Case Note

The Netherlands

Thou Shalt Not Discriminate Against Women: Public Subsidies to Religious Parties Condemned in *Clara Wichmann Foundation* v. *The Dutch State*. Court of First Instance, The Hague. Judgment of 7 September 2005

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Introduction

The court in this case decided that state subsidy to political parties that discriminate against women is prohibited by international treaties, notably the Convention on the Elimination of All Forms of Discrimination against Women.

This raises a number of issues. Where the discrimination is for religious reasons, does sex equality need to be balanced against religious freedom? Both are usually seen as fundamental rights. What about discrimination against men, in favour of women; is that also against the law? Finally, is the obligation not to discriminate only binding on the state, or also on the party itself? Could such a party be banned from politics? Some of these issues were touched on by the court, although not convincingly, and some of them, such as religious freedom, were scandalously ignored.

The Dutch State has appealed. It is unhappy with allocating political subsidies according to the beliefs held by the party, at least where those beliefs are based on a genuine religious conviction rooted in Dutch tradition and culture. However, whether or not that appeal succeeds the judgment of the court of first instance deserves attention for its discussion of this important contemporary problem.

The facts

The *Staatkundig Gereformeerde Partij* (SGP) is a Dutch political party, founded in 1918, based on 'the word of God' as found in the Bible. Although formally interdenominational, its supporters are drawn primarily from members of a certain

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section of the Dutch Reformed Church.[1] It takes the view that men and women, while of equal value, have distinct roles in society, and that public life should be a male domain. In 1997 the party rules were amended to reflect this philosophy. As a result of this full membership of the party is only open to men. Moreover, only men may have management roles within the party, or stand as SGP candidates in local or national elections. There is a form of 'exceptional membership' which is open to both men and women, but these members may not vote within the party nor be put forward for any internal or external office.

The SGP currently has two members (out of 150 total) of the Dutch lower house of parliament and two members (out of 75) of the upper house. The number of SGP members of parliament has not significantly deviated from this in decades. The SGP also has members of local councils and authorities, particularly in strict protestant villages. Dutch law allows parties represented in the upper or lower houses of parliament to receive a subsidy from the state. The amount of this subsidy is linked to the number of members of parliament. The SGP has therefore been the recipient of state financial support.

The Clara Wichmann foundation[2] is dedicated to the 'emancipation' of women and the combating of discrimination. Along with a number of other Dutch organisations with similar or overlapping goals[3] it brought two legal actions, against the SGP[4] and the Dutch state[5] respectively. In the first of these actions it demanded three things:

i. a declaration that the actions of the SGP were contrary to numerous legal provisions, including Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Articles 25 and 26 of the International Covenant on Civil and Political Rights (ICCPR), various provisions of the European Convention on Human Rights, and certain articles of the Dutch constitution;
ii. an order that the SGP amend its statutes to allow women equal rights within four months, or face a fine of 5000 euros per day;

[1] Information in English over the SGP can be found at <www.sgp.nl/Page/sp426/ml1/Index.html>.

[2] Clara Wichmann (1885-1922) was a prominent Dutch lawyer active in a number of causes, including equal political rights for women, whose writings were influential. See <www.clara-wichmann.nl>.

[3] The Dutch Lawyers Human Rights Committee; the FNV (a major trade union) Women's League; the Women's Alliance for Economic Independence and Redivision of Labour; The Foundation for Black, Migrant and Refugee Women; The Humanist Human Rights Congress; The Dutch Association for Women's Interests, Women's Work and Equal Citizenship; the Women's Network of the Netherlands; the Bundeling Foundation; the Dutch Women's Council (author's translation of names).

[4] Rechtbank 's-Gravenhage HA ZA 03/3396. Judgment of 7th Sept. 2005.

[5] Rechtbank 's-Gravenhage HA ZA 03/3395. Judgment of 7th Sept. 2005.

iii. an order that the SGP decision in 1997 to introduce two categories of membership, of which only the lesser was open to women, be declared null and void.

In the second action the Clara Wichmann foundation sought a declaration that the state was acting in a way contrary to the same international treaties and constitutional provisions cited in the first case. Of these, Article 7 CEDAW turned out to be the most important for the case. This requires that

> States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
> (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
> …
> (c) to participate in non-governmental organisations and associations concerned with the public and political life of the country.

The Clara Wichmann foundation claimed that the state had not ensured the equal rights referred to in 7(a) or (c), or taken the appropriate measures of the first sentence. The foundation also sought an order requiring the state to end this situation within a period to be determined by the court, and a fine of 10.000 euros per day if compliance was late.

The Judgment in the Clara Wichmann Foundation v. the SGP

The first action failed on admissibility. The Clara Wichmann foundation had not been able to find any woman who wished to join the SGP – i.e. shared its broader philosophy – and who was prepared to join the legal action. The foundation could not therefore show any direct interest of its own in the SGP rules. It could not produce a victim of discrimination or show that it was such a victim.

The foundation also claimed that there was a 'general interest' in the prevention of discrimination. The court accepted this, but such 'general interest' actions by third party pressure groups and interest organisations are only permitted in Dutch law where they are necessary because individual actions would be difficult to pursue, for example because the effects of a measure on each specific individual are marginal. That was not the case. It was open to any SGP woman to bring an action against the SGP demanding full membership, should she wish to.

The foundation had also submitted to be representing the interests of SGP women who disagreed with the party rules but are under social pressure not to challenge them. It is indeed well-known in the Netherlands that there is a lively

internal debate within the SGP over this topic, and many women are dissatisfied with their limited rights. However, the SGP is a tight community, and, as the court noted in rejecting the foundation's claim, the women have chosen to continue their debate within the party rather than outside it, and none wished to join a legal action. The court did not address the question of whether the pressure on the women was such that their freedom of choice in this matter should be seen as effectively curtailed.

The judgment in Clara Wichmann Foundation v. the Dutch State

Admissibility

Once again the Clara Wichmann foundation could not show a personal interest in the action, but this time the court accepted that it was an appropriate case for a general interest action. The general interest was in living in a democratic society where sex discrimination is not tolerated, and this was an interest shared by the population at large, notwithstanding that some individuals might disagree. Since it was not clear that an individual action against the state would be possible – since the primary complaint of SGP women would be against the SGP itself and no other individual woman would have sufficient interest – it was appropriate to allow the foundation and certain of the other organisations[6] to proceed.

The obligation to take action against discrimination

The court noted that Article 7 CEDAW clearly had direct vertical effect. Moreover, it required the state to take measures against discrimination by political parties. Here it noted with apparent approval the views of the CEDAW committee[7] that

i. Article 7(a) must be *de facto* as well as *de jure* realised. The court considered that discrimination by political parties diminishes the *de facto* right of women to stand for election;
ii. Article 7(c) imposes obligations on political parties not to discriminate, which states must enforce.

The state argued that measures against discriminating political parties could not easily be taken because they would interfere with other rights, such as freedom of

[6] It was found that the goals and statutes of some of the organisations did not sufficiently encompass political equality for women. A condition for an organisation to bring an action of this sort is that the action fall within its stated goals.

[7] Art. 17 CEDAW creates a committee to report on the implementation of the convention in states parties.

religion, association, and expression, which were guaranteed by other treaties. The court rejected this. Looking at the *travaux préparatoires* for CEDAW it noted that there had been fears expressed by states that the convention would indeed conflict with other rights. For this reason the scope of Article 7(c) had been narrowed. Whereas it was originally intended to include social organisations, the final version referred only to public and political ones. The court found this to indicate a conscious choice that for these organisations the elimination of discrimination would prevail over other rights. Thus while it conceded that in general rights had to be balanced, the court found that where political or public organisations were concerned the position was different. The state had an 'unqualified' obligation to act against the SGP and no other treaty limited this obligation.

The state added that women – such as the SGP women – were able to start their own political party. Thus they appeared to suggest that action against the SGP was not necessary. The court rejected this. The fact that the SGP made an unjustified distinction on the basis of sex, and therefore discriminated, was sufficient to invoke Article 7. In any case, if action against the SGP was not deemed necessary because of such arguments then this would require courts to define some kind of threshold for actionable political discrimination, which would be an impossible task. This paragraph of the judgment is brief and opaque, but the state appears to be arguing that the *de facto* effect of a small party such as the SGP is minimal and so does not require a state response, and the court appears to be rejecting both the implicit *de minimis* argument, and the suggestion that other routes open to women can counter the presence of discrimination.

Were current measures by the state adequate?

The court considered that the state's obligation was to take 'appropriate measures', and that for measures to be appropriate they must be effective and in fact lead to the ending of discrimination in public and political life. This was clearly not what had occurred. The state however argued that a number of relevant laws contained provisions combating discrimination, and that the existence of these laws in itself satisfied Article 7. The court rejected this. In two cases, the laws did not in fact enable the state to act against the SGP, and so they were manifestly inadequate measures:

i. Although Dutch law criminalises some forms of discrimination, earlier case law from the Dutch Court of Appeal in The Hague had excluded prosecution of the SGP.[8]

[8] Gerechtshof te 's-Gravenhage, *Nederlandse Jurisprudentie* [Dutch Jurisprudence] 1996/324.

ii. While there were provisions in media law which allowed for the exclusion of discriminatory organisation from the airwaves, the SGP had not in fact been denied airtime. The court found that the media authority was an independent body, and so the state could not instruct it to use or interpret the rules in a particular way.

In two other cases, the law appeared to allow the state to act against the SGP. However, there was no obligation to do so, and a law which created a discretion which did not have to be, and had not been, exercised, could not in itself be an appropriate measure satisfying Article 7:

iii. Article 2.20 of the civil code allows the state to dissolve organisations whose activities are contrary to public policy. Once dissolved, the SGP would not have been able to register as a political party and field candidates, and so its discriminatory political activities would have come to an end. However, the measure had not been used, and the state indicated it would only be used in 'extreme cases'.
iv. The state was permitted by law to provide subsidies to political parties, and to withdraw these if they were guilty of discrimination punishable by criminal law. However, there was no provision allowing for withdrawal for non-criminal discrimination such as that by the SGP, and although it is not discussed in the judgment, clearly the relevant minister did not feel able or inclined to withdraw subsidy selectively without such explicit legal permission. Therefore the SGP continued to receive its subsidy.

The conclusion of the court was therefore that the state was in violation of Articles 7(a) and (c) of CEDAW. The Dutch election system, the court found, is so arranged that political parties essentially control who can stand (there is a list system). The rights of citizens to stand for election are therefore largely determined by the internal procedures of political parties. The state had taken no steps to end discrimination in the internal procedures of the SGP. No justification for the state's position could be found in the protection of other rights.

In the light of this the court considered it unnecessary to consider other treaties or provisions of law.

The order

The court could not order the state to make new laws; this would violate the separation of powers. It could only set aside existing laws, and in particular, as a result of Article 94 of the Dutch constitution, it could set aside laws which conflicted with treaties. Therefore the court ordered the Dutch state (in the person of

the minister for internal affairs) to set aside Article 2.1 of the subsidy law when making decisions on subsidies to the SGP. Article 2.1 is the article which authorises the payment of subsidies to political parties. If this is set aside, the state is therefore no longer empowered to provide funds.

The court noted that this order would not prevent the SGP appealing against any future refusal of subsidy. The issues in this case could therefore arise for consideration again.

The court did not make any provisions for penalties in the event of non-compliance with its order. It was confident that this would not arise.

Notably, the court did not order the state to dissolve the party, using its powers under Article 2.20 of the civil code. It could have done so, although this would have been regarded under Dutch law as a fairly extreme step. The court did not indicate its reasons, but it is likely that it felt such a step would be disproportionate at this stage. The subsidy ruling might well be sufficient to push the SGP into change. If not, it is always possible that a further case will be brought in the future – a point discussed below.

Comment

There is little to say about the first judgment. However both the reasoning and the outcome of the second one are remarkable. The core of this judgment is the idea that continuing discrimination by the SGP means that women cannot be said to enjoy political rights 'on equal terms' with men, as Articles 7(a) and (c) require. The problem with this perception is that the obligations in these two sub-articles are absolute. The state must ensure these equal rights, and there is no room for exception, compromise, or balance. Hence by interpreting them broadly the possibility to respect religious or political freedom has been denied. This raises the question whether it is in fact sensible to read the sub-sections in this way. Is it necessary or wise to take the view that what occurs within a political party is an element of the political rights of women as referred to in Articles 7(a) and (c)?

The alternative would be to rely on the first sentence of Article 7, which simply requires states to take appropriate measure to combat discrimination. This broader, softer, test would allow for other factors to be taken into account. In any case, whatever CEDAW may say or mean, such factors must be taken into account; there are other treaties that are relevant here, and there was no legal basis for the court's neglect of these.

Finally, a reading of Article 7 which allows no room for compromise and renders sex discrimination in politics *per se* prohibited risks having side effects; parties will be prevented from taking measures to positively assist women where these are at the expense of men.

The above points and others are discussed below.

Do Articles 7(a) and (c) even apply?

The obligation in Article 7(c) is strong. Women must be ensured equal rights to participate in public and political organisations. However, it is far from obvious that this is the same thing as saying that each of these *organisations* must treat them equally. An alternative reading is that it requires the *law* to treat them equally in this respect.

If the Catholic Church refuses to marry, or admit to its services, two practising Jews who do not accept Catholic teaching (or vice versa) does this show that Jews do not have equal rights to participate in religious organisations? If a right-wing party refuses to admit someone as a member who claims to be a communist, does this show that communists do not enjoy equal political rights? Does the fact that the majority of the population refuse to marry a person of the same sex as themself mean that homosexuals do not have an equal right to marry? It seems implausible. A right to engage in an activity does not have to mean that every other person or organisation engaged in that activity must welcome you. It may simply mean that, as far as the law is concerned, you must be allowed to do that thing.

Article 7(a) is equally strict in requiring women to be eligible for election to all public posts. However, the court's view that the *de facto* right of women to stand for election is limited by discrimination within parties, because they control access to the lists of candidates is only half-convincing. It is correct that *de facto* access is indeed limited. However, it is again not obvious that this concerns the right. Indeed, the wording of Article 7 (states 'shall ensure to women, on equal terms with men, the right') suggests a legal and formal reading of the concept of right. The state's obligation is not to ensure 'equal participation in public life', but a right 'on equal terms'. The more persuasive reading is that this provision is about law.

Articles 7(a) and (c) are but one part of the article. The first sentence requires states to take 'all appropriate measures to eliminate discrimination against women in the political and public life of the country …' Thus even if the SGP is not caught by 7(c) or indirectly by 7(a) the state will continue to have an obligation to take measures under this umbrella sentence. However, this sentence is somewhat softer and less absolute. States are only required to take 'appropriate measures'. This can very easily be read as an acknowledgment that sometimes other interests and rights and factors will have to be taken into account.

Thus Article 7 has a coherent structure. It is an article in two parts; an initial soft but broad obligation to take 'appropriate measures' against all discrimination in public life, and a hard and precise obligation, delimited in sections 7(a) to (c), to ensure that the legal rights of men and women are the same. The court did not appear to read the article carefully enough to see its internal structure, or to appreciate that the 'appropriate measures' requirement does not apply to Articles 7(a)

or (c). It muddled up all the ideas present, with, as will be seen, potentially dramatic consequences. Its view that Article 7 imposes an unqualified obligation to act against the SGP, irrespective of other rights, is wrong. Article 7 is not that simple.

It is all about balance

Moreover, even if the situation falls within the absolute obligations of 7(a) or (c) rather than the more nuanced requirements of the first sentence of Article 7, there are other sources of law which nevertheless require other rights to be considered. The court's view that this is not the case is bizarre. It is sufficient to look at the European Convention on Human Rights, which requires member states to respect freedom of religion and association and expression, and requires that these rights be enjoyed equally, without discrimination on the basis of, *inter alia*, religion or political opinion.[9] It is inescapable that the court's judgment limits the capacity of those holding the SGP's particular religious views to form political associations and express their views, and even ultimately to practice their religion – since if adherence to a religion limits an individual's other rights this is essentially a form of punishment for that religion, and a limit on religious freedom. The religious and other rights of SGP believers are therefore restricted, and they are treated less advantageously than those of other beliefs.

Perhaps all this is justified. The European Convention on Human Rights allows for justified restrictions on rights. However, no court faced with such a situation can escape the obvious fact that it is balancing religious freedom against sex equality. Whatever the outcome of the balance, this is the process at the heart of the case. To fail to consider this is to award no weight at all to religious, associative and expressive rights.

The court avoided this balance by relying on some very bad arguments. The first was that Article 7 imposed an 'unqualified obligation' – which it is argued above is wrong. The court then argued that since the state had chosen to sign such an absolute commitment, it must take precedence over all other treaties which might seem to limit it by guaranteeing other rights. The first flaw in this argument is conceptual; the assumption that because the state has made a choice the matter is settled. The very purpose of human rights protection by courts is to set limits to the capacity of states to make choices in this area, and to ensure that they do not overstep limits. Whether or not the Dutch state chose to privilege sex discrimination over religious freedom, the obligation remains on the court to decide whether they were entitled to do this. Even if, as was argued, CEDAW reflects a choice on how discrimination and religious freedom should be balanced, the question re-

[9] Arts. 9, 10, 11 and 14 ECHR.

mains whether this choice is compatible with other norms. More precisely, whether or not CEDAW takes precedence over the European Convention cannot be decided merely by reference to the terms of CEDAW. It is no doubt a complicated question of international law, albeit one that an intelligent reading of the two treaties is likely to render hypothetical. If CEDAW allows no room for other rights, this is the beginning of a process of legal analysis, not the end.

Consequences of the judgment

This judgment is sometimes seen as having followed a wise middle path: banning the SGP would have been going too far, but removing its subsidy was just about right, and enough to at least give the state clean hands. Active funding of a party seems much worse than simply allowing it to exist.

However, the substantive arguments of the court were in fact in favour of a ban if necessary. It was clear that only the ending of discrimination by the SGP fulfils the state's obligation to 'ensure' equal rights for women. If the SGP survives without subsidy, and does not change its rules, then the state will be in continuing violation. Nor can the state escape by arguing that to go further would violate other rights; this was explicitly rejected by the court.

As suggested above, the reason why the party was not dissolved immediately was probably in order to give the subsidy ruling a chance to achieve the necessary effects. However, if it does not, the matter may return to court. Therefore one may envisage a future case in which the court concedes that the subsidy ruling was not effective, and orders the state to exercise its powers to dissolve the SGP. Alternatively, if for reasons of Dutch administrative law it feels unable to take this step it may find itself having to rule that the state is in violation but that unfortunately, as a court, it is powerless to remedy the situation, since it cannot order the making of new laws. At this point a penalty payment of the type suggested by the Clara Wichmann foundation might be considered appropriate, to put pressure on the state.

The judgment also has implications for measures in favour of women. By ruling that women do not have equal political rights where parties discriminate against them, the court has opened a can of worms; it would seem to follow that where parties discriminate against men the same is true vice versa. Hence women-only parties, or parties that have women-only lists, or quotas for women, or take other steps that formally discriminate against men must also be banned. Equal political rights are for both sexes.

This can be supported by reference to CEDAW itself, which provides in Article 4(1) that while 'temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination' these

measures 'shall in no way entail as a consequence the maintenance of unequal or separate standards'. CEDAW is in favour of some positive measures to assist women, but prohibits going so far as the creation of formally unequal rights. This is supported by Article 2(1) of the International Covenant on Civil and Political Rights, which also requires its rights to be secured without distinction on the basis of sex. Once again, formal equality is to be maintained. Thus if, as the court (wrongly) claims, what happens within parties is an element of political rights themselves, then both CEDAW and the ICCPR prohibit parties and party measures discriminating against men.[10]

The wider policy

This judgment is not just about discrimination against women. It is about the role of politics in society, about Muslims, and a little bit about the SGP.

Early in the judgment the court states that the general interest in living in a society where sex discrimination is not tolerated and where the state enforces this, takes on a special importance when one considers that it is not unimaginable that in the near future other parties may come into being which assign women, for religious reasons, a different role from that of men. The state, said the court, can play a guiding role here.

No-one living in the Netherlands will have difficulty cracking the code of this paragraph. While the SGP may be generally seen as strange but non-threatening to outsiders, Muslims are certainly not. A concession to the SGP might have made it impossible to prevent a fundamentally sexist, or homophobic, Muslim party taking part in politics. Whether such a party is ever likely to come into being may be debated, but the fear is present, and reflected in the judgment. The court is preparing the ground for a future conflict.

[10] If positive measures for women are to survive the court's ruling it must be because they are seen as substantively non-discriminatory, even though formally they discriminate; they may be understood as remedying disadvantages that other circumstances create for women. However, if this argument is acceptable then it follows that equality in political rights is being treated as a substantive, rather than formal notion. A consequence of this is that discrimination, as well as equality, must be understood substantively. Therefore, if parties exist which, while formally non-discriminatory, in reality tend to discourage or disadvantage those of a particular race, religion or political belief then it may also be said that political rights are not awarded without discrimination on grounds of race or religion or belief. Such discrimination would be contrary to, among other texts, the ECHR (see Arts. 9, 10, 11, 14 ECHR; First Protocol ECHR Art. 3; 12th Protocol ECHR Art. 1). Of course, few parties admit to discrimination, but it would not be hard to construct arguments that the *de facto* conditions for selection for a party list or party office in fact tend to advantage certain types of citizen over others. It would seem all parties with the word 'Christian' in their name, as well as all those with a disproportionate number of white candidates, are liable to attack. If the state does not take measures which cause this state of affairs to come to an end, it is – following the implicit argument of the court – failing to secure political rights without discrimination, in violation of the ECHR.

There is no intention to defend sexist opinions here, but is this the right approach to politics? Should the state sign treaties agreeing not to allow those of certain views to take part in political life? Perhaps this is not quite what has occurred; the SGP could of course campaign for a change in laws, while, until it achieves success, respecting the existing ones and allowing women full participation rights. However, a party that cannot embody its beliefs is severely hampered. There is no doubt that in substance the court in this case denies, or at least restricts, a right to bring sexist views to parliament.

Perhaps one should remember the classic lessons of free speech here. Views that are true should be allowed because they advance knowledge. Views that are false should be allowed because by combating them knowledge advances too. To suppress the expression of distasteful views only weakens the longer term resistance to them. Therefore it is of importance, especially in the press and in politics, that speech and opinions are free. Restrictions, on this view, are emergency measures. Where countries ban the advocacy of hatred or discrimination or violence this is defensible insofar as they cannot trust their populations to resist them – even the vaccine may be deadly to a weakened immune system. There may be harm done in the short-term that the longer term benefits of free speech cannot undo.

Clearly the court considers the Netherlands to be in danger. The SGP – and its possible future fellow travellers – is seen as a genuine threat, which must be countered before harm is done. This is not a view that many rational people will hold, but even assuming it to be defensible it is far from clear that this judgment will achieve its goal of suppressing the discriminatory message. All those whose instinct is to side with the underdog will find themselves in the uncomfortable position of seeking to protect the tiny and vulnerable SGP against the far more powerful lobby of those opposed to sexism. Had the court allowed its subsidies, it would probably have condemned the party to slow stagnation and death under the burden of its own outdated dogma. Instead it is revitalised by persecution and supported by unexpected allies. The court has ensured that many who would happily have seen the SGP disappear from the world suddenly feel it is important as a matter of principle to ensure that it survives. It has also managed to split those opposed to sex discrimination into two camps – those who feel equality should trump freedom of religion, and those who do not. Divide and conquer? Who is really winning here?

Qui bono?

Who does benefit from the judgment? The court found that society as a whole does, but this has been doubted above. In any case, those general gains will be

more convincing if they are rooted in some concrete changes.

If the SGP collapses perhaps other political parties will absorb their two seats, but this is a rather marginal and uncertain gain. Moreover, no woman outside the strange and closed world of hard-core Dutch Protestantism would ever want to be associated with the party, so no non-SGP women are directly benefited. It seems that the only group who are directly assisted are the women within – the ones who did not want that assistance.

There are many cases where it is appropriate to argue that an individual does not know their/its own best interests. We may be confused or oppressed or ill, and measures imposed on us to help us despite our views may be justifiable. But here? Are the SGP women to be seen as children, whose opinions may not be taken seriously, like the Muslim women who claim they wish to wear a headscarf unaware of how they are controlled by a sexist and oppressive culture? Sociologically and psychologically it may be possible to defend this view, but there is not much room for it in the law, where extreme circumstances are required before someone is seen as unable to take decisions for themselves – for good practical reasons. There is undoubtedly a large element of insult in deciding that action must be taken against the SGP even though the entire class of those who might benefit from this does not want the court's help.

Yet of course the court only pushes for women to be allowed to vote and stand. It does not oblige them to. It would be rather magnificent, however misguided, if the women of the SGP were to voluntarily abstain from political functions if the SGP changes its rules to allow them to take such roles. Yet this will probably not be the case. The court will have been well aware of the internal debate in the SGP, and of the increasing pressure from SGP women for change. This judgment may be the final straw, under which the male resistance will break and which will herald female participation in SGP politics. No doubt future generations of SGP women will be glad of this, their daughters and even their sons will, and society will come to see this as another step forward in the ending of discrimination. The fact that religious rights were ignored to achieve this; who knows what price we will pay for that?

What was the problem anyway?

If a woman wishing to join or participate fully in the SGP had brought an action challenging their discriminatory rules, would she have won? In the end this question was not answered, because no such action was brought, but the general approach of the court to the SGP rules, Article 7 CEDAW, and the principle of non-discrimination would suggest that a challenge would succeed. It is arguable that this is enough to satisfy Article 7, even on the court's broad view of what it

means – and the state did so argue. Women clearly do have an enforceable right to equality within political parties.

It seems that the state's obligation to 'ensure' this right means more than ensuring that it exists and is easy to enforce. The state has some kind of paternalistic obligation to do the enforcing itself. Yet this actually diminishes the rights of SGP women. Whereas they now have the legal right to participate if they wish, the court wants to go further than that and take away their right to choose to freely accept a particular role. It does this in the name of non-discrimination. However, discrimination does not occur whenever men and women fulfil different roles, but when they are obliged to do so. On the contrary, it seems likely here that any woman who wishes to stand within the SGP will find the state and the law immediately at her side.

The SGP rules are thus, legally speaking, a voluntary arrangement between consenting adults of different sexes. This is not to say that all SGP women (or men) agree with the policy, but those who do not have made a choice that they will not enforce their right to stand for office until they have been able to bring others round to their view. They place a higher value on a consensual approach, on the unity of their belief-based party, and on continuing its organic internal development, than they do on any particular individual being able to perform a particular role. They have done what adults do when their various desires conflict: made a choice.

In finding a state obligation to reverse this choice, and enforce the majority vision of equality whether or not the women in question want or accept it, the court is leaving individual rights behind. These are sacrificed to social engineering. Women become the manipulable objects of the law, not people with protected rights of their own.

A continental view?

Throughout continental Europe many political parties have their roots in particular religious groups, and links with these remain important. The contrast is with the Anglo-Saxon world. Even in the US, where religion is important in politics, no party has a distinctively denominational identity.

The origin of the difference is social and historical. European politics and state-forming is often seen in terms of deals struck between social groups. This is particularly so in the Netherlands, where part of the founding myth is a social contract between Catholics and various protestant factions, represented by their political leaders. Politics continues to be seen there in terms of the ongoing renegotiation of this contract.

In this context, the idea that an individual should choose the party that they agree with is unrealistic, perhaps even strange. It is rather the obligation of a party

to ensure that it represents its constituency. It is almost a mini-state, or a sub-unit of the democratic structure.

However, while this vision is not dead, and while it is true that if any party remains an example of the idea *pur sang* it is perhaps the SGP, nevertheless this is generally seen as an outdated view of how democracies should work. The idea that society is composed of groups with structurally different interests who must reach a bargain with each other is increasingly replaced by the idea that government is technocratic and encompassing: its task is to make the best decisions for society as a whole, and the function of parties is to bring different views to the debate about what these decisions should be. The function and responsibility of voters is to choose between those views.

One plausible reading of the judgment is that it reflects the older of these two conceptions. The judgment may be read as an implicit acceptance that SGP voters are bound to their party, and that the party therefore has an obligation to act in their interests and in full reflection of their character, which the law will enforce.

It may well be true that many members of the SGP could not imagine supporting another party, and are indeed trapped, albeit only by themselves. However, it is doubtful whether a court should acknowledge this. In doing so it entrenches their passivity, and magnifies the challenge which this represents to the modern Dutch democratic system. It is also a rather weak blow for equality: such policy-indifferent loyalty to the party is a building block of the same mentality of which discrimination is a symptom – one in which collective identity automatically trumps individual.

Altogether, the court seems guided by neither rights nor democracy. It respects neither religion nor a woman's right to freedom of conscience. In fact in its view of politics it is most in tune with the conservative men of the SGP – the one idea that neither of them can take seriously is that women could leave the SGP fold, and express their right as citizens to choose or start a party which does reflect their views.

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