THE NEED FOR ECONOMIC AND SOCIAL RIGHTS DESPITE STRONG EQUALITY PROVISIONS IN DOMESTIC CONSTITUTIONS

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Abstract

This paper seeks to analyse the relationship between equality – especially substantive equality –and economic and social rights. The two are inarguably interdependent and mutually constructive, as one cannot be assured without the other. Indeed, in countries around the world, particularly where governments have been reluctant to fully embrace the concept of economic and social rights, the right to equality has been expanded to include a plethora of economic and social rights, assuring a decent standard of living to people. However, this enormous reliance on the judiciary can be extremely problematic, given the fact that the task of legislating and implementing any right is nuanced and requires a great deal of planning and research. There is also the problem of the courts simply refusing to take on the gargantuan task, deterred by a reluctance to blur the boundaries set in stone by the principle of the separation of powers. Therefore, this paper concludes that even in jurisdictions with strong equality provisions, economic and social rights do not attain the attention they truly deserve, and must be recognised independently of any single other right in order to do full justice to the people most in need of them.

Introduction

The right to equality is arguably the most fundamental of all human rights.However, due to the vague idealism enshrouding it, its interpretation is also prone to provoking fiery debate,[1]dependent as it is on the subjective opinions of judges and scholars.Of late, it hassubtly evolved from the notion of formal

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[1]Beverly McLachlin, 'Equality: The Most Difficult Right' (2014) 14 Supreme Court Law Review 17.

equality to that of substantive equality, a welcome move in human rights law. Not only does substantive equality forbid discriminatory treatment, it also urges states to take positive steps to level the playing field and fulfil their duties to respect, protect and fulfil people's rights. In the absence of thefull achievement of substantive equality, discrimination continues to target people from all walks of life in every aspect of their lives –whether it isemployment, education, housing, health, social services, politics, or even the general administration of justice.[2]

It is then no wonder that economic and social rights are so inextricably linked with this conception of equality. Any gross disparity – pre-existing or state-created – in the aspects that determine the minimum standards of people's lives will surely have ramifications on a state that has undertaken to end discrimination and assure more than just formal equality to everyone. The corollary to this is also true; economic and social rights cannot be effectively guaranteed without the right to equality regulating equal access of everyone to these rights.[3]

Because of this undeniable link, domestic courts have effectively utilised the right to equality in many instances to createa doorway to the world of economic and social rights litigation, even where no actual legal provisions for these rights exist, as will be later explored in the essay. However, relying solely on equality provisions to guarantee economic and social rights could prove to be a double-edged sword, hindering rather than helping the state's attempts to inch towards a welfare-based utopia. Courts could either violate the doctrine of the separation of powers and make ill-fated attempts to take on matters of complex planning, or go in the opposite direction by refusing to hold the state accountable to the people for its exclusionary policies. They could also merely swing confusedly between these two extremes, half-heartedly fashioning vague new economic and social rights for the more litigation-friendly groups while ignoring others.

Keeping this in mind, this paper seeks to analyse the relationship between economic and social rights and the notion of substantive equality, drawing from the advantages and disadvantages that have emerged in

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[2] Office of the High Commissioner for Human Rights, 'The Right to Equality and Non-Discrimination in the Administration of Justice' (*OHCHR)*<http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf> accessed 28 January 2015.

[3] CESCR 'General Comment 20 on Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (02 July 2009) UN Doc E/C12/GC/20.

the legal experience of different countries to prove that relying solely upon equality provisions, howsoever strong, cannot render the need for economic and social rights obsolete.

The Relationship Between Equality and Economic and Social Rights

The notion of formal equality was created for a meritocratic utopia where people's skills and treatment of each other and did not depend on their external attributes or disabilities, but it is evident that this philosophy is less than ideal in the real world, which is rife with discrimination on grounds as diverse as the people that inhabit it. No country has yet been able to escape criticism of its inability to assure economic and social rights in a purely non-discriminatory manner, and in many cases, discrimination is so strongly institutionalised that merely providing equal treatment to people would only serve to exacerbate it.[4]For example, a substandard education combined with inadequate nutrition will hamper the physical, mental and social development of children from poverty-ridden families, sealing their fate to repeat that of their parents. Women who do wish to join the task force will find themselves being increasingly marginalised, as employers refuse to hire and promote them on par with their male peers and as they are increasingly frustrated in their attempts to find adequate childcare services. The litany of potential rights violations is endless, often including people who may be discriminated against on multiple grounds.

This necessitates the inclusion of positive, affirmative measures to ensure that all people have an equal voice and an equal access to resources in society, regardless of any embedded contemporary or historical discrimination. To truly honour its promise of equality, a country will certainly have to promise at least a minimum level of economic and social rights. At the same time, to ensure enjoyment of these rights, the State will have to eliminate the economic and social inequalities that inhibit people's enjoyment of these

[4]Gwen Brodsky and Shelagh Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 Canadian Journal of Women and Law 185.

rights.[5] Substantive equality and economic and social rights are thus inherently interdependent and mutually supporting,[6] and it is not quite possible for either to exist without the other.

Substantive Equality and the Implicit Creation of New Economic and Social Rights

Substantive equality and economic and social rights may well be interdependent and complementary, but in practicality, many States have refused to assure economic and social rights on par with civil and political ones, or failed to include certain essential aspects of these rights even when they have been granted. In these States, the right to equality, especially when understood in its substantial conception, has proven to be a boon by allowing Courts to introduce economic and social rights for the benefit of the people.

In *Eldridge v British Columbia (Attorney General)*,[7] for example, the Canadian Supreme Court expanded the right to health, which was ensured to people via the publicly funded Medicare, to ensure that persons with hearing disabilities would be given a translator to be able to better access their healthcare services. The Court had already identified that Section 15 of The Canadian Charter of Rights and Freedoms guaranteed substantive rather than formal equality in a previous case,[8] so in this one, it was able to hold that discrimination had occurred due to the state not taking into account the adverse effects on deaf people of the lack of a translator, which would lead to them being unable to benefit equally from the right to health.

In *Olga Tellis and Ors v Bombay Municipal Council and Ors*,[9] equality was one of the factors used to justify the court order against the government's plans to evict slum dwellers from pavements in India without any consideration to their rehabilitation. Holding that these dwellers had an equal right to dwell on pavements as pedestrians had to pass on them, and that a welfare state that had failed in its duty of

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[5]Martha Jackman and Bruce Porter, 'Women's Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act' in Status of Women Canada (ed), *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Status of Women Canada 1999) 55.

[6] Pierre De Vos, '*Grootboom*, The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 South African Journal on Human Rights 258.

[7] [1997] 3 SCR 624.

[8]*Her Majesty The Queen in Right of Canada v Big M Drug Mart Ltd* [1985] 1 SCR 295.

[9] 1986 AIR 180.

providing shelter to half the city had no subsequent right to evict it from its makeshift homes, the Court created a new right – that of shelter – for the people.

The courts' attempts to extend notions of substantive equality to include economic and social rights are laudable, but so far, very few cases have emerged that include the creation of new rights where none existed. In this matter, the wariness of the courts is justified, as judicial activism, when taken too far, will only infringe on the domain of the state's administrative and legislative wings.

Substantive Equality and Equal Access to Economic and Social Rights

While not completely comfortable creating new economic and social rights, courts all over the world have been very active in extending existing economic and social benefits to everyone, by ensuring that states do not discriminate in granting these benefits to people.

Internationally, the Human Rights Committee used the right to equality, in article 26 of the International Covenant on Civil and Political Rights, 1966,to extend unemployment benefits to married women on par with married men, without the former having to prove that they were the primary breadwinners of their families, since this requirement was not made of men.[10]Despite the government's protest that the right to social security ought to be covered under the International Covenant on Economic and Social Rights, 1966 and that the right to equality in this case ought to extend to only civil and political rights, the Committee said that the right to equality before the law would apply to every law in the country, and while the State had no obligation to create laws on social security, it did have an obligation of applying existing laws without discrimination.

Similarly, the European Court of Human Rights, which traditionally deals with mostly civil and political rights, did an excellent job of using the right to equality to extend the right to social security to non-nationals, in this case, a Turkish national who had been working in Austria for close to a decade before becoming unemployed and being denied an advance pension that was available to nationals in his

[10]*Zwaan-de Vries v the Netherlands* Communication No 182/1984 (9 April 1987), UN Doc Supp No 40 (A/42/40) at 160 (1987).

position. [11] The Court's logic was that differentiation between nationals and non-nationals was unreasonable, and that everyone had a right to enjoy his or her possessions.

Domestically, in Canada, the Ontario Board of Inquiry considered the use of 'minimum income requirements' and 'rent-to-income ratios' by landlords while evaluating potential tenants. The landlords' justification, that tenants with a low income might have a higher chance of defaulting, was considered unreasonable and without sufficient evidence. The Board held that this practice violated the Ontario Human Rights Code, 1962.[12] The Superior Court of Ontario, on appeal, also held that using minimum income criteria or rent-to-income ratios as the sole ground for refusing applications would end up constituting discrimination under the Code and negatively impact people by forcing them to seek alternative accommodation that would be more expensive and poorer in quality.[13]

On the other side of the globe, in *Air India v Nargesh Meerza and Ors*,[14] the Supreme Court of India had to decide the constitutionality of regulations that retired air hostesses once they attained the age of 35, or became pregnant, or if they married within four years of joining Air India. The Court considered these regulations arbitrary since no such provisions existed for men employed in the same positions, and struck them down.

Equality's role in granting economic and social rights is so well regarded that in Germany, commentators argue that claimants have a better chance of getting courts to protect a minimum core of economic and social rights by relying on equality, rather than dignity.[15]While there are strong examples of courts assuring economic and social befits to everyone without discrimination under existing legislations, there are also examples where courts have failed to do so, for numerous reasons. These shall be analysed in the next section.

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[11]*Gaygusuz v Austria* (1997) 23 EHRR 365.
[12]*Kearney et al v Bramalea Limited et al* [1998] OHRBRD No 21.
[13]*Ontario (Human Rights Commission)vShelter Corp*, [2001] OJ No 297.
[14]1981 AIR 1829.
[15]Katharine G Young, 'A Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113, 139.

The Limits of Equality in Assuring Economic and Social Rights

Substantive equality can certainly create new economic and social rights *in theory*, but instances of this actually happening are few and far between. While many courts could easily use the right to equality to ensure that benefits awarded by the State are equally accessible to all regardless of any unjust discrimination, they are reluctant to overstep the boundaries set down by the doctrine of the separation of powers and begin legislating new rights.If economic and social rights were increasingly treated as a mere subset of substantive equality, this would cause a real blow to the notion of equality and interdependence of all rights, regardless of their nature. Instead of spurring States to enact domestic legislation that makes these rights fundamental, the philosophy would encourage the treatment of these rights as secondary benefits, to be applied in keeping with the State's largesse and not obligations. Even in jurisdictions where these rights are recognised, economic and social rights litigation would take a backseat and equality would be given the spotlight. This could, of course, be remedied by the courts' reliance upon economic and social rights standards to interpret equality standards, but there is no guarantee of the courts actually doing so.

It would also become difficult to control the finer nuances of economic and social rights. In some cases, important rights may not be protected at all. This could especially be the case where a suitable comparator does not exist and it becomes difficult for Courts to even establish if discrimination has occurred or not, like in the case of employers' treatment of pregnant women.

Courts can also sometimes veer in a completely wrong direction, pronouncing judgments based on notions of formal equality, and consequently deny the equal protection of economic and social rights. This happened in Canada, where the Court allowed the appeal of a doctor and his patient, who was tired of queuing for a non-emergency procedure in Quebec's state-supported healthcare system for a year, and ordered the government to life its ban on private health insurance.[16] While this seems like a progressive step marking the equal access of all to healthcare on paper, it in fact had the opposite effect in practicality, as it inadvertently created a disparity (in people's access to healthcare based on their economic status) where none existed.[17]

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[16]*Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791.

[17]Jeff A King, 'Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision' (2006)

Even where economic and social rights are being protected in accordance with the notions of substantive equality, this might happen only in some aspects. It is hard to envision a situation where the entire length and breadth of a State's obligation to fulfil any economic and social right could be covered solely by judicial activism. There are far too many fine nuances, which would take a long and arduous process of case-by-case litigation to be covered. Another problem of using courts to determine and interpret rights would be that judicial decisions can only deal with rights violations after they have occurred. They cannot start examining multiple future scenarios where possible violations might occur and handing out decisions for those contingencies.

The aftermath of a judicial decision also plays a pivotal role in assuring the economic and social rights of a people. This was proven in the *Olga Tellis* case,[18] where, despite asserting that pavement dwellers had a right to shelter, the Court did little beyond staying their eviction for a month. Resettlement was made a priority, not a necessity, and even today, slum dwellers have little protection against authorities intenton demolishing their homes.[19]Courts can thus fail to pronounce a detailed judgment, and state authorities can fail to carry the judgment out in its entire spirit.

Another major problem with relying on substantive equality to generate economic and social rights is that the dependence on courts will increase, making them the first and only resort for claimants. This blurs the traditional divide between the judiciary and the elected representatives of the people. A myriad other problems may arise – like the fact that courts may lack the necessary knowledge, expertise and experience in dealing with the correct implementation of the extremely 'polycentric' economic and social rights.[20]The best way to restore this balance would be to ensure that economic and social rights are made justiciable in their own right, treated as obligations upon the State, rather than stemming from the broader and much more vague right to equality.

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69 Modern Law Review 631.

[18]*Olga Tellis* (n 9).

[19] Clark Cunningham 'A Fundamental Right To Shelter? A Comparison of the Indian and United State's Judicial Systems in Addressing the Problem of Homelessness' (*Clark Cunningham's Home Page*, 11 January 2002) < http://clarkcunningham.org/fall02/DOC/DraftTellis.doc> accessed 04 April 2015.

[20] Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Apprasial' (2007) CHRGJ Working Paper No 15, 11-17.

This aspect becomes even more important when the increasingly evident trend of judicial deferment to the State is taken into account.

When the Judiciary Defers

Perhaps the biggest failure of considering equality as an adequate replacement for economic and social rights is the fact that, for every stray incident where the judiciary steps up and interprets equality in a way that helps people gain access to economic and social rights, there also numerous others where it defers to the state and is unable to hold it accountable for its actions.

In Canada, the Supreme Court is increasingly holding back and deciding that the government's discriminatory policies in the economic and social rights field are justified by relying upon needlessly complicated tests.[21] The first case it dealt with on section 15 of the Canadian Charter of Rights and Freedoms was *Andrews v Law Society of British Columbia*,[22] in which it granted a British man, who was a permanent resident in Canada, the right to work as a lawyer by holding that the provisions that prevented non-citizens from enrolling in the Bar were discriminatory. The case established the *Andrews* test, which rested on three points – whether any differential treatment had occurred, whether this differential treatment was based on any enumerated or analogous grounds, and whether the legislation imposed a real disadvantage by discriminating in a substantive sense. While the *Andrews* case found that discrimination had occurred and paved the way for Mr Andrews to access his economic right of attaining work as a lawyer on par with citizens, the test itself unwittingly became a path strewn with multiple obstructions for future claimants hoping to gain equal access to economic and social rights.

The test was relied upon and made stricter in *Law v Canada (Minister for Employment and Immigration)*,[23] wherein the Court dismissed the appeal of Law, who was denied the benefits offered to widows because she was less than 45 years old, not disabled, and without any dependent children. While Law had alleged that the law relating to social security afforded to widows was discriminatory by only applying to certain groups, the Court disagreed. It expanded the third criterion of the Andrews test to include four contextual factors – namely, any pre-existing disadvantage of the group to which the

[21]Judy Fudge, 'Substantive Equality, The Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 South African Journal on Human Rights 235.
[22][1989] 1 SCR 143.
[23][1999] 1 SCR 497.

claimant belongs, the correspondence between the grounds for distinction and the actual need of the claimant, any ameliorative purposes of the distinction for a more disadvantaged group, and the nature and scope of the claimant's affected interest. Deciding that the claimant belonged to a group ('young people') that was not disadvantaged and did not have any actual need as she could find employment, and that the purpose of the pension plan was ameliorative to other groups, the Court held that the claimant had no right in this case.

Following on its heels, the case of *Gosselin v Quebec (Attorney General)*[24]also applied the same test in deciding whether a welfare programme, which gave lower rates of compensation to unemployed persons under the age of 30 unless they participated in educational programmes that helped them seek work, was discriminatory or not. It ultimately did not consider this treatment to be 'discriminatory', as people under the age of 30 were not historically disadvantaged and the law had an ameliorative purpose and overrode the interest of the claimant by helping the claimant find a job in the longer run. The Court asserted that the question of disadvantage had to be determined by a *reasonable person*, who, when put in the position of the claimant, would legitimately feel that his or her dignity had been violated.

This can only frustrate claimants even further, as the concept of dignity itself is extremely nebulous and will serve to destroy the certainty of any outcome in cases relating to the violation of equality.[25]There is also no reason to not use the notion of dignity in a way that protects rather than hinders claimants. In her dissenting judgment, for example, Arbour J read into the right to dignity *a positive duty of the state to provide* a basic level of subsistence to those who could not provide for themselves, thereby shifting the burden on the state to prove how it felt it could improve the lot and dignity of the group aged under 30 by excluding them from benefits. The fact that the Canadian courts use the concept of dignity to restrict, rather than expand, the notion of equality, speaks volumes about their attitude towards the justiciability of state's welfare programmes.

These tests come across as highly arbitrary on multiple other grounds. The Court, in both cases, assigned the claimant to a group of its own volition and decided if that group was disadvantaged or not. While a *reasonable* young person, who was employed, might not feel that his or her group was disadvantaged, an

[24][2002] 4 SCR 429.
[25]Colleen Sheppard, 'Inclusive Equality and New Forms of Government' (2004) 24 Supreme Court Law Review 45, 57.

unemployed young person who was having a hard time finding a job might hold a different view. In both cases, Law and Gosselin could easily be assigned an altogether different group – that of *unemployed young women*, for example – which would definitely be considered historically disadvantaged.

Add to that the dubiousness of the ameliorative purpose of the impugned law and the fact that the individual claims of these two women were swallowed up in the claim of the group to which they purportedly belonged, and what starts to emerge from Canadian jurisprudence is an ongoing tradition of judicial deference cloaked in the garb of substantive equality. More often than not, the onus of proof falls upon the claimants alleging unfair exclusion from welfare benefits. They have to prove that by excluding them, the state is failing in its obligation of ensuring equality. This becomes harder to do when the state's activities in the sphere of economic and social rights is seen less as a fundamental obligation and more as the product of generosity. Sandra Fredman is right in surmising that, in such cases, judicial intervention will decrease and a greater benefit of doubt will be given to the state in handling its policies.[26]

The pinnacle of judicial deference in the matter of equality and economic and social rights came perhaps in *Newfoundland (Treasury Board) v Newfoundland and Labrador Association of Public and Private Employees*,[27] where the Court did hold that women's dignity had been violated when they were not paid an equal wage as their male colleagues, but ultimately allowed the State's use of a financial crisis as a valid justification for denying this right to women. The Court sent a subtle message with this judgment – that economic and social rights were easily sacrificed at the altar of governmental discretion when it came to utilising resources, finally putting to rest the *dollars versus rights* debate.

Judicial Deferment in the United Kingdom

Canada's judiciary is not the only one prone to deferring to the State when it comes to viewing economic and social rights through the lens of equality. The United Kingdom has followed a simpler approach to determining the violation of equality through the denial of economic and social rights, doing away with complicated tests, but achieved the same results. In most cases, the courts normally tend to defer to the state's justifications, considering distinctions to be inevitable in all welfare legislations and mostly

[26] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 163.
[27] [2004] 3 SCR 381.

holding them to be rational and fair,all the while pronouncing that it is up to the State to make decisions regarding the allocation of resources and the balancing of competing claims.

In *R on the Application of Hooper v Secretary of State for Work and Pensions*,[28]for example, the Court denied widowers the right to state support, which had originally applied only to widows but, from 2000, also began to apply to widowers. Dismissing the widowers' contention that this transition should have in fact been made five years sooner, the Court said that widows were a historically disadvantaged group, so any law protecting them was justified and moreover, it was completely the state's decision as to when the benefits of this law should apply to other groups.

Again, in *Wandsworth Borough Council v Michalak*,[29]the Court held that local authority housing was a valuable resource, and that the state, when deciding who could succeed to the house of the deceased tenant and who could not, was justified in discriminating between the close relatives (such as descendants and spouses) and distant relatives.

The Court went a step further in *Douglas v North Tyneside Metropolitan Borough Council*,[30] and held that the right to education was not even engaged in a case where the state set an age limit of 55 years in the eligibility criteria for qualifying for educational loans. The Court, in this case, went as far as to say that the judiciary should not 'trespass into the discretionary area of resource allocation' in economic and social rights, as this area was not justiciable.

The Court did, however, hold a law to be discriminatory because, while it allowed both married and unmarried heterosexual partners of deceased tenants to succeed to their home, it did not extend this right to homosexual partners.[31]It therefore follows that, barring situations where distinctions are drawn upon more stigmatised grounds – such as race, gender or sexual orientation –the judiciary of the United Kingdom steers clear of intervening in the economic and social rights sphere, choosing instead to defer to State's discretion in these matters.[32]

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[28] [2005] UKHL 29.
[29] [2003] 1 WLR 617 (CA).
[30] (2003) EWCA Civ 1847 (CA).
[31]*Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (HL).
[32]Sandra Fredman (n 26) 187-189.

Judicial deferment may seem like a wise idea to judges in the absence of any legal recognition of economic and social rights, but it carries with it the risk of sterilising the best means of holding elected representatives accountable to the people in the arena of the state's welfare activities. Without the judiciary stepping up, state policies might be left to the mercy of politicians' machinations, who are wont to polarise in one extreme through the encouragement of other like-minded people, without much thought given to the minorities and politically disadvantaged, who are, ironically, most in need of protection. It thus falls upon the courts to be more alert and less deferent in their attitude towards government policies in the field of economic and social rights. Rather than viewing them as benefits that the state has seen fit to bestow upon its people, the courts must recognise that these are crucial rights that need protection, and walk the thin line between refraining from interfering in matters of budgetary allocation and holding the government accountable for any discriminatory policies.

However, in the end, this solution serves as merely a poor alternative to the true need of the hour: the legal recognition of economic and social rights in every domestic jurisdiction. Only when this happens, will the true strengths of both the right to equality and economic and social rights be allowed to shine, as they will work harmoniously and aid each other in raising the standard of life of the people. This symbiotic relationship between the two is best being exemplified by South Africa, where economic and social rights are recognised on an equal footing with civil and political rights, and where the judiciary is more proactive in effectively utilising equality to further develop economic and social rights litigation.[33]

Conclusion

Human rights, especially economic and social ones, are not as black and white in reality as the instruments declaring them would *prima facie*have them be. A lot depends on the states' ability to plan and implement detailed policies to assure these rights, all the while keeping budget constraints in mind. Perhaps this might be a reason why economic and social rights are often consigned to being non-justiciable ideals put on pedestals that every state hopes to achieve someday but does not feel any

[33] Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution' (2007) 23 South African Journal on Human Rights 335.

immediate compulsion to grant to its people. By bringing equality into the mix, this once cordoned-off arena of human rights has been laid bare to judicial scrutiny, guaranteeing a minimum core to people and bringing a measure of accountability to state action. However, using this method has its own drawbacks, the greatest of which is the judicial tendency to defer to state discretion.

In order to truly be able to guarantee economic and social rights using merely the right to equality, courts will have to view the concept of equality in a redistributive sense and the concept of dignity in an obligation-creating sense. Rather than relying upon and accepting justifications by the state to continue applying discretion to its welfare policies, the courts will have to hold these justifications to far stricter scrutiny. But they will also have to strike a balance and take care to not infringe on the areas of planning and implementation which have been decreed by the doctrine of the separation of powers to be exclusively within the government's domain. And even then, this method will remain an inferior option to that of legally recognising economic and social rights.

It is more than apparent that substantive equality can and must not be used as a replacement for economic and social rights all together. Nor should these rights be considered a subsidiary set of human rights emerging from the notion of equality, because that would undermine their position in international law and create possible complications in the pragmatic aspects of their definition, attainability and universality. At best, the relationship between the two should be seen as complementary, each adding value to the other by helping to transform its conception in accordance with the demands of the time. In conclusion, the right to equality cannot be an adequate replacement for economic and social rights, but it is certainly crucial in evolving their jurisprudence.

Bibliography

Brodsky G and Day S, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 Canadian Journal of Women and Law 185.

CESCR 'General Comment 20 on Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (02 July 2009) UN Doc E/C12/GC/20.

Cunningham C, 'A Fundamental Right To Shelter? A Comparison of the Indian and United State's Judicial Systems in Addressing the Problem of Homelessness' (*Clark Cunningham's Home Page*, 11 January 2002) < http://clarkcunningham.org/fall02/DOC/DraftTellis.doc> accessed 04 April 2015.

De Vos P, '*Grootboom*, The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 South African Journal on Human Rights 258.

Fredman S, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 163.

Fudge J, 'Substantive Equality, The Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 South African Journal on Human Rights 235.

Jackman M and Porter B, 'Women's Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act' in Status of Women Canada (ed), *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Status of Women Canada 1999) 55.

King JA, 'Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision' (2006) 69 Modern Law Review 631.

Liebenberg S and Goldblatt B, 'The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution' (2007) 23 South African Journal on Human Rights 335.

McLachlin B, 'Equality: The Most Difficult Right' (2014) 14 Supreme Court Law Review 17.

Nolan A, Porter B and Langford M, 'The Justiciability of Social and Economic Rights: An Updated Apprasial' (2007) CHRGJ Working Paper No 15, 11-17.

Office of the High Commissioner for Human Rights, 'The Right to Equality and Non-Discrimination in the Administration of Justice' (*OHCHR)*<http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf> accessed 28 January 2015.

Sheppard C, 'Inclusive Equality and New Forms of Government' (2004) 24 Supreme Court Law Review 45, 57.

Young KG, 'A Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113, 139.