Towards Strategic Universalism

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Introduction: Deconstructing Universals

As Margaret Davies observes, 'Western positivist law is premised upon the notion of exclusion'. Exclusion is imbricated in the make-up of the legal order, a factor that poses a considerable challenge for effecting a hospitable and inclusive constitutionalism.

My comment will be directed to an elaboration of the way exclusion is effected through language. While purporting to have universal application, the abstract language of constitutionalism may obfuscate the manner in which only the voices of Benchmark Men—the normative citizens, who are white, Anglo-Celtic, heterosexual, able-bodied and/or middle class—are heard. If the voices of women and 'others' are not heard, the universal can have an oppressive, totalitarian and exclusionary effect. What is more, the process of constitutionalising legal disputes may be consciously deployed by powerful Benchmark Men for the very purpose of legitimising exclusion.

One has to venture beneath the universalising carapace of constitutional texts to deconstruct them and to reveal the play of power beneath the surface. Foucault's idea of discourse theory enables one to do this in order to consider the subjectivity of the *dramatis personae* and the nature of the dialogue being conducted, as well as the discontinuities, breaks and limits that can occur in institutional histories.[1] Discourse theory unmasks and disrupts the sameness implied by the universal language of constitutionalism.

Engendering the Citizen

Citizenship is the paradigmatic example of a universal within constitutional discourse. The 'citizen' is the basic constitutional unit, but one that is treated as largely unproblematic within official texts. For example, the Australian Constitution refers to 'citizens' only once, and that is with reference to a foreign power (s 44(1)), although there are scattered references to 'subjects', 'residents', 'people' and 'persons'.

Drawing a metaphysical boundary that is roughly congruent with the nation

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1 Michel Foucault, *The Archaeology of Knowledge* [AM Sheridan Smith trans] (London: Tavistock, 1972) 31 *et passim*.

state, citizenship serves to determine who is in or not in a relevant community. At the border, exclusion is understood as an overt and rational act that has the approbation of the international community. Within the state, citizenship is a neutralised abstraction that sloughs off all dimensions of identity. It signifies that all belong by virtue of birth or nationalisation to the relevant national community. If moves to exclude occur within the state, they are likely to be covert; overt exclusionary practices do not accord with contemporary egalitarian rhetoric. To convey the appearance of inclusiveness, the universal language of constitutional discourse erases differences between citizens. This language represents 'the citizen' as an individual who is de-sexed, de-raced, de-classed and de-politicised. The public sphere, where constitutional discourse prevails, therefore purports to be indifferent to difference, although a cursory examination reveals otherwise.

I was struck by the persistent masculinist bias within citizenship discourse at a recent conference held to mark the 50th anniversary of Australian citizenship.[2] Not only did a number of speakers refer to bearing arms as a key indicium of citizenship, but some of them also commented on how remarkable they thought it was that Australian citizenship had been secured without a revolution. The inference was that there was something suspect about a concept of citizenship that was disconnected from fighting and bearing arms, even though the Australian Constitution, unlike its American model, says nothing about bearing arms.[3] Nevertheless, throughout history, the discourse of citizenship has been suffused with notions of militarism. Iris Marion Young observes that the values of citizenship have in fact been devised from 'militarist norms of honour and homoerotic camaraderie'.[4] While it may be that sport has largely replaced war in the production of fraternal values in modern incarnations of citizenship, the fact remains that the masculinism underpinning citizenship disrupts assumptions of its universality.

The halting admission of women, Aboriginal people, and people from non-English speaking backgrounds to the polity reveals that they have not been fully accepted as citizens, let alone as 'Equals'. The 'Equals', in the Greek democratic poleis of Antiquity, were the equivalent of Benchmark Men who did not need to specify the obvious: equality between them was a norm within the body politic and their rights were implicit. 'Others', or 'Unequals', were not part of the body politic, as the historical sub-texts remind us. Women and 'others' continue to be associated with difference, affectivity and corporeality, manifestations of particularity that consign them to the metaphysical private sphere, in contradistinction to 'the citizen' who is averredly disembodied, and who is the normative inhabitant of the universalised public sphere.[5] Assignation of difference

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2 The 50th Anniversary of Australian Citizenship Conference, University of Melbourne, 21-23 July 1999.

3 Nor does the Australian Constitution make reference to other responsibilities commonly associated with citizenship, such as voting or jury service.

4 Iris Marion Young, 'Polity and Group Difference: A Critique of the Idea of Universal Citizenship' (1989) 99 *Ethics* 250, 253.

5 I have dealt with the ambiguities of the public/private dichotomy elsewhere. See M Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed),

to the private sphere is the liberal solution to the 'problem' of difference:

> To state that the neutrality principle should imply toleration of *any* conception of the good simply overlooks the public/private dimension that regulates the very working of the neutrality principle.[6]

Exposure of the vestigial congruence between the citizen and the soldier reveals 'the citizen's' embodied reality. It reveals that the particularity of benchmark man meretriciously parades as the universal to give the impression that the state is neutral. Deconstruction reveals that gender, far from being irrelevant to the public sphere is a central category of political analysis.[7] In fact, the association between the feminine and the particularity of love and care has been used, in a somewhat circular argument, to exclude women from the public sphere on the basis that they lack the requisite degree of distance and objectivity to enable them to dispense justice and pursue virtue in the political realm in the interests of the common good.[8]

Constitutionalising Disputes

Universality and neutrality are further secured through the process of constitutionalisation, by which I mean the way disputes are brought under the umbrella of the Constitution, usually by corporate respondents. Constitutionalisation may therefore be a strategy for sloughing off particularity, as I shall illustrate. Once a dispute enters the constitutional domain, it is comprehensible only if constitutional language is spoken. Constitutionalisation permits issues, such as substantive claims of sex or race discrimination, to be transmuted into disputes about constitutional inconsistency, for example.[9] A dispute, the nub of which is whether a law of the Commonwealth or of a State prevails, is unlikely to contain any of the piquancy, passion, or even violence, emanating from a workplace sexual or racial harassment suit. Constitutionalisation enables a dispute to be blanched of incriminating evidence that compromises claims to neutrality, fairness and justice. Constitutionalisation is but one strategy invoked to the advantage of those with superior resources within the adversarial arsenal. While sloughing off the particular in favour of the universal appears to contain all the hallmarks of a clever ploy, it is not only legitimate, but laudatory,

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Public and Private: Feminist Legal Debates (Melbourne: Oxford, 1995). See also Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

6 Anna Elisabetta Galeotti, 'Citizenship and Equality: The Place for Toleration' (1993) 21 *Political Theory* 585, 591.

7 Cf Kathleen B Jones, 'Citizenship in a Woman-Friendly Polity' (1990) 15 *Signs: Journal of Women in Culture and Society* 781, 789. See also, Sylvia Walby, 'Is Citizenship Gendered?' (1994) 28 *Sociology* 379.

8 Carole Pateman, '"The Disorder of Women": Women, Love, and the Sense of Justice' in C Pateman (ed), *The Disorder of Women: Democracy, Feminism and Political Theory* (Cambridge: Polity Press, 1989).

9 I have elaborated on the issue of constitutionalisation in M Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' (1999) 23 *Melbourne University Law Review* 749.

within the legal culture. Constitutionalisation elevates a dispute to a rarefied plane beyond bodily disorder. Within liberal legalism, the universal invariably trumps the particular. Hence, exclusion of the 'other' is not only legitimated by constitutionalisation, it may be demanded by the process, for the norms of constitutional discourse are forged through a negation of the 'other'. As Levinas has shown, the notion of a norm acquires meaning only by virtue of an 'other'.[10] Consequently, the exclusionary basis of constitutionalism in general, and positive law in particular, as observed by Davies, does not bode well for a new inclusionary practice.

Constitutionalisation enables powerful litigants, notably corporate respondents, to produce authoritative versions of constitutional jurisprudence so that all but minimal reference is made to the jurisgenerative harm. Just as authoritative histories of war are written by the victors, the 'winners' of litigation generally get to write constitutional decisions, often by dint of superior resources, particularly in the case of corporate appellants. The resulting texts not only shape gender, race and class relations within the social script, but they continue to emphasise *de*-particularity as the indicium of constitutional discourse. By cloaking embodied realities, constitutionalisation reveals how those with social power are consistently able to imbue universals with meanings that operate to their advantage. Although there are a few notable exceptions, exclusion of women and 'others' has been a notable feature of constitutional jurisprudence. In the 18th century, a property qualification was a prerequisite for citizenship (along with sex and race). I would suggest that constitutionalisation today constitutes a de facto property qualification, for it reasserts a class difference under the guise of universalism. The universality of citizenship purports to treat 'have nots' in the same way as the 'haves'.

The dilemma faced by those desirous of effecting an inclusive constitution is how to overcome the pitfalls of constitutionalisation so that the particular can be accommodated, rather than being relegated to the background, or sloughed off altogether. This universality/particularity dilemma is an intractable philosophical one which has beset political philosophers at least since Aristotle.[11] Universality manifests itself within liberal legalism through, for example, the norm of equality before the law which assumes that everyone is similarly situated. Formal equality denies the significance of the disparate impact of treating equally those who are unequal.[12] That is, the mantle of sameness occludes both the allocation of benefits to the privileged and the imposition of burdens to those already disadvantaged.

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10 This is a central idea in the work of Levinas. See Emmanuel Levinas, *Totality and Infinity*, [Alphonso Lingis trans] (The Hague: Martinus Nijhoff, 1979); Emmanuel Levinas, *Otherwise than Being or Beyond Essence*, [Alphonso Lingis trans] (The Hague: Martinus Nijhoff, 1981).

11 For an insightful discussion regarding difference in the context of modern political philosophy, see Christine Sypnowich, 'Some Disquiet about "Difference"' (1993) 13 *Praxis International* 99.

12 As Frankfurter J famously expressed it in *Dennis v United States* 339 US 162 (1950) 184: 'It was a wise man who said that there is no greater inequality than the equal treatment of unequals'.

Even if the Constitution were to be changed to include a guarantee of equality for men and women, and for minorities, of the type included within the Canadian Charter of Rights and Freedoms,[13] the difficulty remains as to how to resist the totalising propensity of universalism. Constitutional discourse erases difference in order to accommodate difference, but all differences are not commensurable. As suggested, the bodily characteristics associated with sexual identity are largely unseeable within constitutional discourse, but the subliminal power associated with a particular identity can be significant, as suggested in the case of the masculinity of the citizen soldier. When the embodied identities of women and 'others' seek to assert themselves, such as in sex and race-based disputes, where corporeality is undeniable, constitutionalisation immediately seeks to suppress them.

Conclusion: Particularity as Hospitality

I do not believe that the illustrative biases of constitutional discourse that I have sought to disinter would be instantaneously cured by effecting a constitutional amendment, leaving aside the question of an equality guarantee. The observation holds good also for a change to the form of constitution, such as a change from monarchy to republicanism.

I am not advocating that universal discourse be abandoned altogether, as collective anonymity and a high level of abstraction are selectively desirable, particularly within constitutional texts themselves. It is acknowledged that a community is constituted by stressing similarities, not differences. Indeed, separating the citizen from social class encapsulates an egalitarian ideal.[14] A similar point can be made about sex, race, ablebodiedness or sexuality. Drawing attention to these characteristics harks back to a time when they automatically meant exclusion and degradation for women and 'others'. Nevertheless, to ignore the disproportionate impact of universality is to ignore its repressive tendencies; to ignore particularity is to ignore difference, and to pretend that those who are unequal are formally equal.

A number of theorists have been wrestling with the dilemma of how to balance an ethical understanding of universality, in which all differences are valued equally, against a selective need to privilege particularity and difference.[15] Rather than abandon the balancing act as hopeless *ad limine*, it should be possible to take advantage of the tensions and contradictions and deploy them productively. Thus, I suggest that we endorse a notion of strategic, or discursive, universalism as a step towards a new constitutional theory of justice. I propose that an open dialogue be

13 Canadian Charter of Rights and Freedoms, ss 1, 15(1). For discussion, see *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

14 Cf Denise Riley, 'Citizenship and the Welfare State', in John Allen, Peter Braham and Paul Lewis (eds), *Political and Economic Forms of Modernity* (Cambridge: Polity Press, 1992) 187.

15 Eg Jodi Dean, *Solidarity of Strangers: Feminism after Identity Politics* (Berkeley: University of California Press, 1996) 143; Ruth Lister, 'Dialectics of Citizenship' (1997) 12 *Hypatia* 6; Anna Yeatman, *Postmodern Revisionings of the Political* (London: Routledge, 1994); Young, above n 4.

effected between the universal and the particular, in order to generate a more hospitable attitude towards the 'other'. Instead of pretending to be neutral when we are not, because the norms of constitutional discourse demand it, strategic universalism requires acknowledgment of the 'other' and accountability to it. While advertence to the situated position of the 'other' may draw attention to difference, to which the seeds of invidiousness might attach, flouting the universalising conventions of constitutionalism is also a subversive act, for it gives voice to that which was formerly ineffable.

Adjudication is necessarily a site of contest, particularly within an adversarial setting, and claimants who are struggling for justice might aim to exploit the friable space between the universal language of primary constitutional texts and the particularity of disputes, rather than defer to the orthodoxy of an imperialistic universal that operates in all domains. The situated language emanating from these spaces must be heeded because it is qualitatively different from the high level of abstraction associated with constitutional discourse. Liberalism does have the ability to accommodate the perspectives of the 'other', but it tends to domesticate, eviscerate and assimilate them.[16] We need to guard against such forms of inhospitable treatment.

Strategic universalism is undeniably a risky venture because power is potent and unpredictable, but power does not flow in one direction alone as Foucault reminds us.[17] It also requires sensitivity and perspicacity to know when to invoke and uphold universal standards, and when to repudiate them. Strategic universalism does offer the possibility of new incarnations of justice based on a dialogic constitutional method. Strategic universalism would allow justice to be envisioned so that it could incorporate an hospitable dimension, in contradistinction to the exclusion, alienation and even violence, legitimated by the universality of constitutional language. This forum has provided an important first step in facilitating the necessary dialogue.

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16 The point is illustrated by *Mabo v Queensland* [No 2] (1992) 175 CLR 1. While overturning the fiction of Australia as *terra nullius* and acknowledging Aboriginal interests in land represented a major breakthrough in Black/White relations, the concept of 'native title' was assimilated into the Anglo-Australian property regime arguably as an inferior form of property holding. See Stewart Motha, 'Encountering the Epistemic Limit of the Recognition of "Difference"' (1998) 7 *Griffith Law Review* 79.

17 Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, C Gordon (ed), [C Gordon et al trans] (New York: Harvester Wheatsheaf, 1980).

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