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THE DEVELOPING EQUALITY JURISPRUDENCE IN SOUTH AFRICA

*Karthy Govender** †

Apartheid was technically about separateness, but it was fundamentally about inequality. The founding premise of the ideology was to preserve the total hegemony of white South Africans. The liberation organizations opposing the apartheid regime sought to affirm that the country belonged to all those that lived in it. Thus, it is unsurprising that the commitment to equality is one of the founding values of the Constitution and an indelible thread woven throughout the fabric of the Bill of Rights. After some misstatements about certain rights being more important than others, courts have interpreted rights in the Bill of Rights to be of equal worth. However, the centrality of the right to equality cannot be gainsaid.

I. THE DEVELOPING JURISPRUDENCE

Over the last fourteen years, the courts have incrementally developed their equality jurisprudence. The drafters of the South African Constitution had the immodest directive of drafting a bill of rights that protected and entrenched all universally accepted fundamental rights and freedoms. Thus, different visions were fused into the Bill of Rights. A constraining vision prevented state action that unreasonably and unjustifiably infringed rights, while an egalitarian vision compelled calculated and measured steps by the state towards the attainment of a fairer and more compassionate society.

When the process of interpreting the Constitution started, it was uncertain which vehicle would best achieve the object of improving the quality of life of all persons. Hence, it was eminently prudent to allow each right to develop incrementally, rather than to engage prematurely in an expansive reflection that could have retarded the development of more relevant and directly applicable rights. With the growth, development, and interpretation of all of these rights, the vista became clearer, making an expansive development of principles appropriate. Apartheid unfairly discriminated based on immutable characteristics and undermined human dignity. The need to repair and remedy this became inherent in the interpretation of the right to equality.

The first decisions interpreting the right to equality involved a curious assortment of litigants—persons unhappy with presumptions of negligence

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in the Forests Act; an insolvent German fugitive seeking to prevent property in his wife's name being presumed to be purchased by the insolvent; and a convicted South African male endeavouring to be included in a general pardon for female prisoners with minor children. Out of these cases, a working formula emerged to interpret the right to equality—section 9 of the Constitution, the first substantive right in the Bill of Rights.

II. INTERPRETATION OF SECTION 9

Section 9(1) affirms the right to the equal protection and benefit of the law. However, section 9(3), the right not to be subject to unfair discrimination on the basis of listed and analogous grounds, is the centerpiece of the developing equality jurisprudence. Courts protect substantive equality and endorse affirmative measures to achieve it by defining equality to include the full, equal enjoyment of rights. The right not to be subject to unfair discrimination is also binding on private and juristic persons, and the Promotion of Equality Act and Prevention of Unfair Discrimination Act of 2000 gives legislative effect to this right. Finally, in order to reduce the demanding burden of proof that plagues applicants in other equality jurisdictions, there is a constitutional presumption that discrimination on one of the listed grounds is unfair unless a defendant establishes the contrary.

Differentiation is objectionable if it imposes burdens or grants benefits on the basis of categorizations that adversely impact the dignity of the complainant. Thus, equality jurisprudence distinguishes categorizations that impact dignity from those that do not. Courts interpret section 9(1) to mean that state differentiation is permissible if the categorization is rationally related to a legitimate state objective. Section 9(1) does not require the state to satisfy a more exacting standard of reasonableness. Courts see the imposition of burdens on some and benefits on others as integral to the process of governance. Provided that these differentiations do not adversely impact dignity and amount to discrimination, courts are content to subject them to non-exacting rationality review and afford a significant measure of latitude to the government. Given the relative ease with which the state can justify its actions under section 9(1), successful constitutional challenges using this section are unusual. This is an appropriate judicial interpretation, as requiring a developing state to establish the reasonableness of every economic choice and decision while operating within the discipline of an expansive constitution would be unduly burdensome.

Differentiation that amounts to discrimination is regulated by section 9(3) of the Constitution. Section 9(3) prohibits unfair discrimination based on race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth (this list is not exhaustive). The listed grounds represent past ways people have been marginalized and oppressed, and courts hold, per section 9(5), that differentiation on any one of them amounts to a presumption of discrimination. The party differentiating on a listed ground

must prove that the differentiation is fair and provide an explanation for its decision.

In addition to the listed grounds, differentiation on analogous grounds (immutable characteristics that have the potential to impact adversely on human dignity) may also be constitutionally illegitimate. Examples of such grounds include citizenship and HIV status. In contrast to the listed grounds of differentiation, the presumption of unfairness does not operate with analogous grounds. The complainant must prove that the ground on which the differentiation occurs qualifies as an analogous ground and that the discrimination is unfair.

III. THE UNFAIRNESS STANDARD

Unfairness has become the main area of contention in discrimination matters as a result of the way courts have interpreted the constitutional right to equality.

In determining whether discrimination is unfair, courts look at the impact the discrimination has on the complainant. Specifically, courts examine whether the complainant belongs to a category of persons that were victims of past patterns of discrimination, whether the measure impairs the dignity of the complainant, and whether the measure is designed to achieve a laudable and important societal objective. The investigation of whether a measure perpetuates systematic and entrenched patterns of discrimination and the assessment of its impact on the complainant are often set against the laudable social objective of the measure. For example, in the early decision of *President of South Africa v. Hugo*, the presidential decision to discriminate against men by pardoning and releasing women from prison who had children under the age of twelve was motivated by a genuine desire to assist those women's children. In fashioning a test, the Court noted the impact on the complainant, but could not ignore the true purpose of the measure.

In *City Council of Pretoria v. Walker*, the Court considered the right to be treated the same, the meaning of equality, and the constitutional imperatives of improving the quality of life. The residents of the predominantly white part of Pretoria were charged a consumption-based tariff, while residents of the African townships were charged a flat rate per household. The flat rate was significantly lower than the consumption-based tariff. White residents argued that they were being unfairly discriminated on the basis of race. While this was indirect discrimination, the court concluded that it was not unfair. The Council had the constitutional mandate of equalizing facilities and services to all within its region. The facilities in the townships were vastly inferior to that of 'white Pretoria.' The white residents, although a political minority, were not victims of past patterns of discrimination. In the circumstances, the Court held that it was not unfair to adopt the differential tariff scheme as an interim measure until facilities were equalized. *Walker* alerted South Africans to the possibility that, in realizing the objective of achieving substantive equality, differently situated persons might be treated

differently. *Walker* determined that this Constitution was neither blind to color, nor the legacy of apartheid.

In 2004, *Minister of Finance v. Van Heerden*, the court clarified the relationship between affirmative action, the attainment of substantive equality, and unfair discrimination. The Court held that remedial and restitutionary equality were integral to the achievement of substantive equality. In other words, “the provisions of section 9(1) and section 9(2) are complimentary; both contribute to the constitutional goal of achieving equality to ensure ‘full and equal enjoyment of all rights.’” Courts assess remedial and affirmative action measures through the criteria in *Van Heerden*: For a categorization to amount to a constitutionally permissible affirmative action measure, it must target persons, or categories of persons, who have been disadvantaged by unfair discrimination, be designed to protect or advance such persons, and promote the achievement of equality. The inherent flexibility of these criteria and the need to be context-sensitive could mean that the rigor and robustness with which these criteria are applied would depend on the extent to which the right to dignity has been affected by the categorization.

IV. CONCLUSION

In the United States, the category of differentiation determines the level of scrutiny to which the conduct or law is subject. These levels range from the rational basis test, to the intermediate level of scrutiny, and, finally, to strict scrutiny analysis. The category of differentiation is often determinative of the outcome of the matter. South Africa, however, has adopted a more nuanced approach. Categorizations that do not impact dignity fall under the mere differentiation standard, or rationality standard, of section 9(1). Categorizations that impact dignity fall under a section 9(3) analysis.

The level of scrutiny to determine whether measures fall within section 9(2) is flexible, as opposed to being an intermediate standard between the non-exacting requirements of section 9(1) and the more exacting requirements of section 9(3). As pointed out in *Van Heerden*, if a measure falls within section 9(2), it will not, in most instances, amount to unfair discrimination. Thus, if section 9(2) permits a measure, that measure is insulated from a challenge on the basis of unfair discrimination in terms of section 9(3). It would be incongruent to have a measure sanctioned in one section of the Constitution, yet prohibited in the next.

Recently, courts have more clearly connected the right to equality with that of human dignity and the realization of socio-economic rights. Denying social benefits to permanent residents is now deemed to be both unfair discrimination on the basis of citizenship and an unreasonable denial of the right to social security. After a cautious start, the Court is prepared to interpret section 9 more expansively in order to obtain substantive equality. Looking forward, it is probable that the right to equality will feature more prominently in applications claiming greater access to socio-economic rights.

AN AGENDA FOR THE OBAMA ADMINISTRATION ON GENDER EQUALITY: LESSONS FROM ABROAD

Adrien K. Wing^{*} & *Samuel P. Nielson*^{** †}

INTRODUCTION

President Barack Obama came into office with a wealth of good will after winning the historic 2008 presidential election to become the first African-American commander-in-chief. Among the many daunting issues we hope he will tackle is one that Abigail Adams mentioned to her husband John in 1776: remember the ladies. How should our President and his new administration affect social justice for women? After all, also in 2008, a woman candidate for president, Hillary Clinton, received over 17 million votes in the primaries. She narrowly missed the opportunity to become the first woman major-party nominee. Sarah Palin became the second-ever female vice-presidential candidate. Additionally, 17 percent of the new Congress is female, an all-time U.S. record, and women are the majority of voters.

To answer our question, we will step outside the bounds of the United States and reengage with the world as our new President plans to do. Like the United States, most countries continue to struggle with gender equality because of deeply entrenched patriarchal customs or religious practices coupled with insufficient resources and a lack of political will. Surveying various nations helps us learn what legal approaches we might consider pursuing in order to achieve more gender equality.

There are four main overlapping possibilities to tackle these problems. The first method is to ratify the Convention on Elimination of Discrimination Against Women (“CEDAW”). The second approach, which is increasingly used in newly drafted or amended constitutions, embraces specific language regarding gender equality. The third method, followed in some constitutions, national legislation, or party rules, is the use of quotas reserving fixed numbers of seats for women in national or local legislatures. The final approach, followed by countries in the prior categories and others

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alike, is national legislation implementing gender equality in various spheres. We briefly examine each of these legal approaches and conclude with our recommendations for the Obama administration.

I. THE FOUR APPROACHES

One-hundred-eighty-five countries have ratified CEDAW, the most comprehensive international agreement concerning gender equality. This convention maintains the dubious distinction of having the most reservations of any treaty. Reservations, understandings, and declarations (“RUDs”) limit a country’s obligations under a treaty, and a number of nations restrict CEDAW’s language to such an extent as to gut the treaty. For example, Saudi Arabia and many Muslim countries endorse the treaty so long as it does not conflict with Islamic law. Reservations are not supposed to conflict with an agreement’s object and purpose, and countries can object to RUDs that they believe go too far. Yet there is no global consequence for nations that severely limit treaty obligations. The United States, an instrumental drafter, signed the treaty in 1980, but has not ratified it.

The second approach involves adopting constitutional provisions with specific language pertaining to gender equality. Most nations follow this method, prohibiting gender discrimination and guaranteeing equal enjoyment of rights. For example, the equality clause in Germany’s Constitution simply states, “Men and women shall have equal rights.” The trend is applicable even in the Middle East in the new Iraqi constitution supported by the United States. Article 14 declares: “Iraqis are equal before the law without discrimination based on gender.” Some states follow South Africa’s technique, adopting one comprehensive equality clause that includes several items that implicate women in addition to specifically mentioning both sex and gender. Article 9 of the 1996 South African constitution is clearly aimed at tackling public and private discrimination. It says that neither the state, nor any person, may “unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” The United States tried the amendment approach, but ultimately failed to pass the Equal Rights Amendment (“ERA”). The last major effort ended in 1982, three states short of the 38 needed to pass the amendment.

The third approach uses parliamentary quotas via the constitution, national legislation, or political party rules to achieve gender equality. These efforts help improve upon the global national average of 16 percent female representation. It is often hoped that increasing the number of women is not only good in itself, but that it might also result in more emphasis on “soft” items that have been socially constructed as “women issues,” such as children, families, and health care. Post-genocide Rwanda has come closest to gender parity with women making up the majority of the national legislature following the 2008 elections. These remarkable results were achieved when women won both reserved and non-reserved seats. Seventeen countries in

Latin America have quotas for female political participation, as do increasing numbers in the Arab world. For example, Article 47 of the Iraq constitution mandates that 25 percent of the national parliament be female. Some countries like South Africa have political parties that mandate female participation in a party list system. Thus, the African National Congress mandates a 25 percent female quota, where every fourth candidate on the list of candidates chosen by the party must be a woman.

The final approach uses national legislation to foster gender equality—a path taken by the United States. Norway has been globally recognized for successfully exemplifying this method. It ranked first in gender equality in the World Economic Forum's 2008 Global Gender Gap Index, which measures inequality between men and women in economic participation, educational attainment, political empowerment, and health and survival. Instead of modifying its constitution, the country chose to pass The Act relating to Gender Equality in 1978 with the purpose of “promot[ing] gender equality and . . . improving the position of women.” Further, the Act proclaims that “[w]omen and men shall be given equal opportunities in education, employment and cultural and professional advancement.” Norway enforces the Act through the Equality and Anti-Discrimination Ombud, a politically independent government body.

Additionally, Norway applies the quota representation concept with a law mandating that 40 percent of the board members in public corporations over a certain size be female or else the companies must dissolve. Consequently, the nation now has the highest percentage of women serving on corporate boards in the world. Conversely, the United States has female board membership of only 15 percent. Still, while Norway pursues quotas in private bodies, it refuses to apply quotas to government representation, with no gender quota for its parliament.

II. APPROACHES FOR THE OBAMA ADMINISTRATION

We can assume that the new administration will need to continue to use a disproportionate share of its honeymoon period and initial political good will to tackle what appears to be the most daunting economic crisis facing the United States since the Great Depression. Most other priorities may need to take a back seat. By the time the administration can seriously focus on other issues, including a significant improvement in gender equality, its power to achieve its ambitions may be severely circumscribed—particularly if pursued after the 2010 midterm congressional elections in which more conservative politicians may regain seats lost in 2008. Thus, we caution against excessive zeal, as such exuberance might result in failure.

With respect to prioritization, we urge the fourth approach—national legislation. Thus, the administration should work with Congress to urge passage of laws that will achieve the equivalent of what CEDAW, constitutional provisions, or quotas would achieve. The administration should look to laws from around the world to learn from other nations' experiences, even though their legislation may have occurred in different historical, political, reli-

gious, and cultural contexts. Universities and nongovernmental organizations would no doubt assist the executive and congressional branches in obtaining and assessing the comparative information in a comprehensive fashion. Additionally, President Obama should, as the chief executive, more explicitly enforce legislative measures improving gender equality and urge the implementation of administrative procedures within the executive branch. The President started off on the right foot by signing, as his very first law, a statute giving women greater options in pursuing equal pay for equal work.

Pursuing a reconceptualized ERA should not be a priority. The original proposal simply stated: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” The enormous political energy involved on the state level in passing a constitutional amendment is far more daunting than any option involving only the national legislature. If and when this approach is dusted off, we should study the language and legislative history in other constitutions quite closely. Even though other societies have numerous distinctions from the United States, we still may be able to learn from them. Co-author Wing did a global analysis in her three experiences advising on the three distinctly different constitutions of South Africa, Palestine and Rwanda. The latter two jurisdictions follow South Africa and the global trend with the inclusion of gender in their equality clauses. Additionally, the U.S. amendment should retain the language found in several of our constitutional amendments and also proposed in the original ERA as well: “The Congress shall have the power to enforce this article by appropriate legislation.” There is rich constitutional jurisprudence on the various enforcement clauses that could be useful in the interpretation of a gender equality amendment.

We do not recommend prioritizing CEDAW ratification over the prior two approaches. The treaty has never made it to the full Senate floor for a vote. Attempting to push it through will be a major political battle, and there will be enormous political compromises involved concerning the various RUDs necessary to reach a resolution. The resulting U.S. RUDs could gut the treaty. Even if adopted, the treaty is unlikely to be self-executing, so both Houses of Congress would need to pass implementing national legislation as well—another exhaustive political battle.

Quotas in the national constitution, legislation, or by political parties, are nonstarters in the United States. The affirmative action debates dating back to *Bakke* have resoundingly rejected the quota idea. The remaining concept of goals remains controversial in itself as the *Grutter* and subsequent Supreme Court educational cases illustrate. Since the United States does not use a party list system, it would be impossible, or certainly extraordinarily difficult, to mandate both political parties run only one gender in elections to ensure a safe female seat would result.

CONCLUSION

With respect to gender equality, can the United States humble itself to learn from the world rather than ignore it? The Obama administration should emphasize national legislation, and should review international approaches in the debate. Subsequently, it should reinvigorate a discussion over passage of a gender equality amendment. Finally, it should invite new discussion over CEDAW ratification. While the challenges are daunting, this administration presents our best chance to date to make significant progress in this regard. Let us hope that the many other problems confronting the United States do not make us once again forget the ladies.

SUBSTANTIVE EQUALITY IN THE EUROPEAN COURT OF HUMAN RIGHTS?

*Dr. Rory O'Connell** †

The European Court of Human Rights (“ECtHR”) has a distinguished track record. Established under the European Convention on Human Rights 1950 (“ECHR”), it was the world’s first international human rights court. It decides thousands of cases every year, and its opinions are cited worldwide. For most of its history, the Court’s jurisprudence on equality was uninspiring, as it was based on a formal conception of equality. In recent years, however, the ECtHR has begun to give equality more substantive content.

ECtHR’s weak equality jurisprudence resulted from the limitations of ECHR, judicial procedure, and a formal conception of equality. Article 14 of ECHR only applies in respect to the enjoyment of Convention rights: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground” Procedurally, only alleged victims can bring complaints (apart from states), and they must first exhaust domestic remedies in the member state. Furthermore, as an evidentiary matter, the ECtHR has been reluctant to draw inferences of discrimination from statistics. By far the most limiting factor, though, was the ECtHR’s *formal* notion of discrimination, which focused on direct discrimination. The Court has had difficulty with cases involving covert discrimination or disparate impact discrimination (indirect discrimination).

During the last decade, however, the ECtHR started to develop a substantive conception of equality. In contrast to formal equality, a substantive conception takes into account how victims experience the reality of discrimination. The central question is not whether the law makes distinctions, nor whether the state is motivated by prejudice, but whether the *effect* of the law is to perpetuate disadvantage, discrimination, exclusion, or oppression. A substantive equality doctrine responds to the effects of structural inequality where it is not possible to identify a specific “wrongdoer” who causes the discrimination.

I. THE DEVELOPING SUBSTANTIVE EQUALITY JURISPRUDENCE

Some of the most important developments of substantive equality jurisprudence have come in cases dealing with discrimination in education (a

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right under Article 2 of the First Protocol to the ECHR). Throughout Europe, nomadic communities such as Roma, Travellers, and Sinti, have experienced educational discrimination and disadvantage. Indeed, according to the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, “segregation in education . . . is a common feature in many Council of Europe member states.”

In *DH v. Czech Republic*, the ECtHR addressed “special schools” in the Czech Republic for pupils with mental “deficiencies.” The children in these schools were disproportionately of Roma origin—a Roma child was 27 times more likely to be sent to a special school than a non-Roma student. In *Oršuš v. Croatia*, the Court dealt with Croatian schools that had established classes exclusively for Roma students due to their difficulties with the Croat language. Finally, in *Sampanis v. Greece*, the Court dealt with segregated preparatory classes as a result of protests from non-Roma parents. Finding a violation of Article 14 in both *DH* and *Sampanis*, the ECtHR decisions in these cases demonstrate a more substantive conception of equality. This is especially true of the landmark decision of *DH*, which was decided by the Grand Chamber (the most solemn formation of the ECtHR).

These cases are interesting both procedurally and substantively. They show a pragmatic attitude toward the requirement that an applicant exhaust domestic remedies. The Grand Chamber in *DH* stressed that this obligation must be interpreted flexibly, taking account of both the general context in the State and the circumstances of the applicant. Accordingly, the Court required the state to prove that the domestic remedies were, in practice, available and effective. Also of interest was the role played by representative organizations in these cases. In each case, the applicants were represented by nongovernmental organizations (“NGOs”) and their legal advisers. These NGOs included groups with records of public interest litigation, such as the European Roma Rights Centre (“ERRC”). The Grand Chamber in *DH* was also willing to hear from eight NGOs as third party interveners. This flexibility was welcome for several reasons: Without the backing of an NGO, individual victims may lack the resources to mount a complex legal challenge and may be more easily subject to pressure. Further, human rights cases often raise issues that go beyond the isolated facts of an individual complaint, and hearing from interveners allows for wider considerations to be taken on board.

It is also welcome that *DH* interpreted the ECHR in light of developments in equality law in other jurisdictions. The European Union, U.N. bodies, the U.S. Supreme Court (in *Griggs v. Duke Power*), and other national courts have adopted a systematic approach to indirect discrimination. The Grand Chamber’s interpretation of its previous case law brought it in line with these European and international precedents. The Grand Chamber ruled that once an applicant demonstrated a discriminatory effect, the burden switched to the State to justify its actions under the Court’s justification test. Contrary to the initial Chamber ruling in *DH*, the Grand Chamber held that it was not necessary to prove any intention to discriminate in indirect discrimination cases.

II. PROVING DISCRIMINATORY EFFECT

In *DH*, statistical evidence indicated that Roma children were far more likely than other children to be placed in special schools. The Grand Chamber followed E.U. and international precedents in holding that “reliable and significant” statistics could be used to prove a discriminatory effect (though such effect also could be proved without statistics). The Grand Chamber also used other sources to understand the background. Lacking the resources to carry out its own fact-finding investigation, the Court relied on reports by non-judicial institutions, such as the Commissioner for Human Rights, the European Commission against Racism and Intolerance (“ECRI”), and the Advisory Committee of the Framework Convention on National Minorities, to conclude that there was evidence of discriminatory effect.

In *Sampanis*, the ECtHR concluded that the applicant had adduced enough evidence to justify a strong presumption that there was discrimination. This evidence included a local official’s call for an informal meeting to oppose the registration of Roma pupils. Also, Greek law and policy tolerated the possibility of separate education for Roma students. Most strikingly, there was racist opposition from non-Roma locals to the inclusion of Roma children. These facts justified a presumption that there was covert racial discrimination in the case.

Once the applicant proves a discriminatory effect, the burden switches to the State to justify its policy by proving that it is necessary to achieve a legitimate aim. This is the ECtHR’s justification test. The Grand Chamber in *DH* stressed that in cases of racial discrimination justification must be “interpreted as strictly as possible.” In *DH*, the State failed to justify its policies. The Czech government argued that the decision to place the Roma children in special schools was based on their performance in psychological tests. The Grand Chamber, drawing on reports from the ECRI, the Advisory Committee of the Framework Committee on National Minorities, and the Commissioner for Human Rights, observed that these tests were not reliably objective because they were based on the experiences of the majority Czech population and made no allowance for cultural differences. Further, the Czech policies lacked satisfactory safeguards—particularly to ensure that the specificity of the Roma culture was respected. In *Sampanis*, the State failed to offer a convincing explanation to justify the special treatment of the Roma children. The ECtHR rejected the State’s arguments that the children had not satisfied all the formalities for joining the regular school. In view of the vulnerable position of the Roma, the ECtHR held that local officials should have waived certain formalities to ensure Roma children received education.

Of the three cases, the Government only successfully justified discriminatory treatment in *Oršuš*. The ECtHR accepted that the applicant children had difficulties with the Croat language. The classes were preparatory in nature, run in mainstream schools, and students could transfer to regular classes when ready. In most of the schools, the majority of Roma were in

mixed classes, and most of the applicants were eventually transferred to mainstream classes. This case has now been referred to the Grand Chamber.

In *DH* and *Sampanis*, the governments argued that the parents' consent to the placements had satisfied the justification test. Yet in *DH*, the Grand Chamber concluded that one could never waive the right not to be subject to racial discrimination. In reaching this conclusion, the Grand Chamber doubted the genuineness of the parents' consent. The parents belonged to a "disadvantaged" and "often poorly educated" community. There was no evidence that they were presented with any detailed information about options or the effects of their choice, and further, they had been given a choice between sending their children to special schools or to mainstream schools where they "risked isolation and ostracism." Though one dissenting judge castigated the majority for being patronizing in its attitude to the parents, these seem good reasons to regard the consent as inadequate.

The absence of meaningful consent was even more apparent in *Sampanis*. Here, the parents agreed to a separate (prefabricated) building for their children, but this consent was given under the pressure of demonstrations by large numbers of local parents who objected to the Roma children joining the mainstream school. Police were called in to assure order, and at one point, the building for the Roma children was attacked. The Court was skeptical of the value of consent in these circumstances.

III. THE BREAKTHROUGH AND LOOKING FORWARD

These cases, particularly *DH*, are a breakthrough for a more substantive model of equality in Strasbourg and are also a welcome provision of clear rules on indirect discrimination under Article 14. Yet these developments leave some questions to be explored, and there remain inadequacies in the ECHR framework for the protection of human rights. Delay is an endemic problem. The children in *DH* were in special schools from 1996–1999, and they lodged a complaint in the ECtHR in 2000. The Chamber decision came down in 2006 and the Grand Chamber decision a year later. By the time the Chamber decided the case, the Czech Republic had already introduced legislation abolishing the special schools. Ironically, in *Oršuš*, the ECtHR censured Croatia for the failure to provide a speedy trial of the issues in the Constitutional Court; the delay in that case was four years. Delays are especially regrettable given the importance of these years in children's education. The Council of Europe ("COE") and the ECtHR are acutely aware of delay caused by the ECtHR's backlog of cases, and unfortunately, one state (Russia) has made no effort to ratify a protocol reforming the ECtHR and its procedures.

Decisions of the ECtHR may fail to address the wider reality on the ground. A dissenting judge in *DH* noted that the Court dealt with one specific issue in the Czech Republic while passing over the more serious problem of hundreds of thousands (perhaps millions) of Roma children in Europe who would not receive any formal education. The majority's decision would do nothing to assist these young Roma. Further, States do not

always (and sometimes cannot) implement ECtHR decisions quickly. Looking at the Czech response to *DH*, the ERRC reported that despite some progress, Roma children were still disproportionately sent to non-mainstream schools. Local opposition and bureaucratic inertia (or resistance) may be difficult to overcome. In the *Sampanis* case, following the attack on the separate school buildings for the Roma, it took five months to replace the buildings, and even then the replacements were not operational. As the initial special building was a prefabricated structure, it is not easy to see why replacing it was so difficult. Eventually, the Roma students were transferred to a new, specially created school.

There are limits to the value of judicial activity, as these facts suggest. Importantly, the COE includes several non-judicial mechanisms. The COE Committee of Ministers monitors the implementation of ECtHR decisions, while several institutions mentioned above monitor the general situation regarding minority rights and racism in the member states. These mechanisms lack the power to impose sanctions on recalcitrant states (apart from the theoretical threat of expulsion from the COE), but they can highlight problems of implementation and apply moral suasion.

IV. CONCLUSION

Article 14 jurisprudence has evolved from a formal to a more substantive model of equality despite these worries about delay, implementation, and the capacity of courts to deal with wider structural problems. The Court is now more open to adopting a substantive equality perspective that stresses the need to protect vulnerable and disadvantaged minorities.

CAN EQUALITY SURVIVE EXCEPTIONS?

*Daphne Barak-Erez** †

I. THE SIGNIFICANCE OF EXCEPTIONS

The meaning of the exception vis-à-vis the general rule is primarily discussed in the context of emergency powers (following Carl Schmitt and Giorgio Agamben). But the complicated relationship between the norm and its exceptions is also relevant to other legal contexts. This Commentary is dedicated to the following question: What are the implications of considering equality a fundamental legal principle while recognizing exceptions to its application? More concretely, how does the existence of exceptions influence the understanding and viability of equality as the norm?

Evaluating this question with the focus on equality is especially valuable because the right to equality is especially sensitive to the impact of derogations from it. Several rights, like privacy, can be compromised in some areas and still retain their viability in other contexts. In contrast, one cannot treat an individual in a discriminatory manner in one area while retaining his egalitarian status as a full citizen. Furthermore, the right to equality is especially susceptible to different understandings, and these serve as justifications for some of the exceptions.

This Commentary uses Israeli protection of gender equality as an example to study the question presented. Later, it broadens the lessons drawn from this example for the purpose of exploring other contexts.

II. GENDER EQUALITY IN ISRAELI LAW: A NORM SUBJECT TO EXCEPTIONS

In Israel, equality has been recognized as a foundational constitutional principle since the early days of the state. Israel's Declaration of Independence from 1948 includes a promise that the state "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex." This vision and its express application to gender equality, which were far from being self-evident in the world during that time, have left their mark on significant laws enacted in Israel's formative years. Examples of this include the Defense Service Law, 1949, which ap-

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plied mandatory military service to both men and women, and the Equal Rights to Women Law, 1951.

At the same time, the Israeli legal system has recognized and applied exceptions to this principle since its beginning. Proponents suggest that some of these exceptions reflect allegedly natural differences between men and women, and hence are not exceptions to equality. However, from a liberal perspective—denying stereotypical distinctions based on group affiliations—they are clearly exceptions to the equality principle.

These exceptions have arisen in several instances. First, for many years, following the British tradition of parliamentary sovereignty, Israel did not recognize the possibility of judicial review of legislation that did not conform to the basic principles of the system, including the principle of gender equality. In practice, Israeli legislation includes instances of different allocations of rights for men and women. In the context of mandatory military service for both sexes, the law has different provisions based on gender regarding length of service and exemptions from service. In addition, as a matter of a political compromise, Israel applies the religious law of the individuals involved in marriage and divorce. For practical purposes, this results in the application of religious regimes that do not conform with current understandings of equality (especially regarding control over the decision to divorce, which is disproportionately given to men in the traditions of the main religions of the country).

Second, this double-edged attitude toward equality survived the later development of Israeli constitutional law, which has adopted judicial review of legislation. When Israel accepted its new basic laws on human rights (Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty)—a form of legislation that prepares the chapters of the country's future constitution—there was a political concern regarding the impact of a full constitutional protection of equality (which had the potential to threaten delicate compromises, such as the law of marriage and divorce). Accordingly, Basic Law: Human Dignity and Liberty does not mention equality in an express manner (leaving open only the option to infer it from other constitutional provisions, such as the protection of human dignity, as the Supreme Court has done in later decisions). Additionally, this basic law applies only to new legislation, and hence awards former laws immunity from direct judicial review.

III. THE CONSEQUENCES OF THE EXCEPTIONS FOR GENDER EQUALITY IN ISRAELI LAW AND STRATEGIES FOR COPING WITH THEM

This Commentary addresses how the Israeli legal system has coped with the double message of accepting and denying gender equality at the same time. For this purpose, the Commentary examines the long-term influence of the exceptions to the norm, on one hand, and the strategies used to cope with these effects, on the other hand.

The Creeping Influence of the Exceptions—In practice, exceptions to the rule of gender equality are often treated as justifications for additional dis-

tinctions between men and women, especially in institutional contexts traditionally involved in gender discrimination (*e.g.*, military and religious institutions). For example, although the Defense Service Law does not include limitations on the participation of women in combat duties, the different regulation of the service of men and women was considered a traditional justification for this policy. Even when this policy was attacked in *Miller v. Minister of Defense*, it was not challenged in a sweeping manner. Rather, the challenge insisted on the right of women to volunteer for military positions. More examples come from the regulation of religion and state. The legislation in this area disqualifies women from certain religious positions of official nature (*e.g.*, Chief Rabbis and Municipal Rabbis), but not from other religion-related government positions (*e.g.*, members of religious councils). However, in practice, women were excluded from the latter as well. This discrimination was gradually abolished only after long legal struggles in such cases as *Poraz v. Tel Aviv Municipality* and *Shakdiel v. Minister for Religious Affairs*.

The possibility to engage in the initiative of enacting basic laws on human rights without expressly mentioning equality reflects, once again, the fact that the long standing exceptions left their mark on the attitude toward equality as a foundational principle. At the same time, this drafting choice contributed and enhanced the compromising attitude toward the right to equality.

Strategies to Limit the Impact of the Exceptions—A close study of judicial precedents and legal activism outside the court reveals several strategies that diminish the impact of the exceptions.

- a. Equality as an Interpretive Principle—the Israeli Supreme Court regards equality as a governing interpretive principle. Accordingly, it conforms laws to the ideal of gender equality when the text is susceptible to such interpretation.
- b. Denying the Precedential Value of the Exceptions—Following the same rationale, when the Supreme Court interprets laws, it focuses on the principle, not on the exceptions. Accordingly, in the *Poraz* and *Shakdiel* cases, the Israeli Supreme Court endorsed equality even though the issues involved the regulation of law and religion—an area susceptible to exceptions. The Court applies this judicial method even when the legislative approach is explicitly non-egalitarian. For example, in *Milo v. Minister of Defense*, where the Court decided whether to recognize an argument for the right of women to be exempt from military service for secular conscientiousness reasons (although the law did not grant this right to men), it invoked the principle of gender equality in flatly rejecting the interpretation offered to support this result. The court did that without giving weight to the fact that the law on military service included many other exemptions from service that apply only to women (exemptions given mainly to married women, mothers, and religious women), and hence may serve as a basis to distinguish between men and women conscientiously objecting to service.

- c. Promoting Equality Jurisprudence in Areas Not Infected by Exceptions—The Israeli Supreme Court has drafted its most important equality precedents in areas that are relatively free from ideological controversies regarding equality. These precedents largely come from the area of equal opportunities at work (for example, *Nevo v. National Labor Court*). In these areas, women activists have even succeeded in pushing forward very impressive reforms regarding affirmative action and representation of women in government positions through amendments to various statutes, such as the Government Companies Law and the State Service law, and court decisions, such as *Israel Women's Network v. Government of Israel*.
- d. Promoting Equality Through Other Mediating Values—Since equality is considered a “suspect” value in some contexts, activists have realized that women’s rights can be more effectively promoted when initiatives are not exclusively justified on equality grounds. For example, they promoted harsher policies in the area of domestic violence without directly connecting the struggle to equality. Similarly, Israel’s advanced sexual harassment law (Prevention of Sexual Harassment Law, 1998) is drafted in a manner that emphasizes its connection to the constitutional value of human dignity—a value to which religious people can connect (Section 1 of the law states that “the purpose of this law is to prohibit sexual harassment in order to protect human dignity, liberty and privacy and to promote equality between the sexes.”). It is interesting to point out the difference between the developments in these areas in the United States and in Israel. In the United States, since there was no question about formal support for equality, the route for recognizing the ability to sue for sexual harassment was a broad interpretation of the right to equality as enacted in Title VII. In contrast, Israel’s sexual harassment prohibitions (including criminal sanctions) received express support in legislation and by politicians who would otherwise have been unlikely to unconditionally support equality in other contexts.

IV. THE NORM AND EXCEPTION DUALITY AND GENDER EQUALITY IN THE GLOBAL CONTEXT

The Israeli case study has the potential to shed light on the dilemma of promoting equality in other contexts, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention, which came into force in 1981, has been signed and ratified by the vast majority of the countries in the world. However, many of these countries ratified the convention subject to reservations that apply to major areas of importance to gender equality, including reservations that give express priority to customs and traditions. This reality calls to mind the same dilemma previously discussed in the context of Israeli law: Can equality survive these exceptions? More concretely, is equality promoted when the

international norm of gender equality has been adopted subject to exceptions? Will the long run be influenced by the norm or by the exceptions? What will be the enduring impact of the exceptions on the norm? Formally, states are not allowed to add reservations that run against the core provisions of the convention. However, the international practice regarding CEDAW tends not to meet this rule.

Additionally, the norm-exceptions dilemma has special relevance to the debate over feminism and multiculturalism. To quickly sketch the argument, since many cultures have discriminatory components, there are different views on how to choose between women's rights and respect for cultural rights of groups. On the two extremes of this debate, one finds those who reject any cultural trait that does not pass the equality test and those who oppose any equality reform that necessitates intervention in cultural traditions—and there are many shades of grey in between. The Israeli experience is very relevant to this debate, especially in countries with high immigration (like Canada), where proposals seek to recognize the operation of community tribunals in the area of family law. From the perspective of this analysis, it is important to engage in this debate with reference to the potential of the exception to reshape the norm.

COMPETENCES OF THE “UNION” AND SEX EQUALITY: A COMPARATIVE LOOK AT THE EUROPEAN UNION AND THE UNITED STATES

*Barbara Havelková** †

The delivery of substantive sex equality guarantees in the European Union and the United States is substantially affected by the division of powers (“competences” in European terminology) between the constituent units and the center. This Commentary compares the technical similarities and differences between the structures of competence of the federal systems of the United States and the European Union. This Commentary also briefly sketches their impact on substantive sex equality law.

I. INTRODUCTION TO SEX EQUALITY LAW IN THE UNITED STATES AND EUROPEAN UNION

United States

United States equality law developed principally as a reaction to slavery, segregation, and discrimination against African-Americans and other racial groups. At its base stood the 1868 Fourteenth Amendment Equal Protection Clause binding the states, and the 1791 Due Process Clause of the Fifth Amendment binding the Union. Both of these constitutional provisions, although not explicitly referring to protected grounds, have been interpreted to guarantee equality on the basis of sex.

Federal statutes further guarantee specific sex equality rights. Notably, Title VII of the 1964 Civil Rights Act prohibits employment discrimination, and Title IX of the 1972 Education Amendments prohibits sex discrimination in education. Further statutory guarantees include equal pay, treatment in housing, education, and credit opportunities.

European Union

While the center in the United States is responsible for both the economy (in terms of creating a single market between the states) and the protection of human rights, the European divided-power system has two

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centers—the European Communities/European Union (“EC/EU”) and the Council of Europe. The European Communities’ (“EC”) primary purpose is economic integration, whereas the Council of Europe protects human rights. In the latter system, the European Convention on Human Rights contains a sex equality guarantee that is guarded by the European Court of Human Rights. The EC, on the other hand, began its history of sex equality law with an economically motivated equal pay provision (Article 119; today 141 of the EC Treaty (“TEC”)). Race equality entered into the *acquis communautaire*, the total body of EC law, only four decades later.

Today, sex equality is seen as a fundamental right with constitutional status as a result of the case-law of the European Court of Justice (“ECJ”). At the statutory level (secondary law), the EC has passed nine original directives implementing the principle of equality between men and women in the areas of employment, occupation, social security, and access to goods and services. These directives contain equality guarantees (e.g., equal treatment in access to employment or equal pay) as well as special rights (e.g., pregnancy protection and maternity leave). The EC guarantees are comparatively very generous. Unlike in the United States, the European law protects transsexuals and homosexuals from discrimination, applies equal worth analysis in equal pay cases, shifts the burden of proof to the defendant for production and persuasion, and provides abundant special labor and social rights connected to pregnancy and parenthood.

II. HOW LEGISLATIVE COMPETENCES HAVE BEEN CONSTRUED

United States

The two most important legal bases for federal legislation on equality have been the Fourteenth Amendment and the Commerce Clause. Congress passed Title VII under its Commerce Clause authority, and Title IX under the Spending Clause. An Equal Rights Amendment (“ERA”) to the Constitution, adopted by both houses of Congress in the early 1970s, would have given Congress the “power to enforce” equal rights on account of sex. However, by 1982, the effort to ratify the ERA had failed.

Both the Fourteenth Amendment and the Commerce Clause were used to adopt the Violence Against Women Act (“VAWA”). However, in *United States v. Morrison*, the Supreme Court declared the provisions of VAWA providing for civil remedies in federal courts unconstitutional. In refusing the Fourteenth Amendment as a legal basis for the provisions, the Court argued that the amendment historically “erect[ed] no shield against merely private conduct,” but prohibited only the actions of states. Under the Commerce Clause, the Court denied that domestic violence had an economic effect, notwithstanding the massive congressional record evidencing the impact of gender-based violence on women’s economic opportunities. Seeing sex-based violence as a traditional, criminal law prerogative of the states, the Court concluded it should continue to be governed at the local level.

From an outside perspective, then, it is surprising to find the heterosexual definition of “spouse” and “marriage” regulated at the federal level, given that family law is a prerogative of the states and at the core of the “private.” The legal basis for the 1996 Defense of Marriage Act was the Full Faith and Credit Clause—the power to regulate recognition of other States’ acts. While it is doubtful that this power extends to the definition of marriage for purposes of federal law, the Supreme Court has so far chosen not to review its constitutionality.

European Union

The European Communities’ central legislator has used several legal bases for equality legislation in the past four decades. The counterpart of the Interstate Commerce Clause in the EC Treaty (Article 100; today 94) was used in conjunction with either the substantive equal pay Article 119 (today 141) or the “residual power” Article 235 (today 308). Other bases included Article 118a of TEC concerning the health and safety of workers, and the Agreement on Social Policy.

The list of competences changed dramatically following the insertion of Article 13 by the Amsterdam Treaty in 1997. This empowered the center to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. However, the center could only act “within the limits of the powers conferred by . . . [the Treaty] upon the Community.” Article 13 is a simple competence provision—it does not actually contain a substantive constitutional guarantee. Unlike the United States, where federal statutes further implement the rights guaranteed by the Federal Constitution, the European central legislator mostly creates these rights in secondary legislation.

The use of EC competences has never been challenged before the ECJ. The reason for this lies, primarily, in the fact that the Community legislator has limited itself to clear economic issues. The use of existing EC competences for the adoption of binding legislation addressing domestic violence is unlikely at this time.

III. LEGAL INSTRUMENTS

United States

In the United States, federal equality guarantees are contained in the Constitution and statutes. They can also be found in executive orders (e.g., affirmative action) and regulations of federal agencies, such as the U.S. Equal Employment Opportunity Commission (“EEOC”). The EEOC regulations are generally not considered binding as judicial deference toward them varies. These instruments provide three levels of equality protection in terms of addressees: the federal government (by virtue of the Fifth Amendment), the states (through the Fourteenth Amendment) and individuals directly (through the Civil Rights Act).

European Union

The European Union also recognizes a constitutional principle of non-discrimination on the basis of sex. Its primary addressee is the center, which is bound by this principle in all of its areas of competence. The Member States, however, are only bound “within the scope of Community law,” due to the non-existence of an all-encompassing bill of rights binding the constituent units. The circumscription of the EC’s competence is thus reflected in the sex equality guarantee’s scope in the Member States in a way that does not exist in the United States. Naturally, the Member States may have their own sex equality guarantees, but these vary.

The principle of equal pay (Article 141), even though contained in the Treaty, is not generally considered a constitutional principle. It does, however, bind the Member States (to whom it was addressed in the first place), as it has what is called a “vertical direct effect.” It is also directly effective in horizontal relationships, as it binds private actors within the Member States.

In terms of secondary legislation in the area of sex equality, the EC regulates by directives. Directives are an instrument of “commandeering,” whereby the center issues binding commands that force constituent units to legislate with respect to private parties. Such an instrument does not have an equivalent in the United States system. Directives cannot bind individuals the same way federal statutes do. Individuals are only bound by provisions of national law that transpose them. Thus, unity of the protection in EC equality law is lower than with federal statutes in the United States. The transposing national provisions are implanted into a web of existing norms, so that the actual protection can differ. This is particularly so with procedural law, and it impacts, for example, the effectiveness of the Burden of Proof Directive. Some questions are also explicitly left to the discretion of the Member States—references to “national legislation or practice” abound. The Council, or the European Parliament, may also issue non-binding recommendations, and have done so on such issues as political representation, dignity at the workplace, or positive action.

Thus, the EC system also contains three levels of sex equality protection: the center binds itself (case-law based fundamental right), the states (the fundamental right in implementing EC law; Article 141 and the directives), and individuals (both directly by virtue of Article 141’s horizontal direct effect, and by national law implementing the directives).

IV. COURTS

United States

The aforementioned is mirrored in the jurisdiction of the federal courts. Given the existence of a constitutional guarantee, constitutional questions of sex equality before the federal courts arise in a wide range of substantive areas including reproduction, family, some issues involving Indian Reserva-

tions, and, on occasion, rape. The federal courts also adjudicate Title VII and Title IX.

European Union

Before the ECJ, only one case, *Rinke v. Arzteammer Hamburg*, has addressed the constitutionality of non-equality central legislation on the basis of its potential conflict with the EC principle of sex equality. Without an all-encompassing guarantee, some questions never arise before the ECJ (or when they do, they are not considered EC/EU matters). Such questions include reproductive rights, gender-based violence, and political representation. Questions like these, admittedly, arise before the European Court of Human Rights, which has dealt with broader issues of sex equality (i.e., domestic violence, rape, prostitution, veiling, etc.) under various human rights rubrics.

Furthermore, most questions concerning sex equality law arrive at the ECJ as preliminary questions from the national courts. Under this procedure, the ECJ examines the validity and interpretation of EC law only. This provides the national courts rather abstract, generalized interpretations of the EC provisions. In many cases, the central questions regarding sex equality remain unanswered by the ECJ because they would not be considered a matter of EC law, and are thus left to national courts. This is true not only of technical issues (such as temporal rules or the conduct of fact-finding) but also of many questions central to implementing sex equality, such as acceptable justifications for *prima facie* indirectly discriminatory measures (disparate impact).

V. DISCUSSION AND CONCLUSIONS

Explicit competence-creation on sex equality questions has happened much faster in the European Union than in the United States. It should, however, be pointed out that the EC/EU competence provisions require unanimity for the adoption of directives, which means Member States de facto keep equality law in their control (through their representatives in the Council). Furthermore, the secondary legislation resulting from the use of Article 94 TEC has been meek compared to, for example, the VAWA, as it only touches on obvious, market-relevant areas. The competence provision of Article 13 TEC is limited to existing EC powers. A stretch in interpretation of this competence into intra-state sex equality issues, such as gender-based violence, will likely not occur any time soon.

Seeing the failed ERA and the *Morrison* decision in the United States, one might conclude that more has remained with the states than the U.S. federal government, and that the European Union might soon overtake the United States. Yet because of the existence of an all-encompassing principle of equality enshrined in the U.S. Constitution, the potential for federal action will be greater in the United States until the EC/EU adopts a similar provision (which again seems unlikely). Also, the use of directives and the

limited judicial review powers of the ECJ might restrain some of the central competence in the EC/EU. This leaves much to be decided at the Member State level and leads to lower levels of unity across the European Union.

A future development to watch is the Lisbon Treaty, which strengthens the European Union's competence to fight cross-border crime by enabling it to adopt directives to battle "trafficking in human beings and sexual exploitation of women and children." It is in this area of interstate criminal cooperation (but not intrastate, non-economic issues) that the European Union might outdo the United States in upcoming years.

RECOGNITION OF GROUP RIGHTS AS REQUISITE TO SUBSTANTIVE EQUALITY GOALS

*Kathrina Szymborski** †

Courts, legislatures, and scholars are increasingly turning away from traditional Aristotelian thinking in favor of a substantive, pro-active approach to equality. Under the substantive approach, the identification and eradication of systematic discrimination replace an adherence to neutral principles. This Comment argues that while a substantive approach is the most effective way to bring about true equality, it will not succeed unless it centers on protecting group rights. State decision-makers and international human rights advocates must focus on group experiences in order to create societies where no one is favored based on immutable characteristics.

I. ARISTOTELIAN THINKING FRUSTRATES TRUE EQUALITY

Aristotle wrote that “[e]quality consists in the same treatment of similar persons.” This thinking still dominates equality law. For example, France refuses to recognize minorities, instead choosing to pretend that everyone is the same. In doing so, France avoids Aristotelian pitfalls that justify inferior treatment for those who are different. When the United Nations Human Rights Committee recently reviewed France, a member of the French Delegation explained, “The French people are one.” Thus, France collects no information or statistics about ethnic origins or religion, and insists that the individual rights in the Constitution adequately protect all citizens.

Though France avoids the Aristotelian tendency to justify second-rate treatment for some, its insistence that all members of a society are the same—and therefore deserving of similar treatment—fits squarely into Aristotelian thinking. This approach is problematic because it elevates abstract principles over human experience. Without considering data that illuminate the realities of social injustice (i.e., who is poor, who is unrepresented, who does what to whom), policymakers cannot identify nor respond to the needs of those who suffer from systematic discrimination. Human Rights Committee member Nigel Rodley pointed out during the review of France that inequality is “perfectly capable of passing as formal equality.” It is easy to

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look at a society and declare that everybody must be equal because the same laws apply to everybody in the same manner. In reality, when the same law applies both to someone suffering from discrimination and to a privileged individual, the outcome preserves the status quo—an unfortunate result, as the status quo is usually unequal and discriminatory.

A policymaker working within an Aristotelian framework may be understandably wary of recognizing differences. While insisting that all are the same has resulted in the maintenance of the status quo, the recognition of difference has led to some of the worst injustices in history. Consider, for example, Nazi Germany's justification of its treatment of Jews based on their difference from "Aryans." This is equality under Aristotelian thinking, provided all Jews are treated the same as other Jews, and all "Aryans" are treated the same as other "Aryans." Compare this with the French model, under which all French people are treated similarly simply because they are French. On a very basic level, the idea is the same in both societies: within each group, everyone receives similar treatment.

Thus, group identification is nothing new in equality law. An effective substantive approach would similarly require categorization to determine proper treatment, but with one big difference: under the Aristotelian framework, differing treatment of different groups *is* equality; while under a substantive approach, differing treatment is *a means* to equality. Substantive equality focuses on a law's effects on individuals and groups.

II. SHIFTING AWAY FROM ARISTOTLE'S PERCEPTION OF GROUPS

The substantive approach recognizes that equality is a comparative concept. To Aristotle, equality is achieved when everyone within an identifiable group is treated similarly. Under a group-based substantive approach, meanwhile, this determination is meaningless without comparing the treatment of the group to that of other groups. In *Bliss v. Canada*, for example, the Canadian Supreme Court used Aristotelian thinking to uphold a law that discriminated against pregnant women by reasoning that "the class into which [plaintiff] fell . . . was that of pregnant persons, and within that class, all persons were treated equally." Had the Canadian Supreme Court used a substantive framework, it would have taken the analysis further, considering whether the law treated pregnant persons differently from non-pregnant persons, and if so, whether the treatment was inferior, thereby warranting rectification.

Of course, the determination that all members of a group are treated equally is important in the substantive approach, but for different reasons than Aristotelian thinking. The determination shows that the treatment is a result of membership in the group, rather than based on individual characteristics or merits. While the Aristotelian framework uses groups to determine whether certain treatment of individuals qualifies as equality, a substantive group-based approach uses categorization to determine whether inferior treatment is a result of group membership, or a consequence of an individual's own merits. Under such an analysis, as Canadian Supreme Court

Justice McIntyre pointed out in *Andrews v. Law Society of British Columbia*, “[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.” Comparing two individuals who have been treated differently does not tell us *why* they have experienced the respective treatments. Unless we find that inferior treatment is the norm across an entire group, we cannot call the treatment discrimination. Thus, the same categorization guidelines that signify equality under Aristotelian reasoning can, under a substantive approach, highlight groups to be targeted by equality legislation.

III. HUMAN RIGHTS ADVOCATES AND POLICYMAKERS MUST EMBRACE GROUP RIGHTS

Human rights scholars and Western policymakers have traditionally shied away from recognizing group rights. Instead, many prefer to concentrate on rights guaranteed to individuals. Group rights are a relatively new and controversial concept. In human rights discourse, the term is most commonly associated with the ever-contentious right to self-determination.

Unease about group rights comes from many sources. As any student of human rights can attest, universality is the central, defining characteristic of human rights. Group rights, however, lack universality, as they do not attach to all people as a fundamental aspect of humanity, but only attach to members of specific groups. Those sensitive to Aristotelian thinking dislike the tendency of social groups to emphasize differences among human beings, and prefer individual rights for the value they bestow on characteristics shared by all people—namely, individuality and common humanity. Meanwhile, the term “group rights” has an unpleasant ring in the fiercely individualist West, where the term conjures images of socialism and state encroachment on political freedom.

Catharine MacKinnon, a vocal advocate of substantive equality, has described the weaknesses of these attitudes and how they hinder the realization of equality. In her book, *Sex Equality*, she writes that “[g]roup membership does not simply distinguish humans; it is part of being human.” This being the case, law should not divide “human status (group-based) from human treatment (individual) . . . as if those with unequal social status will still be treated equally.” In short, refusing to recognize and protect group rights is inconsistent with the realistic pursuit of equal treatment for all individuals.

IV. THE DEFINITION OF DISCRIMINATION SHOULD MAKE SPECIFIC REFERENCE TO GROUPS

Accordingly, the most useful definitions of discrimination incorporate group experiences. Compare, for example, the definition of discrimination articulated in *Andrews*, Canada’s landmark equality case, to that adopted by the United Nations in the Convention on the Elimination of All Forms of

Discrimination Against Women (“CEDAW”). The Canadian Supreme Court in *Andrews* described discrimination as “a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual *or group*, which has the effect of imposing burdens, obligations, or disadvantages on such individual *or group* not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society” (emphases added). CEDAW, on the other hand, refers to discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms.” The crucial difference between the two definitions is subtle. The *Andrews* definition addresses the comparative nature of equality, inviting the decision-maker to assess whether the treatment of group members is worse than the treatment of society members in general. The CEDAW definition, on the other hand, requires a messy analysis to determine whether treatment is inferior “on the basis of” sex. Determining whether mistreatment occurs because of a characteristic is a difficult task when the definition of discrimination makes no reference to groups. Under a group-based definition, the analysis is easier: determine whether other individuals that share a characteristic (i.e., members of a group) receive similar treatment, and then compare that treatment to other groups. If the treatment of entire group is consistently worse than that of another, discrimination is at play.

A substantive, group-based definition of discrimination also helps guard against inversions of equality legislation where members of traditionally elite groups protest favorable treatment of members of other groups. By adhering to the principle that “[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair,” articulated in the South African case *President of the Republic of South Africa v. Hugo*, decision-makers can avoid absurd results that allow elites to use anti-discrimination laws to maintain their position of superiority and privilege in society. Consider, for example, Justice Thomas’ dissent in *Grutter v. Bollinger*, in which a white woman who was denied admission to the University of Michigan Law School complained of discrimination because the school considered racial background as one factor in the admissions process. He wrote that “[n]o one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants,” apparently declining to take into account the concerned groups’ relative vulnerability in society.

V. LAWMAKERS SHOULD FOCUS ON “DISADVANTAGED GROUPS,” NOT MINORITIES

Deciding which groups deserve collective rights has important ramifications for oppressed segments of the population. The *Andrews* Court indicated that “disadvantaged groups” qualify for special legal protection. The U.S. Supreme Court, in the famous *Carolene Products* footnote, pointed

to “discrete and insular minorities” as eligible for specific attention. This determination, however, leaves out a very large group that suffers institutionalized discrimination everywhere: women. As a group, women are hardly discrete or insular, and they are not in the minority—yet everywhere they are second-class citizens.

Therefore, the Canadian Supreme Court’s framework that disadvantaged groups are entitled to collective rights more aptly captures the true conditions of social inequality than does the U.S. Supreme Court’s construction. MacKinnon calls “disadvantaged groups” an “open-ended concept” that “responds to changes in social reality.” This open-endedness is open to criticism for giving the concept a lack of direction and thwarting the development of a cohesive plan. In law-making, though, it is more important to be practical and address the issue at hand than to always do so according to a pre-determined, over-arching formula.

CONCLUSION

Concentrating on group identity is not just a useful tool for decision-makers; activists know that there is power in numbers. The very concept of a group, as opposed to a collection of individuals, commands attention. The U.S. Civil Rights Movement and the Women’s Liberation Movement are examples of the effectiveness of group movements. Both altered the social and political climate surrounding equality, as well as the substance of equality law. The engagement and empowerment of the groups concerned bolsters the need to shift to a focus on groups in equality thinking.

No matter the legal guarantees of equality a country provides, true social justice remains elusive. Many of the impediments on social equality arise from the tendency of traditional equality—derived from Aristotle’s philosophy that similarly situated individuals should be treated alike—to perpetuate inequality by providing justification for inferior treatment of differently situated persons. Only if all segments of society, from those making the law to those affected by it, frame equality issues in group terms, can we fully achieve substantive equality.