



Economic inequality and gender: Where courts fear to tread

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Abstract

This paper argues that the right to equality should not be confined to discrimination based on individual status (such as race, gender, age and disability) but should address distributive inequalities, particularly for gendered inequality. Policies which have an impact on inequality should be analysed under the lens of a four-dimensional right to substantive gender equality. This entails simultaneously (i) redressing redistributive disadvantage; (ii) addressing stigma, stereotyping and violence; (iii) facilitating voice and participation; and (iv) accommodating difference and furthering structural change. Although distributional decisions should remain the primary responsibility of policy-makers, courts adjudicating the right to equality should require policy-makers to demonstrate that their decisions further these four dimensions as far as possible. The paper examines taxation, a key redistributive mechanism which attracts unnecessarily high levels of judicial deference and considers some examples of how courts might apply the four-dimensional principle of substantive equality to require taxation to further the right to gender equality. The focus is on gender in an intersectional context. Further research is needed to demonstrate its application to race, disability and other status-based inequalities

Key words

Substantive equality, gender equality, four-dimensional substantive equality, redistributive inequality, tax.

Resumen

En este artículo se sostiene que el derecho a la igualdad no debe limitarse a la discriminación basada en la condición individual (como la raza, el género, la edad y la discapacidad), sino que debe abordar las desigualdades distributivas, en particular la desigualdad de género. Las políticas que inciden en la desigualdad deben analizarse desde la perspectiva de un derecho a la igualdad de género sustantiva en cuatro

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dimensiones. Esto implica, simultáneamente: (i) subsanar las desventajas redistributivas; (ii) abordar el estigma, los estereotipos y la violencia; (iii) facilitar la expresión y la participación; y (iv) dar cabida a la diferencia y promover el cambio estructural. Aunque las decisiones distributivas deben seguir siendo responsabilidad principal de los responsables políticos, los tribunales que se pronuncian sobre el derecho a la igualdad deberían exigir a dichos responsables que demuestren que sus decisiones promueven estas cuatro dimensiones en la medida de lo posible. El artículo examina la fiscalidad, un mecanismo redistributivo clave que suscita unos niveles innecesariamente elevados de deferencia judicial, y analiza algunos ejemplos de cómo los tribunales podrían aplicar el principio de igualdad sustantiva en cuatro dimensiones para exigir que la fiscalidad promueva el derecho a la igualdad de género. Se presta especial atención al género en un contexto interseccional. Se necesitan más investigaciones para demostrar su aplicación a la raza, la discapacidad y otras desigualdades basadas en la condición social.

Palabras clave

Igualdad sustantiva, igualdad de género, igualdad sustantiva en cuatro dimensiones, desigualdad redistributiva, impuestos.

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1. Introduction

Despite the many global commitments to reduce inequality (United Nations General Assembly – UNGA – 2015), the growth of inequalities appears inexorable (Saez and Zucman 2020). And they are deeply gendered. The COVID-19 pandemic exposed and widened existing inequalities, with women, racialized minorities and people living in poverty particularly badly affected (Campbell *et al.* 2020). Given the economic turbulence caused by conflict and trade wars, and the rapidly escalating climate emergency, such inequalities can only amplify. Yet the right to equality is a central tenet of human rights instruments, whether internationally or at constitutional level, and anti-discrimination laws are well developed in many jurisdictions. Why, then, have such laws had such limited traction? Is it because, as Moyn (2018, 216) has claimed, human rights have ‘nothing to say about material inequality’?

In this article, I argue that such a view is based on a traditional paradigm, whereby distributive inequality is regarded as a matter for the political process, while status-based inequality (including gender, race, disability and other protected characteristics) is seen as a question of human rights or anti-discrimination law (Fredman 2007). Where distributive issues are brought into the human rights arena (for example, in the form of socio-economic rights), they are often carefully caveated to allow a State to achieve them progressively, subject to maximum available resources. In these contexts, courts have been careful to leave it to the State to decide whether resources are available, subject only to a reasonableness threshold of review.

However, this traditional bifurcation ignores the deep entanglement of status and distributive inequalities, rendering invisible the deeply gendered ways in which distributive inequalities are patterned. This has led many to argue that poverty or socio-economic disadvantage should be incorporated as a ground of discrimination, mirroring an emphasis on poverty alleviation in the policy and development arenas (Fredman 2011, Atrey 2018). This article, however, is concerned not just with poverty, but with inequality *per se*. While poverty alleviation can be a factor in reducing inequalities, an exclusive focus on poverty risks ignoring the large and growing disparities between the small wealthy elite and the remaining global population. In 2021, according to the World Inequality Report (Chancel *et al.* 2022, 10), the top 10% of the global population captured 52% of total income and accrued 76% of total household wealth. In stark contrast, the bottom 50% of the global population captured 8% of total income and owned 2% of wealth (Chancel *et al.* 2022, 10). This is specifically gendered. Women are over-represented in the poorest segments, and few reach the elite, a pattern reflected both in global figures and in specific countries (see Part 2 below). It is by now familiar to recognize that a major contributory factor to this stubborn gap is the disproportionate share of unpaid work carried out by women. This makes it difficult for women to enter the labour market on equal terms with men, propelling them into part-time and precarious work, and making it difficult to gain more senior, high paid positions. Current anti-discrimination laws are not shaped to address these structural inequalities. In this article, I explore the potential of a right to substantive equality to pierce the putative divide between policy and law and address the gendered inequalities which reach well beyond minimum levels of entitlement or prohibitions on status-based exclusion. To test this argument, I examine the major redistributive mechanism available

to governments, but one which is also regarded as a paradigmatic area of judicial deference to policy-makers — taxation.

Part 2 briefly challenges the current paradigm according to which distributive inequalities are not considered as the province of human rights or anti-discrimination law. Part 3 asks why inequalities matter, and therefore why it is important to go beyond providing a minimum safety net against poverty and socio-economic disadvantage. Part 4 presents an alternative understanding of the right to equality and the role of justiciable rights. The claim is not that distributive questions, and particularly resource allocation, should be transferred to judges. Instead, justiciable human rights should function as additional accountability vehicles to require inequalities to be reduced in relation to human rights. Part 5 takes the first few steps to testing this approach by sketching the role of the right to substantive equality in relation to taxation. The focus is on gender in an intersectional context. Further research is needed to demonstrate its application to race, disability and other status-based inequalities

2. Separate spheres: Through the looking glass

This Part challenges the assumption that distributive inequalities should be excluded from justiciable rights to gender equality. It does so firstly by demonstrating the specifically gendered nature of distributive inequalities, both in specific countries and reflected in global data. Secondly, it shows that there are ways in which judges can usefully integrate distributive inequality into adjudication without overstepping the bounds of judicial legitimacy and competence.

The tenacity of inequality despite the universal commitment to a right to equality has led many to argue that, at the very least, poverty or socio-economic disadvantage should be included as a protected characteristic or ground for discrimination. This would recognize the enmeshment of status and distributive inequalities, addressing the stigma and stereotyping experienced by those living in poverty. This is an important recognition and is slowly gaining traction (*Social Justice Coalition and Others v Minister of Police and Others* 2018, Committee on Economic, Social and Cultural Rights —CESCR— 2024, para 35). This article aims to take a further step in this direction and examines inequality beyond the minimum. The powerful objections to incorporating redistributive issues into human rights and discrimination law emerge in a particularly challenging form in relation to inequality above the minimum. This article argues that there is nevertheless a compelling case for addressing inequalities, and specifically gendered inequalities, through the right to equality.

This examination is prompted by two provocations. The first is Samuel Moyn's (2018, 216) trenchant critique of human rights as having 'nothing to say about material inequality'. The second comes from the development agenda, most recently in relation to the 2015 Sustainable Development Goals (SDGs) where all countries committed themselves to an ambitious fifteen-year agenda to 'transform the world' (UNGA 2015). Goal 10 promises to reduce inequality within and among countries. However, addressing socio-economic inequality has largely been reduced to anti-poverty measures. As Fukuda-Parr shows, none of the targets and indicators set in place to measure progress towards this goal obliges states to reduce the unequal distribution of income and wealth within their own country or between countries. The focus is on

assisting marginalized groups out of poverty, ignoring the concentration of income and wealth at the top (Fukuda-Parr 2019).

The most prominent objection to incorporating redistributive issues into human rights and discrimination law arises from a particular understanding of appropriate separation of powers. Resource allocation decisions and their consequences for socio-economic inequality are regarded as falling into the exclusive domain of policy-makers. By contrast, 'status-based' inequalities, or inequalities due to group-based characteristics such as gender, race or ethnicity, have generally been constructed in terms of legal rights, whether at constitutional level or through legislation. This distinction is based on the assumption that the aim of anti-discrimination legislation is to prevent individuals from being subject to decisions based on prejudice rather than merit. From this perspective, courts adjudicating claims of discrimination on grounds of status (often referred to in legislation as 'protected characteristics') are well within the traditional boundaries of legitimacy and competence, namely ascribing fault and determining compensation. Any further intervention to correct inequalities should be for the executive, which is accountable to the electorate for decisions which require resource allocation or redistribution.

In reality, however, there is a powerful interaction between status-based inequality and distributive inequality. This is particularly evident in relation to women, for whom distributive inequality remains deeply gendered. Figures from the UK show that in 2024, women accounted for 60.8% of all jobs paid below the Real Living Wage (Mignon 2025, 5),² and women were 50% more likely to be low paid than men (Mignon 2025, 5). Part-time work is particularly at risk of low pay; yet, because of caring responsibilities, part-time workers are predominantly women. The UK study showed that in 2024, nearly one third of all part-time jobs were paid below the real Living Wage as against 9.7% of full-time jobs (Mignon 2025, 5). But this is not confined to the bottom of the earnings ladder. The gender pay gap is evident throughout the earnings pyramid. In the UK in April 2024, the gender pay gap remained at 12.8% among all employees (full-time and part-time) (Office for National Statistics —ONS— 2025, 6). Notably, these are median gross hourly earnings, excluding overtime, and so do not account for actual take home earnings. Since men are more likely to work overtime than women, the gap between men and women in take-home earnings is likely to be even larger.

This is replicated globally. According to the World Inequality Report, women's share of total incomes from work in 2021 was only 35%; up a mere 5% over the 30 years from 1990 (Chancel *et al.* 2022, 17). Gendered patterns are significant at all levels of the labour market. In 2022, women's representation in management positions fell to 27.5%, reversing the already agonizingly slow progress which brought the percentage up to a mere 28.5% in 2021 (Sodergren *et al.* 2024). The same is true of the gender pay gap, which affects women throughout the pay hierarchy. Nor is gendered inequality confined to the workforce. The World Economic Forum's Global Gender Gap Index measures gender parity across four subindexes: Economic Participation and Opportunity, Educational Attainment, Health and Survival, and Political Empowerment. It assesses the percentage of the gender gap that has been closed, or the distance covered towards parity, on a scale of 0-1. The results are striking. Among the 148 economies covered in the 2025 index, the

² £12 across the UK and £13.15 in London (Mignon 2025, 4).

Health and Survival gender gap had closed by 96.2%, and the Educational Attainment gap by 95.1%. However, the Economic Participation and Opportunity gap closed by only 61.0%, and the Political Empowerment gap was well behind, having closed by only 22.9%. This means that, at the current pace of change, it will take 162 years to fully close Political Empowerment gap, and 135 years to close the Economic Participation and Opportunity gap (World Economic Forum 2025, 5).

Such inequalities are no coincidence. They are built into the patriarchal structure of societies. Unpaid caring roles significantly limit women's access to decent paid work, leaving many women with no choice but to accept precarious and low paid work (Rosenblatt and Rake 2003). This is exacerbated by prejudice, the risk of violence, lack of access to education in some areas and absence of good reproductive health care. Nor is progress guaranteed. In Afghanistan, women and girls have been prohibited from accessing education beyond the primary level since 2021. Five years on, an estimated 2.4 million girls remain excluded from secondary school. The effects are devastating (UNESCO 2026). Even for women who do have equal educational opportunities, caring responsibilities often mean that they cannot fully realise their potential in the labour market. In the informal sector, where women predominate (International Labour Organisation —ILO— 2009, 10-12; World Bank Group 2012, 79-80), gendered inequalities in earnings and occupations are replicated. This is clearly demonstrated by Chen's influential pyramid diagram representing the segmentation of informal employment. Those at the top of the pyramid are predominantly men and have higher average earnings, while those at the bottom of the pyramid (homeworkers, industrial outworkers and unpaid family workers) earn the lowest wages and have the highest risk of poverty (Chen *et al.* 2005, 54). Rogan and Alfers' (2019) important study of the South African informal sector reveals a similar structure. In particular, among own-account workers such as waste pickers, market traders and street vendors, where the earnings of all workers are extremely low, women earn only about 71% of men's hourly earnings. For informal workers, such as household and domestic workers, wages are abysmally low, but the risk of poverty wages remains higher for women than for men. In addition, most unpaid family are women (Rogan and Alfers 2019). Rogan and Alfers (2019) show that this is a result of gendered structures, relating to unequal child-care responsibilities, gender-based violence and the gendered impacts of infrastructure deficits in urban settings. Only a tiny minority of women workers have access to quality childcare services; many work in a context of insecurity and fear of gender-based violence, and most lack access to water and sanitation which are crucial both for their trade, often as cooked food vendors, and for their personal hygiene (Rogan and Alfers 2019).

Caring roles have an impact on women's lifetime earnings, which in turn significantly affect pension entitlements. Furthermore, divorce, widowhood, separation and teenage motherhood are major triggers of women's poverty, more so than for men. (Rosenblatt and Rake 2003). This is aggravated by lack of power. For example, as Chant notes, household income may bear no relation to women's poverty because women may not be able to access it (Chant 2006, 208).³

³ These conclusions are based on the Gender-related Development Index (GDI) and the Gender Empowerment Measure (GEM) which use global data.

The second assumption behind the separation of distributive inequality from status-based inequality is that only legislators and the executive should make resource allocation decisions because they are accountable to the electorate. However, this represents an idealized vision of accountable politics. Rather than politics determining the distribution of wealth, wealthy elites are able to shape the direction of policy, sustaining and perpetuating inequality (Fukuda-Parr 2019, United Nations Research Institute for Social Development 2022). As economist and Nobel laureate Joseph Stiglitz (2012, 104-105) shows,

When one interest group holds too much power, it succeeds in getting policies that benefit itself, rather than policies that would benefit society as a whole. When the wealthiest use their political power to benefit excessively the corporations they control, much-needed revenues are diverted into the pockets of a few instead of benefiting society as a whole.

His book *The Price of Inequality* (2012, 161) powerfully demonstrates the ways in which markets, despite being hailed as free and efficient, are fundamentally shaped by politics ‘in ways that advantage the top at the expense of the rest.’ This is reinforced by fellow economist and Nobel laureate Paul Krugman (2021), who demonstrates the ways in which policies do not necessarily have a basis in economic principles, but instead reflect the fact that wealthy individuals and entities are able to use undue influence to capture of the political process. Tax cuts for the wealthy are a clear example.

Defects in the political process have been recognized as a key trigger for judicial review. But this does not mean that courts or judges should replace decision-makers. Instead, it requires courts to insist on the accountability that is not provided for by the political process. It is here that it is necessary carefully to craft the role that judges should play. Policies which exacerbate inequality should therefore be regarded as suspect, with much closer attention being paid to the justifications offered by governments for taking such steps.

3. Why inequality matters and why should this be a human rights issue?

Why then does inequality matter? The standard economic argument holds that inequality is constructive and provides a necessary incentive for hard work and talent (Fukuda-Parr 2019). Even Rawls specifies that if specific inequalities of wealth would make everyone better off than in a situation in which income and wealth are evenly shared, then they accord with his second principle of justice (Rawls 1971/1999, 54-55). Should the State’s role therefore not be confined to providing a safety net for the poorest and outlawing status-based discrimination?

There are at least five trenchant reasons why inequality in itself should matter and why this should be a human rights matter. Firstly, inequality is not only a problem for the very poor, but for everyone in society. It has been well documented that highly unequal societies have higher levels of social problems than more equal societies. This affects not just the most deprived, but also the better off. Thus, someone from the highest earning 20% in a more equal society has a longer life expectancy than an equivalently well-off person in a less equal society. Similarly, more equal societies tend to have lower infant mortality, and lower levels of crime than more unequal societies, even where the latter have higher average rates of income (Wilkinson and Pickett 2009). Moreover, as Stiglitz

(2012, 105) puts it, 'Widely unequal societies do not function efficiently, and their economies are neither stable nor sustainable in the long term'. Particularly important is the correlation between equality and social trust, or a shared sense of social solidarity. Rothstein and Uslaner (2005, 46) demonstrate that

in societies with high levels of economic inequality and with few (or inefficient) policies in place for increasing equality of opportunity [...] neither the rich nor the poor have any sense of a shared fate. Generalized trust is low while particularized (or ingroup) trust is high. In turn, each group looks out for its own interests and is likely to see the demands of the other as conflicting with its own well-being.

On the other hand, where government policies provide for the whole of society, usually through universal social programmes, promoting a more equitable distribution of wealth and more equality in education and the labour market, there is a greater sense of social solidarity, spurring generalized trust. This in turn provides political support for policies leading to more equality (Rothstein and Uslaner 2005, 46). The Nordic countries, the Netherlands and Canada, which rank highest on social trust, also score highest on economic equality (Rothstein and Uslaner 2005, 47-48). Although the relationship between gender equality and trust has received less attention, several recent studies have found that gender equality is positively associated with social and political trust (Lee 2019, Lee and Ottervik 2024).

The second reason why inequality should be regarded as a human rights matter is because it affects the enjoyment of other human rights, damaging the fundamental promise of equality before the law. Doyle and Stiglitz (2014) point out that the Palma ratio reflecting health status shows even greater inequalities than the Palma ratio for income.⁴ This is particularly striking in relation to women's sexual health and reproductive rights. The same is true for education. As they put it: 'Health inequality is both a cause and a consequence of income inequality. Inequalities in education are a primary determinant of inequalities in income and opportunity' (Doyle and Stiglitz 2014, 6). Universal programmes for high-quality education promise longer term opportunities for greater economic equality (Rothstein and Uslaner 2005, 47).

This is an important counter-argument to the concern that removing the boundary between distributive and status-based inequality will simply invite judges to attempt to adjudicate issues should remain part of economic policymaking. To regard income inequality as a paradigmatic policy issue is to artificially segment the complex, interacting factors which create inequality. Courts should rightly be concerned with whether the fundamental guarantee of equality has been fulfilled in relation to established rights such as rights to life, personal security, speech, access to justice, and the vote. Even where rights to health, education and access to housing are not explicit in a constitution, they remain prerequisites to the effective exercise of these rights. This is particularly striking for women. As the ILO puts it:

The issues of productivity and inclusion are linked to the need to prioritize investment in education and skills for girls and women, as well as for low-income and other disadvantaged groups. For many girls and children from low-income or vulnerable groups, the experience of inequality starts with a lack of equal opportunity in access to

⁴ The Palma ratio is a measure of inequality that divides the share received by the richest 10% by the share of the poorest 40% (Cobham and Sumner 2014, 10-13).

education. Yet, inclusive and quality education for all — starting with preschool education and universal compulsory education — remains the foundation for a just society, with social mobility and social inclusiveness (ILO 2021, 111).

It should also be free.

Thirdly, the boundary between status-based discrimination and distributive inequality is not always easy to draw. We have already seen that it is impossible to address discrimination properly without also considering socio-economic disadvantage. Similarly, the distinction between the minimum threshold and distribution above the minimum is difficult to sustain. As a start, the definition of the ‘minimum’ is highly contested (Bilchitz 2003, Young 2008). Alston, in his role as Special Rapporteur on extreme poverty and human rights (2020, 1), argues that the international poverty line is set on the basis of ‘a standard of miserable subsistence rather than an even minimally adequate standard of living.’ The commitment to redress disadvantage is not achieved by setting the standards so low. The alternative is to define poverty as a relative standard. For example, the EU defines people as living in poverty if ‘their income and resources are so inadequate as to preclude them from having a standard of living considered acceptable in the society in which they live’ (Council of the European Union 2004, 7). Inequality is at its core.

The fourth reason why distributive inequality should be an integral part of the right to equality is that the resources available to fund equal enjoyment of rights are disproportionately in the hands of the wealthy. Since supplying the minimum is dependent on resources, concentrations of wealth at the top of the income scale should be of as much concern as absence of basic needs. The ‘trickle down’ theory of redistribution has been roundly repudiated, especially in the light of widespread tax avoidance by the wealthiest in society. By resisting taxes, the wealthy deprive society of the investments needed to sustain growth. A central example is the failure to invest in good quality education, which not only impedes the life opportunities of generations of poorer people, but also deprives companies of well-trained workers (Stiglitz 2012, 105).

Fifthly, a key assumption which purports to legitimate inequality is that wealth reflects individual merit and hard work. Conversely, poverty is regarded as a sign of indolence, lack of motivation or free-riding. On this view, the scale of inequalities is simply a legitimate scale of rewards for hard-work, and merit. These assumptions deliberately conceal the extent to which gender, race and class pattern inequality. As we have seen, deep-seated patriarchy is at the root of women’s inequality in all spheres of life, and hard work is far from rewarded. Indeed, it is women’s unpaid work which largely maintains the labour market in its current form. Moreover, law itself creates and perpetuates these inequalities. There are still jurisdictions which deny women equal access to property rights or succession. But this also operates in more subtle ways. Labour laws in many jurisdictions exclude precarious workers, among whom women predominate. This is because of the restrictive definition of ‘employee’ or ‘worker’ in many labour law jurisdictions. Such workers, however hard they work, will not be able to avail themselves of some basic employment rights, including minimum wages, health and safety at work, protection against unlawful deductions, sickness and parental leave and other

protections against other exploitative practices. Undocumented workers are particularly vulnerable (Desmond 2023).⁵

4. Substantive equality: a democratic role for the judiciary

This section develops the argument that the right to equality requires more than non-discrimination on grounds of status, and more than minimum protections against poverty. It extends to addressing the inequalities which undermine the guarantee that it should be possible for everyone to exercise their rights equally. Despite the evolution of understandings of the right to equality, there is still an entrenched view, typified by Moyn (2018), that the right to equality merely means that everyone should be afforded equal standing on a non-discriminatory basis, notwithstanding their gender, race, sexual orientation, disability, or indigeneity. This is also known as the “anti-classification” principle (Fredman 2016, 718). However, it is now well recognized that classification is not itself the problem; instead, it is the detriment attached to certain classifications, including being Black, a woman, disabled, LGBTQI or other outgroups. The right to equality should instead be understood along four dimensions (Fredman 2002, 2016, see also Fraser and Honneth 2003). Firstly, it should redress disadvantage, including both material disadvantage and power disparities. This is the redistributive dimension. At the same time, material disadvantage causes and is perpetuated by stereotypes, stigma, prejudice and violence. For example, stereotypes of women as primary carers mean that caring work is undervalued, whether performed unpaid at home or paid in the workforce. Stigma and prejudice are demeaning and, at the extreme, lead to violence. This is the recognition dimension of the right to equality: addressing stigma, prejudice stereotypes and violence. The third dimension reflects the importance of participation: exclusion from decision-making, whether political or social, is a key element of inequality. The third dimension of substantive equality therefore requires that facilitation of voice and participation of outgroups. This is the participative dimension (Fredman 2002, 2016, Fraser and Honneth 2003).

The fourth dimension recognizes that inequality is more than the sum of many individual acts of prejudice, but inheres in the structures of society, fuelled by imbalances of power (Young 1990, 30-31). In particular, structures which require conformity to the male norm will continue to perpetuate inequality. To achieve the right to substantive equality therefore requires different identities to be accommodated and structural change. For example, working hours have always been patterned on the assumption that childcare takes place outside the labour market. Women who wish to participate in the paid labour market must conform to this paradigm, either by forgoing having children, or leaving their children with family members or child-carers, who are most likely to be low-paid women, many of whom are also racialized. Substantive equality aims to change such institutions so that participative parenting is compatible with participation of all parents in the paid labour market. The structural dimension highlights the central value of social solidarity. Social solidarity requires, for example, that access to quality services such as health and education should be universal and free. Segmenting socio-economic rights to the poorest or most disadvantaged creates and

⁵ E.g., More than a third of undocumented workers in the US are paid below the minimum wage, which is already low in the US (Desmond 2023).

exacerbates stigma and stereotyping of people living in poverty and removes the social investment of others in society on ensuring that good quality services are available to all. For women, a commitment to universal publicly provided services creates a virtuous circle, whether as users of the services, workers for the services, or participants in their framing (Fredman 2008, 236).

These four dimensions of equality require simultaneous attention, rather than falling into any type of lexical priority (Fredman 2002, 2016). In Alexy's terms, all four require optimization to the extent legally and factually possible (Alexy 2002). For example, redressing women's disadvantage is not sufficient without addressing their stereotyped role as primarily responsible for childcare, or the background structural issues perpetuating disadvantage, such as the privileging of continuous, full-time work; or ensuring the women's voice is heard. A similar analysis can be applied to poverty. Social benefits that assume that poor people are lazy or scroungers might go some way toward the first dimension, redressing disadvantage, but only at the cost of breaching the second dimension, addressing stigma and stereotyping. Both should be achieved simultaneously. Moreover, political participation is much more difficult to achieve for those without the requisite wealth, breaching the third dimension (voice and participation) and with it the ability to redress both the disadvantage and stigma attached to poor people. Behind these are the structural forces with perpetuate and entrench poverty. This is encapsulated in the fourth dimension of substantive equality.

5. Taxation and the right to equality: Where courts fear to tread

This section begins the task of applying a right to substantive, multidimensional, equality to distributive inequalities by examining taxation, the major distributive mechanism available to governments, and an issue which has traditionally attracted a high level of judicial deference. This section is exploratory. The aim is not to construct a brave new world where economic policies are determined by super-charged human rights institutions and principles, but to indicate that human rights should have a role in relation to inequalities which, are continually corroding the ability of both individuals and communities to enjoy their basic human rights. Nor is the aim to construct an idea of what an 'equal' world would look like. It is rather to consider what role human rights can play in reining in the untrammelled pace of accelerating inequalities and ultimately to reduce them. This is no more than the world committed itself to in 2015, when it promised to reduce inequalities within and between countries by 2030 as part of the transformative agenda envisaged by the Sustainable Development Goals.

Taxation can play a significant role in redistribution. But this is only if three criteria are present: firstly, the principle of progressive taxation is applied; secondly, taxes are properly collected; and thirdly, revenues are used to create good quality public services, such as health and education. However, taxation can also play the opposite role. Distributive inequality can be entrenched where there is a greater reliance on regressive taxes such as consumer taxes. This can also occur where there is widespread tax avoidance; especially where the resulting drop in revenue is managed by cutting public services rather than ensuring that the wealthy pay their share of tax. In recent years, the trends have been away from using taxation to further redistribution to allowing taxation to entrench inequality. This raises the question of how the right to substantive

multidimensional gender equality be used to steer taxation in a positive redistributive direction?

There is important historical precedent for such an approach. In the first few decades after World War II, the application of the principle of progressive taxation signified a fundamental commitment by society to substantive equality. Indeed, the objectives of equity and progressivity were key features of tax policies until the mid-1970s (Fredman 2019). During this period, many academics took the view that good tax policy, at least for developed countries, was built on broad-based personal income tax with progressive rates, which incorporated capital gains tax, corporate tax and death duties or estate taxes (Valodia 2010, 300). However, governments, the World Bank and the IMF have shifted the emphasis away from the objectives of equity and progressivity in recent decades. Instead, they regard efficiency and ease of tax administration as the primary goal of a good taxation system (Valodia 2010, 301). This was partly a reaction to a perceived weakness in State capacity to collect taxes. But it also had an ideological component, namely that equity and poverty reduction should not be the concern of taxation. Instead, it was argued that redistributive policies should be conducted through revenue expenditure on benefits and other programs. The focus of tax policy should therefore be on ease of administration and greater resource mobilization (Valodia 2010). As Genschel and Seelkopf (2016, 301) put it,

The new emphasis is on tax neutrality, simplicity and efficiency. Distributive issues are relegated to the spending side of the budget: even regressive taxation is now often considered socially desirable if it serves to efficiently fund progressive expenditure programmes.

This is reflected in increasing trends for countries to reduce the highest marginal rates of personal income tax, while trade taxes have been dropped to comply with the dictates of free trade. The resulting steep decline in trade taxes has been matched by a sharp fall in corporate taxes, ostensibly in response to competition for inward investment (Valodia 2010, 10-11, Genschel and Seelkopf 2016, 323). The period between 1985 and 2018 witnessed a halving of the global average statutory corporate tax rate, from 49% to 24% (Tørsløv *et al.* 2022). Many countries therefore increased their reliance on broad-based value-added taxes (VAT) to compensate for their loss of revenue through trade taxes. Indeed, since 1980, the OECD has taken the view that the ideal form of tax is a broad-based, single-rate, value-added tax, which would enable significant revenues to be raised while decreasing administration and compliance costs. It is also maintained that VAT is not an appropriate tool for advancing equity considerations (Davis Tax Committee 2015). Similarly, the World Bank and the IMF regularly advise developing countries to reduce trade taxes and develop broad-based taxes.

The result is stark. As Saez and Zucman (2020, 21) put it, in the US, ‘the regressivity of the tax system at the extreme top end in 2018 is striking — a direct consequence of the 2018 cut in the corporate tax’. This contrasts with the highly progressive US tax system of the 1950s, when corporate profits, the main source of income for the rich, were subject to an effective corporate tax rate of 50%, and very high top marginal individual income rates were complemented by a progressive estate tax. This changed markedly over the decades, with the erosion of the corporate tax, estate tax and lower individual income

tax at the top (Saez and Zucman 2020, 21), a regressive trend which is clearly set to continue under the second Trump administration.

This comes with widespread tax avoidance, especially due to multinationals' shifting their profits to tax havens. Tørsløv, Weir and Zucman, in research published in 2022, estimate that 36% of multinational profits are shifted to tax havens globally (Tørsløv *et al.* 2022), suggesting a reduction in corporate income tax revenue of \$200bn globally. Since about half of the globally shifted profits accrue to shareholders of US multinationals, this suggests that profit shifting reduces the effective tax rate of the wealthy, contributing to increasing inequality.

The persistence of deeply gendered roles in societies across the globe means that taxation systems have important gendered consequences (Fredman 2019). Although the fact that they tend to be low-paid means that women workers may pay less by way of personal income tax, as consumers of essential products they may pay more in consumer taxes. At the same time, systems that attach employment-related taxes to formal employment encourage employers to reconfigure working relations in favour of casual, agency or self-employed relationships which are cheaper for the employer. Indeed, the movement toward flexibilization of the paid workforce has been one of the primary sources of the increasing precariousness of women's employment (Fredman 1997). The structure of personal allowances and taxation exemptions might similarly entrench gendered roles, although often in complex ways. Moreover, tax avoidance and evasion which reduce the revenue base and lead to cuts in public services clearly affect women, not only as workers and as service users but also because such cuts often increase their responsibility for unpaid caring and domestic work.

A straightforward notion of equality as equal treatment, however, will not illuminate the complex ways in which gendered social relations are affected by taxation systems. Equal treatment in taxation has regressive consequences, as the move toward VAT and other indirect taxes to compensate for loss of trade taxes in the current global economy demonstrates. Similarly, the ongoing influence of gendered roles within the family means that taxation based on households and families might replicate or reinforce gendered structures; but it is not necessarily the case that individual systems achieve horizontal equality (Grown 2010). Ultimately, although the equal treatment principle appears neutral or mechanical, it embeds policy choices based on background ideologies which need to be uncovered. In taxation as in human rights law, it is therefore necessary to move beyond formal equality or the equal treatment principle.

Instead, the multidimensional conception of substantive equality functions as a valuable tool in evaluating taxation systems for their impact on gender. For example, it might be argued that efficiency in tax collection is likely to increase the revenue available to governments for social spending, which could benefit women and therefore achieve the first dimension, redressing disadvantage. Bringing in the other dimensions, however, reveals several problematic consequences. The first is the assumption that the extra revenue will in fact be spent on gender sensitive redistributive measures. This may well not be the case, especially if the third dimension, voice and participation are not present. Secondly, redistribution through the benefit system instead of the taxation system can be highly stigmatic. This is particularly true of means-tested cash transfers, which frequently characterize beneficiaries not as rights-holders but as scroungers or passive

recipients, breaching the second dimension of substantive equality—addressing stigma, stereotype, prejudice, and violence. This is even more so for the IMF's and World Bank's particularly favoured approach, conditional cash transfers, which require women to perform gendered roles as a condition for receiving cash transfers, without giving men equivalent responsibilities (Fredman 2015). Instead, reducing the tax burden on women in the first place might enhance their agency and autonomy. This brings in the third dimension, the participation dimension. Women have little say in determining how taxes are structured, especially when dictated by the IMF or World Bank. Moreover, the regressive impact of indirect consumption taxes is unlikely to be wholly redressed through social benefits, especially if the latter are linked to household income regardless of women's ability to access it. This means that far from achieving structural change as required by the fourth dimension, inequality is perpetuated. Notably, substantive equality does not outlaw all differential treatment: in fact, it might require differential treatment to redress disadvantage. For example, substantive equality might require VAT exemptions for basic foodstuffs, children's goods and menstrual products, without a read across to other uses of VAT, such as to disincentivize smoking or alcohol, or to raise taxes from luxury goods.

Taxation is an issue in which judicial deference is at its highest. However, in 2018, the Colombian Constitutional Court (2018) struck down the 5% VAT on sanitary towels and tampons. Although the Court held that there is a high margin of discretion in tax law, the 5% VAT was found to violate women's rights to equality. Importantly, the Court recognized several dimensions of substantive equality in reaching this conclusion. Firstly, it held that VAT was discriminatory because women's ability to participate in public life is contingent on access to sanitary towels and tampons. This affirmed the redistributive, recognition and participative dimensions simultaneously. Even more importantly, it situated the effect of the tax on structural gendered barriers, the fourth dimension. Women are specifically impacted by indirect taxes, it declared, because of structural barriers to economic equality in pay, access to jobs, access to property rights and use of economic resources on childbearing and household (Arango Olaya 2019).

This is not to suggest that courts should create tax policy. What it does suggest is that judges should require governments to justify, against a high standard, any tax policy which breaches the right to substantive gender equality, using the four dimensions as the standard of assessment. This in turn entails debunking the myth that economic decisions are a science or skill which the courts are not equipped to deal with. A growing number of economists have exposed the disconnect between economic decision-making and objective criteria, and, in particular, the extent to which the wealthy influence economic decision-making (Stiglitz 2012). This is particularly true of the notion that low taxes on the rich are the key to prosperity. Krugman (2021) demonstrates that, despite being tested again and again since the 1980s, this doctrine has not been proved. The well-worn justification for lower corporation taxes is that, in a global capital market, investment will move to the jurisdiction with the lowest taxes where it is expected it will get the highest after-tax return (Krugman 2021, 228). However, while it is true that corporations are able to manage their internal pricing so that their profits appear in low tax jurisdictions, this is no more than an accounting manoeuvre. For example, Krugman (2021, 227-228) shows that the large corporate tax cut brought in by Donald Trump in 2018 did not lead to the promised investment boom. Corporations used the extra funding

they gained from tax cuts to buy back their own shares, rather than to create new jobs and expand their capacity. This strongly suggests, not that courts should take over taxation policy, but that they should require decision-makers to justify tax policy against the yardstick of equality.

The potential for courts to follow such an approach was demonstrated by the UK Court of Appeal in a case decided in 2026, in which several groups challenged the removal of the VAT exemption on private school fees by the Labour Government in 2024 (*BYL v Chancellor of the Exchequer (BYL v Chancellor)* 2026). The measure was part of a manifesto commitment by the Labour Party to charge VAT on private school fees in order to raise revenue to invest in state schools. The case was particularly challenging in that the claimants asserted their own equality rights against the broader redistributive goals of the policy. One group of claimants were parents and children at private schools operated by the disadvantaged Charedi Orthodox Jewish Community; and the second were parents and children at private schools following a strictly Evangelical Christian curriculum. They claimed that the legislation applying VAT to private school fees without an exemption for lower fee-paying schools was discriminatory and in violation of the right to education (Article 2 Protocol 1 (A2P1) of the European Convention on Human Rights (ECHR)), the right to peaceful enjoyment of possessions (Article 1 Protocol 1 (A1P1) ECHR), and the right not to be discriminated against in the enjoyment of these rights (Article 14 ECHR).

The Court of Appeal rejected their claim. To determine whether there is discrimination under Article 14, in circumstances where a measure appears neutral on its face but has disproportionately prejudicial effects on a particular group, the European Court of Human Rights requires the government to show that the policy has no objective and reasonable justification (*Biao v. Denmark* (2017) 64 EHRR 1 [91]). Importantly, although UK Court of Appeal accepted that the Court should be aware of the separation of powers, it held that the case should not be determined according to the margin of discretion, as the lower court had done. Instead, the Court declared,

it is important not to avoid the question of objective justification which must be addressed in this case. It is a question that must be squarely addressed. We have no hesitation in doing so nor do we have any hesitation in reaching the conclusion that there is objective justification which has been demonstrated before this Court for the measure in question and for the absence of an exemption for low-fee schools (*BYL v Chancellor*, [85]).

The Court therefore meticulously applied a four-stage proportionality test to determine whether the government had met this standard: whether the measure without an exemption for low-cost schools has a sufficiently important objective; whether the measure is rationally connected to the objective; whether there is no less intrusive alternative and whether a fair balance has been struck between the rights of the individual and the general interests of the community. It came to a clear conclusion that the measure was objectively justified in this sense. To do so, it gave detailed consideration to the evidence produced by the Government. This demonstrated that the proposal to carve out an exemption for particular schools would be unfair to schools with fees just above the threshold; could risk tax avoidance as schools could attempt to avoid VAT by notionally reducing fees but supplementing income via supposed 'donations'; would be difficult to implement; and would lead to an annual loss of

revenue of an estimated £30 million. The Court stressed too that state education was suitable for children of all faiths and that there was an option of home schooling for families who were unable to afford private education according with their religious convictions. The case has been appealed to the Supreme Court and will be heard in December 2026.

There are several other entry points to challenge gendered inequality in tax. In the UK, section 1 of the Equality Act 2010 requires certain public authorities, when taking strategic decisions, to have due regard to the desirability of reducing socio-economic inequalities. While this is only a nudge to authorities in their decision-making, it could be used to have due regard to taxation as a redistributive mechanism, rather than simply based on efficiency, or, more worryingly, on powerful interests. This complements the existing duty, known as the Public Sector Equality Duty in section 149 of the Equality Act 2010, which requires public authorities to have due regard to the need to promote equality of opportunity, *inter alia*, on grounds of gender. In 2022, the Committee on Economic, Social and Cultural Rights emphasized that States have a duty to conduct comprehensive assessments of the impact of existing and proposed tax policies on the realization of socio-economic rights (CESCR 2021). The UK socio-economic and public sector equality duties have the potential to constitute a valuable vehicle for courts to require gender impact assessments of proposed taxation policies.

In jurisdictions with justiciable socio-economic rights, gendered inequality should be part of judicial scrutiny of whether maximum available resources have been both gathered and applied to advancing socio-economic rights. Thirdly, given that all rights must be enjoyed by every individual, tax policy should be scrutinized to ensure substantive equality in this respect. These avenues should be the subject of further research.

In the meantime, there is a growing impetus at international level to mobilize human rights to address inequalities due to taxation policies. In 2016, in a pioneering submission made to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) during the periodic review of Switzerland, four NGOs highlighted ‘the role played by Switzerland, as one of the world’s leading financial secrecy jurisdictions, in facilitating large-scale cross-border tax abuse that deprives other States of the public resources needed to fulfil women’s rights and promote substantive equality’ (Berne Declaration *et al.* 2016, 1). The response by the CEDAW Committee (2016) was significant in indicating some directions of travel for an equality-based response to gendered tax inequalities. In its concluding observations, it expressed concern at the negative impact of Switzerland’s financial secrecy policies on the ability of other States to mobilize the maximum available resources for fulfilling women’s rights. The CEDAW Committee (2016, 40-41) therefore recommended that the State should conduct

independent, participatory and periodic impact assessments of the extraterritorial effects of its financial secrecy and corporate tax policies on women’s rights and substantive equality, ensuring that such assessments are conducted impartially, with public disclosure of the methodology and findings.

Unfortunately, six years later, there had been little meaningful progress, leading the CEDAW Committee (2022) to repeat this exhortation in substantially similar terms.

There has nevertheless been growing momentum at international level to link taxation with human rights and equality. The Organisation for Economic Co-operation and Development (OECD) in 2022 (3) was unequivocal that 'tax policy can contribute to gender equality and governments' efforts to reduce inequalities.' In a major report on Tax Policy and Gender Equality, it concluded that governments can act to improve gender outcomes by removing overt biases, reconsidering policies that result in implicit gender bias and evaluating ways of designing and implementing tax policies promoting gender equality. Particularly important have been proposals to integrate human rights into the proposed UN Framework Convention on International Tax Cooperation, which aims to enable States to adopt fair, inclusive and effective tax systems and combat tax-related illicit financial flow (Center for Economic and Social Rights 2024). In a crucial statement in March 2025, the CESCR (2025, para 7) emphasized that

States Parties are also required to ensure that tax policies are designed and implemented, as far as possible, in a manner that promotes substantive equality and removes explicit and implicit gender biases.

They should avoid regressive taxes, such as VAT, that disproportionately affect women with low or no income. They should also review tax and social policies to examine how tax credits and allowances influence the distribution of unpaid work, and how higher tax rates on second earners affect gender equality. In an important recognition of how tax can be used to combat structural gender inequality, the Committee encourages tax measures which create incentives to transform the gender division of labour and promote women's labour market participation. Most significantly, it recognizes the role of public services in achieving thoroughgoing distributive equality, exhorting States to

secure fiscal space through equitable and progressive taxation to invest in public services essential for the realization of economic, social and cultural rights, such as comprehensive care and support systems that are gender-, disability- and age-responsive (Committee on Economic, Social and Cultural Rights 2025, para 7).

This would optimise all four dimensions: redressing disadvantage without creating gender-based stigma and facilitating solidarity and full participation in society through gender-conscious structural change. Such changes can have significant effects, as demonstrated by a helpful study demonstrating how tax-benefit changes during COVID temporarily narrowed the gender pay gap (Avram *et al.* 2025).

6. Conclusion

This paper has argued that the right to equality should not be confined to status-based inequality but should fully embrace and address distributive inequalities. This entails recognizing the artificiality of the traditional divide between justiciable human rights, including the right to non-discrimination on grounds of status, and distributive inequalities, seen as the exclusive sphere of policy-makers. Some steps have been taken in this direction, especially through proposals to include poverty as a ground of discrimination (Fredman 2011, Atrey 2018). However, it is argued here that the right to equality goes beyond including the most marginalized, to address inequalities above the minimum. This is particularly true for gendered inequality, which is pervasive within patriarchal societies, and will not be fully addressed if corralled within a paradigm of status-based discrimination. Instead, this paper proposes that policies impacting on

inequality should be analysed under the lens of a four-dimensional right to substantive gender equality, which requires simultaneously addressing redistributive disadvantage; addressing stigma, stereotyping and violence; facilitating voice and participation; and accommodating difference and furthering structural change. While judges should not substitute their views for policy-makers, they should insist on a high level of justification based on the optimisation of these four dimensions for policies which impinge on gender. This analysis is then applied to taxation, one of the most important redistributive mechanisms available to policy-makers but one which attracts unnecessarily high levels of judicial deference. While the paper does not present a vision of an optimal taxation system, it does suggest that all four dimensions are most likely to be optimized where government policies provide universal social programmes, including quality education and health care, which reduce stigma and stereotyping, facilitate participation and further structural change while also redressing gendered disadvantage. It is hoped that future research will apply a similar analysis to other areas, including precarious work and equal pay, and to other protected characteristics.

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