

What is the role of law in ensuring equality of opportunity in society?

By Beatrice Munro

Equality of opportunity is a Liberal concept which entails that individuals should have equal access to opportunities that provide advantage. Two types of equality of opportunity can be identified: formal and substantive. Formal equality of opportunity is most clearly the province of the law; attempting to achieve substantive equality of opportunity would be best done with an alternative instrument.

Equality of opportunity as a general principle is one that society should strive for. It aligns with values of justice and fairness and the anti-aristocratic notion that those best placed to gain positions of power are not simply those born into the highest caste. Instead, individuals should be able to rise through society, as diversity of thought and experience is valuable. Equality of opportunity maintains a hierarchy, however, as although individuals are offered the same opportunities, only some will be able to rise to the task. This is in contrast to the socialist notion of equality of outcome, in which individuals receive the same outcome, regardless of aptitude. Equality of outcome is highly inefficient as it wastes society's talent by requiring all individuals to have the same outcome. It also does not ally itself with justice or fairness, as it is not valid to limit some individuals in order to ensure that all are equal. It is also unrealistic: expertise is always required, therefore individuals' outcome will always be unequal. Equality of outcome does, however, recognise the advantages afforded to some in society from an early age, and that to achieve equality these disparities must be remedied. It is proposed that equality of opportunity's two forms (formal and substantive) are better placed to promote a more equal society than equality of outcome.

Formal equality of opportunity requires that "positions and posts that confer superior advantages should be open to all applicants."¹ Applicants are assessed on their merits, and the applicant deemed most qualified according to the appropriate criteria is offered the position. Formal equality of opportunity is evidenced in UK law in the Equality Act 2010, which aims to outlaw discrimination in

¹ Arneson, Richard, "Equality of Opportunity", The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2015/entries/equal-opportunity/>

hiring practices and in the workplace on the basis of certain “protected characteristics”.² This form of equality of opportunity is limited, however. It is restricted purely to public life, and overlooks structural inequalities that may restrict someone from even reaching the interview stage.

The role of the law in ensuring formal equality of opportunity is clear: the law is generally justified in interfering in public life, and formal equality of opportunity has significant policy concerns validating it (fairness and justice). It is also easy to implement via the law’s system of accountability: for example, anti-discrimination legislation can be upheld by employment tribunals. Moreover, the general societal consensus that discrimination is bad can lead to the exposure of companies in the mainstream press; indicating that formal equality of opportunity also goes further than the law. What formal equality of opportunity and its implementation in the law fail to do is to look behind the protected characteristics to the structural inequalities that render them disadvantageous. Substantive justice is arguably better placed to address these existing inequalities.

Substantive equality of opportunity aims to reduce “the competitive advantages that favourable circumstances confer on some individuals”.³ It attempts to bridge the gap between an individual’s circumstances and the opportunity that they should be able to reach. John Rawls described this as “fair equality of opportunity”.⁴ This is rationalised by justice concerns: one should not be limited by upbringing and that society will be improved if the best people lead it, regardless of their background. It can be distinguished from equality of outcome on the basis that it is still individuals’ ability that separates them, but in substantive equality of opportunity, all have equally been given the chance to attempt to progress. Substantive equality of opportunity faces three key challenges: interaction with private life; the limit of the ability of the law to effect social change; and who determines how substantive equality of opportunity is implemented.

Formal equality of opportunity is concerned purely with the public sphere. It justifies the Equality Act 2010, anti-discrimination legislation and is validated by a liberal societal consensus that people deserve

² Equality Act 2010

³ Arneson, Richard, "Equality of Opportunity", The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2015/entries/equal-opportunity/>

⁴ Rawls, John. A Theory Of Justice, Revised Edition. Oxford: Oxford University Press, 1999

to be treated equally. Substantive equality of opportunity requires the law to expand into the private sphere. This is, however, not a conclusive point. The law intervenes in many private areas of life for justifiable policy reasons: for example, the protection of autonomy and bodily integrity in sexual offences legislation.⁵ Such intervention needs to be limited and timely to ensure that the law does not overreach.

A key example of private life is parent and child. This relationship is protected by article 5 of the Human Rights Act 1998, the right to private and family life, but not absolutely. It may be interfered with on the basis of justified policy concerns such as abuse, neglect or, it is proposed, to ensure substantive equality of opportunity. It is the early stages of life that are formative, and at which significant inequalities are ingrained. Such inequality-inducing behaviours include reading to a child (promoting cognitive development), providing a stable home environment (reducing health concerns) and paying for private schooling (providing better education and connections). For the law to provide substantive equality of opportunity, parents' actions would be prescribed, or at least regulated. This level of control would go far beyond restricting options; it would inhibit choice. This operation of the law would constitute overreach, as its remit is unlimited and encompasses the whole of childhood. It also does not provide realistic law-making. A law so tyrannous would not be practicable in a democratic society: it simply would not be obeyed.

It is also difficult to see the difference between this example of substantive equality of opportunity and equality of outcome. It depends on at what stage of an individual's life one would stop requiring the law to provide substantive equality of opportunity. In attempting to ensure that all children have the same childhood education, all receive the same outcome. If this was continued into adulthood, it would simply constitute equality of outcome. There has to be a point at which the law would enable individuals to take the opportunities provided and use their own talents. Deciding at what point this is would be highly contentious, and perhaps jeopardise the aims of substantive equality of opportunity in the first place.

⁵ Sexual Offences Act 2003

Secondly, the law is not the correct instrument with which to attempt to implement substantive equality of opportunity. Such use of the law would be coercive: substantive equality of opportunity would be less autonomy-denying if enacted via policy measures such as closing private schools, redistributive taxation and public-owned amenities. Although, it is acknowledged that to achieve true substantive equality of opportunity, such measures would not be enough. Not only is the law a coercive instrument, it also does not address the underlying social structures which would remain intact. For example, a parent might be mandated to read their child a bedtime story, but the parent could still read a girl “The Little Princess” and a boy “The Strong Knight”. While these children may have been afforded the same opportunity, their socialisation might still limit their aspirations, preventing true substantive equality of opportunity.⁶ The law is a blunt instrument when faced with ingrained societal practices.

Perhaps what is required is a system of social change. This could potentially be implemented via a more stringent version of substantive equality of opportunity: state-prescribed books for example. But it is likely that this would also just simply reinforce existing social practices. As discussed below, if those attempting to implement substantive equality of opportunity do not recognise the need for it to be anti-discriminatory, the policy is destined to fail on its own terms. Therefore, significant social change would be required before the law could be used to implement substantive equality of opportunity within society.

The final challenge that faces the law enabling substantive equality of opportunity is the law-making process itself. To ensure that the substantive equality of opportunity aimed for is non-tyrannous and rejects society’s rigid prejudices (if this is even possible) the individuals drafting such a bill would have to be chosen on the basis of equality of opportunity. The civil service prides itself on being meritocratic, yet 44% of its members attended independent schools, in comparison to 7% of the UK’s population as a whole.⁷ Moreover, politicians do not embody John Rawls’ notion of democratic equality of fair opportunity. The law is not the correct instrument, and substantive equality of opportunity is perhaps not the guiding principle anti-discrimination activists and lawyers should be looking for. Even if those

⁶ Freidan, Betty. *The Feminine Mystique*, 1963

⁷ The Sutton Trust, *Elitist Britain* 2019. <https://www.suttontrust.com/our-research/elitist-britain-2019/>

in power were truly representative of all backgrounds, the weaknesses of substantive equality of opportunity regarding its relationship to private life and social mores is too great to overcome. State-enforced equality is generally ineffective or despotic: an intermediate position between formal and substantive equality of opportunity should instead be sought after.

One possible intermediate option focusses on redistributive justice to bridge the existent inequalities. This combines “formal equality of opportunity with the requirement that present effects of past wrongful violations of formal equality of opportunity should be fully offset”.⁸ This could be implemented by the law via positive discrimination in employment; increasing the number of employees in a particular category to make up for a historic lack of. After historic inequalities are removed, this theory would then resort back to formal equality of opportunity. This sounds effective in principle, as the issues of privacy are side-stepped in favour of maintaining the law’s remit as the public sphere. But, this theory fails to address the core inequalities that are present within society from an early stage. It acknowledges inequality without truly solving it: an individual hired under positive discrimination may suffer from “imposter syndrome” or be unequipped to handle the role. Other policies, such as reparation payments for historic wrongs, could provide support for marginalised groups, but this is not the role of the law. Ultimately, this theory provides a sticking-plaster for inequalities that are too great to attempt to fix at the stage of employment: earlier intervention is required.

The endorsed intermediary theory “combines formal equality of opportunity with the additional requirement that society provide good enough opportunities for all its members to develop their native talents so as to become qualified for competitive positions.”⁹ Here the law intervenes at an earlier stage than the previous proposition. This theory assumes that there is a threshold level of opportunity at which talents are transformed into skills, to which all are entitled. This chimes with the policies of the Welfare State, such as universal education and healthcare. The difficulty here, however, is demarcating the line of “good enough opportunities”. This insinuates a baseline to which all would have access, but

⁸ Arneson, Richard, "Equality of Opportunity", The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/sum2015/entries/equal-opportunity/>

⁹ Id

which some might exceed. Standardisation is therefore required: redistributing the best teachers across the whole country rather than being concentrated in a few schools, for example. A consequence of this may be widespread mediocrity; a kind of bland uniformity reminiscent of authoritarianism. But, anyone who has been taught knows that a good teacher stands out from a bad one: there is little risk of homogeneity unless a form of teaching is mandated. This theory does require some hope: that sharing resources, encouraging children in their early years, will make a difference.

Ultimately, however, this theory does fall foul due to the limitations of the law. The law remains an inadequate instrument to provide good enough opportunities for members of society. Such a theory would have to be implemented via education policy and a significant expansion of state power to organise a national program. In contrast to the implementation of purely substantive equality of opportunity, in this middle way, the state would be justified in reaching into the private sphere. Its strength would be limited: its main concern being education policy. It is accepted that the issue of socialisation remains. As stated, only with significant societal change would this situation be altered. Finally, such a shift in education policy does not seem beyond the reach of the current political class, even considering its demographic makeup. This proposal is not exceedingly radical, but it does remain the province of policy, not law.

To conclude, the role of law in ensuring equality of opportunity in society should purely be restricted to formal equality of opportunity. To attempt to achieve substantive equality of opportunity, or some intermediate position between the two is potentially a recipe for tyranny and, importantly, not the law's territory. Equality of opportunity remains a noble ideal to strive for, but the law's role in ensuring it should be limited.