INTRODUCTION: SUBSTANTIVE EQUALITY, SOCIAL RIGHTS AND WOMEN: A COMPARATIVE PERSPECTIVE

Developed, developing, and transitional countries are all marked, to different degrees and in different ways, by deep inequalities of gender, race, disability, religion, sexual orientation, and other fault-lines of prejudice, disadvantage, and exclusion. In many countries, equality legislation initially sought to free individuals from the negative effects of these group characteristics, believing that in a colour-blind and gender-neutral world individuals could thrive and develop their potential free from stereotypical assumptions. But this view of equality was narrowly circumscribed. It was a relative principle dependent upon identifying an appropriate comparator. It also operated symmetrically so that the benefits provided to a disadvantaged group could be challenged as a violation of the principle of equality. Moreover, it assumed that the only legitimate role of state action was negative, to stop discrimination, rather than requiring positive steps and measures to be taken to remedy disadvantage. The failure of this formal view of equality to address deeply entrenched and complex patterns of group disadvantage led to sustained criticism by feminist and other writers, and to calls for formal equality to be replaced with substantive equality. Substantive equality, unlike formal equality, requires attention to context, the intersection of different grounds of disadvantage, difference, and positive obligations upon the state.

However, the meaning of substantive equality and what it requires is deeply contested. Equality of opportunity, equality of results, dignity, the recognition and affirmation of difference, social inclusion, and redistributive justice vie as the lodestone of substantive equality. In most societies, poverty and subordination are the results of a legacy of social relations, shaped by power, that have become so encrypted within social institutions and policies that they are no longer visible. Therefore, as Amartya Sen remarked, and the articles that follow demonstrate, ‘[t]he demands of substantive equality can be particularly exacting and complex, where there is a good deal of antecedent inequality to counter’. The articles collected in this issue seek to explore different countries’ responses to the legal challenge of both giving content to substantive equality and to designing mechanisms for achieving it. The International Institute for the Sociology of Law in Oñati, Spain provided both the logistical support and lovely surroundings for a workshop that allowed participants from several countries and continents to explore the topic of substantive equality. All of the articles in this issue were initially presented at this workshop, held in July 2006. We are grateful to the Institute and its helpful and professional staff, as well as to all of the workshop participants, for enabling us to delve into the

1 A Sen Inequality Re-examined (1992).
comparative dimension of substantive equality. By drawing on the experience of India, South Africa, Ireland, the UK and Canada, this collection of articles highlights the extent to which a common notion of substantive equality can be formulated among countries with different constitutional configurations, different institutions, and distinct histories.

As Sandra Fredman shows, substantive equality disrupts the traditional boundaries between redistributive measures, usually dealt with through social policy rather than rights, and ‘recognition’ issues, considered to fall within the purview of constitutional or statutory anti-discrimination guarantees. Emerging from a political concern with inequality as encompassing social and economic disadvantage, substantive equality introduces ideas of economic inequality and redistribution into status-based anti-discrimination law. Yet, at the same time, concerns about social exclusion, pluralism, and multiculturalism have challenged the adequacy of a conception of substantive equality that is exclusively rooted in redistribution. Fredman argues that it is crucial to integrate both redistribution and recognition within our conception of substantive equality. This means that substantive equality should not be seen as a negative duty of restraint, but should encompass positive duties to promote both dimensions of equality. The need for such a rights-based view of redistributive measures is clearly evident from the articles that focus on Canada and Ireland, where the retrenchment of the welfare state and the rise of neo-liberalism have highlighted the need to expand equality to include justiciable social rights. At the same time, however, it is clear from the experience in the countries recounted in these articles that simply attempting to address gender inequality by encouraging greater participation by women in paid work can entrench inequality unless attention is paid to the distribution of work in the home, equal pay for work of equal value, and other recognition issues.

This raises the question of the value or values informing substantive equality. In several jurisdictions, dignity is used to give substantive equality content. But, as the case studies of Canada, Ireland, and South Africa by Judy Fudge, Siobhan Mullally, Cathi Albertyn, Sandra Liebenberg and Beth Goldblatt illustrate, while dignity fits well with harms involving recognition and status, it can often function as a pretext for courts to avoid addressing forms of inequality that explicitly raise redistribution issues. There is a crucial and pressing need not only for courts to be explicit about what dignity entails, but also for them to identify and develop other social values in order to give substantive equality meaning.

South Africa’s constitutional debates, particularly, are characterised by the idea of transformation. Cathi Albertyn’s paper engages with the idea of substantive equality as transformative, especially in a social sense. She argues that, despite the broad reach of constitutional protection of equality in South Africa, there remain clear legal and social boundaries, that are both normative and doctrinal, that sustain conventionally gendered ideas of society. As a result, equality jurisprudence has broadened the net of ‘inclusion’, but has not necessarily dislodged the underlying social framework. For the equality jurisprudence to be truly ‘transformative’, the legal application of substantive equality needs to be more conceptually consistent. This requires it to
be embedded in a broader transformative jurisprudence that is better able to understand systemic inequalities (social context) and to overcome legal formalism, especially the chilling effect of traditional legal concepts and doctrines on transformative outcomes.

All of the articles identify that a central difficulty for the courts is their institutional competence and legitimacy. For some developed countries, such as Canada, Ireland, and the United Kingdom, with long traditions of formal anti-discrimination laws and welfare systems, substantive equality troubles the divide between the role of law and policy in protecting people against status-based discrimination, and the role of policy in addressing redistributive discrimination. Attempts to address substantive equality using legal means have been confronted by reluctance from legislatures and courts to acknowledge the justiciability of social rights, and a concern with the limits of courts’ proper role when it comes to issues that directly involve resource allocation. This is particularly true where substantive equality expressly imposes positive duties on the executive, which need the kind of ongoing supervision which judicial procedures are ill equipped to manage. The examples of Canada and South Africa suggest that the courts find mechanisms to avoid institutional conflict, which include the definition of context and the meaning accorded to substantive equality and its attendant values. In both jurisdictions, the value of dignity has proved to be a powerful means by which courts can avoid dealing with the challenge that redistribution poses to their competence and legitimacy in the context of a conventional understanding of the doctrine of the separation of powers. A common theme across developed, developing and transitional countries is the consciousness of courts of the possibility that governments cannot meet their obligation to honour substantive equality rights without compromising other important social policies. This is as true in India and South Africa, where state resources are seriously pressed, and in rich and prosperous countries, such as Canada, where as Judy Fudge’s article shows, the tendency of courts is to defer to the state when it pleads that it cannot meet its equality obligations for financial reasons.

At the same time, courts and legislatures have risen to the challenge placed on substantive equality by separation of powers and institutional competences by adapting both legal concepts and judicial procedures. Legal concepts have been adapted expressly in South Africa by incorporating programmatic justiciable socio-economic rights. Sandra Liebenberg and Beth Goldblatt argue that integrating an equality perspective into socio-economic rights creates an appropriate balance between context sensitivity and the need for a substantive or minimum core. The Indian approach has been both to interpret fundamental rights as including socio-economic rights, and to legislate widely for affirmative action in the form of reservations for disadvantaged groups. Procedural adaptations, in the form of public interest litigation and wide standing rules, have also been a particular feature of Indian courts. Kamala Sankaran’s discussion shows how, by broadening the rules of standing, the courts were open to, and incorporated, an understanding of equality that protected subordinated groups of people whose civil rights were denied. However, she also shows
how this capacious understanding of equality did not lead to the imposition of positive duties upon the state. Thus, while the affirmative action procedures have been able to capture real resources, socio-economic rights have been more difficult to translate into real change, both because of limitations in the remedies available and also because of judicial caution in this respect. In particular, the courts in India have dealt with the problem of institutional competence by defining affirmative action provisions as neither enforceable rights nor mandatory duties on the state, but as enabling provisions for the development of policy by the executive.

Gender equality, the focus of these articles, operates within a complex of intersecting and competing groups. Joanne Conaghan argues that it is time to move beyond intersectionality analysis, since rigid definitions in terms of grounds of inequality obstruct law’s ability to respond flexibly to social configurations of power. This is borne out by Goldblatt and Liebenberg, who open up the possibility of defining groups primarily by their socio-economic status, so that some groups, such as poor white men, do not fall within the gaps. Their paper, along with Siobhan Mullally’s study of Ireland, suggest the development of additional grounds, such as socio-economic condition or status, may be a fruitful way of addressing the inter-relationship between, and overlap of, substantive equality and social rights.

A collection such as this, spanning a wide range of jurisdictions, inevitably raises the question of the value of comparative law. One possibility is that of direct transplant. In Canada and South Africa, the advent of Bills of Rights since the 1980s has influenced the acceptance of substantive equality as a constitutional right, and the development of a jurisprudence based on context and difference. The courts in these jurisdictions have engaged in fruitful conversation with each other, one that has resulted in the transplantation of legal concepts into different constitutional configurations and socio-economic contexts. However, it is also possible that legal transplants fail to flourish in foreign soil, or develop in unexpected and potentially counter-productive ways. A second use of comparative perspectives is to cast better light on the development of substantive equality in one’s own jurisdiction, exposing assumptions previously taken to be natural or universal, and opening up potential avenues for legal development which had not been explored before. From an analytic and academic perspective, comparative law opens up the question of whether there are universal principles behind the concept of substantive equality, and how such principles interact with the need for substantive equality to be context specific and flexible over time.

In the end, however, it is important to go beyond the conception of equality rights as legal entitlements, the meaning of which is to be determined by the courts, in order to understand equality rights as claims that require all of the institutions of the state — the legislature, the executive, and the administration — to recognize substantive equality as entailing positive duties. Thus, it is necessary to move beyond the narrow issue of the justiciability of substantive equality understood as a social right. The starting point for substantive
equality should be how best to use the legal right to equality to pursue social justice through a variety of legal avenues, and not only through the courts.

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