ZSOLT KÖRTVÉLYESI *

Enforcing Equality? Promises and Limits of Legal Responses to Systemic Inequalities

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* [kortvelyesi.zsolt@tk.mta.hu] (Centre for Social Sciences, Hungarian Academy of Sciences, Budapest)

Inequalities are rising, with social divisions being increasingly presented as cultural, ethnic, religious or racial, as resulting from unchangeable traces and/or deep historical roots, revolving around essentialist visions of groups of people. The call for recognition of diversity has been transformed to identitarian nativism.[1] At times, what surfaces is an anti-Enlightenment vision that seeks to reverse the long march towards the equalizing universal ideal of shared humanity. The impact of this trend on law could not be more pronounced. It seems timely to revisit law's potential in fighting inequalities, assess what has been achieved and what innovative solutions can help equality struggles. The present thematic section focuses on law's potential in fighting systemic inequalities, taking a wide approach that considers not only problems of implementation but also wider questions of political mobilization.

Views diverge on what law is contributing to equality. I will briefly refer to two accounts to illustrate the spectrum. The traditional critical view, usually of a Marxist bent, treats law as the language that power speaks.[2] When power was to make concessions, it is essentially a tool to sweeten the pill, make law enforcement more efficient by voluntary rule-following. Many critical accounts continue to voice this view. Others argue that the very logic of law or, more specifically, of the rule of law has some basic equalizing effect. Marxist historian E. P. Thompson went as far as stating that 'the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.' (Thompson, 1990 [1975]: 266.) Remarkably, he reached this conclusion in a book discussing particularly harsh anti-poor legislation history.

Law does seem to have a universalizing potential.[3] It pushes decision-makers in the direction of transparent and general rules (also assuming their capacity to achieve this) combined with the control by independent judges. Fighting arbitrariness also means that decisions should be justified and held against other comparable decisions. Justification and comparison call for a basic notion of non-discrimination: departure

[1] The term was earlier used to describe (critically) the view on the united voices of the oppressed natives that can only be really understood and expressed by natives themselves. See, e.g., Kuper (1994: 543, cited in Werbner, 2012: 158). In the sense that I use it here, with similar overtones of unity and oppression, covers a wide range of (changing) ideologies. On the trend of what he calls a move from nationalism to 'civilizationism', including Christian identitarian elements but also liberal features, see Brubaker (2017).

[2] See, most famously, Marx (1975 [1842]).

[3] On a basic level, laws should be cast in general terms (targeted laws would undermine the separation of powers doctrine), applied in a uniform matter (lack thereof would undermine the idea of one unified legal system and impartial application). This also means that grounds of (legal) inequality have to be spelled out, making contestation easier. For an account of the underlying morality, see Fuller (1969, esp. Ch. II).

from earlier precedent requires justification. It remains true, however, that the legitimizing effect formal rules have can also be detrimental to mobilizing resistance and political challenge, sometimes outweighing the said rule of law benefits: people tend to accept the legitimacy of law, and are less likely to act against it, partly because of the ceremonial force of formal state norms.[4] The relationship between legal challenges to existing practices, e.g. in the form of human rights litigation, and political mobilization continues to be contested when discussing contemporary equality struggles (see later).

In a more specific field within the realm of equality, minority rights protection, one point of contention is the inherent tendency of Western legal systems to neglect claims that are not easy or possible to be individualized, i.e. presented as a matter of individual rights or individual harm (with prominent exceptions as collective claims made by states, corporations, or churches). While this can be a feature and important guarantee for liberal accounts seeking protection for individual freedom — and there are good arguments for limiting law to what law is good at doing and constraining our expectations[5] — from other angles it seems to be a shortcoming. In the case of claims made on behalf of wronged indigenous communities, it presents itself as a cultural bias, often preventing non-individualized claims to proceed. More relevant for the Central and Eastern European region, for ethnic and national minorities, the individualist filter makes it hard or impossible to counter systemic injustices. The practical requirements of providing proof and establish actual violations can make it prohibitive to challenge discriminatory patterns through litigation.

It is this insight that motivates the on-going research — hosted by the Centre for Social Sciences of the Hungarian Academy of Sciences and funded by the National Research, Development and Innovation Office — on how procedural instruments can bridge the gap between minority claims and legal guarantees.[6] The hypothesis is that aggregating minority claims on the procedural level, even if the underlying rights are purely individual ones, can go a long way towards providing remedies for wider inequalities and systemic wrongs. More specifically, class action type collective procedures can aggregate minority claims, even if these are cast in purely individual terms, which would in itself make these cases more likely to succeed, resulting in a more minority-friendly legal and, as a result, political and social environment. To bring an example for why procedural aggregation matters, when the United States Supreme Court ruled in 2011 on not certifying the class of 1.5 million women employed by Walmart at the time or earlier, alleging discrimination in promotion and pay, that effectively shut down the road to effective remedy for the victims and robust incentives for reform.[7] A lot will depend on non-procedural elements, e.g. the actual standards of discrimination (outcome-based or requiring intent), but procedural rules can also play a key role in bringing about change.

[4] For a classical account, see Max Weber (1978: 37): 'the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner.'

[5] See a recent account by Hannum (2019).

[6] For more information, see https://jog.tk.mta.hu/en/enhancing-minority-rights-using-group-litigation.

[7] For a more recent account on the current state of affairs, see Saniato (2019).

The power of numbers can boost the transformative potential of law (as opposed to its strong potential to preserve the status quo), as exemplified by cases in the wake of the *#MeToo* movement. Charges against Bill Cosby went unnoticed and remained moot for decades, up to the point where a critical mass of women decided to speak up and present their cases not as isolated allegations but part of a pattern, changing public perceptions, prominently including those of criminal justice officials.

It is this line of inquiry that the first study in this special section addresses. András László Pap inquires about the potential of the harassment-based anti-discrimination approach, focusing mostly on cases from Hungary. He argues that the legal instrument which is part of the European anti-discrimination field, while not a magic solution for all ills that members of minority communities face, can go a long way in addressing cases of institutional discrimination. The approach extends the reach of anti-discrimination litigation and brings benefits in areas such as providing evidence. By the same token, however, the approach is also fraught with dangers: lowering the standards of proof creates due process concerns on the other side, for the alleged perpetrators, and it can also end up putting too much of a constraint on free speech. Pap illustrates these threats with how US universities have been dealing with campus rape and campus speech cases. Applying specific measures outside of their original intended scope where deviation from general rules is warranted can lead to solutions that are seemingly beneficial for the original goals of addressing equality and dignity based concerns. At the same time, however, the same approach might violate other human rights considerations, rearranging the field in an undesired way and ultimately undermining the cause, not only legally, but also politically, leading to public backlash.

A more basic limitation of anti-discrimination legislation is under-enforcement. Alexander Osipov in his study of Russia and Ukraine documents how what should be legal guarantees remain empty declarations. The anti-discrimination framework that, in many jurisdictions, sustains a rich field of case law, remains largely sterile both in Russia and Ukraine. This underlines the well-known but rarely followed-through observation from comparative law literature on the low success rate of copy-paste solutions (see, e.g., the critique in Legrand, 1997). The practice of resolving disputes in informal ways rather than through formal legal procedures means that a key (extra-legal, cultural, social) precondition is missing, which renders discussions around the subtleties of definitions and approaches to a great extent futile. Equality as a legal principle can play out very differently in authoritarian regimes that employ ethnicity as a ground for fighting extremism (often excessively) and co-opting minorities (in fact, minority leaders) through patronal relationships. Where fear of repression or just governmental influence discourages private actors to challenge state (sanctioned) policies, anti-discrimination enforcement might be limited to isolated instances of non-state discrimination. This limited approach might risk avoiding addressing deeper, structural forms and causes of discrimination and might amount to little more than window-dressing, yielding some successes at the margins while maintaining larger discriminatory patterns unchallenged. This means that the transformative potential of enforcing equality is not only lost, but is transformed to a pacifier, supporting the status quo instead of challenging existing power relations. The state-controlled ethnic space, inherited from the Soviet times, blocks the emergence

of a decentralized instrument — i.e. a tool that can be used by non-state actors to enforce equality — like anti-discrimination litigation. It plays, rather, into the common authoritarian reflex that seeks to relegate ethnic inequality claims to the field of 'fighting extremism' to isolated cases threatening 'social peace', as opposed to structural causes undermining equality. This is in line with centrally declared 'national programmes' and a criminal law approach where centralized filtering is secured through public prosecution. Civic engagement and civil society organizations that are so central to a functioning democracy prove also essential for rights enforcement in the field of ethnic discrimination. These are the contextual elements that can end up turning a minority-protection instrument into a tool suppressing pluralism instead of helping diversity, and democracy can suffer as a result.[8] All this is aptly illustrated by the case of Lidiya Bainova who was accused of extremist activities (a crime under Russian law) for speaking out exactly against the type of discrimination that equality measures should seek to remedy. If anything, this approach seems to be replicated in other countries in the Eastern and Central European region, a worrying trend.

Our third study, by Eszter Kováts, tracks a regional trend equally worrying for the proponents of equality. The study documents the political context of what is usually interpreted as anti-gender and even anti-human rights engagement, through discussing the Hungarian cases of government attacks on gender studies (practically banning the discipline as a university programme) and the Council of Europe Convention on preventing and combating violence against women and domestic violence ('Istanbul Convention'). She argues that under the surface, these controversies are not proxies for voicing genuine anti-women's rights convictions, but serving the goal of demonstrating a wider threat, of presenting the image of an enemy, and of an on-going cultural war. This explains how usually uncontroversial topics like fighting domestic violence can become politically controversial and the basis of ideological attacks. The direct lesson is that focusing on direct messages while accepting the 'culturalist' framing of anti-human rights attacks merely reinforces the sense of the threat, easily undermining the goals of human rights activism.

An approach that can be helpful in challenging this framework is what Nancy Fraser calls 'perspectival dualism', the recognition of both the cultural and the economic aspects as well as their interrelations. This approach also challenges the individualist approach to/of human rights (see earlier) and the universalist language that tends to hide the centre-periphery power asymmetry (a point also raised by Farkas, see below). The proposed perspective probably questions the legal approach in a more fundamental way as well. If, along Fraser's critique of grounding recognition claims in the human psyche, the psychological foundations of identifying harm and rights violations might be misleading – and in many respect this is reproduced in human rights debates about the usability of the concept of vulnerability[9] – that may undermine the notion of psychological harm that is a routine part of legal remedies, in many cases sanctioning rights violations.

[8] Also confirming Will Kymlicka's insight that securitizing always undermines minority rights (Kymlicka, 2007: 119—120). In the current Russian case, the twist is that seemingly minority-focused measures do the trick.

[9] For a short account, see Andorno (2016), as against, among others, Ricoeur (1996) or Turner (2006).

Fraser's insight into recognition/redistribution is an important reference point in the contribution of Lilla Farkas (who adds that the redistributive, class-aspect had been raised earlier by Júlia Szalai[10]), reviewing two volumes that discuss Roma rights. Crucially, the overview raises what often goes unchallenged, the very notion of 'Roma rights'. Not simply the theoretical debate, but the question of who defines what qualifies for funding, advocacy and litigation. Farkas stresses the importance of local stakeholders and even local contribution to funding, as a guarantee of sustainable efforts, but also notes how, in reality, Western donors have played a crucial role in shaping the agenda. This raises questions of independence from the domestic political context, a double-edged sword considering domestic responsiveness, or even responsiveness to local actors, and also of the limits of 'importing' anti-discrimination law. To put it bluntly, the question is to what extent *Brown* (the leading racial desegregation case in the US) can be replicated in Europe (*D.H. v. Czech Republic,* the most cited European desegregation case). This goes back to debates about the correct understanding of what role court cases like *Brown* played in bringing about change (adding the current – devastating – state of school segregation in the US[11]), but also about the question we addressed earlier on the possibility of what have been often termed 'legal transplants'. For instance, the two countries in Osipov's study, Russia and Ukraine are usually perceived as having different attitudes towards international human rights standards. While the findings there might not question agendas of external equality promotion altogether, it raises important questions about the possible short-term effects as well as about the right instruments to further equality. Similarly, in the case of Roma rights, the decision to focus on certain rights and certain approaches to promote these (in this case school desegregation litigation) should be reflective of the domestic and local context, not (or not primarily) on higher-level agendas.

It is this context that the final contribution to the special section focuses on. Lídia Balogh reviews a book that presents a rich field of civil activism in the Central and Eastern European region, where some movements could be labelled as anti- while others as pro-human rights, e.g., mobilizing against the UN Convention on the Rights of the Child in Russia, making gender-equality claims on behalf of Polish fathers, or the home birth movement in Hungary. While Balogh raises doubts whether these movements are rightfully presented as examples of the same phenomenon, the overview of this diversity itself seems useful in that it challenges the reader to think through the advantages of the political, grassroots approach to claim-making, often used as platforms for middle class privileges, illustrated with the example of the anti-vaccination movement in the Czech Republic.

To finally return to the critique of law, Farkas also hints at how far the critique of the legal approach can go, raising the existential question of human rights whether

[10] See also our special issue from last year: 'Recognition, Rights, Redistribution. In Honor of Júlia Szalai', *Intersections,* 2018/1, https://intersections.tk.mta.hu/index.php/intersections/issue/view/13.

[11] On the changing legal landscape: 'After decisive breakthroughs in the 1960s and early 1970s [...b]y the 1990s the courts were ending desegregation plans and segregation began to creep up year after year after year. Since the early 1980s, few federal funds were available to support voluntary integration and even those voluntary local efforts were undermined by the Supreme Court's decision in the 2007 *Parents Involved* case.' Orfield et al. (2019: 33).

there are 'more political, emancipatory' approaches with more potential that could and should be used. Proceeding with more caution, even if political approaches are proposed as alternatives, would we not risk too much by giving up on the role that human rights have undeniably played in mobilization so far? While the human rights approach to equality has serious limitations — some of which we have seen above — and it might even prove to be counterproductive at times, there is no guarantee that giving up on the rights focus will lead to gains on other levels.

Law is but one of the tools to raise and voice issues, present them as salient, shape public discussions and political agendas, but it is far from bringing about change in itself. Sustained extra-legal activity is necessary sometimes even before litigation starts, and it is key to actual structural changes. The call in the articles for a broader view of equality can be read as in line with the calls for the emancipation of social-economic rights and for a more sensitive approach to social and economic inequalities when making and applying law — a claim that remains controversial but is nevertheless backed up by key UN and EU human rights instruments. But the same call, less controversially, can also remind us to acknowledge the limits of law:[12] to see more clearly what law can realistically achieve, what activists can aim at through law and human rights enforcement, and where equality struggles should look beyond the legal realm. There are merits to the wilful ignorance of law, but we should all the while be cognizant of the resulting confines.[13]

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[12] For an illustrative collection around this dilemma, see, e.g., Claes et al. (2009).

[13] For a qualified criticism of 'shallower' approaches to judicial decision-making, see Sunstein (2007–2008).

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