

The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?

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Many written constitutions contain express statements guaranteeing the right to equality in some form or other. Examples include the Equal Protection Clause contained in the 14th Amendment of the US Constitution, Article 40.1 of the Irish Constitution and Section 15 of the Canadian Charter of Rights and Freedoms. International human rights treaties contain similar provisions, such as Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 14 of the European Convention on Human Rights (ECHR) which is best described as a truncated equality right. The existence of a general principle of equal treatment is recognised even in legal systems such as the UK and the EU which do not have a formal written constitution; the English courts in applying the Common Law have taken the view that unequal treatment that cannot be justified may constitute an irrational act by a public authority,¹ while the European Court of Justice has recognised equality as a general principle of EU law and therefore as a norm to which the actions of the EU institutions and member states applying EU law must conform.²

The existence of a 'right to equality' however defined, is now therefore often regarded as an essential feature of both national law and international human rights instruments. Such equality guarantees have often been applied by courts to protect individuals and groups against discrimination. However, the overall impact of these various legal expressions of the principle of human equality has been mixed. The 'right to equality' has often been interpreted by national and international courts in a narrow and restrained manner. Substantial uncertainty has also tended to surround how such a right should be interpreted and applied by courts and other bodies; 'equality' appears to be an open-ended and indeterminate concept, capable of giving rise to multiple and often conflicting accounts of its 'proper' meaning.

Various attempts have been made using concepts such as 'dignity' and 'substantive equality' to give more bite and tangible content to the otherwise normatively underdeveloped principle of equality. These attempts have had

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¹ Jeffrey Jowell, 'Is Equality a Constitutional Principle' (1994) 47 *Current Legal Problems* 1.

² Case 144/04 *Mangold v Helm* [2005] ECR I-9981.

some success, but remain problematic in many ways, often because they often fail to add much to the inherent fuzziness of the idea of equality. It may be better for lawyers, judges and other constitutional actors to refrain from wasting excessive energy on attempts to define in positive terms what 'equality' means. Instead, it may be more productive to develop a rigorous analysis of what types of behaviour or social outcomes are incompatible with the principle of equality. In other words, it may be a more fruitful enterprise to define the equality principle in negative terms as requiring legal intervention to prevent the occurrence of certain forms of discrimination and demeaning treatment, rather than trying to establish what exactly equality is through abstract moral reasoning.

The Equality Principle in Constitutional and International Human Rights Law

It is commonplace for written constitutions to contain resonant and sweeping statements guaranteeing the right to equal treatment. The oldest and perhaps best known example is the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, enacted in 1868 following the US Civil War and the abolition of slavery; it simply provides that '[No] state shall...deny to any person within its jurisdiction the equal protection of the laws.' Similar guarantees of the right to equal treatment are embedded in every major international human rights instrument, such as Article 26 of the ICCPR and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ Article 14 of the ECHR contains a truncated equality right that is confined to guaranteeing non-discrimination in the enjoyment of convention rights.⁴ However, Protocol 12 ECHR makes provision for a 'free-standing' equality right even if most European states have been very slow to ratify this new provision.

Even constitutional systems with no written constitutional text, such as that of the UK, tend to recognise the existence of some form of residual entitlement to equal treatment as part of the system's underlying general principles of law. Thus, for example, the Privy Council in *Matadeen v Pointu* recognised that a general principle of equality was, in Lord Hoffmann's words, 'one of the building blocks of democracy and necessarily permeates any democratic constitution... treating like cases alike and unlike cases differently is

³ The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD) and the new UN Convention on the Rights of Persons With Disabilities (CRPD) recognise in their texts the existence of a general right to equality, to which their more specific and precise provisions are designed to give substantive content in particular contexts.

⁴ *Belgian Linguistics Case* (1979-80) 1 EHRR 252.

a general axiom of rational behaviour.⁵ A similar development can be recognised within EU law.⁶

It is therefore now commonplace for national constitutions and international human rights instruments to recognise the importance of equality as a fundamental right. By embedding this right in legal texts, these instruments give concrete legal shape to the philosophical belief, now deeply rooted in political rhetoric and popular feeling, that all humans are entitled to a degree of equality of respect in how they are treated by the state. This serves an important symbolic and rhetorical purpose; by the inclusion of equality as a fundamental right within their frameworks, national legal systems and international human rights law reflect the significance that equality has acquired as a social concept since the French Revolution. In addition, a legal right to equality is a useful and progressive tool, as it enables disadvantaged individuals and groups to challenge discriminatory policies and practices. The existence of a guaranteed fundamental right to equality gives victims of discrimination both a legal and political platform from which to push for change. Campaigning lawyers can use this right to challenge discrimination through the legal process, while political campaigners can use the constitutionally approved language of equality to highlight injustice and call for reform.

For example, the Equal Protection Clause of the US Constitution was used to considerable effect by civil rights campaigners from the late 1940s onwards to attack segregation in the southern US states. Similarly, Section 9 of the South African Constitution of 1996 has been used to challenge an array of different discriminatory practices,⁷ and both this equality clause and Section 15 of the Canadian Charter of Fundamental Rights and Freedoms have paved the way for the legal recognition of equal rights for same-sex partners in both jurisdictions.⁸ Article 14 ECHR is now being put to use as a mechanism for

⁵ *Matadeen v Pointu* [1999] 1 AC 98, 109. See also the analysis adopted by McCombe J in *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin). For academic support for the existence of this general principle of equality in UK public law see Jowell, 'Is Equality a Constitutional Principle?' (1994) 47 *Current Legal Problems* 1; Allen, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *LQR* 221, 244. See however the more sceptical view of the existence of this general principle of equality taken by Stanton-Ife, 'Should Equality Be a Constitutional Principle?' (2000) 11 (2) *King's College LJ* 133, and McColgan, 'Discrimination Law and the Human Rights Act 1998' in Campbell, Ewing and Tomkins (eds), *Sceptical Approaches to Human Rights* (OUP 2001) 215-241, 218-224. See also the doubts expressed by Dyson LJ in *Association of British Civilian Internees (Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473 paras [85]-[86].

⁶ Case 144/04 *Mangold v Helm* [2005] ECR I-9981. See also Articles 20, 21 and 23 of the EU Charter of Fundamental Rights, even if it is not a legally binding instrument as yet, and may never be.

⁷ *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1999] (1) SA 6.

⁸ *Minister of Home Affairs v Fourie* (2006) (1) SA 524 (CC); *Halpern v AG Canada* (2003) 225 DLR (4th) 529.

securing greater equality for the severely disadvantaged Roma communities of Central and Eastern Europe (see below).

The Often-Disappointing Results of Equality Jurisprudence

However, equality rights can also be interpreted and applied in a manner that can render them empty vessels, lacking any significant legal impact or substance.⁹ At times, equality guarantees can actually have counter-productive results; grand constitutional statements about the importance of equal treatment can give the impression that all is well with a constitutional system and encourage complacency, even in circumstances where serious inequalities persist in a society.

This ‘hollowing-out’ of the principle of equality is not an uncommon feature within comparative constitutional jurisprudence.¹⁰ For many years the US Equal Protection Clause lay largely dormant, with its interpretation by the US Supreme Court depriving it of real substantive content. For example, segregation in the southern US states obtained the constitutional stamp of approval in *Plessy v Ferguson* in 1896.¹¹ The narrow and formalistic interpretation given by the Canadian judiciary to the equality clause contained in Section 1 (b) of the Canadian Bill of Rights 1960 was one of the reasons why this Bill of Rights was subsequently supplemented and effectively replaced by the Canadian Charter of Fundamental Rights and Freedoms in 1982.¹² The Common Law principle of equality is often talked about, but has rarely been given substantive effect in English law.¹³

The Limits of Article 14 ECHR

The same, until recently, could also be said for the right to equal treatment established by Article 14 ECHR. The text of the Convention confines the scope of Article 14 to guaranteeing equal treatment in the enjoyment of Convention rights. However, even allowing for this modest scope of application, Article 14 is a highly underdeveloped provision of the ECHR. Until recently the European Court of Human Rights has tended to shy away from the complexities of Article 14 preferring instead to base its decisions on

⁹ Aileen McColgan, *Women Under The Law: The False Promise of Human Rights* (London: Longman, 1999).

¹⁰ Aileen McColgan, ‘Women and the Human Rights Act’ (2000) 51(3) *Northern Ireland Law Quarterly* 417.

¹¹ *Plessy v Ferguson* 163 US 537 (1896).

¹² The limits of this approach can be seen in the contrasting Canadian cases of *R v Drybones* [1970] SCR 282 and *Canada (Attorney General) v Lavell* [1974] SCR 1349.

¹³ See Rabinder Singh, ‘Equality: the Neglected Virtue’ [2004] *EHRLR* 141. See also *Nagle v Feilden* [1966] 2 QB 633; *Weinberger v Inglis (No 2)* [1919] AC 606; *Sweeney v Coote* [1907] AC 221; Bob Hepple, *Race, Jobs and the Law in Britain* (2 edn Harmondsworth 1970) 246.

other articles of the Convention.¹⁴ Over the last four decades, the Court has often been to the forefront in protecting the rights of unpopular minorities, in particular homosexuals and religious minorities; however, it has usually relied upon the Article 8 right to privacy, the Article 9 right to freedom of religion and other Convention provisions to achieve this.¹⁵

Where it has been necessary for the Court to apply Article 14 it has applied a test based around a series of questions; a) whether the claim in question relates to an issue that comes within the ambit of one of the other Convention rights; b) whether there has been a difference in treatment of persons in similar situations; c) whether this difference in treatment is on one of the ‘suspect’ grounds outlined in Article 14¹⁶ and d) whether this difference of treatment was objectively justified, in the sense of satisfying the well-established ECHR proportionality analysis. However, the lack of case law on Article 14 has meant that this approach has remained underdeveloped. Judge Bonello in 2000 commented:

‘[that he found it] particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim.’¹⁷

The same remark could have been made with even greater force about Article 14. In particular, what constitutes the ‘ambit’ of another Convention right is notoriously unclear, and what remains hard to define; the Court’s pronouncements on the point have often lacked precision.¹⁸ Which individuals or groups will be deemed to be in a similar situation is also often uncertain, as is the extent to which indirect discrimination is covered.¹⁹ The grounds of discrimination that can trigger Article 14 are also unclear, in particular what constitutes ‘other status;’ the Strasbourg court has stated that Article 14 is a

¹⁴ *Dudgeon v UK* (1982) 4 EHRR 149.

¹⁵ For example, the bulk of the Court’s key decisions on sexual orientation have been decided mainly on the basis of the privacy right in Article 8 ECHR.

¹⁶ Sex, race, colour, language, religion, political or other opinion, national or social origin, minority status, property, or birth, on the grounds of ‘other status.’

¹⁷ *Angelova v Bulgaria*, App No 38361/97, Judgment of 13 June 2002, dissenting opinion.

¹⁸ For example, see the vague attempt to define the ambit of a right in *Petrovic v Austria* (1998) 4 BHRC 232 para [28] ‘the subject matter of the disadvantage...constitutes one of the modalities of the exercise of a right guaranteed,’ or in the alternative, the measures complained of are ‘linked to the exercise of a right guaranteed.’

¹⁹ But see now *Thlimmenos v Greece* (2000) 29 EHRR 162, discussed further below.

‘non-exhaustive’ guarantee, in that it is not confined in scope to a set amount of equality grounds, but has at times spoken of discrimination on the basis of a ‘personal characteristic.’²⁰ This has periodically been interpreted by national courts as substantially restricting the scope of the guarantee.²¹

Textual Constraints and the Lingering Influence of ‘Formal Equality’

Why in general have constitutional equality clauses been so underdeveloped? A number of reasons can be put forward. Firstly, equality clauses are often limited by having too narrow a scope of application, often due to the express wording of their text. The equality right in Article 14 ECHR remains inescapably circumscribed by its restrictions on its scope clearly established in its text.²² The European Court of Human Rights has been relatively generous in its interpretation of what is deemed to come within the ‘ambit’ of the other Convention rights in cases such as *Sidabras and Dziantas v Lithuania* (see below).²³ However, the ultimate limits of Article 14 are well illustrated by a case such as *Botta v Italy*,²⁴ where the inability of a disabled person to access beaches and other public facilities was deemed not to come within the ambit of a Convention right, and therefore Article 14 was not engaged.

A second reason for the underdeveloped nature of equality jurisprudence is that constitutional equality clauses have in particular been interpreted as providing for ‘formal equality,’ for example, in line with Aristotle’s description of the equality principle as involving the treatment of like cases in an alike manner, while unlike cases should be treated in an unlike manner.²⁵ This concept of equality requires that individuals who are classified by law or policy as being in a similar situation should be treated alike by the state.

This type of ‘formal equality’ analysis is often casually dismissed in academic literature as an outmoded understanding of equality. However, it is intimately interlinked to the core elements of the concept of the rule of law. The concern of formal equality is to prevent the formation of different categories of citizens with differing rights and status, and to guarantee the equality of all before the law. This is an important aspect of equality, which encapsulates the rejection of formal hierarchies and unequal classes of citizenship that inspired the French

²⁰ *Magee v. UK* [2000] ECHR 216 para [50].

²¹ *R (S) v Chief Constable of South Yorkshire* and *R (Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39.

²² L. Wildhaber, ‘Protection Against Discrimination under the European Convention on Human Rights: A Second-class Guarantee?’ (2002) 2 *Baltic Yearbook of International Law* 71.

²³ *Sidabras and Dziantas v Lithuania* (2004) 42 EHRR 104.

²⁴ *Botta v Italy* (1998) 26 EHRR 241.

²⁵ Aristotle, *The Politics* III.IX (London: Penguin 1962) 195-196.

revolutions of the 18th and 19th century and has since continued to shape western liberal democracies.

However, the usefulness of adopting a formal equality perspective in areas of legal dispute is inevitably limited, at least in contemporary western societies, where rule of law concepts are more or less established and understood. Constitutional equality clauses and the equality guarantees contained in international human rights treaties perform a useful symbolic role in giving expression to the idea of the equality of law before the law. However, in tangible legal terms, if courts adopt a formal equality analysis, this will usually only involve the application of some form of more or less intense ‘rationality’ review, whereby courts assess whether distinctions made in law and state action are rational, fair and justifiable on their face.

This type of rationality review may be capable of addressing obvious forms of unfairness, such as the example given by Lord Greene MR in the English case of *Associated Provincial Picture Houses v Wednesbury Corporation*²⁶ of irrational discrimination based on the colour of a person’s hair. It also may go further than this very improbable and restrictive example may indicate; rational review adopting a formal equality perspective may ensure that distinctions made in law between individuals and groups which are arbitrary, or not reasonably capable of being justified by reference to a difference of capacity or status, or which is unrelated to the purpose of the legislation in question, may be opened up to challenge.²⁷

However, formal equality analysis lacks any substantive account of what is required to ensure concrete equality of status for all citizens; the emphasis is on securing equality and sameness of treatment in how law is made and applied, not in securing ‘substantive equality’ or ‘equality of respect’ as an ultimate good. The capacity of formal equality to address more complex issues of substantial equality, group disadvantage and redistribution is therefore limited. In addition, as formal equality is concerned with ensuring equal treatment and observance of rational principles *on the face* of enacted law, it lacks any real conceptual framework to cope with the discriminatory *impact* of apparently neutral and inoffensive state action. This means that formal equality analysis can approve a government measure as fully in accord with the right to equality, when it nevertheless is deeply discriminatory in its effects. The classic example of this is the US Supreme Court’s refusal to find that segregation violated the Equal Protection Clause in *Plessy v Ferguson*;²⁸ the Court took the view that as long as

²⁶ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

²⁷ *Brennan v Attorney General* [1983] ILRM 449, 480 (HC) (Barrington J): ‘the classification must be a legitimate legislative purpose...it must be relevant to that purpose, and that each class must be treated fairly.’

²⁸ *Plessy v. Ferguson* 163 US 537 (1896)

segregating states applied their 'separate but equal' policies in a non-arbitrary fashion, the equality principle was not violated, even through the actual impact of segregation was to condemn Afro-Americans to a degrading form of third-class citizenship.

Across Europe, there is considerable attachment to the formal conception of the equality principle.²⁹ In civil law systems, the post-Napoleonic attachment to the uniform and rational application of law to all individuals equally remains strong. In the Common Law world, formal equality chimes with the historically dominant English concept of the judiciary acting as 'lions under the throne,' applying the law neutrally and rationally as servants of the democratically elected and sovereign Parliament. Also, if one adopts a legal realist perspective, it is apparent that adherence to a formal equality approach may have considerable attractions for judges; it permits them to sidestep political controversies by confining their intervention in complex political and social debates about equality to the narrow question of whether the state action in question has complied with the requirements of formal equality.

The Anti-Discrimination Approach

However, formal equality analysis is now being challenged by the emerging tendency of courts to adopt wider and more 'substantive' interpretations of the right to equality. An 'anti-discrimination' analysis is increasingly adopted by national or international courts. Anti-discrimination analysis treats certain forms of distinction as inherently more 'suspect' than others; the use of a person's race, ethnicity or gender in employment decisions and other forms of 'suspect classification' are often seen as *prima facie* irrational and subject to strict and intensive forms of judicial scrutiny. In addition, anti-discrimination analysis tends to be more concerned with the impact of state policy and practices upon disadvantaged groups than is formal equality; it therefore opens the door to a concern with disparate impact and indirect discrimination, where the use of apparently neutral criteria to differentiate between different groups results in particular groups being subject to disproportionate and unfair disadvantage.

To a large extent, this shift from a formal equality approach to the use of anti-discrimination analysis has its origins in US constitutional law; indeed, as we will see below, there exists a strong perception in certain quarters that anti-discrimination analysis is the product of a distinctive 'Anglo-American' form of political liberalism. As previously noted, the Equal Protection Clause of the US Constitution had been originally interpreted by the US Supreme Court as

²⁹ See the discussion in Dagmar Schiek, 'Torn Between Arithmetic And Substantive Equality? Perspectives On Equality In German Labour Law' (2002) 18(2) *International Journal of Comparative Labour Law and Industrial Relations* 149. See also Olivier De Schutter and Julie Ringelheim, 'Ethnic Profiling: A Rising Challenge for European Human Rights Law' (2008) 71(3) *MLR* 358.

restricted to ensuring formal equality of status, civil rights and citizenship.³⁰ However, in the seminal case of *Brown v Board of Education of Topeka*³¹ in 1954, the US Supreme Court re-interpreted the Equal Protection Clause as prohibiting racial segregation in education, thereby considerably expanding its reach and impact. The true significance of *Brown* lay not in the practical impact of the decision, which remains a source of debate and controversy today.³² Instead, the importance of *Brown* lies in how the Supreme Court in that case focussed on the impact of segregation and repudiated the use of classifications based upon race; this involved a dramatic departure from its previous approach of attempting to ensure that the formal requirements of the ‘separate but equal’ doctrine were observed.

The decision in *Brown* was taken up by the civil rights movement and used as a tool to press for change, to considerable effect. The scope of the Equal Protection Clause and associated articles of the US Bill of Rights was extended to cover family law, housing, education, and the myriad range of activities of federal and state government.³³ This opened the path for the introduction of federal anti-discrimination legislation covering these areas of activity.³⁴ ‘Disparate impact’ analysis was developed in *Griggs v Duke Power*³⁵ and subsequent constitutional case-law.³⁶ Racial distinctions were subject to strict scrutiny analysis, with distinctions based on gender increasingly subject to a relatively less exacting but still demanding standard of review.³⁷ In starts and fits, the Supreme Court has gradually recognised that certain forms of classification which are linked to patterns of abuse and denial of equal citizenship in US society should be treated as ‘suspect’ forms of differentiation, which opens the way to intensive judicial scrutiny of the use of such forms of classification that goes well beyond the limits of rationality review.

Brown and the subsequent development of the equal protection jurisprudence of the US Supreme Court had a massive impact, at least in the English-speaking legal world. It provided the template for what was in the late 1950s and early 1960s a radical new vision of the role of courts in protecting constitutional rights; in the wake of *Brown*, protecting disadvantaged groups

³⁰ *Stauder v. West Virginia* (1879) 100 US 303; *The Civil Rights Cases* (1883) 109 US 3.

³¹ *Brown v Board of Education of Topeka* (1954) 347 US 483.

³² James T. Patterson, *Brown v Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York and Oxford: OUP 2001); Jack M. Balkin (ed), *What Brown v Board of Education Should Have Said* (New York: NYU Press 2001).

³³ *Loving v Virginia* (1967) 388 US 1; *Heart of Atlanta Motel Inc. v. United States* (1964) 379 US 241; *Jones v Mayer* (1968) 392 US 409.

³⁴ Civil Rights Act 1964 (Pub. L. 88-352, 78 Stat. 241, July 2 1964).

³⁵ *Griggs v Duke Power* (1971) 401 US 424.

³⁶ *Washington v Davis* (1976) 426 US 229.

³⁷ *Craig v Boren* (1976) 429 US 190.

against discrimination became a task that courts applying constitutional equality principles were now expected to perform. Strategic litigation initiated by activist lawyers and non-governmental associations in the US, Canada and elsewhere began to push the boundaries of existing formal equality approaches, and courts have responded, reflecting the changed assumptions about their appropriate role.

Substantive Equality

In some cases, such as South Africa and Canada, constitutional courts have gone further than the US and developed what was become known as a 'substantive equality' analysis, where the right to equality is interpreted as requiring the elimination of historically-rooted patterns of prejudice, discrimination and disadvantage that contribute to the subordination of particular groups. Subsection 15 (1) of the Canadian Charter, in effect since April 1985, provides that:

'Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

This clause was drafted with the specific intention of encouraging the Canadian courts to depart from their highly-criticised formal equality analysis which had been adopted in interpreting the equality clause contained in the original 1960 Bill of Rights (discussed above). Subsection 15 (2) of the Charter proceeds to specify that this 'does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or group.' Section 9 of the South African Constitution is framed in similar terms.

Both the Canadian Supreme Court and the South African Constitutional Court have interpreted these equality clauses as prohibiting forms of disadvantage, stereotyping or prejudicial treatment which deny the human dignity of individuals and groups. In concrete doctrinal terms, this means that state action which has an adverse impact upon disadvantaged groups, such as women, persons with disabilities or homosexuals, is subject to close scrutiny and must be shown to be clearly necessary and justified. In contrast, differences in treatment which are not linked to historic and persistent patterns of disadvantage or which are not seen as involving a denial of human dignity, will usually be subject to a much weaker standard of review. Positive action designed to combat disadvantage will also not be subject to intensive review,

and will be presumed in general to be constitutional. (In contrast, positive action can be considered to be problematic under formal equality and anti-discrimination approaches, as it can involve favouring particular groups on the basis of their possession of a characteristic such as race, gender or ethnicity, and therefore can feature differential treatment on the basis of a ‘suspect characteristic’).³⁸

The South African and Canadian courts have therefore developed an innovative and rigorous and innovative ‘substantive equality’ jurisprudence, so-called because it focuses upon the substantive impact of state action upon disadvantaged groups, rather than on the formal classification of groups. For example, in decisions such as *M v H*³⁹ and *Halpern v Canada (A.G.)*,⁴⁰ the Canadian courts have interpreted Section 15 of the Charter as requiring the state to recognise same-sex partnerships as equal to traditional heterosexual marriages.⁴¹ The South African Constitution Court has taken a similar stance, and was instrumental in compelling the abolition of discriminatory anti-gay legislation.⁴² In *Hoffmann v South African Airways*,⁴³ unjustified discrimination on the grounds of HIV status was prohibited. In *Eldridge v British Columbia (Attorney General)*,⁴⁴ the Canadian Supreme Court held that deaf persons were entitled to publicly-funded sign language interpretation to access medical services under Section 15, as the failure to provide access would otherwise deny deaf persons the equal benefit of the law.

This approach to equality leaves formal equality behind in its wake; the focus shifts away from an emphasis on rational review and equal treatment before the law towards subjecting measures that contribute to or perpetuate group disadvantage to rigorous review. Support for the substantive equality approach within legal scholarship stems from the influential work of Owen Fiss, who argued in the 1970s for the US Supreme Court to adopt a ‘group subordination’ approach to interpreting the Equal Protection Clause.⁴⁵ Contemporary proponents of substantive equality include Sandra Fredman,⁴⁶

³⁸ See the discussion in N. Bamforth, M. Malik and C. O’Cinneide, *Discrimination law: Theory and Context* (London: Sweet & Maxwell 2008) Chapters 6 and 7.

³⁹ *M v H* (1999) 171 DLR (4th) 577.

⁴⁰ *Halpern v Canada (A.G.)* (2003) 225 DLR (4th) 529.

⁴¹ Emily Grabham, ‘Law v Canada: New Directions for Equality under the Canadian Charter?’ (2002) 22 (4) *Oxford Journal of Legal Studies* 641-66.

⁴² *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1999] (1) SA 6.

⁴³ *Hoffmann v South African Airways* (2001) 1 SA 1 (CC).

⁴⁴ *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR. 624.

⁴⁵ Owen Fiss, ‘Groups and the Equal Protection Clause’ (1975) 5 *Philosophy and Public Affairs* 107.

⁴⁶ Sandra Fredman, *Discrimination Law* (OUP 2001).

while ‘identity’ theorists such as Iris Marion Young have argued along similar lines.⁴⁷

However, it is too early to hail the substantive equality approach as the ‘correct’ or ‘most suitable’ interpretation of all equality clauses in national constitutions or international human rights treaties. In both Canada and South Africa, there has been a pattern of broad political support, or at least a lack of strong political opposition, to the substantive equality jurisprudence of the courts. Notably, where political support has been less forthcoming, the Canadian courts at least have been more cautious,⁴⁸ demonstrating some reluctance to apply the substantive equality approach in its full rigour when it comes to terrain where courts have historically tread cautiously, such as welfare systems⁴⁹ and special needs educational policy.⁵⁰ Also, the substantive equality approach rests on the assumption that it is possible to identify groups which have been subject to clear and distinct patterns of discrimination. In other social contexts, there may be less consensus on this matter.⁵¹ In addition, given the range of measures that might have a disparate impact on disadvantaged groups, the scope of the substantive equality principle may appear to some to be potentially too wide.

Article 14 ECHR – New Life and Old Uncertainties

The problem of how to reconcile very different views as to the best approach to interpreting the right to equality is demonstrated by recent decisions of the European Court of Human Rights. The Court has recently begun to expand and develop its Article 14 jurisprudence. This has occurred partially in response to prodding by non-governmental organisations using test case strategies to highlight pressing equality issues, and partially in response to academic and judicial concerns about the inadequacy of the Court’s equality jurisprudence. To begin with, the Court as already mentioned has begun to adopt an increasingly wide interpretation of what issues will fall within the ‘ambit’ of the other

⁴⁷ Iris M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press 1990).

⁴⁸ Judy Fudge, ‘The Canadian Charter of Rights: Recognition, Redistribution and the Imperialism of the Courts’ in Tom Campbell, Keith D. Ewing and Adam Tomkins (eds), *Sceptical Approaches to Human Rights* (OUP 2001) 336.

⁴⁹ *Gosselin v. Quebec (Attorney General)* [2002] 4 SCR. 429.

⁵⁰ *Eaton v. Brant (County) Board of Education* [1997] 1 SCR. 241.

⁵¹ For example, in the UK, it might appear apparent that minority ethnic groups should benefit from positive action to redress the severe past disadvantage that many of these groups suffered. However, if a white, working class group were also to claim historical disadvantage, should protection under the substantive equality principle also be extended to them, given the UK’s class traditions and the exclusion of working-class families from access to social goods such as good quality education for so long? If so, what implications might this have for positive action programmes?

convention rights and thereby trigger the potential application of Article 14.⁵² The Strasbourg Court in its case law has also shown an increasing readiness to recognise indirect forms of discrimination as covered by Article 14, and to examine the effect and impact of state law and policy, rather than just the formal classifications used.⁵³ It also has established that the use of certain grounds of differentiation to distinguish between individuals and groups, such as race and gender would have to satisfy a very high threshold of justification; sexual orientation is one such ‘suspect’ ground.⁵⁴ The Court is therefore developing a reasonably strong ‘anti-discrimination’ approach in its jurisprudence. In *Connors v UK*,⁵⁵ it even recognised that certain groups may require special treatment to reflect their special needs, which can be seen as representing the first glimmerings of a ‘substantive equality’ approach.

This shift in approach has been confirmed by the very significant recent decision of *D.H. v Czech Republic*, where the Grand Chamber of the Court held that Czech educational policies which resulted in *de facto* segregation of Roma children in special schools violated Article 14, potentially opening up the scope of the Convention in new and dynamic ways.⁵⁶ *D.H.* is particularly striking for how the Grand Chamber of the Court reversed the earlier decision of the first instance Chamber of the Court, which had considered that there was no evidence that Roma children had been actively discriminated against or singled out for special treatment in the allocation of school places in the Czech system. On appeal, the Grand Chamber took the view that the statistical evidence presented by the applicants as to the extent of Roma segregation in the special schooling system placed the onus on the Czech government to justify the educational policies which had produced this outcome, which it failed to discharge. The Grand Chamber was thus willing to accept that statistical evidence of disparate impact could place a member state under an obligation to justify the practices in question.

The *D.H.* decision therefore marks a distinct shift away from the relatively tame and formalistic nature of the Court’s previous Article 14 jurisprudence. The Court’s willingness to consider the impact of the Czech educational policies in question, its recognition of the historically disadvantaged status of Roma, and its readiness to infer the existence of discrimination from a distinct

⁵² In *Sidabras and Dzijauntas v Lithuania* (2004) 42 EHRR, the ECHR considered that the imposition of severe and wide-ranging restrictions upon individuals taking up employment in the private sector could come within the ambit of Article 8, and therefore Article 14 could be triggered. See Virginia Mantouvalou, ‘Work and Private Life: *Sidabras and Dzijauntas v Lithuania*’ (2005) 30(4) *ELR* 573, 581-82.

⁵³ *Thlimmenos v Greece* (2000) 29 EHRR 162.

⁵⁴ *R v Secretary of State for the Home Department, ex p. Carson* [2005] UKHL 37.

⁵⁵ *Connors v UK* [2004] 40 EHRR 189.

⁵⁶ *D.H. v Czech Republic* (App No 57325/00) Judgment of 13th November 2007 ECtHR..

statistical pattern of disadvantage all bear the hallmarks of a willingness to engage in a substantive equality analysis.⁵⁷ It is also notable that the Grand Chamber cited *Brown* in their judgment, thereby explicitly linking their decision in *D.H.* with the seminal impact of *Brown*.

The Strasbourg Court appears therefore in *D.H.* to have nailed its colours in a conscious and deliberate manner to the mast of the post-*Brown* Anglo-American equality jurisprudence. However, this decision also generated several fierce dissenting opinions. Judge Borrego Borrego in his dissent objected in particular to the Court placing especial emphasis on the ‘overall social context’ of the position of Roma in Czech society, which he suggested was not an ‘appropriate’ approach to the question of whether individual rights had been violated.⁵⁸ His strong criticisms of the majority’s decision therefore focused upon the group-centred focus of the Court’s reasoning, which he regarded as negating the individuality of the members of the Roma community. He also accused the majority of adopting arguments from the Anglo-American jurisprudence fed to it by ‘British and American’ lawyers which were alien to the formal and individualistic understanding of equality adopted within much of continental European jurisprudence. Judge Jungwiert also attacked the majority’s decision for its adoption of what he regarded as an ‘abstract’ criticism of an entire education system.

Fundamental to these criticisms is a discomfort with the adoption of the group disadvantage approach that lies at the heart of the substantive equality model, and which represents a considerable deviation from the formal equality model embedded still in many European constitutional systems. In *D.H.*, therefore, we see the tension between the substantive equality approach and the classical formal equality analysis clearly demonstrated in the sharp disagreement between the majority and minority. It remains to be seen how this conflict will play out in subsequent cases. In particular, it will be interesting to see if the ECHR jurisprudence goes further down the substantive equality route. Given the comparative novelty of substantive equality jurisprudence in the European context, can the ECHR move much further beyond an anti-discrimination approach? Should it try to do so, given its transnational status?

The trajectory of the Strasbourg Court’s jurisprudence remains as yet uncertain which obviously generates uncertainty when UK courts, as well as other European courts, attempt to apply Article 14 in their domestic legal systems. A similar uncertainty can be found in the jurisprudence of the European Court of Justice when it applies EU anti-discrimination legislation.

⁵⁷ See now also the decision in *Stoica v. Romania* (App No 42722/02) Judgment of 4 March 2008, ECtHR.

⁵⁸ *Ibid.* paras [5]-[6] of Judge Borrego Borrego’s dissenting opinion.

As McCrudden has argued, trace elements of the ‘anti-discrimination’ and ‘substantive equality’ approaches identified above can be detected in the case-law of the ECJ, along with a strong residue of affection for formal equality.⁵⁹ The ECJ appears to oscillate between these different approaches.⁶⁰ The scope of the underlying general equality principle of EU law therefore remains unclear and undeveloped. In the absence of widespread political agreement as to what a right to equality involves, courts often tread cautiously.

Why a Lack of Clarity about the Meaning of ‘Equality’ Muddies the Judicial Interpretation of Equality Rights

None of the different approaches to interpreting the equality principle outlined above can be sharply differentiated. Formal equality can combine with the anti-discrimination approach, which can in turn merge with substantive equality analysis. Often, the differences between these different approaches involve questions of emphasis. Formal equality prioritises rationality and individual fairness; its principal concern is to prevent the singling-out without good cause of individuals and groups for special treatment. Anti-discrimination analysis is more concerned with the impact of law and policy upon disadvantaged groups and is particularly concerned with specific types of prejudice and discrimination. Substantive equality approaches are primarily concerned with preventing disadvantage. Often, these approaches will overlap. At times, however, they will diverge, generating the tensions and uncertainties that reflect profound uncertainty about the proper scope and content of the equality principle.

These problems all derive from a basic underlying issue; it remains unclear as to what ‘treating persons equally’ actually involves. Equality and the linked concept of non-discrimination are regularly cited by politicians, activists, academics and the media as a basic social good. Equality is now almost universally accepted as a good thing, at least in the abstract. However, the very ubiquity of the idea of ‘equality’ has served to conceal an absence of clarity about what it actually involves. There are multiple accounts in political philosophy of what normative meaning or meanings should be attached to the term ‘equality.’ In legal literature, there is a similar extensive debate about the meaning and ultimate usefulness of equality as a legal concept.⁶¹ Nor is this

⁵⁹ Christopher McCrudden, ‘Theorising European Law’ in Cathryn Costello and Eilis Barry (eds), *Equality in Diversity: The New Equality Directives* (ICEL/Equality Authority: 2003) 1.

⁶⁰ Mark Bell, ‘The Right to Equality and Non-Discrimination’ in T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EC Charter of Fundamental Rights: A Legal Perspective* (Oxford: Hart Publishing 2003) 91.

⁶¹ Nick Bamforth, ‘Conceptions of Anti-Discrimination Law’ (2004) 24(4) *Oxford Journal of Legal Studies* 713-715.

debate confined to the realm of academic speculation. At the political level, arguments about the definition and importance of equality as a principle continue to generate considerable heat and light. Equality can mean wildly different and often conflicting things to different people, who might sharply disagree on a particular issue while asserting passionately their commitment to 'true' equality.

As Weston and others have argued, equality is an 'empty idea' if there is no normative framework that can determine when cases are alike and when they are different, which forms of distinctions between individuals and groups are legitimate and which are not.⁶² Formal equality, anti-discrimination analysis and substantive equality are all normative frameworks that can give some substance to the idea of equality. Each can give definite content to the right to equal treatment contained in constitutional texts and international treaty instruments, which would otherwise be an empty formula. The question then becomes which if any of these frameworks is a 'best fit' (to use Ronald Dworkin's phraseology) with our current understanding of how our constitutional systems should work? Which of these normative frameworks should a court adopt when it comes to the concrete task of deciding when the right to equal treatment has been breached?

Philosophical Analysis of Equality

This question links directly to the philosophical and jurisprudential debate about the normative value of the concept of 'equality.' 'Libertarian' schools of thought, perhaps best exemplified by the work of Robert Nozick, tend to regard the equality principle as lacking sufficient normative substance to justify any substantial governmental interference with individual autonomy.⁶³ Those of a libertarian bent tend therefore to gravitate towards support for formal equality approaches to interpreting constitutional equality principles. This school of thought is also heavily influenced by Hayek's famous argument in favour of formal equality and against substantive concepts of equality, based on his contention that 'any policy aiming at a substantive ideal of distributive justice must lead to the destruction of the rule of law.'⁶⁴

In contrast, 'equality of opportunity' theorists build on the work of John Rawls, Ronald Dworkin and others and argue for individuals to be given a level playing field upon which fair social competition and individual lifestyle choices can be enacted.⁶⁵ 'Capabilities' or 'basic functioning' theorists, drawing on the

⁶² Peter Westen, 'The Empty Idea of Equality' (1985) 95 *Harv L Rev* 537.

⁶³ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books 1974) Chapter 8.

⁶⁴ Friedrich Hayek, *The Road to Serfdom* (Routledge and Kegan Paul 1944) 79.

⁶⁵ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press 2000) especially Chapters 2 and 4; Gerry A. Cohen, 'On the Currency of Egalitarian

highly influential work of Amartya Sen, suggest that societies should ensure that individuals have the basic capacities necessary to flourish or to exercise agency in their lives. Other theorists argue for various versions of ‘strong egalitarianism’ or ‘welfare’ or ‘equality of outcome’ whereby all individuals must benefit from a certain equal amount of ‘human good’ irrespective of their luck or their life choices.⁶⁶ Proponents of these interpretations of equality tend by and large to gravitate towards anti-discrimination or substantive equality approaches.

These philosophical and jurisprudential debates shape the discussion as to which approach courts should adopt in interpreting the equality principle.⁶⁷ However, there is a danger of the abstract nature of this debate, couched as it is in the Kantian language of contemporary political philosophy, glossing over other considerations that will inevitably come into play. Considerable political disagreement exists in contemporary societies as to what extent should group differences be institutionalised within law and policy. In addition, stark and often passionate disagreement can exist as to how much ‘social engineering’ should be conducted via equality and anti-discrimination law.⁶⁸ These areas of disagreement are ultimately rooted in wider conceptual disputes as to the relationship between equality, liberty, autonomy and other values, as well as to the appropriate role of the state *vis-à-vis* different forms of group identity, discrimination and disadvantage. Such arguments will inevitably have a considerable influence upon which approaches are adopted by courts to interpreting the equality principle. So too will arguments about the proper institutional role of unelected courts in a democracy.

The Genealogy of Judicial Interpretations of the Right to Equality

However, the crucial influence on the debate in different jurisdictions as to how to interpret the equality principle may perhaps be the relevant historical context, and in particular the manner in which equality has been given legal and constitutional shape within a national legal system over time. Particular ways of

Justice’ (1989) *Ethics* 906-944; Richard Arneson, ‘Equality and Equal Opportunity for Welfare’ (1989) *Philosophical Studies* 77-93; Carl Knight, ‘In Defence of Luck Egalitarianism’ (2005) 11 *Res Publica* 55-73; Elizabeth S. Anderson, ‘What is the Point of Equality?’ (1999) *Ethics* 287-337.

⁶⁶ Derek Parfit, *Reasons and Persons* (OUP 1984) 493-502.

⁶⁷ Some commentators have questioned whether equality claims can ever serve as an adequate conceptual foundation for anti-discrimination law. See Eliza Holmes, ‘Anti-Discrimination Rights Without Equality’ (2005) 68(2) *MLR* 175. For criticism of this argument, see Colm O’Cinneide, ‘Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain’ (2006) 57(1) *Northern Ireland Legal Quarterly* 57-101.

⁶⁸ For a critique of ‘social engineering,’ see Morris B. Abram, ‘Affirmative Action: Fair Shakers and Social Engineers’ (1986) 99(6) *Harv L Rev* 1312-26. However, every form of state regulation constitutes a form of social engineering, including all law.

understanding equality will often become embedded in national constitutional systems, just as they may become deeply engrained in national political debates, or lodged in popular consciousness. The case-law of courts on questions of equality and discrimination reflects how equality is understood within society when key decisions are made.

Therefore, it is important to understand the historical development or the 'genealogy' of the principle of equality within national legal systems. As already discussed, in most societies across the globe, equality is now understood as an important social value, even if popular understandings of what equality actually means in practice are often fuzzy and vague. However, most societies over time have been founded on inequality. Indeed, human societies throughout history could be said to have actively embraced inequality, treating it as natural and God-given. Greek city-states were heavily reliant upon slave labour, as was the Roman Empire. Slavery appears to have also been relatively common in the Islamic Caliphate,⁶⁹ while toiling underclasses of peasants supported the civilisations of China, medieval Europe and Africa. The Indian caste system is perhaps the planet's longest-lived social structure.

All this has changed, at least in theory. (Contemporary forms of exploitation continue to exist in practice.) For the most part, both intellectual opinion and popular opinion now assumes the basic legitimacy of equality as a fundamentally good thing. A number of factors explain this profound transformation, which has come about via a series of waves of social transformation. Religious ideas about the equality of humans before the Divine, the Reformation and the emergence of modern capitalism, the influence of the Enlightenment philosophers, and ultimately the social movements of the 1960s (in particular feminism, the civil rights movement, and the gay and disability rights movements) have all contributed.⁷⁰

However, it would be a mistake to conceptualise the triumph of equality as a matter of intellectual and popular opinion positively opting for a distinct concept of equality. The modern embrace of equality is largely the product of the gradual rejection of various specific forms of inequality. Political struggles have resulted over time in the recognition in most societies that certain forms of inequality such as racism, patriarchal oppression, the 'natural right to rule' of the aristocracy, segregation and anti-Semitism, are illegitimate and should be rejected. Through this slow process, various forms of inequality have become thought of as 'beyond the Pale' of acceptability (at present, this process is

⁶⁹ Shaun Marmon, *Slavery in the Islamic Middle East* (Princeton, NJ: Marcus Wiener 1999).

⁷⁰ Jeremy Waldron, *God, Locke and Equality Christian Foundations in Locke's Political Thought* (Cambridge: CUP 2002); Sanford A. Lakoff, *Equality in Political Philosophy* (Cambridge, Mass: 1964).

happening with regard to distinctions based on sexual orientation, whose acceptability is gradually been eroded in a slow but systematic manner).

This rejection of specific forms of inequality has been central in establishing respect for equality as a core value for most contemporary human societies. It has also shaped how the very abstract concept of the right to equality has been understood. The long march of equality has involved a slow historical process of learning; as different forms of inequality become rejected as no longer acceptable, social norms have gradually been altered to reflect the new understanding. This means that respect for equality and non-discrimination principles are often defined negatively, both in the popular consciousness and in law, as involving the absence of these rejected forms of discrimination. Thus, acting 'equally' tends to be interpreted as not being racist, not being sexist, and so on.

This is reflected in the judicial interpretation of the equality principle. National courts and international human rights institutions have gradually interpreted the equality principle so as to prohibit the state from recognising or giving effect to condemned forms of inequality. In other words, the equality principle has tended to be fleshed out by a gradual process of shaping constitutional and human rights principles so as to permit courts to exercise review over what came to be accepted as 'suspect' or 'undesirable' forms of inequality. Layers of protection have been gradually laid down in constitutional or human rights law in response to the learned experience of societies as to what forms of inequality are unacceptable.

This has certain consequences. The American and French Revolutions established the central importance of the idea of formal equality to any constitutional system. Equal access to what McCrudden has described as essential 'political goods,' such as the enjoyment of core civil and political rights or democratic rights such as the right to vote, were gradually protected by judicial recognition of the formal equality principle.⁷¹ Then, the political activism of the 1960s established the claims of women, ethnic minorities, persons with disabilities and others to access not just 'political goods' but also to access employment, services, education and other 'social goods.' This in turn led to the expectation that functioning systems of rights protection should protect the right of these groups to access these social goods without discrimination. In the wake of *Brown v Board of Education*, this has gradually resulted in the development of the anti-discrimination approach to interpreting the equality principle. Now, the argument is made that the 'anti-discrimination' approach that has developed in the US, UK and elsewhere does not go far

⁷¹ Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (OUP 2004) Chapter 11.

enough. Supporters of substantive equality argue that this approach does not provide adequate enough protection against the subordination of particular social groups, which our contemporary understanding of the nature of inequality now increasingly sees as the key equality issue.

Thus, unfolding social debate about inequality in our modern societies is reflected in judicial interpretations of the equality principle; as existing interpretations come to be seen as outmoded or inadequate, then pressure within legal systems builds up for new approaches to be developed. New or ground-breaking arguments about how equality should be understood may also come in conflict with embedded ways of understanding equality. Also, new approaches to conceptualising equality will often come into tension with how equality is understood in the popular consciousness. As a result, re-conceptualisations of the equality principle are often seen as unwelcome and alien intruders into an established status quo. The dissenting judgments in *D.H.* exemplify this problem.

This partially explains the way in which judicial interpretation of the equality principle has tended to lag behind legislative innovation and social developments. However, it is also apparent that if embedded approaches to interpreting the equality principle become patently outmoded, then the pressure for change may eventually generate shifts in the case law. Philosophical debates about the meaning of equality may illuminate discussion but it is ultimately the interplay of legal, social and political factors against the historical background context that will drive forward change in how equality rights are interpreted and understood. That is why judges, lawyers and activists would perhaps do better to engage less in abstract philosophical debates and focus more on identifying what now constitute unacceptable forms of inequality in today's society, what causes these forms of inequality, and what justification can exist for state action which generates particular aspects of this inequality. In other words, the legal understanding of the right to equality should be built around our developing understanding of disadvantage, discrimination and inequality, rather than abstract concepts of equal treatment.

Conclusion

Interpreting and applying equality clauses tends to be an uncertain and complex process, which often has yielded little tangible protection for aggrieved individuals and groups. Nevertheless, a shift can be detected from formal equality to anti-discrimination and substantive equality approaches in the contemporary case-law of national and international courts, illustrated by the recent *D.H.* decision of the European Court of Human Rights and the evolving Canadian and South African substantive equality jurisprudence. This may open up more space for the equality principle to come into play as a source of

protection for disadvantaged groups against unequal treatment. However, equality jurisprudence is haunted by the uncertain and contested concept of 'equality.' It may be better for judges and lawyers to concentrate less on abstract debates about what equality means and focus more on building a clear idea of what constitutes unacceptable forms of disadvantage, discrimination and inequality.

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