

# Locating Equality: from Historical Philosophical Thought to Modern Legal Norms

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## 1) Introduction

It is well recognised that a corollary exists between equality and non-discrimination.<sup>2</sup> In order to understand this nexus, however, the meaning of equality and the characteristics that make it a progressive, universal, moral and legal principle must be explored. Equality remains a quandary in both general and legal philosophy. It has been described as a “treacherously simple concept”,<sup>3</sup> yet a spectrum of opinions exist in respect to the meaning, scope and practical application of equality. Moreover, in public discourse the idea of equality is topical and ubiquitous. Moral philosophy, political rhetoric, legal doctrine as well as common daily usage all adopt different concepts of equality that serve both complementary and competing interests. Such interests infuse the idea of equality and illustrate its many normative and positive forms.

Any attempt to locate the conceptual root of equality needs to be undertaken with a key pragmatic consideration in mind, namely, is it feasible to provide a holistic vision of the overarching idea of equality? For the purposes of this article, however, it is not. Instead, this article locates some of the characteristics that a good vision of equality would contain and maps out the parameters of a legal model which is capable of incorporating these characteristics. This approach will account for the complacencies and inadequacies of the better recognised models of equality and will focus

on what has informed various international and national legal standards.<sup>4</sup>

This article first briefly examines the idea of discrimination, unequal treatment and disadvantaging effects and submits a rationale of employing progressive social mores into national legislative frameworks. Next the article sets out the historical philosophical formulations of the idea of equality. This entails an understanding of how the idea of equality has been perceived within moral and social philosophy and the transformation which it has undergone through different epochs. The fourth section of this article critically analyses the different approaches to implementing the principle of equality into law and identifies the limitations of each model respectively. This section focuses on three versions of equality which appear to be more prevalently incorporated into Western democracies: (i) formal equality, (ii) equality of opportunity, and (iii) equality of outcomes. It is argued that all three versions, as foundations for a legal model of equality, are limited in terms of (a) providing an appropriate moral basis from which equality can be legally protected, and/or (b) meeting the emerging challenges which the living nature of discrimination will inevitably produce. Finally, section five puts forward an alternative model which addresses and accommodates some of these concerns. Supporting arguments are submitted to demonstrate how this model provides a better vehicle for today’s emerging equality issues.

## 2) Discrimination, Unequal Treatment and Disadvantaging Effects

In its ordinary sense, “discrimination” imports the notion of difference.<sup>5</sup> However, as a legal term of art, “discrimination” generally signifies the difference that relates to disadvantaging treatment or effect. Equality laws are often justified as a response to the disadvantage suffered by individuals through discrimination based on ownership of a particular trait or membership of a group carrying a particular trait.<sup>6</sup> Such discrimination can manifest itself in a plethora of forms including direct discrimination, indirect discrimination, incitement to discriminate, harassment or workplace bullying, victimisation, and egregiously 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, all people live in a cultural and social environment formed by past, current and emerging forms of discrimination. Modern social relations have not yet reached a sufficient state where fairness and harmony occur and the right not to be discriminated against can be guaranteed without coercive enforcement. In this sense, the case for legally enforceable equality norms necessary to redress the everyday discrimination meted out by society has been well made.

## 3) Equality: A Historical Perspective

As set out above, this section seeks to identify what the idea of equality is (or has been) within current and historical philosophical frameworks as opposed to describing what equality ought to be. This section thus navi-

gates the philosophical debate describing how equality has been viewed in historical thought and briefly evaluates whether certain characteristics can be identified which will provide valuable direction for modern legal equality norms.

### Confucianism

Confucius’ social philosophy has often been charged with promoting societal difference and inequality. To be sure, its advocacy of the distribution of rights and privileges on the basis of social difference suggests that by modern Western standards of equality, Confucian equality sits oddly. In a historical sense, however, Confucian teaching does have significance for the idea of equality. Modern defenders contend that Confucian philosophy is not at odds with the idea of equality per se but rather, is merely at odds with certain mainstream conceptions of equality.<sup>7</sup> Nuyen, for example, argues that the standard view of equality today is one which stems from Marxist credentials and thus it is itself open to the charge of being unworkable:

“If there is to be equality of outcomes, there will have to be inequality in the distribution of resources, if resources or opportunities are equally distributed, some will make better use of them, if there is to be equality in welfare or happiness, there will have to be inequality in the ranking of preferences.”<sup>8</sup>

Illustrating that equality has many more facets, Nuyen distinguishes between, in his terms, horizontal equality and vertical equality.<sup>9</sup> It is within the sphere of vertical equality that the Confucian contribution to the idea of equality can be located. Confucian vertical equality therefore fits within the idea of equality that those who are unequal are treated unequally – in this sense it is closely connected to Greek formalism.

## The Greeks

For the Greeks the idea of equality was an important principle in their understanding of 'the democratic society' which is closely associated to 20th century conceptions.<sup>10</sup> Thucydides, for example, sets out a progressive interpretation of the idea of equality through the prescription of the ways in which law should operate in a democracy:

"If we look to the laws, they afford equal justice to all in their private differences; if to social standing, advancement in public life falls to reputation for capacity, class consideration not being allowed to interfere with merit; nor again does poverty bar the way – if a man is able to serve the state, he is not hindered by the obscurity of his condition."<sup>11</sup>

The conception put forward by Thucydides suggests that equality is intrinsic to any notion of social justice in which the democratic order is bound. But is the Greek idea of equality and the provision in law unduly bound up within a masculine norm? Passages from Plato's *The Republic* setting out opposing arguments on the equality of the sexes indicates that equality meant something different in respect to men and women.<sup>12</sup> In this narrative, Plato expresses the distinction between men and women, the latter being weaker and less suited to military and gymnastic exercise. Plato concludes that while women's function in democracy can sometimes equate to that of men, they are by nature different and in exigent times, these differences should be accounted for.<sup>13</sup> Plato's position, however, has been criticised by 20th century philosophers for its totalitarianism and promotion of a system in which there is little personal freedom or individual rights.<sup>14</sup>

Likewise, the Aristotelian notion of equality was based on formalism.<sup>15</sup> The procedural

manner in which Aristotle viewed equality is represented in his distinction between numerical and proportional equality.<sup>16</sup> For Aristotle, this distinction is significant as it had important implications for the nature of democracy and democratic justice respectively. In respect of the former, Aristotle states:

"Every citizen it is said, must have equality, and therefore in a democracy the poor have more power than the rich, because there are more of them, and the will of the majority is supreme."<sup>17</sup>

In his conception of democratic justice, however, Aristotle required limits to the principle of equality espoused above, thereby reducing its effectiveness as an egalitarian principle:

"(b)ut democracy and demos in the truest form are based upon the recognised principle of democratic justice, that should count equally; for equality implies that the poor should have no more share in the government than the rich, and should not be the only rulers, but that all should rule equally according to their numbers."<sup>18</sup>

Undoubtedly, the classical Greek idea of equality is still important for various modern conceptions. However, a number of qualities which we would feel confident in ascribing to any modern interpretation are missing from the ideas shared among ancient Greek thinkers. One such characteristic is universality.<sup>19</sup> Equality in the mainstream ancient Greek philosophical sense applied only to citizens of a state.<sup>20</sup> It was not similarly ascribed to foreigners or those who were excluded from Greek political life and consequently, the idea of universal citizenship never developed in this aspect of Greek equality.<sup>21</sup> Any normative value we, therefore, wish to derive from the Greeks of the classical age of Pericles for a modern interpretation of equality appears to

exhaust itself once one looks beyond a formalist or procedural conception.

### **The Development of a Christian Idea of Equality**

The notion of universalism, however, was adopted within the framework of early Christian thought.<sup>22</sup> St Thomas Aquinas, though a millennia into the Christian tradition, continued to develop the idea of universal equality before God. His writings on divine law emphasised a more egalitarian approach to equality whereby everyone is united under the common bond of happiness in which all individuals are directed by God. Aquinas' conception of divine law commands that all be united in mutual love:

“Since man by nature is a social animal, he needs assistance from other men in order to obtain his own end. Now this is most suitably done if men love one another mutually. Hence the law of God, which directs men to their last end, commands us to love one another.”<sup>23</sup>

Divine law and the Christian doctrine break from the Aristotelian notion of equality existing within a democratic order. Nevertheless, the Christian position presupposes that equality is something given by a divine power. Therefore, while the universality approach to equality developed by Christian doctrine further developed the framework of the classical Greek idea, it was in itself subject to the limit and privilege of those who believed in the divine. One limitation this places on a modern notion of equality may be observed in the words of the New Testament:

“Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's.”<sup>24</sup>

This verse illustrates the early Christian thought on equality, where inequality of power, status or wealth on earth was accepted due to the belief that the individual would obtain their true reward in heaven where everybody was equal under God.

### **Natural Law and Equality**

Thomas Hobbes sets out succinctly his vision of equality within natural law theory in *Leviathan*:

“Nature hath made men so equal, in the faculties of body and mind; as that though there be found one man sometimes manifestly stronger in body, or of quicker mind than another; yet when all is reckoned together the difference between man and man is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.”<sup>25</sup>

Hobbes' view of equality suggests that despite the inevitability that individuals are different in respect of individual physical and mental talents, such differences should not by themselves imbue benefits. Conor Gearty has argued that Hobbes' conception of a society, where an absolute ruler is needed to whom we all must sacrifice our freedom so as to be able to survive (a *Leviathan*), has important connotations for the modern idea of equality.<sup>26</sup> Gearty submits that Hobbes' basic premise within *Leviathan* appears to be that where all are equal in natural rights they are able to use their equal natural rights to make choices regarding their participation in society. Furthermore, he argues that the natural law discourse of Hobbes' time created a progressive egalitarian vision of equality which provides direction for modern lawmaking in facilitating 'real' equality.<sup>27</sup>

Hobbes and many other natural law philoso-

phers believed that equality imparted natural rights to individuals on the basis of their humanity. For example, Locke recognised that under natural law, all men were equal in the sense that every man has an equal right to his natural freedom without being subjected to the will or authority of any other man. However, without perceiving any contradiction to his idea of equality in nature, Locke did not suggest that all men were equal in everything:

“I cannot be supposed to understand all sorts of equality. Age or virtue may give men a just precedency. Excellency of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude, or other respects have made it due.”<sup>28</sup>

Further, in the seminal *The Rights of Man*, Thomas Paine reiterates that all men are born equal with equal natural right.<sup>29</sup> This unity of man position ascribes God as the source of such an endowment, wherein the only basis of distinction is that of the sexes.

Natural law shifted the discourse of equality into a rights-based framework that offered increased opportunities for individuals to assert the idea of equality in a political-legal sense. Natural law theorists do not, however, provide a vehicle for the exploration of a more egalitarian vision of equality. Indeed, the Hobbesian conception of equality only ever touches upon egalitarianism and does not take into consideration the socially progressive action required in order to achieve ‘real equality’.<sup>30</sup>

## Marxism

Karl Marx elucidates his view on ‘the equal right’ in, *Criticism of the Gotha Program*. This work, in which he espouses his declaratory

banner, “From each according to his abilities, to each according to his needs!”, sets out a critique of ‘the equal right’ developed by natural law theorists. Here, Marx questions the nature of the equal right and its ability to promote ‘fair distribution’. Exploring its effects on labour, Marx states that the equal right is still restricted by capitalist limitations and accordingly, is still a capitalist right. As individuals are physically or mentally superior to one another, the ‘equal right is unequal right for unequal labor’.<sup>31</sup>

The source of Marx’s frustration with the natural law idea of an equal right is that it recognises the inequality of individual endowment and productive capacity as a natural privilege. Marx subsequently argues that:

“It is, therefore, in its substance, a right of inequality, as is all right.”<sup>32</sup>

Marx’s perspective illuminates the subtle discrimination that can occur within systems if the idea of equality is based on a procedural form which envisages equality as the application of rules. Nevertheless, it is not wholly adequate for modern demands. The problem with Marx’s perspective is its bias for labour and economic goods<sup>33</sup> to the exclusion of other social and cultural needs, and the subsequent demands that his conception of equality would place on individual liberty.

## 4) Equality in Context: Legal Application

American pragmatist, John Dewey contends that equality does indeed have democratic credentials but this should not be mistaken with the belief in an equality of natural endowments:

“All individuals are entitled to equality of treatment by law and its administration....(E)ach one is equally an individual and

entitled to equal opportunity of development of his own capacities, be they large or small in range.”<sup>34</sup>

If Dewey’s contention that the proper place for equality is to facilitate opportunity whereby an individual’s talents can be maximised is valid, it is important to examine how this can best be achieved. Section 2 of this article postulated that certain elements are particularly worthy of integration into a modern approach to legal equality. Universalism, individual freedom, egalitarianism all certainly have strong claims for inclusion into a successful model of equality law. This section aims to analyse and evaluate the models of equality which have been integrated into different legal frameworks and to assess whether these models have sufficiently countered the modern nature of discrimination.

### **Formal Equality and the Traditional Legal Approach**

Equality as formal equality is the common and traditional approach in a broad range of national legal systems.<sup>35</sup> The formal approach employs the concept of equality as a system of formal rules. The idea of formal equality has a clear connection to Aristotle and his dictum that equality meant “things that are alike should be treated alike”.<sup>36</sup> 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.<sup>37</sup>

Equality as formal equality has an important role in the law and policy of many countries with advanced equality norms. For instance, it forms the conceptual basis of the term “direct discrimination” utilised in the UK<sup>38</sup> or the guarantee of ‘equal protection of the laws’ contained in the United States Constitution.<sup>39</sup>

The formal approach asserts 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 merit<sup>40</sup> is to be maintained in a democratic society.

Libertarians further defend formal equality by arguing that it disfavours arbitrary decision-making processes – as when policies or people selectively disadvantage others due to a particular irrelevant trait.<sup>41</sup> 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 a person the opportunity to secure a benefit which they may have otherwise been denied which can reduce psychological injury.

Others suggest that the supposed value of neutrality of formal equality is merely an illusion,<sup>42</sup> 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 including, laws concerning issues that do not relate to choices between groups, such as licensing laws, and laws that appear to be based on prima facie neutral criteria but which subsequently create a disparate impact for certain people. In this way, formal equality, it is argued, confuses more than it clarifies.<sup>43</sup> 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 synergy.

One well-documented drawback of formal equality is that it requires comparison. The comparator<sup>44</sup> 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 of racial discrimination, advocates of formal equality would prescribe 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 overly simplistic, as a basis for an integrated and comprehensive set of equality laws and measures.<sup>45</sup>

### **Equality of Opportunity**

Recent constitutional reforms,<sup>46</sup> increasingly influenced by academic debate, have sought to develop a more sophisticated concept of equality which takes into consideration the richness and variety of modern human relations and the subtle characteristics which can lead to discrimination and disadvantage. The concept of equality of opportunity represents a departure from the traditional legal notion of formal equality and the idea of consistent treatment. It is partly 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 partly based on an individual libertarian model as it seeks to limit the application of full redistributive justice. Certain academics suggest that one weakness of focusing on equality of

outcomes is that it affords too much respect to utilitarianism<sup>47</sup> at the expense of other systems of thought.<sup>48</sup>

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 number of legal systems adopt an equality of opportunity approach. 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.<sup>49</sup>

In practice equality of opportunity is a permissive interpretation of the idea of equality, allowing individuals from traditionally disadvantaged groups to receive special education or training or encouraging them to apply for certain jobs.<sup>50</sup> Equality of opportunity recognises the shallow nature of formal equality and injects a substantive element into its framework.

Nevertheless, it seems the equality of opportunity approach depends as much on the notion of opportunity as on equality. Within the concept's substantive hub, the equality limb refers to equality in its procedural sense. It dictates the rule that there should be an equal starting line in relation to goods such as access to employment. It does not create a framework for aligning starting lines wherever disadvantage and discrimination occurs. Furthermore, the task of equalising starting lines becomes more difficult in spheres where the mechanics for creating opportunities are less well defined. While equalising starting lines for employment include wider advertising of posts and increased training of individuals, creating opportunities to combat unconventional forms of discrimination is a greater task. For example, the ability of the equality

of opportunity approach to combat discrimination against a gay couple seeking adoption<sup>51</sup> remains unproven. On a practical level it does not appear to fit easily into the equality of opportunity approach and such cases may consequently remain outliers to any legal model.

In reality it is the conception of opportunity which gives the concept purpose. Dewey's statement above that "each one is equally an individual and entitled to equal opportunity of development of his own capacities" emphasises this point and illustrates that ultimately, equality becomes lost within a conception that relates more appropriately to social movement. For example, most legal models that have adopted an equality of opportunity approach have focused on providing opportunities in respect of economic goods and to lesser degrees, social goods.<sup>52</sup> The neglect shown to a wide spectrum of the discrimination areas raises further concerns regarding its capacity for universal applicability to all individuals who have suffered discrimination and disadvantage.

### **Equality of Outcomes<sup>53</sup>**

Equality of outcomes is a substantive conception 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 discrimination<sup>54</sup> and affirmative action<sup>55</sup> are just a few which have been put forward to represent this concept. Positive discrimination can be succinctly discerned from the positive action approach of equality of opportunity:

"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."<sup>56</sup>

In many ways the terms describing the equality of outcomes approach have politically controversial interpretations. 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.<sup>57</sup>

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.<sup>58</sup>

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 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

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 their rubrics. It is clear that such issues are inherent to the human rights mainstreaming agenda. Therefore, it is necessary to recognise that treating these 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, this legal conception of equality contributes to combating initiatives and processes which result in the worst cases of disadvantage and discrimination for different groups. However, it remains a politically charged interpretation of equality under which competing economic, social and political interests must be addressed and balanced.

### **5) A Human Rights Approach to Equality**

It has been suggested that equality as a stand-alone principle has little impact on combating substantive disadvantage.<sup>62</sup> Equality's amorphous nature means it is capable of taking on

a range of different interpretations. Similarly, 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 approach wherein equality becomes the vessel for the delivery of more enriching value-laden principles.

A contemporary approach of bringing the equality agenda within a human rights framework has the effect of highlighting other conceptions of equality that purely economic integrationist legal models 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.<sup>63</sup> 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 consideration, dignity, respect or worth as a foundation for equal rights may ensure that equality has universal and egalitarian application. Such conceptions of equality provide a moral basis which is comprehensive in respect to the spheres of society it can penetrate. Moreover, it replaces rationality with dignity as a "trigger of the equality right".<sup>64</sup> 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 or economic materialism. This approach 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, such an approach presents a workable framework to the equality agenda which has the potential to avoid negative political rhetoric which surrounds so much current equality discourse.

Admittedly, any promotion of a human rights approach to equality law cannot repel all the charges that may be laid against it. For example, some would argue that such a model would fail in its ability to create certainty in difficult cases as when the right to equality is countered against other freedoms such as religion or expression. The attraction of the human rights framework, however, is that these difficult questions will be confronted. Integrating equality into a human rights framework will unlock new discourses, legal techniques and problem-solving capacities from which it may not have availed if it were restricted to its adopted economic integrationist legal model. Freedom from these economic integrationist chains will enable equality to engage the human rights framework in a way whereby every caveat of disadvantage and discrimination can be examined and if necessary countered.

## 6) Conclusion

The challenge of translating theory into practice is present in all facets of society. Equality law is neither unique in its inability to escape this challenge nor in its failure to accurately defeat the social issues requiring action. However, equality law can be charged with meet-

ing this challenge in a conceptually erroneous way. If the motivation to implement equality law is to be more than mere rhetoric, its theoretical foundations need to be anchored in more than reactive policy formulation. With in many national legal systems and indeed absent in a great deal more, the theoretical formulation of equality law has, at best, been based on an economic integrationist model which overlooks many other modes and spheres of discrimination and at worst, based on a formal version of equality which has traditionally viewed equality as the procedural application of rules and laws.

This article has shown through a brief overview of the historical and philosophical foundations of the idea of equality that the legal models of formal equality, equality of opportunity or equality of outcome insufficiently account for various facets and caveats of modern discrimination. Similarly, all three of these equality legal models are missing important characteristics which we would be confident a good equality law could include. The implementation of equality law, with the exception of a limited number of national and regional jurisdictions,<sup>65</sup> has been formulated from a perspective which borrowed but has not improved on past historical thought on equality. It is important that just as the philosophical notion of equality has evolved into a more substantive notion under the context of emerging issues, so too must the law. In order to combat these emerging issues, equality as guaranteed by law must reflect the dynamic interpretation set by its theoretical context.

To conclude, the principle of equality has undergone a range of interpretations and its scope of possible interpretation undoubtedly remains vast. Whilst no interpretation can claim to be a categorical truth in the application of the conception of equality, it seems the human rights based approach of 'treatment as

an equal, not equal treatment' provides an excellent philosophical maxim by which equality can be translated into meaningful legal and policy instruments. With such a 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 is anything other than inherent, fundamental and indivisible to human rights.

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<sup>2</sup> 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.

<sup>3</sup> 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](http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf), accessed on 11 March 2008).

<sup>4</sup> 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.

<sup>5</sup> For example, the definition contained within the Collins English Dictionary, states that "discrimination" is "1 unfair treatment of a person, racial group, minority, etc; action based on prejudice 2 subtle appreciation in matters of taste 3 the ability to see fine distinctions and differences", Collins English Dictionary, Sixth edition, HarperCollins Publishers, 2006, p. 450.

<sup>6</sup> Two classical forms of discrimination, direct and indirect, have successfully utilised this argument for justifying their prohibition in law. See, for example, Moreau, S. "What is Discrimination?", Draft Paper, Colloquium in Legal, Political and Social Philosophy, New York University, Fall 2006, available at, <http://www.law.nyu.edu/clppt/program2006/readings/What%20Is%20Discrimination.pdf>, accessed on 11 March 2008; Gardner, J. "Liberals and Unlawful Discrimination", *Oxford Journal of Legal Studies*, Vol. 9, No. 1, 1989, pp. 1-22.

<sup>7</sup> See, for example, Nuyen, A.T. "Confucianism and the Idea of Equality", *Asian Philosophy*, Vol. 11, No. 2, 2001, pp. 61 – 71.

<sup>8</sup> See above, n. 7, p. 67.

<sup>9</sup> Horizontal equality, Nuyen states, is when equals are treated equally, vertical equality is where those deemed unequal are treated unequally.

<sup>10</sup> See Abernethy, George. "Introduction", *Introduction to the Idea of Equality: an Anthology*, John Knox Press, 1959, pp. 15 – 24.

<sup>11</sup> Thucydides. "History of the Peloponnesian War", excerpt in Abernethy, George. "Introduction to the Idea of Equality: an Anthology", John Knox Press, 1959, p. 38.

<sup>12</sup> See Abernethy, George. "Chapter 6, Plato", *Introduction to the Idea of Equality: an Anthology*, John Knox Press, 1959, p. 41 - 48.

<sup>13</sup> "Then let the wives of our guardians strip, for their virtue will be their robe, and let them share in the toils of war and the defence of their country; only in the distribution of labours the lighter are to be assigned to the women, who are the weaker natures". (Plato. "The Republic", see above, n. 12, p. 47.)

<sup>14</sup> See, for example, Popper, Karl. "The Spell of Plato", Volume 1 of *The Open Society and its Enemies*, Routledge & Sons: London, 1945.

<sup>15</sup> Perhaps the most significant representation of this approach is Aristotle's dictum that, "things that are alike should be treated alike", Aristotle, 3 *Ethica Nicomachea*, 112-117, 1131a-1131b, Ackrill, J. L. and Urmsen J. O. (eds.), W. Ross translation, Oxford University Press, 1980.

<sup>16</sup> Where numerical equality refers to equality in number or size and proportional equality refers to equality of ratios.

<sup>17</sup> See Abernethy, George. "Chapter 7, Aristotle", *Introduction to the Idea of Equality: an Anthology*, John Knox Press, 1959, p. 49.

<sup>18</sup> See above, n. 17, p. 50.

<sup>19</sup> Another perhaps is individual over collective freedom.

<sup>20</sup> Similarly, the idea of equality applied at varying degrees within the state.

<sup>21</sup> See above, n. 10, p. 18.

<sup>22</sup> See, for example, Cyprian, from “Ad Demetrianum”, who states: “You yourself exact servitude from your slave and, yourself a man, compel a man to obey you, though you share in the same lot of birth, the same condition of death, like bodily substance, the same mental frame, and by equal right and the same rule come into this world and later leave it.” (In Abernethy, George. “Chapter 12, Cyprian”, Introduction to the Idea of Equality: an Anthology, John Knox Press, 1959, p. 66.)

<sup>23</sup> Aquinas, St. Thomas. “The Summa Contra Gentiles”, in Abernethy, George. “Chapter 16, St. Thomas Aquinas”, Introduction to the Idea of Equality: an Anthology, John Knox Press, 1959, p. 73.

<sup>24</sup> Mathew 22: verse 21, Bible of King James.

<sup>25</sup> Hobbes, Thomas. “Of the Natural Condition of Mankind as Concerning their Felicity and Misery”, Chapter 13 in *Leviathan, or, The Matter Forme and Power of a Commonwealth Ecclesiastical and Civil*, London, Printed for Andrew Crooke, 1651, p. 80.

<sup>26</sup> Gearty, Connor. “Can Human Rights Deliver Real Equality?”, 5th Annual LAG Lecture, 19 November 2007, available at [http://www.conorgearty.co.uk/pdfs/Legal\\_Action\\_group\\_GEARTY2007.pdf](http://www.conorgearty.co.uk/pdfs/Legal_Action_group_GEARTY2007.pdf), accessed on 11 March 2008.

<sup>27</sup> See, for example, the contention of the Levellers that ‘as the laws ought to be equal, so they must be good, and not evidently destructive to the safety and well-being of the people’, in Gearty above, n. 26, p. 6.

<sup>28</sup> Locke, John. “The Second Treatise on Civil Government”, para. 54, in Abernethy, George. “Chapter 33, John Locke”, Introduction to the Idea of Equality: an Anthology, John Knox Press, 1959, p. 134.

<sup>29</sup> Paine, Thomas. “Part the First The Rights of Man”, *The Rights of Man*, 1791, reprinted in Thomas Paine. *Common Sense and the Rights of Man*, London, Phoenix Press, 2000, pp. 63 – 128.

<sup>30</sup> This term has been adopted by Connor Gearty in his lecture, “Can Human Rights Deliver Real Equality?”, see above, n. 26.

<sup>31</sup> See, Marx, Karl. “Criticism of the Gotha Program”, 1875, in “‘The Gotha Program’ by Karl Marx and ‘Did Marx Err?’ by Daniel De Leon”, National Executive Committee, Socialist Labor Party, New York, 1922, p. 30.

<sup>32</sup> See above, n. 31, p. 30.

<sup>33</sup> Marx’s states, “Labor is the source of all wealth and of all civilization.” See above, n. 31, p. 19.

<sup>34</sup> Dewey, John. “Democracy and Educational Administration”, 1937, in Abernethy, George. “Chapter 61, John Dewey”, Introduction to the Idea of Equality: an Anthology, John Knox Press, 1959, p. 254.

<sup>35</sup> 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.

<sup>36</sup> See above, n. 15.

<sup>37</sup> Wesson, Murray. “Equality and Social Rights: an Exploration in Light of the South African Constitution”, Public Law, 2007, p. 751.

<sup>38</sup> See for example, Section 1(1)(a) of the Race Relations Act 1976; Section 1(2)(a) of the Sex Discrimination Act 1975.

<sup>39</sup> Section 1, Fourteenth Amendment to the United States Constitution.

<sup>40</sup> 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.

<sup>41</sup> Brest, Paul. “In Defense of the Antidiscrimination Principle”, *Harvard Law Review*, Vol. 90, 1976, p. 1.

<sup>42</sup> Fiss, Owen. M. “Groups and the Equal Protection Clause”, *Philosophy and Public Affairs*, Vol. 5, 1976, p. 107.

<sup>43</sup> Westen, Peter. “The Empty Idea of Equality”, *Harvard Law Review*, Vol. 95, No. 3, 1982, p. 537.

<sup>44</sup> Which can be either real or hypothetical.

<sup>45</sup> 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 ste-

reotypes 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>, accessed on 11 March 2008).

<sup>46</sup> 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.

<sup>47</sup> 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.

<sup>48</sup> See, for example, Fredman, Sandra. "Discrimination Law", Oxford University Press, Oxford, 2002, p. 14. Similarly, Amartya Sen argues that one problem with such utilitarian equality is its focus on the conception of the social good at the neglect of the fundamental diversity of human beings. See, Sen, A. "Equality of What?", in the Tanner Lecture on Human Values, Cambridge: Cambridge University Press, 1980, pp. 197-220.

<sup>49</sup> Council Directive 2000/78/EC of 27 November 2000, (the Employment Directive), Article 7.

<sup>50</sup> McCrudden, Christopher. "The New Concept of Equality", 2003, (available at:

[http://www.era.int/web/en/resources/5\\_1095\\_2954\\_file\\_en.4194.pdf](http://www.era.int/web/en/resources/5_1095_2954_file_en.4194.pdf), accessed on 11 March 2008).

<sup>51</sup> See, for example, the European Court of Human Rights case of *E.B. v. France* (application no. 43546/02).

<sup>52</sup> For example, the United Kingdom and the EU.

<sup>53</sup> Within this article equality of outcomes and equality or results are used interchangeably to represent the same concept.

<sup>54</sup> The term is used in certain European contexts.

<sup>55</sup> The term is commonly used in the context of the USA.

<sup>56</sup> 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.

<sup>57</sup> 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.

<sup>58</sup> 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](http://www.nio.gov.uk/a_new_beginning_in_policing_in_northern_ireland.pdf), accessed on 11 March 2008).

<sup>59</sup> 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.

<sup>60</sup> See, for example, Parekh, Bhikhu. "A Case for Positive Discrimination" in Hepple, Bob and Erika Szyszczak (eds.) "Discrimination: The Limits of the Law", Mansell Publishing Limited, London, 1992, pp. 261 – 280.

<sup>61</sup> 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.)

<sup>62</sup> Westen, Peter. "The Empty Idea of Equality", *Harvard Law Review*, Vol. 95, No. 3, 1982, p. 537.

<sup>63</sup> Dworkin, Ronald. "Taking Rights Seriously", London, Duckworth, 1977, p. 227.

<sup>64</sup> Fredman, Sandra. "Discrimination Law", Oxford University Press, Oxford, 2002, p. 18.

<sup>65</sup> For example, Canada, South Africa or the European Court of Human Rights system.