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SUBSTANTIVE EQUALITY, SOCIAL ORDERING AND CONSTITUTIONAL RECOGNITION[(1)]

A commitment to substantive equality can now be said to underlie Canada's social ordering. The Supreme Court of Canada has given the concept of substantive equality constitutional legitimacy under section 15 of the *Canadian Charter of Rights and Freedoms*. Here I consider the evolution of substantive equality, the inquiry it demands and how it is reflected in constitutional jurisprudence.

1.*The Evolution of Equality Theory and Practice*

As a manifestation of the basic liberal commitment to a set of fundamental political rights which would accrue to all citizens, equality initially represented an equal claim to political rights which were designed to promote the liberty of all individuals in the society. This view of equality as an exercise of *political* rights was eventually transformed into one which took account of *social* expectations and thus one which distinguished between "natural" distinctions and socially determined or "conventional" distinctions (the interrelated distinctions resulting from how, for example, race, sex and economic status are societally constructed).

Liberalism's individualist commitment to capitalism meant that political equality was compromised by distinctions of wealth even after the erosion of the earlier legal inequality characteristic of previous hierarchical political and economic systems. The recognition that "certain basic capacities and needs are possessed equally by all," as the philosopher, D.D. Raphael phrased it, led (eventually) to a concomitant principle to respond to the inability of everyone to enjoy those needs because of natural inequalities. Some reconciliation between liberalism's equality of opportunity (underlying its economic strand) and the reality of both conventional and natural inequalities was needed. If people were to enjoy commonly recognized needs and were to realize an equal opportunity for self-development which was at the heart of the evolving liberalism, some account must be taken of different needs. At first this principle acknowledged obvious differences. As Raphael points out, everyone needs food, but a diabetic needs insulin; every child needs education, but visually impaired children require "special, more costly facilities." Equal distribution of the means to enjoy basic needs or the equal opportunity for self-development means, therefore, an "equitable, not an arithmetically equal, distribution." On the one hand, one liberal view was that where possible, these disadvantages consequent on "difference" ought to be minimized. On the other hand, to some extent this recognition of "special need" displaced a focus on a more equitable distribution of the goods and services society had to offer to people in general.

To some extent, understanding equality is an exercise in contextualization. Legal equality, social equality, economic equality, moral equality and political equality: while they overlap and influence each other, as a practical matter, movement towards them does not always keep pace. What does it mean to speak of being "politically equal," for example? All citizens have one vote; yet not everyone has the same access to resources to influence the political system. Each person is equal under the law; yet not everyone has the same resources with respect to access to the law. While there is a

belief that the law should be available to everyone and there are programs in place to assist in providing access, the result is far from equal access. It is obvious--so much so that it is trite to say--that economic inequality can influence the realization of political and legal equality. These apparent "contradictions" are consistent with the liberal understanding of equality which attempts to accommodate both a social or moral equality with an economic individualism.

Nevertheless, one of the great on-going claims (and to a lesser degree triumphs) of the liberal ethos is the formative role that the concept of equality has played in modern societies. Greek society, feudal systems, the periods of slavery and then segregation in the southern United States, apartheid South Africa or Canada's reserve system: these were or are systems organized around exclusion based on difference. They all assume a norm against which "others" are compared. In contrast, liberalism has in the past hundred years or so increasingly, although not always unambiguously, promoted the possibility of social or economic mobility and the inclusion of all members of society within the legal system. Certainly this was breaking down prior to the beginning of the twentieth century; equally certainly it has not been broken down yet as we enter the twenty-first and the elimination of inequality of social and legal status, as in the case of Aboriginal peoples, appears a daunting challenge to the efficacy of substantive equality theory.

Similarly, competing political views of the common good and the marks of common citizenship struggle constantly within liberal theory. Liberal states experience a tension between the commitment to liberty, the freedom to pursue one's own good without interference from government, and the commitment to equality which may require government interference to attain. As a result the process of extending equality is not linear; nor is there universal agreement on the goal or the means. For example, Canada has experienced a heightened sense of individualism and conservatism in recent years. This process of retrenchment has occurred simultaneously with an increasingly broad judicial interpretation of the *explicit* guarantee of equality in the Charter. Despite this unevenness, liberal societies have increasingly defined themselves as pluralist societies, defined by a mix of differences based on an ever increasing list of characteristics. It is the elimination of barriers facing persons because of particular characteristics and the corresponding need to acknowledge the legitimacy of differences, to engage in the "affirmation" of difference, which characterize liberal equality more than the explicit elimination of economic difference.

Developing the Content of Substantive Equality

The importance of equality as a social, legal and political value in Canadian society has been acknowledged in many ways since Confederation, in statutes, official policies and practices and judicial interpretation. Canada purports to place a high value on reducing the disadvantage consequent on conventional inequality. Because of the impact of policy and law, it is present in private contexts, as well. The parameters framing equality have expanded, however, as the concept has become more complex and sophisticated. Emphasis on similar treatment, the virtue of formal equality, still has its place, but it is no longer sufficient. We might think of the difference between formal and substantive equality in this way: although they both address the goal of eliminating the gap between the powerful and the powerless or between the rich and the poor, formal equality does so by curtailing the power of the rich (by requiring that they have no special privilege before the

law), substantive equality does so by curtailing the disadvantage of the poor.

It has only been a decade and a half since the Supreme Court recognized that discrimination does not need to be direct or overt, but may occur because ostensibly neutral laws or practices have a disparate impact on particular groups. Yet it has now begun to transcend that artificial distinction. In the 1999 *Meiorin* case (brought under British Columbia's *Human Rights Act*), the Government required forest firefighters to meet an aerobics standard which most women could not meet; although the same test applied to everyone, it had a disparate impact on women. Since meeting the standard was unnecessary for safety and efficiency, the standard was discriminatory. More significantly, the Supreme Court decided in this case that the distinction between direct and adverse impact discrimination was detrimental to achieving equality. Rather, the focus should be on the *effect* of the law or policy, as it is under section 15 of the Charter. While this is a more difficult inquiry in some respects, it is also one which more closely approaches the harm of inequality: its exclusionary impact with its suggestion that excluded are less worthy members of society than are those who have defined the parameters of inclusion.

Law has now explicitly incorporated the necessity for different treatment for the achievement of equality into the first stage of the test under section 15 of the Charter. This question ("do we need to treat people different in order to achieve equality?") has enormous implications for how society is structured and poses serious challenges to our self-perception. For example, as Justice Sopinka said in the *Eaton* case, claims based on disability compel us to question how "the mainstream" has constructed society.

Feminist and 'critical race theorists' arguments that the equality analysis must incorporate the intersection of grounds has also been acknowledged (albeit in passing) by the Supreme Court in *Law*. It and the need to unpack the ostensible homogeneity of groups widely acknowledged to be "disadvantaged" force us to recognize the implicit assumptions lurking within the concept of equality itself. In *Corbiere*, the Supreme Court of Canada held that the requirement in the *Indian Act* that voters in band elections be "ordinarily resident" on the reserve contravened the equality of off-reserve band members, not only because they are affected by band council decisions, but also because it leaves the impression that they are more assimilated than are on-reserve members of the band. Although most of the equality cases have involved (in rough terms) a minority-majority comparison, *Corbiere* involved a comparison between members of a disadvantaged group, highlighting the relative nature of inequality.

We may contrast the Court's assessment in *Corbiere* with its decision in *Lovelace*. In *Lovelace* the Court ruled that section 15 of the Charter was not contravened by excluding non-registered aboriginal groups from the profits of a casino project between the Ontario government and registered bands, even though there was no dispute that the non-registered bands were generally at a greater economic disadvantage. Relative disadvantage is not the issue, but rather whether the distinction is, among other factors, a function of stereotyping. While in many respects the Supreme Court's equality analysis has been developing a more fluid and contextual approach, *Lovelace* hints at a retrenchment which will require complainants to satisfy a "checklist" of criteria to determine whether their dignity has been undermined.

These developments reflect the core element of contemporary substantive equality, the recognition of difference instead of homogeneity. But it requires more than recognition, for neutrality is not consistent with an honest commitment to a pluralist society. By not intervening, the state can become complicit in perpetuating disadvantage. As John Kane has said,"the affirmatively multicultural society not only permits but actively encourages and assists different cultures to preserve their separate identities as best they can." This notion of affirmation, developed by Joseph Raz, underlies the concept and practice of substantive equality. It describes in a fundamental way the structure of society and the interrelationships among communities within it. As federalism describes an important manifestation of the institutional structuring of Canada, so substantive equality describes an important manifestation of the human structuring of Canada.

Thus substantive equality has the potential to move Canada to the kind of "just form of Constitution" which James Tully contrasts with the "neutral" Constitution still predominant and consistent with liberalism's earlier "neutrality" on the question of difference. I would argue, moreover, that the Canadian Constitution, through judicial interpretation, has gradually been moving beyond this "neutrality" towards "the full mutual recognition of the different cultures of its citizens," a process which is not only compatible with a substantive equality principle, but is aided by it.

The Process of "Finding" Substantive Equality

The substantive equality inquiry is a "dialogue" about the nature of a society through the legal lens. Thus, in the words of James Tully, "culturally diverse sovereign citizens of contemporary societies negotiate agreements on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity."

Equality claims, in essence, are about being treated with dignity and respect. We can expect them at times to be contradictory. To reconcile these conflicts judges will have to make choices, taking into account explicit constitutional guarantees, unwritten constitutional norms, and legislative preferences. Legislative preference will be particularly relevant in cases where there are a number of alternative policies which can meet constitutional standards.

A fully realized substantive equality concept requires an appreciation of the flexibility and overlapping nature of identity and of the distinction between an externally imposed and an internally derived identity. As Nitya Iyer has pointed out, the need to "categorize" the basis of the inequality as falling within recognized grounds makes it difficult to view inequality in the more complex way required by the intersecting identities to which I have previously referred. Substantive equality recognizes that "the self is a text with a multitude of discourses," in the phrase of M.M. Slaughter. Human rights discourse has not traditionally accommodated this multiple and dynamic self well. It has been only recently (in theory in *Law* and to some extent in practice in *Corbiere*) that the Supreme Court has explicitly acknowledged this fundamental reality.

What are the implications of "taking account of difference"? The first is to recognize the legitimacy of different views or approaches, needs or experiences. The mainstream or dominant view is not necessarily the only view and the goals which the mainstream or dominant group seek are not

necessarily those sought by non-dominant members of society. Substantive equality acknowledges that mainstream ("majority" or "dominant") values, institutions and experiences are not always the appropriate way to organize the society or to organize it for all its members. Substantive equality is, in large measure, about disassembling the norm. Even so, the concept of equality may not be seen as a worthwhile goal by some communities, as Mary Ellen Turpel-Lafond has said with respect to many First Nations women. Furthermore, the experience of some members of society is often at odds with that of others: how one perceives the police, groups of men walking down the street, an emphasis on abortion rights rather than on the right to give birth, a flight of steps and myriad other situations will often seem to reflect a world different from how someone else experiences and perceives these situations. But all are reflective of the fact that in our heterogeneous societies one person's "truth" may be omitted from someone else's truth or indeed may be someone else's "lie." Reconciling conflicts judicially, we have been warned, will not be easy. Important though substantive equality is, it will not automatically "trump" other "rights," as the Supreme Court made clear in *Trinity Western University* v. *British Columbia College of Teachers* (2001) in which it resolved a conflict between religious freedom and equality by concluding that holding religious beliefs reflecting inequality is not discriminatory, while acting on them may be.

In short, the meaning of equality is in part a revealing of inequality which has been hidden because we have approached the inquiry (is there inequality here?) from a particular point of view. Thus the inquiry necessary to determine whether there is substantive inequality must be undertaken from more than one viewpoint. As those responsible for determining whether inequality exists and what is required to replace it with equality, judges must be prepared, as Mari Matsuda maintains, to "ask the other question" which "forces us to look for both the obvious and non-obvious relationships of domination." In *Corbiere*, for example, unpacking the undifferentiated category of off-reserve members to highlight gender reveals the internal complexities of the off-reserve/reserve comparison. While many band members or their foreparents were required to make difficult choices, such as whether to obtain an education or retain status, a significant number of those who lived off-reserve were women who had lost status because they had married non-Indian men. Many of them had not been able to return to the reserve, even after the *Indian Act* had been amended to remove the discriminatory provision responsible for their loss of status, because some band councils (now given the responsibility to decide whether the women or their children should be readmitted) refused to accept them. Understanding the impact of off-reserve status requires not only a consideration of how reserve and off-reserve band members are affected, but a gendered analysis of the reasons for exclusion.

Current inequality is a consequence of the interplay of historical practice, existing norms and the detritus of apparently outdated norms, deep-seated ideological assumptions and the failure to take adequate measures to overcome recognized disadvantages. The inquiry raised by claims of substantive inequality therefore requires asking what it is about societal structures, existing norms and ideological assumptions which results in inequality and what must be changed in order to achieve equality. The process of constructing an identity for one group by another -- attributing characteristics and behaviours as oppositional to how the constructing group sees itself -- includes treating those constructed attributes as natural and therefore a legitimate basis for unequal treatment. These unstated attributions must be revealed. While necessary, however, as Roxanna Ng explains,

this analysis on its own fails to capture the need to treat "ethnicity/race, gender, and class . . . as social relations which have to do with how people relate to each other through productive and reproductive activities." Equality is a relational concept which derives from the way in which societal structures have governed those relations. Thus an important part of the process is moving beyond the other-constructed, the identity revealed through the gaze of the other, to the meaning of identity developed internally, as well as recognizing that any internal identity will contain its own tensions.

The test of whether persons are being treated equally is whether they are being treated as if they are of equal moral worth, recognizing that equal moral worth may mean that it will be necessary to treat people differently from each other in order to respect their specific needs and experiences. There is no easy formula which can be applied to every circumstance but rather a process which the courts are able to apply to the particular context and persons involved. Accordingly, any substantive equality assessment must be grounded in actual experience; furthermore, the persons for whom it is a reality must have a means to communicate that experience to decision-makers. The most successful communication will be in their own "language," defined broadly, although this is not always possible. "Hearing from the complainant about his or her own experience" and "questioning one's own assumptions" reveal alternatives to the dominant view. As Tully explains, "negotiations over cultural recognition" is not expected to result in universal principles, but to establish "a form of association that accommodates their differences in appropriate institutions and their similarities in shared institutions." In negotiating, we cannot forget that it may be the existing system which must change.

The reality of cultural identity includes experiences which are differentiated on the basis of sex, race, sexuality, class, ability and other characteristics. There is, however, a tension between these differing experiences both among "groups" or "communities" which share characteristics and within individuals who consider themselves members of or are "allocated to" a number of communities simultaneously. The exploration of identity and of integration of identity into political, social and legal practice, explains Tully, is ongoing:

> Cultures . . . are continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others. The identity, and so the meaning, of any culture is thus aspectival rather than essential: like many complex human phenomena, such as language and games, cultural identity changes as it is approached from different paths and a variety of aspects come into view. Cultural diversity is a tangled labyrinth of intertwining cultural differences *and* similarities, not a panopticon of fixed, independent and incommensurable worldviews in which we are either prisoners or cosmopolitan spectators in the central tower.

The inquiry into whether individuals or groups are experiencing substantive inequality in a particular context demands a complex assessment. It will ask how the equality needs of different people relate to each other. In a pluralist society there will inevitably be differing views of what it means to be equal as part of the more general project of different views of the "good society." The inquiry cannot assume one view, but neither can it be without moral (some might prefer "political") compass. The values which govern this process and the meaning of substantive equality are not immune from criticism or change, but neither are they without some significant grounding in a more comprehensive understanding of how people are to be treated and how they are expected to treat

each other.

In sum, substantive equality requires consideration of the impact of government policy and decisions on the various communities subject to them. That, in turn, requires a determination of how decisions affect members of society because of unexamined beliefs about their needs, behaviours and experiences. Substantive equality will require addressing omissions (what needs to be added to satisfy substantive equality?) and commissions (what needs to be removed to achieve substantive equality?). This is unlike formal equality which ensures that everyone is subject to the law and that everyone is treated in the same way. The characteristics which signal a reason to consider the impact of policy are not static categories, however, and are not meant to suggest a society divided into isolated groups whose members are seeking their predominant identity, but rather a society whose members' alignments or interests may differ from time to time. These tend to be the characteristics which underlie people's experiences in life, how they are treated by others and their access to society's goods and benefits. In a broader sense, however, the objective is to ensure that policy-making treats people with equal dignity and respect, recognizing that it must be manifested in different ways in light of the fact that people are differently situated.

1. Dean of Law, University of Calgary. Written for this text, based on and incorporating portions of Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle"(1999), 22 Dalhousie L.J. 5 (footnotes omitted).