Discrimination, Dignity, and the Limits of Equality

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Introduction

The fundamental freedoms protected by bills of rights are generally understood as "negative rights"[1] — limitations on the power of the state. The broader these rights are defined, the greater the limitation they impose on state power. No one supposes that rights provide absolute protection, of course; nevertheless, absolute conceptions of rights may provide the baseline from which the protection of negative rights is understood. Freedom of expression is the best example in this regard: some courts define the right so broadly as to include almost *anything* that has expressive content, before determining the extent to which limitations on the right can be justified.[2]

Equality rights are significantly different from freedom of expression and other negative rights. For one thing, equality does not necessarily depend upon limiting state action. On the contrary, it is often supposed that equality *depends upon* state action. For another, equality is a comparative concept rather than an absolute; it cannot be defined in the abstract, generously or otherwise. Comparisons are required in order to determine the requirements of equality, and it is notoriously difficult to agree upon what the appropriate comparisons are.[3] Indeed, equality commands broad support in the community *because* it is so elusive a concept, one that can be embraced by those at opposite ends of the political spectrum.[4]

The drafters of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) supposed that they could avoid the uncertain consequences of a right to equality by providing a more limited right to freedom from discrimination. In this they were mistaken; as cases like *Quilter v Attorney-General*[5] demonstrate,

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1 The classic statement of negative rights is found in Isaiah Berlin's "Two Concepts of Liberty" in *Four Essays on Liberty* (1969). Cf G MacCallum, "Negative and Positive Freedom" in D Miller (ed), *Liberty* (1991) 100, rejecting the distinction between negative and positive liberty.

2 The Supreme Court of Canada has held that the guarantee of "freedom of expression" in the Charter of Rights and Freedoms includes any activity or communication that conveys or attempts to convey meaning, so long as it does so in a non-violent manner. See eg, *Irwin Toy v Quebec (Attorney-General)* [1989] 1 SCR 927 and *Libman v Quebec (Attorney-General)* [1997] 3 SCR 569. Of course, the impact of this expansive definition depends entirely upon the manner in which courts approach the justificatory criteria when it comes to limitations upon the right.

3 Peter Westen argues that the concept is in fact empty: See "The Empty Idea of Equality" (1982) 95 Harv LR 537; *Speaking of Equality* (1991).

4 As Will Kymlicka notes: "While leftists believe that equality of income or wealth is a precondition for treating people as equals, those on the right believe that equal rights over one's labour and property are a precondition for treating people as equals." (*Contemporary Political Philosophy* (1990) 4-5.)

5 [1998] 1 NZLR 523.

discrimination is no less difficult a concept than equality, and requires that similar issues be addressed. My purpose in this short paper is to consider some of the approaches to the right to freedom from discrimination that have been proffered, and to highlight some of the problems that will have to be reckoned with if we are to make sense of the right.

The White Paper's approach to equality and discrimination

The White Paper *A Bill of Rights for New Zealand* makes it clear that those who sponsored and drafted the Bill of Rights wanted nothing to do with equality:[6]

> The phrase "equality before the law" as a right is not used in this Article, or anywhere in the Bill of Rights. Although commonly appearing in national and international instruments (including the Canadian Charter), its meaning is elusive and its significance difficult to discern.
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> Nor is the phrase "the equal protection of the law" included. This is because of its openness and the uncertainty of its application. In particular, on the basis of American experience under the Fourteenth Amendment, it would enable the courts to enter into many areas which would be seen in New Zealand as ones of substantive policy.

This passage seems odd, given that the White Paper was designed to promote the idea of a constitutional democracy, with judges overseeing the legislative process.[7] For all of the enthusiasm for judicial review, here is an acknowledgment that some things are better left to Parliament than the courts. But the omission of equality is consistent with the process-based theory of rights shared by the drafters of the Bill of Rights. They assumed that the rights they proposed to protect would have little impact on the substance of the law,[8] and omitted a right to equality precisely because they were concerned about the impact it might have on public policy. In its place, they proposed a more limited right: freedom from discrimination on the grounds of colour, race, ethnic or national origins, sex, or religious or ethical belief.[9]

This limited right avoided some of the uncertainty associated with equality. But discrimination is a more difficult concept than the drafters of the Bill of Rights supposed, even assuming a limited number of prohibited grounds of discrimination — and amendment of the Bill of Rights in 1993 changed things considerably in this regard. Section 19 was amended to extend the protection of the right to include discrimination on the grounds of disability, age, political opinion, employment status, family status, and sexual orientation.[10]

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6 *A Bill of Rights for New Zealand* (1985) AJHR A6, p 86.

7 Ibid, at 40-41: "There is no denying that to give the judges power to declare an Act of Parliament invalid does constitute a fundamental change in our constitutional arrangements. Indeed that is what this whole exercise is about."

8 See Rishworth, "The Birth and Rebirth of the Bill of Rights" in Huscroft and Rishworth (eds) *Rights and Freedoms* (1995) 13-14; and Keith, "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1985) 11 NZULR 307.

9 Marital status was included as a prohibited ground of discrimination when the Bill of Rights was passed in 1990.

10 Passage of the Human Rights Act 1993, covering both the public and private sectors, was impetus for this amendment, which was viewed as consequential in nature.

Expansion of the scope of the right changed the nature of the right, and rendered the interpretive task even more difficult. As enacted, s 19 provided protection from discrimination on grounds that were largely irrelevant to public policy decisions.[11] As such, distinctions drawn on the basis of these grounds could be considered inherently suspect. The addition of several new prohibited grounds of discrimination necessitates a more nuanced treatment: far from being suspect, some of the prohibited grounds of discrimination — age and employment status, for example — may be relevant considerations in a variety of contexts, depending on the nature and effect of the distinctions drawn.

The White Paper says little about the concept of discrimination:[12]

> The word "discrimination" in this Article [s 19] can be understood in two senses — an entirely neutral sense, synonymous with "distinction", or in an invidious sense with the implication of something unjustified, unreasonable or irrelevant. However, the result would seem to be much the same on either interpretation, because of the application of Article 3 [now s 5] which authorises reasonable limitations prescribed by law on the rights guaranteed by the Bill.

This suggests that the distinction between rights and justification for limitations upon rights is not important, yet it is central to the structure and operation of the Bill of Rights: we need to know what a right is before we can determine whether or not it has been limited. Only if a limitation has been imposed does the question of justification — and the burden that entails — arise. The premise that the same result would obtain regardless of the conception of discrimination adopted is not only irrelevant, but untrue. As Canadian cases demonstrate, the application of reasonable limits provisions lead to results that are unpredictable, to say the least.[13]

The Court of Appeal's approach to discrimination

I referred earlier to *Quilter*, the first s 19 case to reach the Court of Appeal, as a good example of the difficulties inherent in the concept of discrimination. In that case, three lesbian couples sought a declaration that they were entitled to the issue of a marriage licence under the Marriage Act 1955, on the basis that their exclusion from the status of marriage constituted discrimination on the basis of their sex and sexual orientation. Their argument that the Marriage Act should be interpreted as allowing same-sex marriage (pursuant to the operation of s 6 of the Bill of Rights) was unsuccessful in the High Court[14] and unanimously rejected by the Court of Appeal, with all five members of the Court delivering reasons. All were in agreement that, by its terms, the Marriage Act precluded an

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11 I have in mind all of the prohibited grounds save sex and marital status, although it is arguable that even these grounds were and are increasingly becoming irrelevant.

12 *A Bill of Rights for New Zealand* (1985) AJHR A6 p 86.

13 See Hogg, *Constitutional Law of Canada* (1997) ch 35, discussing Canadian cases under s 1 of the Charter, on which s 5 was based.

14 (1996) 3 HRNZ 1. Kerr J assumed that the exclusion of same-sex marriage was discriminatory but held that the Marriage Act 1955 could not be interpreted in a manner consistent with s 19.

interpretation that included same-sex marriage. In other words, this was a case in which the Marriage Act prevailed over the Bill of Rights by virtue of s 4, even assuming that the heterosexual paradigm were considered discriminatory. But there was considerable disagreement about the concept of discrimination, and whether or not the Marriage Act discriminated on the basis of sex or sexual orientation.

A majority of the Court, Richardson P, Gault and Keith JJ, considered that the Marriage Act did not discriminate on either prohibited ground. Thomas J and Tipping J concluded that the Marriage Act discriminated on the ground of sexual orientation, in so far as it stigmatized same-sex couples and their relationships (Thomas J) and deprived them of the ability to enjoy the legal benefits marriage affords (Tipping J). At the end of the day, however, none of the various judgments sets out a coherent conception of the right to freedom from discrimination.[15]

According to Keith J, s 19 simply does not "reach" the question of same-sex marriages. Parliament, he asserts, would not have so altered the law in such an indirect way. But Keith J does not define the right to freedom from discrimination, and does no more than "hint" at some of its "possible positive elements".[16] The right, he argues, must be "understood and applied in a pragmatic, functional way"; it is a "complex principle which cannot always be applied in an automatic, comprehensive way"; courts must take "careful account of the context and competing principles and interests". Nowhere is Keith J's limited conception of the right — and, presumably, the Bill of Rights itself — more apparent than at the conclusion of his judgment, where he observes that "[i]t is not to be expected that [the right to freedom from discrimination] would have an instant very wide ranging effect."[17]

Gault J would limit the protection of the right to "impermissible" differentiation, while allowing for the possibility that discriminatory treatment may be justified under s 5. But there is very little meat on the bones:[18]

> Discrimination to which s 19 of the Bill of Rights Act applies is not capable of precise definition. ... But as is commonly said, to differentiate is not necessarily to discriminate. It is necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination. This is a definitional question and is to be considered before any issue of the possible application of s 5 of the Bill of Rights Act arises. Discrimination generally is understood to involve differentiation by reference to a particular characteristic (classification) which characteristic does not justify the difference. Justification for differences frequently will be found in social policy resting on community values.

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15 Richardson P considered it unnecessary to determine the meaning of discrimination, but noted that he was "not persuaded" that the right required equal legislative recognition of heterosexual and same-sex marriages. He added that he agreed with the judgments of both Keith and Gault JJ.

16 [1998] 1 NZLR 523, 556.

17 Ibid, p 571. See Keith, "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1985) 11 NZULR 307.

18 [1998] NZLR 523, 527.

Like Keith J, Gault J could not conceive of so broad a social policy change being effected by operation of the Bill of Rights.

Thomas J canvasses the nature of discrimination in a lengthy judgment in which he outlines the following approach:[19]

> The key question, then, is not whether there is a distinction but whether the distinction which exists is based on the personal characteristics of the individual or group and has the effect of imposing burdens, obligations, or disadvantages on that individual or group which are not imposed on others. Until participation in and access to the opportunities, status, social institutions and advantages available to other members of society are assured, distinctions which treat certain persons as being less worthy of concern, respect and consideration on the basis of personal differences which are irrelevant, in effect, treat them as second-class citizens. Whether or not this is so will require a comparison to be made with other individuals or groups in the appropriate social and political setting in which the law under consideration operates.

According to Thomas J, then, in order to support a finding of discrimination there must be (1) a distinction based on personal characteristics of the individual or group; and (2) a differential burden, obligation, or disadvantage imposed upon the individual or group as a result of the distinction. But the latter portion of Thomas J's remarks introduces a significant qualification: he is concerned only with distinctions that treat people as being "less worthy of concern, respect and consideration", on the basis of personal characteristics that are irrelevant. Thus, although Thomas J rejects the idea that *any* distinction violates the right, his judgment leaves much unanswered. Indeed, he glosses over the critical issue in determining whether or not a particular distinction is discriminatory when he notes that comparisons with individuals or groups in the "appropriate social and political setting" will be required. The inadequacy of this approach is magnified by his attempt to establish it as exhaustive of the application of the Bill of Rights. There are, he asserts, *no* reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.[20] This is a surprising conclusion given the structure of the Bill of Rights, and goes well beyond what was required in *Quilter*.

For Tipping J, "[t]he essence of discrimination lies in difference of treatment in comparable circumstances". Unlike Thomas J, however, he envisages a significant role for s 5:[21]

> I would prefer to define the right (that is to be free from discrimination) with the purpose of anti-discrimination laws in mind, and then consider whether any suggested limitation is justified or otherwise lawful rather than circumscribe the content of the right at the outset. ... [I]t is better conceptually to start with a more widely-defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right. Of course any such restriction or legitimation will, as is its purpose, pro tanto abrogate the right; but if restrictions which may

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19 Ibid, pp 532–533.

20 Ibid, p 540.

21 Ibid, p 576.

> be legitimate or justified in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified.

Given his conclusion that the Marriage Act overrides the Bill of Rights by virtue of s 4, Tipping J did not go on to consider the application of s 5.

In sum, the judgments in *Quilter* offer little guidance as to how the right is to be understood. This is unfortunate, but hardly surprising given the nature of the claim the Court was asked to consider. Same-sex marriage was always going to be a tough sell, and was particularly so in the absence of a body of case law under s 19. The conclusion that s 4 precluded the plaintiffs' claim from succeeding — an out seized upon even by Thomas J, who considered the Marriage Act odious public policy — rendered it unnecessary for the Court to agree upon a theory of discrimination. But the world has moved on considerably since *Quilter*. The Court's decision in *Moonen v Film and Literature Board of Review*[22] commits it to issuing declarations of inconsistency with the Bill of Rights on "appropriate occasions". Section 4, then, cannot necessarily be relied upon as providing an out. Sooner or later, the Court will be forced to return to the questions left open in *Quilter*.

Equality and discrimination under the Canadian Charter of Rights

Canadian courts have grappled with the concepts of equality and discrimination since s 15 of the Canadian Charter of Rights and Freedoms came into effect in 1985, and recent decisions of the Supreme Court of Canada provide important lessons for New Zealand.

Unlike s 19 of the New Zealand Bill of Rights, s 15 of the Charter explicitly guarantees equality on a number of grounds: individuals are equal before and under the law, and have the right to the equal protection and equal benefit of the law without discrimination. Discrimination is prohibited "in particular", and appears to exemplify rather than limit the right.[23] Nevertheless, in *Andrews v Law Society of British Columbia*[24] the Supreme Court of Canada held that the effect of s 15 was only to prohibit discrimination. In short, the Court read down the equality guarantee, and established the example as the rule.[25]

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22 CA42/99, 17 December 1999.

23 Section 15 reads as follows:
(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Subsection 15(2) provides that the right does not preclude affirmative action programmes as defined.

24 [1989] 1 SCR 143.

25 Peter Hogg has described the Court's interpretation of s 15 in *Andrews* as "the narrowest interpretation that the language will reasonably bear" ("Interpreting the Charter of Rights: Generosity and Justification" (1990) 28 Osgoode Hall LJ 817, 835). For a less temperate view, see D Beatty, "The Canadian Conception of Equality" (1996) 46 UTLJ 349.

Andrews precluded judicial consideration of a raft of equality-based claims that might otherwise have been made. Legislation invariably classifies or draws distinctions between people in one way or another: tax law draws distinctions on the basis of income earned; employment law draws distinctions on the basis of occupation; social welfare law draws distinctions on the basis of need; and so on. *Andrews* gave governments a free hand to legislate in these regards by confining the protection of the right to discrimination on the basis of the enumerated grounds and grounds analogous to those enumerated in s 15 — in general, grounds considered *personal* in character.[26] McIntyre J proffered the following definition of discrimination:[27]

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Thus, the Court refused to consider the fairness or reasonableness of a distinction in determining whether or not it was discriminatory.[28] According to *Andrews*, the fairness or reasonableness of a distinction is only relevant under s 1, when the Court considers whether or not a discriminatory distinction can be justified as a reasonable limit on the right.

Although the Court reiterated its commitment to the *Andrews* approach in subsequent cases, a serious split developed on the question of relevance. A minority of the Court held that not only must distinctions be based on an enumerated or analogous ground, they must be irrelevant to the "functional values of the legislation" in order to be considered discriminatory.[29] The majority of the Court maintained that the relevance of a distinction was merely one factor to be considered. Although these differences in approach did not affect the outcome of several controversial cases,[30] it was clear that the conflicting approaches would have to be reconciled.

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[26] So, for example, the Court subsequently rejected a challenge to provincial workers compensation legislation brought by employees, who argued that the law discriminated against them, as compared to others who might suffer personal injuries due to accidents, by denying them the right to sue for damages. See *Re Workers' Compensation Act, 1983 (Nfld)* [1989] 1 SCR 922.

[27] [1989] 1 SCR 143, 174–175.

[28] The criteria of fairness and reasonableness were suggested by McLachlin JA (as she then was) in the decision of the British Columbia Court of Appeal (1986) 27 DLR (4th) 600, 610.

[29] Provided that those functional values were themselves non-discriminatory. See *Miron v Trudel* [1995] 2 SCR 418, 442 per Gonthier J, Lamer CJ, La Forest and Major JJ concurring, and *Egan v Canada* [1995] 2 SCR 513, 530 per La Forest J, Lamer CJ, Gonthier and Major JJ concurring.

[30] See eg, *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624 (holding failure

The Court revisited the relevance issue in *Law v Canada (Minister of Employment and Immigration)*,[31] a case that concerned the constitutionality of federal superannuation legislation. The legislation provided survivors' benefits to persons 45 years of age and older, in addition to persons who were responsible for caring for the children of the deceased, or who were themselves disabled. A reduced benefit was payable to those aged 35–45, but those under the age of 35 at the time of the death of the contributing spouse received nothing until they reached 65.[32] Law, a 30 year-old, able-bodied woman without dependent children, was therefore denied a survivor's benefit on the death of her older husband. She argued that the legislation discriminated on the ground of age.

Her argument was rejected unanimously by the Court, which modified the approach it set out in *Andrews*. According to *Law*, discrimination is limited to distinctions based on the enumerated or analogous grounds that demean human *dignity*. A similar approach, as we will see, has been adopted by the Constitutional Court of South Africa. It is an approach that causes as many problems as it solves.

The relationship between discrimination and dignity

The purpose of the right to equality, according to the Supreme Court of Canada in *Law*, is to:[33]

> prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and deserving of concern, respect and consideration.

What is dignity? Iacobucci J elaborated:[34]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

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to provide sign language interpreters for deaf patients pursuant to state-run medical scheme to be discrimination on the basis of disability, and not justified pursuant to s 1); and *Vriend v Alberta* [1998] 1 SCR 493 (holding failure to include sexual orientation as prohibited ground of discrimination in provincial human rights legislation to be discrimination on the basis of sexual orientation, and not justified pursuant to s 1).

31 [1999] 1 SCR 497.

32 The plan is outlined ibid, p 510.

33 Ibid, p 529.

34 Ibid, p 530.

It is worth pausing here to note the extent to which the Court's conception of equality takes it beyond the sorts of things about which lawyers and judges might reasonably be expected to have expertise. Self-respect, self-worth, psychological integrity and empowerment are not the stuff of constitutional law; nor do they appear well suited to the judicial processes. In fact, the focus on dignity is a significant shift in the Court's thinking: fairness *is* relevant to the question whether differences in treatment are discriminatory after all, albeit that the criteria of fairness are circumscribed by the language of dignity.[35]

How is a violation of dignity to be established? Iacobucci J outlined the following approach:[36]

> [T]he focus of the discrimination inquiry is both subjective and objective: subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances. The objective component means that it is not sufficient, in order to ground a s. 15(1) claim, for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law.
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> ... [T]he relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. Although I stress that the inquiry into whether legislation demeans the claimant's dignity must be undertaken from the perspective of the claimant and from no other perspective, a court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is supported by an objective assessment of the situation. All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.

Applying this approach, Iacobucci J held that the dignity of the plaintiff in *Law* was not violated by the minimum age requirement for survivors' benefits, because the legislation neither stigmatized on account of age nor suggested that surviving spouses under the age of 45 were less deserving of concern, respect, or consideration than any others. Nor did the law withhold a benefit on the basis of stereotypical assumptions about the complainant's demographic group. Thus, the plaintiff's claim failed.

Few will be troubled by the decision to deny superannuation benefits to a 30 year-old. But the dignity-centred approach announced in *Law* has the potential to limit the protection afforded by the right considerably in future cases: in particular, it will be extraordinarily difficult for men or those supposed to be from a dominant racial, ethnic, or cultural group to establish that their dignity

[35] Iacobucci J puts the point this way: "Human dignity ... concerns the manner in which a person legitimately feels when confronted with a particular law. *Does the law treat him or her unfairly*, taking into account all of the circumstances regarding the individuals affected and excluded by the law?" Ibid, p 530, emphasis added.

[36] Ibid, pp 532–533.

has been impaired. If this occurs, protection from discrimination will become, *de facto*, the preserve of those whom the courts consider disadvantaged and in need of assistance.[37] That may well prove popular politically, but there is no doubting that it will deny the protection of the right in a variety of circumstances in which complaints might reasonably be made.[38]

Consider *Weatherall v Canada*,[39] decided by the Supreme Court prior to its decision in *Law*. In that case, a male inmate complained of frisk searches (while clothed) and being viewed naked by female prison guards, given that female inmates are subject neither to cross-gender frisk searches nor surveillance. The Court unanimously dismissed the inmate's complaint in short order, stating that it was doubtful that the right to equality was violated at all and, even if it were, the breach would be justified as a reasonable limitation under s 1 of the Charter in any event.

The complaint in *Weatherall*, like that in *Law*, was simply one to which the Court was unsympathetic. Nevertheless, the Court had to explain why the difference in treatment of male and female inmates did not constitute discrimination on the ground of sex. La Forest J did so as follows:[40]

> Given the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. Biologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same

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37 The Court denies that this is so. According to Iacobucci J: "A member of any of the more advantaged groups in society is clearly entitled to bring a s. 15(1) claim which, in appropriate cases, will be successful"([1999] 1 SCR 497, 536). My point is that few such claims are likely to be successful. Iacobucci J seems to admit as much when he says: "I do not wish to imply the existence of a strict dichotomy of advantaged and disadvantaged groups, within which each claimant must be classified. I mean to identify simply the social reality that a member of a group which historically has been more disadvantaged in Canadian society is less likely to have difficulty in demonstrating discrimination" (ibid, p 537).

38 Affirmative action is a good example in this regard. In the absence of s 15 (2), which specifically authorizes affirmative action programmes designed to ameliorate the conditions of disadvantaged individuals and groups, it would be arguable that affirmative action programmes infringe s 15(1), since such programmes treat some people less favourably than others on the basis of personal characteristics like race, sex, and so on. But *Law* renders s 15(2) largely redundant, since special programmes for the disadvantaged would never be considered to demean the dignity of those not included. This is part of the rationale proffered by Ronald Dworkin in support of his argument that the right to equal protection of the law is not violated by affirmative action programmes for racial and ethnic minorities in a university admissions process. See Dworkin, *A Matter of Principle* (1985) p 302, discussing *Regents of the University of California v Bakke* 438 US 265: "[N]o one in our society should suffer because he is a member of a group less worthy of respect, as a group, than other groups."

39 [1993] 2 SCR 872.

40 Ibid, p 877-878.

> practice by a male guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than men. The difference in treatment to which the appellant objects thus may not be discrimination at all.

Why does women's "disadvantaged position" in society justify differences in treatment for male *prisoners*, a group that is disadvantaged when compared to all free people in society?[41] La Forest J's truncated s 1 analysis shows that the Court was more concerned with equal employment opportunities for female prison guards than with any embarrassment male inmates might suffer from cross-sex searching and surveillance.[42] He downplays the inmate's complaint, noting that guards were trained to ensure that they acted with "due regard" for the dignity of the inmate, and that few complaints about searches by female guards had been received. The occasions on which a male inmate might be viewed as naked were, he said, rare and fleeting.

I have always thought that *Weatherall* is a more difficult case than the Court's unanimous decision suggests. It is clear, however, that application of the Court's new dignity-centred approach would not change the outcome of the case: *Weatherall* is referred to with approval by the Court at several points in its decision in *Law*.[43] Whatever else may be said about the Court's dignity-centred approach, then, it facilitates a substantial reduction of the protection the right might otherwise afford.[44]

Discrimination and dignity under the South African Constitution

The decision of the Constitutional Court of South Africa in *President of the Republic of South Africa v Hugo*[45] provides a further example of the way in which a dignity-centred approach can be invoked to deny a claim of discrimination. In that case, President Mandela purported to remit the sentences of women with children under the age of 12. The applicant was the father of a child under the age of 12 whose mother had died some years earlier. He sought a declaration that the pardon was unconstitutional on the basis that it unfairly discriminated against him on the ground of sex or gender. Under the South African Constitution, it fell to the state either to rebut the presumption that the distinction constituted unfair discrimination, or to justify the unfair discrimination as a reasonable limit on the right.[46]

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41 This point is made by Peter Hogg in *Constitutional Law of Canada* (1997) 970.

42 That, presumably, was the purpose of the intervention by LEAF, a women's lobby organization. Cf *Johnson v Phelan* 69 F 3d 144 (1995), Posner J dissenting.

43 *Law v Canada* [1999] 1 SCR 497, 527, 537, 539.

44 Cf *Canedy v Boardman* 16 F 3d 183 (7th Cir).

45 [1997] 4 SA 1.

46 The case was decided under s 8 of the interim Constitution, which provides as follows:
8(1) Every person shall have the right to equality before the law and to equal protection of the law.
(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual

The Court[47] accepted that the pardon was motivated by the President's concern for children and his view that mothers were more important to children than fathers. Goldstone J acknowledged that there was no evidence before the Court on this point, but saw "no reason to doubt" that mothers bear more responsibilities for child-rearing than fathers. Indeed, he went so far as to state that the generalization on which the President relied was in fact a root cause of women's inequality: "It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared."[48] Nevertheless, he considered that it was sensible for the President to take into account the way things really are in deciding who should receive the pardon, even if the pardon had the effect of reinforcing the stereotype.

Goldstone J offers two main grounds for rebutting the presumption of unfairness, one of which can shortly be disposed of. Denial of the pardon, he points out, merely deprived male prisoners of something to which they had no legal entitlement: their freedom was not adversely affected, for they were in jail because of their actions rather than anything the President had done.[49] This is irrelevant, of course, because the President's powers must be exercised in conformity with the requirements of the Constitution, regardless of the question of entitlement. President Mandela was under no obligation to pardon anyone, but once he elected to do so he was required to act in a manner that did not discriminate unfairly.

The second ground is more substantive, albeit that it is briefly asserted. According to Goldstone J, the prohibition of unfair discrimination reflects the purpose of the new constitutional order: "the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups".[50] The pardon could not be said to have "fundamentally impaired [the male inmates'] rights of dignity or sense of equal worth",[51] and so was not unfairly discriminatory. O'Regan J spoke in more general terms to the same effect: the impact of the discrimination on fathers was "far from severe"; the discrimination did not cause "substantial harm".[52]

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orientation, age, disability, religion, conscience, belief, culture or language.
...
(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

Equality is guaranteed under s 9 of the final Constitution, which for present purposes is identical. The interim and final Constitution also contain a specific right to dignity.

47 Goldstone J wrote the principal decision, with which Chaskalson P, Mahomed DP, Ackermann, Langa, Madala, and Sachs JJ concurred. O'Regan J wrote a concurring opinion; Didcott J concurred and dissented in part. Mokgoro J found that the presumption had not been rebutted, but nevertheless would have upheld the pardon as a reasonable limitation on the right pursuant to s 33(1) of the interim Constitution. Kriegler J dissented.

48 [1997] 4 SA 1, 22. Similar sentiments were expressed by O'Regan J, p 49.

49 A similar point was made by O'Regan J, and suggests a continuing reluctance to subject the prerogative to judicial review, despite the Court's conclusion that the Constitution was designed to cover it.

50 [1997] 4 SA 1, 22–23.

51 Ibid, p 26.

52 Ibid, p 50. She adds, inexplicably, that the harm "would have been far more significant

Try as I might, I cannot understand how sex can be said to be a fair basis for distributing pardons. Of course, it is not difficult to see what is going on in *Hugo*. As Goldstone J notes, male prisoners outnumber female prisoners almost 50–1:[53]

> In the circumstances it must be accepted that it would have been very difficult, if not impossible, for the President to have released fathers on the same basis as mothers. Were he obliged to release fathers on the same terms as mothers, the result may have been that no parents would have been released at all.

But this cannot be relevant to whether the difference in treatment was *unfair*. At best, it was relevant only to whether unfair discrimination could nevertheless be justified as a reasonable limit on the right.[54]

At the end of the day, the Court sanctions state action based on a stereotype, albeit in order to benefit rather than harm women as a group.[55] All women with children benefit from the pardon, though it is obvious that some may not be good parents. No men with children benefit, though it is obvious that many may be good parents, and needed by their children. The pardon was, in other words, both over-and-under-inclusive — precisely the problem with actions based on stereotypes — and Goldstone J's assertion that the pardon does not impair the dignity of fathers is inadequate to rebut the presumption of unfairness.[56] Not only is this assertion contestable[57] — *Hugo* is a much more difficult case than *Law* in this regard — but there is more to be concerned about than the impairment of dignity in any event.

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in my view if it had deprived fathers in a permanent or substantial way of rights or benefits attached to parenthood" (p 50). I say inexplicably, because the fact that things might have been worse is surely irrelevant to whether or not the actions that were in fact taken were unfairly discriminatory.

53 [1997] 4 SA 1, 25.

54 This point was made by Kriegler J, who notes that not only was this information not before the Court, but there was no evidence as to the difficulty in weighing the family circumstances of individual prisoners, or of using some other means of addressing the problem. Ibid, pp 34, 36.

55 Goldstone J states that it would clearly be unfair if the generalisation that women bear a greater proportion of the burdens of child care were to be used to justify treatment depriving women of benefits or advantages or imposing disadvantages. Ibid, p 22. Of course, it is arguable that even conferring a benefit to women on the basis of this generalisation harms women, since it reinforces the argument that mothers should have greater responsibility for child care, something the Court considered an impediment to an egalitarian society.

56 Justice Albie Sachs, a member of the Court in *Hugo*, has subsequently described the pardon as "a one-off act of generosity to various vulnerable groups, not part of a patterned course of conduct marginalizing men" ("Equality Jurisprudence: The Origin of the Doctrine in the South African Constitutional Court" [1999] Review of Constitutional Studies 76, 86).

57 Only one judge, Mokgoro J, considered that the dignity of fathers was compromised by the grant of the pardon on sex-based grounds: "The Presidential Act does not recognize the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers." ([1997] 4 SA 1, 41.) He concluded that the pardon

Discrimination under the New Zealand Bill of Rights

As we have seen, the right to freedom from discrimination in s 19 of the Bill of Rights was adopted in lieu of an equality guarantee. Moreover, unlike the Canadian Charter and the South African Constitution, the Bill of Rights prohibits discrimination only on the basis of enumerated grounds. Nevertheless, so many and varied are the prohibited grounds of discrimination since amendment of the Bill of Rights in 1993 that there is considerable scope for the application of the right in a variety of contexts. As *Quilter* demonstrates, the social policy questions the drafters of the White Paper sought to avoid are likely to arise regardless of the omission of equality from the Bill of Rights.

What, then, are we to make of the right to freedom from discrimination? Andrew Butler has argued that *any* difference in treatment based on a prohibited ground of discrimination should be considered a violation of s 19, unless justification can be established under s 5:[58]

> Section 19 of the Bill of Rights refers to "the grounds of discrimination in the Human Rights Act 1993". When one looks at the latter Act it is clear that the term 'discrimination' means 'different treatment' related to a prohibited ground pure and simple.[59] ... Thus, differentiation is the key concept and 'discrimination' must be understood in the same way in both Acts. ...[T]he task is to find different treatment of a prohibited group [sic], while under s 5 the discriminator has the burden of justifying the treatment if he or she can.

Butler's approach certainly addresses the concerns I raised about the dignity-centred approach adopted by Canadian and South African courts. It does so, however, by ignoring the need to define the right and moving directly to the question of justification for limitation of the right. The result is not simply a broad conception of the right, but a conception that is devoid of any normative content whatsoever. Thus, Butler's conclusion that the Marriage Act discriminates on the basis of sexual orientation is uncontroversial: it is an observation that a distinction has been drawn rather than an allegation of impropriety. Since he does not separate benign from malign distinctions under s 19, we cannot know whether a distinction is improper until s 5 is applied. Unfortunately, Butler does not discuss whether the traditional conception of marriage can be justified as a reasonable limitation on the right.[60]

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infringed the equality and dignity of men, by denying them the opportunity for release based upon stereotypical assumptions about their aptitude for child rearing, but went on to hold that the unfairly discriminatory pardon could be upheld as a reasonable limitation of the right, largely because of the difficulties involved in pardoning so many men.

58 Butler, "Same-Sex Marriage and Discrimination" [1998] NZLJ 229, 230.

59 The suggestion that the Human Rights Act is concerned with mere differences in treatment overstates the case. The key provisions of the Act proscribe differences in treatment "by reason of" the prohibited grounds of discrimination, a phrase that leaves room for argument concerning causation.

60 Butler criticizes Tipping J for ignoring the application of s 5, "the really hard" issue in the case ([1998] NZLJ 229, 231).

As I have said, there is more to be concerned about than distinctions that demean human dignity. At the same time, there is less to be concerned about than Butler suggests. In attempting to provide the greatest possible protection from discrimination, he ends up not only trivializing the right but expanding the reach of judicial review considerably. His approach would establish a presumption that the right is violated every time a distinction is drawn based on a prohibited ground of discrimination, regardless of the purpose or effect of the distinction. Yet a government concerned with the equality of its citizens must draw distinctions on these and a host of other grounds. Indeed, the failure to do so may result in indirect discrimination.

We need to make some assessment of the validity of a distinction before we can say that the right has been violated. The problem with Butler's approach is that it supposes that justification is only relevant to the inquiry under s 5. This leads him to gloss over the concept of the right itself. But justification is often relevant to determining the parameters of the protected rights. The right to be secure against *unreasonable* search and seizure (s 21) is a good example of explicit justificatory criteria built into the definition of a right. So is the right not to be *arbitrarily* arrested or detained (s 22), and the right not to be subjected to *disproportionately* severe treatment or punishment (s 8). The concept of justification is implicit in the right to freedom from discrimination. The right can only be understood in a relative sense, by comparing the treatment provided different individuals and groups and asking whether or not differences in treatment — deliberate or unintended — are justified. In order to answer this question, we need to develop a theory of discrimination.

Considerations of administrative difficulty, expense, and so on, will *never* be relevant to the question under s 19(1) — whether discrimination has occurred in the first place. They may well be relevant, however, to the inquiry under s 5, which is concerned with whether or not discrimination can be justified for some other reason. (The failure to separate the different contexts in which justification is relevant is one of the problems with the majority decision in *Hugo*: the majority allowed the various difficulties inherent in pardoning the larger number of male inmates to influence its decision on whether or not a distinction based on sex was itself wrongful.) We cannot refuse to define the right, or provide only a partial definition, in order to reserve a large role for s 5 given the burden it establishes on the state. Nor, as Thomas J asserts in *Quilter*, can we exclude categorically the operation of s 5 once we have defined the right. There may be few cases in which discrimination can be justified under s 5, but that is no different than the situation that obtains in regard to any other right that has a justificatory component.

Conclusion

Of all of the challenges for the judiciary under the Bill of Rights, the challenge posed by the right to freedom from discrimination is probably the greatest. We have barely scratched the surface of the claims that are likely to be made.

In the absence of a theory of discrimination, we should not be surprised to find courts reaching decisions that accord with individual judges' sense of fairness. The institutional competence of the judiciary will be a considerable

constraint on the operation of the right; so too will be concern for the political legitimacy of judicial decisions. As the various judgments in *Quilter* indicate, many judges would prefer to leave social policy decisions to Parliament — just like those who drafted the White Paper proposing the right in the first place.