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Equality Law: A Structural Turn

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Abstract

Equality law has developed into a mature and sophisticated field of law across jurisdictions. At the same time, inequality too has bourgeoned. This Article explores this paradox. It argues that the widening gulf between equality law and persisting inequalities can be addressed through a 'structural turn' in equality law. The structural turn is imagined in contrast with the liberal view which sees the harm of inequality/discrimination as something inflicted by and against individuals or collectivities through specific acts or omissions. The structural view places individual victims and perpetrators within the broader dimensions of the social, economic, legal, political, psychic and cultural contexts in which they exist and the power relations within them. The way these dimensions interact with each other and against the relationships of power within them, reveals how structural harm is occasioned. This Article argues that structural harm need not only be treated as a product of structures, including a structure such as equality law, but as the target of equality law which is open to not only enacting structural harm but also structural change.

Keywords: Liberal; structural; harm; disadvantage; discrimination; intersectionality; state; U.S.; South Africa; India

A. Introduction

Equality law has reached an impasse.[1] On the one hand, it has grown into a sophisticated field of law. Having emerged in jurisdictions such as the U.S. through the Fourteenth Amendment of 1868, India through the equality code enshrined in the Constitution of 1950, and South Africa with the adoption of the right to equality and non-discrimination in the Interim Constitution of 1994, the field has expanded beyond the recognition of constitutional guarantees to include an extensive and mature jurisprudence of constitutional courts.[2] Concepts such as indirect discrimination, harassment, reasonable accommodation and positive duties have been embraced.[3]

[1]This Article uses the term "equality law" as a shorthand for referring to equality and anti or non-discrimination law, that it, law which concerns the prohibition of discrimination on the basis of certain protected characteristics or "grounds" such as race, gender, age, disability, etcetera.

[2]While this Article focusses on the aforementioned three jurisdictions—India, South Africa and the U.S., there are equally wide-ranging doctrinal developments and literatures elsewhere in the world including in regional legal systems such as the European Union and in international human rights law, in addition to other jurisdictions around the world. *See* MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION (Oxford Univ. Press, 2002); ODDNY MJOLL ARNARDOTTIR, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Brill, 2003); EVELYN ELLIS AND PHILIPPA WATSON, EU ANTI-DISCRIMINATION LAW (2d ed., 2015); STEPHANIE FARRIOR, EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL LAW (Vol. II, Routledge, 2015).

[3]For a comparative overview of the development of concepts, see SANDRA FREDMAN, DISCRIMINATION LAW (3d ed., Oxford Univ. Press, 2022).

Theoretical accounts of the field have also bourgeoned, complementing developments in practice with a strong philosophical grounding.[4]

On the other hand, inequalities have persisted. The global #MeToo movement in 2017 exposed the ubiquity of sexual harassment despite being prohibited as a form of sex discrimination in most jurisdictions.[5] The movement was unequivocal in expressing its dissonance with law and legal structures in combating sexual harassment and violence against women. Similarly, the deaths of George Floyd and Breonna Taylor in 2020 proved to be a tipping point for the Black Lives Matter movement which exposed the racism entrenched in the US, despite claims of being a "post-racial" society. Likewise, the Rhodes Must Fall movement in South Africa in 2015 challenged the veneration of imperial symbols and systems which continue to subjugate Black people. Since 2019, the global School Strike for Climate has rallied against the inequality of climate change affecting the most vulnerable populations in the world. And in an unexpected and dramatic way, the Covid-19 pandemic has exacerbated the disadvantage suffered by racial and ethnic minorities, indigenous people, migrant workers, refugees, women, children, older persons and disabled people.[6] While these groups have plunged into extreme poverty, wealth inequality has grown at a faster rate than ever before.[7]

For all its sophistication, equality law seems distant from major issues of inequality today. It seems to be particularly distant from large-scale systemic issues of wealth distribution, racism, casteism, climate justice, xenophobia etc. Unlike the post-war developments in equality law triggered by, for instance, the civil rights movement in the US, anti-caste politics in India and the anti-apartheid struggle in South Africa, equality law is seldom invoked as the answer to inequality and discrimination today.[8]

How has this come to be and what can be done about it? This Article explicates the widening gulf between equality law and persisting inequalities and in the process makes a small offering for radically reimagining equality law for combating persisting inequalities through a structural turn. The structural turn is imagined in contrast with the liberal view which sees the harm of inequality/discrimination as something inflicted by and against individuals or collectivities through specific acts or omissions. The structural view places individual victims and perpetrators within the broader dimensions of the social, economic, legal, political, psychic and cultural contexts in which they exist and the power relations within them. The way these dimensions interact with each other and against the relationships of power within them, reveals how structural harm is occasioned. In fact, structural harm occasioned in racism, casteism, sexism, ableism, ageism, xenophobia, homophobia, transphobia etc, is causally complex and involves an appreciation of how power, especially as wielded by powerful actors such as the state, shapes social, economic, legal, political, psychic and cultural relations between people on an everyday basis. This Article argues that structural harm need not only be treated as a product of structures, including a structure such as equality law, but as the target of equality law which is open to not only enacting structural harm but also structural change.

[4]*See e.g.,* Deborah Hellman, When is Discrimination Wrong? (Harv. Univ. Press 2008); Kasper Lippert-Rasmussen, Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination (Oxford Univ. Press, 2013); Philosophical Foundations of Discrimination Law (Deborah Hellman & Sophia Moreau eds., 2013); Benjamin Eidelson, Discrimination and Disrespect (Oxford Univ. Press, 2015); Tarunabh Khaitan, A Theory of Discrimination Law (Oxford Univ. Press 2015); Iyiola Solanke, Discrimination as Stigma (Hart, 2017); Foundations of Indirect Discrimination Law (Hugh Collins & Tarunabh Khaitan eds., 2018); Sophia Moreau, Faces of Inequality: A Theory of Wrongful Discrimination (Oxford Univ. Press, 2020).

[5]The Global #MeToo Movement (Ann M. Noel & David B. Oppenheimer eds., 2020).

[6]Meghan Campbell, Sandra Fredman and Aaron Reeves, *Palliation or Protection: How Should the Right to Equality inform the Government's Response to Covid-19?*, 20 Int'l J. of Discrimination & the L. 183 (2020).

[7]Oxfam Report, Inequality Kills (Jan. 17, 2022), https://policy-practice.oxfam.org/resources/inequality-kills-the-unparalleled-action-needed-to-combat-unprecedented-inequal-621341/.

[8]Exponential Inequalities (Shreya Atrey & Sandra Fredman eds., 2023).

The argument is made in three parts. Section B explains how persisting inequalities can be understood as structural harm. Section C shows that constitutional jurisprudence often does not address structural harm within the material scope of equality law. In particular, it shows how racism, casteism, xenophobia and homophobia are left by the wayside of equality law in India, South Africa and the U.S. These jurisdictions are often studied together in comparative equality law.[9] The reason is that, in addition to a shared language, English, and system of law, common law, they also share doctrinal features around which equality law is organised such as a constitutional guarantee of equality and non-discrimination, and the recognition of grounds of discrimination—both enumerated and analogous. More importantly, there is an established tradition of constitutional adjudication of equality and non-discrimination in these jurisdictions. Section D of the Article shows that expansive approaches too are visible in constitutional jurisprudence which are committed to seeing inequality through a structural rather than liberal lens. Ultimately, it is the sensitivity of constitutional judges to structural harm in a normative sense that carries great promise in addressing persisting inequalities.[10]

B. The Nature of Structural Harm

Structural harm can be understood as a result of how power circulates within the social, political, legal, economic, psychic and cultural dimensions in which the world exists.[11] It has four components. First, it exceeds the focus on specific acts or omissions and refocuses attention on the broader social, political, legal, economic, psychic and cultural contexts within which power operates both as a matter of ideology and norms and as a matter of everyday practice and processes. Second, it exceeds the focus on individuals and collectivities acting on their own or within specific institutional settings and instead refocuses attention on individuals and collectivities in whom power is concentrated such as the nation state or large multinational corporations and how they wield power in a quotidian sense. Third, it exceeds the definition of harm or injustice in any specific way and instead reimagines harm substantively and catholically through a variety of harms or disadvantages such as material, redistributive, status-based, expressive, participative, cultural, etcetera.[12] Fourth, it considers harm as co-constituted by a range of categories such as race, gender, gender identity, sexuality, disability, age, religion, etcetera.[13]

These four components, to do with (i) the quotidian power of structures—social, political, legal, economic, psychic and cultural; especially (ii) state power, or actors in whom power is

[9] *See* Fredman, *supra* note 3; Khaitan, *supra* note 4.

[10] Neil MacCormick, *Institutional Normative Order: A Conception of Law*, 82 Cornell L. Rev. 1051, 1057 (1996–97):

> Necessarily, normative order involves judgment . . . To engage with a norm as an acting subject is to judge what must be done in a given context; to reflect in normative terms upon one's own or another's conduct in a given setting is to judge, against some envisaged norm, whether what was done ought to have been done or ought not to have been done. The judgment that an act ought not to have been done normally entails a consequential judgment of the measure of penitence, restitution, or censure that is apt to the case. All in all, to think normatively is to think judgmentally. This is a general and significant truth about all forms of normative order.

Id. See also David Dyzenhaus, *The Very Idea of a Judge*, 60 Univ. of Toronto L. J. 61 (2010).

[11] This understanding is drawn from discussion of structural racism in Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 Am. Socio. Rev. 465 (1997); Derrick Bell, Race, Racism and American Law (6th ed. Aspen, 2000); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. Rev. 791 (2008); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 Kent. L. J. 1 (2011).

[12] This component reflects the substantive equality framework in equality law which conceives of equality as a broad concept which "resists capture by a single principle, whether it be equality of results, equality of opportunity, or dignity. Rather, it should be seen as a multi-dimensional principle" such as including redistributive, recognition, participative and transformative dimensions. *See* Fredman, *supra* note 3, at 29.

[13] This component reflects the theory and praxis of intersectionality. *See* Kimberlé W Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 Univ. of Chicago Legal F. 139 (1989).

concentrated; and the understanding of the harm, and in particular, inequality or discrimination in (iii) a substantive and compressive way—including material, redistributive, status-based, expressive, participative, cultural, etc; and (iv) an intersectional sense—as co-constituted by race, gender, gender identity, sexuality, disability, age, religion, etcetcer—define the complex way in which structural harm comes about: As a matter of course and not as an extraordinary or aberrational result of a discrete act or omission of an individual or a particular institution. Structural harm is thus simply the result of structures which are taken for granted on an everyday basis.

Under this conception of structural harm, structural inequality or structural discrimination is a particular kind of harm which produces, reinforces or exacerbates the power differential and attainment gaps between social groups. In this sense, not all structural harm is a harm of structural inequality or structural discrimination, but only that harm which has the particular effect of leaving some social groups worse off than others in a comparative sense of the power differential between the groups and consequently the material wellbeing of members of social groups.[14]

This conception of structural harm is distinct from and broader than Iris Marion Young's influential account, where she defined structural injustice as a distinct moral harm which cannot be traced back to acts or omissions of specific individuals or policies.[15] While Young correctly distanced structural harm from the question of moral responsibility of individuals, she left the question of causality or correlation hanging in the air. How does structural harm actually come about? My conception elaborates on this and is clearer about the root causes of structural injustice or harm.[16]

It is important to unpack the claim about how structural harm transpires as it is this conceptual meaning of structural harm that acts as the bridge to translating the reality of being exposed to group disadvantage, from ontology—materially and experientially, to law—theoretically and doctrinally. That is, it is the concept that provides the basis of translation across the two registers. Giving some shape and contour to the concept is thus the key to examining how equality law first understands and then addresses structural harm.

Young's account of structural injustice is one that is constructed in opposition to the liberal focus on individuals especially in John Rawls' *A Theory of Justice*. In coming in as a response to the dominant liberal paradigm which sees individuals as the bearers of rights and thus the unit of attention in organising politics, Young's account exposes the limitations in enacting justice through individuals as injustice is not often enacted by individuals. Thus, in instances where no particular individual or collectivity may be traced in the direct line of causal chain of a result such as poverty or climate change, assigning responsibility on an individual basis becomes futile. Young's account emphatically diverts attention away from obviously blameworthy actions or omissions and instead directs us towards:

[14]A helpful way of thinking about material wellbeing in a broad sense is via the international human rights law framework for discrimination where categories such as race discrimination qua art 1(1) of ICERD and sex discrimination qua art 1 of CEDAW are defined as that which has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." In constitutional law, this could be translated as a test which nullifies or impairs the recognition, enjoyment or exercise, on an equal footing, of all fundamental rights and freedoms. While not all material interests may be addressed via constitutionally recognised rights, most perhaps may be accommodated and reflected in the vast framework of human rights protections in international law. *See* Joseph Raz, The Morality of Freedom 165–192 (Oxford Univ. Press, 1988) (presenting this link between rights as protecting material interests).

[15]Iris Marion Young, Responsibility for Justice 44 (Oxford Univ. Press, 2011).

[16]*See* Shreya Atrey, *Structural Racism and Race Discrimination Law*, 74 Current Legal Probs. 1, 4–10 (2021); Shreya Atrey, *Xenophobic Discrimination*, 87 Mod. L. Rev. 80, 108 (2024); Shreya Atrey, Anti-racism as a Legal Principle (Oxford Univ. Press, *forthcoming*).

> Structural injustice [which] exists when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them. Structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent or the repressive policies of a state. Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.[17]

Though significant in many ways, the account Young offers is limited in tracing how exactly structural injustice comes about and hence ultimately how it can be addressed. While it is true that structures are meant to be self-perpetuating and need no more than themselves to go on perpetuating the injustice associated with them,[18] structural injustice, once enacted, seems inevitable and hence permanent in Young's account. This is because Young's account does not make obvious as to who, if not the individual, is responsible for structural injustice and if no particular entity is responsible for it, then through whom should structural change happen. This has two consequences. First, it immunises structures and those who hold most power within structures from scrutiny by suggesting that the (re)production of injustice through structures is a matter of course or just how things are in a liberal order. There is little accounting for the power differential amongst actors who wield the structures and against whom structures are wielded. Second, it does not account for resistance to structural injustice through social movements, strategic litigation etc as a central part of the account of structural injustice itself. The modus operandi of structural change is left undetermined.

In contrast, other structural accounts in sociology and political theory are both more precise about the *deliberateness* of structures in reproducing injustice and also the role of resistance in *countering* structural injustice.[19] For example, in William H Sewell's account, he conceives of structures as linked to Pierre Bourdieu's "habitus" and thus as defined by a range of social, political, economic and cultural forces which combine to produce structural injustice or harm but not in any causally deterministic way.[20] He conceives of structures as responsive to human agency and thus recalibrates the relationship between individuals and structures such that structural harm is at least, in part, both attributable to and can be changed by powerful individuals and collectivities such as institutions, corporations and states. This accounting of causal complexity of how structural harm comes about without abandoning an interest in making such harm attributable and redressable where possible, distinguishes Sewell's account from Young's account as for him structures are deliberate, attributable and ultimately open to change.

In human rights law, for example, structural harm or injustice is considered as rooted in "planned misery," brought about by powerful actors such as the states who possess the will and means to lead to—if not directly cause—abuses or violations.[21] The subject of critique of human rights are thus primarily states who are the guarantors of human rights but also, often, the violators of human rights. Human rights law is thus imagined as a tool which punctures the

[17] *See* Young, *supra* note 15, at 52.

[18] *See* Pierre Bourdieu, Outline of a Theory of Practice (Cambridge Univ. Press, 1977).

[19] *See* William H. Sewell, *A Theory of Structure: Duality, Agency, and Transformation*, (1992) 98 Am. J. of Socio. 1 (1992); Sally Haslanger, *What is a (Social) Structural Explanation?,* 173 Phil. Stud. 113 (2016); David Atenasio, *Blameless Participation in Structural Injustice*, 45 Soc. Theory and Prac. 149 (2019); Ruth Faden and Madison Powers, Structural Injustice: Power, Advantage, and Human Rights (Oxford Univ. Press, 2019); Maeve McKeown, With Power Comes Responsibility: The Politics of Structural Injustice (Bloomsbury, 2024).

[20] Sewell, *supra* note 19, at 2–3.

[21] Susan Marks, *Human Rights and Root Causes*, 74 Mod. L. Rev. 57 (2011).

inevitability of structural harm, by acknowledging that law including human rights law is a tool in the processes of both enacting and addressing structural harm.[22]

In a similar vein, critical race theorists conceive law, especially equality law, at least in principle, as at once a legal structure which can create but also dismantle inequality.[23] For example, the concept of substantive equality, as opposed to formal equality, is considered as committed to the redressal of structural harm by expanding the notion of equality to include redistribution, recognition, participation and transformation.[24] Likewise, the recognition of the concept of intersectionality in equality law reimagines inequality or discrimination as fundamentally co-constituted by "a matrix of domination"[25] or "several, simultaneous oppressions."[26] The concept of indirect discrimination, as opposed to direct discrimination, recognises that discrimination may result from application of neutral laws, policies or practices which have a disparate impact on some social groups as compared to others.[27] Similarly, the concept of reasonable accommodation requires the provision of adjustments based on religion or disability when the application of neutral or universal "structures" such as staircases or verbal communication disadvantage wheelchair users and deaf persons respectively.[28] The discriminatory harm occasioned in these examples is structural in that it is not the doing of one morally blameworthy individual or an explicit institutional policy which is at issue. Instead the harm transpires in the course of the liberal order, that is, just how the world is organised socially, politically, legally, economically, psychically and culturally.

Ultimately, equality law can make structural harms redressable because the way the world is structured is exactly what seems to produce the harm of inequality or discrimination. However, the harms occasioned in particular instances may be made scrutable in equality law not *only* because they result from how the world is structured. Rather, the harms of inequality or discrimination seem to result from *within* the structure and indeed *despite* the structure which includes equality law which is ostensibly about combating inequality or discrimination. In this way, equality law becomes implicated in enacting structural harm as part of the structure itself, and at the same time, a means of upending structural harm by committing to combat the harms of inequality or discrimination, including structural harms.

Thus, the very structures which lead to structural harm can be used to address structural harm. To recall, structural harm may not be traced back to specific individuals or policies, but may be occasioned by the particular ways in which power circulates within social, political, legal, economic, psychic and cultural dimensions. Structural harm is thus causally complex in four ways: it is not a result of a single individual or policy, but how powerful actors exercise their power as a matter of course or in a quotidian not exceptional sense; and it includes all kinds of harms—redistributive, recognition, participative, structural, expressive etcetera—which are often co-constituted by different axes of disadvantage—race, gender, gender identity, sexuality, disability, age, religion, etcetera. Although structural harm is self-perpetuating because it is supported by the liberal order or just how things operate, it can also be undone with attentive

[22]*See e.g.,* Marie-Bénédicte Dembour, Who Believes in Human Rights?: Reflections on the European Convention (Cambridge Univ. Press 2006).

[23]Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1131 (1998); Patricia J. Williams, The Alchemy of Race and Rights (Harv. Univ. Press, 1994).

[24]Sandra Fredman, *Substantive Equality Revisited*, 14 Int'l J. of Const. L. 712 (2016).

[25]Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment 227–28 (2d ed., Routledge, 2000).

[26]Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 Signs 42, 47 (1998).

[27]*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *LT Col Nitisha v. Union of India* (2021) SCC Online SC 261; S. Afr. Const., 1996, s 9 [hereafter *Nitisha*].

[28]*See generally*, Pamela S. Karlan and George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L. J. 1 (1996).

unravelling of the ways in which dominant structures such as law and policy are implicated in what equality lawyers call *persisting, pervasive and substantial disadvantage*[29] or *systematic patterns of group disadvantage and harm*.[30] Equality law appears conceptually open to the possibility of both reckoning with and redressing the causal complexity of structural harm.[31]

C. The Material Scope of Equality Law and Structural Harm

What is equality law really about? This question has hitherto been answered in reference to conceptions of equality such as by comparing formal versus substantive conceptions of equality.[32] It has also been answered by focusing on values such as dignity,[33] autonomy,[34] capabilities,[35] substantive freedoms,[36] anti-stereotyping,[37] and anti-subordination.[38]

But little attention so far has been paid to whether the harm that equality law is meant to address is one that is conceived in a structural sense as described in the previous section. While attention has still been paid to thinking about group versus individual disadvantage in equality law,[39] even this inquiry has not translated into thinking about the complex origins of inequality beneath the surface of the immediate acts, omissions, policies or practices, neutral or otherwise, which seem to undergird inequality. As Catharine MacKinnon notes, though systemic or structural discrimination is "definitely integral to substantive equality [it] is not typically recognized as a legal claim or doctrine."[40] The result being that, much like other forms of discrimination such as intersectional discrimination which is also often not recognised in existing constitutional or statutory law, structural discrimination defined *qua* structural harm too remains overlooked in mainstream jurisprudence.

This and the next section of the Article canvass the latest jurisprudence from India, South Africa and the U.S., to assess how structural harm is addressed through equality law. This jurisprudence includes salient caselaw which has come through the apex courts and thus represents the trends in equality jurisprudence befittingly. This includes, in the case of India—*Janhit v Union of India*,[41] *Supriya Chakraborty v Union of India*[42] and *Nitisha*; in the case of South

[29]*See* Khaitan, *supra* note 4, at 35–38.

[30]*Brink v. Kitshoff NO* 1996 (4) SA 197 (CC) at 41–42 (S. Afr.). *See also* Kate O'Regan, *Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa's Sexual Orientation Equality Jurisprudence*, 37 NYURLSC 307 (2013).

[31]This Article uses the term structural harm generally to indicate a broad category of harm or injustice which is causally complex in how it comes about. At appropriate points, the Article also refers to structural inequality or structural discrimination referring to the specific structural harms in equality law or those that can be addressed in particular as a form of inequality or discrimination *qua* equality law, as not all structural harms—such as associated with poverty—are after all about inequality or discrimination.

[32]*See* Fredman, *supra* note 2.

[33]Denise G. Réaume, *Discrimination and Dignity*, 63 La. L. Rev. 1 (2003).

[34]Joseph Raz, The Morality of Freedom 217–244 (Oxford Univ. Press, 1998).

[35]Amartya Sen, Development as Freedom (Oxford Univ. Press, 1999); Martha Nussbaum, Women and Human Development (Cambridge Univ. Press, 2001).

[36]Sophia Moreau, *What is Discrimination*, 38 Phil. & Pub. Affairs 143 (2010).

[37]Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11 Hum. Rts. L. Rev. 707 (2011).

[38]Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994).

[39]*See* Marius Pieterse, *Finding for the Applicant? Individual Equality Plaintiffs and Group-based Disadvantage*, 24 S. Afr. J. Hum. Rts. 397 (2008).

[40]Catharine A MacKinnon, *Substantive Equality Revisited: A Reply to Sandra Fredman*, 14 Int'l J. of Const. L. 739, 742 (2016). Although as described in the previous section, a more accurate understanding of the relationship between substantive equality and structural harm is the opposite of what MacKinnon describes—that is, structural harm incorporates a substantive understanding of harm itself and hence, as a corollary, substantive equality is part of addressing structural harm but it requires more than just substantive equality to address structural harm as it is a broader form of injustice and requires reconfiguration of power, especially state power.

[41]Janhit Abhiyan v. Union of India (2022), Writ Petition (Civil) No. 55 of 2019 (Nov. 7, 2022) [hereafter *Janhit*].

[42]Supriyo v. Union of India (2023) INSC 920 [hereafter *Supriya Chakraborty*].

Africa—*Rafoneke v Minister of Justice and Correctional Services and Others (Makombe Intervening)*[43] and *Mahlangu v Minister of Labour*;[44] and in the case of the U.S.— *Students for Fair Admissions v Harvard*.[45] These cases illustrate that the fight at the heart of equality law—as to what it is really meant to address—is not simply a disagreement over various conceptions of equality or non-discrimination but a more fundamental disagreement about the overall material scope of the field: Whether it is meant to address individual instances of discrimination or whether it is meant to address structural harm per se. This part of the Article shows that the latest landmark decisions from the three jurisdictions seem to indicate that the material scope of equality law is being delimited to exclude substantive conceptions of equality. But this is not all. The decisions are accompanied by a narrowing of the material scope of equality law in another way: As addressing a narrower range of harms to the exclusion of structural harm which is causally complex yet quotidian.

This is captured most strikingly in the 2023 U.S. Supreme Court decision in *SFFA v Harvard*. The case involved a challenge to the race-based affirmative action policies of Harvard College and the University of North Carolina. While the majority struck down affirmative action based on race the minority upheld it. The difference between the two outcomes can be neatly explained in terms of the disagreement between the majority and the minority as to the purpose of the Fourteenth Amendment of the U.S. Constitution which guarantees equal protection. According to the majority, equal protection meant anti-classification. According to the minority, equal protection meant anti-subordination. On the one hand, equal protection as anti-classification left little room for *any* classification to exist and thus led to race-based affirmative action being struck down. On the other hand, anti-subordination provided a wider berth for race-based affirmative action by not only allowing *some* racial classification to exist but also allowing to address, as Justice Jackson put in her dissent, "the elephant in the room—the race-linked disparities."[46] The fundamental difference between the two positions is thus about the material scope of equality law: Whether it is about (i) addressing racism per se—a system of power structured around the logic of "race" which divides people into racial groups where some fare better than others across major indicators to do with income, wealth, education, employment, health etcetera (according to the minority), or is it about (ii) banishing race and race-based classifications from the public realm (according to the majority).

This debate is often dubbed as a debate between formal and substantive equality. I too think it is that. But I also think that turning the focus on the broader mischief equality law tries to solve instead of the specific range of substantive harms it covers provides a distinct insight into the material scope of the field. After all a substantive view of harm is only one aspect of structural harm described in the previous section. Structural harm is about how power circulates within the social, political, legal, economic, psychic and cultural dimensions in which the world exists. It thus needs more than substantive equality to be addressed. It can be addressed in equality law if the mischief equality law tries to solve has to do with what equality law considers not only wrongful and hence something to be corrected through law, but also the root causes of the mischief itself, i.e. how it comes about in the first place, rather than just the symptoms of inequality or discrimination as manifested in discrete actions and omissions of individuals or collectivities.

The tool that equality law has chosen to delineate its material scope, is the construct of "grounds" or "personal characteristics" such that inequality or discrimination is centrally defined by that which is *based on* or *because of* certain grounds or personal characteristics.[47] But equality law's reliance on grounds such as race and gender rather than forms of inequality such as racism

[43]*Rafoneke and Others v. Minister of Justice and Correctional Services and Others (Makombe Intervening)* 2022 (6) SA 27 (CC) (S. Afr.) [hereafter *Rafoneke*].

[44]*Mahlangu and Another v. Minister of Labour and Others*, 2021 (2) SA 54 (CC) (S. Afr.) [hereinafter *Mahlangu*].

[45]*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) [hereafter *SFFA*].

[46]*Id.* (Jackson J., dissenting) at 213, n. 103.

[47]John Gardner, *On the Ground of Her Sex(uality),* 18 Oxford J. Legal Stud. 167 (1998).

or sexism gives the impression that it really is about anti-classification rather than the "systems of power,"[48] "systems of oppression"[49] or "systemic and structural causes of discriminatory relationships."[50] The construct of grounds seems one step too far removed from reaching the core of racism or sexism—which is about structural injustice, that is, how differential power relations across social, political, legal, economic, psychic and cultural registers produce recursive disadvantage based on grounds such as race and gender.[51] Equality lawyers may respond by saying that indeed equality law is not about addressing these -isms per se but only addressing particular instances of these -isms *as* discrimination based on grounds. But this response would only prove right constitutional judging which ousts structural inequality from the realm of equality law such as exemplified in the majority decision in *SFFA* without justifying why this should be so.

This ouster is distinctly visible in the way the majority in *SFFA* construed race. Race to the majority did not signify racial hierarchisation or disadvantage.[52] Instead, race signified objective characteristics of an individual such as colour, national or ethnic origin, but nothing about the position of those individuals as members of a racial group as opposed to members of other racial groups. The relationship of dominance and oppression between racial groups in America was thus left unacknowledged by the majority for whom race was an individual matter where racialised experience was to be understood through "[a] student's courage and determination."[53] According to Chief Justice Roberts, students were to be assessed based on "the touchstone of an individual's identity [that is] challenges bested, skills built, or lessons learned" and through "his or her experiences as an individual—not on the basis of race."[54] Experiences of race or racism were thus isolated from the historical, economic, social, cultural and political context in which they exist; and where race is a tool for dominating some racialised groups based on characteristics such as skin colour or national or ethnic origin. In reality, an individual's response to racism is framed by the historical, economic, social, cultural and political context in which group-based domination and subordination is located.[55] For the majority however, there was no such thing as group-based domination and subordination at a structural level. Race and racism, especially according to Chief Justice Roberts, were instead characteristics and experiences which operated entirely at an individual level in college admissions.[56] They could thus be overcome by individuals with courage and determination; and by institutions with a commitment to "colorblindness" which demands wilfully turning a blind eye to how race transpires in reality as a form of structural injustice as a matter of course given the social, political, economic and cultural arrangement of the American society. This is confirmed by Chief Justice Roberts, who suggested that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[57] Race-based

[48]Emerging Intersections: Race, Class, and Gender in Theory, Policy, and Practice ix (Bonnie Thornton Dill & Ruth Enid Zambrana eds., 2008).

[49]Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment 289 (2d ed. 2000).

[50]Nitya Duclos, *Disappearing Women: Racial Minority Women in Human Rights Cases*, 6 Can. J. of Women & the L. 25, 47 (1993).

[51]*See* Atrey, *Xenophobic Discrimination*, *supra* note 16, at 107–109.

[52]Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. Rev. 1455 (2001); Richard T Ford, *Race As Culture? Why Not?*, 47 UCLA L. Rev. 1803 (2000); K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections, in*, Color Consciousness: The Political Morality of Race (K. Anthony Appiah and Amy Gutman eds., 1996).

[53]*See SFFA*, 600 U.S. 181 at 220–221.

[54]*Id.*

[55]In particular, Justice Thomas, in his concurring opinion, rejected the notion of 'antisubordination' as underlying the Fourteenth Amendment in favour of colourbliness. *See SFFA,* 600 U.S. 181, 198 (Thomas J., concurring).

[56]Shreya Atrey, *The Grounds of Affirmative Action* (Human Rights Quarterly, *forthcoming*).

[57]*See SFFA,* 600 U.S. 181, 220.

affirmative action thus seemingly survived—albeit very narrowly—but only in an individual not structural sense.

A similar pattern emerges in the Indian Supreme Court's recent jurisprudence, coincidentally on affirmative action. *Janhit* concerned a constitutional challenge to the validity of the Constitution (One Hundred and Third Amendment) Act, 2019.[58] The amendment added new clauses to articles 15 and 16 of the constitution enabling the state to provide up to 10% reserved spots to "economically weaker sections" (EWS) in education and employment. The amendment was challenged, inter alia, on grounds that: (i) Reservations based on economic criteria were impermissible under the constitution; (ii) and in any case, the exclusion of socially and educationally backward classes—"Scheduled Castes" (SCs), "Scheduled Tribes" (STs) and "Other Backward Classes" (OBCs)—from reservations for EWS was discriminatory. The Supreme Court found that the affirmative action based on economic status was permissible to the exclusion of caste.

The result, which appears to favour affirmative action on one ground—economic status—actually ends up limiting affirmative action on another ground—caste—earmarked by the constitution for the benefit of caste groups—SCs, STs and OBCs. This result ensued by a reading of caste as divorced from economic status. The Supreme Court rejected the petitioners' argument that caste comprised of social, educational, political, as well as, economic disadvantage, and thus could not be isolated from economic status.[59] Instead, the Supreme Court upheld the government's argument that economic status alone, to the exclusion of caste, could be the basis of affirmative action, something that was not originally mandated in the text of the constitution.

Much like *SFFA*, the majority in *Janhit* explicitly adopted a view of caste and casteism which was narrow and detached from the structural exclusions such as the impugned constitutional amendment which legally and constitutionally limited the existing constitutional protection of affirmative action based on caste. This was despite the overwhelming statistical evidence that caste status and economic status indeed coincided in reality and that those belonging to the lowest caste groups were the most economically poor section in the country. The fact that affirmative action on the basis of caste already existed was treated as a reason for not giving "excessive advantage" to those who were both belonging to lower caste groups and were also poor.[60] The logic is tantamount to, for example, excluding women from affirmative action intended for persons with disabilities if affirmative action for women already exists, lest affirmative action for persons with disabilities gives excessive advantage to women with disabilities.

The Court in *Janhit* however did not reason how caste-based exclusion could be justified from affirmative action based on economic status. In assuming that caste and economic status were mutually exclusive categories, the Court ultimately viewed affirmative action based on caste and economic status as mutually exclusive too: Casteism could thus be addressed through affirmative action based on caste while classism could be addressed by affirmative action based on economic status. The fact that casteism and classism were actually structural issues incapable of being siloed in this way went amiss.

In a similar vein, the South African Constitutional Court in *Rafoneke* divorced an assessment of xenophobia as a structural issue from the question of discrimination against foreign nationals in South Africa.

In *Rafoneke*, the South African Constitutional Court unanimously upheld the constitutional validity of the provisions of the Legal Practice Act 28 of 2014 which bars foreigners from being admitted and authorised as non-practising legal practitioners in South Africa. The applicants had argued that the impugned provisions violated their constitutional right to equality because they discriminated between South African citizens and permanent residents, on the one hand, and

[58]The Supreme Court of India has the power to review all law, including constitutional amendments, under articles 32 and 136 of the constitution. India Const. arts. 32, 136.

[59]*Janhit, supra* note 43, at ¶¶ 7.6, 10.2.

[60]*Id.*, ¶¶ 78.2, 80.

foreigners on the other on the basis of their social origin and nationality.[61] The government had responded that there was a rational connection between the discriminatory provisions and the objective sought to be achieved by them as reflected in the prevailing immigration and employment law and policy in the country which preserved work which did not entail a scarce or critical skill for citizens or permanent residents.[62]

The Constitutional Court unanimously agreed with the government. Three things are noteworthy. First, the decision turned on a particular conceptual move made by the Court, one which conceived the role of the Constitutional Court in equality cases as addressing only such inequality that is patently or manifestly lacking in basis.[63] Thus, according to the Court, its role was to assess whether the government was regulating the legal profession in an "objectively rational" manner and not in an "arbitrary manner" or as "manifest[ing] 'naked preferences' that serve[d] no legitimate governmental purpose."[64] This move essentially immunised structural harm by assuming that all objective or rational exercise of power is legitimate. It thus failed to view structural harm as conceivable through the quotidian exercise of governmental power.

Second, what was at stake was not simply the exclusion of non-citizens and permanent residents such as the applicants who had visas to live and work in South Africa and were gainfully employed in law firms after having completed their higher education in South Africa. At stake were also rights of other groups of migrants, such as asylum seekers, refugees and undocumented migrants, who were excluded from admission as lawyers in South Africa, despite permission to live in South Africa. So the applicants' argument was not for a blanket admission of all or any foreign national to practice law in South Africa. Basically, at stake were rights of those migrants who had permission to live and work in South Africa, including refugees who under sections 22 and 27 of the Refugees Act were entitled to live, study and work in South Africa. According to the applicants and the amici, the impugned provisions thus fed into an already charged xenophobic environment in South Africa where non-citizens and non-permanent residents are being targeted as dangerous, unreliable or opportunistic.[65] Instead, the Court cited with confidence a view from India which also excludes foreign nationals from practising law at Indian courts but where the xenophobic discourse based on ethno-nationalism is also mainstream under the current authoritarian government.[66]

Third, the Court sidestepped any discrimination analysis by drawing an artificial distinction between social origin and citizenship and considering the latter as attracting far less scrutiny under constitutional law.[67] The Court accepted that the impugned provisions may be considered discriminatory on the basis of citizenship but that such discrimination was not ultimately unfair because "the restrictions do not prevent the applicants from ever working in South Africa, and doing so by providing legal services that do not require admission."[68] Because the exclusion did

[61] *See Rafoneke, supra* note 45, at ¶ 35.

[62] *Id.*, at ¶ 36.

[63] *Id.*, at ¶ 74 ("[A]s long as the power to regulate is exercised in an objectively rational manner related to a legitimate governmental purpose, a court's interference would not be warranted."); *see also id.* at ¶ 75 ("It should thus be determined whether the State, in enacting section 24(2), is effectively regulating the legal profession in an arbitrary manner or manifests "naked preferences" that serve no legitimate governmental purpose.").

[64] *Id.*

[65] *See* David Everatt, *Xenophobia, State and Society in South Africa, 2008–2010*, 38 S. AFR. J. OF POLI. STUD. 7 (2011) (providing a discussion on "Afrophobia" in South Africa); Mamokhosi Choane and Lukong S. Shulika, *An Analysis of the Causes, Effects and Ramifications of Xenophobia in South Africa*, 3 INSIGHT ON AFRICA 129 (2011); Hussein Solomon and Hitomi Kosaka, *Xenophobia in South Africa: Reflections, Narratives and Recommendations*, 2 S. AFR. PEACE & SECURITY STUD. 5 (2013).

[66] *See Rafoneke, supra* note 45, at ¶ 88. *See* Sumedha Choudhury, *Denationalisation and Discrimination in Postcolonial India*, 22 INT'L J. OF DISCRIMINATION & THE L. 209 (2022).

[67] *Id.* at ¶ 93 ("[S]ocial origin refers to concepts such as class, clan or family membership. Citizenship, on the other hand, defines a relationship between a person and a state. Citizenship may occur by reason of birth, ties of blood, naturalisation and the like. But it is not a matter of social origin but national origin.").

[68] *Id.* at ¶ 97.

"not operate as a blanket ban to employment in the profession as a whole," the Court required no more from the government to prove that the exclusion was indeed fair.[69] From here, the Court made a significant leap and went on to conclude that the applicants were:

> [N]ot left destitute with no alternative source of employment. The activity which the applicants seek constitutional protection for is the enjoyment to choose one's vocation and as such this cannot be held to amount to unfair discrimination, as *this right does not fall within a sphere of activity protected by a constitutional right available to foreign nationals such as the applicants*.[70]

There was little reasoning which preceded or succeeded this view which—(i) set the threshold for an equality violation at an absolute level; and (ii) excluded the right to vocation of foreign nationals who had the permission to live, study and work in South Africa from constitutional protection. The Court took the current legislative and policy preference as justification enough rather than having the government justify its view against constitutional principles. The Court essentially abdicated its judicial review function in equality law and restricted it to extreme yet inadvertent violations.

Likewise, in the landmark decision in *Supriya Chakraborty* the Indian Supreme Court refused to even apply the constitutional right to equality and non-discrimination to determine whether the absence of provision for same-sex marriage was unconstitutional while acknowledging at great length, in the same decision, the homophobia entrenched in the Indian society. The Supreme Court ultimately left the Parliament to not only *legislate* but essentially *decide* whether same-sex marriage was constitutionally permissible. But the question before the Court was not about *who* should enact same-sex marriage but whether its exclusion in the existing marriage legislation was discriminatory. The Court essentially abdicated its judicial role in avoiding making a finding on this precise issue even when it acknowledged the widespread discrimination of same-sex couples as a result of being excluded from the institution of marriage.

The stance mirrors Justice Thomas's view in *SFFA* who acknowledged that "social racism" could not be addressed through a constitutional mandate for affirmative action which he saw as "government-imposed racism"[71] in turn. Despite this observation which is likely an admission of the structural character of racism in the U.S., neither his nor the majority decision did anything to address such structural racism judicially. Instead, they swiftly proceeded to delimit the material scope of the constitutional guarantee of equality to address racism as an individual matter and let its structural dimension go unchallenged.

Interestingly, in the case of *Chakraborty* the litigation had not sought to expose issues with the absence of an individual right to marry but the structural barriers which existed as a consequence of it. The litigation was firmly focussed on parental rights, adoption, inheritance, taxation etc and thus sought to highlight the material consequences of marriage inequality. Not all material consequences flowed from explicit homophobia or even overt exclusion—they flowed from the reading of apparently neutral notions such as partnerships, union, marriage, parentage etcetera in heterosexual terms, when they could be read more broadly than the prevailing social norms. It was the liberal—that is, avowedly neutral and equal but ultimately unequal—rendering of the laws which was at stake. A structural view of equality law could tackle that exactly. But the way the Supreme Court conceived the marriage equality challenge, it reduced it to a matter of individual rights in an individual sense, something to be negotiated through democratic politics by making demands to an elected Parliament. No appreciation was shown towards the possibility that perhaps it were the political—and thus in turn legal—structures which were enacting the very

[69] *Id.*
[70] *Id.* at ¶ 101 (emphasis added).
[71] *SFFA*, 600 U.S. 181, 236 (Thomas J., concurring).

injustice at the heart of this case by neither enacting a legislation allowing equal marriage nor dismantling the barriers to other related material interests which were compromised as a consequence.

These four cases—*SFFA*, *Janhit*, *Rafoneke* and *Chakraborty*—from three jurisdictions—India, South Africa and the U.S.—concerning racism, casteism, xenophobia and homophobia respectively, show how landmark constitutional jurisprudence of apex courts in some of the largest and most unequal countries can constrict the project of equality law. The routes to constriction are varied—from the conception of the meaning and scope of constitutional equality or non-discrimination guarantees to the quality of judicial review and standard of scrutiny being applied. It is thus not simply a normative constriction in how the courts imagine the project of equality law. But as this Article has argued, the result is the same, and ends up limiting what equality law does and indeed should do.

None of the apex courts thought that racism, casteism, homophobia or xenophobia did not exist. In fact, they explicitly acknowledged that these did exist. They just did not think that constitutional adjudication of the right to equality and non-discrimination had much to do with these. Thus, what appears to be the big picture across these jurisdictions is the diminishing of the material scope of equality law itself, that is, the mischief that a constitutional right to equality and non-discrimination gets at, which seems to be defined as anything but structural—that is, brought about by individual or isolated instances of discrimination and not by the dominant social, political, legal, economic and cultural forces which perpetually produce disadvantage as a matter of ordinary course.

D. Centring Structural Harm in Equality Law

Rafoneke was decided unanimously by the South African Constitutional Court. Despite some divergences, the Indian Supreme Court in *Chakraborty* was also largely united in setting aside the determination under articles 14 and 15 of the Indian Constitution which protect the rights to equality and non-discrimination respectively. But in *Janhit*, Judge Bhat delivered a crafty dissent on behalf of himself and the then Chief Justice UU Lalit. In *SFFA*, thundering dissents were delivered by Justice Sotomayer and Justice Jackson. In addition, there are other instances where these apex courts, either unanimously or in majority, activated the constitutional equality guarantees robustly to address structural harm. One such decision is the South African Constitutional Court's unanimous judgment in *Mahlangu* which found the exclusion of domestic workers from workplace injury compensation to be discriminatory on the basis of race, gender and socio-economic status. The Indian Supreme Court also, for the first time in its history, embraced the notion of indirect discrimination in *Nitisha*.

These successful cases, along with the considered dissents in unsuccessful ones, show that the current constitutional jurisprudence across jurisdictions is hardly a monotone. In fact, the jurisprudence appears sufficiently eclectic in its approach to equality law. Given that the Indian Supreme Court and the South African Constitutional Court do not sit *en banc* and thus do not speak in one voice, this eclecticism forever leaves open the possibility for amenable justices to expand the project of equality law to address structural harm.[72] In the case of the U.S. Supreme Court, the possibility is more distant given that the judges sit *en banc* and the current composition of, what is ostensibly a politically-appointed, court seems unfavourable to progressive rights jurisprudence, on the Fourteenth Amendment or otherwise. But perhaps for this reason, individual justices at the U.S. Supreme Court also readily dissent and stake a different vision of equality law than the mainstream one.

[72]Gautam Bhatia and Shreya Atrey, *Gender and Transformative Constitutionalism in India*, *in*, GENDER, SEXUALITY AND CONSTITUTIONALISM IN ASIA (Ruth Rubio-Marín, Wen-Chen Chang, Mara Malagodi and Kelley Loper eds., 2023).

It thus remains useful to consider what happens when individual justices, on their own or collectively, seem to take a structural turn to expand the project of equality law. Do they succeed in addressing entrenched patterns of social, political, economic, legal and cultural disadvantage which are causally complex?

For example, Judge Bhat's dissenting opinion in *Janhit* showed remarkable clarity over the historic and persisting casteism in India. It was in light of this understanding that he parted with the majority of the Indian Supreme Court which upheld the exclusion of lower castes from constitutional reservations meant for "economically backward sections" even though lower caste groups statistically constituted the poorest sections of the Indian society. For Judge Bhat, the fact that lower caste groups in India continued to face extraordinary casteism especially in accessing employment and education provided unequivocal evidence for their continued inclusion across affirmative action programmes. He thus asserted that:

> [B]y excluding a large section of equally poor and destitute individuals – based on their social backwardness and legally acknowledged caste stigmatization – from the benefit of the new opportunities created for the poor, the amendment *practices* constitutionally prohibited forms of discrimination.[73]

This statement shows how structural discrimination can be recognised and addressed through equality law. Judge Bhat couches the impugned amendment—which extended affirmative action to "economically backward sections" but excluded SCs, STs and OBCs—as itself a form of discrimination thus recognising the structural roots of discrimination in law, even the constitution—often deemed immune from too harsh a scrutiny especially from judges in a democracy. The recognition that constitutional provisions can themselves enact inequality while portending to advance equality cannot be underestimated and lies at the heart of detecting and articulating structural discrimination of this kind.[74] It throws open liberal democratic constitutions to critical enquiry and to ensuring that they *actually* enact equality not (i) in a monolithic sense where caste is removed from its economic and class implications or (ii) under a false sense of caste discrimination being presumed as incapable of being enacted by the state.[75]

Similarly, the thrust of the dissents in *SFFA* was not only in justifying a race-conscious view of the Equal Protection Clause to promote "racial equality"[76] but doing so against a clear-eyed recognition of both historical and persisting forms of racial inequalities to do with slavery, segregation and vast gaps in economic and educational attainment of racial groups. An understanding of the material reality of inequality in the American society underpinned the dissents and their consequent understanding of the material scope of the Equal Protection Clause.

So, while the majority made no reference to economic, educational or political disadvantage associated with race, in contrast, Justice Sotomayor in *SFFA* understood racism through "interlocking" disadvantages:

> Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system. Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process. Further, low-income children of color are less likely to attend preschool and other early

[73] *See Janhit, supra* note 43, at ¶ 101 (Bhat J., dissenting).

[74] *Id.* at ¶ 328 (Bhat J., dissenting) ("[T]his Court has for the first time, in the seven decades of the republic, sanctioned an avowedly exclusionary and discriminatory principle.").

[75] Shreya Atrey, *The Intersectional Case of Poverty in Discrimination Law*, 18 HUM. RTS. L. REV. 411 (2018).

[76] *SFFA*, 600 U.S. 181, 182 (Sotomayer J., dissenting).

> childhood education programs that increase educational attainment All of these interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions.[77]

Likewise, Justice Jackson made "race-based disadvantage" or "race-based gaps" between Americans central to her dissent.[78] She considered race-based disadvantage "intergenerational" and as spanning across all major indicators of wealth, income, home ownership, educational qualifications, employment levels, health and life expectancy.[79] She thus insisted on focussing on this "racial disparity unblinkingly"[80] including by continuing race-based affirmative action in college admissions.

These dissents do not pretend that structural harm to do with racism, which is multi-causal and intersectional in its nature, will disappear with a single stroke of intervention of equality law. But they do show an appreciation of this nature and acknowledge possibilities of addressing it through affirmative action. The material scope of equality law thus includes the redressal of structural injustice in these dissents.

This view has also been embraced unanimously by the South African Constitutional Court in *Mahlangu*. The judges held that the exclusion of domestic workers from compensation for workplace injury was unconstitutional and violated, inter alia, the constitutional protection against discrimination because it constituted indirect intersectional discrimination against Black women domestic workers on the basis of their gender, race and socio-economic status.[81] While the main judgment—penned by Acting Justice Victor—as well as the two concurring opinions all agreed on the unconstitutionality of the exclusion, it was Judge Mhlantla's concurring opinion which made the historical intersectional discrimination suffered by Black women the mainstay of her judgment. As she declared at the outset, she wrote the concurring opinion "to underscore the historical significance of this matter coupled with its intersectional nature."[82] In analysing whether the impugned exclusion constituted unfair discrimination under the South African Constitution, Judge Mhlantla preferred the excavation of the root causes of such discrimination which originated from the "grinding together of the tectonic plates of racism, sexism, and social class."[83] She thus traced back the discrimination in domestic work as a relic of white settler colonialism and the slavery, servitude, subordination and oppression which accompanied it.[84] Taking note of the evidence before the Court, she found that these conditions had not really changed in post-apartheid South Africa and that domestic workers had remained "severely exploited, undermined, and devalued as a result of their lived experiences at the intersecting axes of discrimination."[85] It was the appreciation of the nature of discrimination suffered by domestic workers as both (i) causally intersectional and as (ii) historically contingent that drove Judge Mhlantla's determination of unfair discrimination. Because for her:

> [I]t is not enough to take cognisance of the discrimination that makes up the present lived experiences of domestic workers but that it is necessary to also acknowledge the historical significance of the role that domestic workers play and the accompanying struggles they face.[86]

[77] *Id.* at 200–01 (Sotomayor J., dissenting).
[78] *Id.* at 182, 203, 207 (Jackson J., dissenting).
[79] *Id.* at 192–95 (Jackson J., dissenting).
[80] *Id.* at 207 (Jackson J., dissenting).
[81] *See Mahlangu*, *supra* note 47, at ¶ 18.
[82] *Id.* at ¶ 184 (Mhlantla J., concurring).
[83] *Id.* at ¶ 187 (Mhlantla J., concurring).
[84] *Id.* at ¶ 188 (Mhlantla J., concurring).
[85] *Id.* at ¶ 195 (Mhlantla J., concurring).
[86] *See Mahlangu* Media Summary (Jan. 17, 2024), https://www.saflii.org/za/cases/ZACC/2020/24.html.

Simply put, what looked like indirect intersectional discrimination today was a remnant of the colonial and apartheid past that reflected in the contemporary social, legal, economic, political, psychic and cultural relations in the South African society, even though no specific individual or policy had caused this per se.

Furthermore, it was explicitly the fact that this case concerned both "intersectional discrimination" and "systemic discrimination" that Acting Judge Victor's main judgment in *Mahlangu* provided a retrospective remedy for "breaking the cycle of poverty" suffered by Black women.[87] A structural view of discrimination thus fed directly into fashioning a retrospective remedy—something far from the norm in cases with far reaching monetary implications.[88]

It is important to note that *Mahlangu* is quite the outlier in the jurisprudence of major apex courts.[89] Because even comparably momentous and unanimous judgments which seem to appear to be embracing a structural view are often not doing so fully or in fact.

For example, the Indian Supreme Court in *Nitisha* in 2021 formally adopted the concept of indirect discrimination under the constitution, and did so in recognition of the need to address "systemic" and "structural" discrimination against women in the army.[90] At issue was a policy which treated men and women who had served in the army uniformly for service in the "Permanent Commission," that is, as part of permanent service in the army. Thus, men and women officers had both to complete a medical fitness test and also show favourable annual records of their service to be selected for the Permanent Commission. But women had only recently been allowed to apply for the Permanent Commission at all. So the competition for Permanent Commission was really a competition between much older women who had served in the army for decades and were between 40–50 years old, versus men who applied for it when they were 25–30 years old.[91] Women's medical fitness and indeed annual records which were kept mechanically over the years—as there was little possibility for women to move from the "Short Service Commission" to the "Permanent Commission"—thus compared poorly against younger colleagues. The charge of indirect discrimination—where a neutral policy ends up disproportionately impacting a group as compared to another—was thus successfully made at the Supreme Court.

The Court however limited indirect discrimination substantially by requiring that it be "caused" by a neutral policy—provision, criterion or practice—and not be "remote" in any sense.[92] This test of causal proximity is antithetical to a structural view which treats inequality or discrimination as causally complex both in terms of the colliding social, political, legal, economic and cultural forces and also multiple and intersecting disadvantages associated with gender, race, class, disability, sexuality, age, religion, etcetera. Even if indirect discrimination may well be traced to a particular provision, criterion or practice it is never wholly explained by it.[93] That is simply because the disadvantage which forms the basis of indirect discrimination is pre-existing—historical yet subsisting at the same time.[94] While the South African Constitutional Court in

[87] *See Mahlangu, supra* note 47, at ¶ 128.

[88] Shreya Atrey, *Beyond Discrimination: Mahlangu and the Use of Intersectionality as a General Theory of Constitutional Interpretation*, 21 Int'l J. of Discrimination L. 168 (2021).

[89] *Cf Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) (S. Afr.); *Centre for Child Law v T S and Others* 2023 (6) SA 1 (CC) (S. Afr.); *VJV and Another v Minister of Social Development and Another* 2023 (6) SA 87 (CC) (S. Afr.).

[90] *See Nitisha, supra* note 29, at ¶¶ 46–53.

[91] *Id.* at ¶ 22.

[92] *Id.* at ¶ 49 ("'[I]ndirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion.").

[93] Sandra Fredman, *The Reason Why: Unravelling Indirect Discrimination*, 45 INDUS. L. J. 242 (2016); Tarunabh Khaitan, *Indirect Discrimination Law: Causation, Explanation and Coat-Tailers*, 132 L. Q. REV. 35 (2016).

[94] As Catharine MacKinnon explains:

> "But substantive equality is not just another version of disparate impact. If hierarchy is not recognized as the concept core to inequality, disparate impact/discrimination-in-effect doctrine is vulnerable to repeated failure,

Mahlangu recognised that, the Indian Supreme Court in *Nitisha* did not and ended up mistakenly calling its view in *Nitisha* as favouring substantive as opposed to formal equality even though it ignored structural harm.[95]

The question thus is not simply about the meaning of equality—formal or substantive—adopted by constitutional courts. The question is: Whether the material scope of equality law is about addressing the *systems or structures of inequality per se* or *particular instances of inequality which narrowly qualify as discrimination based on grounds*. A focus on the former as the mischief equality law is meant to address dramatically broadens the material scope of the field while a focus on the latter narrows it. Recent constitutional jurisprudence, albeit dissenting, save in the case of *Mahlangu*, shows the interest in refocussing equality law on the former. The fact that this interest is not lost or buried in the history of constitutional jurisprudence but is continuing to exist alongside the dominant liberal discourse confirms the contemporaneous possibilities of a structural turn in equality law. That is, exceeding episodic problems of discrimination between individual victims and perpetrators and addressing broad, large-scale systemic or structural issues best captured in the -isms and -phobias so far shunned from the language and logic of equality law, namely, racism, sexism, ableism, ageism, classism, casteism, homophobia, transphobia, ethno-nationalism, xenophobia, etcetera.

E. Conclusion

This Article has argued that the recent constitutional jurisprudence from India, South Africa and the U.S. shows a clear divide between justices who view equality in the liberal frame—as an individual, episodic and isolated issue versus equality in the structural frame—as having historical, multi-causal and materially informed frame. Equality law's apparent inability to act as a bulwark against persisting and proliferating inequalities can thus be understood not only in reference to the nitty gritty of equality law or even the broader theories of the meaning of equality and non-discrimination; but against the very mould or frame in which the field is constructed. This zoomed out, external vision of the framework of equality law rather than an internal one allows us to appreciate the fundamental limitations and possibilities of the field. Following, what appears to be a minority view in constitutional adjudication, the Article suggests an expansion of the external mould in which equality law is cast to include structural harm. Herein lies the key to resurrect the significance of a field which seems to be plateauing against the escalation of inequality and discrimination around the world.

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because unless one already knows that a disparity is the impact or effect of a preexisting substantive hierarchy, addressing it can be, and repeatedly is, evaded."

Catharine A. MacKinnon, *Substantive equality revisited: A reply to Sandra Fredman*, 14 Int'l J. of Const. L. 739, 742 (2016).

[95] *See Nitisha, supra* note 29, ¶ 106.

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