



Incorporating Respect for Difference into Equality Jurisprudence

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Respect for Difference

“Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” – Convention for the Rights of Persons with Disabilities (CRPD)

Canada ratified the CRPD as of March 2011. The principle of respect for difference has not yet been explicitly acknowledged in Canadian law and policy. The purpose of this presentation will be to consider how the concept might be incorporated into equality jurisprudence. The tensions between the two principles aid in identifying the limitations to equality theories.



Equality of Sameness

Before the establishment of the *Charter* in 1980, the *Canadian Bill of Rights* (1960) interpreted equality as formal in character: “in Canada there have existed and shall continue to exist without discrimination by race, national origin, colour, religion or sex...the right of the individual to equality before the law and the protection of the law”. When defining formal equality, the Supreme Court has quoted Aristotle: “things that are alike should be treated alike, while things that are unlike should be treated as unlike in proportion to their unlikeness” (1925, 1131a-6).

This configuration of equality seems outright incompatible with respect for difference. Silvers (1994, 1998) has criticized this notion of equality on the grounds that equality does not belong to an abstractly conceived being, for only in that way would human beings be essentially the same, with the same objectives. Rioux and Valentine (2006) identify the implications that formal equality would have for disabled people: “This standard of equality justifies many existing policies that disadvantage people with disabilities because the policies...are not designed to recognize their being accessed by a diverse population” (p. 54). Noonan (2003) argues that an emphasis on human commonalities – identity thinking – is only ever possible to the extent that all those who are other to the definition of ‘human’ are excluded or eliminated. He advocates that we instead engage in postmodern critique of identity thinking and develop a politics of difference: “This means accepting difference and contradiction as, in a sense, basic to the world. ...Identity is always the product of exclusion of difference” (p. 23).

Equality of Opportunity

Equality of opportunity, a principle found in the CRPD, entails positive state obligations which ensure that disadvantaged groups have access to the same opportunities that the rest of a citizenry enjoys (Boyd & Sheehy, 1989; Rioux & Valentine, 2006). This formulation of equality compensates for historical discrimination with the intended purpose of levelling the playing field. Affirmative action is an example of equalized opportunity, whereby disadvantaged groups benefit from differential treatment (Ehrlich & Jurik, 2007; Fineman, 1994).

There is an assumption built into the concept of equality of opportunity that the availability of opportunities will lead to positive results for disadvantaged people, but these results are not guaranteed. Disadvantaged persons under this model are assumed to have the ability to take advantage of the opportunities made available to them. When the intended results of equal opportunities do not come to fruition, the fault lies with those persons who do not or cannot take advantage of available opportunities, or who do not maximize their opportunities and yet still experience inequality. Equality of opportunity involves differential treatment, but not necessarily a respect for differences. While affirmative action strategies entail the acknowledgement that differences between people exist, these strategies are designed to ameliorate the differences that are the result of discrimination, not necessarily to accommodate differences that are features of the human condition.

Substantive Equality

“15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

15(2) Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.” – Canadian Charter of Rights and Freedoms

Substantive equality in Canadian law is designed to make laws and programs meaningful to all minority groups, which entails in some instances laws and programs that treat groups differently. Again though, as in the case of equality of opportunity, does differential treatment constitute a respect for difference? Minow (1991) characterizes what she calls the dilemma of difference: “The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently” (p. 13). For her, our current social contexts can be characterized by power imbalances, by the privileging of some groups of people over other groups. One reason for acknowledging differences would be to ameliorate longstanding disadvantage and discrimination, and to correct the power imbalances that constitute our social contexts. Subsection 15(2) of the equality provision in the Charter may be employed in legal and political decisions for the purpose of redressing the disadvantages and disrespect people experience because they are part of minority groups. The principle of respect for difference may not merely entail differential treatment for the purpose of ameliorating discrimination, as though all differences are produced via inequality; rather, the principle may entail embracing differences that are the result of human diversity.

