

Economic Inequality, Fundamental Rights Adjudication, and the (Limited) Potential of Non-Discrimination Review*

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1. Introduction

Economic inequality continues to persist, even in times of relative economic prosperity. What is more, the gap between the rich and the poor seems to be widening rather than getting smaller. Economic inequality and how to address it, is one of the most pressing and complex issues constitutional orders are facing. A fundamental question in this regard is what constitutions and constitutional law can or should offer to tackle economic inequalities. In other words, what can we expect from fundamental public law arrangements in promoting equality and reducing the gap between the (few) rich and the (many) poor? The protection of fundamental individual rights forms a prime point of departure in this regard. One particular way to combat economic inequality, and not a bad one, it appears, is with the help of the equality norms that can be found amongst these fundamental rights. After all, when equality or non-discrimination is the (legal) rule, economic inequality is bound to be in trouble. Indeed, when our aim is to render an unequal situation more equal, compared to fundamental rights such as the right to private life and protection of

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property, or the right to adequate housing and an adequate living standard, a ‘right to equality’ or prohibition of discrimination seem particularly fitting.

In this article, I deal with the promise of judicial non-discrimination review in addressing economic inequality, as well as illustrate that non-discrimination norms’ potential for combatting inequalities can be hampered by substantive and structural limitations. The article is divided into three parts. First, I discuss the appeal of fundamental equality norms in general and for addressing social inequality before the courts in particular. Norms that protect individuals against unjustified unequal treatment on a range of grounds can be found in virtually all constitutions as well as in international human rights documents. For this and other reasons, it should not come as a surprise that high hopes are placed on them. In the second part, I will present a case study of the case law of the European Court of Human Rights (ECtHR) to illustrate what may hinder discrimination norms’ practical use in terms of directly addressing the gap between the rich and the poor. This case law is by no means representative for judicial review generally, but it does provide an interesting example of how the hopes we place on non-discrimination, not always materialize. The structure of Article 14 of the European Convention on Human Rights (ECHR; Convention),¹ as well as the context in which this provision is invoked, make the ECtHR unlikely to address the structural challenges presented by economic inequality. I will not, however, conclude that there is hence no added value in non-discrimination review. Rather, in the third and final part, I argue that the limitations identified partly relate to untenable expectations that conceal the more indirect effect of non-

¹ Article 14 ECHR (prohibition of discrimination) reads: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

discrimination review even where its promise appears limited. At the same time, a focus on non-discrimination should not stand in the way of the further development of the content of (other) substantive socio-economic rights – an approach that deserves more praise than it usually gets.

Before I get started, a few things related to the focus and scope of my argument deserve some further explanation. First, I am not dealing with equality or non-discrimination norms in the abstract, but in a particular context, namely that of *fundamental rights adjudication*. Thus, I will elaborate on the potential of these norms to the extent that they are part of a fundamental rights document and as such invoked before a court. Effects of equality guarantees beyond this particular context might of course be significant – these guarantees hopefully trigger lawmakers to treat persons alike and dispense with categorizations in social law that unjustifiably benefit some, but not others. The issue here is however the protection of fundamental equality norms in applications before a court, in light of the aim of promoting economic inequality.

In my article, I move beyond theoretical possibilities and look at what happens when these are transformed into actual court reasoning. The choice for a ‘case study’ of the case law of the ECtHR in this regard may not seem very logical. After all, the European Convention lists civil and political rights, whereas the ECtHR’s protection of socio-economic rights is often seen as collateral. However, as will be elaborated upon below, the protection against discrimination in the ECHR is to a certain extent invisible in that it does not discriminate between civil and social rights protection. More generally, the ECtHR’s engagement with social rights can no longer be overseen.² To this it can be added that the Strasbourg system of rights review

² See, for example, I. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2009; I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge University Press, 2018.

provides an important example of binding rights adjudication beyond the State level, especially when it comes to social rights issues. The ECtHR's case law has shaped (academic) debates and developments worldwide and the way rights are dealt with by the Court is hence relevant beyond the Convention context as well.³ Albeit being an international human rights court, the ECtHR has been compared to a constitutional court and, in any case, shows that national and international fundamental rights protection are no worlds apart.⁴ Altogether, thus, even though the ECtHR might not be the most promising body to turn to for judicial protection against discrimination with the aim of addressing economic inequality, if only for the fact that its 'traditional' civil and political rights oriented role make it grant States serious discretion, the example it provides is worth having a look at. As we will see below, this example is able to provide some clear lessons the relevance of which is not on forehand limited.

³ For one, the Charter of Fundamental Rights of the European Union shall be interpreted in line with the interpretation of the Convention, see art. 52(3) of the Charter. Besides, in discussing (global) trends in fundamental rights review, reference is often made to the ECtHR's case law. See, for example, Kai Möller, *The Global Model of Constitutional Rights*, Oxford University Press, 2016.

⁴ An interesting example is provided by the Dutch legal system: In the Netherlands, constitutional review of legislative acts is prohibited (Article 120 of the Dutch Constitution) while review on the basis of international norms such as those enshrined in the ECHR is allowed (Articles 93 and 94 of the Dutch Constitution – and very popular. As a consequence, it often makes more sense to phrase one's claim in terms of human rights. Cf. the recent Court of Appeals judgment in the 'Urgenda' climate change case, in which it was concluded that the state's efforts to reduce greenhouse gas emissions are insufficient in the light of Articles 2 and 8 ECHR (the right to life and the protection of private life). (Court of Appeals of The Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2610.)

2. *Equality Norms and their Perceived Promise*

Guarantees of non-discrimination or equality in constitutions and human rights documents take different forms. Yet they also have a lot in common. In the International Covenant on Economic, Social and Cultural Rights (ICESCR), it can be read that ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.⁵ The ECHR contains a non-discrimination requirement holding that ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.⁶ Constitutional provisions echo this structure. The German *Grundgesetz* requires that ‘No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability’;⁷ in Canada every individual ‘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’,⁸ while in Colombia all individuals ‘shall receive equal protection and treatment from the authorities, and shall enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or

⁵ Article 2(2) ICESCR.

⁶ Article 14 ECHR; see also the ‘self-standing’ non-discrimination requirement of Article 1 of Protocol No. 12 to the ECHR.

⁷ Article 3(3) of the German *Grundgesetz*.

⁸ Section 15 of the Canadian Charter of Rights and Freedoms.

philosophy⁹ (Article 13). All these norms consist of a guarantee of equality or non-discrimination, combined with a limited or not so limited list of grounds on which distinctions may be prohibited.

Besides alike, fundamental equality norms also are ‘everywhere’.¹⁰ Their omnipresence is a first reason for why they appear so hopeful: no matter the jurisdiction and situation, there will be an equality guarantee that is applicable to one’s case. In turn, the fact that virtually all fundamental rights documents contain a requirement of equal treatment, or non-discrimination, signals that the founders of these conventions, covenants, and constitutions considered listing these norms worthwhile. Not necessarily – or most likely not – for the purpose of promoting economic equality, but at least because equal treatment generally is agreed to be a desirable aim and worth anchoring so it can form the starting point for (legal) action. That the multiplicity of equality norms is there to form a bulwark against inequality, seems to be a truth that need not be stated.

Besides, the reason why equality norms seem to be *comparatively* promising, is their elevated status, not only compared to other legal norms but also when contrasted with other fundamental rights. Constitutional equality norms may be found at the very beginning of a constitution’s rights catalogue,¹¹ or considered unamendable.¹² In the context of human rights, in the International Covenant on Economic, Social and Cultural Rights (ICESCR), non-discrimination is considered an immediate requirement not subject to progressive realization.¹³ The minimum core obligations recognized in relation to the different ICESCR-rights moreover include, without

⁹ Article 13 of the Constitution of Colombia.

¹⁰ See, for example, <https://www.constituteproject.org>.

¹¹ Cf. Article 1 of the Dutch Constitution.

¹² Cf. Article 5, I of the Constitution of the Federative Republic of Brazil.

¹³ Cf. the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, paras. 22 and 35.

exception, requirements of equal treatment.¹⁴ And also in times of crisis or austerity, non-discrimination is seen as an indisputable obligation.¹⁵

Equality and non-discrimination requirements are moreover ‘indivisible’ par excellence. Indivisible rights protection means that no clear distinction can be made between protection of different categories of rights.¹⁶ Classical, civil and political rights and economic and social rights cannot entirely be separated, and this goes to some extent – depending on the judicial context – for their application in the legal sphere as well.¹⁷ A right to food cannot entirely be severed from the right to life, and a right to vote can meaningfully be linked to the right to education. Equality, or non-discrimination, is a particularly ‘indivisible’ norm for if a government is required to refrain from discrimination, it mostly does not make a difference whether this discrimination takes place in relation to social rights or negative liberties.¹⁸ Someone can be treated unequally on the ground of sex in exercising his or her right to vote, as well as in receiving a particular social benefit. To put it differently, even in a ‘classical’ rights context, an equality norm may be invoked in order to improve

¹⁴ See, for example, CESCR, General Comment No. 13, para. 57; CESCR, General Comment No. 14, para. 43(a); CESCR, General Comment No. 15, para. 37(b); CESCR, General Comment No. 18, para. 31(b); CESCR, General Comment No. 19, para. 59(b); CESCR, General Comment No. 20, especially para. 7.

¹⁵ See, for example, Letter dated 16 May 2012 addressed by the Chairperson of the Committee of Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights.

¹⁶ Cf. United Nations General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 (Vienna Declaration), para. 5. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex, reprinted in 9 *Human Rights Quarterly* 1987, 123.

¹⁷ Cf. the case law of the ECHR; I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge University Press 2018.

¹⁸ This is not to say that when eventually reviewing discrimination complaints in the social sphere, courts will not be more hesitant compared to in civil rights cases. This may result from the (perceived) fact that the protection of social rights brings along more costs for the State.

one's socio-economic situation. The case law of the ECtHR discussed in the following section, is a case in point.

Besides these general characteristics, there are more features of equality requirements and their interpretation that seem to underline their relevance for the economic inequality issues. In order to rely on an equality or non-discrimination norm before the courts, one's success depends, amongst other things, on the ground of discrimination invoked. This ground must first of all be covered by the specific provision invoked.¹⁹ A development that suggests that equality norms are becoming more relevant to the issue of economic inequality, is the recognition at both international and constitutional levels of prohibited grounds related to economic status, social origin, property etc.²⁰ This explicitly allows for complaining about one's economic position as a matter of discrimination.

Besides a relevant ground for discrimination, a comparator is needed. Indeed, in the socio-economic field, this means that it needs not be argued that one is entitled to this or that *as a matter of right*, but that an entitlement exists because others, in a similar situation, *are* getting a benefit or housing aid (of a certain amount). Constitutional or other fundamental equality guarantees, in other words, are focused on *relative*, rather than on absolute, deprivation. This seems to fit particularly well the aim of achieving (more) economic equality. This aim has less to do with achieving a certain, sufficient level of economic wellbeing, than with decreasing the gap between the rich and the poor.

Importantly, this provides a level of flexibility (other) material social rights do not seem to offer. Courts are hesitant to conclude that a particular level of social provision is required as a level of right, for

¹⁹ In case of a non-exhaustive list, there is no pre-set limit to grounds that can be brought forward. This is different when the list of grounds mentioned is fixed and cannot be expanded.

²⁰ For several relevant examples, see R. Dixon and J. Suk 'Liberal Constitutionalism and Economic Inequality', 85 *University of Chicago Law Review* 2018, 381-2.

the simple reason that budgetary choices remain the prerogative of legislators and the practical reality that the (continued) provision of a certain social standard is not always possible.²¹ ‘Equality reasoning’, instead, seems more in line with a court’s legitimate role, allowing it to put a finger on the sore spot without overstepping its task.²²

3. Chances and Pitfalls of Equality Review: the Case Law of the ECtHR

There is a lot that speaks in favour of relying on equality and non-discrimination norms when fighting economic inequality. At least in theory, they form a promising starting point for combatting economic inequality, also through courts. Nevertheless, if we have a closer look at the case law of the ECtHR, it appears that equality norms may come with hurdles that limit their effectiveness for this purpose. These hurdles cannot always be taken away by means of a flexible interpretation of either scope or room for justification. At least in the context of the ECHR, they form part of the ‘fabric’ of the non-discrimination norm serving as a starting point for rights adjudication.

Article 14 ECHR guarantees the enjoyment of other Convention rights and freedoms without discrimination. It is therefore described as ‘parasitic’ and as having ‘no independent existence’.²³ At the same time, the application of Article 14 ‘does not necessarily presuppose

²¹ As King rightly notes, ‘flexibility’ is a good argument against judicial social rights review: ‘It is hard to say that there exists a fundamental right to kidney dialysis in January, but not in December, because the price spiked in June.’ See J. King, *Judging Social Rights*, Cambridge University Press, 2012, p. 6.

²² See, for important arguments concerning the appropriateness of judicial equality review in the field of social rights, Mark Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, 2008, p.

²³ ECtHR (GC), 29 April 1999, app. 25088/94, 28331/95 and 28443/95, *Chassagnou a. O. v. France*, para. 89.

the violation of one of the substantive rights guaranteed by the Convention. It is necessary but also sufficient for the facts of the case to fall “within the ambit” of one or more of the Convention Articles.²⁴ This can be understood as pointing at something that is more inclusive than the strict scope of a particular Convention provision. Over time, the Court has come to recognise that Article 14 also attaches to additional rights voluntarily provided by the state, as long as they fall within the ‘general scope’ of any Convention Article.²⁵ This is relevant for the social protection this provision can offer: any benefit or social policy the state provides for that can be linked to a Convention article like the right to respect for private and family life (Article 8) or protection of property (Article 1 of the First Protocol to the ECtHR) triggers protection. The more recent Article 1 of Protocol 12 ECHR underlines this.²⁶ It provides a self-standing requirement of non-discrimination stipulating that all government action – or lack thereof – should be non-discriminatory.

Regardless of their broad applicability, however, the fact that equality guarantees like Article 14 ECHR focus on relative deprivation, in turn means that a ‘comparator’ must be found. That is, a complainant must be in a situation that is comparable to the situation of another person, who is however treated differently. Yet convincing a court of the comparability of situations is easier said than done. What exactly makes situations similar, or not similar enough? There is likely to be a difference (in the country where one lives, the contributions one has paid, the years one has worked) that may be

²⁴ ECtHR, 27 March 1998, app. 20458/92, *Petrović v. Austria*.

²⁵ See, for the first time, ECtHR, 9 February 1967, app 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium*.

²⁶ Art. 1 P12 reads: ‘1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.’

explained as resulting in ‘non-comparability’. In turn, whether a comparison is valid, is often open to contestation. There are plenty of cases in the case law of the ECHR, in which someone seemingly has a reasonable claim, yet is said not to be in a ‘similar situation’.²⁷ This means that also when we talk about economic inequalities, starting points may differ to such extent that a case goes away. The recent Grand Chamber judgment in *Fábián v. Hungary* is a case in point.²⁸ The case concerned the discontinuation of the State old-age pension of persons working in the public sector. In December 2015, a Chamber of the Court had held that this violated Article 14 in conjunction with the right to protection of property (Article 1 P1) since the State had not sufficiently motivated the distinction made between the public and the private sector and between different categories of public sector workers.²⁹ On appeal, however, it is concluded that the distinction made is not contrary to Article 14. The applicant had not demonstrated to be in a relevantly similar situation to pensioners employed in the private sector, mainly because he would receive both his salary and his old-age pension from the State, the impossibility of which was aimed at correcting financially unsustainable features in the pension system of Hungary. In the end, thus, a claim to equal treatment in this case was of no avail to the applicant.

Likewise, because the ground of discrimination concerned is to some extent decisive for the outcome of a case, the relevant ground may also limit eventual protection. Being treated differently on the ground of race, for example, is more likely to constitute prohibited discrimination than differential treatment on the basis of residency status. Yet there are cases thinkable in which both grounds can plausibly be invoked, and it is then at the discretion of the court to

²⁷ ECtHR, 4 November 2008/ECtHR (GC), 16 March 2010, app. 42184/05, *Carson a. O. v. the UK*.

²⁸ ECtHR (GC), 5 September 2017, app. 78177/13, *Fábián v. Hungary*.

²⁹ ECtHR, 15 December 2015, app. 78117/13, *Fábián v. Hungary*.

opt for the one or the other. Consider the case of *Bah v. the United Kingdom*.³⁰ Ms Bah was denied priority treatment under the housing legislation because of her son's conditional immigration status. The ECtHR held that if a state provides benefits, 'it must do so in a way that is compliant with Article 14'.³¹ Eventually, however, it concluded that the authorities' decision was not arbitrary. The ECtHR emphasized that 'any welfare system, to be workable, may have to use broad categorizations to distinguish between different groups in need',³² and that states may justifiably 'limit the access of certain categories of aliens to "resource-hungry" sources', amongst which social housing can be counted.³³ This conclusion cannot be detached from the fact that the ground for the unequal treatment was considered 'immigration status' and not 'nationality', as the applicant had submitted. The strictness of the test in Article 14 cases, after all, primarily is dependent on the ground of discrimination.³⁴ When a distinction is made on a 'suspect ground', 'very weighty reasons' are required.³⁵ However, as *Bah* shows, grounds of distinction considered applicable in the field of social policy are by no means always 'suspect', or are not labelled as such.

Talking about the relevant ground, the fact that there now is increasing recognition of grounds relating to economic inequality, such as social origin, social status, and property, is not necessarily helpful either. After all, these may be claimed to be the ground on which one was treated differently, and as such lead to findings of violations, yet this does nothing about the presence of the relevant

³⁰ ECtHR, 27 September 2011, app. 56329/07, *Bah v. the UK*.

³¹ *Ibid.*, para. 40.

³² *Ibid.*, para. 49.

³³ *Ibid.*, para. 49.

³⁴ See, on the intricate link between the margin of appreciation and the grounds of discrimination, J. Gerards, 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination' in M. Balboni (ed.), *The Principle of Non-Discrimination and the European Convention of Human Rights* (forthcoming). Available at SSRN: <https://ssrn.com/abstract=2875230>.

³⁵ Cf. ECtHR, 24 July 2003, app. 40016/98, *Karner v. Austria*.

ground. An example might explain this. If someone complains about unequal treatment on the ground of property – the assets one has or does not have, successful adjudication will mean that those with and without sufficient property need to be treated alike. It does not imply that the status itself – and thus someone’s property situation – will thereby be altered. In this regard, discrimination review will not always address the root cause of inequality, even if a violation is found.

More generally, it must be kept in mind that unequal treatment does not equal discrimination. In other words, unequal treatment can often be justified in terms of fundamental rights, and is then not prohibited (discrimination). Especially in the context of socio-economic guarantees and provisions, moreover, courts like the ECtHR are likely to grant the other branches significant leeway and will be hesitant to provide sweeping statements as to an authority’s *discrimination* in this field.

In more technical terms, whereas prohibitions of discrimination may be absolute, equality norms such as Article 14 ECHR are relative. That is, whether or not unequal treatment results in a fundamental rights violation, is determined by means of a proportionality exercise or other forms review of justifications provided by the government that are generally not very favourable to individual economic concerns, especially when legitimate interests of the state are involved.³⁶ Two recent Strasbourg cases confirm this. First, in *Belli and Arquier-Martínez v. Switzerland*, the ECtHR had to judge on the discontinuation of the special disability benefit of Ms Belli because she had moved with her mother to Brazil and no longer lived in

³⁶ Cf. I Leijten, ‘Potential and Pitfalls of Indivisible Judicial Protection of a Social Minimum:

From Inflation to Procedural Protection?’, in Kotkas, Leijten and Pennings (eds.), *The Battle Against Poverty: Specifying and Securing a Social Minimum*, Hart Publishing (forthcoming).

Switzerland.³⁷ Recipients of invalidity-insurance benefits who had been able to pay contributions to the scheme – which due to her condition was impossible for Ms Belli – could continue to receive their benefits while residing abroad. The ECtHR does not consider this distinction contrary to the Convention. In light of the principle of solidarity it was justified that the continuation was made dependent on contributions paid, even if the impossibility of paying these lay completely outside the applicant's control.

In the admissibility decision in *Yeshtla v. the Netherlands*, the ECtHR again concludes that a distinction made in social policy is proportional – or in fact that it sees no reason to depart from the conclusion of the national court as to the proportionality of the measure.³⁸ Ms *Yeshtla* was required to pay back a rent subsidy to which she had no right as she was living with her son who did not have a residence permit. The 'linkage principle' is meant to ensure that those residing in the Netherlands illegally, cannot enjoy State benefits. However, Ms *Yeshtla* was ill and needed her son's help, and she argued that she could not be required to choose between the subsidy and evicting her own son. According to the Dutch highest administrative court, the distinction between those eligible for rent subsidy cohabiting with persons with a residence permit and those with illegally residing cohabitants, was justified by the policy aim of the measure. Due to a lack of 'exceptional circumstances', it was also considered proportional in the instant case. The supranational ECtHR is deferring to the Dutch court's judgment, implicitly corroborating with the finding that in the socio-economic sphere, there is a wide margin of appreciation for the State. The emphasis in this case, it has been argued, was laid on the aims of the government policy, rather

³⁷ ECtHR, 11 December 2018, app 65550/13, *Belli and Arquier-Martinez v. Switzerland*.

³⁸ ECtHR (dec.), 15 January 2019, app 37115/11, *Yeshtla v. the Netherlands*.

than on the socio-economic needs and unequal treatment of someone who was not well-off to start with.³⁹

Overall, the systematic features of judicial review of individual claims of unequal treatment, may result in a large gap between this practice and the aim to address economic inequality. Even if there is a comparator, a valid (and ‘suspect’) ground, and eventually a violation is found, effects will be limited in terms of both scope and depth. The individual concerned may benefit from the judgment, which makes him or her comparatively better off – yet also better off than those who find themselves in somewhat similar situations yet have not obtained an order in their favour. Moreover, recognizing the needs of the ‘worst-off’⁴⁰, does not alter the situation of the (extreme) rich. Indeed, also those who find themselves in very comfortable financial situations, can rely on fundamental rights, for example when they are confronted with high taxes that infringe on their property rights.⁴¹

4. *Alternative Foci, Realistic Expectations*

It cannot be stated enough that a case study of the ECtHR case law is not representative for judicial fundamental rights review generally. It would require a comprehensive and thorough study to reach conclusions on the overall potential of non-discrimination review. What is more, examples can be given of where this kind of

³⁹ F. Staiano, ‘Yeshtla v. the Netherlands: A Missed Opportunity to Reflect on the Discriminatory Effects of States’ Social Policy Choices’, *Strasbourg Observers* 8 March 2019, available at www.strasbourgobservers.com.

⁴⁰ At the same time, we must be mindful of the fact that those who have access to and actually go to (a human rights) court, are not generally the poorest.

⁴¹ A brief glance at the case law under Article 1 P1, however, suggests that as long as ‘means of subsistence’ are not at stake, a disproportional relation between the individual and general interest is unlikely to be found. Cf. ECtHR 25 October 2011, app. 2033/04, 171/05, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 2041/05 and 24729/04, *Valkov a. O. v. Bulgaria*; ECtHR, 7 March 2017, app. 8263/15, *Baczúr v. Hungary*.

review was able to put a hold on austerity measures with serious social implications.⁴² Still, what the section above has illustrated, is that judicial review on the basis of equal treatment norms, regardless of its ‘flexibility’, is not a straightforward exercise per se. Let alone that it can have a direct influence on the gap between the rich and the poor. The illustrations have shown that there are several hurdles that have to be taken before a violation of the non-discrimination principle in socio-economic cases can be found. Even if this is the case, a judgment does not necessarily address in a more structural or lasting way existing inequalities. Nevertheless, this conclusion is no reason to become sceptical. First, the pitfalls identified help to establish a realistic image of what non-discrimination review can do, and what not. This allows for constructive thinking about how to improve its effectiveness and about what can be expected from fundamental rights protection in the first place. Second, this realistic image allows for ‘spreading our chances’: alternative rights avenues are available and worth investing in. I will not be able to address these issues in depth here, but aim to at least provide some starting points.

As to the first point, it is important to make a link with Samuel Moyn’s 2018 book *Not Enough. Human Rights in an Unequal World*, and the discussion it has led to.⁴³ Moyn argues that human rights have advanced status equality but have failed to promote material equality altogether. Although his focus is much broader than adjudication, while being limited to human rights, his argument cannot but make us ponder the role of fundamental rights in relation to material equality broadly speaking, as well as the role of adjudication in this regard. Socio-economic rights, according to Moyn, have emphasized sufficient provision and resulted in a ‘jurisprudence of minimum

⁴² See, as an important example, the austerity case law of the Portuguese Constitutional Court, cf. M. Canotilho, T. Violante and R. Lanceiro, ‘Austerity measures under judicial scrutiny: the Portuguese constitutional case-law’, *European Constitutional Law Review* 2015, pp. 155-183.

⁴³ S. Moyn, *Not Enough. Human Rights in an Unequal World*, The Belknap Press of Harvard University Press, 2018.

sufficiency’, all the while accompanying the rise of capitalism and the growing gap between the rich and the poor. Arguably, Moyn’s ‘exaggerated’ criticism fails to do justice to the achievements of human rights and those that strive for their effectiveness.⁴⁴ If human rights deserve blame, then what about financial institutions, inert democratic decision-making and political systems more generally? The fact that human rights have not achieved material equality does not equal a reason for blaming them for not doing so. In line with this, we should be conscious of the expectations we have in regard to fundamental rights and their (direct) effects on social inequalities. These must be context sensitive and take into account, for example, that a system allows for individual complaints review only, and that courts are bound to their limited role as part of a separation of powers. Even if not engaging directly with the persisting gap between rich and poor, then, non-discrimination may still contribute to a more just situation for the individuals involved. Indeed, like human rights, judicial fundamental rights review has focussed on status equality more than on material equality, and the ECtHR case law is no exception. It is nevertheless wrong to assume, as Moyn does, that status equality by now is merely uncontroversial while not at all being concerned with material equality and the improvement of socio-economic circumstances of particular individuals and groups. Indeed, it can be seen as a crucial step towards achieving these aims.

Concerning the second point, apart from the distinct value of non-discrimination review, other fundamental rights norms should also not be overlooked as a starting point for increasing social justice. For these rights to be effective, it is important that we know what they require – which is not self-evident. When rather than equality norms, socio-economic rights norms are invoked before the courts, no comparator or suspect ground of unequal treatment is needed.

⁴⁴ G. de Búrca, ‘Shaming Human Rights. A Review of *Samuel Moyn, Not Enough: Human Rights in an Unequal World*, Jean Monnet Working Paper 2/18, available at www.JeanMonnetProgram.org.

Instead, it must be argued that one is entitled to socio-economic aid (in the form of benefits, housing, protection of property) as a matter of right. It must be clear, thus, that rights to adequate housing, health care, and social security include such entitlements. When socio-economic rights norms are not available, or not legally binding, ‘classical’ rights norms such as human dignity, the right to private life or a prohibition of degrading treatment must do the trick.⁴⁵ For these norms, too, it can be said that they can only be truly helpful if their (social) content is sufficiently developed. What is it that substantive rights, at minimum, require? Does a right to housing merely require protection against the elements or rather adequate housing guaranteeing privacy and sufficient comfort? What basic social security schemes must be in place in order to comply with a right to social security or the *Sozialstaatsprinzip*? When the emphasis is shifted from non-discrimination to (other) substantive rights relevant to the issue of economic inequality, this enables these rights to be further interpreted in order to form clearer benchmarks. In turn, if we allow these rights to develop into mere abstract proportionality requirements, this may seriously limit the protection of socio-economic rights.

This second point, too, can be linked to Moyn’s book. The tendency to stop short of concretizing social rights and recognizing specific entitlements, is ultimately linked to the hesitance of courts that do not want to be seen as ‘activist’ or fear other (conceptual) issues that come with interpreting positive social rights. As a consequence, *if* social rights are concretized, this is likely to be done in a ‘minimalist’ fashion. ‘Minimalism’, however, has a bad reputation

⁴⁵ Cf. the protection of the right to a subsistence minimum in German constitutional law, cf. I Leijten, ‘The German right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection’, 16 *German Law Journal* 2015, pp. 23-48.

which again may lead to avoidance.⁴⁶ *Not enough* underlines this by criticizing human rights' focus on 'sufficiency' rather than material equality. Their emphasis on sufficient protection for all, rather than on setting a ceiling on the gap between the rich and the poor, humanizes neoliberalism and its effects, according to Moyn.

Yet just like promoting status equality, providing a subsistence minimum for all should be seen as a worthwhile, and in fact crucial aim. Without such baseline to build upon, and the policy as well as judicial prioritization it suggests, social justice remains far on the horizon.

5. Conclusion

In order to fight economic inequality, fundamental equality norms seem to be the right place to start. Equality and non-discrimination guarantees trigger law and policymakers to treat like persons alike and dispense with categorizations in social law that unjustifiably benefit some, but not others. As a starting point for judicial review, moreover, they appear to provide the necessary flexibility while allowing for avoiding substantive social rights' 'indeterminate' content. By looking at the case law of the ECtHR, however, it was shown that the potential of non-discrimination review is neither always straightforward, nor significant when it comes to addressing the gap between the rich and the poor. This example does not allow for overall conclusions, while at the same time it can lead us to reflect on our expectations of non-discrimination review and the alternatives we have in this regard. Labelling the limitations of non-discrimination review as well as the aim to provide material social rights with minimum content as evidence of the failure of rights,

⁴⁶ Cf. for a critical view on minimum core social rights protection, K.G. Young, 'The minimum core of economic and social rights: a concept in search of content', 33 *Yale Journal of International Law* 2008, pp. 113–175.

dangerously overlooks the importance of both in signalling the need for minimum social protection for all.

Abstract: In order to address economic inequality, judicial review on the basis of equality and non-discrimination norms forms a promising approach. After all, these norms are omnipresent and allow for dealing with relative deprivation without requiring the definition of (minimum) social rights. At the same time, their potential can be hampered by substantive and structural limitations. A case study of the case law of the European Court of Human Rights illustrates that this potential is neither always straightforward, nor significant when it comes to confronting the gap between the rich and the poor. While this does not allow for overall conclusions, it creates awareness of the fact that we should not place all our hopes on non-discrimination, and focus on (other) substantive rights as well. Even when not directly promoting material equality, moreover, both non-discrimination review and minimum social rights protection are important for achieving social justice.

Keywords: Economic inequality, Equality, Non-Discrimination, Fundamental Rights Adjudication, European Court of Human Rights

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