

Equality Law: A Comparative Study

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Comparative Law: Uses and Misuses

- USA, Canada, South Africa, India
- Commonalities: English-speaking, common law heritage
- Divergences: Historical, socio-economic, political, legal institutions and culture
- Aim: Illuminate universalisable conceptions while recognising context specificity



Context

Comparators

- USA: Slavery
- India: Caste
- South Africa: Apartheid
- Canada: Linguistic and First Nation minorities

BUT: Cross-fertilisation

EU

- Common market: free movement of labour;
- Gender equality;
- Civil law;
- Binding law but not a federation.

Constitutional Sources

- USA: Fourteenth Amendment (1870): 'No State shall.... deny to any person the **equal protection of the laws...**'
- India: Article 14 (1950): 'The State shall not deny to any person equality before the law or the **equal protection of the laws...**'
- Art. 15: Prohibition on discrimination
- Art.16: Equal opportunity in State employment

Constitutional Sources (cont)

- Canada: S.15 Canadian Charter (1982) 'Every individual is equal before **and under** the law and has the right to **the equal protection and equal benefit** of the law.'
- South Africa S.9 (1997): 'Everyone is equal before the law and has the **right to equal protection** and **benefit** of the law.'
- The State may not discriminate **unfairly**.

Statute: US

- Civil Rights Act 1964:
- Title VII Employment discrimination (sex, race, colour, national origin) and public accommodations (race, colour, national origin)
- Title IX Publicly funded educational institutions et al (sex, race, colour, national origin)
- **Age Discrimination in Employment Act 1968: Protects over 40s from employment discrimination**
- Americans with Disabilities Act: Employment and public accommodations

Statute cont

- Canadian Human Rights 1978: Employment, goods and services.
- Provincial human rights law
- India: No comprehensive legislation
- South Africa: Employment Equity Act 1998: Employment
- Promotion of Equality and Prevention of Unfair Discrimination Act 2000: Non-employment

Grounds



- Not every distinction is discriminatory. Which classifications are legitimate?
- Three methods:
- Specify list exhaustively – changeable only by amendment (EU, India?)
- Open – grounds generated by courts (US)
- Non-exhaustive – list plus ‘other status’ - courts extrapolate by analogy (Canada, SA)



Generating grounds: US Constitutional level

- US: ‘Discrete and insular minorities’ where prejudice curtails operation of political processes normally relied on to protect minorities (Carolene Products)
- ‘Strict scrutiny’ – but only for race, aliens and ancestry
- Gender: Not suspect – ‘intermediate scrutiny’
- Age; disability: Mere rational relationship

Generating Grounds: Canada



- Canada: 'in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'
- Sexual orientation missing...
- Analogous grounds:
 - Discrete and insular minority;
 - immutable characteristic
 - Dignity
- Sexual orientation, citizenship, etc
- Same standard of scrutiny

Generating Grounds: India



- S.15: No discrimination 'on grounds **only of** religion, race, caste, sex, place of birth or any of them'
- Missing : Disability, sexual orientation, age
- Naz Foundation (2009): US and Canadian case-law: Analogous grounds as those with potential to impair personal autonomy.
- Sexual orientation analogous to sex.

South Africa

- S.9: 16 grounds: including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language, birth.
- Can be added to if potential to impair fundamental human dignity
- e.g. HIV/AIDS



From formal to substantive equality

- Disparate impact: US Title VII
- 'The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation
- Touchstone is business necessity – if not related to job performance, prohibited (Griggs v Duke Power, 1971)



Intention?

- For constitutional claims, disparate impact not enough - need discriminatory purpose (Washington v Davis)
- Does disparate impact in Title VII conflict with equal treatment in 14th Amendment? (Scalia J in dissenting in Ricci v Stefano 2009)

Canada: Dignity and Substantive Equality

- 'Equality means that our society cannot tolerate distinctions that treat certain people as second class citizens, demean them... or otherwise offend fundamental human dignity (Law v Canada)
- Extra obstacle? (Gosselin)
- 'Dignity is an essential value... but has proven to be an additional burden...' (Kapp)

Disparate impact: Canada

- Disparate impact: Aim not to punish perpetrator. Discriminatory if effect is to impose burdens. (Simpson-Sears)
- BUT: Rigid distinction rejected – difficult to categorise neatly (Meiorin).

South Africa: Fairness and Substantive Equality

- Enumerated grounds: Fairness presumed
- Unenumerated grounds: Test of unfairness focuses on impact on person
- Disparate impact: Conduct which 'may appear neutral and non-discriminatory may nonetheless result in discrimination'
- But no need for precise definition of indirect discrimination – presumed unfair.

Substantive Equality: India

- When a classification infringes on the fundamental right to autonomy of a disadvantaged or vulnerable group, subject to 'heightened'/'strict' scrutiny. (Anuj Garg, Naz)
- Facially neutral but impacts on one group
- Human dignity and constitutional values.

EU: Direct and indirect discrimination



- Disparate impact (Griggs) – Indirect discrimination (UK) – part-time workers cases (ECJ: Jenkins, Bilka Kaufhaus) – indirect discrimination (Burden of Proof directive)
- Free movement of workers: O’Flynn)
- Indirect discrimination: ‘particular impact’ (EU directives)
- BUT: rigid distinction – only indirect discrimination can be generally justified.

Duty of Accommodation

- EU: Disability (Art 5, Dir 2000/78)
- US: Disability plus religious needs short of ‘undue hardship’ (Title VII)
- Canada: Beyond religion and disability: ‘All have equal opportunity to have needs accommodated’ (s.2 Human Rights Act)
- SA Failure to reasonably accommodate needs on grounds of race, gender or disability is unfair discrimination.



Limits of reasonable accommodation

- How far must community to go to enable those outside mainstream to swim freely in its waters? (Pillay SA)
- Believers have no automatic right to be exempted from laws of land
- But State should avoid putting believers to painful choices of either being true to their faith or respectful of the law (Christian Education, SA)
- Undue hardship (Canada, US)

Affirmative action:

Exception from Equality

- EU: Exception or derogation – strictly construed
- Equal opportunity not equal results
- Saving for individuals
- Proportionality

Means to Equality

- Canada
- South Africa
- India
- USA??

Affirmative action: Means to achieve equality



- Canada: s.15(2): Permits programs whose object is 'the amelioration of conditions of disadvantaged individuals or groups'
- 'Sections 15(1) and (2) work together to confirm s.15's purpose of furthering substantive equality
- S15(2) supports a full expression of equality rather than derogating from it.'(Kapp)

Affirmative action: Means to achieve equality

- SA: s.9(2) 'Measures designed to protect or advance persons disadvantaged by unfair discrimination may be taken'
- 'Such measures are not a deviation from the right to equality...they are integral...both contribute to constitutional goal of achieving equality.' (Van Heerden)

Affirmative Action and Reservations: India

- Constitutional mandate for reservations in public employment and education
- Scheduled Tribes and Scheduled Castes; 'Other Backward Classes' (OBCs)
- 'Not an exception but one of the many tools to preserve and promote the essence of equality so that disadvantaged groups can be brought to the forefront of civil life.' (Ashoka Kumar Thakur, 2006)
- Strict scrutiny rejected

Affirmative Action: Strict Scrutiny

- US: From endorsement to restriction.
- Strict scrutiny – but not fatal (Adarand)
- Acceptable to remedy past intentional discrimination – but not past de facto discrimination (Seattle)
- or to further diversity (Grutter)



Justification

- Proportionality
- US: Strict scrutiny: narrowly tailored to compelling state interest;
- Intermediate: 'Exceedingly persuasive' - substantially related to important interest
- Rational connection to legitimate state interest

Justification

- Canada: Section 1: Stringent standard of justification – relate to pressing and substantial concerns, and reasonable and demonstrably justified means, impairing right as little as possible.
- SA: S.36: Reasonable and justifiable limits
- India: Generally low standard, but 'heightened' for gender etc?
- EU: 'Appropriate and necessary'
