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Human Rights and Social Policy

A Comparative Analysis of Values and Citizenship in OECD Countries

Edited by **Ann Nevile**

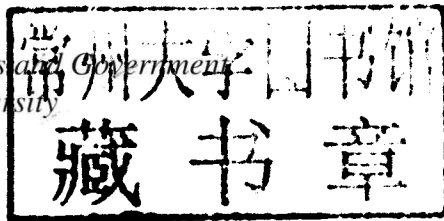# Human Rights and Social Policy

A Comparative Analysis of Values and Citizenship in OECD Countries

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Ann Nevile has worked as a policy practitioner and academic and is currently a Senior Lecturer and Director of the Social Policy Action Research Centre, Crawford School of Economics and Government at The Australian National University. Her research work combines theory and practice, often in innovative ways, in order to better explain complex policy environments. Most recent work focuses on values and rights-based approaches, and values and the legitimacy of third sector organisations.

Abbreviations

ABS	Australian Bureau of Statistics
ACOSS	Australian Council of Social Services
AI	*Allocation d'Insertion*
AIHW	Australian Institute of Health and Welfare
ALP	Australian Labor Party
ASS	*Allocation Spécifique de Solidarité*
CCR	Canadian Council for Refugees
CE	Council of Europe
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CFDT	*Confédération Française Démocratique du Travail*
CFI	Court of First Instance
CGT	*Confédération Generale du Travail*
CIC	Citizenship Immigration Canada
CNPF	*Conseil National du Patront Français*
CORE	Centre for Operations Research and Evaluation
CRA	Commonwealth Rent Assistance
CRC	Convention on the Rights of the Child
CSHA	Commonwealth State Housing Agreement
CSMA	Convention on Social and Medical Assistance
CSS	Convention on Social Security
DPB	Domestic Purposes Benefit
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
EES	European Employment Strategy
ESC	European Social Charter
EU	European Union
FES	Federal Employment Institute
FHOS	First Home Owners Scheme
FO	*Force Ouvrière*
GATT	General Agreement on Trade and Tariffs
GBA	gender-based analysis
HRA	*Human Rights Act 1998*
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGAS	*Inspection Générale des Affaires Sociales*

IRPA	Immigration and Refugee Protection Act
IRPR	Immigration and Refugee Protection Regulations
NAWL	National Association of Women and the Law
OECD	Organisation for Economic Cooperation and Development
PARE	*plan d'aide au retour à l'emploi*
PISA	Programme for International Student Assessment
PSA	Personnel Service Agency
RMI	*Revenu Minimum d'Insertion*
RSA	*Revenu de Solidarité Active*
SA	social assistance
SAAP	Supported Accommodation Assistance Program
SEU	Social Exclusion Unit
SWC	Status of Women Canada
UA	unemployment assistance
UB	unemployment benefit
UK	United Kingdom
UN	United Nations
UNEDIC	*Union Nationale Interprofessionelle pour l'Emploi dans l'Industrie et le Commerce*
UNICEF	United Nations Children's Fund
USA	United States of America
WTO	World Trade Organisation

Contents

1. Values, rights and concepts of citizenship

Ann Nevile

Australia is the only OECD country not to have a Bill of Rights and the question of whether Australia needs some form of comprehensive legal protection such as a charter or bill of rights never really goes away. Public debate resurfaced most recently when the Federal Labor Government (elected one year previously after 11 years of conservative Liberal/National Party coalition government) used the 60th anniversary of the Universal Declaration of Human Rights (10 December 2008) to announce a 'national consultation' to determine how the human rights of all Australians might best be protected. The ensuing public debate exemplifies the issues which lie at the heart of this book.

The last 40 years have seen an increasing number of rights claims being put forward and, in many instances, institutionalised through international, regional or national legislation. Economic and social rights to employment, education, healthcare and housing have been articulated alongside civil and political rights. Collective rights to culture, language and development have also been recognised as has the right to self-determination (Soysal 1994, pp. 157, 160). Much more attention is now given to the rights of groups within society seen as vulnerable, such as children, the homeless or those living with a mental illness, in the hope that focusing on rights will reduce their vulnerability and promote inclusion. For example, in discussing how the rights of those living with a mental illness in New Zealand can best be protected, Bell (2005) argues that for people with a mental illness to be able to realise their right to health, governments must adequately resource the provision of community services, something which the New Zealand government has failed to do, in spite of the fact that mental health legislation in New Zealand is based on a commitment to community care. The solution, according to Bell (2005, p. 153), is to apply a 'rights-based model when developing social policy'. What was once seen as a matter of welfare (the care of vulnerable groups within society) is now seen as a matter of human rights. Reframing the issue from one of welfare to one of rights predisposes policy-makers to regard a more explicit focus on rights as the solution, or as Butcher (2000, pp. 94–95) described it:

[a] commitment to human rights has become a panacea for all manner of political and social woes ... By ascribing to all manner of powerless people a whole range of rights we hope, or assume, that such groups of individuals will automatically be protected from all forms of abuse and neglect.

Butcher's conclusion that rights-based approaches have not helped, and will not help ensure the effective care and protection of those living with a mental illness, is echoed in other studies, such as Walsh (2006) which noted the difficulty homeless people have in exercising their rights and concluded that, on its own, a rights-based approach will not be sufficient to ensure that the homeless are able to realise basic economic and social rights (Walsh 2006, p. 199).

As noted earlier, rights-based approaches reframe what is provided to individuals, particularly vulnerable individuals, from a matter of welfare or charity to one of entitlement. Welfare recipients become rights-holders who are assisted by the state, not as an act of paternalistic benevolence, but as an entitlement. The creation of legally enforceable rights is often seen as a necessary tool to enable vulnerable groups to realise their rights, but rights-based approaches are more than legal instruments. Rights-based approaches can also be seen as a conceptual framework that allows policy-makers to recharacterise and guide what they do and how they do it (Bessell & Gal 2009, p. 286).

Given the debate around the effectiveness of rights-based approaches, this book aims to explore the relationship between rights-based approaches and the reality of service provision within specific national boundaries and policy sectors. It seeks to answer the question as to whether legally enforceable rights and/or the wider rights discourse influence what services are provided and how they are provided, and to identify the paths through which any influence is transmitted. While recognising the importance of cultural rights, the book focuses on economic and social rights as it is these rights (the right to an adequate standard of living, the right to work, the right to social security, for example) which are most closely associated with the 'welfare' state.

One of the ways in which rights-based approaches recharacterise how policy-makers think about what they do, is the emphasis on the obligation of the state to ensure all citizens are able to exercise their economic and social rights. Thus, rights and citizenship are linked and central to that relationship is the role of values and the contest between values and power, a relationship most clearly articulated in the social constructionist view of rights.

VALUES AND RIGHTS: A SOCIAL CONSTRUCTIONIST VIEW OF RIGHTS

Contrary to the notion that certain rights are natural, universal and intrinsic to all human beings, proponents of social constructivism believe that all rights are extrinsic to individuals in that they are products of specific social historical contexts. In other words, what should count as a right and who can make claims is a matter of power, social structure and politics (Woodiwiss 2005, p. xiii). For example, in the late eighteenth century when what is now known as civil rights were articulated in the French Declaration of the Rights of Man and Citizen and the American Bill of Rights, it was not considered legitimate for women, people of colour and children to make rights claims. Similarly, the type of rights recognised in these documents, and then reified as 'natural' rights, focus on certain aspects of an individual's life; in particular, the freedom to own property, to work and make contracts, all necessary freedoms for capitalism to flourish (Woodiwiss 2005, p. 9).

The continued dominance of individual rights and individual autonomy over group rights and reciprocity within international human rights frameworks, not only reflects the continuing dominance of capitalism in the world economy, but also the value placed on individual autonomy in the western liberal tradition because individual autonomy facilitates choice. Autonomous individuals have the freedom to choose how they wish to live their lives. There are, of course, obvious caveats on individuals' freedom to follow their own conception of 'the good life'. Individual autonomy, for example, does not extend to actions that will harm others. Thus, values determine what should count as a right, but these rights are always relational, in that the exercise of any particular right may potentially affect the exercise of other rights. A hierarchy of values is acknowledged, but again this hierarchy is limited to dominant social norms or values. Consequently, when the concept of human rights is exported beyond its western roots, the values underpinning what are claimed to be universal human rights are challenged by alternative moral frameworks, such as those that value communal solidarity and observance over individual rights (Stones 2006, p. 136–137).

Woodiwiss (2005, p. 88) characterises the history of human rights discourse in the United Nations as a struggle between a 'parochial, autonomy-centred American reading [of the discourse and a] cosmopolitan series of readings emanating from the remainder of the globe and stressing variants of the reciprocity principle'. The shared experience of Nazi atrocities meant that the USA and Western Europe were easily able to agree on a value hierarchy when drafting the Universal Declaration of Human Rights as one that largely focused on issues of personal freedom and reflected developed nations' views on the necessary structures to support a good life; that is, a liberal–democratic

political system in which private property is sacrosanct, the rule of law well-established and a range of social services already established. Because countries under colonial rule were excluded from the drafting exercise, only a few socialist and Islamic states were in a position to challenge the dominant orthodoxy, and challenges to the dominant orthodoxy only succeeded in areas where an emphasis on reciprocity was consistent with an autonomy-centred view of human rights (Woodiwiss 2005, pp. 89–91).

The history of human rights discourse in the international arena demonstrates that the process of institutionalising rights is also a product of both values and power mediated through existing institutional structures. A similar struggle characterises the institutionalisation of rights at the domestic level. For example, Short (2007, p. 858) describes the process of institutionalising indigenous rights in Australia 'as a product of ideals, entrenched colonial structures, and, most importantly, the balance of power between political interests'. The fact that indigenous native title holders were not given a right of veto over any future development activities on their land did nothing to alter the unequal power relationship between indigenous peoples and mining interests. In this instance, institutionalising indigenous land rights maintained rather than removed existing social, political and economic inequalities (Short 2007, pp. 859, 868–869). At the domestic level the hierarchy of interests is even wider than in the international arena and more pressing, so it is not surprising that political, economic or social imperatives usually 'trump' the human rights of marginalised and less powerful sections of society (Butcher 2000, p. 91). As Freeman (2002, p. 85) observed, 'the institutionalisation [of human rights] is a social process, involving power, and should be analysed and not assumed to be beneficial'. Freeman's observation highlights the tension inherent in rights discourse where rights are the product of power as well as a defense against it (Woodiwiss 2005, p. 15). This tension is most evident in cases where individual states, which are the main duty-holders in relation to human rights, are also the source of human rights violations.

RIGHTS AND CITIZENSHIP

The same tension permeates citizenship discourse. For T.H. Marshall, membership of a community, or citizenship, conferred 'a kind of basic human equality' which, to some degree, compensated for the inequality inherent in the class system, or any other social structure (Marshall 1950, p. 8). Citizens, by virtue of this basic human equality, are 'invested with a formidable array of rights' and it is the duty of the state to provide for the rights of all citizens (Marshall 1950, pp. 8–9). However, as critics of the liberal-democratic view of citizenship have pointed out, Marshall's notion of citizenship is not fully

inclusive because a citizen is conceptualised as white, male and heterosexual, which has implications for the type of rights attached to citizens and who can claim those rights. For example, the need for paid maternity leave was not recognised for many years in the USA because judges argued that equal treatment of all workers (citizens) precluded benefits, such as paid maternity leave, which applied only to women (Elson 2006, p. 108). Similarly, heterosexual citizens have the right to choose their own partner, the right of public recognition of that partnership and the right to adopt or foster children, rights which in many countries are denied to lesbian citizens (Richardson 2000, p. 263).

The fact that lesbian citizens are granted political and civil rights but denied certain social rights is reflected in the idea of incremental or partial citizenship (Roche 1999, p. 482). Incremental or partial citizenship occurs because the acquisition of rights associated with citizenship differs for different groups in society. In the west women achieved political citizenship before civil citizenship, while for the majority of men, civil citizenship preceded political citizenship (Walby 1992, pp. 90–91). While the notion of incremental citizenship implies a natural progression (however slowly) towards full realisation of all civil, political, economic, social and cultural rights, partial citizenship captures the uneven nature of citizenship where rights can be eroded or even removed by the state. For example, in Australia prisoners serving sentences of three years or more experience a loss of political rights as they are not allowed to vote.

However, precisely because rights are embedded in particular societies and shaped by dominant social norms, change is always possible as norms and values change and new claims come to be regarded as legitimate by the majority (if not all) of society, or if 'claimants are able to exert sufficient pressure on political authorities so that they perceive it to be as much in their own interests to institutionalise the rights as it is in the interests of the claimants' (Waters 1996, p. 595). For example, Ruzza's (2006) analysis of the circumstances surrounding the institutionalisation of EU anti-racism policy reveals that the combination of a range of factors created an environment in which change was possible. A change of government in the UK came at a time when all EU governments were concerned at the election of a right-wing extremist in Austria and at a time when the declining legitimacy of the EU integration process demanded a demonstration of European unity (Ruzza 2006, p. 118). In addition, anti-racism was an issue that allowed EU political and bureaucratic institutions to counter criticism that they were only concerned about economic prosperity. The fact that anti-racism could be incorporated into dominant neo-liberal values, with arguments that anti-racism legislation would strengthen the operation of labour markets, improved the fit 'between universal principles and the EU principles that characterise the process of European construction' (Ruzza 2006, p. 127).

In other words, rights are always constructed through political and moral struggles in which groups of people imagine and then articulate rights claims (Plummer 2006, pp. 152–155). Early claims for the civil and political rights that underpinned citizenship were made by an emerging middle class against the dominant elite of the day: the monarch and the aristocracy (Waters 1996, p. 597). Claims for economic and social rights were first developed by socialist and workers' movements just over one hundred years later, and in the twentieth century, new social movements articulated new sets of rights claims on behalf of women, ethnic minorities, indigenous peoples or gays, lesbians and bisexuals which challenge existing relations and structures of power (Stammers 1999). The close link between rights and citizenship means that new rights claims are often articulated through debates over citizenship with the success of such claims measured by extension of what constitutes 'a citizen'. For example, in the UK a citizen now encompasses homosexuals who want to raise children, conform to gender roles and link love and sex. The inclusion of such homosexuals within notions of 'the normal citizen' is made easier by the fact that they are claiming the same rights as enjoyed by heterosexual citizens; for example, the right to raise children and serve in the armed forces. This process of 'normalisation' is in turn contested by queer theory which 'shuns … the notion of the "good and responsible lesbian and gay citizens" who are inside the charmed circle of citizenship [and] starts to speak instead of "queer rights" as part of a new order … a celebration of marginalities and dissonance' (Plummer 2006, p. 165). Different claimants compete with each other, and those who oppose their claims, for recognition and institutional validation. The abortion debate, for example, is never settled and a woman's right to control her own fertility is continually challenged by those who come from a different moral background.

The claims of homosexual citizens to raise children and serve in the armed forces are examples of rights claims advanced by arguing for an extension of existing rights and, as such, are more easily incorporated into existing rights regimes than claims for qualitatively different kinds of rights. For example, Staeheli, Mitchell and Gibson (2002) relate how claims based on a collective or communal right to space in New York City came into conflict with the property rights of individuals or individual entities as enshrined in the US Constitution.

During the 1970s as owners of housing units abandoned their rental properties, New York City administration took over the properties, but with no money to maintain them, many of the buildings deteriorated and collapsed. Greening advocates used these vacant lots to establish community gardens and in 1978 the City offered leases and resources to many of the gardens through its Green Thumb program. However the City believed that the gardens would eventually be converted back into housing, arguing that housing was a basic

right and it was the City's responsibility to ensure that residents were able to realize this right. The best way to do this would be to sell the land to developers who would then build houses and sell them to individuals (Staeheli et al. 2002, p. 198).

While not disputing the need for housing, greening advocates and gardeners argued that the New York City administration was more interested in promoting the rights of certain sections of the population (white middle class residents, real estate and development interests and potential political donors) than in ensuring housing rights for all. The initial sale of 113 gardens with no restrictions on what could be done with the land provoked a new set of rights claims by the gardening community; that is, as a marginalised community, they had 'a particular communal right to the space in which they could organize, mobilize, and seek empowerment' (Staeheli et al. 2002, pp. 198–202). The claim to a communal right was not recognised by the courts and initial legal challenges to the sale of the gardens were rejected. However the claim for collective rights over 'public' space resonated with other members of the public and a campaign of community mobilisation and awareness-raising placed sufficient pressure on the City administration to direct the Trust for Public Land and the New York Restoration Project to buy 112 gardens due to be auctioned. Three years later (in 2002) 500 of the remaining 600 gardens facing redevelopment were preserved with the remaining being redeveloped as City-sponsored housing. While the outcome of the battle between communal and individual property rights could be interpreted as a triumph for a new type of rights claim, Staeheli et al. (2002, pp. 202–203) note that the mechanism by which the gardens were retained as public space to be used for the benefit of marginalised communities did not challenge the pre-eminence of individual property rights over communal or collective rights in that the land trusts became the new owners of the gardens. In other words, political activism had the power to put pressure on the City administration to find a way of accommodating activists' concerns, but only within existing legal structures.

For T.H. Marshall, citizenship involved obligations or duties as well as rights, and in that sense recognised a weak form of reciprocity. However the duties of citizens to the state, or to each other, were never clearly defined and the balance between duties and rights has been subject to debate ever since. For new right critics such as Lawrence Mead, the emphasis on rights over duties is misguided, as it leads to a culture of dependency that entrenches poverty and disadvantage. Anti-poverty policies, according to Mead, should be based on the notion of reciprocity rather than rights, with needy citizens receiving assistance from the state, not as an entitlement, but in return for accepting their responsibility to support themselves through paid work (Mead 1997, pp. 220–221).

Those on the left accept that citizenship involves obligations as well as rights but argue that rights must take precedence over obligations. In other words, the state can only demand fulfillment of responsibilities after it has done all it can to guarantee social rights, for example by increasing the skills of jobseekers through training or work experience. Similarly, the response to welfare dependency requires the state to supplement welfare rights with democratic participatory rights in the administration of welfare programs (Kymlicka & Norman 1994, pp. 358–359). The debate between 'left' and 'right' illustrates the fact that obligations and rights are not discrete categories. What Mead would describe as an obligation of citizenship, for example supporting yourself through paid employment, would be regarded as a desirable right by non-citizens prevented from working by the state (Morris 2006, p. 89). Similarly, in Australia where voting is compulsory, turning up to a voting booth and having your name crossed off the electoral roll is considered a basic obligation of citizenship, but the opportunity to participate in the political process is also a fundamental political right.

A similar blurring of categories is evident in notions of active citizenship in which citizenship is a practice as well as a status with rights attached (Lister 2001, p. 103). Informed by what those with experience of poverty and disadvantage value, active or inclusive citizenship demands that citizens be given the opportunity to be involved in decision-making processes that affect their lives (Lister 2001, p. 102). Lister (2007, p. 440) argues that participation is a crucial human and citizenship right because the realisation of other rights depends on participation. Yet participation should not be seen as obligatory, because this makes people feel even more inadequate when they are unable to participate, nor should participation be used as a mechanism for modifying the behaviour of those dependent on welfare (Lister 2007, p. 448). In inclusive models of citizenship, the state retains the responsibility for ensuring that individuals are able to participate in decision-making processes that affect their lives, and thus clearly favours rights over obligations. Citizenship status does not depend on individuals acting in a certain way or fulfilling certain requirements. Participation is a right, but not an obligation or duty.

However a different perspective on the role of rights versus responsibilities emerges from conversations with former political prisoners in Northern Ireland, many of whom chose to exclude themselves from citizenship or who face social and structural exclusion because of their status as ex-prisoners. For this group of people, citizenship in a post-conflict society is shaped by pragmatism rather than ideology, so it is 'the bread and butter issues of social welfare' that provide an opportunity to re-engage with the state and participate in society by promoting the welfare of themselves and their own communities (McKeever 2007, pp. 424–430). While McKeever argues that the state could do more to facilitate and expand the role played by Loyalist and Republican