



# Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India

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# Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India

European Network of Legal Experts in the non-discrimination field  
Written by Sandra Fredman

**European Commission**  
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Daan | 1986

# Executive Summary

The aim of this study is to compare and contrast anti-discrimination and equality laws in the US, Canada, South Africa and India, with a view to inform future development of EU anti-discrimination laws. Comparative law is of great value, particularly in the equality field, where there is increasing cross-pollination across different jurisdictions. At the same time, comparative law carries with it important challenges, as the harmonising project of the EU has itself demonstrated. The four jurisdictions to be examined here share English as a common language as well as, in varying degrees, a common law heritage.<sup>1</sup> However, there are significant differences in historical, socio-economic and political contexts as well as in legal institutions. The challenge is therefore to illuminate universalisable conceptions while at the same time recognising context specificity.

The study begins with a brief description of the historical and social context of each of the jurisdictions. US equality law has been fundamentally influenced by its history of slavery; Indian law by the heritage of caste; South Africa by the need to heal the wounds of apartheid; and Canada by its linguistic and First Nation minorities. This section provides a brief sketch of the development of equality law in each of these jurisdictions.

Part II considers sources of equality law. All four jurisdictions include an equality guarantee in their Constitutions. The oldest and most open-textured is the Fourteenth Amendment in the US Constitution, adopted in 1870 after the Civil War and the victory of the non-slave owning North. This provision has been emulated and expanded upon in the more recent Constitutions of India, Canada and South Africa. Thus Article 14 of the Indian Constitution, drafted between 1947 and 1949 for the newly independent India, derives directly from the Fourteenth Amendment of the US Constitution. At the same time, the Indian Constitution further augments the broad equality right by more specific anti-discrimination guarantees in Articles 15 and 16, and an express mandate for affirmative action. The Canadian Charter of Rights and Freedoms, adopted in 1982, was specifically drafted to improve and strengthen older and less effective versions, incorporating not just the right to equality before and under the law, but also the right to the equal benefit of the law. Like the Indian and South African Constitutions, it expressly permits affirmative action. Most recent is the South African Constitution, drafted to 'heal the wounds of apartheid'. As well as including a general equality guarantee, a specific anti-discrimination provision, and express authorisation for affirmative action provisions, it also introduces the idea of 'unfair discrimination' and considerably lengthens the list of protected characteristics.

As well as the constitutional guarantees, each of these jurisdictions has statutory protection against discrimination. This report looks only at federal legislation, bearing in mind that this leaves out of account an important layer of protection at state or provincial level. The most important source of statutory protection in the US at federal level is Title VII of the Civil Rights Act of 1964, which prohibits discrimination on specified grounds in employment and access to public services. The US also has specific statutes prohibiting discrimination against older workers and people with disabilities and a highly developed contract compliance regime. The most important human rights statute at the federal level in Canada is the Canadian Human Rights Act, which proscribes discrimination in employment and in the delivery of goods and services. There is no comprehensive anti-discrimination statute in India, although there are laws that address specific aspects related to equality. Instead, the primary focus has been on the issue of reservation in public employment and education. Nevertheless, there are several moves currently afoot to create new legislation on disability and sexual harassment as well as an equal opportunity commission. South

<sup>1</sup> Under the common law system, which prevails in England, the US and other countries previously colonised by England, judges can develop the law on a case by case basis. Common law courts have authority to make law where no legislative statute exists, and to give meaning to legislation. Judges base their decisions on prior judicial pronouncements (or precedents): a court's decision is binding authority for similar cases decided by courts of the same or lower rank. This contrasts with the civil law system, which predominates in Europe, where cases must be decided according to codified law. Judicial precedent is given less weight and scholarly texts have more influence than in common law systems.

Africa, by contrast, has two comprehensive anti-discrimination statutes, one for employment (the Employment Equity Act) and one for non-employment issues (the Promotion of Equality and Prevention of Discrimination Act).

All four jurisdictions have signed and ratified the International Convention on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). All have signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), and the recently agreed Disability Convention, but, while India, South Africa and Canada have also ratified these Conventions, the US has not. Neither the US nor, surprisingly, South Africa has ratified the ICESCR, while both India and Canada have. All these jurisdictions have dual systems of international law, which means that legislation is needed to bring international conventions into effect. Although all have indirect effect, they are much more influential in practice in South Africa, Canada and India than in the US.

Part III of this report considers the protected characteristics or grounds in each jurisdiction. The Fourteenth Amendment of the US Constitution is entirely open-ended, leaving it to the courts to determine which grounds should be protected. To do so, the US Supreme Court has developed a three tier framework of scrutiny, with strictest scrutiny applying to race and alienage, and intermediate scrutiny to gender. Other grounds are subjected only to the most lenient or rational basis scrutiny. This contrasts with the Canadian and South African approaches, which include a wide-ranging list of grounds, but allow courts to expand them to include analogous grounds. The Indian Constitution has a fixed list of grounds, but very recently, the Delhi High Court has drawn on Canadian and South African jurisprudence to hold that these can be expanded.

There is a growing convergence between the grounds protected by different jurisdictions, but each jurisdiction still reflects its own social context. As we have seen, in the US, under the Fourteenth Amendment, race and alienage have been the main focus of protection, with gender coming after. However, at a statutory level, Title VII protection extends to race, colour, religion, sex, or national origin, while older people and disability are covered by separate statutes. Sexual orientation is not mentioned. The Indian Constitution covers 'religion, race, caste, sex, place of birth or any of them'. While this is unique in covering caste, notably absent from this list are disability, sexual orientation and age. Nevertheless, in the seminal case of *Naz Foundation*, the Delhi High Court held that the Indian Penal Code breached the constitutional equality guarantee insofar as it criminalised consensual sexual acts of adults in private. Section 15 of the Canadian Charter specifies 'race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. This list includes both age and disability, but excludes sexual orientation. Nevertheless, the inclusion of the words 'in particular' has allowed the Canadian Court to extrapolate this list to include unenumerated or analogous grounds. Most important among these have been citizenship,<sup>2</sup> sexual orientation<sup>3</sup> and the combination of aboriginality and residence.<sup>4</sup> At statutory level, an even wider range of grounds is covered, including race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. Discrimination on grounds of pregnancy or child-birth is deemed to be on the ground of sex.

The South African Constitution contains the most wide ranging list of expressly prohibited grounds. Section 9 of the Constitution specifies 16 prohibited grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The express mention of sexual orientation contrasts with the other Constitutions, and has been relied on in a fruitful set of cases which systematically outlawed sexual orientation discrimination. The South African statutes cover the same range of grounds, with the further possibility of extension to include HIV/AIDS status, socio-economic status, nationality, family responsibility and family status.

<sup>2</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Supreme Court of Canada).

<sup>3</sup> *Egan v Canada* [1995] 2 SCR 513 (Canadian Supreme Court); *Vriend v Alberta* [1998] 1 SCR 493 (Supreme Court of Canada).

<sup>4</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (Supreme Court of Canada).



The report also briefly considers intersectionality. It is now accepted by US courts that black women constitute a distinct subgroup. However, it has been held that cumulative discrimination should be restricted to a combination of only two of the grounds (the 'sex plus' approach). This can be compared to the much more flexible approach of the South African Constitutional Court. The problem of intersectionality has been given the most active attention by the Supreme Court of Canada whereas India has retained an approach which views identity in single water-tight compartments.

Part IV of the report examines the coverage of equality laws. Different jurisdictions delineate the coverage of discrimination law in distinctive ways. At constitutional level, coverage generally extends to all governmental actions, although in federal systems, the limitations of federal power need to be born in mind. Since statutes bind private parties, it is often thought necessary to limit their coverage, usually to employment, education and access to publicly available goods and service.

Part V considers who is bound by equality guarantees. Human rights at constitutional level are generally considered to bind only the State. This is true for the constitutional guarantees in the USA, Canada and India. However, in the US and Canada, courts are themselves bound by the equality guarantee. This means that they are required to interpret the common law in the light of the equality guarantee, thus potentially binding private parties, for example in contractual relations. Only in South Africa is there an express commitment to the horizontal application of the Constitution. In India, the only provision that binds both the public and private sector is Article 17, which outlaws untouchability. Nevertheless, in the *Naz Foundation* case, the Delhi High Court found that Article 15(2) incorporates the notion of horizontal application of rights. Statutory provisions tend to bind private parties.

Part VI of the report considers definitions of equality. In all four jurisdictions, there has been an important recognition that equality means more than treating likes alike. Instead, courts have developed conceptions of substantive equality using a range of formulations such as disparate impact, indirect discrimination, systemic discrimination, and unfair discrimination. These developments have to some extent been mirrored in legislation, often in more specific form. However, this development has been far from even.

The concept of disparate impact was first shaped by the US Supreme Court in the pioneering US case of *Griggs v Duke Power*.<sup>5</sup> As Burger CJ put it: 'The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'<sup>6</sup> However, whereas intention is not required in a Title VII claim, plaintiffs are required to prove that the government intended to discriminate in order to prove a breach of the Fourteenth Amendment. Recent dicta suggest that the US Supreme Court is taking an even more restrictive approach.

The Supreme Court of Canada, by contrast, has been progressively developing a conception of substantive equality, which it has refined over the years. The Canadian Court has found little difficulty in developing the constitutional equality guarantee in the direction of adverse impact discrimination. However, it has been loath to draw a rigid distinction between direct and indirect discrimination.

Consistently with the general transformative approach of the South African Constitution, the interpretation of the equality guarantee in Section 9 was from the start expressly substantive. Similarly, the South African Constitutional Court has readily defined a conception of indirect discrimination. The concept of substantive equality has been developed very differently in India. The need to give positive preference to disadvantaged groups in the form of reservations has always been regarded as an essential element of equality, rather than as a breach or even an exception. The Indian conception is therefore clearly substantive. However, until recently, there has been almost no development of a concept of indirect discrimination equivalent to that in the US, Canada or South Africa.

<sup>5</sup> *Griggs v Duke Power Co.* 401 US 424, 91 S Ct 849 (1971) (US Supreme Court).

<sup>6</sup> *Ibid.* at 431.

Susanne | 2006

An increasingly important aspect of substantive equality is the requirement of reasonable accommodation. Although the concept is generally associated with disability discrimination, in the US it also applies for religious purposes. An employer is required to make 'reasonable accommodations' to the religious needs of its employees, short of 'undue hardship'.<sup>7</sup> Similarly, in Canada, the duty has its origins in religious discrimination, but now extends to all prohibited grounds of discrimination. In South Africa too, in the constitutional context, the duty of reasonable accommodation has been primarily developed in the context of religion,<sup>8</sup> but in its statutory form it extends into employment and non-employment issues.

However, not all practices can be reasonably accommodated. Balancing the needs of the individual and those of society has been debated in several courts, and different positions have been taken. While the term 'undue hardship' is used in both the US and Canada, the US Supreme Court has held that employers need only incur 'a *de minimis* cost' in order to accommodate an individual's religion,<sup>9</sup> whilst the Canadian Supreme Court has stressed that more than mere negligible effort is required. The South African Court, which has cited both approaches, has preferred the latter position. In India an express duty of reasonable accommodation is underdeveloped. However, the proposed Rights of Persons with Disabilities Bill 2011 includes a duty to make reasonable accommodation for people with disabilities.

All four jurisdictions now include harassment within their anti-discrimination framework. Both 'quid pro quo' (where employment or academic benefits, such as promotion, places at university or grades, are conditional on an employee or student's submission to sexual advances) and 'hostile environment' sex discrimination are actionable under Title VII, although the latter though the latter requires harassment that is severe or pervasive. The US Supreme Court has held that an employer can be liable for both kinds of sexual harassment, but made it relatively easy for the employer to mount a defence. Drawing directly on US jurisprudence, the Supreme Court of Canada has similarly affirmed that sexual harassment is a form of sex discrimination. Here employers should be liable for all acts of their employees 'in the course of employment', interpreted broadly. Developments in India in relation to sexual harassment have been dramatic. In the 1997 *Vishaka* case, the Supreme Court held that sexual harassment in the workplace violated women's rights to equality. The Court framed guidelines on sexual harassment in the workplace and declared the guidelines as the law of the land until the legislature took further action. It was not, however, until 2010 that the Protection of Women Against Sexual Harassment at Workplace Bill was presented to the Indian Parliament. In South Africa, the situation is much clearer. The Employment Equity Act states that harassment is a form of unfair discrimination and is prohibited on one or a combination of grounds listed.<sup>10</sup> The Promotion of Equality and Prevention of Discrimination Act (Equality Act) states bluntly: 'No person may subject any person to harassment.'<sup>11</sup>

Part VII of the report examines affirmative action. All four of the jurisdictions dealt with here have accepted that affirmative action can be an aspect of equality, although recent decisions in the US Supreme Court have been increasingly restrictive, holding that even in cases of 'benign' racial classification, the standard of strict scrutiny

<sup>7</sup> 42 USC 2000e(j) (1970 ed, Supp V). See also 703(a)(1) of the Civil Rights Act of 1964, Title VII, 78 Stat 255, 42 USC 2000e-2(a) (1) (prohibits religious discrimination in employment).

<sup>8</sup> *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794 (South African Constitutional Court) at paras. 76; 14-148; 170-172; *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (South African Constitutional Court) at 159.

<sup>9</sup> *Trans World Airlines Inc v Hardison* 432 US 63 (1977) at 84.

<sup>10</sup> Employment Equity Act, s.6(3).

<sup>11</sup> S.11. See s1(1)xiii where harassment is defined as: 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to (a) sex, gender or sexual orientation; or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group'.

should apply. This has not, however, meant that no affirmative action programmes can be lawful: more recently the Court upheld the University of Michigan's race-conscious policy on the grounds that it furthered the legitimate aim of diversity in higher education. The other three jurisdictions have had a much less anguished approach to affirmative action, assisted by the fact that affirmative action is expressly mandated in all three Constitutions. The Constitution of India was one of the earliest constitutions to expressly incorporate provisions for affirmative action, in the form of 'reservations' of a proportion of university places or public sector jobs. Courts in all three jurisdictions have stressed that affirmative action is a facet of the principle of non-discrimination rather than an exception, a possible means of achieving equality rather than a breach.

Part VIII examines the defence of justification. Generally, the defence has been formulated in terms of proportionality. Proportionality is, however, open to varying interpretations, both as to which aims should be legitimate and how close the 'fit' should be between the means and the ends. The US Supreme Court has developed a three tier test to determine when an infringement can be justified under the Fourteenth Amendment. Essentially based on proportionality, the tiers differ in respect of the strictness of the 'fit' required between means and ends. For disparate impact under Title VII, the test was originally formulated as 'business necessity' but this has subsequently been diluted.

Canadian law differs from US law in that the Charter has an express limitations clause. However, it too has been interpreted as entailing a proportionality test. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, the objective must be of sufficient importance and the measures adopted must not be arbitrary, unfair or irrational and should impair the right as little as possible. In addition, the effects must be proportional to the objective. Until recently, the conventional analysis applying to human rights legislation in the workplace depended on whether the discrimination was classified as direct discrimination or adverse effect discrimination. However, the Supreme Court of Canada in the *Meiorin*<sup>12</sup> case determined that the distinction was unnecessarily complex and artificial, particularly in the light of the fact that there are few cases which can be neatly characterised as direct or 'adverse effect' discrimination. Instead, it proposed a single test: the most important part being that the standard is reasonably necessary to the accomplishment of a legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees without imposing undue hardship upon the employer.

South Africa, like Canada, includes a general limitation clause in the Constitution and, as in the US and Canada, the defence is based on a concept of proportionality. In India, to be permissible, a classification must be founded on an intelligible differentia which distinguishes a group and the differentia must have a rational relation to the object sought to be achieved by the statute in question.<sup>13</sup> In practice, the standard of justification imposed by the Supreme Court has traditionally been low, but the Supreme Court has begun to develop a tighter standard of justification of whether the legislative interference is justifiable in principle, and whether there is a reasonable relationship of proportionality between the means used and the aims pursued.<sup>14</sup> In *Naz Foundation*, the Delhi High Court interpreted the approach in *Anuj Garg* as requiring 'strict scrutiny'.<sup>15</sup>

The conclusion briefly sketches the similarities and difference between EU law and the four jurisdictions examined here, focussing on sources of EU non-discrimination law, grounds, coverage, who is bound, definitions of equality including affirmative action, and justification defences. It should be noted that the report does not cover remedies, enforcement mechanisms, or equality bodies.

<sup>12</sup> *British Columbia (Public Service Employee Relations Commission) v BCGEU* (1999) 3 SCR 3 (Supreme Court of Canada).

<sup>13</sup> *Budhan Choudhry v The State Of Bihar* 1955 SCR (1)1045 at 1049; see also *State of West Bengal v Anwar Ali Sarkar* (1952) SCR 284; *RK Dalmia v Justice Tendulkar* (1959) SCR 279; *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41; *D.D. Joshi v Union of India* AIR 1983 SC 420.

<sup>14</sup> *Anuj Garg & Ors v Hotel Association of India & Ors* [2007] INSC 1226; AIR 2008 SC 663 (Supreme Court of India) at paras 48-9.

<sup>15</sup> *Naz Foundation v Government of NCT of Delhi*, WP(C) No.7455/2001, 2 July 2009 (High Court of Delhi).

# Introduction

The aim of this study is to compare and contrast anti-discrimination and equality laws in the US, Canada, South Africa and India, with a view to inform future development of EU anti-discrimination laws. Comparative law is of great value, particularly in the equality field, where there is increasing cross-pollination across different jurisdictions. Similar questions are asked in a diversity of jurisdictions, and it is illuminating to compare and contrast the answers given. As well as an important intellectual exercise, comparative law sharpens our understanding of our own jurisdiction and suggests alternative means of accomplishing stated aims. At the same time, comparative law carries with it important challenges, as the harmonising project of the EU has itself demonstrated. As Kahn Freund famously argued in his article entitled 'The Uses and Misuses of Comparative Law',<sup>16</sup> we should not take it for granted that rules or institutions are transplantable. To draw appropriate lessons from foreign law, it is important that it be understood in its legal, social and political context. The four jurisdictions to be examined here share English as a common language as well as, in varying degrees, a common law heritage. However, there are significant differences in historical, socio-economic and political contexts, as well as in legal institutions. The challenge is therefore to illuminate universalisable conceptions while at the same time recognising context specificity.

This report begins by considering the legal and social context within which the equality guarantee operates. Part II examines sources of equality law, focussing on constitutional sources, but also sketching the main contours of statutory law at federal or national level. The role of international equality law is also touched on. Part III considers the grounds or prohibited characteristics in each jurisdiction. The report examines both the ways in which different jurisdictions allocate responsibility for determining grounds as between the constitution, the legislature and the courts, and the actual grounds covered in the different jurisdictions. Intersectionality is also briefly considered. Part IV turns to the substantive conceptions of equality, examining in particular the concepts of disparate impact, reasonable accommodation and harassment. Part V is concerned with the justification defence, drawing out the different ways in which the concept of proportionality has been developed. Part VI looks at the extent to which equality law at constitutional level binds non-state parties, and Part VII examines different approaches to affirmative action. The conclusion very briefly situates EU law within the comparative context. The report does not deal with remedies, structures of enforcement or equality bodies. These issues are very specific to the legal and institutional context of each jurisdiction and they are too complex to do justice to in addition to the substantive issues dealt with here.

<sup>16</sup> O Kahn-Freund, 'The Uses and Misuses of Comparative Law', *Modern Law Review*, 37/1 (1973).

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# Part I

## Legal and Social Context



The study begins with a brief description of the historical and social context of each of the jurisdictions. They have different histories, each is in a different phase of socio-economic development, and their legal and institutional arrangements differ. On the other hand, there are remarkable convergences in the modern era, with active borrowing of equality conceptions between jurisdictions. The divergences and convergences are particularly apparent when comparing constitutional texts, within which all legislation and jurisprudence is grounded. This part highlights the differences and similarities in the contexts in which equality functions, with the aim of ensuring that comparative law is appropriately understood.

Gender inequality has been endemic in all four jurisdictions for many generations. The same is true for disability and sexual orientation. However, while these groups have, through contestation and organisation, come to be included in the constitutional guarantees, it is not these inequalities which have generally been the primary forces shaping equality law in these jurisdictions. Instead, race, ethnicity and caste have been determinative. Thus US equality law has been fundamentally influenced by its history of slavery; Indian law by the heritage of caste; South African by the need to heal the wounds of apartheid; and Canadian by linguistic and First Nation minorities. This section provides a brief sketch of the development of equality law in each of these jurisdictions.

## 1. The US

The American Declaration of Independence in 1776 asserted that: 'We hold these truths to be self-evident: that all men are created equal ...' These words would seem to 'embrace the whole human family.'<sup>17</sup> However, as the US Supreme Court asserted in the infamous case of *Dred Scott*<sup>18</sup> in 1857: 'It is too clear for dispute, that the enslaved African race were not intended to be included ... The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property.'<sup>19</sup> Moreover, the Court held: 'the right of property in a slave is distinctly and expressly affirmed in the Constitution.... This is done in plain words — too plain to be misunderstood.'<sup>20</sup> The intention of the original framers of the Constitution was paramount: 'No one, we presume, supposes that any change in public opinion or feeling,... should induce the court to give to the words of the Constitution a more liberal construction in their favour than they were intended to bear when the instrument was framed and adopted.... If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.'<sup>21</sup> Thus the Act of Congress prohibiting slave-owning in the Northern States was held to be unwarranted by the Constitution and void, and slaves remained the property of their owner even if they were taken to Northern States which had abolished slavery.

It was only after the victory of the North in the Civil War of 1861-1865 that progress could be made. Three seminal constitutional amendments were adopted directly after the Civil War. The Thirteenth Amendment, adopted in 1865, outlawed slavery and prevented the imposition of any burdens or disabilities that constitute badges of slavery or servitude. The Fifteenth Amendment, adopted in 1870, provided equal suffrage to all adult male citizens: 'The right of citizens of the US to vote shall not be denied or abridged by the US or by any State on account of race, color, or previous condition of servitude.' But by far the most important for our purposes was the Fourteenth Amendment, also adopted in 1870. As well as giving citizenship to all former slaves, it stated: 'All persons born or naturalized in the US, and subject to the jurisdiction thereof, are citizens of the US and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US, nor shall any

<sup>17</sup> *Dred Scott v Sandford* 60 US 393 (1857) (US Supreme Court) at 411.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 451-2.

<sup>21</sup> *Ibid.* at 426.



State deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws ...'

Despite the abolition of slavery and the constitutional guarantee of equality, blatant discrimination remained endemic throughout the US. African Americans were not permitted to vote in many states, and they were consigned to separate and vastly inferior facilities. Nor was the Equal Protection Clause in the Fourteenth Amendment sufficiently robust to combat such inequality. In *Plessy v Ferguson*,<sup>22</sup> the Court refused to strike down a Louisiana statute, passed in 1890, providing for separate railway carriages for the 'white and colored races.' The Court held that although the object of the Fourteenth Amendment 'was undoubtedly to enforce the absolute equality of the two races before the law, ... it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality.'<sup>23</sup> The Court's assumption that enforced separation did not 'stamp the colored race with a badge of inferiority' was forcefully rebutted by Harlan J. In a stinging dissent, he argued: 'Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.... No one would be so wanting in candour as to assert the contrary.'<sup>24</sup>

It was not until well into the 20th century that the majority of the Court began to echo the lone voice of Harlan J that 'such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States.'<sup>25</sup> Thus, in a seminal case concerning internment of Japanese citizens during the Second World War, the Court held: 'Legal restrictions which curtail the civil rights of a single racial group are immediately suspect ... Courts must subject them to the most rigid scrutiny.'<sup>26</sup> Although this in principle leaves open the possibility of justification of a racial classification, in practice the strict scrutiny test has almost invariably led to the Court striking down racial classifications operating to the detriment of Afro-Americans.<sup>27</sup> In the famous case of *Brown v Board of Education* in 1954, the US Supreme Court decisively rejected the 'separate but equal' doctrine. In a surprisingly brief but unequivocal judgment, the Court held that 'in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs ... are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.'<sup>28</sup> This opened the door to a series of cases in which segregated hospitals, libraries, parks, public transit systems and other publicly owned facilities were held to be unconstitutional.<sup>29</sup>

In the latter part of the 20th century, the initiative for change was taken by the US Congress. In 1964, the Civil Rights Act was passed, banning discrimination by both private and public entities. This was followed quickly by the Voting Rights Act 1965, aimed at states and communities which suppressed minority voting. Other important federal anti-discrimination statutes were passed in the subsequent decades (see below). However, since 1980, these initiatives have met growing opposition from the US Supreme Court, which has become increasingly conservative. Such resistance looks set to continue. In addition, a proposal to amend the US Constitution to include a gender equality clause (the 'Equal Rights Amendment') was passed by both houses of Congress in 1972 but failed to be ratified by two thirds of states and so died in 1979.

<sup>22</sup> *Plessy v Ferguson* 163 US 537 (1896) (US Supreme Court).

<sup>23</sup> *Ibid.* at 544.

<sup>24</sup> *Ibid.* at 557.

<sup>25</sup> *Ibid.* at 555.

<sup>26</sup> *Korematsu v United States* 323 US 214, 65 S Ct 193 (1944) (US Supreme Court) at US 216.

<sup>27</sup> See e.g. *McLaughlin v Florida* 379 US 184, 85 S Ct 283 (1964); *Loving v Virginia* 388 US 1, 87 S Ct 1817 (1967).

<sup>28</sup> *Brown v Board of Education* 347 US 483 (1954) (US Supreme Court) at 494.

<sup>29</sup> D.B. Oppenheimer 'Sources of US Equality Law', *Anti-discrimination Law Review*, 10 (2010), 20.

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## 2. Canada

Canadian equality law should be read against the backdrop of the colonisation of the First Nation or indigenous peoples, the sometimes fierce interaction between French and English linguistic groups, and the modern cosmopolitanism which has resulted from decades of immigration of ethnic groups from many parts of the world. Having negotiated the surrender of the preponderance of Aboriginal title, much governmental activity, both before and after the Canadian provinces became a federation in 1867, was premised on the paternalistic assumption that indigenous peoples were unable to defend their own interests and were consequently in need of guardianship.<sup>30</sup> Thus, according to the Supreme Court of Canada in a case decided in 1950, the Indian Act was based on 'the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation.'<sup>31</sup> The guardianship ideology was, however, a smokescreen for subordination of the most intense kind. 'Indians' as classified under the Indian Act were deprived of the right to vote in federal and provincial elections; and while men could vote in band elections, women were not permitted to vote in band elections until 1951. Band members residing outside the reserve only gained the right to vote in band elections as a result of a Supreme Court decision in 1999.<sup>32</sup> It was not until 1960 that all Indians, male and female, were permitted to vote in federal elections.<sup>33</sup> At the same time, the long-term aim was to assimilate them into the dominant culture. Aboriginal people continue to be among the most disadvantaged of Canadian society. However, in recent years, the indigenous population has begun to regenerate, growing by 45% between 1996 and 2006 (compared with 8% among the non-Aboriginal population) and surpassing the one million mark in the 2006 census, reaching 1,172,790.<sup>34</sup>

A further source of complexity in the Canadian context has been the need to protect the Francophone minority. The choice of a federal system in 1867 was partly motivated by the desire to give the Francophone population the control of the province of Quebec, where they formed a large majority. This was not, however, sufficient to protect the right of French speaking Canadians elsewhere in Canada, nor of English speaking Canadians in Quebec. Particularly controversial has been the need to secure the right to maintain the French language, for example through education.<sup>35</sup> At the same time, the Canadian population has become increasingly multicultural. More than 200 different ethnic origins were reported in the 2006 census. An estimated 5,068,100 individuals were members of the visible minority population, representing 16.2% of the total population in 2006, up from 13.4% in 2001.<sup>36</sup>

In addition to measures subordinating Aboriginal peoples, many of the provinces included laws which were blatantly racist, discriminating against Chinese, Japanese and other minorities. However, before the enactment of the Charter of Rights and Freedoms in 1982, Canadian courts failed signally to protect minorities from discrimination.<sup>37</sup> In a series of cases before the Supreme Court of Canada and the Privy Council (then the court of final resort), challenges to racist legislation were unsuccessful. This was somewhat counteracted in the post-War period by the enactment of human rights codes, aimed at providing legal protection against discrimination.<sup>38</sup> Provincial human rights codes played an important role in the struggle against racism, sexism and other forms of discrimination

<sup>30</sup> S Grammond, *Identity Captured by Law* (McGill-Queen's University Press, 2009), 72-3.

<sup>31</sup> *St Anne's Shooting and Fishing Club v The King* [1950] SCR 211 at 219.

<sup>32</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (Supreme Court of Canada); see further Grammond 103.

<sup>33</sup> Grammond 74.

<sup>34</sup> Canadian census 2006.

<sup>35</sup> Grammond 153.

<sup>36</sup> Canadian census 2006: Categories in the visible minority population variable include Chinese, South Asian, Black, Filipino, Latin American, Southeast Asian, Arab, West Asian, Korean, and Japanese.

<sup>37</sup> R Sharpe and K Roach, *The Charter of Rights and Freedoms* 3rd edn. (Toronto: Irwin Law, 2005), 15.

<sup>38</sup> *Ibid.*

in this period.<sup>39</sup> Much more disappointing was the Canadian Bill of Rights, which was enacted in the form of an ordinary Act of Parliament in 1960. Initially, it seemed that the Supreme Court of Canada would regard the Bill of Rights as quasi-constitutional in nature. In *R v Drybones*,<sup>40</sup> the Court struck down a provision in the Indian Act which made it an offence for an Indian to be intoxicated in any part of Canada outside of the reserves, an offence which was considerably harsher than that which applied to others in the Northwestern Territories. However, because it was an ordinary statute of Parliament and did not have constitutional status, judges in later cases did not regard it as giving them authority to invalidate duly enacted laws.<sup>41</sup> Moreover, courts adopted a narrow and formal view of the right to equality in the Bill. In the case of *Lavell*,<sup>42</sup> an Aboriginal woman challenged the statutory provision depriving Aboriginal women of their status under the Indian Act if they married non-Aboriginal men. The Court dismissed the application on the narrow and formal ground that the provision treated all women in her situation in the same way. In an even more deferential decision, the Court held in *Bliss*<sup>43</sup> that it was not sex discrimination to limit pregnant women's rights to access unemployment insurance.

When the Charter of Human Rights and Freedoms was enacted in 1982, it deliberately invited judges to be more robust in the protection of human rights. In addition, the disappointing experience of the Canadian Bill of Rights meant that much effort was expended on drafting a stronger and more substantive equality guarantee in the form of Section 15 of the Charter. Whereas the Canadian Bill of Rights referred only to the right to 'equality before the law and the protection of the law',<sup>44</sup> Section 15 of the Charter states that 'every individual is equal before *and under* the law and *has the right to the equal protection and equal benefit of the law*' (italics added). Its addition of the right to equal protection echoed the formulation of the Fourteenth Amendment of the US Constitution<sup>45</sup> and the inclusion of 'equal benefit of the law' made it clear that it extended beyond a duty to refrain from discriminating to include a positive duty to redress and even eradicate poverty.<sup>46</sup> Indeed, it has been argued that 'with the broad wording and the addition of disability as a prohibited ground in section 15, Canada had adopted a unique protection of equality, considered more expansive than any in the world'.<sup>47</sup> Whether Section 15 has lived up to this expectation remains controversial. In addition to the Charter protection, there is a federal human rights act and 14 human rights acts in different provinces.

### 3. South Africa

The South African Constitution must be understood in the context of the very recent history of apartheid with its legally enforced, systematic and wholesale racial subordination. Under apartheid, all people were classified into four groups – White, African, Coloured and Indian – and only the former enjoyed full rights of citizenship. The other groups suffered a range of disabilities, including denial of the right to vote, to own property in urban areas, and to move freely around the country. Black women were doubly and triply discriminated against, particularly in relation to highly unequal personal laws of marriage, divorce and property ownership. It was thus with the aim of making a clear break with history and healing the scars of the past that the Constitution of South Africa was framed. After an extraordinarily participative constitution building process, the final Constitution came into effect in February 1997. As stated in the preamble, the Constitution was adopted to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and

<sup>39</sup> Ibid. 16.

<sup>40</sup> *R v Drybones* [1970] SCR 282 (Supreme Court of Canada).

<sup>41</sup> Sharpe and Roach 17.

<sup>42</sup> *Canada (Attorney General) v Lavell* [1970] SCR 282 (Supreme Court of Canada).

<sup>43</sup> See also *Bliss v Canada (AG)* [1976] 1 SCR 183 (Supreme Court of Canada).

<sup>44</sup> S.1(b).

<sup>45</sup> Sharpe and Roach 310.

<sup>46</sup> B Porter, 'Expectations of Equality', *Supreme Court Law Review*, 33 (2006), 27.

<sup>47</sup> Ibid. 26.

open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.’

Equality therefore permeates the Constitution as a whole. Both equality and dignity are part of its founding values. As stated in Section 1, South Africa is founded on values which include ‘human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; and universal adult suffrage.’ The specific equality guarantee is found in Section 9. Reflecting the direct influence of Canadian constitutional law, Section 9(1) states: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law.’ The remainder of Section 9 fleshes out this concept. In a distinctive contribution, the concept of ‘unfair’ discrimination is included, and, equally importantly, the provision is not confined to state action, but proscribes unfair discrimination by individuals against other individuals.<sup>48</sup> The South African Constitution also addresses distributive inequalities by expressly including socio-economic rights. Thus everyone has the right to have access to adequate housing, health care services, sufficient food and water, and social security.<sup>49</sup> In addition to the constitutional guarantee, the South African government has passed two major pieces of legislation on equality. The Employment Equity Act applies to employment discrimination, while the Promotion of Equality and Prevention of Unfair Discrimination Act applies outside employment (see further below).

## 4. India

Equality law in India has been heavily influenced by the caste structure of Hindu society. Religious conflict between Muslims and Hindus, which resulted in Partition and the creation of the State of Pakistan in 1947, has also been a central factor. Although Pakistan became a Muslim state, India remained secular. Caste, however, remained deeply engrained in Indian society. Hindu society is characterised by a hierarchy of castes, determined by birth. There are four main castes; and those without caste, or outcastes.<sup>50</sup> This group are often known as ‘Untouchables’ because physical untouchability is a central part of their subordination. Dominant castes would not accept food or water from them, and in parts of South India they were required to live as a group on the outskirts of villages. In his determined campaign to integrate the ‘Untouchables’, Gandhi called them ‘*Harijan*’ or people of God; but members of this group in modern India prefer to be known as ‘*Dalits*’ or broken people. *Dalits* were oppressed for centuries, restricted to the most menial and degrading of tasks, and often subject to violence and humiliation.

The abolition of such practices, as well as the substantive advance of the *Dalits*, was central to the constitutional commitments made by the Constitutional Assembly, which drafted the Constitution of newly independent India between 1947 and 1949. Article 17 of the final Constitution, which came into effect in January 1950, specifically prohibited untouchability, and Articles 15 and 16 expressly authorise the State to provide for reservations in public employment and education for ‘Scheduled Castes and Tribes’ and ‘other backward classes’.

The Indian Constitution contains a cluster of provisions pertaining to the right to equality. The flagship provision, Article 14, derives directly from the Fourteenth Amendment of the US Constitution.<sup>51</sup> Thus, it states: ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.’ Article 14 has been held to form part of the basic structure of the Constitution. This means that it cannot be curtailed by

<sup>48</sup> South African Constitution, Section 9(3).

<sup>49</sup> South African Constitution Sections 26 and 27: The State is under a duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

<sup>50</sup> This paragraph and the following one rely heavily on Anup Surendranath ‘Sub-Classification of Scheduled Castes Before the Indian Supreme Court: The Case for a More Inclusive Approach’, M Phil thesis, Oxford University (2009).

<sup>51</sup> I Jaising, ‘Gender Justice and the Supreme Court’, in B Kirpal and others (eds), *Supreme but not Infallible* (New Delhi: OUP, 2000), 293.

constitutional amendment.<sup>52</sup> In addition, Article 15 provides that the State shall not discriminate against any citizen and that no citizen should, on the specified grounds 'be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing *ghats*, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.' Finally, Article 16 provides for equality of opportunity for all citizens in relation to employment or appointment to an office under the State and prohibits discrimination on the specified grounds in relation to state employment or office. Article 15 also allows for special provision to be made for women, children, socially and educationally backward classes of citizens as well as the Scheduled Castes and Tribes. The Constitution does not specifically mention reservation for women. However, the Constitutional (Seventy-fourth Amendment) Act, 1992, brought in provisions mandating one-third reservations for women in local governance bodies.

As well as these 'fundamental rights', the Indian Constitution also contains 'Directive Principles of State Policies', which include socio-economic and cultural rights. In principle, Directive Principles, unlike the fundamental rights, are not enforceable, but are intended to guide the State in its legislative and policy-making functions. However, the Supreme Court of India has relied on the directive principles to give substantive meaning to the fundamental rights, in particular, the right to life. This has opened up the opportunity to bring legal challenges in relation to socio-economic inequalities in India. The Constitution gives the Supreme Court and the High Courts the power to enforce constitutional guarantees of fundamental rights.<sup>53</sup> The right to a constitutional remedy is itself a fundamental right.

India differs from the US, South Africa and Canada in that 'caste-based reservations in public employment and education have been India's primary vehicle for fulfilling its constitutional promise of an egalitarian society.'<sup>54</sup> The most important questions have therefore been the eligibility of different groups to access the benefits of reservation. In the past five years, there have been some proposals to include a more general equality provision. The Sachar Committee, which reported in 2006 on the Social, Economic and Educational Status of the Muslim Community of India, recommended the establishment of an Equal Opportunity Commission, a proposal which was followed up in detail in 2008 by the Menon report.<sup>55</sup> This report, together with a related report on diversity, opened up the possibility of a broader anti-discrimination framework, which affected the private as well as the public sector. The recommendations emphasise deprivation as the key issue to be addressed. Deprivation is to be identified by an objective deprivation index which potentially spreads beyond caste to include sex, caste, language, religion, disability, descent, place of birth, residence, race or any other ground.

<sup>52</sup> *Raghunath Rao v Union of India* (AIR 1993 SC 1267) at para. 185.

<sup>53</sup> Articles 32 and 226.

<sup>54</sup> T Khaitan, 'Transcending Reservations: A Paradigm Shift in the Debate on Equality', *Economic and Political Weekly* 20/8 (2008).

<sup>55</sup> M Menon, 'Equal Opportunity Commission: What, Why and How?' (2008).





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## Part II

# Sources of Equality Law

## 1. Constitutional Sources

As we have seen, all four jurisdictions in this study include an equality guarantee in their Constitutions. The broadest and most open-textured is the Fourteenth Amendment in the US Constitution. Thus the Equal Protection Clause of the Fourteenth Amendment states: 'No State shall ... deny to any person the equal protection of the laws...' This provision has been emulated and expanded upon in the more recent Constitutions of India, Canada and South Africa. Thus Article 14 of the Indian Constitution, which derives directly from the Fourteenth Amendment of the US Constitution,<sup>56</sup> states: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' This generic right is elaborated on in Articles 15 and 16. Article 15 states: '(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them; (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.' Article 16 in turn provides: '16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.' Articles 15 and 16 also allow for special provision to be made for women, children, socially and educationally backward classes of citizens as well as the Scheduled Castes and Tribes. Article 39(d) of the Constitution also mentions the principle of equal pay for equal work.

The Canadian constitutional guarantee follows a similar pattern. Section 15 of the Canadian Charter provides: '(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.' Section 15 also expressly permits '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.'

The South African Constitution elaborates further on this pattern. As well as including a general equality guarantee, a specific anti-discrimination provision, and express authorisation for affirmative action provisions, it also introduces the idea of 'unfair discrimination' and considerably lengthens the list of protected characteristics. It also expressly applies to private as well as public bodies. Thus Section 9 of the South African Constitution provides: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

<sup>56</sup> I Jaising, 'Gender Justice and the Supreme Court', in B Kirpal and others (eds), *Supreme but not Infallible* (New Delhi: OUP, 2000), 293.

## 2. Statutory Provisions

As well as the constitutional guarantees, each of these jurisdictions has statutory protection against discrimination. This report looks only at federal legislation. It should be born in mind that this leaves out of account an important layer of protection at state or provincial level. It should also be noted that the US, India and Canada are federal jurisdictions, and the division of power between the federation and states or provinces differs in each case. The extensiveness of statutory protection at federal level depends to some extent on the degree to which the federal government has power to regulate the states or provinces.

The most important source of statutory protection in the US at federal level is Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex, race, colour, religion or national origin by employers (public or private) of 15 or more employees.<sup>57</sup> Title VII also prohibits discrimination based on race, colour, religion or national origin (but not sex) by private and public entities in access to public accommodations (e.g. hotels, restaurants and theatres).<sup>58</sup> The Equal Employment Opportunity Act of 1972<sup>59</sup> extended federal employment discrimination law to state employers. Also important is Title IX of the Civil Rights Act 1964, which prohibits discrimination on race, colour, or national origin (and since 1972, sex) by publicly funded educational institutions and by public entities that receive funds from federal government.<sup>60</sup> In addition, Title VI prohibits discrimination based on race, colour or national origin in any 'program or activity' receiving 'federal financial assistance'.<sup>61</sup>

Specific statutes cover other grounds of discrimination. The Age Discrimination in Employment Act, passed in 1968, protects workers over 40 from age discrimination. The Americans with Disabilities Act 1990 prohibits discrimination in employment and requires access to public accommodations for persons with disabilities. It was amended in 2008 to reverse court decisions limiting its effect.<sup>62</sup> The 1975 Education for All Handicapped Children Act 1975 (subsequently renamed the Individuals with Disability Education Act) requires public schools to provide equal access to students with disabilities. Particularly important have been the provisions for contract compliance, which were originally introduced by President Kennedy in 1961 and later embodied in Executive Order 11246 (1965). Contract compliance requires contractors of the federal government to increase the representation of racial minorities in their workforces as a condition for the award and the continuation of the contract.<sup>63</sup> Originally confined to race, these requirements have been extended to cover sex and religion,<sup>64</sup> and there are also schemes for persons with disabilities and disabled war veterans.

Other federal legislation in the US has been introduced specifically to counteract restrictive decisions by the US Supreme Court. Thus the Pregnancy Discrimination Act was passed in 1978, reversing a holding by the Supreme Court that discrimination on grounds of pregnancy was not sex discrimination. The Court had held that occupational sickness benefit plans which excluded pregnancy were not in breach of either the constitutional protection under

<sup>57</sup> 42 USC 2000e-2 (2006) and 42 USC 2000e(b) (2006); amended in 1972 to prohibit employment discrimination by public as well as private employers (92 PS 261).

<sup>58</sup> 42 USC 2000a(a)-(b) 2006.

<sup>59</sup> PL 92-961.

<sup>60</sup> 42 USC 2000d (2006).

<sup>61</sup> Codified at 42 USC 2000d (2010).

<sup>62</sup> Americans with Disabilities Amendment Act of 2008 Pub. L. No. 110-325, 122 Stat. 3553.

<sup>63</sup> Executive Order 10925.

<sup>64</sup> Executive Order 11246.

the Equal Protection Clause<sup>65</sup> or Title VII of the Civil Rights Act.<sup>66</sup> However, the US Supreme Court has fought back. Since 1990, a series of cases have held that Congress's power to enact civil rights legislation under the Fourteenth Amendment might itself be very limited. Although the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees of the Equal Protection Clause by enacting appropriate legislation, the Court has held that it is the responsibility of the Court, not Congress, to define the substance of constitutional guarantees.<sup>67</sup> Accordingly, such legislation must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'<sup>68</sup> This approach has been used to strike down a series of federal anti-discrimination provisions. Thus it was held that Congress exceeded its constitutional authority when it legislated to provide a remedy for disability discrimination against a state in federal courts under the Americans with Disabilities Act.<sup>69</sup> The Court took a similar stance in relation to the Violence against Women Act of 1994, which it held exceeded the power of Congress to enforce the Fourteenth Amendment. The remedy for crimes of violence against women should be provided by states, not the federal government.<sup>70</sup>

So far as Canada is concerned, the most important human rights legislation at the federal level is the Canadian Human Rights Act,<sup>71</sup> which came into force in 1978. The purpose of this Act is to 'to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.'<sup>72</sup> The Act proscribes discrimination in employment and in the delivery of goods and services on any of these grounds, as well as on the grounds of pregnancy and child-birth, which are deemed to be discriminatory on grounds of sex. The Act applies to anyone working for either the federal government or a private company regulated by the federal government, as well as anyone who receives goods and services from any of those sectors. All federal government departments and crown corporations, as well as private companies such as railroads, airlines, banks, telephone companies, and radio or TV stations, are bound by the Act. Each province has its own human rights law, covering organisations not included under federal legislation, such as schools, retail shops, restaurants, factories and provincial governments themselves. This report does not deal with provincial legislation except in the context of decisions of the Canadian Supreme Court which have more general implications.

As we have seen, the primary focus of Indian anti-discrimination law has been on the issue of reservation in public employment and education. There is no comprehensive anti-discrimination statute in India, although there are laws that address specific aspects related to equality. For example, the Persons With Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act 1995 places a wide range of responsibilities on states and public bodies, including the duty to take measures for the prevention and early detection of disabilities; to ensure that every child with a disability has access to free education in an appropriate environment until the age of 18; to produce a comprehensive education scheme making provision for transport to school, adaptation of schools, and appropriate modifications of the curriculum; and to set aside up to three percent of vacancies for persons

<sup>65</sup> *Geduldig v Aiello* 417 US 484 (1974) (US Supreme Court).

<sup>66</sup> *General Elec. Co. v Gilbert* 429 US 125 (1976) (US Supreme Court). Similarly, the Lilly Ledbetter Fair Pay Act was passed in 2009, reversing a Supreme Court finding that that the statute of limitations in pay cases ran from the first pay disparity even if plaintiff did not know she was being paid less than her male co-employees: *Ledbetter v Goodyear Tire & Rubber Co., Inc.* 127 S. Ct. 2162 (2007) (US Supreme Court).

<sup>67</sup> *City of Boerne v Flores*, 521 US 507 (US Supreme Court).

<sup>68</sup> *Ibid.* at 522.

<sup>69</sup> *Board of Trustees of Univ. of Ala. v Garrett* 531 US 356 (2001) (US Supreme Court).

<sup>70</sup> *United States v Morrison* 529 US 598 (2000) (US Supreme Court).

<sup>71</sup> RSC, 1985, c. H-6.

<sup>72</sup> Canadian Human Rights Act, s.2.

with specified disabilities. The Maternity Benefits Act 1961, Equal Remuneration Act 1976 and the National Rural Employment Guarantee Act 2005 all attempt to address the existent systemic discrimination towards women in employment. Based on the guarantee of equality, laws have been enacted to address violence against women under civil and criminal laws, including the Protection of Domestic Violence Act, 2005 and the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.<sup>73</sup> Most recently, the Indian government constituted a committee to draft new legislation<sup>74</sup> to bring Indian law in line with the new UN Convention on the Rights of Persons with Disabilities. The committee recommended the adoption of The Rights of Persons with Disabilities Bill 2011, which provides protection against discrimination in a wide range of circumstances. Parliament is also in the process of considering a sexual harassment bill. There is no statutory protection for religious discrimination, although, as we have seen, there is a strong constitutional protection. There are statutes which deal with hate speech in relation to religious minorities in terms of hate speech<sup>75</sup> and anti-conversion laws in different states, although the latter are controversial because they are seen as oppressive. The government has also attempted to pass the Prevention of Communal and Targeted Violence (Access of Justice and Reparations) Bill 2011, but this has met with strong opposition from the main opposition party.<sup>76</sup>

South Africa has an approach which is much more akin to a comprehensive legislative code than either India or the US. Pursuant to the constitutional requirement that the State provide protection against discrimination by private as well as public bodies, the South African Parliament has produced two main pieces of legislation, dividing up the jurisdiction between employment and non-employment related issues. The first, the Employment Equity Act (EEA) of 1998, provides protection against discrimination in the workplace for a long list of protected groups (see below) and enables affirmative action in relation to three designated groups: blacks, women and people with disabilities. Non-employment issues are dealt with by the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (the Equality Act), which provides comprehensive protection against unfair discrimination in the public and private spheres, except where the EEA is applicable. Unlike other jurisdictions, there is no separate legislation comparable to disability legislation in the USA and India. Instead, the Equality Act addresses disability in some detail, whether in removing barriers, eradicating discrimination and in providing positive measures to accommodate and include people with disabilities. There is similarly no separate age discrimination legislation.

### 3. International Law

All four jurisdictions are signatories to one or more international conventions relevant to equality. Canada and India have signed and ratified all the relevant conventions: the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The Convention on the Rights of Persons with Disabilities (CRPD) was ratified by Canada in 2009 and by India in 2007. South Africa has similarly signed and ratified the ICERD, CEDAW, ICCPR, and CRC, and, most recently, the Disability Convention. Surprisingly, however, it has signed but not ratified the ICESCR. The US has ratified significantly fewer such conventions. It has signed and ratified the ICCPR and ICERD, but although it has signed the CEDAW, CRC, ICESCR and the Disability Convention, it has ratified none of these.

These international sources play significantly different roles in each jurisdiction. International law is of least significance in the US. It is rare for US courts give direct effect to treaties, or even refer to them as a source of auxiliary

<sup>73</sup> See Lawyers' Collective <http://www.lawyerscollective.org/anti-discriminationsex-equality.html>.

<sup>74</sup> Replacing the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995.

<sup>75</sup> Indian Penal Code, ss. 153A, 295A.

<sup>76</sup> I am grateful to Anup Surendranath for this information.

law.<sup>77</sup> Citation of comparative law has been viewed as highly controversial. Under Canadian law, international conventions are not directly applicable unless implemented by Parliament or legislatures. But these conventions can function as an interpretative device by courts construing domestic legislation. The Indian approach is similar to the Canadian. Here it is generally accepted that international treaties can be legally enforceable only when Parliament enacts enabling legislation incorporating it under the domestic system. However, the Indian Supreme Court has held that due regard must be given to international conventions and norms for construing domestic laws where there is no inconsistency between them. In a significant number of judgments, the Court has expressly considered CEDAW, the Beijing Declaration, the preamble to the ILO treaty, and the Universal Declaration of Human Rights.<sup>78</sup> Particularly notable was the Court's reliance on CEDAW in the *Vishaka* case, in which it promulgated guidelines for the regulation of sexual harassment at work. According to the Court: 'In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.'<sup>79</sup> South Africa is governed by a similar dualist system. However, the Constitution specifically requires the court to consider international law when interpreting the Bill of Rights.<sup>80</sup>

<sup>77</sup> D.B. Oppenheimer 'Sources of US Equality Law', *European Anti-discrimination Law Review* (EADLR), issue 10 (2010), p. 19.

<sup>78</sup> See cases cited in *Anuj Garg & Ors v Hotel Association of India & Ors* [2007] INSC 1226: AIR 2008 SC 663 (Supreme Court of India) at paras 9ff.

<sup>79</sup> *Vishaka v State of Rajasthan* (1997) 6 SCC 241 (Indian Supreme Court) at para 7.

<sup>80</sup> South African Constitution, s. 39.





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## Part III

### Grounds or Protected Characteristics

## 1. Specifying Grounds

### 1.1 Constitutional Level

Not every distinction is discriminatory. Governments classify people into groups for a wide variety of reasons and many of them are legitimate. The challenge therefore is to frame laws which are sensitive enough to outlaw invidious distinctions while permitting and even supporting positive difference.<sup>81</sup> There are three ways in which this challenge can be addressed. The first is to frame a broad open-textured equality guarantee, stating simply that all persons are equal before the law, without specifying any particular grounds. This approach leaves it to judges to decide when a classification is prohibited under the constitution. The second is to specify a list of grounds of discrimination, but with an indication that the list is not exhaustive, using the terms 'grounds such as...', 'including...', 'in particular...' or 'other status'. This approach gives judges some discretion to extend the list according to a set of judicially generated principles, but judicial discretion is shaped by the existence of enumerated grounds. The third approach, which has generally been used in EU discrimination law, is to specify a list of grounds which cannot be extended except by legislative amendment.

The first approach is epitomised by the Fourteenth Amendment of the US Constitution which, as we have seen, states simply that no state may 'deny to any person within its jurisdiction the equal protection of the laws.' It has been up to the Supreme Court to determine which legislative classifications should be regarded as invidious. It has done so by developing a three tier framework of scrutiny. Most classifications are simply required to demonstrate a rational connection to a legitimate state interest. However, a classification which refers to a 'discrete and insular minority' is 'inherently suspect' and therefore subject to an intense standard of scrutiny. According to Stone J in the famous footnote 4 of the *Carolene Products* case,<sup>82</sup> 'more searching judicial inquiry' may be required for statutes directed at particular religious or national or racial minorities, or where 'prejudice against discrete and insular minorities tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.'<sup>83</sup> Strict scrutiny differs from rational review in that the classification must further not just a legitimate but a compelling state interest. Moreover, rather than being rationally related to that interest, the classification must be 'narrowly tailored' to achieve it, in the sense that no other alternatives are available. In the result, however, only alienage, race and ancestry have qualified for strict scrutiny. Indeed, the Court has been deeply resistant to attempts to expand strict scrutiny beyond these grounds. For most other grounds, such as age,<sup>84</sup> and disability,<sup>85</sup> rational basis review has been deemed sufficient.

Moreover, the Court has consistently refused to regard gender classifications as suspect. Instead of requiring the most intense scrutiny, as applied to race, an 'intermediate' test is applied.<sup>86</sup> As reformulated in *US v Virginia* in 1996, this test requires states to produce a justification which is 'exceedingly persuasive'.<sup>87</sup> This means that states must show that the discriminatory classification is substantially related to the achievement of important governmental objectives. Heightened review places a demanding burden of justification on the defender. In addition, the justification must be genuine, not invented post hoc in response to litigation. Particularly importantly, it cannot rely on 'over-broad generalizations about the different talents, capacities or preferences of males and females.'<sup>88</sup>

<sup>81</sup> This section draws heavily on S Fredman, *Discrimination Law*, 2nd edn. (Oxford: Oxford University Press, 2011), chap. 3.

<sup>82</sup> *United States v Carolene Products Co* 304 US 144, 58 S Ct 778 (1938).

<sup>83</sup> *Ibid.* at 152.

<sup>84</sup> *Massachusetts Board of Retirement v Murgia* 427 US 307 (1976).

<sup>85</sup> *Cleburne v Cleburne Living Center* 473 US 432 (1985) (US Supreme Court).

<sup>86</sup> *Craig v Boren* 429 US 190, 97 S Ct 451 (1976); *Orr v Orr* 440 US 268, 99 S Ct 1102 (1979); *Michael M v Superior Court, Sonoma Cty* 450 US 464, 101 S Ct 1200 (1981).

<sup>87</sup> *United States v Virginia* 116 S Ct 2264 (1996).

<sup>88</sup> *United States v Virginia* 116 S Ct 2264 (1996) at 533.

Moreover, whereas the availability of other suitable means is irrelevant in relation to rational basis review, the availability of sex-neutral alternatives to a sex-based classification is of key importance to determining the validity of the classification.

The second model, namely a non-exhaustive list of grounds, is found in the Canadian Constitution. Thus Section 15 of the Canadian Charter specifies that every individual has the right to the equal protection and equal benefit of the law *in particular* 'without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' Race includes Aboriginal people. Notably, this list includes both age and disability, but excludes sexual orientation. Nevertheless, the inclusion of the words 'in particular' has allowed the Canadian Court to extrapolate this list to include unenumerated or analogous grounds. Most important among these have been citizenship,<sup>89</sup> sexual orientation,<sup>90</sup> and the combination of aboriginality and residence.<sup>91</sup>

The Canadian Court has not followed its US counterpart in introducing a three-tier standard of scrutiny. Instead, it has attempted to discover the unifying thread in the enumerated grounds, which can then be used to determine analogous grounds. Nevertheless, the principles it has evolved are similar to those used by the US Court: 'It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or only changeable only at unacceptable cost to personal identity ... Other factors identified ... like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against ... too often have served as illegitimate and demeaning proxies for merit based decision-making.'<sup>92</sup>

India has a hybrid approach, including both an open-ended guarantee in Article 14 and a fixed list of protected grounds in Articles 15 and 16(2). Thus, Article 14 of the Indian Constitution, reflecting almost precisely that of the Fourteenth Amendment, states: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' Similarly, the employment provision in Article 16(1) simply states: 'There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.'

As in other jurisdictions, when applying this provision the Indian Supreme Court has had to distinguish between legitimate and illegitimate classifications. To do so it has developed the 'reasonable legislative classification test'. As the Court put it in a case in 1955: 'It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question.'<sup>93</sup> However, as Jaising argues, the Court found itself 'trapped in the discourse of reasonable classification.' If these two conditions were fulfilled, the Court would reject any challenge founded on the equality clause. In a series of cases in the 1970s, 'the Court laid bare a new dimension of Article 14 and pointed out that Article has highly activist magnitude and it embodies a guarantee against arbitrariness.'<sup>94</sup> As Baghwati J put it:

<sup>89</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Supreme Court of Canada).

<sup>90</sup> *Egan v Canada* [1995] 2 SCR 513 (Canadian Supreme Court); *Vriend v Alberta* [1998] 1 SCR 493 (Supreme Court of Canada).

<sup>91</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (Supreme Court of Canada).

<sup>92</sup> *Ibid.* at para. 13.

<sup>93</sup> *Budhan Choudhry v The State Of Bihar* 1955 SCR (1)1045 at 1049; see also *State of West Bengal v Anwar Ali Sarkar* (1952) SCR 284; *RK Dalmia v Justice Tendulkar* (1959) SCR 279; *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41; *D.D. Joshi v Union of India* AIR 1983 SC 420.

<sup>94</sup> I Jaising, 'Gender Justice and the Supreme Court' in B Kirpal and others (eds), *Supreme but not Infallible* (New Delhi: OUP, 2000), 296.

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The basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude ... From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in state action and ensure fairness and equality of treatment.<sup>95</sup> Thus, 'the doctrine of classification which is evolved by the courts is not a paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality.'<sup>96</sup>

As well as the open-ended model of Articles 14 and 16, the other provisions of the Indian Constitution use an exhaustive list. Thus Article 15(1) provides that 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them', and Article 15(2), which protects against discrimination in relation to public places, uses the same set of grounds. The use of the word 'only' has been interpreted restrictively by the Indian Court, particularly in the area of sex discrimination, where it has drawn a line between sex discrimination, and the more socially based manifestations of gender discrimination.<sup>97</sup>

Notably absent from this list are disability, sexual orientation and age. Nevertheless, in the seminal case of *Naz Foundation*,<sup>98</sup> the Delhi High Court held that the Indian Penal Code breached the constitutional equality guarantee insofar as it criminalised consensual sexual acts of adults in private. The Court used a purposive construction to hold that the prohibition on discrimination applied too to grounds which are analogous to those specified in Article 15. Drawing on Canadian and US case law, the Court regarded personal autonomy as the principle behind the grounds in Article 15(1). 'Personal autonomy is inherent in the grounds in Article 15. The grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual.'<sup>99</sup> On this basis, it held that sexual orientation was analogous to sex as a ground of discrimination, and the criminalisation of homosexual behaviour was discriminatory. This approach also opens up the possibility of holding that pregnancy and disability are analogous grounds.<sup>100</sup>

The South African Constitution contains the most wide ranging list of expressly prohibited grounds. Section 9 of the Constitution specifies 16 prohibited grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The express mention of sexual orientation contrasts with the other Constitutions, and has been relied on in a fruitful set of cases which systematically outlawed sexual orientation discrimination. Beginning with the invalidation of criminalisation of sodomy,<sup>101</sup> the Constitutional Court went on to outlaw discrimination against same-sex partners in immigration,<sup>102</sup>

<sup>95</sup> *E. P. Royappa v State Of Tamil Nadu* 1974 SCR (2) 348 (Indian Supreme Court) at 386.

<sup>96</sup> *Ajay Hasia v Khalid Mujib Sehravardi* 1981 SCR (2) 79 (Indian Supreme Court) at 102.

<sup>97</sup> See I Jaising, 'Gender Justice and the Supreme Court', in B Kirpal and others (eds), *Supreme but not Infallible* (New Delhi: OUP, 2000), 296; see *Air India v Nargesh Meerza* (1981) 4 SCC 335.

<sup>98</sup> *Naz Foundation v Government of NCT of Delhi*, WP(C) No.7455/2001, 2 July 2009 (High Court of Delhi).

<sup>99</sup> *Ibid.* at para. 22.

<sup>100</sup> T Khaitan, 'Reading *Swaraj* into Article 15: A New Deal for All Minorities', *NUJS Law Review*, 2/3 (2009), 419.

<sup>101</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (South African Constitutional Court).

<sup>102</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (South African Constitutional Court).

pension<sup>103</sup> and adoption,<sup>104</sup> culminating in the invalidation of marriage laws which required opposite sex partners.<sup>105</sup> Following the famous *Fourie* case,<sup>106</sup> the South African Parliament passed the Civil Union Act of 2007, permitting gay marriage.

As in the Canadian Charter, the list of grounds protected by the South African Constitution is non-exhaustive. The Court may add to the list of protected grounds if differential treatment on such a ground has the potential to impair human dignity. Thus in the case of *Hoffman*, discrimination on grounds of HIV status was held to be unfair:

At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.<sup>107</sup>

## 1.2 Statutory Level

At statutory level, less discretion is generally left to the courts. In the US, Title VII of the Civil Rights Act of 1964 makes it unlawful employment for an employer to discriminate on grounds of race, colour, religion, sex, or national origin.<sup>108</sup> It is noteworthy that sex was only included in Title VII at the last minute on the floor of the House of Representatives.<sup>109</sup> Age is covered by the Age Discrimination in Employment Act (ADEA), which forbids age discrimination against people who are age 40 or older. Disability is covered by the Americans with Disabilities Act, as amended, or the Rehabilitation Act. Sexual orientation is not mentioned.

The Canadian Human Rights Act includes a closed but wide ranging list of grounds, prohibiting discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. Discrimination on grounds of pregnancy or child-birth is deemed to be on the ground of sex.<sup>110</sup> At provincial level, Canadian human rights statutes generally contain a closed list of prohibited grounds including colour, race, national or ethnic origin, religion, sex, pregnancy, civil or marital status, and disability. Some statutes also include social condition, source of income or criminal record.<sup>111</sup> Notably, the Supreme Court of Canada has held that to exclude sexual orientation from this list would constitute a breach of the Charter guarantee. In the famous case of *Vriend*,<sup>112</sup> the Supreme Court of Canada held that the Alberta human rights statute was in breach of the Charter guarantee because it excluded sexual orientation in its list of

<sup>103</sup> *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (South African Constitutional Court).

<sup>104</sup> *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* BCLR 1006 (CC). 2003 (2) SA 198 (CC); 2002 (10) (South African Constitutional Court).

<sup>105</sup> *Minister of Home Affairs v Fourie (CCT 60/04)* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (South African Constitutional Court).

<sup>106</sup> *Ibid.*

<sup>107</sup> *Hoffmann v South African Airways (CCT17/00)* [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (South African Constitutional Court).

<sup>108</sup> 42 USC 2000e-2(a)(1).

<sup>109</sup> 110 Cong. Rec. 2577-2584 (1964).

<sup>110</sup> Canadian Human Rights Act, s. 3.

<sup>111</sup> B Vizkelety, 'Discrimination Law: The Canadian Perspective', *European Anti-Discrimination Law Review*, 6/7 (2008), 23-32.

<sup>112</sup> *Vriend v Alberta* [1998] 1 SCR 493 (Supreme Court of Canada).

prohibited grounds. 'In excluding sexual orientation from the [statute's] protection, the government has, in effect, stated that "all persons are equal in dignity and rights" except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1).'<sup>113</sup> The Court therefore read sexual orientation into the statute.

Statutory protection in South African law largely mirrors the constitutional guarantee. Both the employment and the non-employment related statutes include broadly the same grounds. Thus the Employment Equity Act refers to race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, colour, age, disability, religion, HIV status, conscience, language, political opinion, culture, belief and birth.<sup>114</sup> Under the Equality Act (which deals with non-employment related discrimination), the prohibited grounds are similar, covering race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Notably, it also includes a broad provision proscribing discrimination on '(b) any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination [as defined in the Act]'.<sup>115</sup> The Equality Act also includes a 'Directive Principle' which states that the Minister should give special consideration to including in this list the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status.<sup>116</sup> Despite a report by the South Africa Human Rights Commission that this should be included, no legislative amendments have been forthcoming. This does not itself preclude courts from incorporating these categories if they are considered to fulfil the above test relating to systemic disadvantage and dignity.<sup>117</sup>

It is noteworthy that the Equality Act includes 'culture' as an enumerated ground. In the recent case of *Pillay*, the Constitutional Court for the first time sought to define the word 'culture', finding that a school's refusal to grant an exemption to allow a learner to wear a nose-stud was unfair discrimination based on 'culture'. The Court held that, while the outer bounds of the definition should remain open, the core meaning of 'culture' relates to groups defined by a combination of religion, language, geographical origin and artistic tradition.<sup>118</sup>

In India, there are specific statutes dealing with particular grounds. Disability is protected by the Persons with Disabilities Act 1995, together with three other related statutes.<sup>119</sup> The Equal Remuneration Act 1976 provides for equal pay to men and women workers and 'for the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto.' The Sexual Harassment Bill, once it becomes law, will similarly protect women employees. There are also numerous regulations relating to reservations for Scheduled Castes and Tribes, as well as 'other backward classes'. There is no codified law on age discrimination or on discrimination on grounds of sexual orientation. Although religion is protected under the Constitution, there is no statutory protection against religious discrimination.

## 2. Intersectionality

The focus on group identity within constitutional equality provisions tends to assume that each individual belongs to a single, well-demarcated identity group. However, identity groups intersect at many points: all individuals have a

<sup>113</sup> Ibid. at para. 104.

<sup>114</sup> Employment Equity Act 1998, s6(1).

<sup>115</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (Section 1 (xxii)).

<sup>116</sup> Ibid. s.34.

<sup>117</sup> Ibid. s.34(2)(c).

<sup>118</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (South African Constitutional Court) at para 50.

<sup>119</sup> The Mental Health Act of 1987; the Rehabilitation Council of India Act 1992; and the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act of 1999.



gender, an age, a sexual orientation and an ethnicity.<sup>120</sup> Multiple identities can intensify disadvantage for those who belong to more than one disadvantaged group. For example, black women are subject to both sexism and racism; ethnic minority women, older women, black women, and disabled women are among the most disadvantaged groups in many countries. Similar cumulative or intersectional discrimination is experienced by gay or lesbian members of ethnic minorities, disabled black people, younger ethnic minority members or older disabled people.

The synergistic nature of cumulative discrimination means that it has proved difficult to frame policy and law in ways which can address cumulative discrimination. In the US, judges and law-makers have been wary of opening a 'Pandora's box' to claims by multiple subgroups. It is now accepted by US courts that black women constitute a distinct subgroup.<sup>121</sup> However, later courts were concerned that protected subgroups would exist for every possible combination of race, colour, sex, national origin and religion.<sup>122</sup> To prevent the spectre that the benefits of the anti-discrimination legislation would be 'splintered beyond use and recognition',<sup>123</sup> it was held that cumulative discrimination should be restricted to a combination of only two of the grounds (the 'sex plus' approach).<sup>124</sup>

This can be compared to the much more flexible approach of the South African Constitutional Court. In *Bhe*,<sup>125</sup> the applicant challenged the customary rule of primogeniture, which held that the property of an intestate deceased passed to the nearest male relative. Customary law, which applied only to black people, had been preserved in the post-apartheid era. The Court struck down the rule on the grounds that it constituted discrimination on grounds of race and gender.<sup>126</sup> In a recent case, Muslim women in polygynous marriages argued that they were being treated less favourably than non-Muslim women in polygynous marriages. Whereas the latter were fully recognised, only one wife in Muslim polygynous marriage was recognised as an heir. The Court unanimously held that they were discriminated against on the triple grounds of religion, gender, and marital status.<sup>127</sup> Far from splintering the principle of equality, this permitted the law to respond with appropriate sensitivity to a situation of multiple disadvantage.

The problem of intersectionality has been given the most active attention by the Supreme Court of Canada. At first, this was found only in the minority opinions of Justice L'Heureux-Dubé. Thus, dissenting in the *Mossop* case, she stated: '...categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.'<sup>128</sup> This approach was reflected in the majority decision in *Law v Canada*,<sup>129</sup> where the Court held: 'There is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15 (1).'<sup>130</sup> This approach was fully developed in the *Corbiere* case, which concerned a provision of the Indian Act that barred band members who lived off-reserve from voting in band elections. In establishing 'aboriginality-residence' as an analogous ground of discrimination, the Court was already drawing together two different identities. L'Heureux-Dubé J took this further by drawing particular attention to the

<sup>120</sup> This section is derived from S Fredman, *Discrimination Law*, 2nd edn. (Oxford: Oxford University Press, 2011), chap. 3.

<sup>121</sup> *Jeffries v Harris County Community Action Assn* 615 F 2d 1025 (5th Cir 1980) (USA Federal Court of Appeals) at 1034.

<sup>122</sup> *Judge v Marsh* 649 F.Supp. 770 (1986) (United States District Court, District of Columbia).

<sup>123</sup> *Ibid.* at 779.

<sup>124</sup> See *Jeffries*, above n. 120, at 1033-4.

<sup>125</sup> *Bhe v Khayelitsha Magistrate* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (South African Constitutional Court).

<sup>126</sup> See also *Gumede (born Shange) v President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (South African Constitutional Court).

<sup>127</sup> *Hassam v Jacobs NO and Others* (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (South African Constitutional Court).

<sup>128</sup> *Canada (A.G.) v Mossop*, [1993] 1 SCR 554 at 645-646; See *Egan v Canada* [1995] 2 SCR 513 (Canadian Supreme Court) at 563.

<sup>129</sup> *Law v Canada* [1999] 1 SCR 497 (Canadian Supreme Court).

<sup>130</sup> *Ibid.* at 554-5.



impact on Aboriginal women 'who can be said to be doubly disadvantaged on the basis of both sex and race.'<sup>131</sup> Therefore, she argued, it is necessary to 'recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.'<sup>132</sup>

This issue has not, however, even begun to be addressed by Indian law. A complainant cannot claim under two combined heads; instead, she has to make sure her claim fits into one of the discrete grounds. For example, if an employer discriminates against a *Dalit* woman on the grounds that she is a *Dalit* woman, she needs to decide whether to claim on grounds of caste or sex. Yet if the employer does not discriminate against women as a whole, or *Dalits* as a whole, but only against *Dalit* women, then she has no claim.<sup>133</sup>

<sup>131</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (Supreme Court of Canada) at 259.

<sup>132</sup> *Ibid.* at 253.

<sup>133</sup> T. Khaitan 'The Theory and Practice of Equality Law' (Report for the Consultation on Discrimination law organized by the Lawyers' Collective, Delhi, 2009) 44.

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## Part IV Coverage

Discrimination may not be prohibited in all walks of life. Different jurisdictions delineate the coverage of discrimination law in distinctive ways. This section considers the ways in which different jurisdictions have addressed the coverage of discrimination law.

## 1. Constitutional Level

At constitutional level, coverage generally extends to all governmental actions, although in federal systems, the limitations of federal power need to be born in mind. Thus the US is similar to the EU in that the federal government only has the power delegated to it by the states. According to the Tenth Amendment of the US Constitution: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Thus, as the Supreme Court put it in a case in 1999:

although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognised competence, the founding document 'specifically recognizes the States as sovereign entities.' ... The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design.<sup>134</sup>

Nevertheless, Section 5 of the Fourteenth Amendment specifically gives power to Congress to enforce its provisions by appropriate legislation. The US Supreme Court, in its early case law, held that this is a broad power which extends to actions preventing future violations. Most importantly, the Court repeatedly affirmed that: 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.' However, Congress is not given carte blanche. Legislation passed at federal level to enforce the Fourteenth Amendment must be congruent and proportionate to the Fourteenth Amendment breach. In recent years, the US Supreme Court has been increasingly restrictive in its interpretation of this formula, particularly when federal anti-discrimination statutes have the effect of giving individual remedies against state governments, in contravention of the constitutional principle which gives states immunity against money suits in federal courts brought by citizens of other states and, increasingly, by citizens of their own. Thus the Court struck down a provision in the Age Discrimination in Employment Act (ADEA) which permitted public employees to sue their state employers for breach of the ADEA.<sup>135</sup> It similarly struck down a provision in the Disability Discrimination Act which gave individuals the right to seek damages against states in employment cases<sup>136</sup> but permitted the ADEA to provide such a right against states in cases of denial of public services.<sup>137</sup>

The Canadian Charter of Rights and Freedoms applies to 'the Parliament and government of Canada in respect of all matters within the authority of Parliament' and 'to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.'<sup>138</sup> In the seminal *Dolphin Delivery*<sup>139</sup> case, the Supreme Court of Canada held that the Charter only applies to government, which includes the legislative, executive and administrative branches. All laws and regulations are therefore subject to the Charter. The Charter also covers the actions of the police or other governmental officials in their treatment of individuals. Where government relies on the common law, for example to bring a suit against individuals, the Charter would apply.

<sup>134</sup> *Alden v Maine* 527 US 706 (1999) (US Supreme Court).

<sup>135</sup> *Kimel v Florida Bd. of Regents* 528 US 62 (2000) (US Supreme Court).

<sup>136</sup> *Board of Trustees of the University of Alabama v Garrett* 531 US 356 (2001) (US Supreme Court).

<sup>137</sup> *Tennessee v Lane* 541 US 509 (2004) (US Supreme Court).

<sup>138</sup> Canadian Charter of Rights and Freedoms, s. 32.

<sup>139</sup> *RWDSU Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573 (Supreme Court of Canada).

So far as South Africa is concerned, the Constitution states that the Bill of Rights ‘applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’<sup>140</sup> The Indian Constitution, in turn, provides in Article 13(2) that: ‘The State shall not make any law which takes away or abridges the rights conferred by this Part [Fundamental Rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void.’

## 2. Statutory Level

Given that statutes frequently bind private parties, it has generally been found necessary to limit their coverage to particular areas such as employment, education or the provision of goods and services to the public. Thus Title VII of the Civil Rights Act in the US prohibits discrimination by employers (public or private) of 15 or more employees.<sup>141</sup> Title VII also prohibits discrimination based on race, colour, religion or national origin (but not sex) by private and public entities in access to public accommodations (e.g. hotels, restaurants and theatres).<sup>142</sup> Also important is Title IX of the Civil Rights Act 1964, which prohibits discrimination on race, colour, or national origin (and since 1972, sex) by publicly funded educational institutions and by public entities that receive funds from federal government.<sup>143</sup> In addition, Title VI prohibits discrimination based on race, colour or national origin in any ‘program or activity’ receiving ‘federal financial assistance’.<sup>144</sup> Other statutes contain their own limitations. The Age Discrimination in Employment Act applies only to employment, while the Americans with Disabilities Act 1990 prohibits discrimination in employment and requires access to public accommodations for persons with disabilities. The Individuals with Disability Education Act requires public schools to provide equal access to students with disabilities.

The Canadian Human Rights Act<sup>145</sup> proscribes discrimination in employment and in the delivery of goods and services. It applies to anyone working for either the federal government or a private company regulated by the federal government, as well as anyone who receives goods and services from any of those sectors. All federal government departments and crown corporations, as well as private companies such as railroads, airlines, banks, telephone companies, and radio or TV stations, are bound by the Act. The South African legislation divides the jurisdiction between employment and non-employment related issues. The Employment Equity Act of 1998 provides protection against discrimination in the workplace while the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 provides comprehensive protection against unfair discrimination in the public and private spheres, except where the EEA is applicable. India, as has been seen, concentrates its efforts on reservations, which apply primarily in public employment and education. There is no comprehensive statute giving individuals a right to complain of discrimination, but there are piecemeal interventions in various fields. For example, as we have seen, the Persons With Disabilities Act 1995 places responsibilities on states and public bodies in relation to education, reservations in public employment and detection and prevention of disabilities. The Maternity Benefits Act 1961 and Equal Remuneration Act 1976 address gender discrimination in employment. The Equal Remuneration Act 1976 covers all industries and sectors, public and private, organised and unorganised, and all employees doing permanent, temporary and casual work. The proposed sexual harassment legislation focuses on employment, although the proposed Rights of Persons with Disabilities Bill 2011 aims to provide protection against discrimination in a wide range of circumstances.

<sup>140</sup> South African Constitution, s.8.

<sup>141</sup> 42 USC 2000e-2 (2006) and 42 USC 2000e(b) (2006); amended in 1972 to prohibit employment discrimination by public as well as private employers (92 PS 261).

<sup>142</sup> 42 USC 2000a(a)-(b) 2006.

<sup>143</sup> 42 USC 2000d (2006).

<sup>144</sup> Codified at 42 USC 2000d (2010).

<sup>145</sup> RSC, 1985, c. H-6.

Morgan | 1963

## Part V

### Who is Bound?



## 1. Constitutional Level

Human rights at constitutional level are generally considered to bind only the State. It is then the responsibility of the State to produce legislation which binds private individuals. This is true for the constitutional guarantees in the USA, Canada and India. Thus under US law, the Constitution only applies to discrimination by the states and their subdivisions and agents.<sup>146</sup> As the US Supreme Court put it, since 1883 ‘the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.’<sup>147</sup>

However, private transactions are not entirely immune. In the famous case of *Shelley v Kraemer*, the US Supreme Court held that courts were bound by the Fourteenth Amendment when applying the common law to individual contracts. In this case, landowners had entered into restrictive covenants with the aim of excluding black people from the ownership or occupancy of real property. The Court made it clear that, being a transaction between two private bodies, the restrictive covenant was not in itself in breach of the Constitution. However, it also held that the action of courts and legal enforcement officers were actions of states within the meaning of the Fourteenth Amendment. ‘In granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws.’<sup>148</sup>

The Canadian Charter similarly applies to Parliament, legislatures and government action, but not to private acts of discrimination. Thus the Supreme Court of Canada regards the Charter as ‘essentially an instrument for checking the powers of government over the individual ... To open up all private and public action to judicial review could strangle the operation of society and ... could seriously interfere with freedom of contract.’<sup>149</sup> It is up to legislation to control acts of private parties. As in other jurisdictions, the precise delineation of the ‘government’ has been the subject of some litigation. The Court has held, in a series of cases, that the ‘test for determining whether entities such as hospitals, public broadcasters or the post office are “government” for the purposes of the Charter turns on the degree to which there is significant control by government ministers or their officials in their day-to-day operations and on the extent to which the entity acts on the government’s behalf or furthers some specific governmental policy or program.’<sup>150</sup> However, the Charter has indirect effect: where legislation is ambiguous, it must be interpreted in a manner compatible with the Charter and human rights legislation.

Again, in India constitutional guarantees apply to state and public institutions. The only provision that binds both the public and the private sector is Article 17, which outlaws untouchability and forbids its practice in any form. Nevertheless, in the *Naz Foundation* case, the Delhi High Court found that: ‘Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.’<sup>151</sup>

Only in South Africa is there an express commitment to the horizontal application of the Constitution. Thus the Constitution states that the Bill of Rights binds individuals ‘if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’<sup>152</sup> In addition, in a development similar to that in *Shelley v Kraemer* above, the Constitution provides that courts ‘must apply, or if necessary develop,

<sup>146</sup> D.B. Oppenheimer ‘Sources of US Equality Law’, *European Anti-discrimination Law Review* (EADLR), issue 10 (2010), p. 21.

<sup>147</sup> *Shelley v Kraemer* 334 US 1 (1948) (US Supreme Court) at 13.

<sup>148</sup> *Ibid.* at 21.

<sup>149</sup> *McKinney v University of Guelph* [1990] 3 SCR 229 (Supreme Court of Canada).

<sup>150</sup> R Sharpe and K Roach, *The Charter of Rights and Freedoms*, 3<sup>rd</sup> edn. (Toronto: Irwin Law, 2005), 102.

<sup>151</sup> *Naz Foundation v Government of NCT of Delhi*, WP(C) No.7455/2001, 2 July 2009 (High Court of Delhi) at para. 104.

<sup>152</sup> South African Constitution, s. 8(3).

the common law to the extent that legislation does not give effect to that right.<sup>153</sup> In relation to equality, there is an express horizontality provision. Thus Section 9(4) states: 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds.... National legislation must be enacted to prevent or prohibit unfair discrimination.' However, the Constitutional Court has held that since the South African government has in fact enacted legislation to prohibit unfair discrimination by private bodies, there should be no right of challenge directly under the constitutional provision.<sup>154</sup>

## 2. Statutory Level

Statutory protections are generally designed to bind private as well as public bodies, depending on the formulation of the statute. In the US, Title VII of the Civil Rights Act applies to public employers as well as private employers of 15 or more employees. The Equal Employment Opportunity Act 1972 extended federal discrimination law to state employers.<sup>155</sup> When first passed in 1967, the Age Discrimination in Employment Act applied only to private employers but in 1974, its application was extended to states.

In Canada, human rights legislation applies to both private and public acts. In South Africa, the prohibition on unlawful discrimination in the Employment Equity Act applies to all employers and employees. The duty to implement affirmative action provisions in that Act, however, only applies to 'designated employers', that is, employers employing over 50 employees, having a turnover above a specified limit, or appointed as a designated employer by a collective agreement. It also applies to organs of the State. The Equality Act binds the State and all persons, where 'person' includes juristic persons and non-juristic persons.<sup>156</sup> More broadly, the State has the duty, not just to refrain from interfering with rights, but also to 'protect, promote and fulfil' the rights in the Bill of Rights.<sup>157</sup>

In India, there is, as we have seen, no general statutory right for an individual to claim unlawful discrimination. Instead, there is a patchwork of provision. The Equal Remuneration Act 1976 has a wide coverage, including all central, state and local authorities, hospitals and dispensaries, banks and financial services, educational institutions, mines, provident funds and other state insurance corporations, the Food Corporation of India and other warehouses, all industries, power, water and gas generation, trade, transport (water, land and air), construction, real estate and sanitation, religious communities and medical and personal services. The Persons with Disabilities Act does not provide individual rights, but rather places obligations on the government or individual states to put various schemes in place, including, for example, schools for children with disabilities.

<sup>153</sup> South African Constitution, s. 8(4).

<sup>154</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (South African Constitutional Court).

<sup>155</sup> 92 PL 261.

<sup>156</sup> Equality Act s. 5(1).

<sup>157</sup> South African Constitution s. 7(2).



Annemieke | 1966

## Part VI

# Definitions of Equality

## 1. From Formal to Substantive Equality

Constitutional guarantees of equality rarely elaborate on the meaning of equality or discrimination. The closest to such an elaboration is the South African provision, which, as we have seen, refers to fair discrimination. It is thus left to courts to give meaning to the concepts. In all four jurisdictions, there has been an important recognition that equality means more than treating likes alike. Instead, courts have developed conceptions of substantive equality using a range of formulations, such as disparate impact, indirect discrimination, systemic discrimination, and unfair discrimination. Courts in some jurisdictions have also developed a conception of reasonable accommodation. These developments have to some extent been mirrored in legislation, often in more specific form. However, this development has been far from even. The South African Constitutional Court, for example, has resorted to a formal equality approach in a cluster of cases, primarily in the context of gender discrimination.<sup>158</sup> Moreover, in recent years, the US Supreme Court, itself the pioneer of substantive conceptions of equality, has adopted an increasingly restrictive approach to this question. These developments are elaborated below.

The concept of disparate impact was first shaped by the US Supreme Court in relation to Title VII<sup>159</sup> in the landmark US case of *Griggs v Duke Power*.<sup>160</sup> The employer, Duke Power, required a high school education and satisfactory scores in an aptitude test as a condition of employment or transfer to the jobs in question, manual work which required no specific level of education. The same test was applied to all candidates, but because African-American applicants had long received inferior education in segregated schools, both requirements operated to disqualify such applicants at a substantially higher rate than whites. Neither standard was shown to be significantly related to successful job performance. The Court responded by expanding the principle of equality in Title VII. As Burger CJ, delivering the judgment of the Court, put it: 'The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.'<sup>161</sup> Thus equal treatment was held to be discriminatory if the result was that fewer blacks could comply, unless the requirement was necessary for the proper execution of the job in hand.

This conception is codified in the Civil Rights Act 1991.<sup>162</sup> Under this statute, a plaintiff establishes a prima facie violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of race, colour, religion, sex, or national origin'.<sup>163</sup> An employer may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity'.<sup>164</sup> However, even if the employer establishes this defence, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.<sup>165</sup>

The conception of disparate impact was developed in the statutory context of Title VII. However, the US Supreme Court refused to carry over this analysis to the constitutional guarantee. In *Washington v Davis*, it held: 'Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.'<sup>166</sup> In other

<sup>158</sup> See e.g. *S v Jordan* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (South African Constitutional Court).

<sup>159</sup> See further Christa Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerp/Oxford: Intersentia, 2005), 91-92.

<sup>160</sup> *Griggs v Duke Power Co.* 401 US 424, 91 S Ct 849 (1971) (US Supreme Court).

<sup>161</sup> *Griggs v Duke Power Co.* 401 US 424, 91 S Ct 849 (1971) (US Supreme Court) at 431.

<sup>162</sup> 105 Stat 1071.

<sup>163</sup> 42 USC 2000e-2(k)(1)(A)(i).

<sup>164</sup> *Ibid.*

<sup>165</sup> 2000e-2(k)(1)(A)(ii) and (C).

<sup>166</sup> *Washington v Davis* 426 US 229, 96 S Ct 2040 (1976) (US Supreme Court) at 239.

words, whereas intention was not required in a Title VII claim, plaintiffs were required to prove that government intended to discriminate in order to prove a breach of the Equal Protection Clause in the Fourteenth Amendment. This did not in itself challenge the right of Congress to enact statutes, such as Title VII, which bar disparate impact discrimination. However, recent dicta suggest that the US Supreme Court is taking an even more restrictive approach. In *Ricci v De Stefano*,<sup>167</sup> the Court by a majority held that steps taken to reduce disparate impact could breach the prohibition against disparate treatment.<sup>168</sup> Scalia J in his dissenting opinion went even further, and cast doubt on whether the disparate impact principle in Title VII is capable of reconciliation with the constitutional guarantee of equal treatment.<sup>169</sup>

The Supreme Court of Canada, by contrast, has been progressively developing a conception of substantive equality, which it has refined over the years. Beginning with the seminal case of *Andrews v Law Society*,<sup>170</sup> the Court has held that the Charter guarantees not just the right to formal equality, but also the right to substantive equality. In other words, the Charter protects individuals, not just against intentional discrimination by the State, but also against policy, legislation or practices which in effect create inequality. The Canadian Court has also used the concept of systemic inequality. In this context, there is no need for evidence of a specific discriminatory rule or standard: inequality can result from numerous factors and institutional factors which interact.<sup>171</sup>

In developing a substantive conception of equality, the Court has placed particular emphasis on the foundational value of human dignity. As the Court put it in *Law v Canada*: 'Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.'<sup>172</sup> However, in turning the value of dignity into an element of the legal principle, the Court found itself erecting extra barriers for claimants. To prove a breach of Section 15, plaintiffs were required to show not just that the distinction was based on a listed or unenumerated ground, but also that it constituted a violation of human dignity.<sup>173</sup> Thus in *Gosselin*,<sup>174</sup> welfare beneficiaries under 30 received significantly lower benefit than those over 30 unless they participated in a designated work activity or education programme. In practice, there was a considerable shortfall in places available. As a result, many young people, including the claimant, experienced real poverty. She claimed that this constituted age discrimination, in breach of the equality guarantee in Section 15(1) of the Canadian Charter. However, the majority held that 'the provision of different initial amounts of monetary support to each of the two groups does not indicate that one group's dignity was prized above the other's'.<sup>175</sup> It therefore rejected her claim.

This problem has now been recognised by the Canadian Court. In an important case in 2008, *R v Kapp*,<sup>176</sup> it acknowledged that 'several difficulties have arisen from the attempt ... to employ human dignity as a legal test. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity.... But as critics have pointed out, human dignity is an abstract and subjective notion that ... has ... proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.'<sup>177</sup>

<sup>167</sup> *Ricci v DeStefano* 129 S. Ct. 2658 (2009) (US Supreme Court).

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.* per Scalia J at 2681-2.

<sup>170</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Supreme Court of Canada).

<sup>171</sup> *Action Travail des Femmes v Canadian National Railway Company* [1987] 1 SCR 1114 (Supreme Court of Canada).

<sup>172</sup> *Law v Canada* [1999] 1 SCR 497 (Canadian Supreme Court) at para. 51.

<sup>173</sup> *Ibid.* ; *Gosselin v Quebec* 2002 [SCC] 84 (Canadian Supreme Court).

<sup>174</sup> *Gosselin v Quebec* (n 172).

<sup>175</sup> *Ibid.* para. 61 (per McLachlin J).

<sup>176</sup> *R v Kapp* 2008 SCC 41 (Supreme Court of Canada).

<sup>177</sup> *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 53 (Supreme Court of Canada) at paras. 21, 22.



Theo | 1964



The Canadian Court has found little difficulty in developing the constitutional equality guarantee in the direction of adverse impact discrimination. In the landmark case of *Ontario Human Rights Commission v Simpson-Sears Ltd*, interpreting the equality guarantee in the Ontario Human Rights Code, McIntyre J stated that the main aim was 'not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.... if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.'<sup>178</sup> This definition of adverse effects discrimination has been expressly adopted in the context of the equality guarantee in Section 15(1) of the Canadian Charter.<sup>179</sup> However, the Canadian Court has been loath to draw a rigid distinction between direct and indirect discrimination or equal treatment and disparate impact. In a case in 1997 (the *Meiorin* case),<sup>180</sup> McLachlan J took the opportunity of rejecting the conventional bifurcated approach which categorised discrimination as either 'direct', meaning discriminatory on its face, or 'adverse effect', meaning discriminatory in effect. She recognised that 'the conventional analysis was helpful in the interpretation of the early human rights statutes, and indeed represented a significant step forward in that it recognized for the first time the harm of adverse effect discrimination'.<sup>181</sup> However, it no longer served the purpose of human rights legislation. There were a number of reasons for this. Most important for our purposes was the fact that few cases could be neatly categorised as direct or adverse effect discrimination. The example given by McLachlan J is particularly instructive. She referred to a rule requiring all workers to appear at work on Fridays or face dismissal. This could be directly discriminatory, in that no workers whose religious beliefs preclude working on Fridays may be employed there. Or it could be characterised as an apparently neutral rule that merely has an adverse effect on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays).<sup>182</sup> The difficulty in classification led McLachlan J to conclude that it was not appropriate for the distinction to constitute the basis for diverging remedial or other outcomes.<sup>183</sup>

Consistently with the general transformative approach of the South African Constitution the interpretation of the equality guarantee in Section 9 was from the start expressly substantive. This approach is readily apparent in the framework of analysis of Section 9 set up by the Court early on in its jurisprudence. The first stage ('everyone is equal before the law and has the right to equal protection and benefit of the law') constitutes a test of rationality. If the provision differentiates between people or categories of people, the State must demonstrate that the differentiation bears a rational connection to a legitimate government purpose. If it passes the rationality test, it might nevertheless amount to unfair discrimination under Sections 9(3)-(4). Where differentiation is on the basis of an enumerated ground, discrimination is presumed and the onus passes to the State to show that it is not unfair.<sup>184</sup> Otherwise, whether or not there is discrimination will depend upon 'whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'.<sup>185</sup> The fairness question has been similarly framed in substantive terms. Thus 'the test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation'.<sup>186</sup> The criterion of fairness is therefore the main vehicle by which the Court has developed substantive equality. Finally, if the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause.

<sup>178</sup> Ibid. at para. 12.

<sup>179</sup> *Egan v Canada* [1995] 2 SCR 513 (Canadian Supreme Court) at para. 138.

<sup>180</sup> *British Columbia (Public Service Employee Relations Commission) v BCGEU* (1999) 3 SCR 3 (Supreme Court of Canada).

<sup>181</sup> Ibid. at para. 25.

<sup>182</sup> Ibid. at para. 27.

<sup>183</sup> See further ('Defences').

<sup>184</sup> Section 9(5).

<sup>185</sup> *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) (South African Constitutional Court) at paras 22-41.

<sup>186</sup> Ibid. See also *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) (South African Constitutional Court) at para 42.

Although the Constitution refers to direct and indirect discrimination, this was not clearly defined until the case of *Walker*.<sup>187</sup> In that case, which was decided under the interim Constitution, the Court stated: 'The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by [the constitutional equality guarantee] evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination.'<sup>188</sup> The Court held that it was unnecessary in the present case to formulate a precise definition of indirect discrimination. However, it was held that both direct and indirect discrimination on one of the specified grounds gives rise to a presumption of unfair discrimination.

The South African statutory provisions likewise refrain from precise definitions of the concepts of direct and indirect discrimination. Instead, the focus is on fairness. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 defines 'discrimination' as: 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds'.<sup>189</sup> As in the Constitution, the onus is on the respondent to prove fairness. The statute lists the factors to take into account to determine fairness. Some of these are concerned with fairness per se. These include whether the discrimination impairs human dignity, the impact on the complainant, whether the complainant suffers from patterns of disadvantage or belongs to a group which does. Others are more concerned with the justification or limitation of fairness. These include whether the discrimination has a legitimate purpose, whether it achieves its purpose, whether there are less restrictive and disadvantageous means to achieve the purpose and whether and to what extent the respondent has taken reasonable steps to address the disadvantage or accommodate diversity.<sup>190</sup> Courts are required to construe the Equality Act consistently with the Constitution. The Employment Equity Act 1998 simply echoes the constitutional guarantee. Thus, it states that no person may unfairly discriminate, directly or indirectly, against any employee on one of the prohibited grounds.<sup>191</sup>

The concept of substantive equality has been developed very differently in India. The need to give positive preference to disadvantaged groups in the form of reservations has always been regarded as an essential element of equality, rather than as a breach or even an exception. The Indian conception is therefore clearly substantive. However, until recently, there has been almost no development of a concept of indirect discrimination equivalent to that in the US, Canada or South Africa.<sup>192</sup> Instead, the interpretation of the general equality guarantee in Article 14 has focussed on the rationality of a classification. In an important recent decision, *Anuj Gharg*,<sup>193</sup> however, the Supreme Court paid close attention to the demands of equality in the context of discrimination on a prohibited ground. In this case, which concerned a prohibition on the employment of women and men under 25-year-olds in premises in which alcohol was consumed, the Court drew heavily on jurisprudence from the US, South Africa, and the European Court of Human Rights in formulating its approach. Ultimately, it held that when a classification impinges on the fundamental right to autonomy of a disadvantaged or vulnerable group, including women, the Court should subject the classification to a heightened degree of scrutiny:

It is to be borne in mind that legislations with pronounced 'protective discrimination' aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the

<sup>187</sup> *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; (South African Constitutional Court).

<sup>188</sup> *Ibid.* at para. 31.

<sup>189</sup> Section 1.

<sup>190</sup> Equality Act s. 14.

<sup>191</sup> Employment Equity Act 1998, ss. 5 and 6.

<sup>192</sup> T. Khaitan 'The Theory and Practice of Equality Law' Report for the Consultation on Discrimination law, organized by the Lawyers' Collective, Delhi, 2009.

<sup>193</sup> *Anuj Garg & Ors v Hotel Association of India & Ors* [2007] INSC 1226: AIR 2008 SC 663 (Supreme Court of India).

implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling state purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases.<sup>194</sup>

However, the test formulated by the Court does not appear to be as rigid as the strict scrutiny test used by its US counterpart. Instead, the Court formulated a two stage test: whether the legislative interference is justifiable in principle, and whether there is a reasonable relationship of proportionality between the means used and the aims pursued.<sup>195</sup> In particular, the principle of 'strict scrutiny' would not apply to affirmative action (see further below).

Although this approach is yet to be further developed by the Supreme Court, it has been applied and developed by the Delhi High Court in the *Naz Foundation* case, in which the Court struck down anti-sodomy legislation as a breach of the equality guarantees. As the Court put it, the criminalisation of sodomy 'is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class.'<sup>196</sup> The Court interpreted the approach in *Anuj Garg* thus:

As held in *Anuj Garg*, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against 'reasonableness' under Article 14 but be subject to 'strict scrutiny'. The impugned provision ... criminalises the acts of sexual minorities particularly men who have sex with men and gay men. It disproportionately impacts them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution.... A provision of law branding one section of people as criminal based wholly on the State's moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.<sup>197</sup>

## 2. Duty of Accommodation

An increasingly important aspect of substantive equality is the requirement of reasonable accommodation. This concept is generally associated with disability discrimination. Thus in the US, the Americans with Disabilities Act of 1990 provides that it is discriminatory for an employer to fail to make 'reasonable accommodations to the known physical or mental limitations of an [employee] with a disability' unless the employer 'can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business'.<sup>198</sup> 'Reasonable accommodation' may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities. It may also entail job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.<sup>199</sup> 'Undue hardship' means an action requiring significant difficulty or expense when considered in light of factors such as the nature and cost of the accommodation; the overall financial resources of the responsible entity; its size; functions; location; etc. However, the concept is not confined to disability. In the

<sup>194</sup> *Anuj Garg & Ors v Hotel Association of India & Ors* [2007] INSC 1226: AIR 2008 SC 663 (Supreme Court of India) at paras. 44-45.

<sup>195</sup> *Ibid.* at paras. 48-9.

<sup>196</sup> *Naz Foundation v Government of NCT of Delhi*, WP(C) No.7455/2001, 2 July 2009 (High Court of Delhi) at para. 94.

<sup>197</sup> *Ibid.* at para. 113.

<sup>198</sup> 42 USC 12112(b)(5)(A).

<sup>199</sup> 42 USC 12111 (9).

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US, the duty of reasonable accommodation also applies for religious purposes. An employer is required to make 'reasonable accommodations' to the religious needs of its employees, short of 'undue hardship'.<sup>200</sup>

Similarly, in Canada, the duty has its origins in religious discrimination. Thus in *Simpson-Sears*,<sup>201</sup> the applicant argued that a rule requiring employees to be available for work on Saturdays discriminated against those observing a Saturday Sabbath, thus contravening the Ontario Human Rights Code.<sup>202</sup> The Supreme Court of Canada held that the respondent had an obligation to take reasonable steps to accommodate the religious observance of the complainant, short of undue hardship in the operation of its business. This approach has been expressly adopted in relation to the constitutional guarantee of equality in the Canadian Charter.<sup>203</sup>

In Canadian law, the duty extends well beyond religion and disability. It is expressed as one of the central purposes of the Canadian Human Rights Act, Section 2 of which reads as follows:

All individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

More specifically, the Act provides that the special needs of a person relating to a prohibited ground of discrimination must be accommodated unless the employer or service provider can prove that to do so would be an undue hardship. A similar broad ranging obligation is found in the Canadian Employment Equity Act. Section 5 provides that 'every employer shall implement employment equity' by, among other measures, 'making such reasonable accommodations as will ensure that persons in a designated group' achieve a degree of representation commensurate with their representation in the Canadian workforce and their availability to meet reasonable occupational requirements.

In South Africa too, in the constitutional context the duty of reasonable accommodation has been primarily developed in the context of religion.<sup>204</sup> In its statutory form, it extends into employment and non-employment issues. Thus, in an approach which almost mirrors that of the Canadian Employment Equity Act, the South African Employment Equity Act places a duty on designated employers, as part of their affirmative action obligations, to make reasonable accommodation for workers with disabilities, blacks and women to ensure that they enjoy equal opportunities and equitable representation in the workforce.<sup>205</sup> Reasonable accommodation includes any modification or adjustment to a job or working environment. Similarly, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 recognises that 'failing to take steps to reasonably accommodate the needs' of people on the basis of race,<sup>206</sup> gender<sup>207</sup> or disability<sup>208</sup> will amount to unfair discrimination. In particular, it is unfairly

<sup>200</sup> 42 USC 2000e(j) (1970 ed, Supp V). See also 703(a)(1) of the Civil Rights Act of 1964, Title VII, 78 Stat 255, 42 USC 2000e-2(a) (1) (prohibits religious discrimination in employment).

<sup>201</sup> *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR. 53 (Supreme Court of Canada).

<sup>202</sup> Section 4(1)(g) of the Ontario Human Rights Code prohibiting discrimination on grounds of 'creed'; since superseded by the differently worded Section 10 of the Human Rights Code 1981.

<sup>203</sup> *Eldridge v British Columbia* [1997] 3 SCR 624 (Canadian Supreme Court) at para. 63.

<sup>204</sup> *Prince v President of the Law Society of the Cape of Good Hope (CCT36/00)* at paras. 76, 146-148, 170-172; *Minister of Home Affairs v Fourie (CCT 60/04)* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (South African Constitutional Court) at 159.

<sup>205</sup> Employment Equity Act s.15.

<sup>206</sup> Section 7(e).

<sup>207</sup> Section 8(h).

<sup>208</sup> Section 9(c).

discriminatory to ‘fail to eliminate obstacles that unfairly limit or restrict people with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such people.’<sup>209</sup> The Act places a duty on the State to ‘develop codes of practice in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation’<sup>210</sup> and permits courts to order that a group or class of persons be reasonably accommodated.<sup>211</sup> Finally, whether the applicant has taken reasonable steps to accommodate diversity is a factor for the determination of fairness.<sup>212</sup>

What then is the content of the principle? In the *Pillay* case in the South African Constitutional Court, Langa CJ stated as follows:

At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.... While the extent of this exclusion is most powerfully felt by the disabled, the same exclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm. Our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred.<sup>213</sup>

Reasonable accommodation is an important expression of the conception of substantive equality. Rather than expecting disadvantaged individuals and groups to conform to the dominant norm, this approach requires the norm to be adapted to facilitate equal participation. As Sopinka J put it in the Supreme Court of Canada:

Exclusion from the mainstream of society results from the construction of a society based solely on ‘mainstream’ attributes to which disabled persons will never be able to gain access.... [I]t is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.<sup>214</sup>

Moreover, reasonable accommodation is an aspect of substantive equality, not a breach or an exception to it. Thus the US Supreme Court has emphasised that ‘preferences will sometimes prove necessary to achieve the [Americans with Disabilities] Act’s basic equal opportunity goal. The simple fact that an accommodation would provide a “preference” – in the sense that it would permit the worker with a disability to violate a rule that others must obey – cannot, *in and of itself*, automatically show that the accommodation is not “reasonable.”’<sup>215</sup> Similarly, the Supreme Court of Canada has stressed that avoidance of discrimination on grounds of disability will frequently require distinctions to be made to take into account the actual personal characteristics of disabled persons.<sup>216</sup>

Furthermore, the duty of reasonable accommodation expressly imposes a positive duty to make changes. This has been particularly clearly emphasised by the Supreme Court of Canada, which has held that it is not enough to respond to individual accommodation requests. Instead, ‘Employers ... must build conceptions of equality into

<sup>209</sup> Promotion of Equality Act s. 9.

<sup>210</sup> Section 25(1)(c)(iii).

<sup>211</sup> Section 21(2)(i).

<sup>212</sup> Section 14(3)(i)(ii).

<sup>213</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (South African Constitutional Court) at paras 73-75.

<sup>214</sup> *Eaton v Brant County Board of Education* [1997] 1 SCR. 241 (Supreme Court of Canada) at paras 66-7.

<sup>215</sup> *US Airways v Barnett* 535 US 391 (2002) (US Supreme Court) at 397-8.

<sup>216</sup> *Eldridge v British Columbia* [1997] 3 SCR 624 (Canadian Supreme Court) at para 65.



workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible... The standard itself is required to provide for individual accommodation, if reasonably possible.<sup>217</sup> This was extended beyond employment to other services in the *Grismer* case.<sup>218</sup>

However, not all practices can be reasonably accommodated. In *Christian Education*,<sup>219</sup> the South African law prohibiting corporal punishment in schools was challenged as a breach of the right to religious freedom. The Constitutional Court identified the dilemma as follows:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.<sup>220</sup>

Balancing the needs of the individual and those of society, therefore, remains problematic. As Langa CJ put it in the *Pillay* case:

The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the 'mainstream' to swim freely in its waters. This is an issue which has been debated both in this Court<sup>221</sup> and abroad<sup>222</sup> and different positions have been taken. For instance, although the term 'undue hardship' is employed as the test for reasonable accommodation in both the United States and Canada, the United States Supreme Court has held that employers need only incur 'a *de minimis* cost' in order to accommodate an individual's religion,<sup>223</sup> whilst the Canadian Supreme Court has specifically declined to adopt that standard<sup>224</sup> and has stressed that 'more than mere negligible effort is required to satisfy the duty to accommodate.'<sup>225</sup> The latter approach is more in line with the spirit of our constitutional project which affirms diversity. However, the utility of either of these phrases is limited as ultimately the question will always be a contextual one dependant not on

<sup>217</sup> *British Columbia (Public Service Employee Relations Commission) v BCGEU* (1999) 3 SCR 3 (Supreme Court of Canada) at para. 168.

<sup>218</sup> *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 (Supreme Court of Canada).

<sup>219</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) (South African Constitutional Court).

<sup>220</sup> *Ibid.* at para. 35.

<sup>221</sup> See *Prince v President of the Law Society of the Cape of Good Hope and Others* (CCT36/00) [2000] ZACC 28; 2001 (2) SA 388; 2001 (2) BCLR 133 (South African Constitutional Court).

<sup>222</sup> For a useful summary of the various positions see Pretorius et al *Employment Equity Law* (Durban: LexisNexis Butterworths, 2001) at 7.6-7.18.

<sup>223</sup> *Trans World Airlines Inc v Hardison* 432 US 63 (1977) at 84.

<sup>224</sup> *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970 at 983g-985a.

<sup>225</sup> *Ibid.* at 984a.



its compatibility with a judicially created slogan but with the values and principles underlying the Constitution.<sup>226</sup> Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.<sup>227</sup>

Thus in both the US and South Africa, courts have rejected a claim that criminal prohibitions on drug-taking should be relaxed to accommodate Rastafarians and First Americans.<sup>228</sup> On the other hand, the South African Constitutional Court upheld a claim by a Hindu student that an exception should be made to school uniform rules to permit her to wear a bracelet which was part of her cultural identity.<sup>229</sup>

Indian law in this respect remains focussed on reservation as the main vehicle for bringing about change. An express duty of reasonable accommodation is therefore underdeveloped. However, the proposed Rights of Persons with Disabilities Bill 2011 includes a duty to make reasonable accommodation for people with disabilities. The proposed bill defines reasonable accommodation as a duty to take reasonable steps to avoid disadvantages in relation to practices and provisions, or physical premises, or to provide relevant auxiliary aids.<sup>230</sup> The Bill also requires states and governments to make reasonable accommodation for persons with disabilities in education.

### 3. Harassment

Although it has been a struggle to achieve recognition of sexual harassment as a species of sex discrimination, all four jurisdictions now include sexual harassment and other forms of harassment within their anti-discrimination framework. Thus the US Supreme Court has acknowledged sexual harassment as falling within Title VII although not expressly mentioned therein. Particularly important was the case of *Meritor Savings Bank*, where the Court accepted that sexual harassment did not need to be directly linked to an economic quid pro quo, but could arise where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'<sup>231</sup> Thus both 'quid pro quo' and 'hostile environment' sex discrimination are actionable under Title VII, although the latter requires harassment that is severe or pervasive.<sup>232</sup> On the other hand, the Court also held that evidence as to the respondent's 'sexually provocative' speech and dress could be admitted.

Subsequently, the question which has engaged the courts has concerned vicarious liability, or the extent to which an employer can be held to be liable for acts of sexual harassment perpetrated by an employee. The Court has held that an employer can be liable, not just for quid pro quo sexual harassment, but also for the hostile environment created by a supervisor. However, the Court made it relatively easy for the employer to mount a defence.<sup>233</sup> Thus an employer may defend against such a claim by showing both that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus.<sup>234</sup>

<sup>226</sup> *Prince v President of the Law Society of the Cape of Good Hope and Others* (CCT36/00), above n 220, at para 155 (Sachs J).

<sup>227</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (South African Constitutional Court) at para 76.

<sup>228</sup> *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 (1990) (US Supreme Court); *Prince v President of the Law Society of the Cape of Good Hope and Others* (CCT36/00) [2000] ZACC 28; 2001 (2) SA 388; 2001 (2) BCLR 133 (South African Constitutional Court).

<sup>229</sup> *Bhinder v CN*, [1985] 2 SCR 561.

<sup>230</sup> Rights of Persons with Disabilities Bill 2011. See <http://www.disabilitystudiesnalsar.org/newlaw.php>.

<sup>231</sup> EEOC Guidelines § 1604.11(a)(3); *Meritor Savings Bank, FSB v Vinson*, 477 US 57 (1986) (US Supreme Court).

<sup>232</sup> *Ibid.*

<sup>233</sup> *Burlington Industries, Inc. v Ellerth* 524 US 742 (1998) (US Supreme Court).

<sup>234</sup> *Pennsylvania State Police v Suders* 542 US 129 (2004) (US Supreme Court).

The Supreme Court of Canada has similarly affirmed that sexual harassment is a form of sex discrimination, overturning the Manitoba Court of Appeals, which expressed 'surprise' at the idea that sexual harassment could constitute sex discrimination in contravention of the Manitoba human rights statute.<sup>235</sup> Drawing directly on US jurisprudence in *Meritor Savings Bank*, Dickson CJ stated: 'When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.'<sup>236</sup> The Canadian Court, however, formulated a somewhat different test for employer liability than its US counterpart. In its view, employers should be liable for all acts of their employees 'in the course of employment', where the latter was interpreted broadly to include all activities in some way related or associated with employment.<sup>237</sup>

At federal level, the Canadian Human Rights Act states that it is a discriminatory practice to harass an individual on a prohibited ground in the provision of goods, services, facilities or accommodation customarily available to the general public as well as in the provision of commercial premises or residential accommodation and in matters related to employment.<sup>238</sup> This includes sexual harassment. Similarly, the Canadian Labour Code provides that every employee is entitled to employment free of sexual harassment, and every employer must make every reasonable effort to ensure that no employee is subjected to sexual harassment.<sup>239</sup>

Developments in India in relation to sexual harassment have been dramatic. In the 1997 *Vishaka* case, a public interest petition was brought in relation to a gang rape of a woman employee of the state government and the failure of officials to investigate her complaints.<sup>240</sup> The Supreme Court held that sexual harassment in the workplace violated women's rights to equality. According to the Court: 'The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.'<sup>241</sup> As well as defining sexual harassment at work, the Court held that employers were obliged to provide a mechanism for the prevention of sexual harassment and for its resolution, settlement or prosecution. Accordingly, the Court framed guidelines on sexual harassment in the workplace and declared the guidelines as the law of the land until the legislature took further action.<sup>242</sup> It was not, however, until December 2010, over 13 years since the *Vishaka* case, that the Protection of Women Against Sexual Harassment at Workplace Bill was presented to the Indian Parliament. The Bill was referred to a parliamentary sub-committee, where it remains at present.

In South Africa, the situation is much clearer. The Employment Equity Act states that harassment is a form of unfair discrimination and is prohibited on one or a combination of grounds listed.<sup>243</sup> The Equality Act states bluntly: 'No person may subject any person to harassment.'<sup>244</sup>

<sup>235</sup> *Janzen v Platy Enterprises Ltd* [1989] 1 SCR 1252 (Supreme Court of Canada).

<sup>236</sup> *Ibid.* at para 56.

<sup>237</sup> *Ibid.*

<sup>238</sup> Section 14(1).

<sup>239</sup> Canada Labour Code at 247.2 and 247.3.

<sup>240</sup> *Vishaka v State of Rajasthan* (1997) 6 SCC 241 (Indian Supreme Court).

<sup>241</sup> *Ibid.* at para. 14.

<sup>242</sup> See I Jaising, 'Gender Justice and the Supreme Court' in B Kirpal and others (eds), *Supreme but not Infallible* (New Delhi: OUP, 2000), 296.

<sup>243</sup> Employment Equity Act, s.6(3).

<sup>244</sup> Equality Act s.11.

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## Part VII

# Affirmative Action

Affirmative action has always been a highly controversial issue in discrimination law. By expressly preferring an individual or group on the basis of race, gender or other status, such strategies appear to breach the fundamental principle of anti-discrimination law. However, with the increasing recognition that equality constitutes more than 'treating likes alike', it has become clear that such preferences, when exercised in favour of a disadvantaged group, could well further equality rather than detracting from it. The extent to which it does so depends heavily on how carefully it is framed, and how beneficiary groups are demarcated. All four of the jurisdictions dealt with here have accepted that affirmative action can be an aspect of equality, although recent decisions in the US Supreme Court have been increasingly restrictive.

## 1. USA

Early cases in the US Supreme Court recognised that although 'the enduring hope is that race should not matter; the reality is that too often it does'. Mandated by Title VII of the Civil Rights Act 1964, courts began to order affirmative action as a remedy in cases of proven past discrimination.<sup>245</sup> This soon extended into an acceptance of voluntarily instituted affirmative action programmes, often instituted by employers to avoid the risk of disparate impact litigation.<sup>246</sup> This extended too to states. Indeed, in *Fullilove v Klutznick*,<sup>247</sup> Chief Justice Burger stated specifically that substantive reverse discrimination was a necessary means to achieve equal economic opportunities.

However, recent cases have been marked by the ascendancy of a far more restrictive approach, which centres on the question of whether 'strict scrutiny' should apply to affirmative action measures in the same way as it applies to invidious discrimination. After much conflicting jurisprudence, the exacting standard of strict scrutiny won the day. Thus in *Adarand v Peña*,<sup>248</sup> the Court decided by a majority of 5:4 that even in cases of 'benign' racial classification, or affirmative action, the standard of strict scrutiny should apply. Nevertheless, O'Connor J, giving judgment for the Court, was at pains to dispute the notion that strict scrutiny is strict in theory but fatal in fact.<sup>249</sup> Indeed, she held, the federal government might well have a compelling interest to act on the basis of race to overcome the 'persistence of both the practice and lingering effects of racial discrimination against minority groups'.<sup>250</sup> This approach was tested in *Grutter*,<sup>251</sup> where the legitimacy of affirmative action measures in favour of Afro-Americans in higher education was again before the Court. In this case, the University of Michigan's affirmative action strategy was challenged on the grounds that its preference for Afro-Americans breached the Fourteenth Amendment equality guarantee. The Court upheld the plan. Signalling the narrow triumph of O'Connor J's approach, the Court stated: 'Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. ... Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context.'<sup>252</sup>

This raises the question of what would constitute a compelling interest sufficient to legitimate an affirmative action programme. Two acceptable interests have been identified in Supreme Court case law. The first is well established: the interest in remedying the effects of past intentional discrimination. The second is more complex: the interest in diversity. The idea that diversity could be a compelling interest first surfaced in the judgment of Powell J in the

<sup>245</sup> *Franks v Bowman Transportation Co* 424 US 747, 96 S Ct 1251 (1975).

<sup>246</sup> *United Steelworkers v Weber* 443 US 193, 99 S Ct 2721 (1979); *Johnson v Santa Clara* 480 US 616, 107 S Ct 1442 (1987).

<sup>247</sup> 448 US 448, 100 S Ct 2758 (1980).

<sup>248</sup> *Adarand Constructors, Inc. v Peña*, (1995) 515 US 200 (US Supreme Court).

<sup>249</sup> *Ibid.* at 2117.

<sup>250</sup> Rehnquist, Kennedy, and Thomas JJ all agreed.

<sup>251</sup> *Grutter v Bollinger* 539 U.S. 306 (2003).

<sup>252</sup> *Grutter v Bollinger* supra note 252 at 327.

*Bakke* case.<sup>253</sup> It was this interest that the Court emphasised in *Grutter*,<sup>254</sup> which upheld the University of Michigan's race-conscious policy on the grounds that it furthered the legitimate aim of diversity in higher education. Moreover, *Grutter* held, for a race-conscious programme to be 'narrowly tailored', it must be flexible and allow individual evaluation.

The most recent dispute concerns school districting measures aimed at avoiding re-segregation and countering the effects of residential segregation. In *Parents Involved in Community Schools v Seattle*,<sup>255</sup> a challenge was mounted against a school district student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools with these aims in mind. The Court struck down the plan by a majority of 5:4. All the judges in *Community Schools* agreed that the need to remedy intentional past discrimination constituted a compelling reason. However, the majority held that this did not extend to de facto discrimination: 'Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not.' Nor was a state permitted to voluntarily institute such measures. When de facto discrimination is at issue, states must 'seek alternatives to the classification and differential treatment of individuals by race'.

The plurality decision took the view that race should never feature in a government decision. However, Kennedy J, who held the swing vote, rejected this approach. To regard the Constitution as wholly colour blind 'is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.' In particular, he held, if school authorities were concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all their students, they were free to devise race-conscious measures to address the problem in a general way, provided they did not treat each student on the basis of a systematic individual typing by race. Thus it is clear that even in the US there remains a clear role for race-conscious programmes. Kennedy J's judgment strongly suggests it is possible for an affirmative action programme to be upheld if it is narrowly tailored to achieve a legitimate state interest. Remedial programmes to correct previous de jure discrimination will fulfil this standard if narrowly tailored (in the sense described above), as will programmes to promote diversity, whether in higher education, in schools, or potentially elsewhere. For a programme to be narrowly tailored, it is not necessary for a body to have exhausted every conceivable race-neutral possibility.

As we saw above, gender is not considered a suspect class that is subject to strict scrutiny. Thus affirmative action programmes in favour of women need not reach the standard of strict scrutiny required in race cases. In *US v Virginia*,<sup>256</sup> the Supreme Court reiterated that 'sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, to advance the full development of talent and capacities of nation's people; but such classifications may not be used to create or perpetuate legal, social, and economic inferiority of women.'

## 2. Canada

The other three jurisdictions have had a much less anguished approach to affirmative action, largely regarding it as a means to achieve substantive equality, rather than as a breach. This is assisted by the fact that affirmative action is expressly mandated in all three Constitutions. Thus the Canadian Charter makes it clear that measures will not

<sup>253</sup> *Regents of the University of California v Bakke* 438 US 265 (United States Supreme Court).

<sup>254</sup> *Grutter v Bollinger* above note 252.

<sup>255</sup> *Parents Involved in Community Schools v Seattle School Dist. No. 1* 127 S Ct 2738 (2007) (US Supreme Court).

<sup>256</sup> *US v Virginia* 518 US 515 (1996) (United States Supreme Court).

be a breach of the equality guarantee in the Charter if the object is to ameliorate the conditions of disadvantaged individuals or groups. Section 15(2) states: '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.'<sup>257</sup> While there was some suggestion in earlier cases that Section 15(2) should be read as an exception to the equality guarantee, the Supreme Court of Canada in its 2008 decision in *Kapp*<sup>258</sup> emphatically held that:

Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies

s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combating discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the Charter preserves the right of governments to implement such programs, without fear of challenge under s. 15(1).... Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.<sup>259</sup>

Moreover, 'Section 15(2) supports a full expression of equality, rather than derogating from it.'<sup>260</sup>

### 3. South Africa

Similarly, Section 9(2) of the South African Constitution provides: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' The meaning of this provision was elaborated in *Van Heerden*.<sup>261</sup> As Moseneke J stressed, instead of being an exception to equality, restitutionary measures are an essential part of it.

What is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality ... Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'.<sup>262</sup>

Affirmative action programmes are a major part of the strategy of achieving equality, particularly in employment. Thus the Employment Equity Act requires designated employers to implement affirmative action measures for people from designated groups (black people, women and people with disabilities). Affirmative action measures are defined as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce.<sup>263</sup> It is expressly provided that it is not unfair discrimination to take affirmative action measures in accordance with the Act. However, an individual does not have a claim against the employer for failing to afford

<sup>257</sup> Canadian Charter of Rights, s. 15(2).

<sup>258</sup> *R v Kapp* 2008 SCC 41 (Supreme Court of Canada).

<sup>259</sup> *Ibid.* at para. 16.

<sup>260</sup> *Ibid.* at para. 37.

<sup>261</sup> *Minister of Justice v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (South African Constitutional Court).

<sup>262</sup> *Ibid.* at para. 30.

<sup>263</sup> Employment Equity Act s. 15(1).



her preferential treatment.<sup>264</sup> Notably, measures to ensure the equitable representation of designated groups may include preferential treatment and numerical goals but exclude quotas. Notably too, employers are not required to take any decision 'that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.'<sup>265</sup>

## 4. India

The Constitution of India was one of the earliest constitutions to expressly incorporate provisions for affirmative action, in the form of 'reservations' of a proportion of university places or public sector jobs. The framers of the Constitution took note of the fact that certain communities in the country were suffering from extreme social, educational and economic disadvantage, arising out of the age-old practice of 'untouchability' and caste discrimination, and needed special consideration to accelerate their socio-economic development. Special provision is therefore made in the Constitution for two categories of disadvantaged groups. The first are known as 'Scheduled Castes and Scheduled Tribes' and are specified by the President.<sup>266</sup> The second are referred to as 'socially and educationally backward classes of citizens',<sup>267</sup> or other 'backward classes'.<sup>268</sup> The latter are specified in a list drawn up by the National Commission for Backward Classes.<sup>269</sup> Article 15(4) permits special provision for the advancement of any 'socially and educationally backward' classes of citizens or for the Scheduled Castes and the Scheduled Tribes, and in particular, for their admission to educational institutions. Similarly, Article 16, which provides for equal opportunity in public employment, expressly permits the State to make provisions for reservations in recruitment or promotion in favour of the Scheduled Castes and Scheduled Tribes.<sup>270</sup> At the same time, Article 15(3) states that the State may make special provision for women and children.

The Supreme Court of India has made it clear that affirmative action is a facet of the principle of non-discrimination rather than an exception, a possible means of achieving equality rather than a breach.<sup>271</sup> According to Justice Krishna Iyer: 'To my mind, this sub-article [16(4)] serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to.... It has not really carved out an exception but has preserved a power untrammelled by the other provisions of the Article.'<sup>272</sup> This perspective was reinforced in the seminal case of *Indra Sawhney*,<sup>273</sup> where Justice Reddy for the majority made it clear that Article 14 did not entail the removal of classifications or formal, symmetric equality. Instead, the concept of 'equality before the law contemplates minimising the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals, but also among groups of people'.<sup>274</sup> In particular, it contemplates the promotion 'with special care [of] the educational and economic interests of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes'.<sup>275</sup>

<sup>264</sup> *Dudley v City of Cape Town and Another* (CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC) (South African Labour Appeal Court).

<sup>265</sup> Employment Equity Act ss 15 (3) and (4).

<sup>266</sup> Constitution of India, <http://lawmin.nic.in/coi/coiason29july08.pdf>, Articles 341(1) and 342(1).

<sup>267</sup> *Ibid.* Article 15(4).

<sup>268</sup> *Ibid.* Article 16(4).

<sup>269</sup> *Ibid.* Article 340(1); the list can be found at <http://ncbc.nic.in/backward-classes/index.html>.

<sup>270</sup> *Ibid.* Article 16(4A) and (4B).

<sup>271</sup> *State of Kerala v NM Thomas* AIR 1976 SC 490 (Supreme Court of India).

<sup>272</sup> *Ibid.* at 513.

<sup>273</sup> *Indra Sawhney v Union of India* AIR 1993 SC 477 (Supreme Court of India).

<sup>274</sup> *Ibid.* at para 5.

<sup>275</sup> *Ibid.* at 502-3.

The most recent case on reservations in the Supreme Court of India crystallises the view that equality requires affirmative action, rather than precluding it. In the 2008 judgment in *Ashoka Kumar Thakur*,<sup>276</sup> the Chief Justice stated: 'Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution.'<sup>277</sup> Thus 'Article 15(4) and 16(4) are not exceptions to Article 15(1) and Article 16(1) but independent enabling provision[s]'.<sup>278</sup> In *Ashoka Kumar*, the Supreme Court of India was invited to hold that affirmative action decisions should be subject to 'strict scrutiny' in a similar fashion to the test used in the United States (see above). The Supreme Court of India rejected this view. Affirmative action was legitimated both by express constitutional provision for reservations and by the specific provision in the Directive Principles referred to above.

Reservations are now widespread in higher education and public service jobs. But in recent decades, the question has arisen as to whether they should continue to be available to the 'creamy layer', or those members of the certified groups who are in fact no longer socially or educationally disadvantaged. In two of the foremost cases, the Indian Supreme Court has held emphatically that, at least in the case of other backward castes, the creamy layer should be excluded. Justice Jeevan Reddy stated in *Indra Sawhney*'s case, 'In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class as a backward class.'<sup>279</sup> Similarly, the Chief Justice in *Ashoka Kumar* stated: 'To fulfil the conditions and to find out truly what is socially and educationally backward class, the exclusion of "creamy layer" is essential.'<sup>280</sup> In other words, the definition of the beneficiary class must correspond with the purpose of the provision, namely to advance those who are disadvantaged. On the other hand, there is no provision for reservation in favour of disadvantaged Muslims.

<sup>276</sup> *Ashoka Kumar Thakur v Union of India*, Writ Petition (civil) 265 of 2006 (Date of Judgment 10/04/2008).

<sup>277</sup> *Ibid.* at para 6.

<sup>278</sup> *Ibid.* at para 100.

<sup>279</sup> *Indra Sawhney v Union of India* AIR 1993 SC 477 (Supreme Court of India) at p. 724.

<sup>280</sup> *Ashoka Kumar Thakur v Union of India*, Writ Petition (civil) 265 of 2006 (Date of Judgment 10/04/2008) para. 149.



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## Part VIII

# Justification Defences

In all four jurisdictions, a crucial question arises. When will discrimination be capable of being excused or justified? What competing priorities can displace a finding of discrimination? Generally, the answer has been formulated in terms of proportionality. Proportionality requires close scrutiny first of the stated aims, and secondly of the extent to which the derogation from equality achieves those aims. Proportionality is, however, open to varying interpretations, both as to which aims should be legitimate and how close the 'fit' should be between the means and the ends.

As we have seen, the US Supreme Court has developed a three tier test to determine when an infringement on equality can be justified under the Equal Protection Clause of the Fourteenth Amendment. Essentially based on proportionality, the tiers differ in respect of the strictness of the 'fit' required between means and ends. Thus a legislative or other classification on grounds of race and alienage can only be justified if it furthers a *compelling* interest of a state and the classification is *narrowly tailored* to achieve it, in the sense that no other alternatives are available. A classification based on gender, by contrast, requires a justification which is 'exceedingly persuasive'.<sup>281</sup> that is the discriminatory classification must be *substantially related* to the achievement of *important* governmental objectives. All other classifications, including those based on age, need only demonstrate a *rational* connection to a *legitimate* interest of a state.

Under the statutory guarantee found in Title VII of the Civil Rights Act, we have seen that the US Supreme Court fashioned the concept of disparate impact in the *Griggs* case. Here too, the question arises as to the extent to which the disparate impact should be condoned if it furthers other interests. As expressed in *Griggs*, 'the touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.'<sup>282</sup> The justification phase therefore requires, a consideration of (i) the justifications an employer offers for his use of these practices; and (ii) the availability of alternative practices, with less racial impact, to achieve the same business ends. The insistence on business necessity has, however, been somewhat diluted by later cases. Thus in *Wards Cove*,<sup>283</sup> the Court stressed that, although 'a mere insubstantial justification in this regard will not suffice ... there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster.' *Wards Cove* also made it significantly more difficult for plaintiffs to prove disparate impact by holding that although the employer carries the burden of producing evidence of a business justification, the burden of persuasion remains with the plaintiff. Moreover, it was up to the plaintiff to persuade the court that there were other means to achieve the employer's legitimate interests without a similar undesirably racial effect.<sup>284</sup> These strictures were in part overridden by the Civil Rights Restoration Act of 1991, which placed the burden of proof back on the employer.

Canadian law differs from US law in that the Charter has an express limitations clause. However, it too has been interpreted as entailing a proportionality test. Section 1 of the Charter states: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' In the much cited *Oakes* case,<sup>285</sup> the Supreme Court set out the relevant principles for applying the limitation. Dickson CJ stressed that: 'Any section 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms – rights and freedoms which are part of the supreme law of Canada.'<sup>286</sup> This said: the rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These

<sup>281</sup> *United States v Virginia* 116 S Ct 2264 (1996).

<sup>282</sup> *Griggs v. Duke Power Co.* 401 US 424 (1971) (US Supreme Court) at 431.

<sup>283</sup> *Wards Cove Packing Co. v Atonio* 490 US 642 (1989) (US Supreme Court).

<sup>284</sup> *Ibid* at 659-660.

<sup>285</sup> *R. v Oakes* [1986] 1 SCR 103 (Supreme Court of Canada).

<sup>286</sup> *Ibid.* at para 63.

criteria impose a stringent standard of justification, especially when understood in terms ... the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.<sup>287</sup>

As a start, the onus rests on the State to prove that a limit is justified. The proportionality test, while more flexible than that the strict scrutiny test in the US, is capable of being equally demanding. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. At a minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society. Secondly, the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This proportionality question, in turn, has three components. First, the measures adopted must not be arbitrary, unfair or based on irrational considerations. Second, the means, even if rationally connected to the objective in this first sense, should impair the right as little as possible. Third, the effects of the measures which are responsible for limiting the Charter right or freedom must be proportional to the objective. The more severe the deleterious effects of a measure, the more important the objective must be.<sup>288</sup>

Under the Canadian Human Rights Act, there are several statutory justifications, the most important of which is found in Section 15(1)(a), which provides that a 'bona fide occupational requirement' is not a discriminatory practice. A similar exception is provided in relation to goods and services, which refers to a 'bona fide' justification.<sup>289</sup> The wording of 'bone fide occupational requirement' is echoed in provincial human rights documents such as that of British Columbia, and there have been several important decisions of the Supreme Court of Canada establishing a Charter standard to apply to state human rights documents. Until recently, the conventional analysis applying to human rights legislation in the workplace depended on whether the discrimination was classified as direct discrimination or adverse effect discrimination. However, the Supreme Court of Canada in the *Meiorin*<sup>290</sup> case determined that the distinction was unnecessarily complex and artificial, particularly in the light of the fact that there are few cases which can be neatly characterised as direct or 'adverse effect' discrimination. Moreover, the conventional analysis under human rights legislation was inconsistent with the approach under Section 15 of the Charter, according which the principal concern is the *effect* of the impugned law.

Thus McLachlan J proposed a single three-step test to determine whether a standard which is *prima facie* discriminatory is a 'bona fide occupational requirement'. Again, it is essentially a proportionality test. According to this test, 'an employer may justify the impugned standard by establishing on the balance of probabilities: (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.'<sup>291</sup> At this third stage, the factors to be considered include whether the employer has investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard; whether it is necessary for *all* employees to meet the single standard; could standards reflective of group or individual differences and capabilities be established; whether there is a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose;

<sup>287</sup> Ibid at para 65.

<sup>288</sup> Ibid. at paras 69-71.

<sup>289</sup> Canadian Human Rights Act s.15(1)(g).

<sup>290</sup> *British Columbia (Public Service Employee Relations Commission) v BCGEU* (1999) 3 SCR 3 (Supreme Court of Canada).

<sup>291</sup> Ibid. at para 54.



and whether other parties, such as the union or the employee herself, have fulfilled their roles in assisting in the search for possible accommodation.<sup>292</sup> The same principle applies to the provision of goods and services.<sup>293</sup>

South Africa, like Canada, includes a general limitation clause in the Constitution and, as in the US and Canada, the defence is based on a concept of proportionality. Thus Section 36 reads as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

As we have seen, the statutory provisions draw a less secure line between the establishment of a prima facie breach and its justification. In particular, the Equality Act includes, among the criteria for 'fair' discrimination, factors which might otherwise be included in a justification defence. These include whether the discrimination has a legitimate purpose, whether it achieves its purpose, whether there are less restrictive and disadvantageous means to achieve the purpose, and whether and to what extent the respondent has taken reasonable steps to address the disadvantage or accommodate diversity.<sup>294</sup>

So far as India is concerned, we have seen that it is well established that not all differentiation constitutes discrimination. Instead, the Supreme Court, like its peers in other jurisdictions, has developed a proportionality test. To be permissible, a classification must be founded on an intelligible differentia which distinguishes a group and the differentia must have a rational relation to the object sought to be achieved by the statute in question.<sup>295</sup> In practice, the standard of justification imposed by the Court is low. Because Articles 15, 16 and 29 use the words 'on grounds only of' one of the prohibited grounds, the Court has held that to show that a classification is reasonable, all the State needs to show is that it was also made on a ground which is not proscribed.<sup>296</sup> It is only very recently that the Court has begun to develop a tighter standard of justification. In *Anuj Gharg*,<sup>297</sup> the Court held that, as a start, the burden was on the State to prove absence of discrimination. 'When the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefore would be on the State.'<sup>298</sup> Furthermore, when a classification impinges on the fundamental right to autonomy of a disadvantaged or vulnerable group, including women, the Court should subject the classification to a heightened degree of scrutiny. This entails a two stage test: whether the legislative interference is justifiable in principle, and whether there is a reasonable relationship of proportionality between the means used and the aims pursued.<sup>299</sup> In *Naz Foundation*, the Delhi High Court interpreted the approach in *Anuj Garg* as requiring 'strict scrutiny'.<sup>300</sup>

<sup>292</sup> Ibid. at para 65.

<sup>293</sup> *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 (Supreme Court of Canada).

<sup>294</sup> Equality Act s.14.

<sup>295</sup> *Budhan Choudhry v The State Of Bihar* 1955 SCR (1)1045 at 1049; see also *State of West Bengal v Anwar Ali Sarkar* 1952) SCR 284; *RK Dalmia v Justice Tendulkar* (1959) SCR 279; *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41; *DD Joshi v Union of India* AIR 1983 SC 420.

<sup>296</sup> Khaitan above note 134 p 41.

<sup>297</sup> *Anuj Garg & Ors v Hotel Association of India & Ors* [2007] INSC 1226: AIR 2008 SC 663 (Supreme Court of India).

<sup>298</sup> Ibid.

<sup>299</sup> Ibid. at paras 48-9.

<sup>300</sup> *Naz Foundation v Government of NCT of Delhi*, WP(C) No.7455/2001, 2 July 2009 (High Court of Delhi).



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## Conclusion: A Comparison with EU Law

EU anti-discrimination law has had a different trajectory from the four jurisdictions discussed here. Its origins lay in a response to gender discrimination in the workplace, particularly in relation to pay, as well as in the need to remove discrimination on grounds of EU nationality to facilitate free movement of labour. Its specific history, its origins in common market objectives, its unique role as source of binding law within its particular competences without constituting a fully fledged federation, as well as the predominance of civil law jurisdictions within its Member States, set it apart from India, South Africa, Canada and the US. Nevertheless, there has been an important cross-fertilisation of concepts and legal privileges. On the other hand, there have been important points of divergence. These are briefly discussed below.

## 1. Sources of EU Non-discrimination Law

As in the four jurisdictions discussed in this report, two layers of EU law have to be distinguished, namely constitutional law and statutory law. On the constitutional level (primary EU law), there are multiple sources. The earliest was the treaty provision guaranteeing equal pay for equal work for women. In expanded form, this is now found in Article 157 of the Treaty on the Functioning of the European Union (TFEU), which is the new name for the former EC Treaty. Secondly, equality law is found in the framework of the general principles of EU law and the fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States (Article 6 TEU). A third important source is the Charter of Fundamental Rights, which, since the entry into force of the treaty revision of Lisbon on 1 December 2009, has the same legal value as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

On the statutory level and outside purely economic law (i.e. the law on the internal market and competition), there are a number of important directives that prohibit discrimination on different grounds and in different fields of application, as mentioned below in the section on fields of application.

## 2. Grounds

So far as the prohibited grounds or protected characteristics are concerned, EU law has traditionally preferred a fixed list. After many years of focussing only on gender and EU nationality, Article 13 EC (inserted into the EC Treaty through the revision of Amsterdam; now Article 19 TFEU) gave explicit legislative competence in relation to discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. In addition, there is secondary EU social law on discrimination on grounds of part-time work and of fixed-term work. Although this is a wider range than previously, and pregnancy as well as gender reassignment have been included as species of sex discrimination through the Court of Justice's case law,<sup>301</sup> the list covers a relatively narrow span of grounds compared to the wide-ranging and non-exhaustive lists of South Africa and Canada. Moreover, treaty amendment is required before new grounds can be added.

On the constitutional level, Article 21 of the Charter of Fundamental Rights provides for an open and more extensive list. However, according to its Article 51, the Charter is addressed to the Member States 'only when they are implementing Union law', and it does not extend the field of application of Union law beyond the Union's powers. Accordingly, Article 21 of the Charter cannot by itself create new non-discrimination rights.

<sup>301</sup> Regarding pregnancy, Case C-177/88 *Elisabeth Johanna Pacifica Dekker v VJV-Centrum* [1990] ECR I-3941, now codified in Article 2(2)(c) of Directive 2006/54. Regarding gender reassignment, most recently Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

### 3. Coverage

As in the four jurisdictions discussed in this report, the prohibitions of the various types of discrimination have different fields of application, notably on the statutory level. Only the prohibition of discrimination on grounds of nationality applies in all fields of EU law (Article 19 TFEU). All other prohibitions of discrimination have limited fields of application, which differ strongly depending on the type of discrimination:

- The prohibition of discrimination on grounds of racial or ethnic origin under Directive 2000/43<sup>302</sup> (Racial Equality Directive) has the broadest field of application: It covers access to employment, to self-employment and to occupation, including promotion; access to all types and to all levels of vocational guidance and training; employment and working conditions, including dismissals and pay; membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession; social protection, including social security; social advantages; education; and access to, and supply of, goods and services available to the public, including housing.
- The prohibition of sex discrimination applies in a considerably narrower field, namely employment and occupation, including equal pay and occupational social security (Article 157 TFEU, Directive 2006/54 or Recast Directive);<sup>303</sup> statutory social security (Directive 79/7);<sup>304</sup> self-employment, including agriculture (Directive 86/613,<sup>305</sup> as of 5 August 2012: Directive 2010/41);<sup>306</sup> and access to, and supply of, goods and services available to the public (Directive 2004/113).<sup>307</sup>
- Much more narrow is the field of application of the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation: employment, self-employment and occupation, with specific exemptions in relation to discrimination on grounds of age and disability in the armed forces (the Employment Equality Directive 2000/78).<sup>308</sup> A proposal for a new directive that would cover other fields is still pending.<sup>309</sup>
- The prohibitions of discrimination on grounds of part-time work<sup>310</sup> and on grounds of fixed-term work<sup>311</sup> apply in the field of employment.

<sup>302</sup> Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

<sup>303</sup> Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

<sup>304</sup> Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

<sup>305</sup> Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ 1986 L 359/56.

<sup>306</sup> Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ 2010 L 180/1.

<sup>307</sup> Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

<sup>308</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

<sup>309</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 fin.

<sup>310</sup> Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14/9.

<sup>311</sup> Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175/43.

## 4. Scope: Who is Bound?

The question of whether individuals are bound by EU non-discrimination law has to be answered differently depending on the type of EU law in question. Regarding Article 157(1) and (2) TFEU on equal pay for men and women, the Court of Justice held in 1976 that it is directly effective not only vertically (i.e. against the State) but also horizontally (i.e. against an individual employer).<sup>312</sup>

In contrast, it is established case law that directives cannot have horizontal direct effect, i.e. they cannot be invoked against other individuals in situations where this would lead to obligations being imposed on those individuals through the directive.<sup>313</sup> However, the existence of a directive may trigger the application of a general principle of EU law or of provisions of the Charter of Fundamental Rights, which takes precedence over conflicting national law.<sup>314</sup> Moreover, directives might have indirect effect: that is, there is an obligation on courts of Member States to interpret legislation as far as possible to comply with EU law.

## 5. Definitions of Equality, including Defences and Affirmative Action

So far as the substantive law is concerned, the concept of disparate impact is a particularly important example of the cross-fertilisation of legal concepts between the jurisdictions discussed in this report, and more specifically US law, and European law. The concept of disparate impact was imported to the UK in the form of the concept of indirect discrimination. UK law in turn influenced EU law.<sup>315</sup> In the framework of EU social law, the concept was adopted and developed by the Court of Justice in establishing that discrimination against part-time workers was a form of sex discrimination.<sup>316</sup> Merging with the concept as developed in the context of free movement of workers,<sup>317</sup> the concept of indirect discrimination received statutory formulation first in the former directive on the burden of proof in sex discrimination cases, passed in 1997,<sup>318</sup> and subsequently in the Racial Equality and Employment Equality Directives, passed in 2000. This concept is now central to the modern EU directives. Notably, similar challenges have faced the Court in interpreting this doctrine as those faced by the four jurisdictions examined here. Most important has been how strict the scrutiny of the employer's justification should be.

Moreover, EU law has preferred a relatively rigid distinction between direct and indirect discrimination, with in principle only the latter being open to an objective justification defence.<sup>319</sup> This distinction has not featured in the constitutional equality guarantees in the four jurisdictions discussed, with the focus being on the strictness of the defence available in cases of intentional as against impact-based discrimination. At a statutory level, the Canadian Supreme Court has expressly rejected such a distinction, preferring a single test for justification which is sensitive to the severity of the impact, the availability of alternatives, the possibility of accommodation, and the

<sup>312</sup> Case 43/75 *Gabrielle Defrenne v SABENA* [1976] ECR 455.

<sup>313</sup> Case 152/84 *M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, as confirmed in particular in Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325 and Joined cases C-397 to 403/01 *Bernhard Pfeiffer and others v Deutsches Rotes Kreuz* [2004] ECR I-8835.

<sup>314</sup> See notably, Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, judgment of 19 January 2010, n.y.r., in relation to the general principle of equal treatment and non-discrimination on grounds of age.

<sup>315</sup> See e.g. Christa Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, (Antwerp/Oxford: Intersentia, 2005), 95 *et seq.*

<sup>316</sup> Case 96/80 *J.P. Jenkins v Kingsgate* [1981] ECR 911, Case 1007/84 *Bilka-Kaufhaus* [1986] IRLR 317 (ECJ).

<sup>317</sup> See in particular Case C-237/94 *O'Flynn v Adjudication Officer* [1996] 3 CMLR. 103 (ECJ)I-2617.

<sup>318</sup> Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ 1998 L 14/6. Subsequently, this directive was merged into Directive 2006/54.

<sup>319</sup> Objective justification is now available also for direct sex discrimination under Directive 2004/113, discrimination on against part-time workers under Directive 97/81, and discrimination against fixed-term workers under Directive 1999/70.



burden on the respondent. South African law has focussed on the concept of ‘unfairness’ rather than on whether the discrimination is strictly direct or indirect.

Under EU law, in the case of direct discrimination, different treatment is possible (and in the case of reasonable accommodation actively required) only on the basis of grounds expressly stated in the directives. In this context, the duty of reasonable accommodation has so far been developed only in relation to disability (Article 5 of Directive 2000/78), rather than including it in all the grounds, particularly, religion and belief.

So far as affirmative action is concerned, the EU has followed a similar pattern to that of India, South Africa and Canada in that there is express permission to undertake affirmative action. However, the EU has tended to express this as a derogation from the principle of equality rather than a means to achieving substantive equality. Thus Article 157(4) TFEU provides as follows: ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment *shall not prevent* any Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers’ (italics added). This approach is mirrored in the most recent generation of non-discrimination directives (Article 5 of the Racial Equality Directive, Article 7(1) of the Employment Equality Directive, Article 3 of the Recast Directive and Article 6 of Directive 2004/113 on goods and services). The case law of the Court of Justice has also generally preferred the language of equal opportunities rather than equality of results.<sup>320</sup> In its recent case law, the Court, like its counterparts in the jurisdictions examined in this report, has emphasised the role of proportionality:

In determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.<sup>321</sup>

It is in the application of the concepts of ‘appropriate and necessary’ that the effect of this principle is felt in practice, much as in the application of ‘strict scrutiny’ in the US Supreme Court and the more facilitative standards in India, Canada and South Africa.

<sup>320</sup> Case C-319/03 *Briheche v Ministre de L'Interieur* [2005] 1 CMLR 4.

<sup>321</sup> *Ibid.* at para. 24; Case C-476/99 *Lommers v Minister Van Landbouw, Natuurbeheer En Visserij* [2004] 2 CMLR 49 (ECJ) at para 39.







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