the Department of Prime Minister and Cabinet at a 24 per cent gender pay gap are above 20 per cent. The Defence Forces at 42 per cent and Education at 35 per cent are other large public sector employers with yawning gender pay divides.

A confluence of factors has seen groups of women coalesce around equal pay in the past two years. First, the Committee on the Elimination of Discrimination Against Women, after examining New Zealand for the seventh time, made a series of four explicit recommendations to the government relating to equal pay and pay equity. These were:

- Enact appropriate legislation that guarantees the operationalization and implementation of the principle of "equal pay for work of equal value" in line with article 11(d) of the Convention.
- Effectively enforce the principle of equal pay for work of equal value, through establishing specific measures and indicators, identifying time frames to redress pay inequality in different sectors and reviewing the accountabilities of public service chief executives for pay policies
- Adopt policies and take all necessary measures, including temporary special measures in accordance with article 4, paragraph 1, of the Convention and the

Committee's general recommendation No 25 with time-bound targets, to eliminate occupational segregation, both horizontal and vertical

- Ensure that there is a monitoring institution for gender pay inequity within the State party's administration despite the closure of the Pay and Employment Equity Unit in the Department of Labour.¹²

The explicit nature of these recommendations was unusual and more prescriptive than the usual aspirational language so beloved of UN committees. It reflected a frustration by the Committee with New Zealand's slow progress as a country traditionally regarded as progressive and a best-practice example in many other areas of women's rights.

The Committee's report also prompted a number of women who had attended New Zealand's country examination in New York to consider how best civil society could re-organise and exert pressure on the Government to implement the recommendations. In April 2013 a group of 21 influential women met and decided to form the CEDAW Coalition of New Zealand NGOs with 25 member organisations, one with another 11 groups under its mantle. They include large faith-based women's groups, Māori and Pacific groups, women's health collectives, groups working against violence, large NGOs and some of the bigger existing women's civil society organisations. Its aims were not to duplicate existing civil society activism but to ensure that government progressed gender equality through the systematic and continuous implementation of all of the provisions of CEDAW.

The umbrella group aims to raise the visibility and profile of the Convention and hold the State party accountable for its implementation. Since its formation the CEDAW Coalition has actively engaged in New Zealand's second Universal Periodic Review with pay equality and pay equity as a primary focus in a stakeholder report. Partly as a result of this concerted civil society advocacy, at least five countries made recommendations in the interactive dialogue to New Zealand about closing its gender pay gap.

Civil society mobilisation has also involved using the courts to fight for equal pay, the first such litigation in 28 years. In late 2012, a rest home worker from the North Island of New Zealand, Kristine Bartlett and the Service and Food Worker's Union took the first equal pay for work of equal value case to the Employment Court since 1986. Kristine and her union

¹² Committee on the Elimination of All Forms of Discrimination Against Women, Fifty-second session, 9-27 July 2012, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, New Zealand. CEDAW/C/NZL/CO/7.

argued that her pay rate was discriminatory; that her skills, responsibility, service and conditions of work in caring for the elderly were undervalued because caring work was done almost entirely by women. As Hill (2013) states the case is an important test of law (it is now in the higher courts) because the last equal pay case 27 years ago was rejected. The Court said it had no jurisdiction to decide equal pay issues if the parties could not, except during the implementation of the ACT.¹³ The quixotic decision was not appealed and it was widely considered that the Equal Pay Act 1972 was virtually unusable to test equal pay cases comparing men's and women's work.

The current case would not have been taken, though, without women's civil society agitation and a New Zealand Human Rights Commission national inquiry report that focused on equal pay for aged care workers.¹⁴ The report, *Caring Counts*, concluded that as many as 40,000 workers, the vast majority of them women, working in indispensable but largely invisible work- caring for older people in their homes, in residential aged care facilities or in hospitals- were being systemically discriminated against either in terms of pay equality or pay equity or both. Because the workforce was female the pay scales reflected the historic systemic undervaluation of the roles women played in society. As the equal Employment Opportunities Commissioner at the time and one of the report's authors, I wrote:

The consensus revealed by the inquiry means that New Zealand has an unprecedented opportunity to address the indecency of poorly paid "emotional labour" undertaken by often marginalised workers looking after vulnerable older people. A much repeated comment up and down the country when the Commission undertook its field work was that the value we place on older people in New Zealand society is linked to the value we place on those who care for them. (p.1).¹⁵

During the inquiry process in 2010 politicised female care workers themselves. They attended public meetings, focus groups, interviews and individual meetings right around the country, which focussed on the systemic undervaluation of their jobs. Traditionally these low paid female workers had been a sectoral group with low visibility, an absence of their own 'public voice' and little agency, expressed during the inquiry with the oft-repeated phrase, 'I'm only a carer.' The Human Rights Commission's national inquiry and the *Caring Counts*

¹³ Hill, L. (2013). Equal pay for equal value: the case for care workers. *Women's Studies Journal*. 27(2), 14-31.

¹⁴ New Zealand Human Rights Commission (2012). *Caring counts; report of the inquiry into the aged care workforce*. Wellington. www.hrc.co.nz

¹⁵ Ibid fn 14, p.1.

report legitimised their claims. The report received significant, blanket media coverage, proportionate to other national human rights institution reports, because as Equal Employment Opportunities Commissioner at the time, I worked undercover in an incognito role as an aged care worker and wrote about the experience. Journalists were as interested in this self-expression by an elite advocate as they were in the issue that concerned a previously ‘voiceless’ group of workers.

Another salient feature of civil society activity was the involvement of Grey Power, New Zealand’s largest older people’s civil society organisation, in the inquiry. This linked women’s unionism, women’s and older people’s civil society support, and NHRI advocacy in an unusual congregation of interest around economic and social rights

The Service and Food Workers Union, the trade union representing many of the unionised carers, responded proactively to a rising tide of increasing agency and public voice by their largely female members on the issue. The resulting court case re-testing the Equal Pay Act 1972 is union-funded and is part of a broader Pay Equity Challenge campaign by women’s civil society and unions.

These two examples, coalition building by women’s groups around CEDAW and union partnership with civil society groups and female workers to drive litigation, are evidence of a re-awakening of public activism. In this example, equal pay has been used but it could equally apply to the growing mobilisation of women’s activism on violence against women.

A feature of the renaissance of women’s rights in New Zealand is an accompanying transformation of institutional and organisational structures. The internet has to some extent de-bureaucratized organised women’s civil society with the informality, ubiquity and ease of internet-based affiliation and as a means of mobilisation. There is, however, an urgent need to harness and co-opt net feminism so that fourth wave feminism takes a shape that moves beyond “likes” and converts into public activism.

Connecting the ‘waves’ of women working on gender equality is an urgent challenge if CEDAW is to be promoted effectively to younger women. Recent New Zealand research (Schuster, 2013)¹⁶ on younger women’s political participation and social media suggests a generational divide because online activism hides many young women’s activities from politically active older women who are not online in the same spaces. This has led to

¹⁶ Schuster, J. (2013). Invisible feminists? Social media and young women’s political participation. *Political Science* 65(1), 8-24.

frustration among some older women that their hard fought battles using CEDAW as a mechanism are neither appreciated nor likely to survive. The international feminist 'third wave' literature suggests that feminism is not fading but rather changing (Budgeon, 2011)¹⁷, and fighting for women's economic rights is likely to be at the forefront of this change. Unequal pay and pay inequity are significant barriers to women's full participation and gender equality globally.

When State parties are indifferent at a national level to introducing effective equal pay legislation or resourcing mechanism for implementation, then civil society needs to push from below. There is evidence of women's civil society re-engagement in New Zealand, the country that first gave women the vote.

¹⁷ Budgeon, S. (2011). *Third wave feminism and the politics of gender in late modernity*. Houndmills. Palgrave MacMillan.

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