

SUBSTANTIVE EQUALITY, PUBLIC POLICIES, AND DEMOCRACY: BEYOND THE RIGHT TO FORMAL EQUALITY

Igualdad sustantiva, políticas públicas y democracia: más allá del derecho a la igualdad formal

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Summary: 1. Context. 2. Formal equality and substantive equality. 3. Substantive equality, democracy and public policies. 4. Conclusion. References.

Abstract: The paper revisits the concepts of formal equality and substantive equality, proposing a critical revision toward a solidary conception that prioritizes public policies as instruments for developing a democratic society that respects minorities and promotes human rights.

Although formal equality has played a central historical role in the affirmation of the rule of law and fundamental rights, the mere declaration of the equality of all people before the law (or even equal opportunity) is not capable of providing, by itself, the realization of the democratic ideal of peaceful coexistence between different people in the various spheres of belonging in which individuals participate in social life.

Thus, implementing public policies that encourage substantive equality must be a permanent objective of any essentially democratic political organization.

Keywords: formal equality; substantive equality; democracy; public policies; human rights.

Resumen: El trabajo retoma los conceptos de igualdad formal e igualdad sustantiva, proponiendo su revisión crítica a favor de una concepción solidaria que priorice las políticas públicas como instrumentos para la construcción de una sociedad democrática respetuosa de las minorías y promotora de los derechos humanos.

Si bien la igualdad formal ha jugado un papel histórico central en la afirmación del estado de derecho y los derechos fundamentales, la mera declaración de la igualdad de todas las personas ante la ley (o incluso la igualdad de oportunidades) no es capaz de proporcionar, por sí misma, la realización del ideal democrático de convivencia pacífica en los distintos ámbitos de pertenencia en que los individuos participan de la vida social.

Mediante la implementación de políticas públicas que la fomenten, la igualdad sustantiva debe ser un objetivo permanente de una organización política esencialmente democrática.

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Palabras clave: igualdad formal; igualdad sustantiva; democracia; políticas públicas; derechos humanos.

1. CONTEXT

Equality is a protean word. It is one of those political symbols –liberty and fraternity are others – into which men have poured the deepest urgings of their hearts. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society².

Throughout the history of civilization, the right to equality has continued to be more than a dream, presenting itself, in a substantive perspective, as a true challenge whose field of action has gradually focused on designing and implementing public policies³.

The concept of equality, a pivot of extensive ideological disputes and political battles in the 19th and 20th centuries, has suffered from stress in the first few decades of the 21st century.

Thus, for example, the extensive use of information technology has generated a new segment of marginalized people: the digitally excluded. Along with the traditional income criteria and the poverty line, people began to be segregated based on the availability and access to communication and the internet.

In this already troubled scenario, with significant changes in how people relate to one another and how the workforce is structured and organized, the COVID-19 pandemic broke out in 2020, severely impacting all aspects of social life⁴, multiplying inequalities among individuals and countries.

Following the global health crisis, the terrible war in Ukraine started in 2022, swelling the streams of refugees, those who, deprived of everything, are the poorest of the poor in their search for survival and dignity.

With inequality intensified, it becomes urgent to revisit the legal notion of equality in its formal and substantive aspects and point out the special connection of the latter with public policies as suitable mechanisms to foster a less unequal society.

² SCHAAR, J. H. "Equality of opportunity, and beyond", in PENNOCK, J. R.; CHAPMAN, J., *Equality*, Atherton, New York, 1967, p. 228.

³ VAN DYKE, V. *Equality and Public Policy*, Nelson-Hall, Chicago, 1990.

⁴ MATTIETTO, L. "Disasters, pandemic and repetition: a dialogue with Maurice Blanchot's literature", *Academia Letters*, Jul. 2021, p. 1-4. Available in: <<https://doi.org/10.20935/AL1825>>. Accessed on July 24, 2021.

2. FORMAL EQUALITY AND SUBSTANTIVE EQUALITY

As an accomplishment of constitutionalism, formal equality, praised in the declarations of rights and the constitutions, played a vital historical role in the search for overcoming the unequal treatment of people before the law.

Formal equality gave way to the so-called equal opportunity, which varnished the precept with an ideological hue, barely palpable in factual reality, in favor of a hypothetical meritocracy with a propensity to leave behind the weakest people.

Nevertheless, equality of opportunity “[...] is not enough. It does not protect those who are less gifted, or less ruthless, or less lucky, from becoming objects of exploitation for those who are more gifted, or ruthless, or lucky”⁵.

It is a poor tool in that, whereas it seems to defend equality, it really only defends the equal right to become unequal by competing against one's fellows. Hence, far from bringing men together, the equal opportunity doctrine sets them against each other. The doctrine rests on a narrow theory of motivation and a meager conception of man and society. It reduces man to a bundle of abilities, an instrument valued accordingly to its capacity for performing socially valued functions with more or less efficiency. Also, the doctrine leads inevitably to hierarchy and oligarchy, and tries to soften that hard outcome by a new form of the ancient argument that the best should rule⁶.

Furthermore, if reduced to a formal sense:

[...] the principle of equality would end up being translated into a simple principle of the prevalence of the law in the face of jurisdiction and administration. Consequently, it is necessary to outline the principle of equality in a material sense. This does not mean that the principle of formal equality is not relevant or correct. It only highlights its biased tautological nature “since the core problem remains unresolved, namely, knowing who is equal and who is unequal”⁷.

Substantive equality, as a model of a just society, emerged in tandem with the redefinition of democracy as a regime that not only catalyzes the will of the majority and ensures individual freedom but also provides essential protection for minorities.

Democracy, under the sign of equality, cannot be reduced to a network of franchises⁸. It must be able to forge a good route for developing public policies linked to fundamental rights.

On that account, “[...] the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for

⁵ POPPER, K. *The open society and its enemies*, Princeton University Press, Princeton, 2013, p. 335.

⁶ SCHAAR, J. H. “Equality of opportunity, and beyond”, in PENNOCK, J. R.; CHAPMAN, J., *Equality*, Atherton, New York, 1967, p. 241.

⁷ CANOTILHO, J. J. G. *Direito Constitucional e Teoria da Constituição*, 4. ed., Almedina, Coimbra, 2000, p. 417-418.

⁸ COELHO DE SOUZA, D. *Interpretação e democracia*, 2. ed., Revista dos Tribunais, São Paulo, 1979, p. 147.

themselves”⁹.

Going beyond formal safeguards, the democratic state promotes the inclusion of those discriminated against based on gender, sexual orientation, origin, race, and income¹⁰. In honor of the fundamental rights set out in the constitution (although sometimes with regrettable delay and different levels of protection), emancipatory public policies are multiplied.

Human rights align with a renewed ethical personalism, proclaiming that certain essential rights concern everyone.

*Ethical personalism [...] identifies in the human being, precisely because he is a person in the ethical sense, a value in himself, the dignity, from which it follows that every man has, concerning every other, the right to be respected as a person, not to be molested in his existence. The relationship of mutual respect that everyone owes to the other is the fundamental legal relationship, the basis of all coexistence in society and each legal relationship in particular*¹¹.

This postulate, however, has not existed universally, given the genocides and ethnic cleansings perpetrated against humanity, despite all the religions and philosophies based on loving one’s neighbor.

The unity of this ethos can appear only with “a difficult navigation between two rocks”: one being uniformity – because recognizing that all men are equal does not mean that they are equal everywhere and because the nation-state itself is “a matrix of minorities” – and one being heterogeneity, provided that:

*[...] the autonomy of cultural particularities can only be relative, especially in a vibrant world of migratory flows. When exacerbated, it leads to conflicts and reintroduces inequality and oppression under the mask of the right to be different*¹².

Equality is not only the attribution of the same rights to all people but also “a means of compensating for social inequalities” in a context that denotes an unequal order, of which the state inevitably historically takes part¹³.

The evolution of our societies leads individuals to live simultaneously or successively in multiple pertinences, from the family circle to supranational ensembles [...]. This phenomenon has always existed, more or less. Nevertheless, its distinguishing feature today consists of its complexity and extent: the intermediate groups within which we evolved are probably more numerous than those in most traditional societies; immigration clashes with

⁹ DWORKIN, R. *Taking rights seriously*, Harvard University Press, Cambridge, 1977, p. 199.

¹⁰ BANDEIRA DE MELLO, C. A. *O conteúdo jurídico do princípio da igualdade*, 3. ed., Malheiros, São Paulo, 2000, p. 18.

¹¹ MATTIETTO, L. “Dos direitos da personalidade à cláusula geral de proteção da pessoa”, *Revista Fórum de Direito Civil*, Belo Horizonte, n. 16, set./dez. 2017, p. 13-14.

¹² ROULAND, N.; PIERRÉ-CAPS, S.; POUMARÈDE, J. *Direito das minorias e dos povos autóctones*, UnB, Brasília, 2004, p. 11.

¹³ TOURAINE, A. *O que é a Democracia?*, 2. ed., Vozes, Petrópolis, 1996, p. 37.

cultures – in that sense, we are all, at some point, a minority¹⁴.

A minority is not a number, but a social characteristic. Everyone is, at some time and in some space, part of a minority group in the complex web of social relations and multiple subjective pertinences.

3. Substantive equality, democracy and public policies

Formal equality and substantive equality are not two sides of the same coin. Currently, the defense of strictly formal equality triggers the erosion of substantive equality, with the refusal of transformative and emancipating public policies that could lead to a genuine democratic rule of law.

An individualist thought inspired formal equality¹⁵, linked to the economic dimension in affirming the first fundamental rights. It was also associated with the development of capitalism when contemporary states emerged.

Meanwhile, shaped by a solidarity logic¹⁶, substantive equality seeks to reflect the existential dimension of humanity: a universal nature where human rights are presented as a normative expression. Thus, “the universality of human rights constitutes a normative claim on the mode of organization of political and social relations in the contemporary world”¹⁷.

It is, therefore, attainable that:

*[...] a further general value of the principle of solidarity can be learned. This principle is the founding reference of the new concept of citizenship and is understood as the set of rights that accompany the person wherever he is. Its recognition is a function precisely of a logic of solidarity, which generalizes the inclusion of the other by reinforcing the same reference to the principle of equality*¹⁸.

The shaping of democracy – on the horizon of the severe crisis of political institutions’ legitimacy – depends on achieving public policies¹⁹ that put substantive equality into practice.

The search for foundations of power (and obedience) within the scope of reason itself, avoiding concepts such as fear – timor fecit regnum – or tradition, renewed with

¹⁴ ROULAND, N.; PIERRÉ-CAPS, S.; POUMARÈDE, J. *Direito das minorias e dos povos autóctones*, UnB, Brasília, 2004, p. 607.

¹⁵ MOUNIER, E. *Le personnalisme*, 16. ed., Presses Universitaires de France, Paris, 1995, p.32.

¹⁶ DUVOUX, N. *Le nouvel âge de la solidarité: pauvreté, précarité et politiques publiques*, Éditions du Seuil, La République des Idées, Paris, 2012, p. 7-10.

¹⁷ HOGEMANN, E. R. “Human Rights beyond Dichotomy between Cultural Universalism and Relativism”, *The Age of Human Rights Journal*, n. 14, 2020, p. 32. Available in: <<https://doi.org/10.17561/tahrj.v14.5476>>. Accessed on October 15, 2022

¹⁸ RODOTÀ, S. *Solidarietà: un’utopia necessaria*, Laterza, Bari, 2014, p. 33.

¹⁹ INGRAM, H.; SCHNEIDER, A. L. “Policy analysis for democracy”, in MORAN, M.; REIN, M.; GOODIN, R. E. *The Oxford Handbook of Public Policy*, Oxford University Press, Oxford, 2006, p. 171-172.

Rousseau the idea of the contract, legitimizing coexistence and sovereignty [...]. With liberalism, founded on references to contracts and individualities, the state was legitimized on account of its own rationally required limitation. In this way, legitimacy, losing its ancient divine touch and historical fascination, was found in the form of elaboration of power itself: convergence of wills, acquiescence of obedience, and delimitation-denial of power as such²⁰.

The legitimacy of state action should not be found, however, by denying the state itself but positively by promoting substantive equality as a vector in the human rights framework.

To justify and legitimize the state's very existence and survival, the allocation of budget resources must consider programs to reduce inequalities²¹.

It should be noted that “democracy is not arithmetic: it is measured by the degree of diversity it is willing to recognize and is capable of generating. The fact that authoritarian regimes define themselves by the inverse rule and practices is proof of this”²².

Education demands special attention in favoring a society that intends to be truly fair and more egalitarian:

[...] resources for education are not to be allotted solely or necessarily mainly according to their return as estimated in productive trained abilities, but also according to their worth in enriching the personal and social life of citizens, including here the least favored. As society progresses, the latter consideration becomes increasingly more important²³.

Education encompasses caring for people and constantly renewing knowledge²⁴. In higher education, it is particularly strategic to indicate the furtherance of universities regarding public policies, knowing that:

a range of factors shape the contemporary university, such as interests beyond both the nation-state and the academy that exercise influence, such as foreign states, industry, and other powerful stakeholders; 2. in the face of rhetoric of the deregulation and internationalization of higher education, there is a continuing role for the nation-state in shaping and supporting the university; and 3. our framework can guide future critical analysis of public policy towards universities and future empirical research²⁵.

²⁰ SALDANHA, N. Da teologia à metodologia: secularização e crise no pensamento jurídico, DelRey, Belo Horizonte, 1993, p. 68-69.

²¹ BOZIO, A.; GRENET, J. *Économie des politiques publiques*, La Découverte, Paris, 2017, p.20-23.

²² ROULAND, N.; PIERRÉ-CAPS, S.; POUMARÈDE, J. *Direito das minorias e dos povos autóctones*, UnB, Brasília, 2004, p. 606-607.

²³ RAWLS, J. *A Theory of Justice*, Harvard University Press, Cambridge, 1971, p. 107.

²⁴ MATTIETTO, L. “Pós-graduação em Direito: locus para a compreensão crítica da judicialização de políticas públicas”, in MENDONÇA, P. R. S. (org.), *Judicialização de políticas públicas: a visão dos juristas*, Multifoco, Rio de Janeiro, 2020, p. 12.

²⁵ GUNN, A.; MINTROM, M. *Public Policy and Universities: The Interplay of Knowledge and Power*, Cambridge University Press, Cambridge, 2022, p. 2.

It is, consequently, essential to understand the obstacles inherent to the core public policies by seeking to improve them and proposing solutions to the identified problems.

[...] public policies do not exist in a vacuum; they are immersed in the world of law and mixed with infinite norms and legal acts – antagonistic, strange to each other, from different eras, and with incoherent language that is impotent or incomplete²⁶.

As the delayed effects of norms, acts, and interpretations of the past may compromise the evaluation of public policies, perceiving the value of substantive equality is convenient because it gives force to democratic coexistence and social justice.

Considering “the value of equality still needs specification if it is to serve as a guide for action through public policy”, it could be better understood as *equal outcomes* rather than equal opportunity²⁷.

Given its complex ethical and social aspects, there is no “one-size” solution²⁸. It is useful instead to stipulate a four-dimensional framework of aims and objectives:

Firstly, the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic. Third, it should enhance voice and participation, countering both political and social exclusion. Finally, it should accommodate difference and achieve structural change²⁹.

Strictly formal equality would not be appropriate to sustain relevant public policies, such as gender equity, the reception of refugees, affirmative actions for university and public service admission, minimum income programs, and so many others that substantive equality encourages.

Therefore, public policies must emphasize the substantive meaning of equality and avoid the embarrassment of its formulation and implementation resulting from an anachronistic attachment to the merely formal concept.

4. Conclusion

We have the right to be equal whenever difference diminishes us; we have the right to be different whenever equality mischaracterizes us³⁰.

²⁶ SUNDFELD, C. A.; ROSILHO, A. “Direito e Políticas Públicas: Dois Mundos?”, in SUNDFELD, C. A.; ROSILHO, A. (orgs.), *Direito da Regulação e Políticas Públicas*, Malheiros, São Paulo, 2014, p. 72.

²⁷ REIN, M. “Reframing problematic policies”, in MORAN, M.; REIN, M.; GOODIN, R. E. *The Oxford Handbook of Public Policy*, Oxford University Press, Oxford, 2006, p. 391.

²⁸ WOLFF, J. *Ethics and public policy*, 2. ed., Routledge, London, 2020, p. 174.

²⁹ FREDMAN, S. “Substantive equality revisited”, *International Journal of Constitutional Law*, v. 14, n. 3, jul. 2016, p. 727.

³⁰ SOUSA SANTOS, B. “A construção multicultural da igualdade e da diferença”, *Oficina do Centro de Estudos Sociais*, Coimbra, jan. 1999, p. 44.

Despite its historical importance for the containment of state power and consecration of the first fundamental rights, the establishment of a merely formal notion of equality does not meet the current needs of the democratic regime's configuration.

Democracy presupposes the recognition of diversity and the protection of minorities in view of the countless spheres of belonging to which the subjects of law are bound.

Public policies aimed at promoting human rights contribute decisively to establishing the foundations of living together with dignity and assessing the legitimacy of state action.

In favor of all minorities, the oppressed, and those whose dignity is at permanent risk, it must be asserted that substantive equality will never cease to be one of the central objectives of any essentially democratic political organization.

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