Response

UNDERSTANDING INEQUALITY: A REPLY TO DALE GIBSON

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In vol. 1, no. 1 of Constitutional Forum there is an article by Professor Dale Gibson entitled "The Nature of Equality: Apples and Oranges/Chests and Breasts". This article was discussed by students in the Legal Theory class at the law school at the University of Victoria. We recorded the comments that were made about the article and wrote them up in the form of the following response. We did not all agree with everything that was said and cannot, of course, speak with one voice on this. But we have agreed that the following commentary does accurately summarize our discussion, and the conclusions stated are ones upon which there was fairly widespread agreement.

As we understand Professor Gibson's argument, human equality is not a descriptive or mathematical concept, but a normative and relativistic one. He accepts Artistotle's definition of equality as "treating likes alike; unalikes differently", and concludes that because people are in fact different, the crucial question is what differences may justifiably be used as the basis for different legal treatment. Professor Gibson argues that we can take neither a purely descriptive approach nor a purely prescriptive approach to answering this question: "If we permit a simple description of prevailing norms to justify in perpetuity the way a particular society treats its women, we rule out progress... On the other hand, if we adopt a relentlessly prescriptive approach, we overlook societal inertia".

Professor Gibson therefore suggests that it is necessary to strike a balance between prevailing social norms and egalitarian aspirations. Whether different treatment is justified depends upon how we understand the differences between people in light of the purpose and context of the law. The mere fact that as a matter of description there is a socially recognized difference is not enough to justify different treatment. The question a judge must ask is whether the difference between two groups is as important as their similarities for the purpose of the particular law and "what is determinative is the respective weights of the similar and dissimilar factors, measured on the scale of contemporary, but forward-looking, public opinion".

Professor Gibson applies this approach to a number of hypotheticals. So, for example, in discussing a law prohibiting public sunbathing by black persons, he suggests that while there may be differences between black and white persons those differences "are not nearly as important as the relevant similarities in the opinion of most Canadians". On the other hand, when he turns to a law prohibiting topless sunbathing by women, he states that it is "highly pertinent" that "our society attributes considerably more sexual significance to women's breasts than to men's chests". He then concludes that when we "weigh relevant gender resemblances and differences in accordance with prevailing progressive social standards" we would conclude that "the problems associated with attitudinal sensitivities about female breasts over-balance the benefits of topless sunbathing in public places by women".

Our class shared a sense of unease about these hypotheticals and we began to explore what we found wrong with them as a way of probing Professor Gibson's overall argument. In the first place, he seems to concede an awful lot to the status quo of inequality. Gender specific laws regarding clothing are acceptable. And while laws prohibiting black sunbathing are no longer acceptable they "probably would have been thought perfectly justifiable a century ago". We immediately thought about South Africa where such laws are still thought to be acceptable. Perhaps the problem is that while Professor Gibson recommends that we should look to "forward-looking public opinion" to determine social values, he seems too ready to accept simply the dominant opinion. At this point we tried a thought experiment. Would any dominant group, satisfied with the status quo, disagree with Professor Gibson's analysis? We found it difficult to think of one.

Why does the analysis produce these results? Many of us disagreed with Professor Gibson's assessment of progressive social standards. He concludes that when we "weigh relevant gender resemblances and differences in accordance with prevailing progressive social standards" we would conclude that a law prohibiting female topless sunbathing would be justified because of "attitudinal sensitivities". Many of us simply disagreed with this statement. And while we may personally choose not to sunbathe topless we might make this decision because we do not want to be viewed as sexual objects, or run the physical risks that stem from current social attitudes towards women. But is there a good reason why the law should entrench or build upon such repressive social attitudes?

We spent some time exploring the assumptions that seemed to be at work in the argument. Several of us questioned whether it is accurate to say that there is a difference between men's and women's breasts. And if there is a difference is it true to say that society attributes more significance to women's breasts than to men's chests? While we were not all agreed that women are fixated upon men's chests to the same extent that men are fixated upon women's, we were agreed that the "society" to which Professor Gibson turns to discover the significance of the difference between men and women must be one that is made up primarily of heterosexual men. The

rhetorical structure of the article seemed occasionally to reflect this same perspective. Phrases such as "women resemble men in many respects" made many of us feel that men are being used as the baseline against which women are to be measured. Similarly, in discussing the black sunbathing example, Professor Gibson writes about the way in which "blacks have less need for tanning than whites". We recognized that the point he is making here is that this difference should not be relevant. But even to articulate the difference in this way shows how the needs and experiences of one group (blacks who want to go shirtless) are almost inevitably interpreted in terms of the consciousness of another (whites who want a tan).

Professor Gibson admits that many differences between men and women (and presumably other groups) are culturally determined. We agreed with this. But we also thought that the cultural nature of "difference" may be part of the problem rather than the solution. Groups such as women and blacks often suffer precisely because of the way "society" constructs their differences. It may be true that "our society attributes considerably more sexual significance to women's breasts than to men's chests". For many of us, this is simply one more example of the objectification of women. It explained, but did not justify to us, why women should be treated differently. A recognition that "differences" are socially constructed may help us to understand the problem of inequality, but it does not seem to suggest a solution. Indeed, many of us felt that any analysis that depends so heavily upon the dominant understanding of social differences merely perpetuates inequality.

Towards the end of our discussion we were struck by another apparent dilemma. Professor Gibson is seeking to provide some guidance for judges in interpreting section 15 of the Charter. The adoption of the Aristotelian formula of "treating likes alike and unalikes differently" appears to offer a precise form into which equality discourse may be channeled. Yet Professor Gibson also recognizes that this form is not perfectly determinate because the question of "justifiable" difference is a normative one that will change over time. Nevertheless he does offer judges "determinative" guidance, being "the respective weights of the similar and dissimilar factors, measured on the scale of contemporary, but forward-looking, public opinion."

The problem that this raised for us is one that is common to Charter adjudication, indeed to all adjudication. If judicial decisions are to be rational and different from "political" decisions, if adjudication is somehow different from legislation, there must be some fixed standards by which decisions are to be reached. But how are we to determine what is "forward-looking public opinion"? How much "weight" do we give to particular similarities and differences? Who gets to decide? We began to discuss ways in which judges might make this decision. Should they simply consult their own views on the assumption that they represent progressive social opinion? Perhaps the question should be left to juries. Or the court might do a public opinion poll. But if so, who should be on the jury? Who should be polled? Presumably, only that sector of society that is "forward-looking" and "progressive".

This portion of the discussion revealed what appeared to us to be an irony. Because there is public disagreement about "social standards" we generally make social choices through democratic processes in which "public opinion" may express itself. But because we do not always trust democratic processes and public opinion we have enacted a Charter of Rights and Freedoms to guard against the excesses of majority rule. But the only check on the politics of majority opinion seems to be the politics of minority (progressive, judicial) opinion.

It is not just that we disagree with Professor Gibson on the appropriate way to evaluate "progressive social standards". Nor simply that this concept is so vague. What his analysis of the sunbathing cases revealed to us was the fact that lawyers and judges are the only ones that will be participating in the process and that their view of these matters will inevitably be partial. Part way through reading the article, one of us asked "is something missing from this?" We know that the groups who suffer most from inequality have notoriously little say in the development of law, especially in courts. Solutions to problems of inequality cannot be solved by consulting popular opinion or elites, no matter how "progressive". While we certainly did not arrive at a unanimous opinion on what "equality" means, we did agree that the application of the analysis demonstrated very well why we would be uncomfortable leaving the courts to articulate a theory of equality along the lines suggested by Professor Gibson.

Finally, while we knew it was not intended, many of us found the article alienating right from the outset. While the article did provide a good basis for our discussion, we felt that its title, and the hypotheticals chosen, trivialized the facts of inequality and the experience of women. The article's treatment of a formal law of no great importance ignored the real sources of women's inequality and the way power is exercised in society. And some of us thought that the title felt like a "cheap shot". Men and women have both breasts and chests, but the article basically divided us into two groups, thus changing the meaning of those words and altering the nature of our relationship with one another. This is not what dialogue about equality should do.

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