

The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality

Introduction

The principle of equality is a fundamental assumption of a democratic society. It is well recognised that a corollary exists between equality and non-discrimination.¹ To understand that we should first examine what we mean by equality and explore the characteristics that make it a progressive universal moral and legal principle.

Equality has been described as a “treacherously simple concept”², yet a diverse spectrum of opinions exists as to what is equality and what should a society do to incorporate and promote this value. The traditional approach of national legal systems³ was to employ the concept of equality as a system of formal rules. More recent constitutional reforms⁴, informed by increasing academic debate, have sought to develop a more sophisticated concept of equality and have taken into consideration the richness and variety of modern human relations and the subtle characteristics which can lead to discrimination and disadvantage. A range of different opinions exist as to what model of equality should be employed within modern democratic states. Accepting that the broad range of different views and theories regarding the nature of equality and non-discrimination can only be grasped within their own historical and cultural context, the focus of this article is nevertheless on what has informed various international and national legal standards.⁵

Discrimination and Unequal Treatment

While in its everyday sense the word “discrimination” imports the notion of difference, in law the term “discrimination” generally refers to the different treatment of an individual or a group of individuals, which results in a disadvantage. Instances of discrimination as unequal treatment can be wide-ranging from harassment or work place bullying to the systematic exclusion or persecution of an entire people. Although a “Golden Age” of fairness and harmony among humans is believed by some to have existed before the beginning of written history, discrimination as unequal treatment has defined the human experience throughout history and across regions of the world. Today, virtually all people live in a cultural and social environment formed by past, current and emerging forms of discrimination.

¹ See, for example, Grant, Evadre. “Dignity and Equality”, *Human Rights Law Review*, Vol. 7, No.2, 2007, p.300; McCrudden, Christopher. “Equality and Non-Discrimination” in Feldman, David (ed.) “*English Public Law*”, Oxford University Press, Oxford, 2004, pp.581 – 668.

² Holtmaat, Rikki. “The Concept of Discrimination”, *Academy of European Law Conference Paper*, 2004, p.2, (available at: http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf).

³ See, for example, the early interpretation of the “Equal Protection Clause” by the Supreme Court of the USA in *Plessy v Ferguson* 163 U.S. 537 (1896). Similarly, this was the approach in the incorporation of early anti-discrimination law in the UK, for example, the Race Relations Act 1965 or in the early interpretation of section 15 of the Canada Charter of Rights and Freedoms by the Supreme Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

⁴ For instance, in Canada in 1982 and the Supreme Court decision of *Law v. Canada* (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 and South Africa in 1996.

⁵ For example, the International Human Rights Law contained within UN Conventions and Declarations jurisprudence, and the law of countries such as the UK, the USA, Canada, South Africa or Ireland.

Formal Equality and the Traditional Approach – Treating Likes Alike and Unalikes Unalike

The idea of formal equality can be traced back to Aristotle and his dictum that equality meant “things that are alike should be treated alike”.⁶ This is the most widespread understanding of equality today. Formal equality promotes individual justice as the basis for a moral claim to virtue and is reliant upon the proposition that fairness (the moral virtue) requires consistent or equal treatment.⁷

Equality as formal equality has an important role in the law and policy of many countries with advanced equality and non-discrimination provisions. For instance, it forms the conceptual basis of the term “direct discrimination” utilised in the UK⁸ or the guarantee of ‘equal protection of the laws’ contained in the United States Constitution.⁹

The formal approach to equality and non-discrimination supports the position that a person’s individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain. At the heart of most protagonists’ defence of this model is the principle of merit. The liberal argument sets out that formal equality is necessary if the principle of merit¹⁰ is to be maintained in a democratic society.

Libertarians further defend formal equality by arguing that it disfavors arbitrary decision-making processes – as when policies or people selectively disadvantage others due to a particular irrelevant trait.¹¹ The value of formal equality is its ability to protect against defects being introduced into the decision-making process, and ensuring that irrational and unfair decisions based on arbitrary criteria are kept out. Furthermore, it prevents the harm which may occur from any arbitrary decision-making process, by permitting the person the opportunity to secure a benefit which may otherwise have been denied and reducing any resultant psychological injury.

Others suggest that the supposed value of neutrality of formal equality is merely an illusion¹², as it is questionable whether the law, legislature and the judiciary can claim to be truly neutral to all parties. To this end, formal equality cannot adequately deal with certain types of laws. For instance, laws concerning issues that do not relate to choices between groups, as with licensing laws, or laws which appear to be based on *prima facie* neutral criteria but subsequently create a

⁶ Aristotle, 3 *Ethica Nicomachea*, 112-117, 1131a-1131b, Ackrill, J. L. and Urmson J. O. (eds.), W. Ross translation, Oxford University Press, 1980.

⁷ Wesson, Murray. “Equality and social rights: an exploration in light of the South African Constitution”, *Public Law*, 2007, p.751.

⁸ See for example, Section 1(1)(a) of the Race Relations Act 1976; Section 1(2)(a) of the Sex Discrimination Act 1975.

⁹ Section 1, Fourteenth Amendment to the United States Constitution.

¹⁰ For example, S merits X in virtue of M, where S is a person, X a mode of treatment or an outcome, and M some feature possessed by S. So, for example, we might say that John (S) merits the award of the sports prize (X) in virtue of having ran faster than anyone else competing in the race (M). See McCrudden, Christopher, ‘Merit Principles’, *Oxford Journal of Legal Studies*, Vol. 18, No 4, 1998, pp.543 – 579.

¹¹ Brest, Paul. “In Defense of the Antidiscrimination Principle”, *Harvard Law Review*, Vol. 90, 1976, p.1.

¹² Fiss, Owen. M. “Groups and the Equal Protection Clause”, *Philosophy and Public Affairs*, Vol. 5, 1976, p.107.

disparate impact for certain people. In this way formal equality, it is argued, confuses more than it clarifies.¹³ By masquerading as an independent norm, formal equality blinds us to the real nature of substantive rights and creates a dichotomy between human rights and equality (or non-discrimination), wherein both principles appear to operate independently rather than in combination with one and other.

One well documented drawback to formal equality is that it requires comparison. The comparator¹⁴ predominantly applied in the UK in proving direct discrimination is white, male, Christian, able-bodied and heterosexual. This rule assumes the existence of a 'universal individual' which can neglect the variety and diversity of modern society.

Modern society is rich in diversity. The approach of formal equality is to ignore the personal characteristics of an individual altogether. For example, in respect to racial discrimination advocates of formal equality would proscribe a colour blind rather than a colour conscious approach. Whilst the model of consistent treatment has a role in society, the richness and complexity of modern life and modern social relations makes the application of this approach, as a basis for integrated and comprehensive non-discrimination laws and measures, overly simplistic.¹⁵

Equality of Opportunity

The concept of equality of opportunity represents a departure from the traditional notion of formal equality or treating likes alike and unlikes unlike. It is partially based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination, because to fail to do so would leave people and groups at different starting points. However, equality of opportunity is also partially based on an individual libertarian model as it seeks to limit the application of full redistributive justice. Certain academics suggest that a weakness of focusing on equality of results is that it affords too much respect to utilitarianism¹⁶ at the expense of other systems of thought.¹⁷

The integration of these theoretical perspectives has led to a notion of equality which seeks to equalise starting points irrespective of a person's background or status. At present only a small

¹³ Westen, Peter. "The Empty Idea of Equality", Harvard Law Review, Vol. 95, No.3, 1982, p.537.

¹⁴ Which can be either real or hypothetical.

¹⁵ The limitations of the formal approach to equality are acknowledged in the interpretation of the idea of non-discrimination provided by the Committee on the Elimination of Discrimination against Women, where the Committee stated that Articles 1 to 5 and 24 together indicate that State Parties under CEDAW are required to go beyond a formal interpretation of equal treatment between men and women to counter and improve the *de facto* situation of women and to address prevailing gender relations and the persistence of gender-based stereotypes that affect women. See General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 30 January 2004, para. 6 (available at: <http://www.un.org/womenwatch/daw/cedaw/30sess.htm>).

¹⁶ Utilitarianism in this sense correlates to a socio-legal conception where the overemphasis on results, and the principle of distributing equal proportions of a resource, can mask the unfairness inherent in the process of achieving these results.

¹⁷ See for example, Fredman, Sandra. "Discrimination Law", Oxford University Press, Oxford, 2002, p.14.

number of legal systems have equality of opportunity legal provisions. For instance, the European Union has legal mechanisms and policies in place which permit the use of positive action to prevent and compensate for disadvantage and to promote equality.¹⁸

In practice equality of opportunity is a permissive interpretation of the concept of equality and non-discrimination, allowing individuals from traditionally disadvantaged groups to receive special education or training, or encouraging them to apply for certain jobs.¹⁹ Equality of opportunity recognises the shallow nature of formal equality and injects a substantive element into its framework.

Equality of Outcomes²⁰

Equality of outcomes is a substantive conception of equality, as it attempts to provide substance to the concept of equality. Unlike formal equality, which dictates behaviour through applying rules and procedures consistently, equality of outcomes seeks to invest a certain moral principle (namely social redistribution) into the application of equality. This concept of equality manifests itself through a spectrum of policies and legal mechanisms in various jurisdictions. Reverse discrimination, positive discrimination²¹ and affirmative action²² are just a few which have been put forward to represent this concept. Positive discrimination can be succinctly discerned from positive action:

“Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the grounds of race, sex, religion or belief, etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit.”²³

In many ways the terms describing the equality of outcomes approach have politically controversial interpretations. Politically, more moderate interpretations exist in the form of special treatment provisions wherein it has been recognised that the principle of equal treatment sometimes requires different treatment for certain grounds of disadvantage.²⁴

¹⁸ Council Directive 2000/78/EC of 27 November 2000, (the Employment Directive), Article 7.

¹⁹ McCrudden, Christopher. “The New Concept of Equality”, 2003, (available at: http://www.era.int/web/en/resources/5_1095_2954_file_en.4194.pdf).

²⁰ Within this article equality of outcomes and equality of results are used interchangeably to represent the same concept.

²¹ The term is used in certain European contexts.

²² The term is commonly used in the context of the USA.

²³ See, Department for Communities and Local Government, “Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, a consultation paper”, 2007, p.61.

²⁴ See for example, Thlimmenos v. Greece, Judgment of 6 April 2000, (Application no. 34369/97), Para. 44, or, the principle of reasonable accommodation contained within many laws protecting persons with disabilities, for example, Council Directive 2000/78/EC of 27 November 2000, (the Employment Directive), Article 5.

This conception is inherently linked to the group/redistributive justice model and the achievement of a fairer distribution of benefits. The equality of outcomes approach has been adopted in the past in certain spheres in the USA and Northern Ireland.²⁵

The social philosophy underlying this conception of equality is an egalitarian understanding of social justice and of the good life. Wherein the moral worth of equality and non-discrimination is centred on its ability to provide equal outcomes for individuals or at the very least a satisfactory outcome for the most disadvantaged groups. In this sense equality of outcomes submits to a socialist agenda, albeit one which has limits imposed on it by the central tenets of a liberal democracy.²⁶ The application of this conception of equality is subject to stringent scrutiny from classical liberalism which maintains that the distributive justice theory is abhorrent to liberal democratic thought for it imposes too high a burden on the state and individual autonomy.

Likewise, one perceived danger of this approach is that it places too little emphasis on the importance of accommodating diversity by adapting existing structures.²⁷ In this regard some philosophers and theorists believe that the focus on certain disadvantaged social groups under this conception of equality misdirects the wider debate away from more serious and arbitrary distinctions that lead to disadvantage.²⁸

This point of conjecture reveals the quandary of whether countries founded on common national and cultural values can expect to successfully incorporate individuals, whose values and traditions are different to that of the majority. It seems the answer must be positive: human rights and equality discourses have consistently and organically incorporated issues relating to diversity and cultural appreciation into its rubric. It is clear that such issues are inherent to the human rights mainstreaming agenda. Therefore, it is necessary to recognise that treating these

²⁵ In the USA context equality of outcomes policies have been adopted (and legally challenged) through quota systems within university admissions procedures. See, for example, *Regents of the University of California v. Bakke* 438 U.S. 265 (1978). In respect to Northern Ireland, one particularly noteworthy example is in respect to criminal justice and recruitment onto the Police Service for Northern Ireland, as set out by Recommendation 121 of, "A New Beginning: Policing in Northern Ireland: the report of the Independent Commission on Policing for Northern Ireland", 1999, (the Patton Report), (available at: http://www.nio.gov.uk/a_new_beginning_in_policing_in_northern_ireland.pdf).

²⁶ For example, the prevention of harm to the individual. See, Mill, John Stuart. "On Liberty", 1859, in Collini, Stefan (ed.). "On Liberty: with, the Subjection of Women; and, Chapters on Socialism", Cambridge University Press, Cambridge, 1980, p.13.

²⁷ See, for example, Parekh, Bhikhu. "A Case for Positive Discrimination" in Hepple, Bob and Szyszczak, Erika (ed.) "Discrimination: The Limits of the Law", Mansell Publishing Limited, London, 1992, pp.261 – 280.

²⁸ For example, Nagel argues that the greatest source of injustice is not sexual or racial discrimination but intellectual discrimination where intellectual merit is regarded as a non-arbitrary moral virtue indicative of worth. He states, "One may be inclined to adopt admission quotas, for example, proportional to the representation of a given group in the population, because one senses the injustice of differential rewards per se..... The trouble with this solution is that it does not locate the injustice accurately, but merely tries to correct the racial or sexual skewed economic distribution which is one of its more conspicuous symptoms..... In most societies reward is a function of demand, and many of the human characteristics in most demands result largely from *gifts* or *talents*. The greatest injustice in this society, I believe, is neither racial or sexual but intellectual." Nagel, Thomas, "Equal Treatment and Compensatory Discrimination", *Philosophy and Public Affairs*, Vol. 2, No. 4, 1973, pp.356 - 357.

issues outside the equal rights framework will only serve to dilute the force of the human rights discourse in general. Furthermore, expanding global markets propel migration across borders. In order to accommodate these migration patterns states need to be in a position to capture the advantage of economic migrants who possess the abilities and capacity to meet inevitable labour demands.

In sum, the concept of equality of outcome makes an important contribution to combating initiatives and processes involving the worst cases of disadvantage and discrimination to different groups. However, it remains a politically charged interpretation of equality, under which competing economic, social and political interests must be addressed and balanced.

A Human Rights Approach to Equality

It has been suggested that equality as a stand-alone principle has little impact on combating substantive disadvantage.²⁹ Equality's amorphous nature means it is capable of taking on a range of different interpretations. It may be viewed as an empty vessel which provides a pattern for building human relations. Consequently, there is a need for it to take greater moral character, to invest in other moral principles and form an ethical basis from which acceptable human relationships can be derived. The concerns regarding the above equality models have led to the emergence of a human rights based approach, wherein equality becomes the vessel for the delivery of more enriching value-laden principles.

The contemporary approach of bringing the equality and non-discrimination agenda within a human rights framework has the effect of highlighting other conceptions of equality that purely economic integrationist models largely seem to neglect. This approach is based on dignity, but dignity in this paradigm is meant to reflect the universality, indivisibility, and inter-relatedness of all human rights, as understood in present-day interpretations. It proffers a theoretical distinction between treating people equally in the distribution of resources and treating them as equals, which suggests a right to equal concern, dignity and respect.³⁰ Treatment as equals shifts the focus of analysis, to whether the reasons for deviation between persons are consistent with equal concern and respect. Interpreted in this way, equality offers a range of different conceptions.

Equality of dignity, respect or worth as a foundation for equal rights may ensure that equality has universal application. Such conceptions of equality provide a moral basis which is comprehensive in respect to the spheres of society it can penetrate. Also, it importantly replaces rationality with dignity as a "trigger of the equality right".³¹ The human rights based approach to equality adopts a similar substantive approach to equality as the equality of outcome model (and to a lesser extent the equality of opportunity model), however, it can be distinguished from these two conceptions by the way in which it incorporates a human rights framework within its conceptual core rather than some varying notion of socialism. In this regard the approach

²⁹ Westen, Peter. "The Empty Idea of Equality", Harvard Law Review, Vol. 95, No.3, 1982, p.537.

³⁰ Dworkin, Ronald. "Taking Rights Seriously", London, Duckworth, 1977, p. 227.

³¹ Fredman, Sandra. "Discrimination Law", Oxford University Press, Oxford, 2002, p.18.

creates the potential for a more purposeful and workable application of law and policy, through correlating the equalities and the human rights agenda and removing any artificial conceptual distinction among them. In addition, the human rights based approach presents a tenable and workable framework to the equality and non-discrimination agenda which has the potential to avoid the political rhetoric which surrounds so much current equality and non-discrimination discourse.

Conclusion

The principle of equality and non-discrimination has undergone a range of interpretations. The scope of possible interpretation of the notion of equality and non-discrimination is undoubtedly vast. Whilst no interpretation can claim to be a categorical truth in the application of the conception of equality or non-discrimination, it seems the human rights based approach of 'treatment as an equal not equal treatment' provides an excellent philosophical maxim by which equality and non-discrimination can be translated into meaningful legal and policy instruments. With such philosophical basis in place, equality can regain its role as a central pillar of the human rights discourse and break down any artificial barriers which uphold the idea that equality and non-discrimination are anything other than inherent, fundamental and indivisible to human rights.

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