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RECOGNITION OF GROUP RIGHTS AS REQUISITE TO SUBSTANTIVE EQUALITY GOALS

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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 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.