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ORIGINAL SCIENTIFIC ARTICLE

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NAVIGATING THROUGH THE SUBSTANTIVE EQUALITY DOCTRINE: ANTI-DISCRIMINATION LAW AND SOCIAL CHANGE

Abstract: *The substantive equality doctrine is an important aspect of legal scholarship and judicial practice built around the principles of equal treatment and non-discrimination. The doctrine departs from the critique of the "formal approach to equality" and places great expectations on the legislator and the courts vis-à-vis its equality aspirations, which encompass objectives related to both redistribution and recognition. The paper examines the relationship between its basic postulates, its equality goals, and the law as its main method. The author charts the developmental trajectory of the doctrine, provides an overview of its premises, and an analysis of its objectives. The author concludes that the proponents of the substantive equality doctrine rightly point to deeper societal structures as the source of patterned inequalities, yet they are mistaken in their belief that the subtle and complex forms of discrimination can be effectively addressed through anti-discrimination law.*

Key words: Substantive Equality, Formal Equality, Anti-discrimination Law, Structural Inequalities, Structural Discrimination, Socioeconomic Disadvantage, Social Justice.

1. Introduction

Substantive equality is a notion that connects different strands of human rights constitutionalization, which have evolved from an expansive theoretical and judicial interpretation of the principles of equal treatment and non-discrimination.[1] The doctrine brings an egalitarian promise of a

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1 In this paper, the notion of constitutionalization stands for the practices and processes through which an increasing number of public matters, which were so far in

more equal society to be achieved through the law, a promise that contemporary inequalities will be dealt with in a way that is attentive to the manifold and mutually reinforcing dimensions of inequalities faced by those who were historically subordinated, exploited, and oppressed. The courts are asked to abandon the narrow vision of equality, so far embraced by the law and traditional equality jurisprudence, and to embark on the quest for substantive equality.

The doctrine was sparked by the insights into the complexities and pervasive nature of inequalities gained by the social sciences in the US during the late post-segregation period. In the past thirty years, its main views and arguments have become part of mainstream equality jurisprudence in many countries around the world. In legal scholarship, it became an important way of approaching matters of discrimination and persistent inequalities that permeates the contemporary critique of the anti-discrimination law and the proposals for its improvement. Despite its broad acceptance, the doctrine is characterized by a pronounced conceptual indeterminacy, which is likely the reason why only a small fraction of scholars commits to more profound analyses and critical reflections of its basic propositions. The fact that substantive equality is predominantly used as a self-referential notion or as a framing device in debates on the effectiveness of anti-discrimination law, in which value-driven arguments often become dominant, are additional reasons why such inquiries are few in number.

The present paper points to the unsteadiness of the doctrine's conceptual edifice. Yet, its primary goal is not confined to identifying the inadequacies of the conceptual apparatus of the substantive equality doctrine. The paper analyses the relationship between the basic postulates of the substantive equality doctrine, its goals, and the law as a method of social regulation. Its main aim is to set the direction that could structure further discussion on the logical grounding and attainability of the doctrine's goals. With that aim, the author charts the developmental trajectory of the substantive equality doctrine, provides a short overview of its basic postulates, and points to the breadth of expectations that the doctrine places on the legislator and courts.

The doctrine is analyzed as present in the scholarly works on the topic of substantive equality and in the judicial interpretations of the principles

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the domain of political decision-making, are brought to the purview of judiciary by being included in constitutions, interpreted as matters of constitutional importance, or regulated by the higher ranked laws. More on the author's view of the phenomenon of human rights constitutionalization in: Matijević, V. M., Some Critical Reflections on the Broad Human Rights Constitutionalisation, in: Nikolić, O., Čolović, V., (eds.), 2021, *Constitutio Lex Superioris: In memoriam of Professor Pavle Nikolić,* Belgrade, Institute of Comparative Law, pp. 155–172.

of equal treatment and non-discrimination.[2] In that sense, the term "doctrine" is used simultaneously in its continental European meaning of "the doctrinal study of law",[3] *i.e.*, as a reference to legal scholarship, and in the meaning of the common law notion of "judicial doctrine", referring to the body of rules for the interpretation of a legal concept or a principle arrived at through judicial activity.[4] Hence, the phrase "substantive equality doctrine" stands as a label for both types of legal praxis involving arguments on substantive equality. The term "substantive equality doctrine" is used interchangeably with "substantive equality approach" and similar phrases. Another important terminological note concerns "anti-discrimination law", employed here as a generic term for legal rules that regulate prohibition of discrimination and provide equality guarantees along the "nexus between group membership and disadvantage",[5] as laid down in the constitution and laws or shaped through judicial activity.

In the paper, the author deals primarily with the strand of the substantive equality doctrine that is concerned with the application of anti-discrimination law, although many of its observations are also valid for the judicialization of socioeconomic rights, as another important aspect of

2 For a succinct analysis of the relationship between the principle of equal treatment and the principle of non-discrimination see Marinković, T., Pravna i suštinska jednakost – konceptualna razgraničenja, in: Petrušić, N., (ed.), 2012, *Sudska građanskopravna zaštita od diskriminacije*, Belgrade, Poverenik za zaštitu ravnopravnosti, Pravosudna akademija, pp. 39–46.

3 Alf Ross used this term to overcome the linguistic confusion arising from the different meanings of the notion "doctrine" in the common law and the civil law jurisdictions, *i.e.*, misunderstandings that stem from the fact that in the common law countries the term "legal doctrine" stands for the body of rules (the law itself), while in the civil law jurisdictions it refers to the knowledge about the existing rules. Ross, A., 2004, *On Law and Justice*, Clark, The Lawbook Exchange (originally published: Berkeley, University of California Press, 1959), pp. 10–11.

4 The term "judicial doctrine" refers to what Gerald Baier defines as "a set of standards, maxims, tests and approaches to the interpretation of the law that is used to regularize law's application and make it more routine and predictable." Baier, G., 2006, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada*, Vancouver, UBC Press, p. 14.

5 Anti-discrimination law is not concerned with the randomly distributed disadvantage but with the relative group disadvantage. Hence, classificatory grounds and group disadvantage are the central features of anti-discrimination law, as elaborated in the work of Tarunabh Khaitan, who points out the "nexus between group membership and disadvantage" as its *differentia specifica* and the dividing line between this field of law and the other legal fields aimed at operationalizing the social ideal of equality. Khaitan, T., Prelude to a Theory of Discrimination Law, in: Hellman, D., Moreau, S., (eds.), 2013, *Philosophical Foundations of Antidiscrimination Law*, Oxford, Oxford University Press, pp. 152. See also, Khaitan, T., 2015, *A Theory of Discrimination Law*, Oxford, Oxford University Press.

the process of human rights constitutionalization evolving around the notion of substantive equality. Due to its limited length, the author does not elaborate on the proposition from which the paper departs – that there is a single and identifiable jurisprudential phenomenon, which can be named the substantive equality doctrine. Instead, throughout the text she does so indirectly by pointing to a number of legal studies and judgments in which the notion of substantive equality has been employed.

The paper is structured in the following way. The first three sections set the scene for the analysis by mapping the development of the doctrine and its spread to various jurisdictions, by discussing its conceptual underpinnings, and by outlining its basic postulates. In the fourth section, the author points to the depth of ambition with which the substantive equality doctrine speaks to the legislator and courts vis-à-vis its equality aspirations. The last part of the analysis sets signposts for future, more in-depth analyses of the relationship between the postulates of the substantive equality doctrine, its equality aspirations, and the law as the method for their realization. In the conclusion, the author summarizes her main arguments why the anti-discrimination law cannot be the right path for the realization of this evolving societal conception of equality.

2. The Rise and Spread of the Substantive Equality Doctrine

The notion of substantive equality emerged within the scholarly critique of the anti-discrimination law as an answer to the entrenched societal inequalities. Not much is known about the genesis of this notion. Beverley Baines situates its birthplace, at least in the Canadian context, in the writings of feminist legal scholars.[6] According to C. A. MacKinnon, the notion first appeared in the judicial proceedings in *Andrews v. The Law Society of British Columbia*, decided in 1989 by the Supreme Court of Canada.[7] An influential women's rights organization argued in its *ami-*

6 Baines, B., 2015, Is Substantive Equality a Constitutional Doctrine?, *Queen's University Legal Research Paper Series,* No. 042, p. 78.

7 MacKinnon, A. C., 2016, Substantive Equality Revisited: A Reply to Sandra Fredman, *International Journal of Constitutional Law*, Vol. 14, No. 3, p. 739. The case *Andrews v. The Law Society of British Columbia* (1989 1 S.C.R. 143) was the first judgment in which the Canadian Supreme Court interpreted and applied the equality provisions of the Canadian Charter of Rights and Freedoms. Mark David Andrews, a law graduate of the Oxford University in England and resident of British Columbia, was refused membership in the provincial law society on the grounds that he did not hold Canadian citizenship. The case was decided in his favor and the Supreme Court of Canada found that discrimination on the basis of citizenship violated the section

cus curiae that the inadequacies of the formal conception of equality can be overcome only through a broader interpretation of the constitutional equality clause which would embrace "substantive equality".[8]

Since the late 1990s, substantive equality has been a dominant theme in jurisprudence and in the legal developments of the growing number of national jurisdictions. The jurisprudence of the Canadian Supreme Court and of the Constitutional Court of South Africa are the most prominent examples of the judicial equality doctrine built around the notion of substantive equality. Since its first case law on the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada has been interpreting the equality provisions as embracing substantive equality claims. Starting from that premise, in a number of cases the Supreme Court found a violation of the Charter's equality provisions even where discrimination occurred as an effect of a facially neutral law of general application.[9] Side by side with its Canadian counterpart, the Constitutional Court of South Africa built its own version of the substantive equality doctrine, which places a distinct emphasis on the importance of the sociohistorical context for the judicial equality examinations.[10] In a number of cases, the South African Constitutional Court held that, in a society with a long record of widespread societal inequalities, a protection against discrimination that is reduced to equal treatment would only lead to the further entrenchment of the existing inequalities.[11] In India, substantive equality jurisprudence has

15(1) equality provisions of the Canadian Charter of Rights and Freedoms (*Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11). For a comment on the case see Gold, M., 1989, Comment: *Andrews v. Law Society of British Columbia*, *McGill Law Journal*, Vol. 34, pp. 1063–1064.

8 *Andrews v. The Law Society of British Columbia* (1989 1 S.C.R. 143), Factum of the Intervener, Women's Legal Education and Action Fund Inc. (LEAF), para. 29. Only in this way, the organization claimed, the equality provisions could serve as a barrier to "the adverse effects of apparently 'neutral' forms of social organization premised on the subordination of certain groups and the dominance of others" (para. 23).

9 See, for instance, *Eldridge v. British Columbia* (1997 S.C.R. 624), where it was claimed that the discrimination arose from the law of general application, *i.e.*, where no evidence of a specific discriminatory rule or standard was furnished.

10 One of the most often cited cases, in which the Constitutional Court of South Africa applied the substantive equality doctrine, is *Brink v. Kitshoff* (1996 (6) BCLR 752 (CC)). For an analyses of the equality jurisprudence of the South African Constitutional Court see Smith, A., 2014, Equality Constitutional Adjudication in South Africa, *African Human Rights Law Journal*, Vol. 14, No. 2, pp. 609–632. For a different view of the South African constitutional equality jurisprudence, see Yap, P., 2005, Four Models of Equality, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 27, No. 1, pp. 63–100.

11 See, for instance, *Hugo v. President of the Republic of South Africa and Another* (1997 ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC)) para. 112.

had a very direct impact on the broadening of the scope of its equality guarantees. In the landmark case of *Lieutenant Colonel Nitisha and Others v. Union of India and Others* from 2021, the Indian Supreme Court developed a conceptual grounding for the concept of indirect discrimination by invoking not only the case law of its Canadian, South African, and US counterparts, but also the writings of Sandra Fredman, an outspoken proponent of the substantive approach to equality.[12]

In the United States, the doctrine was primarily built through the scholarly critique of the procedural approach of the courts to the 14th Amendment,[13] especially via the attempts to flesh out the new types of remedies for the subtle and complex forms of employment discrimination.[14] Despite the fact that these developments only sporadically invoked the notion of substantive equality, one would not be mistaken to say that it was the legacy of *Brown v. Board of Education* that served as the main source of inspiration for the substantive equality jurisprudence in the jurisdictions in which the doctrine took hold.[15]

When it comes to European countries, although the formal conception of equality still dominates the jurisprudence of the courts, in the past two decades, the equality provisions have been increasingly approached as the duty to address the subtle forms of discrimination. This trend can

12 Writ Petition (Civil) No. 1109/2020 (decided on 25 March 2021). For an analysis of the case, see Khanna, V., 2022, Indirect Discrimination and Substantive Equality in Nitisha: Easier Said than Done under Indian Constitutional Jurisprudence, *International Journal of Discrimination and the Law*, Vol. 22, No. 1, pp. 74–86.

13 Constitution of the United States, 14th Amendment, Section 2.

14 See, for instance, Rosenfeld, M., 1986, Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal, *California Law Review*, Vol. 74, No. 5, pp. 1687–1712; West, R., 1990, The Meaning of Equality and the Interpretive Turn, *Chicago-Kent Law Review*, Vol. 66, No. 2, pp. 451–480; Sturm, S., 2001, Second Generation Employment Discrimination: A Structural Approach, *Columbia Law Review*, Vol. 101, No. 3, pp. 458–568. When it comes to the case law of the US Supreme Court, Fredman and West actually claim that its interpretation of the Equal Protection Clause stands firmly attached to the concept of formal equality, as illustrated in the case *Ricci v. De Stefano* (557 U.S. 557 (2009)) and *Parents Involved in Community Schools v. Seattle School District* (551 U.S. 701 (2007)) (Fredman, S., 2016, Substantive Equality Revisited, *International Journal of Constitutional Law*, Vol. 14, No. 3, pp. 712–738). William E. Forbath, on the other hand, argues that the broader conception of constitutional equality provisions in the US, or as he calls it "the social citizenship tradition", at least in the past, could be traced not only to the scholarly literature but also to the decisions of the US courts (Forbath, E. W., 2001, Constitutional Welfare Rights: A History, Critique and Reconstruction, *Fordham Law Review*, Vol. 69, No. 5, pp. 1855–1891).

15 For the European context, this is well illustrated in: Hepple, B., 2006, The European Legacy of *Brown v. Board of Education*, *University of Illinois Law Review*, No. 3, pp. 605–624.

be mapped primarily in the legislative and judicial elaborations of indirect discrimination, affirmative action measures, positive duties, and other legal strategies aimed at overcoming limitations of the formal equality approach.[16] The same can be observed in the case law of the Court of Justice of the European Union (CJEU) which, according to Marc de Vos, is the story of gradual discovery of the limits of affirmative action developed under the banner of substantive equality.[17] The European Court of Human Rights, which, together with the CJEU, has a prevailing influence on national judicial doctrine, follows the same path when applying the European Convention on Human Rights.[18]

16 In effect, all European Union member states adopted legislation that contains provisions on indirect discrimination and positive action measures in the process of transposition of the EU equality directives to the national laws. See, for instance, Equal Treatment Act of the Kingdom of the Netherlands (Staatsblad 1994, 230); Federal Equal Treatment Act of the Republic of Austria (Bundes-Gleichbehandlungsgesetz (BGBl. Nr. 100/1993); General Equal Treatment Act of the Federal Republic of Germany (Allgemeines Gleichbehandlungsgesetz (BGBl. I S. 1897)). Similar trends can also be identified in other European countries. See, for instance, Law on the Prohibition of Discrimination of the Republic of Serbia (Zakon o zabrani diskriminacije Republike Srbije, *Official Gazette of the RS*, Nos. 22/2009, 52/2021). For a comparative overview of the different conceptions of equality and non-discrimination pursued by the courts in the European Union Member States see McCrudden, C., Prechal, S., 2011, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach*, Luxembourg, Office for Official Publications of the European Communities). For an account of the implementation of the Serbian anti-discrimination law, see Gajin, S., 2021, *Zakon o zabrani diskriminacije: prvih dvanaest godina*, Vol. I, Belgrade, Centar za unapređivanje pravnih studija – Pravni fakultet Univerziteta Union.

17 Vos, M. de, 2007, *Beyond Formal Equality: Positive Action Under Directives 2000/43/EC and 2000/78/EC*, Luxembourg, Office for Official Publications of the European Communities, pp. 11, 18; Vos, M. de, 2020, The European Court of Justice and the March Towards Substantive Equality in European Union Anti-Discrimination Law, *International Journal of Discrimination and the Law*, Vol. 20, No. 1, pp. 62–87. Some of the European Court of Justice (ECJ) early case law illustrating this is available in: *Commission of the European Communities v. French Republic* (Case C-312/86, Judgment of 25 October 1988); *Joseph Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* (Case C-366/99, Judgment of 29 November 2001); *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* (Case C-407/98, Judgment of 6 July 2000). Sacha Prechal argued that a clear tendency toward applying the substantive equality doctrine could be observed in some of the ECJ's decisions in the field of gender equality (Prechal, S., 2004, Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes, *Common Market Law Review*, Vol. 41, No. 2, p. 537).

18 Since its landmark decision in *D. H. and Others v. Czech Republic* (Application no. 57325/00, Judgment of 7 February 2006), the European Court of Human Rights (ECtHR) has been steadily applying and broadening the indirect discrimination analysis and the positive obligations of the State Parties related to it, as the manifestations of the substantive equality approach. Yet, the scope of its adherence to the substantive

The substantive equality doctrine can also be observed at the international level. The UN treaty bodies, established under the main international human rights instruments, interpret the prohibition of discrimination as embracing both de jure and de facto equality goals, where the term "de facto equality" is used as a synonym for "substantive equality". The concept of substantial equality has become the standard for measuring state compliance with the prohibition of discrimination. In General Recommendations No. 16, the UN Committee on Economic, Social, and Cultural Rights argued for a very broad interpretation of the equal right of men and women to the enjoyment of economic, social, and cultural rights. According to the Committee, the Covenant's provisions mandate not only remedial but also proactive measures needed to ensure that the effects of laws, policies, and practices "do not maintain, but rather *alleviate*, the inherent disadvantage that particular groups experience."[19] As such, a failure to create conditions for substantive equality between men and women in the enjoyment of the Covenant's rights, the Committee stated, constitutes a violation of its equality guarantees.[20]

3. The Notion of Substantive Equality

Although substantive equality is a central theme of mainstream equality jurisprudence in many national jurisdictions and international human rights forums, the concept has remained vague and analytically underdeveloped. So far, there is neither a consensus nor even an analytically valuable disagreement among the proponents of the substantive equality doctrine on what "substantive equality" is. The same applies to the courts' invocations of the notion, which are equally indeterminate.

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conception of equality, even after entering into force of the Protocol 12 (Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 2000), E.T.S. 177, entered into force 1 April 2005) and despite the Court's attempts to protect certain socioeconomic rights via Convention rights, in essence remains limited to the civil and political rights. For a scholarly account of the ECtHR's case law exhibiting substantive approach to equality see O'Connell, R., 2009, Substantive Equality in the European Court of Human Rights?, *Michigan Law Review First Impressions*, Vol. 107, pp. 129–133; Mjöll Arnardóttir, O., 2017, Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?, *Oslo Law Review*, Vol. 4, No. 3, pp. 150–171.

19 UN Committee on Economic, Social and Cultural Rights, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), E/C.12/2005/4 (11 August 2005), para. 7 (emphasis by author).

20 UN Committee on Economic, Social and Cultural Rights, General Comment No. 16, para. 41.

Substantive equality is mostly used as a self-referential term, interchangeable with "de facto", "real" or "effective" equality, "equality of results" or "equality of outcomes".[21] In scholarly works, the notion is rarely defined and can carry, often simultaneously, a variety of meanings. Scholars refer to it as a particular conception of equality,[22] theory,[23] principle,[24] substantive interpretation of equality rights,[25] constitutional value,[26] judicial doctrine,[27] norm,[28] right,[29] a set of equality principles,[30] etc. The scholarly discussions on the content of substantive equality doctrine suffer from the same indeterminacy and complexity.[31] The opus of Sandra Fredman, who, as already mentioned, is one of the most renowned proponents of the substantive equality doctrine, can serve as

21 Here an additional clarification should be made about the notion of equality of outcomes. The proponents of the substantive equality, who argue that the anti-discrimination law should pursue equality of outcomes as its goal, rarely if ever interpret this notion in the sense that strict egalitarianism does, *i.e.* as equal allocation of the societal wealth to each member of the society (see Lamont J., Favor C., Distributive Justice, in: Zalta, E. N., Nodelman, U., (eds.), 2017, *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition). Rather, in the terminology of the substantive equality doctrine, the equality of outcomes refers to equal access to those public goods, such as education, and health, which are instrumental for the realization of other human rights.

22 Mitchell, B., 2015, Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law, *Irish Jurist*, Vol. 53, pp. 38.

23 This is primarily the case with the early writings on substantive equality. See, for instance, Rosenfeld, M., 1986, Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal, *California Law Review*, Vol. 74, No. 5, pp. 1689.

24 Hepple, B., Can Discrimination Ever Be Fair?, in Malherbe, K., Sloth-Nielsen, J., (eds.), 2012, *Labour Law into the Future: Essays in honour of D'Arcy du Toit*, Cape Town, University of the Western Cape, p. 12; Fredman, S., 2016, Substantive Equality Revisited, *International Journal of Constitutional Law*, Vol. 14, No. 3, p. 713. When it comes to the substantive equality between men and women, some authors argue that substantive equality has gained the status of constitutional principle in some national jurisdictions. See, for instance, Anagnostou, D., Gender Equality and Parity in European National Constitutions, in: Irving, H., (ed.), 2017, *Constitutions and Gender*, Cheltenham, Edward Elgar Publishing, p. 268.

25 Brodsky, G., Shelagh, D., 2002, Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty, *Canadian Journal of Women and the Law*, Vol. 14, p. 207.

26 Albertyn, C., 2007, Substantive Equality and Transformation in South Africa, *South African Journal on Human Rights*, Vol. 23, No. 2, p. 254.

27 O'Connell, R., 2009, p. 129.

28 Brodsky, G., Shelagh, D., 2002, pp. 205, 206.

29 Albertyn, C., 2007, pp. 254–255.

30 MacKinnon, A. C., 2011, Substantive Equality: A Perspective, *Minnesota Law Review*, Vol. 96, p. 27.

31 See on this: Stancil, P., 2017, Substantive Equality and Procedural Justice, *Iowa Law Review*, Vol. 102, No. 4, p. 1646.

a handy illustration of the panoply of meanings that the concept of substantive equality carries in scholarly works. Fredman is of the opinion that "substantive conception resists capture by a single principle,"[32] and in several of her papers, she tries to elaborate on a "multi-dimensional notion of substantive equality."[33] Fredman believes that such conception should recognize and address "the distributional, recognition, structural, and exclusive wrongs experienced by out-groups."[34] For that reason, she merges several different equality conceptions into a four-dimensional analytical framework that should provide the criteria on whether a law, policy, and practice meets the right to equality. These four dimensions, when translated into the goals of the substantive equality approach, are: "to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change."[35]

Some authors raise substantive equality to the rank of a right. Catherine Albertyn argues that in the South African constitutional jurisprudence, substantive equality is at the same time an aspirational idea and a legally enforceable right, which are both indispensable for "social and economic 'transformation'" and the role of law in the attempts to achieve such transformation.[36] Kelley Loper speaks about an international right to substantive equality, which she derives from the provisions of the main UN human rights instruments and from the interpretive materials produced by the respective UN treaty bodies.[37] For Charilaos Nikolaidis, the right to substantive equality in the jurisprudence of the European Court of Justice exists alongside market equality, as vertical obligations enforceable against the state and horizontal obligations enforceable against individuals and non-state entities.[38] When discussing the affirmative action measures envisioned by the British Equality Act

32 Fredman, S., 2011, *Discrimination Law*, Oxford, Oxford University Press (2nd edition), p. 25.

33 Fredman, S., 2007, Redistribution and Recognition: Reconciling Inequalities, *South African Journal on Human Rights*, Vol. 23, No. 2, p. 215.

34 Fredman, S., 2016, p. 738.

35 *Ibid.*, p. 713.

36 Albertyn, C., 2007, pp. 254–255.

37 Loper, K., 2011, Substantive Equality in International Human Rights Law and Its Relevance for the Resolution of Tibetan Autonomy Claims, *North Carolina Journal of International Law and Commercial Regulation*, Vol. 37, No. 1, pp. 6, 13.

38 Charilaos Nikolaidis also claims that the European Court of Justice played a pivotal role in its development. Nikolaidis, C., 2015, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts*, London, Routledge, p. 104.

of 2010, Bob Hepple speaks about the right to substantive equality of opportunity.[39]

Faced with this array of different meanings assigned to substantive equality, we can only note that theory and practice have not yet yielded sufficient elements for a coherent definition of the notion. The only certainty that remains, when confronted with the task of defining substantive equality and the related doctrine, is that it represents an attempt by legal scholarship and judicial practice to turn away from a conception of anti-discrimination law that is based on what its proponents call "the formal approach to equality". A commendatory use of the latter notion, with the aim of disqualifying the interpretations of equality provisions that are considered "formal" or "procedural", has long become commonplace in contemporary anti-discrimination law parlance.

4. The Basic Postulates of the Substantive Equality Doctrine

No matter which vision of substantive equality its proponents pursue, their point of departure is always to be found in the inadequacies of the "formal approach to equality". The formal conception of equality formulated as the legal imperative of equality before the law – the doctrine's proponents claim, – is of no avail in tackling the subtle and entrenched forms of discrimination.[40] Such formalistic interpretation of equality provisions is only a pledge to legal consistency that cannot guarantee real equality. Instead of asking whether a rule, policy, or practice results in unjustified distinctions, judicial inquiry should go into examining what are its effects on disadvantaged social groups. Advocates of the substantive equality doctrine underline that in contemporary societies, with their long history of oppression and exploitation of less powerful social groups, the rules, policies, and practices that do satisfy the requirements of formal equality can often become a source of discrimination. This is the central tenet of the substantive equality doctrine, which is anchored in the insight that

39 Hepple, B., 2012, p. 16. See also study of Päivi Gynther, in which she speaks about the right to substantive equality in the context of linguistic educational rights (Gynther, P., 2007, *Beyond Systemic Discrimination: Educational Rights, Skills Acquisition and the Case of Roma*, Leiden, Martinus Nijhoff Publishers, p. 280).

40 The cynical aphorism of Anatole France, the French Nobel Prize laureate from the early 20th century, that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread", is with good reason often quoted in this context. France, A., 1910, *The Red Lily*, New York, Current Literature Publishing Company, p. 87.

discrimination comes not only in its overt forms, but that it can also be subtle, complex, and hard to identify because it ensues from the very basic structures of society. The notions of structural inequalities and structural discrimination (developed in anti-discrimination research of the last decades of the 20th century, especially within the critical race theory) are often used in jurisprudence as a shorthand for this complex view of a social reality from which the substantive equality doctrine departs. For this reason, a closer look at these two concepts is indispensable for the in-depth understanding of both the basic theoretical postulates and the breadth of the aspirations of the substantive equality doctrine.

4.1. STRUCTURAL INEQUALITIES

For the proponents of the substantive equality doctrine, the contextualization of equality claims is the first step toward a judicial inquiry that would be capable of overcoming the limitations of formal equality. Formal equality is blind to the background conditions that generate inequalities. To be able to respond "to real wrongs", Fredman argues, "[t]he right to equality should be located in the social context."[41] What a simple analysis of the social context reveals is that there are persistent and patterned inequalities, the existence of which cannot be explained through discrimination seen as a sporadic, irrational, and arbitrary act. Hence, the first goal of the substantive equality doctrine is to acknowledge the complex and systemic nature of societal inequalities, as the doctrine's basic premise that found its expression in the concept of structural inequalities.

The advocates of the substantive equality approach use the term structural or systemic inequalities to emphasize the pervasive nature and institutional embeddedness of the existing inequalities. Those who do not employ either of the two notions speak about the "entrenched"[42] and "deep-patterned inequalities",[43] "deeply rooted" in "social structures"[44] or in "systems and institutions",[45] or otherwise linked to the "structural fac-

41 Fredman, S., 2016, p. 713. See also Schiek, D., Waddington, L., Bell, M., Introductory Chapter: A Comparative Perspective on Non-Discrimination Law, in Schiek, D., Waddington, L., Bell, M., (eds.), 2007, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart Publishing, p. 28.

42 Bell, M., 2008, *Racism and Equality in the European Union*, Oxford, Oxford University Press, p. 35.

43 Conaghan, J., 2007, Following the Path of Equality Through Law: Reflections on Baker et al., *Equality: From Theory to Action*, *Res Publica: A Journal of Legal and Social Philosophy*, Vol. 13, p. 160.

44 McHugh, C., 2006, The Equality Principle in E.U. Law: Taking a Human Rights Approach?, *Irish Student Law Review*, Vol. 14, pp. 31, 34.

45 Fredman, S., Goldblatt, B., 2014, Gender Equality and Human Rights, *UN Women Discussion Paper Series*, p. 9. See also Vos, P. de, Transformative Justice: Social and

tors of discrimination".[46] For the proponents of the substantive equality doctrine, the entrenched and patterned social inequalities are an undeniable feature of contemporary societies, which cannot be reduced to the question of individual responsibility, as suggested by the merit-based ideologies. Persistent societal inequalities are socially caused.[47] In order to explain them, one needs to look into the "social structures", understood as broad as "social values and behaviours, the institutions of society, the economic system and power relations."[48]

For C. Albertyn, the problem with the existing inequalities "is not difference per se, but rather the manner in which difference is tied to hierarchies, exclusion and disadvantage."[49] As said, the substantive equality doctrine demonstrates that discrimination can also ensue from the social practices that easily satisfy the requirements of procedural justice venerated by the principle of formal equality. For that reason, the central objective of the substantive equality doctrine is to ensure that the judicial inquiry is broadened to include the societal practices that purport to the same treatment but are in effect a "cover for substantive inequality"[50] of the traditionally vulnerable and disadvantaged groups. As phrased by the Supreme Court of Canada in *Withler v. Canada*, for such a legal endeavor the central question becomes "whether, having regard to all relevant factors, the impugned measure *perpetuates disadvantage* or stereotypes the claimant group."[51]

4.2. STRUCTURAL DISCRIMINATION

A key to this broad conceptualization of unjustified unequal treatment, which produces structural inequalities, lies in the notion of "structural" or "systemic" discrimination. The two terms, which are often used interchangeably, denote complex forms of discrimination, which are about

Economic Rights in South Africa's Constitution, in: Auweraert, P. van der, Pelsmaker, T. de, Sarkin, S., Lanotte, J. van de, (eds.), 2002, *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments*, Antwerp, Maklu Publishers, p. 252.

46 In the context of persistent ethnic inequalities, Mark Bell speaks about structural factors as, "notably the (conscious and unconscious) processes and cultures of institutions which operate to reproduce inequality." Bell, M., 2008, p. 180.

47 Young, I. M., 2001, Equality of Whom? Social Groups and Judgments of Injustice, *Journal of Political Philosophy*, Vol. 9, No. 1, p. 15.

48 Albertyn, C., 2007, p. 254.

49 *Ibid.*, p. 260.

50 Davies, G., 2003, *Nationality Discrimination in the European Internal Market*, Kluwer Law International, p. 41.

51 *Withler v. Canada* (2011 1 S.C.R. 396), para. 3 (emphasis by author).

"problems that cannot be isolated to a particular act or actor, that involve dynamics of interaction and evaluation producing marginalization or exclusion, [and] that are inextricably linked with activities that we actually value."[52] They are a consequence of systemic, cumulative and incremental ways in which social structures work to produce structural inequalities. The notion of structural discrimination or, as also called, "substantive or de facto discrimination",[53] also points to the mutually reinforcing effect that societal inequalities taking place in different societal fields have one on another.[54] In that sense, the concept is employed to explain that patterned and entrenched disadvantages come from the interaction of discriminatory rules, policies and practices in different areas of social life.[55]

The complex forms of discrimination are identified primarily through their effects of "withhold[ing] or limit[ing] access to opportunities, benefits, and advantages available to other members of society."[56] An important aspect of the substantive equality doctrine is its insistence that the courts and legislators should focus on disadvantage. Placing the accent of judicial inquiry on disadvantage is essential for the doctrine in two ways. Firstly, by taking into account the pre-existing disadvantages, the courts are able to single out those groups in relation to which a claim that a law or policy has a detrimental treatment should result in heightened

52 Sturm, S., 2003, Equality and the Forms of Justice, *University of Miami Law Review*, Vol. 58, No. 1, p. 66.

53 Consequently, the Committee concluded that the State Parties are under an immediate duty to "adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination." UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20 (2 July 2009), para 8. In similar way, the UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25: On Article 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Doc. No. HRI/GEN/1/Rev.7. (18 August 2004), para. 8.

54 For a view of systemic discrimination which emphases this mutually reinforcing character of the relationship between the discrimination and disadvantage see the case *Action Travail des Femmes v. Canadian National Railway Company* ([1987] 1 SCR 1114), pp. 1138–1140. In this case, the Supreme Court of Canada speaks in particular about the exclusion of disadvantaged groups, as a type of disadvantage which generates further stereotypes and prejudices that lead to an even greater exclusion of these groups.

55 Vasiljević, S., Intersectional Discrimination: Difficulties in the Implementation of a European Norm, in: Prügl, E., Thiel, M., (eds.), 2009, *Diversity in the European Union*, London, Palgrave Macmillan, p. 169.

56 *Andrews v. Law Society of British Columbia*, factum, para. 65.

judicial scrutiny.[57] Secondly, it enables the courts to determine the existence of detrimental treatment even in those cases in which the impugned rule is of a general character, *i.e.*, where no direct relationship between the legal classification and the protected group can be established.

The proponents of the substantive equality doctrine are generally aware that it is difficult to establish the direct causal link between the structural inequality observed in the persistent group-based disadvantages, structural discrimination, and a concrete act challenged before the court. They also acknowledge that it is often impossible to trace structural discrimination to an identifiable wrongdoer. Yet, for them this still does not mean that the problem of structural discrimination is beyond the reach of the law. On the contrary, "the elimination of structural discrimination [is] a valid social goal" that can be achieved through law.[58] Hence, it is the task of the theory and practice of substantive equality to "identify the social and economic conditions that [...] create unequal and exclusionary consequences for groups and individuals,"[59] and to push the boundaries of law in an attempt to remedy structural inequalities.

4.3. PROACTIVE EQUALITY STRATEGIES

The view of social reality that ensues from the concepts of structural inequalities and structural discrimination is the starting point of any assessment of the effectiveness of anti-discrimination law, as well as of the doctrine's own vision of how to improve the position of disadvantaged social groups. In its critique of the formal approach to equality, which dominates anti-discrimination law, the doctrine points to the negative, and remedial character of its equality guarantees as one of its principal shortcomings. By being primarily concerned with the prohibition of arbitrary differential treatment of two or more persons in analogous situations, the formal conception of equality addresses only the most superficial forms of discrimination and leaves the "social structures of inequality untouched."[60] The aspiration of the substantive equality doctrine, on the other hand, is to transcend the goal of ensuring symmetric treatment, derived from the proposition that the only way to overcome persistent inequalities is to treat different persons and groups differently. The proponents of sub-

57 Fredman, S., 2005, Providing Equality: Substantive Equality and the Positive Duty to Provide, *South African Journal on Human Rights*, Vol. 21, No. 2, p. 178.

58 Williams, M., In Defence of Affirmative Action: North American Discourses for the European Context?, in: Appelt, E., Jarosch, M., (eds.), 2000, *Combating Racial Discrimination: Affirmative Action as a Model for Europe*, Oxford, Berg, p. 74.

59 Albertyn, C., 2007, p. 259.

60 Fredman, S., 2005, p. 169.

stantive equality thus argue for proactive, asymmetric and result-oriented strategies aimed at eliminating the existing socioeconomic disparities and status-based harms suffered by disadvantaged groups.[61] The breath of ambition with which this proactive approach speaks to social inequalities can be seen in the following pronouncement of the UN Committee on the Elimination of Discrimination Against Women on temporary special measures:

> "In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women."[62]

There is a bewildering array of affirmative action measures, as the principal method of the doctrine, that have been developed under the heading of substantive equality. Broadly speaking, the proactive strategies comprise the measures aimed at enabling greater recognition of the particular style of life or perspectives of the vulnerable groups,[63] at catering to their access to socioeconomic goods, and at preventing prejudice and stereotyping of these groups.[64] Although the substantive equality doctrine advocates the use of proactive measures in diverse fields of societal life

61 Substantive equality encompasses both distributive and identity related equality goals, but most of its proponents emphasize the importance of the first set of goals. See, for instance, D. Wiseman, who uses the terms "substantive equality", "socioeconomic equality" and "social justice" interchangeably (Wiseman, D., 2015, The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?, *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, Vol. 71, p. 565.

62 UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, para. 8.

63 In particular those aimed at their wider participation in public bodies, as advocated by the politics of recognition.

64 The first type of measures has become particularly dominant in post-industrial countries in which the equality strategies pursued by feminists and other social movements have shifted their focus from redistribution to recognition and representation. For more on this, in the context of gender equality strategies, see Squires, J., 2007, *New Politics of Gender Equality*, Basingstoke, Palgrave, p. 7.

and their advancement through different methods of societal regulation, the world of laws and courts is where the era of greater equality for all is expected to begin.

5. The Law, Courts and "Social Change"[65]

The legal field is the primary locus of the campaign for greater societal equality, waged by the proponents of the substantive equality doctrine. Legal equality tools and strategies are passionately developed and discussed not only by legal scholars, but also by researchers from the political sciences, sociology, and other academic fields, by governmental and non-governmental, international and local organizations pursuing a wide range of goals, as well as by private sector actors.

The legal provisions and the "contextual, responsive, result-oriented equality rights jurisprudence"[66] are seen as the main tools for more meticulous realization of substantive equality objectives. This is observable in the degree to which the analyses of constitutional equality jurisprudence and anti-discrimination law dominate the scholarly discourse and, in particular, in the expectations placed on the judiciary vis-à-vis the desired societal transformation. The legal research and practice revolving around the notion of substantive equality is filled with exclamations on the "transformative role" of the courts and their duty to challenge the "social structures" leading to societal inequalities and oppression as the path to "social change".[67] This is particularly the case in South African jurisprudence, where the term "transformative constitutionalism" is often used to point to the role of the courts in mending the societal inequalities left by apartheid. As formulated in *Minister of Finance v. Van Heerden*, the goal of constitutional equality jurisprudence is "to ensure that equality be looked at from a contextual and substantive point of view" and that such a substantive approach "roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved."[68]

65 The author uses the term "social change" in the meaning of a large-scale transformation of society in any of its main domains, be it the economic, political or social.

66 Hankivsky, O., 2004, *Social Policy and the Ethic of Care*, Vancouver, University of British Columbia Press, p. 52.

67 As an illustration: West Coast LEAF, 2023, Equality Law for Social Change, (http://www.westcoastleaf.org/our-workshop/equality-law-social-change/, 12. 1. 2024).

68 *Van Heerden v. Minister of Finance* (2004 11BCLR 1125 (CC)), para. 142. The same can be observed in the South African scholarship. Eric Kibet and Charles Fombad

In a similar vein, Catharine A. MacKinnon, a prominent American feminist scholar, describes the substantive approach to equality as one that does not "fully fit into any mainstream equality doctrine" because it aims to change not only the way courts adjudicate the discrimination cases but, even more importantly, to alter the circumstances that led to discrimination. For Robin West, another US scholar, the substantive meaning of equality "is that legislators must use law to ensure that no social group [...] wrongfully subordinates another social group."[69] In Europe, the importance of law in the equality discourse is reflected in the degree to which scholarly attention is placed on the anti-discrimination law and its interpretation by the courts.

Even though the concrete manifestations of this fascination with the law as a method for social change differ from jurisdiction to jurisdiction, the substantive equality doctrine represents a law-centered approach to matters of social justice. By being asked to eliminate the complex forms of discrimination which are ingrained in societal structures, the courts are also asked to find innovative solutions for the institutional practices that are identified as the source of rights' violations. For this reason, in the quest for substantive equality, the development of remedial jurisprudence is as important as the elaboration of the rights' guarantees. Susan Sturm, a renowned US scholar who advocates for the use of the "structural regulatory approach" to address the subtle forms of workplace discrimination, explains this in the following way:

> "Law imposes an obligation to inquire upon a showing of an unexplained pattern of bias. Thus, the legal consequence of exposing a discrimination problem through this normative inquiry is not the imposition of a sanction; it is instead the imposition of a legally enforceable obligation to correct the problem."[70]

The beginnings of the growing expectations from the equal protection jurisprudence can certainly be traced to the US experience in the desegregation process following *Brown v. Board of Education*, in particular to the scholars who advocated for the broader use of what they called "structural remedies". In a series of essays, Owen Fiss, an influential

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speak about the "transformative constitutionalism" as an "antidote" for the weak protection of fundamental rights and freedoms (Kibet, E., Fombad, C., 2017, Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa, *African Human Rights Law Journal*, Vol. 17, No. 2, p. 348). See also the paper by Pius Langa, the Chief Justice of the Constitutional Court of South Africa until 2009 (Langa, P., 2006, Transformative Constitutionalism, *Stellenbosch Law Review*, Vol. 17, pp. 351–360).

69 West, R., 1990, p. 469.

70 Sturm, S., 2003, p. 67.

theorist of a court-centered approach to structural inequalities, who places adjudication "on a moral plane with legislative and executive action,"[71] developed the notion of structural injunction as a common denominator for remedial devices to be used by the courts in the structural reform, which, in his opinion, is necessary for the effective implementation of equality rights.[72] The structural injunction, which for a long time for many scholars represented the model of an efficient exercise of judicial power in equality rights matters, embraced different types of activities: "selected and assembled mandated policy reforms, budget related orders, continuing judicial supervision, information-gathering, and various types of dispute resolution outside of the courtroom."[73] The main purpose of structural remedies was to "alter broad social conditions by reforming the internal structural relationships of government agencies or public institutions."[74]

Even though the structural injunction was replaced with less ambitious types of remedies with the end of the civil rights movement,[75] an active and result-oriented judiciary has still remained central to equality protection. More importantly, the symbolic potential of victories won through the use of structural remedies during the desegregation process has made them an enduring inspiration for the court-centered equality strategies in other jurisdictions. The idea that "systemic discrimination requires systemic remedies"[76] has inspired the proponents of the substantive equality doctrine in other countries to argue that it is the duty of the courts to guide the transformation of societal structures that are at the roots of contemporary inequalities. Today, even in the civil law countries, characterised by the traditional distrust in the activist judiciary, there is a

71 Fiss, M. O., 1979, The Forms of Justice, *Harvard Law Review*, Vol. 93, No. 1, p. 41.

72 See Fiss, M. O., 1979; Fiss, M. O., 1993, The Allure of Individualism, *Iowa Law Review*, Vol. 78, pp. 965–979; Fiss, M. O., 2004, Another Equality, *Issues in Legal Scholarship* (Symposium: The Origins and Fate of Antisubordination Theory), pp. 1–25.

73 Easton, E. R., 1990, The Dual Role of the Structural Injunction, *Yale Law Journal*, Vol. 99, p. 1983.

74 *Ibid.*

75 Myriam Gilles is of the opinion that the structural injunction was not really abandoned by the courts but, instead, it has been more and more used in cases in which the affirmative action programs are being challenged (Gilles, M., 2003, An Autopsy of the Structural Reform Injunction: Oops... It's Still Moving!, *University of Miami Law Review*, Vol. 58, No. 1, pp. 143–171).

76 An often-cited quote from the 1984 Report of the Canada's Royal Commission on Equality in Employment, which has laid ground for the affirmative action measures in Canada (Abella, S. R., 1984, *Equality and Employment: Report of the Royal Commission on Equality in Employment*, Ministry of Supply and Services of Canada, p. 9).

clear tendency to place ever greater hopes on the court-centered approach to societal inequalities.[77]

6. Right Insights and Misplaced Strategies

The substantive equality doctrine is an attempt to translate the valuable insights on the depth and complexity of societal inequalities, yielded by social sciences research, into a more efficient legal approach to discrimination. It was born as a reaction to the feeble achievements of legislators and courts in addressing non-overt forms of discrimination. The doctrine raised awareness on the subtle and institutionalized practices that generate disadvantages for vulnerable social groups but are normally beyond the radar of traditional anti-discrimination tools. Through the concepts of structural inequalities and structural discrimination, the proponents of substantive equality arrived at a clearer view of how facially neutral social practices can perpetuate existing inequalities.

Transposed to the legal arena, this view can be summarized in the following way: Each law, policy, and other set of rules that a society creates as a means of organizing itself operates in a certain context. In contemporary society this context features entrenched and patterned inequalities. When creating a law, policy or rule, the rule-maker departs from what is taken to be the standard circumstances of the social position of the subjects of such laws, policies or rules. A law, policy or rule that is created by disre-

77 These two tendencies can be observed in the growing influence of the judiciary over the legislative processes and of the growing significance of the class action, as well of the public interest litigation in general in the European national jurisdictions belonging to the civil law tradition. See, for instance, Article 61 of the Law on Modernization of the 21st Century Justice No. 1547 of 18 November 2016 (Loi no. 2016–1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, Journal officiel *Lois et Décrets* no. 0269), which introduces class action into French civil procedure law. More on this in Dyevre, A., The French Constitutional Council, in: Jakab, A., Dyevre, A., Itzcovich, J., (eds.), 2017, *Comparative Constitutional Reasoning*, Cambridge, Cambridge University Press, pp. 323–355. The public interest litigation is often promoted as an important legal tool for societal transformation without changing the basic postulates on which the society is based. According to Helen Hershkoff, a legal scholar and the World Bank expert, the public interest litigation makes part "of a broader effort to use the tools and principles of legal liberalism as a way to change existing patterns of power and privilege" (Hershkoff, H., 2005, *Public Interest Litigation: Selected Examples*, World Bank, p. 7). In fact, the practice of public interest litigation around the world shows that its use is no longer confined to the protection of civil liberties, but that its symbolic arsenal now includes a promise of systemic court-induced reform in a wide range of fields, including the redistribution of socio-economic goods.

garding pre-existing inequalities, becomes a source of disadvantage for the vulnerable social groups. These disadvantages further perpetuate or even increase the level of existing socioeconomic disparities between different social groups. In this way augmented socioeconomic disparities lead to an even greater discrepancy between the standard circumstances, as the "reality" from which the neutral law, policy or rule departs, and the socioeconomic position of the disadvantaged groups. As a consequence, the negative effects of a facially neutral law, policy, or rule on the latter groups continue to grow. Because the propositions on which this law, policy or rule is based become even more remote to the socioeconomic position of the disadvantaged groups, the law, policy or rule starts to have an even more exclusionary or otherwise harmful effect on such groups.

Naturally, all of this is, primarily, the consequence of the fact that laws, policies, and other societal rules generally depart from the "reality" of the groups that are somewhere in the middle of the socioeconomic stratification. When enacting a law, for instance, the legislator simply needs to start from a premise, and the way contemporary democracies work is to have those premises be identified and shaped by the individuals and groups who, by definition, do not come from the groups at the bottom of the social ladder. As Thomas Piketty observed: "t]he history of inequality is shaped by the way economic, social, and political actors view what is just and what is not, as well as by the relative power of those actors and the collective choices that result."[78] However, the proponents of the doctrine do not go that far in the effort to understand the sources of societal inequalities; they remain focused on the discovery that even neutral laws, policies, and rules can be a source of discrimination, and engrossed in the idea that it is the world of courts, equality bodies, and new legislative solutions where this problem will be resolved. In that way, their main objective becomes the creation of a more efficient anti-discrimination law that would be apt to meet the challenges of complex forms of discrimination and thus become a path to a more equal society.

Nevertheless, the substantive equality doctrine will never be able to meet its goals, *i.e.*, to make the anti-discrimination law and jurisprudence the principal road toward greater societal equality. There are two sets of reasons for that: those that ensue from the doctrine itself, and those that are inherent to the limitations of the law as a method for regulating social life. The doctrine itself, as we saw in the previous chapters, suffers from a great deal of conceptual vagueness, which brings an additional layer of complexity to the already complex and demanding judicial interpretations

78 Piketty, T., 2014, *Capital in the Twenty-First Century*, Cambridge, The Belknap Press of Harvard University Press, p. 21.

of the meaning and scope of equality provisions. It also generates an additional layer of morality-based considerations in their application. As Dworkin observed forty years ago, equality is an abstract concept whose specific content depends on the context where it is applied; in other words, it depends on the conception of equality that is valid at the given point in time for the given field.[79] The previous analysis has shown that there is an array of different meanings assigned to the notion of substantive equality, and that anti-discrimination theory and practice have not yet managed to yield a coherent definition of the concept. There is no unambiguous answer to the question of what the substance of "substantive equality" is. According to Luc B. Tremblay, substantive equality is an abstract ideal and abstract concept that does not contain "the material premises that would persuasively and positively determine one single concrete vision or conception."[80] So far, this notion is primarily used to point out the limitations of what substantive equality scholars and practitioners call the "formal" or "procedural" conception of equality. As Nicholas Smith notes, such usage of the notion is so widespread that "it has been *de rigueur* to commence any discussion of equality law by noting (but not critically analysing) the difference between 'formal' and 'substantive equality."[81] Despite attempts by the doctrine's proponents to turn the notion into an explicit rationale for some future, more advanced anti-discrimination laws, so far, the prospects of arriving at a legal definition of substantive equality are non-existent.

There is also a number of hurdles awaiting those who try to determine the meaning and scope of the concept of substantive equality and make of it the basis for a more efficient anti-discrimination law. The substantive equality doctrine, in most of its interpretations, attempts to reconcile the politics of distribution and the politics of recognition in a much broader way than just through the use of identity categories as the enumerated grounds for the protection provided by the anti-discrimination law.[82] This is attempted through the proposals that often encompass, as we have seen, a very creative mixture of legal remedies aimed at addressing both socioeconomic inequalities and inequalities ensuing from privileging the identity features of a dominant group. Such an approach to anti-discrimination law disregards the differences between the two

79 Dworkin, R., 1986, *Laws Empire*, Cambridge, Harvard University Press, pp. 70–72.

80 Tremblay, L. B., 2012, Promoting Equality and Combating Discrimination through Affirmative Action: The Same Challenge – Questioning the Canadian Substantive Equality Paradigm, *American Journal of Comparative Law*, Vol. 60, p. 204.

81 Smith, N., 2007, A Critique of Recent Approaches to Discrimination Law, *New Zealand Law Review*, 3, pp. 509–510.

82 More on this in Choudhry, S., 2000, Distribution vs. Recognition: The Case of Anti-discrimination Laws, *George Mason Law Review*, Vol. 9, No. 1, pp. 145–178.

paradigms of social justice, which is one of the principal reasons why the substantive equality doctrine cannot but remain undefined and vague. Thanks to the 20th century political theorists, such as Iris Marion Young and Nancy Fraser, today it has become common knowledge that the social practices of subordination, non-recognition, and disrespect of non-dominant groups go hand in hand with the socioeconomic deprivations of their members.[83] However, the question is to what extent can the goal of remedying both distributional and cultural inequalities be achieved through the use of anti-discrimination law; in other words, how to reconcile the two paradigms of social justice and their demands with the limited set of remedies and even more limited analytical tools available to courts in applying anti-discrimination law. All of this points to substantive equality being above all an aspirational idea, which, if used as a rationale for anti-discrimination law, cannot result in its more consistent and unambiguous interpretation.[84] On the contrary, it is rather the case that the goals of contemporary anti-discrimination law, as shaped by the substantive equality doctrine, have become more elusive and the reasonings of the courts invoking the doctrine fuzzier. Even now, when the substantive equality doctrine has entered courtrooms in many countries around the world, equality jurisprudence is as much as before confronted with the question of how to translate the abstract values hidden in the equality provisions into a coherent system of legal rules.

The second group of obstacles to the realization of the goals set by the substantive equality doctrine lies in the nature of law as a method of social regulation. As we have seen through the brief overview of the notions of structural inequalities and structural discrimination, the existing inequalities that the substantive equality doctrine aims to tackle are far too complex to be dealt with through the law. One cannot find a response to the aggregate nature and other complexities of structural discrimination in the litigation-centered makeup of anti-discrimination law. The maze of acts with different levels of specificity that generate structural discrimination escapes the "cause-and-effect" logic of legal causation. The task of identifying and evaluating the facts needed to unravel this maze is beyond the reach of civil

83 Despite their disagreement regarding the extent to which the paradigm of recognition and distribution can be combined in the single framework of anti-discrimination analysis, Nancy Fraser and Iris Marion Young both acknowledge the intertwinement of socioeconomic and cultural inequalities. Fraser, N., 1995, From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age, *New Left Review*, 212, pp. 68–93, reprinted in: Fraser, N., 1997, *Justice Interruptus: Critical Reflections on the "Post-Socialist" Condition*, Routledge, pp. 15–39. Young, I. M., 1990, Justice and the Politics of Difference, Princeton University Press, pp. 15–18.

84 Similar in Smith, N., 2007, p. 512.

adjudication and its concept of legal responsibility. The legal process cannot embrace the cumulative and elusive nature of disadvantage ensuing from structural discrimination, just like the more and more diffused contemporary socioeconomic inequalities cannot be dissected into patterns that would fit the grounds-based anatomy of an anti-discrimination claim.

These limitations of anti-discrimination law also cannot be overcome through the greater use of affirmative action measures and other proactive equality strategies. Even though, as noted, substantive equality can embrace different and very ambitious conceptions of equality, the proactive strategies advanced under its label in practice rarely pursue equality of results as their goal. Despite the solemn promises of a more equal society, to be achieved through proactive, result-oriented strategies, their reach rarely goes beyond equality of opportunity or symbolic accommodation of difference.[85] The same can be said for the courts' approach to the issue of the legal boundaries of affirmative action measures, as the most discussed type of proactive strategy mandated by the substantive equality doctrine.[86] This is, again, a consequence of the fact that in order to pursue a greater level of societal equality, we first need to reexamine the basic parameters by which the positions of different individuals and groups are compared. Yet, law is not the arena in which the answer to that question should be sought. Legal justice depends on the postulates of social justice, and the only thing legal justice can do, as Wojciech Sadurski noted, is to "translate the postulates of social justice into the language of legal rules and judicial decisions."[87]

7. Conclusion

The substantive equality doctrine was born as a reaction to the broadening gap between the promise of greater societal equality, brought by the end of the Jim Crow era in the United States, and the feeble results of

85 The exception to this can be found primarily in the field of equal gender representation in the European Union law, the most recent example of which is Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures (*Official Journal of the European Union* No. L 315/44 of 7 December 2022).

86 Apart from quotas for the greater representation of women in public bodies and on corporate boards, those used in certain stages of recruitment, and quotas for employment of persons with disabilities, in the European context the affirmative action measures that could bring quantifiable outcomes are considered off limits by both the courts and the general public. See Vos, M. de, 2020, The European Court of Justice and the March Towards Substantive Equality in European Union Anti-Discrimination Law, *International Journal of Discrimination and the Law*, Vol. 20, No. 1, pp. 74–76.

87 Sadurski, W., 1984, Social Justice and Legal Justice, *Law and Philosophy*, Vol. 3, No. 3, p. 330.

the desegregation process. Legal scholars embraced the insights into the depth and nature of persistent inequalities, attained through the research in political and other social sciences, and these insights became the basis for a new view on the role of law in addressing this societal problem. The substantive equality doctrine interprets the ideal of equality through the concept of substantive equality and brings a promise of a more equal society, to be achieved by legal means. The courts are asked to abandon the narrow vision of equality embodied in traditional equality jurisprudence and to embark on the quest for substantive equality.

Anti-discrimination law is an important, if not central, element of the substantive equality doctrine – as a theoretical and judicial attempt to meet the societal ideal of greater equality by means of law. The substantive equality doctrine translates the abstract ideal of equality to the principle of prohibition of discrimination and approaches the anti-discrimination law as a very important method for its realization. In that way, it brings entrenched socioeconomic inequalities to the purview of the law and transforms the courts into the prime sites for resolving societal conflicts over the basic socioeconomic goods. The proponents of the substantive equality doctrine do so in the belief that many complex social justice issues, which have accrued over the past decades, will get more just, robust, and predictable answers once they are disciplined by the logic of law.

The substantive equality doctrine rightly points to the "deeper structures of discrimination"[88] as the source of patterned and persistent socioeconomic inequalities, yet it is mistaken in its belief that these structures are amenable to change through anti-discrimination law. The litigation-centered makeup of anti-discrimination law cannot provide a response to the aggregate nature and other complexities of structural discrimination. The maze of laws, rules, and other practices at different levels of concreteness, which make up structural discrimination and lead to structural inequalities, escapes the "cause-and-effect" logic of legal causation. The task of identifying and evaluating the facts needed to unravel this maze is beyond the reach of legal adjudication and its conception of responsibility. The legal process cannot embrace the cumulative and elusive nature of disadvantage ensuing from structural discrimination, just as the more and more diffused socioeconomic inequalities cannot be dissected into patterns that would fit the grounds-based anatomy of the anti-discrimination claim. Finally, the field of legal justice is not where the decisive battle for greater societal equality is to be waged. Before venturing on a quest for more equality, we first need to know what kind of equality we want for our societies.

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O ANTIDISKRIMINACIONOM ZAKONODAVSTVU I DRUŠTVENIM PROMENAMA: PRILOG ZA JASNIJE RAZUMEVANJE DOKTRINE SUŠTINSKE JEDNAKOSTI

Milica V. Matijević

APSTRAKT

Doktrina suštinske jednakosti je važan aspekt teorije i prakse nastalih kroz analizu i primenu principa jednakog postupanja i zabrane diskriminacije. Doktrina se temelji na kritici takozvanog „formalnog pristupa" nejednakostima, koje sagledava kroz koncepte strukturne nejednakosti i strukturne diskriminacije. Ciljevi doktrine tiču se i pravičnijeg pristupa društvenim dobrima i očuvanja grupnih identiteta, a svoj glavni metod nalazi u antidiskriminacionom pravu. Predmet rada je odnos između postulata, ciljeva i prava kao osnovnog metoda doktrine suštinske jednakosti. U radu se prati razvojni put doktrine, razmatraju njena polazišta, kao i zadaci koje postavlja pred zakonodavca i sudove. Zaključak analize je da predstavnici doktrine suštinske jednakosti s pravom ističu značaj dubljih društvenih struktura za nastanak i održavanje postojećih nejednakosti, ali da greše kada u antidiskriminacionom zakonodavstvu pokušavaju da pronađu odgovor na kompleksne oblike diskriminacije.

Ključne reči: suštinska jednakost, formalna jednakost, antidiskriminaciono pravo, strukturne nejednakosti, strukturna diskriminacija, socijalno-ekonomske razlike, socijalna pravda.

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