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Equality

Susanne Baer

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Abstract and Keywords

This article first discusses key equality guarantees in law today. It then focuses on different understandings of the right to equality: as either a principle or an individually enforceable claim (the status); as an ‘empty idea’, a rationality test, or a ‘substantive’ right (the content); as a right of individuals or for groups (who bears the right?). It next examines equality as categorically distinctly structured as opposed to or as similar to other liberty interests (the test); as a general entitlement or as a specific guarantee to address particular inequalities, either separate or intersecting (the inequalities); and as general or specific regarding the application in distinct areas of life (the reach). Finally, the article addresses the often crucial question of whether equality as a fundamental right is directed exclusively against the state, or whether it may also have binding effects on other actors.

Keywords: right to equality, constitutional rights, fundamental rights, inequalities

- I.** Key Equality Guarantees 983
- II.** The Status of a Right to Equality 985
- III.** The Content of a Right to Equality 986
- IV.** The Scope: Who Bears the Right to Equality? 993
- V.** The Test 994
- VI.** The Inequalities 996
- VII.** The Reach 999
- VIII.** The Binding Force of a Right to Equality 1000

IN law, equality is everywhere. But equality (Greek, *isotes*; Latin, *aequitas*, *aequalitas*; French, *égalité*; German, *Gleichheit*) is not just a legal issue, as an idea of justice, a principle, or a right. Not least since the French Revolution, equality has also been a political claim, and one of the most controversial ones, oscillating between egalitarianism

Equality

(associated with Marxism or socialism, but also with the welfare state) and anti-egalitarianism (associated with capitalism, (neo)liberalism, but also with a liberal state). In philosophy, equality is a canonical topic with controversies around the meaning of equality, the relation between justice and equality, the material requirements and measure of the ideal of equality (equality of what?), the scope of equality (equality among whom?), and its status within a theory of justice (the value of equality).¹

In law, several notions of equality inform constitutionalism around the globe. Equality is foundational to *the idea of justice*, to law as a form or a mode of regulation, in that the very idea of legal norms implies that they apply to all legal subjects alike. In a sense, equality forms the bedrock of the rule of law and a key component of constitutionalism. This is based on a notion of substantive universal moral equality of all human beings, an embrace of individuality. It was not endorsed by Aristotle or Plato, but has been widely held since the Stoics who emphasized the natural equality of all rational beings. Similar positions can be found in early New Testament Christianity, in the Talmud, and in Islam, as well as in Hobbes,² Locke,³ and (p. 983) Rousseau,⁴ culminating in Kant's moral philosophy.⁵ In Kant's categorical imperative, a recognition of equal freedom for all rational human beings forms the sole principle of fundamental human rights.⁶ This is the idea that many a constitutional preamble alludes to (examples include the United States, India, Egypt, Kenya, etc 'We the people'). It is also the idea of fundamental equality which informs most liberty rights ('everyone has the right').

More recent constitutions not only emphasize *individual*, but also address *collective* notions of belonging which undergrid diversity. This is often the case in postcolonial settings,⁷ as well as in transnational constitutionalism, as in the EU⁸ which rests upon non-discrimination among member state nationals.⁹

In addition, notions of equality also oscillate between *recognition* and *redistribution*, a right to be among equals and a right to an equal share. Constitutional law in fact merges both. Political rights are not only about recognition, but in fact distribute political power, or agency. Similarly, economic rights may appear to redistribute resources, but also regulate recognition in that they not only prevent poverty, but also marginalization (thus, precarization) and social exclusion.

Finally, a constitutional right to equality may address specific *inequalities*, such as privilege or disadvantage, in clauses that prohibit discrimination regarding race, sex, disability, age, etc. It may also target different *spheres of application*, as political equality, equal taxation, equality in education, equal access to employment etc.

To grasp the multiplicity of relevant rules and meanings, I first discuss key equality guarantees in law today. I then focus on different understandings of the right to equality: as either a principle or an individually enforceable claim (the status); as an 'empty idea', a rationality test, or a 'substantive' right (the content); as a right of individuals or for groups (who bears the right?). I next examine equality as categorically distinctly structured as opposed to or as similar to other liberty interests (the test); as a general entitlement or as a specific guarantee to address particular inequalities, either separate

Equality

or intersecting (the inequalities); and as general or specific regarding the application in distinct areas of life (the reach). Finally, I address the often crucial question of whether equality as a fundamental right is directed exclusively against the state, or whether it may also have binding effects on other actors.

I. Key Equality Guarantees

Equality clauses are found at all levels of law, ranging from the Universal Declaration of Human Rights (which promises equality in Articles 1, 2, 7, 10, 16, 21, 23, and 26), numerous provisions in the human rights treaties of the United Nations and of regional systems,¹⁰ (p. 984) to national, subnational, or local and communal constitutions. Equality provisions are also found in statutes and in by-laws of non-state entities, like a private club, a university, or a corporation. As in all multilevel law, equality law does not always amount to a coherent body of norms, but as an instance of legal pluralism, equality law is more or less consistent, sometimes inherently ambivalent and even at times contradictory.

In global human rights law, equality features prominently in all key documents, from the non-binding Universal Declaration to the binding International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as several treaties that address specific inequalities (discussed below). In international customary law, equality is not explicitly guaranteed, although the prohibitions against genocide and against slavery can be understood as targeting the most murderous aspects of a systematic inequality that fly in the face of equal dignity for all human beings. Regional human rights systems guarantee the right to equality.¹¹ The EU Treaty references international human rights law and emphasizes sex equality,¹² while the Charter of Fundamental Rights also addresses distributive aspects of equality.¹³ Also, under the ICCPR, even measures taken in states of emergency may not discriminate, since 'there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances'.¹⁴ Moreover, seemingly all national constitutions feature an equality clause.

While equality is ubiquitous in treaties and constitutions, language differs significantly, as do levels of specificity in defining the meaning and scope of equality. Often, constitutions and treaties guarantee a *general right* to equality. This is phrased as a right to equal treatment, equality before the law or of the law, a principle of non-distinction, and, in more recent texts, non-discrimination, or a combination of these terms and concepts. As an example, in the 2010 Constitution of Kenya, Article 27 ('equality and freedom from discrimination') guarantees equality before the law, equal protection and equal benefit of the law, the equal enjoyment of all rights and fundamental freedoms, equal treatment of and equal opportunities for women and men, and prohibits direct and indirect discrimination. Much more succinctly, the Fourteenth Amendment to the US Constitution,

Equality

adopted in 1868, proclaims that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'.¹⁵

However, even such general clauses *often also institute inequalities*. In section 2, the Fourteenth Amendment to the US Constitution specifies that 'Indians not taxed' will not be represented, and that the right to vote is limited to 'any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States' who has not participated 'in rebellion, or other crime'. Similarly, the French Declaration of the Rights of Man in 1789 did not extend its equality guarantee¹⁶ to women, inspiring an alternative draft by Olympe de Gouges in 1791; also, in spite of lobbying efforts, it did not prohibit slavery. At present, the ICCPR guarantees equality (Art 26), but only prohibits the death penalty regarding persons below age 18 and pregnant women (Art 6(5)) and reserves the right to vote for nationals (Art 25). Also, the non-binding Cairo Declaration on Human Rights in Islam (1990) proclaims a right to equality but, based on a notion of essential difference, also endorses several (p. 985) inequalities otherwise not accepted in human rights law, particularly regarding religion and gender.¹⁷ Similar inequalities are enshrined in the Arab Charter of Human Rights, revised in 2005.¹⁸ Thus, equality may be simultaneously guaranteed *and* limited in constitutional and human rights law; the supreme law of the land may thus promise equality but also entrench inequality and institutionalize discrimination. Some constitutions expressly address this internal tension, as Malaysia in Article 2(2).¹⁹ While equality as a fundamental right is thus ubiquitous, it differs enormously in status, binding force, content, rigor of enforcement or structure, inequalities targeted, and reach.

II. The Status of a Right to Equality

Equality may be guaranteed and interpreted in both constitutional law and human rights law, as either a principle or as a right. This may be explicit in the legal text, but it may also be implied by reference to different procedural options. Whether or not one is able to lodge an individual complaint before a constitutional court or human rights body and to present claims subject to enforcement, can distinguish a right from a principle.

As a *principle*, equality informs the very idea of law as a general norm. Some constitutions command the state to pursue equality, as in the German Basic Law.²⁰ And often, equality informs all other human rights as is expressly stated in clauses that read 'Everyone has the right to ...'. Equality is, then, the 'starting point of all liberties';²¹ it informs all human rights.²² As an example, under Article 14 of the European Convention on Human Rights (ECHR), discrimination is expressly prohibited in relation to one of the substantive rights set forth in the Convention.²³

More specifically, some constitutions feature *distributive notions* of equality. As such, equality is closely linked to social rights (see Chapters 49 and 50), but it is technically

Equality

guaranteed as a principle that informs the interpretation of liberties. Then, a liberty may turn into a right to participate, or a right of equal access, which in fact amounts to a specific equality test (below).

Much more often, equality is guaranteed as a *free-standing human right against discrimination*. In the European human rights system, this move to an independent right was achieved by way of an amendment²⁴ and in court decisions.²⁵ In many constitutions, equality is expressly (p. 986) guaranteed as such. It is an individual right directed against unequal treatment, and more specifically recently, against discrimination. Some constitutions refer to historical disadvantage, like section 15 of the Canadian Charter. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) lists

any distinction, exclusion or restriction ... which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise ... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Legal language thus already points to a variety of concepts that inform the content of a right to equality.

III. The Content of a Right to Equality

Equality has been described as many things, among them an empty idea, a guarantee of rationality, a formal right, a substantive right, and there are discussions contrasting equality of opportunity and equality of results. There is thus no single concept that defines equality as a right, but rather several controversial interpretations of it.

The starting point of all understandings of equality is that equality is not identity or sameness, but that equality implies, based on the moral equality of all human beings, being different but fundamentally similar. However, the focuses of equality theories do shift. Some focus on the claim that all individuals *are* equal, others on the claim that all should be *treated* alike, some ground their arguments in metaphysics, some in politics. In the present context, equality means to not differentiate between individuals in irrational ways, because we are essentially equal. This is a right to equal treatment, derived from a concept of humanity, featured most prominently in Kantian rationality. This symmetrical and formal approach goes back to Aristotle and has been discussed in law as a similarly situated test.²⁶

As such, equality amounts to the *prohibition against arbitrariness*, and thus to an obligation to act rationally. Some philosophers conceptualize equality in that tradition, that is, as a right to rationality,²⁷ a right to justification,²⁸ a right to treatment of persons as equals, with equal concern and respect,²⁹ an 'egalitarian plateau',³⁰ a promise of a deliberative reasoning before something is done. The more we consider a social distinction irrational, the more a right to equality prohibits making that distinction. In the history of equality jurisprudence, the focus on rationality has however served to weaken claims for equal treatment. The weakness of this equality concept derives from the similarity test: the more we understand people or situations to be different, the less we demand equality for them. To name an infamous example, German Nazis relied on this concept to argue that since Jews are not similar to 'Aryans', they could be progressively excluded from the community of Germans, up to the point of mass murder. The (p. 987) US Supreme Court based its endorsement of segregation between 'Blacks' and 'Whites' on a 'separate but equal' doctrine in *Plessy v Ferguson*,³¹ claiming that a separation was not unequal treatment. In the 1954 decision of *Brown v Board of Education*,³² the Supreme Court eventually found that such a differentiation bears the seed of discrimination, such that 'separate educational facilities are inherently unequal'.³³

Even if we would argue that segregation violates human dignity and the right to life, a similarity test generally allows for the exclusion and marginalization of some for being 'different', rather than strive for equality for all. Today, widespread examples are law on pregnancy, and law on abortion. The more one defines these to be unique, dissimilar, or 'different', the more one can justify 'different' treatment, which, in contexts of gender inequality, has the effect of discriminating against women.

Equality

At the other end of the interpretive spectrum, a right to equality may be understood as a prohibition of any distinction, because to distinguish between humans who are essentially the same is irrational. Constitutions may therefore feature a general equal treatment clause, directed against arbitrariness, and specific equality clauses, as rights against discrimination. Examples are Article 3 of the German Basic Law, section 15 of the Canadian Charter of Rights and Freedoms, Article 32 of the Polish Constitution, or Articles 14 to 18 of the Constitution of India. Such specific clauses may then be understood to strictly prohibit any distinction which takes into account a difference that 'doesn't make a difference'. For example, a right to sex equality may then be understood as a right against ever using sex to make a difference (which is discussed as 'degendering' in gender studies). Such an approach would indeed solve many problems of people who do not conform to a rigid sex-gender system, that is, intersexuals or people with a transgender identity. If we do not allow for sex to ever justify a difference, to make a distinction, it would not matter who we are sexually. On the other hand, an overly radical degendering may hinder an adequate understanding of diversity and pluralism, and of sex based inequality as well, that is, if one renders sex-differentiated data on inequality to be problematic. As another example, a concept of equality as a right against distinctions may inform radical secularism or laicity, which prohibits any reference to religion or belief as discriminatory. This may indeed solve problems of marginalized beliefs and non-believers, but it would also produce complicated clashes between a desire to pursue one's spiritual life and a state that does not allow for that to matter (see Chapter 43). Thus, a rule that will not allow for any religiously inspired clothing will affect mainstream Christians much differently than devout Muslim women or orthodox Jewish men. As another example, an understanding of citizenship as radically 'national' and not diverse or pluralistic regarding ethnicity may inform consistent politics of equal treatment, but it may, as in France, also serve to refuse any collection of data that would bring to light discriminatory social structures. Therefore, a symmetrical or a radically 'blind' approach with a focus on distinctions does not allow us to address the complicated cases relating to equality in a pluralist world. Rather, an asymmetrical approach to equality seems fit to address the power relations involved, which lead to injustice in the form of discrimination.

A starting point of constitutionalism is that people are fundamentally equal in that they are human beings (based on metaphysics, or on politics), but the whole point about being human is the ability to differ, by choosing to lead one's own life, in situations that differ tremendously, around the globe, but also within a region, a city, a social entity. This is why a constitutional right to equality is often interpreted as a right to recognition of such diversity. Historically, the (p. 988) focus has shifted from an emphasis on similarity to a recognition of difference, and eventually, dominance.

Then, equality is a claim to diversity *and* a call for equal treatment. This tension has been called by authors like Minow 'a dilemma of difference' in equality law,³⁴ it is a central challenge to politics of multiculturalism and pluralism, to minority rights and other group based privileges (see Chapter 53). Philosophers such as Gosepath have argued that in light of this, equality is not one concept, but a bundle of principles to ensure social

Equality

justice.³⁵ In defining the content of a right to equality, we need to grapple with the fact that a right *against* a distinction does indeed target something a person may *want* to be positively identified with (eg a right to sex equality for people who identify as male or female, a right against disability discrimination for people who want to be recognized as facing specific barriers, a right against ageism for people who identify as old or young). Formal equality may not help us in certain situations where we may need an accommodation of difference.

Equality law may therefore be seen as directed against a difference we care for. Again, this is why it is so important to distinguish between an understanding of equality as a right *of or to* differences and equality as a right *against* discrimination. The challenge is particularly evident in the case of rights against discrimination relating to a disability. Disability is, in a world shaped according to specific standards, a status of non-conformity with that standard, a way of being different. Equality law cannot fight that difference, but needs to accommodate that feature of human diversity, in light of the power relations in play. Thus, human rights law like the UN Convention on the Rights of Persons with Disabilities from 2006 obligates states to respect and accommodate disabled people as equals (Arts 3 and 4). It calls upon us, indeed an obligation, to change the world into a barrier-free environment for all (Arts 5(3), (4) and 9). Equality then means to modify the standards we live with, rather than modify a person who does not 'fit'. Here, equality law becomes a right to transformation, to change the structures and to redistribute power, rather than a right to change oneself to fit in.

In other instances, equality law may have to accept a difference we care for but may be directed at those aspects of that difference which amount to dominance, resulting in disadvantage. Feminist lawyer and theorist MacKinnon has famously rejected the difference approach, and conceptualized the dominance approach to equality. As a substantive right, in this view, equality is a claim to equal treatment in recognition of one's differences: it is the prohibition of a difference amounting to an inequality. Thus, it is not difference but dominance that matters.³⁶ It is called asymmetrical, substantive, or material accommodation of those who are disadvantaged, with a focus on dominance, subordination, discrimination. Here, equality is a right against being hurt, against violating the harm principle of liberal constitutionalism according to which your liberty ends when others suffer.

The substantive approach is dominant in much human rights law.³⁷ Several constitutions explicitly prohibit 'discrimination', and courts are very clear that authorities that engage in or tolerate violence against historically disadvantaged groups or minorities violate a right to equality. The European Court of Human Rights (ECtHR), in *Alekseyev v Russia*,³⁸ stated that lack of police (p. 989) protection for gay rights activists in Russia is a violation of human rights.³⁹ It is, according to the Court, discrimination prohibited by equality law.⁴⁰

Equality

In addition, constitutional law may explicitly name the harm it is meant to stop. For example, the South African Constitution names racism and sexism as inequalities a constitution shall not tolerate.⁴¹ Also, the Canadian Charter of Fundamental Rights and Freedoms, states that

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁴²

In jurisprudence, it is the Canadian Court which articulated this approach in *Andrews v Law Society of British Columbia*.⁴³ Justice McIntyre explained that the similarly situated

test as stated ... is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. ... Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights.

Rather, 'consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application.' Finally, the Justice added, the rights to equality 'are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant.' The Justice went on to define discrimination:

[it] may be described 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. Distinctions 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.

(p. 990) If equality means more than rationality, but rather addresses substantive issues, there are additional questions to answer. A famous controversy addresses the tension between *equality of opportunity* and *equality of results*. In what is closely related to this tension, the Preamble to the Constitution of India promises equality of status and of

Equality

opportunity. In liberal constitutionalism, it is rather obvious that a right to equality cannot mean a right to resources others may aspire to as well, since their liberty interests would be violated, in a discriminatory fashion, if the state were to define who gets what or belongs where. Rather, liberal constitutionalism ensures that opportunities are equal, fairly distributed to all. Based on this, it all depends upon one's understanding of social reality: When do opportunities end and results begin?

Affirmative action or *positive measures* or *quota* are a case in point. Do laws that promote certain individuals who have been discriminated against in the past or who are underrepresented in a particular context violate or implement the right to equality? Does it violate the right to equality if women or members of linguistic minorities or African-Americans or disabled people are given a job instead of an equally qualified man, member of an ethnically defined majority, or a person not physically challenged? Most cases arise in the area of employment, but affirmative measures are also controversial in politics as I discuss below.

Generally, many courts have stated that affirmative action promotes equality, rather than violating it. More specifically, the German Federal Constitutional Court stated in 1992 that 'the provision that men and women shall have equal rights is designed not only to do away with legal norms that base advantages or disadvantages on sex but also to bring about equal opportunity for men and women in the future. Its aim is the equalization of living conditions.'⁴⁴ Also, the South African Constitutional Court stated in *Hugo*,⁴⁵ a complex case brought by fathers that were excluded from being pardoned from a prison term like mothers:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

However, it all depends on the legal scheme chosen in a given context. The European Court of Justice has developed a sophisticated jurisprudence in the area of employment. The Court stated in *Kalanke*⁴⁶ that laws designed to promote women over equally qualified men in male-dominated employment sectors are meant to 'counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures'.⁴⁷ But not every law will do. The Court stated that

a national rule which provides that, where equally qualified men and women are candidates for the same promotion in fields where there are fewer women than

Equality

men at the level of the relevant post, women are automatically to be given priority, involves discrimination on grounds of sex.

(p. 991) In fact, there may be good reasons to prefer an individual man. Affirmative action then needs to guarantee an opportunity, but not an 'automatic' result. Similarly, the Supreme Court of India, in *Uttar Pradesh v Pradip Tandon*,⁴⁸ struck down a rule which reserved places in medical school for candidates from rural areas because it was overbroad. It emphasized, however, that the government may very well design better schemes to promote 'socially and educationally backward classes of citizens'.

In *Marschall*,⁴⁹ the European Court of Justice explained that

it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances. It follows that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may [be consistent with the right to equality] if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world. However, ... such a national measure specifically favouring female candidates cannot guarantee absolute and unconditional priority for women ... [But if the rule] contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.

Put differently, affirmative action rules promote equality if they themselves do not reinforce stereotypes and perpetuate discrimination, not even through the back door of a savings clause.

This is also a key issue in US jurisprudence on affirmative action in education. The end of formal segregation, *Brown v Board of Education*, did not end substantive inequality. In

Equality

particular, US universities have sought to promote minorities and diversify student bodies with a variety of rules which have repeatedly been attacked in the courts. There is a long line of cases decided by the US Supreme Court, the last to date being *Grutter v Bollinger*,⁵⁰ where the Court stated that:

We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. ... This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. ... When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

(p. 992) And then, the Court says: 'context matters'. In the case, Michigan Law School, as part of its goal of 'assembling a class that is both exceptionally academically qualified and broadly diverse', seeks to 'enrol a "critical mass" of minority students'. The Law School's interest, the Court stated,

is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin. That would amount to outright racial balancing, which is patently unconstitutional. ... Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

And, the Court continued, 'These benefits are substantial'. In addition, the Court noted, the Law School did not perpetuate stereotyping:

The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' ... To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.

To achieve this, a system must be narrowly tailored, it cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants'. Instead, a university may consider race or ethnicity only as a "plus" in a particular applicant's file', without 'insulat[ing] the individual from comparison with all other candidates for the available seats'. In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'

More generally, equality also touches on the limits of democracy. Who shall be allowed to be treated like a citizen? Who loses the right to be treated as a citizen? Not only postnational and multilevel democracies have to grapple with political equality, global

Equality

migration has resulted in multinational populations, which also form transnational networks. The German Federal Constitutional Court decided that 'there can be no democratic state without a body politic, ... the people, from whom all state authority emanates', but held that this body must be a 'cohesive, unified group'.⁵¹ Later, the German Basic Law, as many other EU member state laws, was amended to extend local voting rights to EU citizens. However, 'third country nationals' have no vote. In addition, many states do deny voting rights to citizens living permanently abroad, such as Korea.⁵² Today, in light of a post-Westphalian global order, discussions of cosmopolitanism revive calls for a right to political equality. Basically, equality then means to have a resident voice in local matters, independent of nationality. This is not a new notion, since it has been known to the Stoics as well as Erasmus von Rotterdam, to Grotius as well as Kant, and more recently, to philosophers like Rawls, Tilly, Benhabib, Pogge, or Held. But it is, generally, not the law.⁵³

Finally, many conflicts arise when states strive to ensure representation of all factions of society in politics, including minorities. In France, the Constitutional Council rejected (p. 993) minority rules in *Elections in New Caledonia*.⁵⁴ India is known to employ several mechanisms in that realm. In *Murthy et al v India*,⁵⁵ the Supreme Court upheld reserved seats for members of backward classes in local self-government, the panchayats. It used a strict proportionality test, which results in ordering a maximum level of reserved seats, but also leaves room for minority quotas. The Court made a distinction between election and selection:

The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. ... [T]he principles that have been evolved in relation to the reservation policies [there] cannot be readily applied in the context of local self-government. Even when made, they ... can be much shorter.

Socio-economic deprivation, it stated, may result in disadvantages when people are selected for a job, but may not necessarily have such effects when people are elected for a seat. According to this jurisprudence, the right to equality is not a formal claim, but needs to be applied in context. Similarly, the Hong Kong court struck a balance between a strict right to equality in elections, and an equally valid claim to ensure participation of minorities, by referring to international law, the ICCPR. In *Tse Kwan Sang v Pat Heung Rural Cttee*⁵⁶ it stated that even rules that ensure representation of indigenous people need to be non-discriminatory in nature, that is, may not exclude women. In the US case *Santa Clara Pueblo v Martinez*,⁵⁷ that balance however tilted against a woman who sought equal rights in a minority context in the United States and inspired a lasting controversy on the tension between group equality rights and individual ones.⁵⁸ Overall, equality law confronts complicated questions which arise from our multiplicity of belongings today.

IV. The Scope: Who Bears the Right to Equality?

Equality is a right to address the fundamental similarity of human beings as well as the differences among them, to eventually target discrimination. As a fundamental human right, it is a claim for individuals, but equality also invites collective claims, as in the case of Martinez against her Pueblo kinship.⁵⁹ As another example, equality may motivate a state to impose an official language on its territory, but equality will also invite claims by people who identify with another language, as a right to differ. Often, courts then seek a rather pragmatic compromise among competing goals. In Latvia, the Constitutional Court upheld a law which empowered the state to transcribe German last names into Latvian spelling, yet required the state to add a 'special note' with the original name in documents.⁶⁰ But does this solve the tension between a collective entity and the individual?

Famously, Article 27 of the ICCPR addresses rights of minorities, yet is interpreted as an individual right.⁶¹ Also, some national constitutions protect minorities, and constitutional law (p. 994) may also grant rights of recognition and redistribution to corporations or other legal entities. Most prominently, much constitutional law grants rights of self-determination to churches and religious communities, often based on the notion of equal treatment of all religious beliefs. However, such rights, similar to rights of linguistic or cultural minorities, not only serve to protect their existence, but can also be used to curtail the rights of their members in relation to such organizations or groups. A tension arises around 'Minorities within Minorities'⁶² or more precisely: of diverse individuals in seemingly homogenous groups. Such a concept of equal rights for groups assumes that such collectives may be clearly distinguished from one another, and that people always belong to any one group, rather than many. Empirically, this is highly problematic because most groups have boundaries which are both blurred and shifting, and because individuals live different group identities or share multiple group characteristics. Thus, the construction of groups in law, as 'legal groupism',⁶³ collides with a notion of individual rights. In light of this, some argue that there are two aspects of the right to equality: to prevent discrimination and to support minorities.⁶⁴ Others conceptualize equality as an individual right for respect of a socially situated identity, which eventually protects a group as well. In *Santa Clara Pueblo v Martinez*, Justice White argued in his dissent that equality strives to protect individuals from arbitrary and unjust actions, including those of their tribal governments.

V. The Test

Equality

We have seen that a concept of equality as a guarantee of rationality and a right to justification informs a similarly situated test, most famously known as the test applied by the US Supreme Court, but explicitly rejected by Canadian jurisprudence and not applied by the European Court of Justice and others. The more equality is understood as a right against discrimination, the more a test moves away from a comparative exercise and resembles a liberty test, directed against a violation of a fundamental interest or need. In addition, equality allows for an interpretation of liberties as social rights. Thus, there are, in the world of constitutional law, three different tests for equality: a similarity assessment, a discrimination test (a negative 'freedom from' state intervention), or an egalitarian test (a positive 'claim to' access, distribution, resources).

Regarding the *egalitarian test* of equality as a positive claim to something, there are two versions of equality guarantees: as a minimum guarantee of basic resources or as access to resources without discrimination. Many European constitutions contain social or welfare state clauses.⁶⁵ The Hungarian Constitutional Court has interpreted the right to social security—that is, basic economic equality—as a principle only (in Article 70E). Conversely, the German Federal Constitutional Court has famously interpreted the principle of the welfare state in Article 20 of the Basic Law, in conjunction with the right to dignity, Article 1, as an individual right to a minimum guarantee of existence,⁶⁶ an obligation to care for 'those in (p. 995) need', like people with physical or mental handicaps, to secure 'the basic conditions for a dignified existence'.⁶⁷ This may also be understood as a right to basic economic equality: the state must 'provid[e] the basic conditions for a humane existence of its citizens. ... As long as these basic conditions are not at stake, it lies in the discretion of the legislator to what extent social assistance can and is to be granted.'⁶⁸ In contrast, the *discrimination test* serves to protect individuals from the state discriminating against them either explicitly (direct discrimination) or by way of seemingly neutral measures (indirect or disparate impact discrimination). Here, the decisive step is not to compare someone to others, but to understand whether someone has been harmed.

However, equality as a right to *equal access* to liberties may also amount to a constitutional obligation of state action. This is explicit in derivative equality clauses that guarantee equal enjoyment of liberties.⁶⁹ The ECtHR as well as the UN Human Rights Committee have used what could be called the equal access test in cases on sex, sexual orientation, or marital status discrimination in social security.⁷⁰ Another example is the EU law on equal pay for equal work with an elaborate jurisprudence on sex equality regarding remuneration. If the state offers or enforces or protects something, it has to do this for all citizens or even residents alike. Courts do not determine *what* is distributed, but courts ensure that there must be no discrimination in distribution. This has been stated by the ECtHR. In a case of a woman who sought divorce from an abusive husband, but had no money to pay for legal advice, the ECtHR argued:

Equality

fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and there is ... no room to distinguish between acts and omissions. The obligation to secure an effective right of access to the courts falls into this category of duty.⁷¹

However, comparative studies indicate that such positive rights claims are less successful than negative ones.⁷² It should be noted however, that several fundamental rights catalogues of the late twentieth and twenty-first centuries do explicitly set forth rights to social security, to work and to protection against unemployment, to rest and leisure, including periodic holidays with pay, to an adequate standard of living, to education, and to the protection of one's scientific, literary, and artistic production.⁷³ This is often labeled as the rise of a new 'generation' of human rights.

However, the jurisprudence of rights to equal access may be understood as an application of the right to equality to liberties, which eventually informs enforceable social rights. This shatters the categorization of human rights as 'generations', a conceptual frame that follows the history of dominant ideas.⁷⁴ Rather, one may understand both as components of constitutionalism.⁷⁵ (p. 996) The first generation, according to the common narrative, consists of civil and political rights, while the second generation features economic, social, and cultural rights, with a third generation for collective rights to development, sustainability, etc. Yet as a cross-cutting right, equality is a principle that informs the liberties of the first generation, and the defining feature of the second generation, originating in notions of distributive justice, the socialist traditions of the Saint-Simonians of early nineteenth-century France and various emancipatory movements in different regions, at different times, and with different inequalities to struggle against. These movements in fact, just like the current efforts to fight poverty, sought to break free of the chains of inequality, and thus demanded liberties to further that claim. In some ways, a call for equal rights is thus a reaction to a limited concept of liberty, which tolerates or even legitimizes the exploitation of people for profit, be it in colonies or factories. Different from that, one may also understand equality to inform all rights to liberty. Some courts do thus employ equality to safeguard fair contracts, or emphasize that no person can have his or her dignity or enjoy a liberty if economically or socially backward, for example the Indian Supreme Court in *Kesavananda v Kerala*.⁷⁶ The same court stated that 'socio-economic democracy' is built into the Indian constitution, in *Ahmedabad Municipal Co v Nawab Khan et al.*⁷⁷

Overall, equality and the notion of social rights are thus closely related, exemplified in Article 2 of the ICESCR, in Article 26 of the American Convention on Human Rights, and in the African Charter on Human and Peoples' Rights 1981, while granted separately in the European Social Charter (revised in 1996). The close relation is evident in cases on equal access to water, which are currently rather prominent. The South African Court held that not every citizen has a right to the same type of access, but that it must nonetheless install a proportionate scheme which delivers water, in light of limited resources, to all.⁷⁸ Also, equality informs much jurisprudence on health care, since

Equality

unequal access to medical treatment may easily be read to constitute discrimination rather than just a decision on how to distribute social goods. Examples include the *DiBella Treatment* case in India,⁷⁹ in which the International Criminal Court held that there must be equal access to treatment. In Latvia, the Constitutional Court held in 2005 that childcare cannot be limited to parents not working. In Egypt, an Administrative Court stopped a new drug-pricing system, because it would violate the right to equal access to drugs of all Egyptians if prices were not kept low.⁸⁰

VI. The Inequalities

Philosophers tend to ask: Equality 'in what respect'? This is also a key question in law. Constitutions and human rights treaties mostly contain a general equality clause, but very often also name specific inequalities, either separate from each other or intersecting, and either in exhaustive lists or in non-exhaustive lists. Such lists may be seen as naming paradigmatic examples of structural or systemic discrimination, which, if non-exhaustive, do promise equal rights in analogous cases as well.

Historically, the call for equality was a rejection of specific inequalities, and at least a call for justification, and as such a truly modern right. Neither nobility nor place of birth nor religion nor sex nor certain physical features (still termed 'race') shall make a difference, which is what (p. 997) older equality clauses promise. Gradually, sexual orientation, disability and age and genetic features are added to such lists. Furthermore, some constitutions feature the prohibition of discrimination of people from particular regions, like the mountains, which indicates that social deprivation and exclusion may be related to geographic location. However, equality law does usually not prohibit economic inequalities. The US Supreme Court, in *San Antonio Independent School District v Rodriguez*,⁸¹ expressly declined to recognize the poor as a suspect class for equal protection analysis. Also, *DeShaney v Winnebago County Department of Social Services*,⁸² may be understood to hand distributive questions regarding state protection via welfare programs over to 'democratic political processes'.⁸³ However, even in the United States, some state constitutions oblige the legislature to care for the poor.⁸⁴ And again, much law addresses economic discrimination in combining liberty claims with equality to inform rights of access, as social rights (discussed above).

As one prominent example, the South African Constitution from 1996 names racism and sexism as key targets,⁸⁵ and also lists 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth' as specific inequalities the Constitution shall strive to erase. The constitution of Kenya, in 2010, prohibits discrimination 'on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.'⁸⁶ The European Charter of Fundamental Rights, drafted in 2000, prohibits discrimination on 'any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.' The African Charter on Human and Peoples' Rights names 'race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status',⁸⁷ and protects women and children in additional charters.⁸⁸ In the global human rights system, general equality clauses with basic lists have been supplemented with specific conventions that target one inequality at a time, namely racism,⁸⁹ sexism discriminating against women,⁹⁰ ageism

Equality

regarding children,⁹¹ racism and xenophobia regarding migrant laborers,⁹² and ableism/disability.⁹³

Although such lists—either exhaustive or not—seem similar, and imply an analogy of inequalities, there is a tendency to treat inequalities unequally. The German Basic Law emphasizes sex equality in Article 3(2), lists specific aspects which should not amount to privilege or disadvantage in Article 3(3)(1), and provides an affirmative guarantee regarding disability in Article 3(3)(2). Similarly, the UN human rights treaties differ in scope and structure, and often do address sex inequality separately (ie Article 3 of the ICESCR and the ICCPR), but also (p. 998) emphasize that several inequalities often intersect. Discrimination does not focus on one characteristic or ground only, but subordinates individuals in a multidimensional way, where the specific interdependency of sex/ual orientation, ethnicity, ability, age etc matter.⁹⁴

In addition, even ‘classic’ items on the list are controversial. The paradigmatic example is ‘race’, prominent in many constitutions to target racism, yet in itself an expression of a racist theory, a theory which claims that people belong to different races. This has been addressed by the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001, which strongly rejected ‘any doctrine of racial superiority, along with theories which attempt to determine the existence of so-called distinct human races.’

As another example, the meaning of dis/ability is often unclear. Also, the meaning of sex became controversial. While some constitutional jurisprudence treats a right to sex equality to also protect people who love people of the same sex against discrimination,⁹⁵ others treat this as a different topic, either analogous to other listed grounds,⁹⁶ or accepted as a ‘rational’ distinction. The controversy is displayed in a US decision, *Romer v Evans*,⁹⁷ where the majority struck down a state referendum that banned laws that prohibit discrimination against homosexual or bisexual practices or relationships, thus limiting the reach of equal rights, while the dissenters would have upheld such laws which they interpreted as only prohibiting ‘special treatment’ of sexual minorities. Based on a constitution that names sexual orientation as a ground in need of equal rights protection, the South African Court has consistently held that there is no reason whatsoever to disadvantage people because of the sex of the person they love.⁹⁸ But even when such express protection is absent, fundamental rights jurisprudence around the globe gradually extends equality protection to sexual minorities. In *Salgueiro da Silva Mouta v Portugal*,⁹⁹ a gay father was protected against the denial of parenthood because of his sexual orientation. The argument that a child should grow up in a ‘traditional Portuguese family’ was rejected as discriminatory. In 2011, the Brazilian Supreme Court held that all rights granted to ‘stable unions’ must be granted to homosexual and heterosexual relationships alike.¹⁰⁰

Also, some see ‘sex’ as relating to men and women only, while others have used sex equality guarantees to protect transsexuals as well as transgender and intersexuals against discrimination. However, cross-dressing or transvestism has not been accepted as

Equality

such an inequality.¹⁰¹ This is based on an understanding of listed inequalities as characteristics which people cannot choose to live or not live, but that form a component of one's identity. Therefore, many legislators state very clearly that equality regarding sex or sexual orientation does not protect sexual practices that harm others, like sexual abuse of children or pedophilia. Rather, non-harmful sexual practices are protected as part of private life.¹⁰² In light of this, same-sex couples may (p. 999) enjoy family life, *Schalk and Kopf v Austria*,¹⁰³ yet were not granted a human right to be treated like heterosexuals regarding marriage.¹⁰⁴

VII. The Reach

Similar to the differences it underscores in listing specific inequalities, constitutional law like human rights law targets inequalities in different areas of life, thus varying in its reach.

As a starting point of constitutionalism, the basic notion of universal moral equality informs *political equality*, thus democracy, by requiring that a political system equally recognize all those who are governed by it.¹⁰⁵ Here, equality guarantees voice in categorical contrast to regimes which formally distinguish classes of citizens, as in apartheid, colonialism, or caste systems. This is why courts have generally subjected elections to a strict equality standard. Some states strip citizens of voting rights for being imprisoned,¹⁰⁶ while the South African Court extended the right to vote to prisoners, in *August v Electoral Commission*,¹⁰⁷ similar to the Canadian Federal Court of Appeal, in *Sauvé v Canada*.¹⁰⁸ The Canadian Supreme Court, however, also upheld an exclusion from membership in parliament for people convicted of an illegal practice related to voting.¹⁰⁹ The South African Court, although strict regarding prisoners, however upheld an ID requirement to ensure equality in that one person has not more than one vote, even if such requirement imposes an additional burden on people. Although 'the importance of the right to vote is self-evident and can never be overstated', the South African Constitutional Court stated that

the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless, which is why the state may require special IDs because and when the old IDs were issued by the apartheid government on a racial basis and thus 'constitute a powerful symbol and reminder of a shameful past'.¹¹⁰

However, Justice O'Regan dissented: since a large number of voters carried the older ID, one should not disenfranchise them by asking for another form, 'in a country where such a right is only in its infancy'. Formal requirements are different from economic expectations. The US Supreme Court stated that the right to equality in elections is violated by a state 'whenever it makes the affluence of the voter or payment of any fee an electoral standard'.¹¹¹ Nor may local voting rights be tied to property.¹¹² But it remains

Equality

highly controversial whether less direct property-related opportunities to influence elections, like party or campaign funding by corporations, violate the right to political equality. The US Supreme Court upheld such financial power,¹¹³ while many constitutional systems at least require full transparency and often mandate absolute caps or tax deduction caps on such donations.

(p. 1000) Closely related to political equality is equality before the law, as equal access to law enforcement and equal treatment in the legal system. This is why many constitutions feature rights to fair trial, rights to public hearings in court, and rights to access to justice. Again, some courts interpret equality as a right to equal access in fact, that is, a mandate to support poor people who want to bring a case, a public defender system, and similar safeguarding measures.

Another constitutional dimension of equality focuses on distribution, as a right to *socio-economic equality*. As discussed above, this is often constructed as equal access to a liberty, a social dimension of fundamental rights. More specifically, tax law is also very often subjected to rigid yet formal equality standards, in that everyone shall be taxed based on individual economic status. In fact, however, many constitutional courts are regularly confronted with tax measures that disparately burden people in a given society. In addition, several constitutions and all social rights catalogues expressly address equality in employment. As one example, EU law prohibits sex discrimination in pay.

Finally, equality rights may also extend to cultural recognition, a right to *cultural equality*. More recent constitutional and human rights law addresses equal respect in the sense of pluralism in that they guarantee both for equal treatment and non-discrimination but simultaneously affirm diversity, heritage, tradition, and culture. Examples include the Constitutive Act of the African Union, Article 2, as well as Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU). Often, such equality law is guaranteed in the context of education and rights to schools, where constitutional courts may protect minority curricula or institutions. More specifically, many constitutions and human rights treaties take particular care regarding equality of families, in that they guarantee equal rights for children born in or outside marriage, or guarantee a right to equal access to marriage and against forced marriage, often using age as a proxy to indicate that children shall not marry since one cannot know whether it is based on free will, absent coercion. Again, the meaning of fundamental rights has changed significantly. Historically, this has been understood as a right against sex discrimination consisting in not to have daughters married off. While today this remains a key issue, it also needs to be regarded as a right to protect men from forcibly being married to women they do not know.

VIII. The Binding Force of a Right to Equality

Equality

Generally, constitutions limit state power, as do human rights. However, inequalities are often deeply embedded in our societies, which is why a right against discrimination may be rendered ineffective if it is limited to address state action only. Regarding political equality, it may suffice to have a constitutional right to vote and to stand for elections, as in Article 39 of the European Charter of Fundamental Rights, as the relevant domain is exclusively within the purview of the state. But regarding economic, social, and cultural equality, private actors also engage in discrimination, whether intentionally or not. Therefore, although the binding force of fundamental rights to equality is particularly controversial, it is more likely than liberty interests to be expanded to cover private actors. According to the German doctrine of third party effect, constitutional law does at least address public enforcement of private acts. According to EU equality law, private actors, both in employment as in markets of goods and services, are bound by strong equality directives. Also, UN human rights law expressly addresses some inequalities in private spheres, as does CEDAW to protect women in all walks of life. Thus, equality may be more than a negative right against the state, and it may inform a positive obligation of states to act against discrimination.

(p. 1001) In the area of human rights, committees have argued for a state obligation to prevent discrimination by public and by private actors.¹¹⁴ Similarly, some constitutions explicitly extend the binding force of a right to equality to all actors.¹¹⁵ But in most constitutions, equality is simply stated as a right, with no further specification. Then, general standards of constitutional law apply: courts that enforce private law are bound by the constitution, and may thus interpret private action, protected as liberty—that is, of contracting—to be limited when it amounts to discrimination. As an example, the German Federal Constitutional Court has developed a doctrine of ‘disturbed contractual parity’, to stop banks from exploiting naive customers based on rigid credit contracts, or to stop companies from harming former employees in contracts which oblige those to not take up employment close to their former job.¹¹⁶ Here, the general right to equality, in the sense of equal standing and recognition based on equal knowledge and competence is applied to limit an overly libertarian understanding of liberty. Rather, a fundamental right to equality seems to inform a notion of individual rights of socially situated individuals.

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(12) See Arts 2, 3, 15, and 157.

(13) See Ch III on equality, Ch IV on solidarity.

(14) Gen Comment No 29, CCPR/C/21/Rev.1/Add.11.

(15) Section 1.

(16) See Art I: 'Men are born and remain free and equal in rights. Social distinctions can be founded only on the common utility.'

(17) See Art 7, which states that

(a) Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage. (b) The husband is responsible for the maintenance and welfare of the family.

(18) See Art 3(3):

Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favor of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite

Equality

measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.

(19) 'Except as expressly authorized by this Constitution, there shall be no discrimination. ...'

(20) See Art 3(2)(2): 'The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.'

(21) Justice Tanaka, *South West Africa Cases* [1966] ICJ Reports 304.

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(39) Ibid:

77. . . . The Court concludes that the Government failed to carry out an adequate assessment of the risk to the safety of the participants in the events and to public order ...

81. The Court further reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.

(40) Ibid para 109.

(41) South African Constitution, s 1(b).

(42) Section 15, 'Equality Rights'.

(43) [1989] 1 SCR 143.

(44) *Nocturnal Employment Case*, 85 BVerfGE 191 (1992).

(45) 1997 (4) SA 1 (CC).

(46) Case C-450/93 [1995] ECR I-3051.

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- (70) See ECtHR, *Carson and Others*, App no 42184/05, 2010 (Grand Chamber), para 63; General Comment No 18 (37th session, 1989, UN Doc HRI/GEN/1 Rev.3).
- (71) *Airey v Ireland*, 32 ECtHR (Ser A), para 25 (1979).
- (72) See Ran Hirschl, *Towards Juristocracy* (2004/2007), on Canada, New Zealand, South Africa, and Israel.
- (73) Universal Declaration of Human Rights, Arts 22–27; European Charter of Fundamental Rights; Banjul Charter.
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Equality

(74) See Henry J. Steiner, Philip Alston, and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (3rd edn, 2008), Pt A.

(75) Susanne Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 4 *University of Toronto Law Journal* 417.

(76) (1973) Supp SCR 1, 280.

(77) (1996) Supp 7 SCR 548.

(78) *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28.

(79) 1998.

(80) Case No 2457/64 (2010).

(81) 411 US 1 (1973).

(82) 489 US 189 (1989).

(83) *Ibid* 195.

(84) eg Alabama, Kansas, New York, and Oklahoma.

(85) Section 1(b).

(86) Article 27(4).

(87) Article 2.

(88) The Maputo Protocol 2000 and the Charter on Rights of the Child 1990.

(89) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1966).

(90) CEDAW (1976).

(91) Convention on the Rights of the Child (CRC) (1989).

(92) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (1990).

(93) Convention on the Rights of Persons with Disabilities (CRPD) (2006).

(94) Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (2008).

(95) Most famously *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), and ECtHR, *Kozak v Poland*, App no 13102/02, 2 March 2010.

Equality

(96) See the Canadian Supreme Court, *Egan v Canada* [1995] 2 SCR 513: 'The historic disadvantage suffered by homosexuals has been widely recognized and documented'.

(97) 517 US 620 (1996).

(98) See *Minister of Home Affairs v Fourie*, 2006 (1) SA 524 (CC).

(99) ECtHR, App no 33290/96, 1999.

(100) ADI 4277 and ADPF 132.

(101) NL Equal Treatment Commission (Commissie Gelijke Behandeling), Opinion 1996-108.

(102) Under the ECHR, see ECtHR, *Smith and Grady v United Kingdom*, App nos 33985/96 and 33986/96, 1999-VI; *L and V v Austria*, App nos 39392/98 and 39829/98, 9 January 2003.

(103) App no 30141/04, 24 June 2010.

(104) Ibid 62: 'In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another'.

(105) See *Reynolds v Sims* 377 US 533, 561-2 (1964): 'The right of suffrage is a fundamental matter in a free and democratic society'.

(106) See eg US Constitution, Amendment 14.

(107) 1999 (3) SALR 1 (CC).

(108) [1999] 180 DLR (4th) 385.

(109) *Harvey v New Brunswick* [1996] 2 SCR 876.

(110) *New National Party v RSA*, 1999 (3) SALR 191 (CC).

(111) *Harper v Virginia Bd Of Elections* 383 US 663, 666 (1966).

(112) *Kramer v Union School District* 395 US 621 (1969).

(113) *Citizens United v Federal Election Commission* 558 US 50 (2010).

(114) ICCPR, ie *Nahlik v Austria* (608/95).

(115) Kenya, Art 27(5): 'A person shall not discriminate directly or indirectly against another person ... '.

(116) Another example is BVerfG, 1 BvR 12/92 (2001) marriage contract.

Equality

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