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Equal Treatment or
Equal Outcomes?



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THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION IN THE HUMAN RIGHTS DEBATE: EQUAL TREATMENT OR EQUAL OUTCOMES?

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The Convention on the Elimination of All Forms of Discrimination against Women 1979 (the Women's Convention) is an international human rights treaty that focuses specifically on equality between women and men in all areas of life. It defines discrimination against women and sets up an agenda for national action to end such discrimination. In its Title, the Convention underscores states' obligation to prohibit discrimination against women. Under the Convention, equality is non-discrimination, and discrimination against women violates the principles of equality of rights and respect for human dignity. In the Preamble, the Convention explicitly acknowledges that '*extensive discrimination against women continues to exist*' and emphasizes that such gender discrimination '*violates the principles of equality of rights and respect for human dignity*'.

Article 1 of the Convention provides that, *'For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'*. According to the definition of discrimination stated in **Article 1**, there is a close relationship between equality and non-discrimination.

In the human rights context, equality and non-discrimination are the most fundamental principles together with justice and dignity. Griffin (2008: 39) has stressed that *'equality is a ground for human rights'*. Equality and non-discrimination are the basis of international human rights; as Rehman (2003: 269), McCrudden (2004) and Grant (2007) said, a corollary between equality and non-discrimination is well recognised.

The widespread understanding of equality today is based on liberal equality, that *'things that are alike should be treated alike'*. Non-discrimination is understood as formal equality (Kapur and Cossman, 1996: 178). As stressed by Smith (2003: 185), the usual rule that applies for equality is that *'a situation is unequal if like situations are treated differently or different situations are treated similarly'*.



Wesson (2007: 751) and Ahmad (2005: 4) stated that this kind of equality relied upon the proposition that fairness requires similar treatment only. Liberal equality, which is drawn from the aforementioned maxim *'likes should be treated alike'*, asserted by Fredman (2001: 154), is associated with *'neutrality'*, individualism and autonomy. This might conflict with collective interest and equal distribution of social goods.

Fredman (2003: 43) has stressed that the aim of equality is to give people an equal set of alternatives from which to choose to pursue their own version of a good life, thus, treating different people similarly will deny them their choice for a good life. Fredman has explained that this limited sense of equality which is correlated with neutrality is achieved by forbidding the state's preferences for any group (disadvantage group) but applying similar treatment by laws. Even though this sounds impartial to every individual, the insistence on a particular set of values based on the dominant power which set the choice might result in discrimination against disadvantaged groups. Fiss (1976: 107) has even claimed that the neutral value of similar treatment is merely an illusion.

There is a varied body of literature on equality based on gender from the human rights perspective. Issues of equality and possible ways to achieve it have always been at the heart of the feminist project (Frug, 1992: 4).

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Most writers have claimed that similar treatment is insufficient because it fails to address societal structures that perpetually disadvantage women. Charlesworth and Chinkin (2000: 10) professed that, even though women’s rights to equality are guaranteed with similar treatment, inequality might still exist in the process and the principles of legal systems. As noted by Unterhalter (2005: 30), *‘equality is no longer a matter of equal amounts, but a more substantive idea associated with solidarities and confronting injustice’*.

The aim of substantive equality is to remedy past and present disadvantages (Rebouche, 2009: 712-713). As stressed by Husband (2004: 11), equality of treatment does not take into account the fact that *‘the equal application of rules to unequal groups or individuals can have unequal results’*. According to Husband, equal treatment for unequal potential groups tends to reinforce inequalities and can lead to inequalities for groups that have been disadvantaged by a system that fails to take different needs into account.

Substantive equality goes further than the notion of equal treatment because it considers different needs between groups and individuals to achieve equal outcomes. Indeed, focusing only on results would not be the best practice because overemphasis on results might cause unfairness inherent in the process of achieving these results. Therefore, the application of formal equality without setting aside substantive equality would help achieve the maximum justice for people, including disadvantaged groups.

Even though equality has been described as a simple concept (Holtmaat, 2004: 2), its meanings and principles have not been properly understood. Similar treatment might not have a value of neutrality because, once the right to equality is related to and enforced by laws, its objectivity and impartiality can be challenged.

Because of the ‘aura’ of truth and justice, laws have always caused people to believe that truth and justice are incorporated into laws; in fact, however, as Fredman (1997: 2) alleged, laws are made by people in power, and their interests have always been predominantly male, which is why Fiss (1976) challenged the neutral value of similar treatment. This might be because the concept of similar treatment conceals the real nature of substantive needs and correlative principles of human rights and equality.

In thinking their way through such problems, feminists have developed certain critiques of the concept of equality which informs them. The critique asks that ‘equality not be reduced to sameness’ (Fletcher, 2002: 149). In other words, if obstacles still exist to impede genuine exercise of choice, equal treatment is not sufficient (Fredman, 2003: 43). Smart (1989: 85 and 1995: 188) has criticized that the notion that women should be equal (treatment) to men, as if men are the standard by which women must be judged.



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As claimed by Fredman (1997: 15), 'the problem with relying in this way on the male norm is that the existing values in a male-dominated world are accepted without challenge and women are required to compete on their terms'. McKinnon (1987: 34) also condemned the notion of the sameness standard which always measures females against male standards. Women, as such, must be given equal rights with men to gain access to all opportunities that might lead to equal outcomes of justice for them, not similar treatment with men which results in injustice. And indeed, justice for women must be defined by women, not men.

Clearly, the idea that equality can be achieved by considering the differences between people is a departure from the notion that it can be achieved only by considering the sameness between them, as the latter requires that laws or policies be applied to treat people in the same way (Fredman, 2003). Therefore, in achieving gender equality, modern feminism corresponds not only to equal treatment (similar treatment), which is commonly known as 'formal equality' in the feminist discourses, but also to

'substantive equality' which can be achieved through laws (Smart, 1989: 140).

Thus, equality of gender may not be achieved if substantive equality is not to be considered, because the objective of substantive equality is to eliminate the substantive inequality of disadvantaged groups.

That is why human rights experts, both in the United States of America and United Kingdom, have been concerned with the inability of the concept of equal rights. (which refers to formal equality only) to address the reality of gender inequality (Kingdom, 1991: 114).

Wolgast (1980: 48), for instance, did not reject the concept of equality as commonly referring to equal status, but preferred the notion that rights are equally protected if they depend on gender differences. Women, as such, should be treated in a manner which implies they need special protection solely on account of being a disadvantaged group. The aims of equality require more than equal treatment: they require equal outcomes.

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“O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.”

Surah Al-Hujurat (49) verse 13

