

Introduction

States that are signatories to the *Convention on the Elimination of All Forms of Discrimination against Women*¹ (CEDAW) have an obligation to engage principles of gender equality when drafting legislation regarding nationality and membership laws. Fundamental to this obligation is the duty to ensure that both men and women have equal access to gain, maintain and transfer nationality and citizenship. In *Lovelace v. Canada*² the Committee neglected to engage principles of gender equity in the judgment, instead choosing to rely on principles of minority membership and the importance of protecting an individual's right to partake in their cultural community. While the case was heard by the Human Rights Committee and engaged the rights of Ms. Lovelace under the *International Covenant on Civil and Political Rights*³, Canada had signed CEDAW in 1979 and was bound under the terms of the *Vienna Convention on the Law of Treaties*⁴ to uphold its terms, objectives and purpose⁵. This paper will present a critique of the *Lovelace*⁶ judgment as if it had been decided under the Optional Protocol of CEDAW⁷. Canada neglected its obligation to uphold CEDAW. Section 12(1)(b) of the *Indian Act*⁸ discriminates against women on the basis of sex which is inconsistent with Canada's commitment to eliminate discrimination against women. By neglecting to engage principles of gender equality and discrimination the Committee denied the Ms. Lovelace's right to recognition as an equal citizen within her community. Further, the Committee negated an opportunity to set a meaningful precedent with respect to citizenship and membership rights for women. Section 1 of the paper will include a review

¹ 1249 U.N.T.S. 13.

² 1981 H.R.C. 36 U.N. G.A.O.R. Supp. (no. 40)

³ 999 U.N.T.S. 171.

⁴ 155 U.N.T.S. 331.

⁵ Note that CEDAW was not ratified by Canada until 1981, however, under the *Vienna Convention* the state is still obligated to uphold the treaties to which they are signatories.

⁶ *Supra* note 2.

⁷ A/RES/54/4

⁸ *Indian Act* R.S., c.I-6, s. 1.

of the facts and judgments of *Lovelace*; Section 2 provides a critique of *Lovelace* judgment and the implications of the non application of Article 9 of CEDAW; finally, Section 3 discusses some possible remedies for the gendered harms created by the *Indian Act* Section 12(1)(b).

Section 1: *Lovelace v. Canada*

Ms. Lovelace was a 32 year old woman who was a Maliseet Indian under the provisions of the *Indian Act*⁹. She married a non-aboriginal and as a result lost her rights and status as an Indian pursuant to Section 12(1)(b) which states: “a woman who marries a person who is not Indian...is not entitled to be registered as Indian”. Ms. Lovelace subsequently separated from her husband and returned to the reserve to live with her parents and raise her children within her community. Ms. Lovelace submitted a communication to the Committee on the grounds that the *Indian Act* was discriminatory and contrary to Articles 2(1), 3, 23(1) and (4), 26 and 27 of the *International Covenant on Civil and Political Rights*¹⁰.

In regards to the admissibility of the communication, Ms. Lovelace relied on the Supreme Court of Canada’s treatment of *Canada (Attorney General) v. Lavell*¹¹, to demonstrate that she had exhausted all of her domestic remedies and was entitled to a hearing by the Committee. The *Lavell*¹² case proceeded on a similar facts to *Lovelace*¹³. Three Indian women were challenging the legitimacy of the *Indian Act* on the basis of s. 1 of the *Canadian Bill of Rights*, which prohibited discrimination on the grounds of sexual discrimination. The Supreme Court ruled that the provision of the *Indian Act* was not discriminatory, as Article 1 referred

⁹ *Supra* note 7.

¹⁰ *Supra* note 2 at 7.1-1.4.

¹¹ [1971] F.C. 347

¹² *Ibid.*

¹³ *Supra* note 2.

to equality in the application and enforcement of Canadian laws. They ruled that there was no such inequality present in the *Indian Act* and thus it was not discriminatory¹⁴. As such, Ms. Lovelace contended that she was denied an effective domestic remedy. The Committee agreed and accepted the communication.

The Human Rights Committee found in favor of Ms. Lovelace. They determined that as a result of her loss of membership, Ms. Lovelace had been deprived of her right to enjoy her culture and live within her community. They decided that pursuant to s.12(1)(b) of the *Indian Act* she was denied the rights guaranteed by article 27 of the Convention. Further, they found that there was no reasonable justification for the limitation or restriction of these rights and Ms. Lovelace had been denied a legal right to reside on the reserve. The Committee declined to comment on the breach of her equality right based on a timing technicality. The infringement of her equality right, her loss of membership as a result of her marriage to a non-aboriginal, had occurred prior to Canada ratifying the treaty and thus, could not be considered.

Following the judgment the *Indian Act* was amended. The offending provision was removed and band membership was restored to those individuals that had lost their status under s. 12(1)(b) of the *Act*¹⁵. This remedy was not given by the Committee, they declined to supply Ms. Lovelace with any remedy other than the statement that her legal right was being denied. While the actions taken by the Canadian government were sufficient to prevent any further harm to Ms. Lovelace and others in her position, as well as ensure that discrimination on the

¹⁴ *Supra* note 10.

¹⁵ Bill C-31, *An Act to Amend the Indian Act*. See also: Megan Furri and Jill Wherett, "Indian Status and Band Membership Issues" (2003) Library of Parliament, BP 410E.

basis of sex was remedied, the Committee did not provide Ms. Lovelace with any specific remedy for her personal harm.

The judgement resulted in the resolution of discrimination under the *Indian Act*. However, the Committee's resistance to Ms. Lovelace's claim of infringement of her equality right results in a precedent that does little to further the objectives of women's equality in nationality and citizenship laws. It does not live up to the objective and purpose of the *International Covenant on Civil and Political Rights*, nor does it adequately fulfill Canada's duties under CEDAW. The next section will discuss the role the implications of discrimination in nationality and citizenship legislation and an alternative analysis of *Lovelace* that would work to fulfill the CEDAW obligations and remedy the harms of the *Indian Act* in accordance with a purposive analysis of CEDAW.

Section 2: Discrimination, Nationality and International Obligations

Discrimination within Nationality and Citizenship Laws

Discrimination in nationality laws on the basis of sex has been an issue for many decades. In 1933, the *Montevideo Convention on the Nationality of Women*¹⁶ provided that there should be no discrimination in nationality laws on the basis of sex, the *Convention on the Nationality of Married Women*¹⁷ followed in 1957 and since then numerous other international treaties have endeavoured to deal with the problem of women's equality in nationality laws. Despite these provisions and the appearance of an international desire to remedy the multiplicity of problems caused by discrimination in nationality laws, many countries still maintain and enforce discriminatory laws. The *Indian Act* provision regarding the discontinuance of Indian

¹⁶ Dec. 26. 1933.

¹⁷ 309 UNTS 65.

status as a result of marriage is based upon similar assumptions as immigration laws restricting the rights of women to transfer citizenship to their husbands upon marriage, laws restricting the transference of citizenship to children to paternal parents, and laws that void a women's citizenship in her country of birth upon her marriage to an individual of a different nationality. They are predicated on the understanding that women's citizenship and nationality are inextricably linked to that of her husband. Furthermore, there is an implicit assumption of patrilocal residence patterns, whereby upon marriage the woman will move to reside in her husband's country, premised on a patriarchal understanding of the family unit and the relative powers and roles of husband and wife. This gendered understanding of family life and the lives of wives in particular has far reaching effects on women's lives¹⁸.

Nationality is the "right to have rights"¹⁹. Discriminatory nationality laws effect many areas of a woman's life including; her choice as to where she will reside, because if she loses her own citizenship upon marriage to a foreigner she may lose her right to reside in the country; her ability to pass along her nationality to her children, and in situations where the citizenship of the woman is dependant upon that of her husband, in the event of divorce or separation she may become stateless, dissolving all of her rights²⁰. As seen in *Lovelace*²¹, Ms. Lovelace, by virtue of the *Indian Act* was denied not only her right of residence on the reserve, but also her right to medical benefits, tax exemptions, housing benefits, and traditional hunting and fishing rights. In addition to her personal loss of Indian status, the *Indian Act* provisions denied her the ability to pass her status to her children. The

¹⁸ International Law Association Committee on Feminism and International Law *Final Report on Women's Equality and Nationality in International Law*. (2000 Committee on Feminism and International Law, London), Pp. 10-17.

¹⁹ *Perez v. Brownell* (1958), 356 U.S. 44 at 64.

²⁰ Lisa C. Statton, "The Right to have Rights" (1992) 77 Minn. L. Rev. 195 at 203-204.

²¹ *Supra* note 2.

implications of the discriminatory provisions were multi-generational. As a result of being a woman Ms. Lovelace suffered a myriad of harms that would not have been inflicted upon a male member of an Indian nation. She experienced a loss of continuity with her community, a loss of her right to reside within her community, a loss of her political rights to vote in band council elections and referendums, and a loss of the right to pass her identity along to her children. Thus, the Committee denied the complainant recognition of the gendered harms she suffered, by neglecting to address the issue of sexual discrimination in their judgement, and failed to fulfil their obligations under CEDAW and the ICCPR.

CEDAW and the Equality Obligation

The application of international conventions and treaties to domestic law is widely contested. Many states place reservations upon large portions of treaties, specifically human rights conventions, in order to ensure that they will not be held accountable for state actions that are contrary to the treaty. As noted by Rebecca Cook in *State Responsibility for Violations of Women's Rights*²², intervention by an international body into areas of exclusive state domain, include citizenship, have historically been precluded by the doctrine of non- intervention. However, the role of international adjudicative bodies is increasing, as witnessed by the adoption in 2002 of the optional protocol of CEDAW by many states, including Canada. Moreover, Canada is a signatory to the *Vienna Convention on the Law of Treaties*. Under article 18 the state is “[O]bliged to refrain from acts that would defeat the object and purpose of a treaty”²³. Therefore, even despite the fact that CEDAW had no enforcement apparatus when it was originally ratified by Canada in 1981, under international law Canada was

²² (1994) Harvard Human Rights J. 7.

²³ *Supra* note 4.

obliged to act in accordance with its object and purpose. Thus, Canada should have upheld their commitments as a signatory of CEDAW.

Supreme Court of Canada has accepted that international conventions would have implications for the interpretation of the Charter and other legislation²⁴. Moreover, the adoption of the *Bangalore Principles* and the *Harare Declaration of Human Rights* by many Commonwealth countries in the 1988 and 1989, demonstrates a growing commitment to the implementation of human rights principles to domestic law. It is no longer acceptable, in the field of the international law of human rights, to avoid application rights conventions and treaties, specifically the articles relating to nationality, by arguing that the State has supreme jurisdiction over decisions of citizenship and nationality. States must conform to the equality guarantees that they have ratified under CEDAW, ICCPR and other similar documents concerning nationality laws. The *Indian Act* and other Canadian laws relating to nationality and citizenship accord with the object and purpose of CEDAW.

Article 24 of the CEDAW states that, “States Parties Undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present convention”²⁵. State obligations under CEDAW are contained both within the text of the document and within the larger understanding of the overall object and purpose of the document. CEDAW aims to eliminate not only discrimination against women on the basis of sex, but all forms of discrimination, including that based upon the women’s race,

²⁴See Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313; Baker v. Canada (Minister of Citizenship & Immigration) [1999] 2 S.C.R. 817.

²⁵ *Supra* note 1.

nationality, and socioeconomic status²⁶. Additionally, contained within the text of CEDAW, states have a positive duty to ensure equality between men and women²⁷. They have an obligation under many of the articles in the document to act to ensure that women are in full possession of civil and political rights equal to those of men. Thus, the CEDAW convention obliges states to take action to prevent discrimination, work to eliminate discrimination within their existing laws, and provide for all means necessary to assist women in achieving full legal and social equality to men.

The Lovelace Decision and CEDAW Obligations

The *Lovelace* ruling denied Ms. Lovelace to her right to equality under CEDAW. Article 9(1) of CEDAW reads:

“State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”

The Committee failed to discuss this aspect of Ms. Lovelace’s communication. She complained to the commission that s. 12(1)(b) of the *Indian Act*²⁸ discriminated against her on the basis of sex. She was deprived of her Indian Status, essentially her nationality as it relates to her First Nation, by virtue of the discriminatory provision. However, instead of engaging this claim and providing Ms. Lovelace with recognition of her harm, the Committee chose to rule on the basis of her membership rights to the minority community with which she identified. This ruling is contradictory to the text of CEDAW. If Ms.

²⁶ See *General recommendation no. 25, on article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/2004/I/WP.1/Rev.1.

²⁷ *Supra* note 1 at Article 2(a).

²⁸ *Supra* note 7.

Lovelace's nationality rights are deprived as a result of sexual discrimination, then the State is in violation of article 9(1). Moreover, the lack of recognition of the discriminatory action was inconsistent with the object and purpose of the provision²⁹. The Committee's failure to engage the complainant's infringement of her equality right negates the ability of other similarly situated complainants to rely upon the precedent to demand their right to equal nationality laws³⁰.

CEDAW and the provisions within it are not meant to solely enforce equality of laws within a particular state, but additionally to "address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through acts by individuals but also in law, and legal and societal structures and institutions."³¹ By not engaging Ms. Lovelace's right to equality the Committee allowed for the continuing discrimination against women as a result of nationality laws. By not providing other women with a precedent to base later rulings upon, or to use as an advocacy tool by women's rights lobbyists, the Committee's ruling is inconsistent with the overarching purpose of CEDAW³². It does not provide a platform from which to forward women's equality. It diminishes her independent right to equality, as Ms. Lovelace was only able to achieve an appropriate remedy under a right that is available to men and women, the right to cultural continuity within a minority community. Thus, where the rights of both men and women are affected the Committee saw need to take action, however, when dealing with a gendered harm perpetrated against a woman, they

²⁹ Rebecca Cook, "Reservation to the Convention on the Elimination of All Forms of Discrimination against Women"(1990) *Virginia Journal of International Law* 30 at 661.

³⁰ Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?" (1996) *XXI Brooklyn Journal of International Law* 707 at 711.

³¹ *Supra* note 25 at para 7.

³² Desiree Bernard, "The Work of the Committee on the Elimination of Discrimination against Women: Its Focus on Nationality, Custom, Culture and the Rights of the Girl Child" in *Hong Kong Judicial Colloquium on Women's Rights*, Hong Kong, 20-22 May 1996 at 74.

state that they are unable to engage the issue. This is irreconcilable with CEDAW. A woman must have rights to nationality as a result of her right to be treated as an equal, not as a result of her being able to “piggyback” her rights upon those of men and women. CEDAW demands that the gendered harms experienced by women as a result of sexual discrimination be recognized and remedied so as to support the goal of *de facto* equality. This judgment accomplishes neither of these goals but rather subjugates Ms. Lovelace’s equality rights to that of the right as a cultural minority. While she achieves her right to membership, she is simultaneously dispossessed to her right to equal treatment, as a woman, under the law.

Additionally, Article 2(f) of CEDAW states that the state are obliged

“[T]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulation, customs, and practices which constitute discrimination against women;”

Thus, Canada had a duty as a signatory of CEDAW to abolish or re-write the parts of their existing laws that are discriminatory against women. Canada’s submissions to the Committee in the *Lovelace* decision demonstrate disregard for their obligations to work to ensure that all discriminatory laws are abolished. Canada stated that the *Indian Act* did not have to conform to principles of equality because it was a special piece of legislation intended to give special rights to certain members of society³³. Thus, they were not bound to give those special rights to all members of society, or indeed all members of a specific community, but rather as the legislation was meant to protect members of a minority community, they could apply it in a discriminatory fashion. Canada argued that as the threat to aboriginal communities was traditionally posed by non-indian men, the legislation conformed to the needs of the community and was not discriminatory. Furthermore, they raised a cultural relativity

³³ *Supra* note 2 at 9.3

argument noting that aboriginal societies were traditionally patrilineal and the legislation was conformed to the norms and mores of the minority community which it meant to protect³⁴.

These arguments clearly contradict Canada's commitment to end discrimination under Article 2(f). The text of the article states that all laws that are discriminatory shall be abolished or modified. There is not room within a "plain and clear" textual interpretation for justification of discriminatory laws. CEDAW does not contain a "margin of appreciation" or "justifiable limitations" clause and it should not be open to state parties to argue that they have justifiable reasons for not rescinding discriminatory legislation³⁵. Moreover, the arguments that Canada put forward to defend their legislation are sexist and arguably racist. To rely upon the notion that aboriginal societies are all patrilineal is misguided and factually incorrect; there is a broad variation of kinship systems within Canada's aboriginal peoples. While many of the nations were patrilineal, a good number were matrilineal and many others were ambilineal³⁶. To describe all aboriginal nations in Canada as patrilineal is to essentialize the cultures of our aboriginal peoples and disregard their distinctive cultural and social patterns. Additionally, the argument that cultural relativism should allow the state to enact and maintain discriminatory laws contradicts the text of the provision which states that "customs and practices" that are discriminatory will be abolished. While this may be offensive to a cultural feminist and a reflection of the cultural imperialism of western

³⁴ *Ibid.*

³⁵ The *Canadian Charter of Rights and Freedoms* section 1 contains a justifiable limitation clause and the *European Convention on Human Rights* has a margin of appreciation clause. See *Petrovic v. Austria* (156/1996/775/976).

³⁶ R. Bruce Morrison and C. Roderick Wilson, *Native Peoples: The Canadian Experience* (2004, Toronto: McClelland and Stewart).

feminists, a textual interpretation of CEDAW provides that arguments made from a position of cultural relativism are impermissible³⁷.

The judgment does not take Canada's justificatory arguments into consideration and in contrast, rules that the *Indian Act* provision is contradictory to the maintenance of a minority community. However, the fact that Canada raised these arguments in defence of a law that is clearly inconsistent with their obligations under CEDAW is demonstrative of a lack of commitment to the obligations that they are bound to perform under the Convention. These arguments are logically inconsistent with the object and purpose of article 2(f), in addition to the law being in conflict with a textual interpretation of the provision.

Thus the *Indian Act*, prior to the amendments made following the *Lovelace*, decision was contradictory to article 2(f) and 9(1) of CEDAW. Moreover, the judgment was inconsistent with a purposive analysis of the text of the convention, recognizing the context and purpose of its enactment, and giving power to the dynamic interpretation of its articles and principles. An alternative analysis of the *Indian Act* and Ms. Lovelace's communication, giving voice to the gendered harms and fulfilling the obligations of CEDAW, will be discussed in the following section.

³⁷ Hillary Charlesworth, "Feminist Methods in International Law" (1999) 93 *The American Journal of International Law* 379, at 86; see also Hilary Charlesworth and Christine Chinkin, "Feminist theories and international law" *The boundaries of international law* (2000, Manchester University Press) at 40.

Section 3: Alternative AnalysisRuling

The Committee could have handed down a strong judgement regarding women's equality rights and nationality laws on the facts of the *Lovelace* case. They could have delivered a strong precedent that would have been in keeping with the obligations of States under CEDAW which would have provided other individuals with a strong platform from which to advocate for changes in nationality laws and base legal claims upon in other tribunals. By engaging Ms. Lovelace's equality rights, providing a contextual analysis of the facts and the gendered harms that she experienced and conducting a purposive analysis of CEDAW the court could have produced a precedent for women's equality in nationality laws.

As noted in the previous section, the *Lovelace* ruling was deficient in providing a strong assertion of women's equal rights to nationality. The Committee's assertion that it was unable to engage the issue of discrimination because the Mrs. Lovelace had been deprived of her right to status prior to the ratification of the optional protocol is a weak. They argue that they were able to rule on the issue under article 27 because the effects of her status deprivation were ongoing in regards to her connection to her community. However, this appears to be an inconsistent argument, as by virtue of her sex and the engagement of section 12(1)(b) of the *Indian Act* she had been deprived of her status, and the effects were ongoing. Because of her sex she had lost her ability to gain access to the special rights accorded to aboriginal people, and the deprivation of those social, economic and cultural rights were ongoing. Ms. Lovelace's equality rights were infringed and the court should have upheld those rights.

In 1981, the UN Human Rights Committee released a ruling that dealt with the rights of women in Mauritius to enjoy the same rights as men in regards to the naturalization and citizenship of their foreign spouses. *Aumeeruddy-Cziffra and Nineteen Other Women v. Mauritius*³⁸. The Committee stated that the immigration laws in Mauritius, which permitted foreign wives to gain residence within the country with relative ease and subjected foreign husbands to a broad range of restrictions, were inconsistent with the complainant's equality rights under the ICCPR, specifically articles 2(1), 2 and 27. The Committee stated that although the administration of immigration policies was the purview of the State, they could not conduct their duties in a manner that was contradictory to their obligations under the international treaties to which they were signatories. The Committee noted that;

“Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements”³⁹

The Committee was thus able to set guidelines for signatory states regarding citizenship laws without infringing extensively upon the right of the State to control and administer citizenship and nationality laws. The implications of the judgment are that the State continues to have supremacy over its nationality laws, but the international system will interfere to the extent that these laws are applied in a discriminatory manner.

The *Lovelace* decision should have been engaged similar principles. Though the fact situation was different, it involved a domestic membership provision rather than an immigration policy, the laws implicated are analogous. The Committee should have recognized Ms.

³⁸ Communication No. 35/1978

³⁹ *Ibid.* at para 9.2 (b) 2 (ii)

Lovelace's equality rights by stating that Canada was free to set membership guidelines as regards aboriginal people, but that they could not set these guidelines in a manner that was discriminatory. Canada could not have membership provisions that accorded aboriginal people differing access to their rights as a result of their sex. Thus, if the law acted to rescind the status of aboriginal peoples upon marriage to non-aboriginals, the provision must apply equally to both sexes. Alternatively, if aboriginal peoples were to maintain their status upon marriage to non-aboriginal peoples, then this provision should apply to all peoples regardless of sex. Had the Committee properly engaged Ms. Lovelace's right to equal retention of her aboriginal status after marriage, they would have given effect to Canada's obligations under CEDAW.

It should be noted that the effect of the *Lovelace* decision was to compel Canada to revise the *Indian Act*. This ensured that Canada's laws were in accordance with their obligations as per the text of CEDAW. However, the Committee, by not acknowledging Ms. Lovelace's equality rights did not fulfil Canada's obligations under a purposive analysis of CEDAW, which imposes an obligation to further women's rights. By engaging in an analysis along the lines of that in *Aumeeruddy-Cziffra*⁴⁰ the Committee could have fulfilled Canada's duty to the elimination of all discrimination against women, not just that which results from the removal of their right to belong to a cultural minority.

In addition to acknowledging the infringement of Ms. Lovelace's equality rights, the Committee could have used their judgment as a platform for articulating the unacceptability of arguments couched in terms of the "traditional" patriarchy of a given culture. This issue

⁴⁰ *Ibid.*

was engaged by the European Court of Human Rights in *Abdulaziz, Cabales and Balkandali v United Kingdom*⁴¹. Similar to the arguments raised in *Lovell*, the United Kingdom, in defence of its immigration policy that made it more difficult for foreign husbands to gain residency permits than foreign wives, argued that men were more likely to upset the social peace and harmony by taking up jobs that would otherwise be available to United Kingdom citizens. The case arose in a time of relatively high unemployment and they argued that having foreign wives gain residency did not impact on the unemployment rate to the same extent as having foreign husbands. The State did advance some statistical support for this argument but the Committee was quick to note that statistical evidence could be manipulated and that it was not indicative or determinative of legislative policy.

In the judgment, the Committee noted that, unlike CEDAW, the *Convention for the protection of Human Rights and Fundamental Freedoms*, has a “margin of appreciation” clause that functions to allow for states to justify legislation and behaviour that is inconsistent with their obligations. However, the court states that the margin is not so wide as to allow states to enforce blatantly discriminatory laws. More importantly, they take the time to critique the argument which is inherently premised upon a patriarchal view of marital relations. They note that the impact of immigrant women’s work on the economy ought not to be underestimated, or the role of immigrant men overstated. Underlying this critique is the feminist notion of women’s work not being recognized equally to men. This ruling supports the equality of women in their economic contributions to the family unit, while simultaneously criticising the government for advancing justifications predicated on patriarchal assumptions about the family.

⁴¹ 15/1983/71/107-109

The Committee in *Lovelace* should have reacted to the argument regarding the traditional kinship structure and societal threats of aboriginal people in a similar manner to the Committee in *Abdulaziz, Cabales and Balkandali*⁴². Instead of avoiding a discussion of Canada's justificatory arguments, the Committee should have engaged in a discussion of the inadequacies and sexist of these arguments. The Committee should have noted that while *some* of the aboriginal nations were traditionally patriarchal, these nations adapt and alter over time, similar to mainstream society, and thus the people should not be ruled by societal norms that existed in the past. Moreover, they should have discussed the relevance of Canada's commitment to sexual equality, and noted that "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention"⁴³. By articulating the reasons why the justification of the infringement of Ms. Lovelace's equality rights was insufficient, the Committee could have exposed the stereotypes that inform the argument.

Canada's argument regarding threats to aboriginal land should have been similarly explicated. It is premised on the notion that the husband is entitled to all of the property previously owned by the woman once they are husband and wife. This is no longer the reality within Canadian law and it presupposes an unequal power relationship between the two parties within a marriage, privileging the husband's ownership over that of the wife. Again, by raising these objections to the argument made by the State the Committee could have questioned the "common sense" understandings of marital relationships and the judgment would be able to contribute to the elimination of discrimination against women. The recognition of the underlying patriarchal assumptions would perform a similar task to

⁴² *Ibid.*

⁴³ *Ibid* at para 78

exposing the silences in international law, as discussed by Hilary Charlesworth in *Feminist Methods in International Law*⁴⁴. By naming the assumptions the court would have engaged in a discussion of their falsities. This is an important aspect of advancing women's rights as the International legal system can hardly deal with inequalities and discriminatory assumptions if it refuses to acknowledge their existence.

Additionally, the court in *Abdulaziz, Cabales and Balkandali* articulated their concerns with the argument made by the United Kingdom that they were extending privileges to some individuals through their immigration policies and were not required to extend special privileges in a uniform manner. This is an analogous argument to that raised by the Canadian government in their defense of the inequality of the *Indian Act*. This is an important issue as it concerns the distinction between negative rights, those which involve the restraint of State action, and a positive right which obliges the State to act. CEDAW contains many provisions that call for States to act in order to ensure the elimination of discrimination thus, a discussion surrounding the provision of these rights by the states is important to the fulfillment of the purpose of CEDAW.

The Committee in *Lovelace* should have outlined, similar to the *Abdulaziz, Cabales and Balkandali* ruling, that “the notion of discrimination... includes general cases where and individual or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for...”⁴⁵. Essentially, if the state is going to provide a group with special treatment or rights, they must provide them in a non-discriminatory fashion. The Committee in *Lovelace* should have provided a clear response to

⁴⁴ *Supra* note 33.

⁴⁵ *Supra* note 37 at para 82.

Canada's argument that they do not need to provide special provisions in a non-discriminatory manner. This would have allowed for other complainants to engage the precedent to ensure that positive actions by the state are done with an awareness of equality principles and obligations. In order to fulfill a purposive analysis of CEDAW, Canada has to ensure that all state actions are done in accordance with the goal ensuring *de facto* equality for women⁴⁶.

In addition to acknowledging the discriminatory assumptions underlying the justificatory arguments, the Committee should have given greater recognition to the context of Ms. Lovelace's complaint. By recognizing the situated context of her complaint they could have acknowledged the gendered harms that she suffered as a result of the infringement of her equality rights. Additionally, they could have acknowledged the harms suffered by those around her, specifically her children who were also denied their Indian Status as a result of the operation of s. 12(1)(b) of the *Indian Act*.

In 1992, the Botswana Court of Appeal released a judgment regarding the right on a woman citizen to pass her citizenship to her children. In *Unity Dow v. Attorney General of Botswana*⁴⁷, the court recognized that the gendered harms perpetrated on a woman as a result of discriminatory immigration and naturalization laws also affect her children and her family. The court acknowledged that while she did not lose her citizenship rights, her inability to pass along her nationality to her children placed her in a position of undue stress and anxiety

⁴⁶ See Sandra Fredman, "Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights" *Temporary Special Measures* eds. I. Boerefijn et al. (2003, Intersentia) at 115.

⁴⁷ Case No. Misc.A 124/90 (High Ct. 1991)(Bots.)

that would not have been present had she been a male citizen. In a clear statement reflecting the effects of discriminatory laws and the importance of equality the Court notes;

“It is unreasonable that a citizen of Botswana should be resentful and aggrieved by a law which puts her in this invidious position as a women, when that same law is not made to apply in the same manner to other citizens, just because they are men. Equal treatment of the law irrespective of sex has been denied her.”⁴⁸

In acknowledging that her harm was not only to herself but to her family, the court acknowledged the context of her complaint and the specific harm she suffered as a result of the discriminatory law. It is important to note that the harm suffered was not the loss of her citizenship rights, but those of her children. The court was acknowledging the context of the harm and recognizing the multi-faceted effects that extend from discriminatory laws. This is in keeping with the feminist method of contextual reasoning as outlined in *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*⁴⁹. The value in contextual reasoning is that it allows the reasoner to look outside of the bounds of recognized harms and identify harms that were previously concealed by standards of international law.

Lovelace is bereft of any discussion of the contextual gendered harms suffered by Ms.

Lovelace. The court should have gone into a discussion of the extent to which her loss of citizenship precluded her children from obtaining Indian Status. Acknowledging that her inability to obtain housing and other benefits on the reserve would have infringed upon her ability to properly care for the children and increased her levels of stress and anxiety would have provided Ms. *Lovelace* with recognition of the variance of harms she suffered.

Additionally, it would have provided precedent for the understanding of the broad ranging

⁴⁸ See *Unity Dow The Citizenship Case: Attorney General of the Republic of Botswana v. Unity Dow* (1995, Gaborone: Lentswe La Lesedi Press) at pg. 157.

⁴⁹Phyllis Goldfarb, (1990-1991) 75 Minn. L. Rev. 1599 at 1637.

effects of discriminatory laws. The Committee's denial of the context and broader implications of her loss of Indian Status led to a negation of the harms she suffered and an implied understanding that simply reforming the law would be sufficient to remedy her harm. However, by not recognizing the harm, the court cannot engage in an appropriate remedy and thus is unable to fulfill the CEDAW purpose of eliminating and responding to discrimination and the resulting harms. A brief discussion of an appropriate remedy will be canvassed in the following section.

Remedies

The role of remedies in international human rights jurisprudence is not only to provide the individual with compensation for their loss, but also to provide for recognition of the particular manifestation of the individuals rights and demand that the State act to ensure that citizens are able to have full and complete enjoyment of their rights within their countries.

Thus, the remedies awarded in international human rights courts must reflect the context of the harm suffered by the complainant. The remedy provided to Ms. Lovelace by the Committee was a statement by the court that the *Indian Act* breached article 27 of the *International Covenant on Civil and Political Rights* and as such that she had been denied her legal right to reside on the reserve. The result of this remedy was that the offending law was amended by the government of Canada. As previously mentioned, this remedy did provide Ms. Lovelace with a reparation of her harm as it resulted in the return of her status and the subsequent right to live on the reserve in addition to her benefits as an aboriginal person.

Article 2(b) and (c) of CEDAW states:

- b) To adopt appropriate legislative and other measures, including sanctions were 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.

When this provision is read with Article 24, it can be interpreted as giving rise to the right to remedy for violations under CEDAW⁵⁰. Thus, Ms. Lovelace was entitled to an appropriate remedy for the violation of her Article 9 right. However, the judgment failed to acknowledge the other harms that were suffered as a result of her denial of status. An appropriate remedy, in accordance with the object and purpose of CEDAW, would have provided Ms. Lovelace with recognition of the broader scope of harms suffered⁵¹.

Ms. Lovelace deprivation of her legal status affected her mental and physical health. She submitted to the court that her residence on the reserve, in violation of the law of the local band council was contested by members of the community⁵². Ms. Lovelace suffered anxiety related to her uncertain tenure on the reserve. She was housed as a result of the goodwill of a few members of her community, but the unreliability of this arrangement would have resulted in stress and mental health difficulties. Additionally, the psychological implications of being separated from her community, and being stripped of her identification as an aboriginal person most likely had a damaging effect on her mental health and state of mind. This infliction of stress and anxiety by the offending law was not discussed by the court and the remedy provided was insufficient to compensate Ms. Lovelace for her harm.

⁵⁰ Rebecca Cook, "State Responsibility for Violations of Women's Rights" (1994) 7 Harvard Human Rights J. 125 at 170.

⁵¹ See Committee on the Elimination of Discrimination against Women, "Issues arising under the Optional Protocol to the Convention on the Elimination of Discrimination against Women" 12-30 January 2004, para 56.

⁵² *Supra* note 4 at para 9.7

In contrast, the court could have provided some monetary compensation as a remedy, simultaneously recognizing Ms. Lovelace's harm and forcing the state party to acknowledge the effects of discriminatory laws. This approach was taken in *X and Y v. The Netherlands*⁵³, where the European Court of Human Rights, provided the mentally handicapped victim of a sexual assault with monetary compensation for her mental anxiety and suffering.

Additionally, the *Lovelace* decision did not provide a remedy for the harms suffered by Ms. Lovelace's children. They too lost their Indian Status as a result of the *Indian Act* provision; however, this harm is never discussed by the court. The children were removed from their community and as a result were most likely unable to form close bonds with their extended family, which would have occurred if they had been permitted to remain on the reserve and had retained their status. The Committee does not consider that, despite the violation of right being claimed by Ms. Lovelace on behalf of herself, this violation infringed on the rights of her children to a large extent. Furthermore, the Committee does not discuss the effects on Ms. Lovelace's extended family. Her parents were placed in a position wherein they had to go against the ruling of their community in regards to the residence of their daughter on the reserve. They were also likely harmed by the forced separation of their child and grandchildren from the community. By neglecting to discuss this extended harm the court is confining the analysis of the harms of discrimination to the immediate victim, this is an inaccurate and damaging portrayal of the effect of discriminatory laws. The harms of discriminatory laws are not confined to the immediate victim but have repercussions throughout the community.

⁵³ EHCR, (1985) App No. 00008978, 26/03/1985

CEDAW acknowledges the extensive effects of discrimination in the preamble. Stating that;

“Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity...

... the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,”⁵⁴

Thus, to fulfill the requirements of the obligations of the State parties under CEDAW, the remedy provided must reflect the extended harms associated with discriminatory laws. The *Lovelace* decision should have named these extended harms by discussing the full effects of the laws on the children and extended family, similar to the remedy within the decision of the Inter-American Court in *Loayza Tomayo v. Peru*⁵⁵. The Court in that case systematically named the harms to Ms. Tomayo’s family members, the mental harm to her extended family and children, and the expenses associated with visiting her while she was removed from the community. Additionally, they name and discuss the damage done to her “life plan”, but do not ascribe any amount of monetary damage. The outcome of this decision reflects the ability of the court to adequately deal with the extensive effects of discriminatory actions by the state. Additionally, and perhaps more important to the *Lovelace* decision, the court in *Loayza Tomayo* acknowledged that while they are unable to give monetary compensation for all of the harms, are still able to recognize that they exist. The *Lovelace* court could have provided the extended family with this remedy without going beyond the boundaries of the current jurisprudence. This would have served two purposes; it would have acknowledged

⁵⁴ *Supra* note 1.

⁵⁵ Inter-American Court of Human Rights, (1998) No. 42.

the extended harm to Ms. Lovelace's family, thus fulfilling the objectives of CEDAW, whilst simultaneously providing a precedent which could have been used by subsequent claimants to support their submissions for damages and reparations.

Conclusion

Nationality and citizenship rights are the basis of many of the social and economic rights that we assume to be fundamental to equal participation in society. Thus, discriminatory nationality and citizenship laws affect multiple areas of one's life and the lives of those around them. The effects are far reaching and the distinctly gendered harms are often not discussed or acknowledged. The *Convention on the Elimination of All Forms of Discrimination against Women* and various other international documents that preceded it, acknowledge the insidious effects of discrimination in citizenship laws and provide for the elimination of laws and practices that do not support the aim of establishing equality. However, despite the international consensus that discriminatory citizenship laws are of concern to state parties and individuals, laws in breach of CEDAW provisions still persist. Moreover, even in situations where the international conventions and treaties provide for communication of complaints and remedies are sought by a complainant, often the courts and tribunals fail to fulfill the purpose and objectives of the documents.

*Lovelace v. Canada*⁵⁶ is an example of a court performing its obligation to the textual requirements of CEDAW and failing to fulfill its obligations to the object and purpose of the document. The Committee provided a judgment that remedied the wrong of the discriminatory provision of the *Indian Act*, but they failed to provide a judgment that fully acknowledged the harms of the law or remedied the gendered harms of discriminatory

⁵⁶ *Supra* note 4.

citizenship laws. By not engaging with the broader scope of issues regarding the violation of Ms. Lovelace's rights, specifically a discussion of the violation of her equality right, the Committee was effectually negating her right to equal treatment under the law. A right that is not actionable and not enforced can hardly be considered a right. Merely discussing rights in the air, without making them useful or actionable, does not forward the goals of CEDAW and women's equality. For rights to provide women with relief from discriminatory practices and laws, court must utilize provisions prohibiting discrimination.

The alternative analysis discussed by this paper, including recognition of the context of the claimant's cause of action, recognition of the gendered harm resulting from the violation of her equality rights, provision of a remedy that recognizes, names and remedies those harms fulfils the text, object and purpose of CEDAW. Had the court provided a judgment that adequately addressed these issues, it would have fulfilled the object and purpose of CEDAW and provided precedent for future claimants to rely upon. The lack of engagement with the issues of discrimination and equality presented resulted in a correct result, insofar as the discriminatory law was remedied, but an insufficient and inadequate judgment incapable of pursuing the goal of the elimination of discrimination against women.