

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

**By Jenson Davenport**

The concept of equality of opportunity finds itself tied to many facets of society, in both public and private spheres. Many conceptions of equality of opportunity are wholly procedural in practice, seeking to tackle discrimination in the workplace and ensuring that arbitrary decisions are not being made. Equality of opportunity exists in a society where people of similar ability are given an equal chance of succeeding in whatever they choose to do regardless of the social and economic circumstances of themselves or their family. This essay will consider the role that the law plays in ensuring this. Part I shall consider the theoretical concepts underpinning equality of opportunity. Part II will then consider to what extent and in what capacity the law does or should ensure equality of opportunity, applying theories of equality of opportunity to inheritance tax and education. Part III will end the essay with a comparative analysis of legislation and policies enacted in the name of equality of opportunity. Through this analysis, it will become clear that even in its most controversial forms, equality of opportunity is something to be desired within society, with the law acting subsidiary to government policy.

### **Part I: Equality of Opportunity as a Concept**

Equality is not a new idea. Aristotle concluded that alike cases should be treated alike, and unlike cases being treated unlike. An Aristotelian definition, however, describes a purely formal conception of equality containing the principle of equal treatment and of non-discrimination. Westerman presents two meanings to the principle of equal treatment, one of equal distribution of resources and another of consistent application of rules.<sup>1</sup> She writes that “whereas the principle of equal treatment requires the decision-maker to apply rules, the principle of non-discrimination requires these laws to apply to mankind as a whole and prohibits unjustified distinctions.”<sup>2</sup> What neither principle does, however, is to suggest the correct distribution of resources according to notions of equality. The principle of equal treatment may

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<sup>1</sup> Westerman, *The Uneasy Marriage Between Law and Equality* *Laws* (2015) <https://doi.org/10.3390/laws4010082>

<sup>2</sup> *Ibid* 85

be defended on the grounds that its application, in theory, prohibits arbitrary decision-making by political actors or private individuals (when considering its application in the workplace for instance) which in turn promotes legal certainty and social stability. This is the formal conception of equality of opportunity, where arbitrary and irrelevant characteristics of a person unrelated to their merit are to be disregarded when considering a person's prospects of success. This is strongly exemplified by current anti-discrimination legislation prohibiting factors such as race or gender from being considered when deciding or planning something, whether that be the decision to hire somebody or to grant somebody council housing. Equality of opportunity insists that all members of society are equally valuable; as all people are valued as equal, so too are their goals and choices.

The formal conception of equality however suffers from a large deficit, both in practice and in principle. By focusing itself on its procedural virtues, it ironically fails to account for the positions that individuals find themselves in: it fails to answer how resources are to be – if they are to be - (re)distributed within society to ensure equality of opportunity in practice. Likewise, whilst it directs decision-makers how they must *apply* rules, it does not direct how the rules themselves should be made, to whom they should apply and what resources are to be allocated. Therefore, the limits of formal equality of opportunity must be remedied by a more substantive conception which, in its most radical form, requires equalizing the *starting point* or *the outcome*.<sup>3</sup> Victoria, Australia, for instance, has codified elements of substantive equality into its Equal Opportunity Act 2010 in the form of “special measures” and “reasonable adjustments” where preferential treatment for marginalized groups is given in the form of recruitment programs designed to increase representation. Such elements are also present within international legislation, with the principle of “reasonable adjustments” being a central concept to the Convention on the Rights of Persons with Disabilities.<sup>4</sup> Substantive equality recognizes differences between people and accommodates accordingly. It is no surprise therefore that using elements of substantive equality can be a controversial matter, as it

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<sup>3</sup> Allen, Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (Vic) (2020) 44 Melb U L Rev 466

<sup>4</sup> Adopted by the UN in 2006

aims to shake up the status quo and potentially disadvantage those that are, through the genetic lottery, the most privileged and powerful in society.

John Rawls' "luck egalitarianism" argues that equality of opportunity must account not only for economic inequalities but also for the many individual characteristics that make up opportunities in society. Through his "veil of ignorance", Rawls focuses on the equality of members of society *from the outset*, arguing that material resources must be made available to all individuals in "approximately equal amounts" before true equality of opportunity is attained, again failing to ascertain what is to be made available and specifically to whom. From Rawls, different ideas concerning equality of opportunity have arisen, with "resource egalitarians" arguing for a high level of resource distribution, compensating the disabled for additional expenses incurred for wheelchairs, medical bills etc. Fleischer identifies that for the various conceptions of equality of opportunity, there are two common threads which create the link between them: A tolerance of unequal outcomes due to choices and an intolerance of unequal outcomes stemming from the chance circumstances of one's birth.<sup>5</sup> Fleisher gives weight to the notion of "choice." A person does not choose their circumstances; thus, only their choices should impact their success, not the position they found themselves in at birth.

## **Part II: Equality of Opportunity as a Goal**

Conceptually, there is much to be valued in equality of opportunity. As a society, we take pride in valuing the principle of equality. However, this is far from the reality of society, with wealth inequality as prominent now as it ever has been; linked to systemic racism and conservative economic policies which do not seek to redistribute wealth. Bird-Pollan, when introducing the topic, writes that "equality of opportunity is at the heart of American political thought."<sup>6</sup> Ideals such as the American Dream rest upon the notion of equality of opportunity, which is something lacking within European thought. If equality of opportunity is the goal set by a society – or a legislature – then how could it be realized? A revised system

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<sup>5</sup> Fleischer, Equality of Opportunity and the Charitable Tax Subsidies (2011) 91 BU L Rev 632

<sup>6</sup> Bird-Pollan, Unseating Privilege: Rawls, Equality of Opportunity and Wealth Transfer Taxation (2013) 59 Wayne L Rev 716

of taxation would be the first step in the right direction, focusing on the redistribution of wealth and targeting the wealthiest most. Bird-Pollan analyzes the American estate tax from a Rawlsian perspective, writing Rawlsian equality of opportunity “is consistent with... a heavy wealth transfer tax in order to ensure justice within a society.”<sup>7</sup> Her thesis proposes that high wealth transfer taxes are well suited to achieving equality of opportunity as they are often made between family members, demonstrating the advantage of being born into a wealthy family. Equality of opportunity, if it is to be achieved in all facets of society for all people of society, can and should lead to the imposition of radical policies such as this. Unfortunately, policies such as these, when largely affecting the middle-class, often poll incredibly unpopular, with most people favouring a higher threshold for inheritance tax. If equality of opportunity is to be the goal of a legislature, policies enacted must be gradual whilst also strong enough to create the foundation for further policies to be enacted.

More uncontroversial policies take the form of investing in education and local authorities. In this way, equality of opportunity takes shape indirectly through the allocation of funds to public institutions that can invest or divest the money locally in order to improve the quality of schools, businesses, hospitals etc. For equality of opportunity to be achieved in any meaningful sense, it will take more than legislation which usually takes the form of prohibiting discrimination or compelling political actors to apply certain factors to be given consideration before coming to their conclusions. Instead, investing in the communities that suffer highest from wealth inequality should create a foundation for equality of opportunity, whilst also being politically viable. In his book, *Black, Listed*, Jeffrey Boakye writes about wealth inequality within black communities, writing that “poverty is a defining characteristic of the black experience.”<sup>8</sup> Investment into such communities and an increase in public spending moves us into the realm of the political and thus highlights the main deficit that the law has in ensuring equality of opportunity. Anti-discrimination legislation often is not “goal” oriented – it does not seek to achieve the goal of equality of opportunity, only to prevent discrimination which indirectly can lead to further equality of opportunity by creating an

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<sup>7</sup> Ibid 740

<sup>8</sup> Boakye, *Black, Listed*, (published by Dialogue Books, 2019) 49

environment where decision-makers are compelled to decide in a certain, fairer manner. The legislation often imposes duties upon authorities which are not stringent enough to create a ripple of change within society, as discussed within Part III. Therefore, the role that the law currently plays in ensuring equality of opportunity is largely (if not wholly) only in a formal capacity, and any realistic substantive redistribution of wealth and resources to create a level playing field would likely be subject to government policy. The law as a subsidiary could however help to remedy deficits which substantive equality falls victim to, such as clearly defining or aiding interpretation as to how  $x$  resources are to be allocated to  $y$  people with  $z$  characteristics.

### **Part III: Equality of Opportunity as a Reality**

In many jurisdictions, equality of opportunity is a value sought after to at least some degree. Mostly, this can be found in the form of anti-discrimination legislation but may also be evident from certain provisions or interpretations of the Constitution. In the UK, the Equality Act 2010 is the most well-known example of anti-discrimination legislation, continuing the progress made by the Race Relations Act 1976. Section 71 of the 1976 Act, as amended by the Race Relations (Amendment) Act 2000, created a new positive duty on every local authority to make appropriate arrangements to aid the elimination of unlawful racial discrimination and to *promote* equality of opportunity between persons of different racial groups. This obligation placed upon local authorities was increased through the enactment of section 149(1) Equality Act 2010, known as the Public Sector Equality Duty (PSED) which provided that a public authority must have due regard to the need to *advance* equality of opportunity “between persons who share a relevant protected characteristic and persons who do not share it.” The choice of “advance” replacing “promote” within the section is no accident: the PSED is intended to positively further equality of opportunity rather than create an environment in which it might germinate. It is, however, a limited duty, with English jurisprudence suggesting that “the duty is not a duty to achieve a result, namely, to eliminate unlawful racial discrimination... it is a duty to have due regard to the need to achieve these goals.”<sup>9</sup> Olatokun

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<sup>9</sup> *Baker v SS for Communities* [2008] EWCA Civ 141 [31]

concludes that “At best the duty ensures that sufficient work is done to understand the impact that policies will have on underserved groups, rather than prioritise steps that will benefit those groups when given alternative options.”<sup>10</sup>

Italy has sought to engrain principles of equality and solidarity into its constitution through Article 3 of the 1948 Constitution, the first paragraph entitling Italian citizens to formal equality, the second to substantive equality. Article 3.2 affirms that “it is the *duty* of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens...” providing equality of opportunity with real constitutional protection, and in turn granting the citizen the *right* to equality of opportunity for which the Republic owes a corresponding duty. The practical consequence of Article 3.2 is that any legislation which does not conform with the principle established may be subject to a *questione di legittimità costituzionale* whereby the Constitutional Court will refuse to apply the offending legislation on account of its incompatibility, thereby acting as an *a posteriori* safeguard to prevent the legislature legislating without due regard to the removal of social or economic obstacles. Using the constitution in order to promote principles of equality helps define what the Italian Republic strives to be. In doing so, it changes the way Italians see themselves and one another, strengthening a principle of solidarity within the country. Arban defines the principle as a “shared value for citizens... that helps define their identity, the functioning of the state as well as other fundamental values.”<sup>11</sup> A society that sees itself as many individuals rather than one body will be less likely to respond well to policies of equality of opportunity which, either directly or indirectly, will negatively affect them.

In both the UK and Italy, specific pieces of legislation aim to promote equality of opportunity. In the Scandinavian countries, however, it may be argued that the structure of the State itself creates the conditions for equality of opportunity to thrive. Greatly reducing wealth inequality is the only way equal opportunity can be achieved. Sørensen argues that the two characteristics of the social-democratic welfare state which have played a role in these are 1) a lower social and economic inequality throughout the

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<sup>10</sup> Olatokun, Does The Law Think That Black Lives Matter? (2021) <https://doi.org/10.1080/20508840.2021.1909367> 83-95

<sup>11</sup> Belser et al. The Principle of Equality in Diverse States, 108

country and 2) having family policies aimed at equalizing conditions for children during their formative years.<sup>12</sup> The Scandinavian countries to differing extents aim to provide widespread availability of parental leaves and high-quality childcare facilities at a reasonable price. Sweden, for instance, grants parents a combined 480 days of paid parental leave. As suggested in Part II, the most effective way of achieving equality of opportunity may not in fact be through legislation, but rather structural societal reforms through investment and higher taxes/redistributions of wealth.

### **Conclusions**

This essay has discussed the concept of equality of opportunity in both the abstract and the concrete. It has sought to bring about a case for radical political reform in the form of taxation and investment in the public sector, whilst also suggesting that the role the law plays is merely subsidiary in practice, with its aim of compelling decision-makers to act in non-discriminatory ways. For equal opportunity to be present within a society there must be some degree of wealth redistribution, for the disadvantaged to have an equal chance at success which should begin with taxing the richest and systematically redistributing the funds gained to local authorities or individuals in the form of an allowance.

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<sup>12</sup> Sørensen, Welfare States, Family Inequality and Equality of Opportunity RSSM 24,2 (2006) 371