

## EQUALITY – A CORE COMMON LAW PRINCIPLE, OR ‘MERE’ RATIONALITY?

Colm O’Cinneide\*

### Introduction

In 1994, Jeffrey Jowell published a paper in that year’s volume of *Current Legal Problems*, entitled ‘Is Equality a Constitutional Principle?’<sup>1</sup> He began that paper by noting that equality was an oddly neglected topic in discussion of UK constitutional and administrative law, in contrast to its salience in other legal systems. He then argued that this neglect served to obscure the fundamental importance of equality – and in particular the ‘fundamental precept’ that persons should be treated as having ‘equal worth’ and not be discriminated against without adequate justification, which he argued was ‘constitutive of democracy’.<sup>2</sup> He made the case that this ‘equality principle’ should be recognised as having constitutional status, and be expressly recognised by the courts to be a free-standing ground of judicial review – as distinct from being submerged within ‘vague definitions of irrationality’.

Twenty-five years later, it is instructive to revisit Jowell’s analysis. At first glance, much would appear to have changed. Equality has acquired a much more tangible status within UK public law, and is now generally acknowledged to be an important constitutional value – at a certain level of abstraction, at least.<sup>3</sup> The right of individuals to equality and non-discrimination, i.e. to be treated as enjoying equal worth in accordance with Jowell’s equality principle, receives a degree of legal protection through the provisions of both the Human Rights Act 1998 (‘HRA’) and UK and EU anti-discrimination legislation.<sup>4</sup> Within the sphere of common law adjudication, the courts regularly acknowledge the fundamental importance of the equality principle, often quoting Jowell’s 1994 paper with approval in so doing.<sup>5</sup> The courts have also exercised their common law powers of review to strike down a number of discriminatory decisions by public authorities. *De Smith*, the leading practitioner text in the field, states that the equality principle applies ‘to the exercise of all public functions’, and provides a long list of administrative law cases apparently illustrating the application of this principle.<sup>6</sup>

One might thus assume that Jowell’s arguments have been vindicated, and the equality principle has put down deep roots in UK public law. However, a closer look complicates the picture. In actuality, the status of equality is qualified in significant ways. This is particularly true when it comes to the common law dimension of UK public/administrative law. Judges have repeatedly emphasised the constitutional significance of the equality principle. However, they have been reluctant to treat it as a free-standing ground of review. Instead, the courts have subsumed equality considerations within the general scope of rationality review, treating them in Lord Sumption’s words in *R (Gallaher Group Ltd) v Competition and Markets Authority* as ‘no more than a particular application of the ordinary requirement of rationality imposed on public authorities’.<sup>7</sup>

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\* Professor of Law, UCL.

<sup>1</sup> (1994) 47 *Current Legal Problems* 1-18.

<sup>2</sup> *Ibid*, 7.

<sup>3</sup> Bamforth has described anti-discrimination law as evolving out from its labour law roots and taking a ‘constitutional turn’: see N. Bamforth, ‘Conceptions of Anti-discrimination Law’ (2004) 24(4) *OJLS* 693.

<sup>4</sup> The distinction between the scope and substance of these various legislative instruments as they apply to equality is outlined in Part II of this chapter, below.

<sup>5</sup> See e.g. *Matadeen v Pointu* [1999] 1 AC 98, as discussed below in Part IV of this chapter.

<sup>6</sup> Lord Woolf et al, *De Smith’s Judicial Review* (8<sup>th</sup> ed., Sweet & Maxwell, 2018), paras. 11.061-11.068.

<sup>7</sup> [2018] UKSC 25, [50].

Thus, the core argument made by Jowell back in 1994, namely that the equality principle should be liberated from the confines of rationality review and acknowledged to be a core structural common law norm, has not become accepted orthodoxy. By extension, the courts have not recognised the existence of a common law right to non-discrimination: this right informs the application of rationality review, but beyond that receives at best indirect protection via the common law.

This is a sub-optimal situation. Equality concerns fit awkwardly within the framework of rationality review. The copiousness of rationality review creates a risk that the normative specificity of the equality principle will be lost in its imprecision.<sup>8</sup> Furthermore, it is not clear what standard of scrutiny should be applied in subjecting potentially unequal treatment to rationality review: the relevant case-law in this regard is characterised by a high degree of vagueness, uncertainty and inconsistency. In general, the current legal status quo offers neither clarity nor consistency – and also arguably undervalues the constitutional importance of the equality principle.

Jowell's central argument in his 1994 paper – namely that the equality principle is too important to be left to the vagaries of rationality review – thus continues to have force. However, it is also important to recognise that equality is a notoriously abstract concept that is capable of being interpreted and applied in very different ways. As such, if the equality principle is to be liberated from the distorting framework of rationality review and treated as a free-standing ground of review in its own right, courts need articulate its scope and substance with a greater degree of precision than has hitherto been present in much of the relevant common law jurisprudence. A strong case can also be made for disaggregating the principle, and recognising that different types of differential treatment should attract different standards of review – depending on the extent to which equality of status is undermined by the type of treatment under review.

Part I of this chapter clarifies contemporary normative understandings of equality, with a particular emphasis on disentangling certain specific views of what respect for equality entails which are often bundled together under the generic term of 'equal treatment': clarifying some conceptual starting-points is a necessary first step in this context, before engaging with the relevant common law jurisprudence. Part II outlines how respect for 'equality of status' has come to be recognised as an important constitutional value. Part III analyses the arguments made by Jowell and others as to why respect for equal status should be elevated to the status of a free-standing ground of review – which would give it analogous status to recognised common law rights. Part IV examines the circumstances in which the courts have been prepared to review the actions of public authorities for conformity with the principle of equality – and analyses how this legal status quo falls short of the position Jowell argued for back in 1994. Part V critically examines the current legal position, identifying some significant areas of uncertainty and conceptual mismatch, while the Conclusion draws some wider lessons from the ambivalent status of equality within the common law with a view to proposing some necessary adjustments to the status quo. Throughout this chapter, the focus will be on public law: space permits detailed consideration of the interesting question of how the equality principle should influence the interpretation and application of relevant private law norms, although aspects of the public/private law interface in this context will be discussed.<sup>9</sup>

## **Part I – The Equality Principle Disaggregated: Equality of Status and its Formal/Substantive Aspects**

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<sup>8</sup> As McColgan has argued, much discrimination has been 'widely regarded as acceptable, even common-sensical' until prohibited by statute: its 'irrationality' has rarely been self-evident: A. McColgan, *Discrimination, Equality and the Law* (Hart, 2014), 12.

<sup>9</sup> For detailed consideration of the private law dimension, see C. McCrudden, 'Equality and Non-Discrimination', in D. Feldman (ed.), *English Public Law* (OUP, 2004), Ch. 11, p. 587.

Debates about equality are often muddled by conceptual confusion about the meaning of this term. As such, before turning to legal analysis, it is helpful to clarify what people mean when they talk about equality - especially in the context of its status as an important constitutional value.

Equality is an abstract term, capable of bearing multiple meanings. Some commentators have argued that this malleability indicates that equality is an 'empty' concept, i.e. that it lacks any substantive content or intrinsic value in its own right.<sup>10</sup> However, as deployed in political and legal debate since the early modern (17<sup>th</sup> and 18<sup>th</sup> centuries) period in Europe, the concept has come to be associated with a complex set of interlinked ideas clustered around a unifying core idea – namely that all persons should be treated as being equal in status (or as enjoying 'equal worth', as Jowell put it).<sup>11</sup>

Described by Waldron as reflecting the 'basic' notion that no morally significant differences exist between different classes of human being,<sup>12</sup> and shaped by a reaction against centuries-old practices of racism, patriarchal oppression and socio-economic class differentiation, the idea of equal status requires that all persons be treated as if they possess a shared degree of intrinsic dignity.<sup>13</sup> The concepts clustering around this foundational idea include notions such as 'equality before the law', 'equal protection of the law', 'equality in the law', and 'equal citizenship'. These concepts often overlap in scope and content, and are not always easy to disentangle. However, taken together, they are generally viewed as generating two distinct but inter-related sets of normative obligations – 'formal' and 'substantive' equality.<sup>14</sup>

Formal equality is generally associated with the concept of 'equality before the law'. It requires that persons 'who have equal status in at least one normatively relevant respect...must be treated equally with regard to this respect'.<sup>15</sup> In other words, it requires consistency of treatment: similarly situated persons should be treated in a similar manner, unless differential treatment can be shown to be clearly justified. Such consistency of treatment is widely viewed as an intrinsic good, on the basis that it manifests respect for equality of status.<sup>16</sup> Perhaps more convincingly, it is also viewed as an instrumental good, as it limits the extent to which power can be exercised in an arbitrary and/or irrational manner – which is why formal equality tends to be viewed as an integral aspect of rule of law.<sup>17</sup>

In contrast, substantive equality requires that persons not be subject to treatment that denies or undermines their intrinsic equality of status, i.e. that they not be discriminated against on grounds that offend their dignity, or otherwise deny their 'equal worth'. This can include stereotyping,

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<sup>10</sup> See e.g. J. Raz, *The Morality of Freedom* (Oxford: OUP, 1986), Ch. 9. See also P. Westen, 'The Empty Idea of Equality' (1985) 95(3) *Harvard L. Rev.* 537-596.

<sup>11</sup> A wide range of different theorists have identified the key importance of equal status as an organising concept in political and legal debate: see e.g. R. Dahl, *On Political Equality* (Yale University Press, 2006), 4; R. Dworkin, *Taking Rights Seriously* (Duckworth, 1977), 272–273; N. M. Smith, *Basic Equality and Discrimination: Reconciling Theory and Law* (Routledge, 2011), 1.

<sup>12</sup> J. Waldron, *One Another's Equals: The Basis of Human Equality* (Harvard University Press, 2017).

<sup>13</sup> *Ibid.* See also S. Moreau, 'Equality and Discrimination', in J. Tasioulas (ed.), *The Cambridge Companion to Philosophy of Law* (Cambridge University Press, 2019), forthcoming.

<sup>14</sup> See in general S. Fredman, *Discrimination Law* (2<sup>nd</sup> ed., OUP, 2011).

<sup>15</sup> S. Gosepath, 'Equality', *Stanford Encyclopaedia of Philosophy*, available at <https://plato.stanford.edu/entries/equality/#ForEqu> (last accessed 20 February 2019).

<sup>16</sup> T.R.S. Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2001), 243-281.

<sup>17</sup> F. K. Thomsen, 'Concept, Principle, and Norm—Equality before the Law Reconsidered' (2018) 24 *Legal Theory* 103–134.

harassment, and other forms of unjustified discrimination which are predicated on assumptions about the lesser worth of particular social groups.<sup>18</sup>

Formal equality is thus essentially concerned with consistency of treatment, while substantive equality targets demeaning discrimination: the former seeks 'equal treatment' as a general rule, the latter is focused on redressing specific forms of injustice. Some commentators lump both types of obligation together into a single agglutinate mass, and slap the same 'equality' label on the resulting mush: others try to draw a bright-line distinction between the two.<sup>19</sup> However, their relationship is more complex than either of these approaches would suggest.

The two types of equality overlap: treatment may be inconsistent because it is based on demeaning assumptions, and vice versa. Indeed, substantive equality is best viewed as a fully fleshed-out, intensified application of the formal equality approach: it targets specific forms of status-denying differential treatment, while aiming to ensure comprehensive consistency of treatment for the individuals affected. However, while both types of equality require that differential treatment of similarly situated individuals be justified, substantive equality is generally understood to impose a more demanding justificatory burden.<sup>20</sup> In particular, it requires that compelling reasons be shown to justify the use of 'suspect' grounds of discrimination, such as race, sex or disability, which are linked to historic patterns of group subordination. In contrast, formal equality is less exacting, as a rule of thumb: in general, only differences in treatment which are clearly irrational or arbitrary will be viewed as breaching its requirements, reflecting the multitude of different situations where a reasonable case may be made for treating persons differently.<sup>21</sup>

The formal/substantive distinction is also important to bear in mind when considering the status of the human right to equality and non-discrimination. This right is prominent within the international human rights lexicon: it affirms the equal status of all humans, along with their entitlement not to be discriminated against in ways that deny their equality of status.<sup>22</sup> Every major international human rights treaty contains provisions requiring state parties to respect the equal status principle when giving effect to their provisions: examples include Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 14 of the European Convention on Human Rights (ECHR). The existence of a free-standing individual right to equality and non-discrimination is also affirmed, i.e. in Article 26 of the ICCPR and Protocol 14 of the ECHR. These abstract provisions are generally interpreted as covering both the formal and substantive dimensions of the equal status principle.<sup>23</sup>

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<sup>18</sup> See in general T. Khaitan, *A Theory of Discrimination Law* (OUP, 2015).

<sup>19</sup> See e.g. Thomsen, above at n 17.

<sup>20</sup> Substantive equality also has a positive dimension: pre-emptive action in the form of reasonable accommodation measures and other positive steps may be required in certain circumstances to eliminate discriminatory obstacles. In contrast, formal equality is usually not conceptualised in positive terms, but instead solely as a negative constraint on inconsistent treatment. Similarly, substantive equality is viewed as 'biting' on both public and private actors, while formal equality tends to be viewed solely as an issue of public power – and thus as not translating over into the private sphere. See in general Khaitan, n 18 above.

<sup>21</sup> Lord Nicholls set out the distinction between these varying levels of scrutiny with admirable clarity in the HRA case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at [9]: 'In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment...Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory.'

<sup>22</sup> See e.g. Articles 1 and 2 of the Universal Declaration of Human Rights.

<sup>23</sup> The provisions of the EU Charter of Fundamental Rights are unusual in this respect, in that they explicitly recognise both the formal and substantive dimensions of equality. Article 20 guarantees 'equality before the

However, particular emphasis tends to be placed on the non-discrimination requirements of the latter.<sup>24</sup> International human rights bodies, along with national courts applying these provisions as part of domestic law, thus subject differential treatment based on 'suspect' grounds such as race, sex, religion or (increasingly) sexual orientation to demanding scrutiny, in contrast to the lighter touch applied to other forms of differential treatment.

In other words, the human right to equality and non-discrimination is largely interpreted in substantive terms – whereas formal equality tends to be a more peripheral concern.<sup>25</sup> 'Mere' inconsistent treatment, without the added 'substantive' ingredient of discrimination on suspect grounds, is generally not viewed as infringing upon human rights.<sup>26</sup> It may be concerning from a rule of law and/or good governance perspective – perhaps even seriously so – but it usually not be conceptualised as a violation of fundamental rights as such (with all that entails in terms of remedial expectations).

These distinctions between the formal and substantive dimensions to equality of status, and the relative 'demandingness' of the normative obligations they impose upon public authorities, are widely recognised in the academic literature.<sup>27</sup> However, they are not always disaggregated in judicial discussions of what 'equal treatment' entails (as outlined further below). This is unfortunate: equality is a complex idea, and the common law like other legal frameworks needs to reflect this complexity. In the subsequent parts of this chapter, the evolving status of equality within the constitutional and public law architecture of the UK, and in particular within the common law, are analysed with reference to these conceptual distinctions – which comprise the ideational grammar through which tangible expression is given to the notion of 'equality of status'.

## **Part II – The Constitutional Status of Equality**

When the modern language of equality first entered European political discourse, it was radical and destabilising. By affirming the equal status of all citizens, it posed a direct challenge to the notions of natural, God-ordained hierarchy that had hitherto shaped the political and social organisation of societies across Europe and beyond. However, with the gradual expansion of the franchise, the development of legal constraints on the arbitrary exercise of state power, and the emergence of modern constitutional democracies, this once radical notion became part of a new constitutional orthodoxy.

The concept of equal status – concisely encapsulated by the slogan 'one person, one vote' – now underpins contemporary forms of democracy, in both its representative and direct modes. The associated principle of 'equality before the law' has also become one of the integral elements of rule of law. It is now commonplace for national constitutional orders to treat equality as a foundational principle, and for the written texts of virtually all liberal democratic constitutions to recognise equality to be a fundamental right. Furthermore, national legal systems are increasingly giving legal effect to the formal and substantive dimensions of equality, through e.g. the developing case-law of

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law' while Article 21 protects against discrimination on an assortment of suspect grounds - thereby giving textual shape to the formal/substantive equality distinction.

<sup>24</sup> For the ECHR case-law in this regard, see J. Gerards, 'The Discrimination Grounds of Article 14 ECHR' (2013) 13(1) *Human Rights Law Review* 99-124.

<sup>25</sup> See e.g. *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 (UK House of Lords); *Carson and Others v United Kingdom* (2010) 51 EHRR 13 (ECtHR).

<sup>26</sup> See e.g. *Springett and Others v United Kingdom*, Application Nos 34726/04, 14287/05 and 34702/05, Decision on Admissibility, 27 April 2010.

<sup>27</sup> See e.g. Fredman, n. 14 above.

national courts and the expanding scope of anti-discrimination legislation in both the public and private spheres.

The UK is no exception to these general trends. Much of its machinery of state was not originally designed with the equal status principle in mind.<sup>28</sup> However, over time, equality has become an animating value of the British constitutional order: strong expectations exist that its component parts should function in a manner broadly compatible with equality of status and its associated formal/substantive dimensions.

For example, representative democracy in the UK is now structured around the assumption that all citizens should enjoy 'political equality', i.e. formal equality of status as participants within the democratic process.<sup>29</sup> Key aspects of the UK's political system, such as the primacy of the Commons, the sovereign law-making authority of Parliament, and the functioning of its inter-institutional accountability mechanisms, are structured and justified by reference to this value.<sup>30</sup>

A commitment to formal equality of status also underpins contemporary understanding of what respect for the rule of law entails. Writing in 1885, Dicey famously argued that the equal application of the law to all persons, irrespective of their social or political status, was one of the defining features of the British rule of law tradition: '[h]ere every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.<sup>31</sup> This was a highly formalist view of what respect for equal status entailed, which required little if anything more than the equal subjection to the jurisdiction of the courts.<sup>32</sup> However, Dicey's views have been revised and reworked by subsequent commentators. An expanded formalist interpretation of 'equality before the law', requiring consistency of treatment as between similarly situated persons, is now generally acknowledged to be a key element of the rule of law. For example, in his influential analysis of the rule of law, Lord Bingham argued that 'the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.<sup>33</sup>

In line with formal equality reasoning more generally (as outlined in Part I above), this understanding of the notion of equality before the law is justified on the basis that it both manifests respect for equality of status and limits the potential for arbitrary exercise of power. It is also increasingly viewed as having a substantive dimension, i.e. as precluding the exercise of legal powers in a way that discriminates on grounds incompatible with equality of status.<sup>34</sup> As with other aspects of the

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<sup>28</sup> It also retains certain elements, such as the monarchy and the House of Lords, which can be difficult to reconcile with a deep attachment to this notion.

<sup>29</sup> This does not necessarily translate into practical or substantive equality of status – as evidenced by, for example, the restrictions imposed on prisoner voting.

<sup>30</sup> As Gordon puts it, 'it is this notion of the political equality of citizens which gives force to, and is manifested by, the extra-constitutional and intra-constitutional aspects of democracy': M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart, 2015), 34. Respect for political equality generally plays out in formal terms, as for example reflected in the importance assigned to majoritarian decision-making. However, it is gradually acquiring a more substantive dimension, as evidenced by measures such as ss. 104 and 106 of the Equality Act 2010 which are directed towards encouraging political parties to select more candidates from under-represented groups.

<sup>31</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed., Macmillan, 1959, ed. E.C.S. Wade), 193.

<sup>32</sup> As Craig has argued, Dicey's analysis provides little if any insight as to when it will be legitimate to apply different rules to different groups of individuals, or when public authorities such as the police should benefit from special powers and privileges unavailable to others. See P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467-487, 472-3.

<sup>33</sup> T. Bingham, *The Rule of Law* (Allen Lane, 2010), xxx. See also T. R. S. Allen, *Constitutional Justice*, 243-281.

<sup>34</sup> Bingham, *ibid.*

rule of law, the exact parameters of ‘equality before the law’ remain a matter of debate. However, the general idea that law should respect equality of status, in both its formal and substantive dimensions, is widely accepted – and reflected in how legislators, administrators and judges go about the business of framing, interpreting and applying legal rules.<sup>35</sup>

The value assigned to equality of status is also reflected in the UK’s ratification of all the core UN and Council of Europe treaty instruments guaranteeing the right to equality and non-discrimination, and the incorporation of Article 14 ECHR into domestic law via the HRA. Article 14 ECHR is a circumscribed equality guarantee, as it only prohibits discrimination against individuals on ‘status’ grounds such as race and sex when it comes to matters that come within the ‘ambit’ of another Convention right. However, the Strasbourg Court has adopted a wide interpretation of what comes within the ambit of Convention rights, and also of what qualifies as a status ground. As a result, the scope of Article 14 as incorporated by the HRA is wide, and it has generated an extensive and influential case-law.<sup>36</sup> Differences in treatment of similarly situated persons that affect the enjoyment of other Convention rights, which are linked to a status ground, must be shown to be objectively justified in line with the standard proportionality approach of the Strasbourg court – with differences of treatment based on ‘suspect’ grounds such as race attracting more intensive scrutiny from the courts. A failure to differentiate between differently situated individuals can also qualify as discrimination,<sup>37</sup> as can a failure on the part of public authorities to take positive steps to protect individuals against discriminatory treatment by employers and other private actors.<sup>38</sup>

The UK has also enacted detailed anti-discrimination legislation (prompted in part by the requirements of EU law). The Equality Act 2010 codified the law in this regard in Britain, after decades of incremental development.<sup>39</sup> Unlike Article 14 ECHR, which as mentioned above protects against all discrimination based on the open-ended grounds of ‘personal status’, anti-discrimination legislation only protects against discrimination based on a much narrower set of specified ‘protected characteristics’ such as race/ethnicity, sex, sexual orientation, disability and religion and belief.<sup>40</sup> However, anti-discrimination legislation regulates the conduct of both private and public bodies, unlike Article 14 ECHR, which via the HRA is only capable of exercising a qualified form of indirect horizontal effect on laws regulating the relationship between private parties.<sup>41</sup> It also imposes a positive duty on public authorities to eliminate discrimination and promote equality of opportunity

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<sup>35</sup> Thus, for example, Lord Bingham suggests that laws which discriminate on status grounds such as race and sex are not based on ‘objective differences’, and therefore contravene the rule of law: Bingham, *ibid*.

<sup>36</sup> An arguable case can be made that Article 14 jurisprudence of the UK courts has generated more substantial changes to UK law than any other single element of the Convention rights incorporated by the HRA.

<sup>37</sup> *Thlimmenos v Greece* (2001) 31 EHRR 411.

<sup>38</sup> *Eweida v UK* (2011) ECHR 738.

<sup>39</sup> The 2010 Act does not apply to Northern Ireland, where discrimination law still consists of a complex mix of primary legislation and regulations implementing the various provisions of the EU equality directives.

<sup>40</sup> Within this narrower scope of application, the requirements of anti-discrimination legislation can be more demanding than those arising under the HRA. For example, most forms of direct discrimination based on protected characteristics is prohibited, without any possibility of showing objective justification: see s. 13 of the Equality Act 2010.

<sup>41</sup> Formerly, UK public bodies were only bound by anti-discrimination legislation when they acted in their capacity as service providers or employers, i.e. in a manner analogous to private bodies. A number of legislative reforms, culminating in the provisions of s. 29 of the 2010 Act read together with Schedules 3, 22 and 23 of the Act, have now prohibited discrimination by public authorities in the performance of their public functions. However, Schedule 23(1) of the 2010 Act exempts all acts done under authorisation by primary and secondary legislation: this constitutes a significant limitation on the scope of anti-discrimination legislation as it applies to public authorities.

in respect of all the protected characteristics<sup>42</sup> – thereby requiring public authorities to take procedural steps to give effect to substantive equality considerations in their policies and practices.

EU law has also been influential in extending legal protection against discrimination. Crucially, it has both a formal and a substantive equality element.<sup>43</sup> The Court of Justice of the EU (CJEU) has recognised the existence of a general principle of equal treatment.<sup>44</sup> Within the scope of application of EU law, differences in treatment of similarly situated persons must be objectively justified in line with the demands of formal equality – with this principle now acknowledged to be a ‘right’ by virtue of Article 20 of the EU Charter of Fundamental Rights. However, this principle of equal treatment also has a distinct substantive dimension, recognised by Article 21 of the EU Charter. Differences of treatment based on ‘suspect’ grounds such as sex and race will be subject to more demanding scrutiny. Furthermore, the detailed provisions of the EU equality directives, which require states to enact laws prohibiting discrimination on a number of specific grounds, are read by the CJEU as having direct horizontal effect by virtue of this general principle – while UK legislation must comply with their requirements.<sup>45</sup> In general, due to the supremacy and direct effect of EU law, its equality/non-discrimination dimension has been very influential in shaping key aspects of UK law, including the provisions of the Equality Act 2010. (Brexit will obviously impact on this, as discussed further below.)

Not every facet of UK public law animated by a concern with equality of status is ‘constitutionalised’, i.e. is acknowledged to form part of the core framework of legal and political norms that make up the UK’s constitutional infrastructure. For example, the provisions of the Equality Act 2010 have no special constitutional status (even if important elements of the legislation are currently backstopped by the supremacy/direct effect requirements of EU equality law). However, on a general level, equality of status has become a key underpinning value of the UK’s constitutional order. Writing in 1994, Jowell described respect for equal status as ‘fundamental’ to a rule of law-based democracy like the UK. Since then, its constitutional significance has, if anything, grown – due in particular to the new substantive dimension it has acquired via the incorporation of Article 14 ECHR. Strong expectations now exist that state institutions should respect both its formal and substantive dimensions - even if what such respect entails in practice is often a matter of debate.

### **Part III – The Case for Recognising the Existence of the Equality Principle within the Common Law**

Common law adjudication in fields as diverse as administrative law, tort law or employment law is informed by certain core values, such as respect for the principle of legality, legal certainty and individual autonomy.<sup>46</sup> Within public law, these values crystallise at times into free-standing ‘principles’ or ‘common law rights’, which impose specific constraints on government action that are distinguishable from irrationality and other grounds of review.<sup>47</sup> Public authorities are presumed to

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<sup>42</sup> S. 149 Equality Act 2010.

<sup>43</sup> See in general E. Ellis and P. Watson, *EU Anti-discrimination Law* (2<sup>nd</sup> ed.) (OUP, 2012).

<sup>44</sup> C. O’Cinneide, ‘The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground’ (2015) 22 *Maastricht Journal of European and Comparative Law* 370-395.

<sup>45</sup> Case C-144/04, *Mangold v Helm* [2005] ECR I-9981; Case C-388/07, *Age Concern England (Incorporated Trustees of the National Council for Ageing)*, [2009] ECR I-1569.

<sup>46</sup> D. Oliver, *Common Values and the Public-Private Law Divide* (Butterworth, 1999).

<sup>47</sup> See e.g. *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115; *R (Unison) v Lord Chancellor* [2017] UKSC 51. The UK courts do not appear to draw a sharp distinction between ‘principles’ and ‘rights’ in this context: see e.g. *R (Unison) v Lord Chancellor* [2017] UKSC 51, [65], where Lord Reed stated that the ‘constitutional right of access to justice’ was one of the ‘constitutional principles’ at play in that case. Within EU law, ‘principles’ are treated as objective norms of the EU legal order which primary and secondary legislation must respect - while ‘rights’ involve a crystallisation of such principles into the form of ‘subjective’

lack the power to act in contravention of such principles/rights, in the absence of clear statutory authorisation for their actions. These principles and rights are also taken into account in statutory interpretation, with legislation being interpreted subject to a presumption that Parliament did not intend to limit these principles/rights.<sup>48</sup>

So, given the constitutional significance of equal status, where does it fit into this picture? Whether, how and to what extent should courts take equality into account when developing the common law? Is equality a value that should inform the development of established common law norms? Or is it something more than that – a free-standing principle, on a par with access to justice and the other common law rights that have been recognised to constitute free-standing grounds of review within UK public law over the last few decades?

In asking this question, some historical context needs to be added to the picture. It has been long established that the courts can strike down decisions by public authorities which treat people in an unequal manner, if such decisions lack a ‘reasonable’ basis. In other words, as discussed further below, unequal treatment may fall foul of common law rationality review. However, beyond that, the common law has historically lacked a well-developed equality dimension.

For example, when litigants began to challenge race and sex discrimination by private employers and service providers from the 1940s on, they found common law causes of action to be of limited use. In 1944, the famous West Indian cricketer Learie Constantine successfully invoked the implied duty of an innkeeper to provide accommodation to guests on a reasonable basis in challenging a hotel’s refusal to give him a room on the grounds of his race.<sup>49</sup> However, other attempts to invoke tort or contract law causes of action to challenge discrimination were generally unsuccessful – with the Court of Appeal in *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe* acknowledging that there was no bar in law to the plaintiffs denying admittance to ‘coloured people’.<sup>50</sup>

McColgan has characterised this historical approach of the common law to discrimination as displaying a ‘marked lack of concern’.<sup>51</sup> A more charitable way of putting it would be that the common law lacked any articulated concept of equality, or any legal channel to vindicate claims of discriminatory treatment aside from rationality review in the case of public authorities – and, even in the latter case, the relevant case-law was often criticised for lacking coherence and consistency.<sup>52</sup>

Beginning with the Race Relations Act 1965, Parliament used anti-discrimination legislation to plug the gap left by the lack of a meaningful equality/non-discrimination dimension to the common law. Subsequently, much academic commentary questioned the capacity of the common law to engage meaningfully with equality and non-discrimination values – both on the basis of its lack of an articulated conception of equality, and also because of concern that the ideological biases of the

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norms conferring specific legal entitlements upon individuals: see e.g. T. Tridimas, ‘Fundamental Rights, General Principles of EU Law, and the Charter’ 16 *Cambridge Yearbook of European Legal Studies* 361-392. Lord Reed’s above-cited comments in *Unison* indicates that an analogous relationship exists between the two concepts in the context of UK common law.

<sup>48</sup> See in general M. Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) 68 *Current Legal Problems* 85-117.

<sup>49</sup> *Constantine v Imperial Hotels Ltd* [1944] KB 693

<sup>50</sup> [1958] 3 All ER 220.

<sup>51</sup> A. McColgan, *Discrimination, Equality and the Law*, 11.

<sup>52</sup> In 1972 Lester and Bindman observed that ‘apart from their disapproval of slavery, English judges have never declared that acts of racial discrimination committed in this country are against public policy’: see A. Lester & G. Bindman, *Race and Law* (Penguin, 1972), at p. 25, and the reference at p. 34 to the case of *Santos v Illidge* (1859) 6 CB (NS) 841.

judiciary would invariably infect any common law adjudication in this context.<sup>53</sup> Interestingly, the courts themselves also tended to adopt the position that legal developments in the equality/non-discrimination field had to be driven by legislation, because of the conceptual complexity of the issues involved. This view remains very influential: for example, as of 2003, Lord Hope in *Relaxion Group v Rhys-Harper plc* commented as follows:

[A]lthough discrimination on whatever grounds is widely regarded as morally unacceptable, the common law was unable to provide a sound basis for removing it...Experience has taught us that this is a matter which can only be dealt with by legislation, and that it requires careful regulation by Parliament...The fact is that the principle of equal treatment is easy to state but difficult to apply in practice.<sup>54</sup>

However, this scepticism about the capacity of the common law to handle equality issues sits a little uncomfortably with how the common law has developed over the last few decades: the normative dimension of the common law has deepened considerably, in response to the 'rights revolution' and shifts in the UK's constitutional self-understanding. This is particularly marked when it comes to the development of common law rights jurisprudence since the early 1990s (as described in detail in the other chapters of this book). Given the importance of equal status as both a right and a constitutional bedrock, it would be an interesting exception for the common law's historically stunted equality dimension to remain untouched by this process.

Furthermore, as discussed in Part II of this chapter, equality in both its formal and substantive dimensions has acquired much greater salience within the UK constitutional order over the last few decades. In particular, the importance of substantive equality is now acknowledged in both the political and legal spheres, in a way that was not the case when cases like *Constantine* and *Scala Ballroom* were being decided in the 1940s and 50s – while the concept of 'equality before the law' is now much more articulated within rule of law theorising by academics and judges alike than was the case back then. As a result, the formal and substantive dimensions of equality have acquired much greater definition than was hitherto the case. Again, this raises the question of whether the common law should evolve in response.

Jowell's 1994 paper was an attempt to jump-start the development of the common law in this regard. In essence, he argued that equality of status had become such an established and sufficiently articulated value within the UK constitutional order that the courts should take it into account in developing the common law. More specifically, he argued that 'our constitution rests upon the assumption that government should not impose upon any citizen any burden that depends upon an argument that ultimately forces the citizen to relinquish her or his sense of equal worth', and that the common law should give effect to this 'equality principle' by restraining public authorities from acting in a way that failed to respect equality of status.<sup>55</sup> Furthermore, Jowell suggested this principle should be regarded as a free-standing ground of review, capable of being applied in its own right to invalidate government action which was incompatible with its requirements. This would ensure it was 'explicitly articulated and declared' within the framework of administrative law adjudication, rather than being treated as a 'well-disguised rabbit to be hauled occasionally out of the *Wednesbury* hat'.<sup>56</sup>

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<sup>53</sup> See in general B. Hepple, *Race, Jobs and the Law in Britain* (Penguin, 1970), 143; also McColgan, *ibid.*, 10-13.

<sup>54</sup> [2003] UKHL 33, [78].

<sup>55</sup> Jowell, 'Is Equality a Constitutional Principle?', 18.

<sup>56</sup> Jowell, 'Is Equality a Constitutional Principle?', 14.

Other commentators have subsequently made similar arguments, making the case for the equality principle to be treated on a par with other fundamental rights and principles that have become free-standing grounds of review within administrative law – such as access to justice, or the principle of legality. In Trevor Allan’s view, this would ensure that the common law kept fidelity with the normative requirements of rule of law.<sup>57</sup> For Paul Bowen QC, this would enhance the common law’s ability to act as a guarantor of individual rights, by reinforcing the existing protection afforded by the HRA and the Equality Act 2010 to the right to equality and non-discrimination.<sup>58</sup>

Giving legal weight in this way to the equality principle would arguably enhance the capacity of the common law to protect individuals against unequal treatment, by establishing a clearly-defined, distinct ground of review. It also could provide a clear common law basis for interpreting and applying legislation and other legal rules in ways that reflect the normative demands of the formal and substantive dimensions of equal status. It would also be in tune with the wider legal trend of recognising the existence of fundamental common law principles, and of ensuring that the common law was capable of protecting basic rights.

However, it would also introduce a newly recognised ground of review into an already well-populated administrative law landscape. Furthermore, the scope of the equality principle as defined by Jowell and others is potentially very wide: it could open up any differential treatment of similarly situated individuals that is deemed to affect ‘equal worth’ to judicial scrutiny. The HRA and anti-discrimination legislation already provide relatively comprehensive protection against discrimination in both the public and private law contexts.

Arguments thus can be made both for and against judicial recognition of a distinct equality principle within the common law. It is thus unsurprising that the courts have trod with some caution in this area. Enthusiastic affirmation of the constitutional significance of the equality principle has gone hand-in-hand with a tendency to keep its actual legal effect corralled within the framework of rationality review.

#### **Part IV – The Current Status of Equality within the Common Law**

The courts have repeatedly acknowledged the fundamental importance of equality of status to democracy and rule of law. For example, in the HRA case of *Ghaidan v Godin-Mendoza*, Baroness Hale concisely outlined the deep connection between democracy and equality:

Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being.<sup>59</sup>

Indeed, it has become common for judges to genuflect to the constitutional significance of equality of status, both in *obiter* comments in judgments and speaking extra-judicially.

The courts have also affirmed that some variant of the equality principle is immanent to the common law. Lord Hoffman referred in *Arthur JS Hall v Simons* to ‘the fundamental principle of

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<sup>57</sup> T.R.S. Allen, *Constitutional Justice*, 246.

<sup>58</sup> P. Bowen, ‘Lion under the Throne or Rabbit from a Hat? Equality as a constitutional right in the law of the United Kingdom’, conference paper, JUSTICE Human Rights Conference, 14 October 2016, on file with the author.

<sup>59</sup> [2004] UKHL 30, [132].

justice which requires that people should be treated equally and like cases treated alike',<sup>60</sup> while Rault J. in *Police v Rose* affirmed that '[e]quality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently'.<sup>61</sup> Similarly, in *Edwards v SOGAT*,<sup>62</sup> a case involving the withdrawal of trade union rights, Lord Denning said '[t]he courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules or in the enforcement of them' – while Lord Sumption in *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* recently pronounced to the effect that the equality principle was 'fundamental to any rational system of law'.<sup>63</sup>

By extension, the courts have been prepared to treat the equality principle as informing the application of irrationality review. It is now well-established doctrine that differential treatment of similarly situated persons that lacks objective justification may be struck down on the basis that it is *Wednesbury* unreasonable. Lord Russell CJ affirmed in *Kruse v Johnson* that byelaws could be struck down as 'unreasonable' if they were 'partial and unequal in their operation as between different classes'.<sup>64</sup> This was cited by Simon Brown J. in *R v Immigration Appeal Tribunal, ex p. Manshoora Begum*,<sup>65</sup> in concluded that a provision in the Immigration Rules was 'manifestly unjust' on account of how it applied minimum income requirements for leave to enter in a discriminatory fashion as between inhabitants of poorer and more affluent states. Similarly, in *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England & Wales*,<sup>66</sup> Stanley Burton J. ruled that the exclusion of mushroom pickers from a set minimum harvesting wage was a form of differential treatment that could not be objectively justified in the circumstances – and thus was irrational.<sup>67</sup>

Cases with a substantive equality dimension can also fall within rationality review. Thus, in *Gurung v Ministry of Defence*,<sup>68</sup> McCombe J. concluded that unjustifiable distinctions based on racial or ethnic distinctions would be 'irrational and inconsistent with the principle of equality that is the cornerstone of our law', while concluding that the exclusion of Gurkha soldiers from the scheme of compensation payments awarded to former Japanese prisoners of war was irrational. Similarly, in *R (Limbu) v Secretary of State for the Home Department*,<sup>69</sup> another case concerning race and ethnicity discrimination claims related to the treatment of Gurkhas who had served in the armed forces, Blake J. was of the view that this 'common law principle [of equality] is an important instrument whereby it can be determined whether a discretionary public law decision is rational' – even though he concluded on the facts that the treatment of Gurkhas by the immigration authorities under review in that case did not breach the principle.

The courts have also occasionally applied other common law grounds of review in a way that has given indirect effect to the equality principle. For example, de Smith cites a number of cases where

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<sup>60</sup> [2002] 1 AC 615, 688-9. See also Lord Donaldson MR in *R (Cheung) v Hertfordshire County Council*, *The Times*, 4 April 1998: '[i]t is a cardinal principle of public administration that all persons in a similar position should be treated similarly', cited in de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, fifth edition, at paragraph 13-041.

<sup>61</sup> [1976] M.R. 79, 81.

<sup>62</sup> [1971] Ch 354.

<sup>63</sup> [2015] UKSC 6, [26].

<sup>64</sup> [1898] 2 Q.B. 91.

<sup>65</sup> 1986] Imm AR 385.

<sup>66</sup> [2004] EWHC 1447 (Admin) (18 June 2004).

<sup>67</sup> [74], citing Lord Donaldson MR's comments in *Cheung*, cited above at n. 60.

<sup>68</sup> [2002] EWHC 2463 (Admin).

<sup>69</sup> [2008] EWHC 2261 (Admin), [50].

unequal treatment fell foul of the procedural requirement to take relevant considerations into account.<sup>70</sup> However, in general, equality and discrimination claims have been argued and adjudicated by reference to the irrationality ground of review.

The assumption underpinning this approach is that differences in treatment that cannot be objectively justified lack rational foundation – with judges often classifying discriminatory behaviour as motivated by stereotyping, prejudice and other forms of ‘bad faith’ reasoning.<sup>71</sup> Indeed, the classic example of *Wednesbury* unreasonableness, as originally set out in Warrington LJ in *Short v Poole Corporation*<sup>72</sup> and subsequently cited by Lord Greene MR in *Wednesbury* itself, constitutes a flagrant breach of formal equality principle – namely ‘the red-haired teacher, dismissed because she had red hair’.<sup>73</sup> Paul Daly has argued it is consistent with the ‘internal logic and structure’ of *Wednesbury* unreasonableness to treat differential treatment as one of the ‘indicia’ of irrationality, generating a presumption of unreasonableness unless objectively justified.<sup>74</sup>

However, framing breaches of the equality principle as instances of irrationality also generates some conceptual difficulties. Irrationality is a fluid and uncertain concept, which is inherently prone to subjective interpretation. Insofar as it has a conceptual core, it is structured round the idea of ‘reasonableness’: decisions by public authorities must usually be shown to be clearly unreasonable before a challenge on this ground can succeed. However, discriminatory practices are often based on received wisdom, or embedded assumptions about how particular matters should be handled. As a consequence, their unreasonableness is rarely self-evident.<sup>75</sup> Taken together with the inchoate nature of this test and its vulnerability to subjective interpretation, this means that rationality review has often proved to be a poor diagnostic tool for identifying breaches of the equality principle.

*Short v Poole Corporation*, already cited above, illustrates this problem.<sup>76</sup> In that case, the Court of Appeal upheld that a decision by a public authority to terminate the employment contract of a teacher after it concluded that her husband would be able to ‘maintain her’. The dismissed teacher had a husband to look after her, and her job could be given to another – meaning that, in the Court’s view, the decision was not based on ‘alien and irrelevant grounds’.<sup>77</sup> This conclusion would now be plainly incompatible with the requirements of the equality principle.<sup>78</sup> McCombe J. acknowledged as much in *Gurung*: ‘the facts [of *Short*] may well provide an example of a danger of decision makers today adopting a “rationality” based upon the criteria of yesterday.’<sup>79</sup>

Furthermore, rationality review focuses on the coherence of public authority decision-making, while the equality principle focuses on whether public authority decision-making shows sufficient respect for the concept of equal status. The two lines of analysis will often overlap. But there are times when discriminatory treatment will often be motivated by eminently rational concerns, which may nevertheless be insufficiently compelling to satisfy the demands of the equality principle. Thus, for example, the outcome of cases such as *Middlebury* and *Gurung* flow from the failure of public

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<sup>70</sup> *De Smith’s Judicial Review*, paras. 11.061-11.068.

<sup>71</sup> B. Hale, ‘The Quest for Equal Treatment’ (2005) *Public Law* 571-585.

<sup>72</sup> [1926] Ch. 66, 90, 91.

<sup>73</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, 229.

<sup>74</sup> P. Daly, ‘Wednesbury’s Reason and Structure’ (2011) *Public Law* 237.

<sup>75</sup> A. McColgan, *Discrimination, Equality and the Law*, 12.

<sup>76</sup> [1926] Ch. 66

<sup>77</sup> [1926] Ch. 66, 91 (*per* Warrington LJ).

<sup>78</sup> The initial decision by the public authority would also now be an obvious breach of the sex discrimination provisions of the Equality Act 2010.

<sup>79</sup> [2002] EWHC 2463 (Admin), [35].

authorities to provide *adequate* justification for differential treatment, rather than from a failure to provide a rational justification as such for their actions. This makes rationality review an awkward receptacle for the equality principle: labels such as ‘reasonableness’ or ‘irrationality’ do not describe what is really driving the outcome of such judgments.

Perhaps conscious of these tensions, the courts have retooled aspects of rationality review to accommodate the equality principle. Case-law has clarified that ‘flawed logic, more readily shown than a decision which simply defies comprehension, may breach the principle of rationality’, as Ouseley J. put it in *R (Gurung) v Secretary of State for Defence* (another equal treatment case involving the situation of Gurkha ex-soldiers.)<sup>80</sup>

Furthermore, the courts have sometimes been prepared to apply more intensive scrutiny in cases involved alleged infringements of the right to non-discrimination, and thus the substantive dimension of the equality principle – reflecting the ‘anxious scrutiny’ approach now applied to common law rights claims more generally.<sup>81</sup> There are even suggestions in the case-law that a similar intensity of review should be applied to common law equality claims as is applied to Article 14 ECHR claims. Thus Ouseley J. in *R (Gurung) v Secretary of State for the Defence* indicated that when equality rights ‘are interfered with, the greater the scrutiny to which the reason for the interference will be subjected...[T]he consideration of the human rights claim, which would often require a more intrusive analysis of the basis of the claimed justification, is likely to be satisfied on the same basis as or in step with what would satisfy rationality in public law’.<sup>82</sup> Blake J. in *Limbu* similarly took the view that ‘the common law and Convention principle essentially walk hand in hand together, although the common law principle [of equality] has to be applied through the public law doctrine of rationality’.<sup>83</sup>

However this intensity of review is not always consistently applied across all common law cases with a substantive equality dimension. For example, McColgan has argued that a less exacting standard was applied in *ABCIFER v Secretary of State for Defence*.<sup>84</sup> This case concerned an irrationality challenge to the exclusion of British civilian subjects who were neither born in the United Kingdom nor had a parent or grandparent so born from a compensation scheme for civilians interned by the Japanese during the Second World War. In his judgment, Scott Baker J. suggested it was ‘reasonable’ for the UK government to distinguish between persons with a clear link to the territory of the UK and those who did not. As McColgan notes, it is debatable whether this conclusion is compatible with a rigorous application of anxious scrutiny review, especially if the purpose of the compensation scheme and the background historical context are taken into account.<sup>85</sup> Instead, the judgment in *ABCIFER* is probably best viewed as an application of the weaker reasonableness standard, which is more commonly applied in rationality review cases than intensive scrutiny. The language associated with this test - as distinct from the more demanding standard associated with rights review either under the ECHR or common law - has been used in subsequent judgments relating to race discrimination claims litigated through rationality review.<sup>86</sup>

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<sup>80</sup> [2008] EWHC 1496 (Admin).

<sup>81</sup> See Bingham MR (as he was then) in *R (Ministry of Defence), ex p Smith* [1995] EWCA Civ 22.

<sup>82</sup> [2008] EWHC 1496 (Admin), [54], [60].

<sup>83</sup> [2008] EWHC 2261 (Admin), [50].

<sup>84</sup> [2002] EWHC 2119 (Admin).

<sup>85</sup> A. McColgan, *Discrimination, Equality and the Law*, 12.

<sup>86</sup> See e.g. Ouseley J.’s judgment in *R (Gurung) v Secretary of State for the Defence* [2002] EWHC 2119 (Admin): [t]hat principle also requires a rational connection between the problem to be solved or aim to be advanced and the means chosen to solve the problem or to advance the aim. The [measure under challenge] comes well within the range of responses available to a reasonable decision-maker. I also accept that where, i.e. within

Furthermore, uncertainty persists as to what level of scrutiny should be applied when it comes to cases involving an allegation of a breach of formal equality requirements – as distinct from the substantive equality issues at stake in cases like *ABCIFER* and *Gurung v Ministry of Defence*. This is evident from the judgment of UK Supreme Court in *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills*,<sup>87</sup> the first case where the UK's apex court has taken account of the equality principle in an administrative law context. *Rotherham* involved a challenge to how the Secretary of State had allocated EU structural funds to different regions across the UK, with the applicants arguing that this process had unjustly discriminated against certain regions in the north of England. The Supreme Court agreed that the differential treatment in question could be subject to rationality review under the common law, as well as under the general principle of equal treatment recognised in EU law. The majority of the Court then proceeded to apply a very light touch standard of review in concluding that the differential treatment in question was not unjust, as is usually the case when such decisions involve resource allocation. However, in dissenting, Lords Mance and Carnworth (with Lady Hale concurring) took the view that 'closer review' could be applied in cases such as this where there was a 'failure to treat like cases alike' – especially when the decision in question had been taken on an informal basis and without prior consultation.<sup>88</sup>

This 4-3 divide in *Rotherham* is striking, especially given the leeway normally given to resource allocation decisions by public authorities. The minority regarded such treatment as a pressing 'indicator' of unreasonableness (to use Daly's terminology), with the burden passing to the Secretary of State to show a clear justification. In contrast, the majority applied a much less demanding level of scrutiny, which was more in tune with the traditional light touch associated with *Wednesbury* unreasonableness.

These uncertainties relating to the appropriate standard of review, as well as to what qualifies more generally as 'irrational' behaviour, are symptoms of a wider problem – namely the inherent difficulties of accommodating the equality principle within the confines of rationality review. As originally set out in cases such as *Short* and *Wednesbury*, this ground of review was conceptualised as setting a forbiddingly high threshold for judicial intervention, only to be crossed in situations where public authorities had behaved in a manifestly irrational manner. However, these expectations sit uneasily with the value now assigned to the equality principle, and the widespread view that courts should play an active role in reviewing conformity with its normative demands.<sup>89</sup> Adjusting the standard template of rationality review to give effect to the principle, by for example applying heightened scrutiny in substantive equality cases, can help to reduce this inherent tension. However, this stretching of *Wednesbury* unreasonableness is problematic from the point of view of coherence and clarity. As Jowell argued in 1994, it risks turning the equality principle into a 'well-disguised rabbit' to be pulled periodically out of the *Wednesbury* hat as and when judges see fit.

Some commentators have taken the view that a better approach would be to classify the existing 'equality as rationality' jurisprudence as an aspect of a wider legal framework structured around the equality principle. They regard cases like *Middlebrook* and *Gurung* as in effect involving the direct application of the equality principle, with 'irrationality' simply serving as an artificial label for what is

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the range of responses open to a reasonable decision maker'. See also *R (Mohammed) v Secretary of State for Defence* (2007) 104(20) L.S.G. 32; *R (Mohammed Rafi Hottak and Al) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438.

<sup>87</sup> [2015] UKSC 6.

<sup>88</sup> Lord Mance, [142]; Lord Carnworth, [167].

<sup>89</sup> I am grateful to Mark Elliott for this point.

really going on in these cases – namely the review of state action by reference to an overarching ‘constitutional principle of equality’ which also is protected by EU law and Article 14 ECHR.<sup>90</sup> However, this take on the status of the equality principle – which is for example adopted in de Smith - overeggs the current status quo. The courts have been slow to set the equality principle free from its irrationality shackles, reflecting their historic caution in this area.

Lord Hoffmann’s judgment in the Privy Council case of *Matadeen v Pointu* has been a regular point of reference in this regard.<sup>91</sup> *Matadeen* concerned a challenge to a regulation introduced by the government of Mauritius, on the basis that it gave an unfair advantage in the university admissions exam process to secondary school students studying an Asian language. The Supreme Court of Mauritius interpreted sections 1 and 3 of the Mauritian Constitution, which taken together guarantee the enjoyment without discrimination of the protection of the law and other basic democratic rights and freedoms, as setting out a general justiciable principle of equality<sup>92</sup> – before proceeding to strike down the regulation at issue, on the basis it offended against this principle. In contrast, the Privy Council concluded that the provisions of the circumscribed non-discrimination clause set out in s. 3 of the Constitution, which was similar in substance to Article 14 ECHR, could not be read as establishing the existence of such a justiciable general equality principle. Giving the judgment of the Judicial Committee, Lord Hoffmann affirmed the importance of the equality principle to rule of law and constitutional democracy more generally – citing Jowell’s 1994 paper in so doing. He also recognised that it could be invoked as a ‘ground’ of irrationality, thereby implicitly endorsing the expanded approach to rationality review that the lower courts have adopted with respect to the equality principle.<sup>93</sup> However, in a much-cited passage, he went on to express concern about the uncertain scope of the principle:

8. Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational: see Professor Jeffrey Jowell Q.C., *Is Equality a Constitutional Principle?* [1994] Current Legal Problems 1, 12-14 and De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, paras. 13-036 to 13-045.

9. But the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not?...The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a

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<sup>90</sup> Lord Steyn in 2002 welcomed what he saw as the development by the UK courts of a domestic ‘constitutional principle of equality’, on the basis that it constituted a welcome ‘organic development of constitutional rights’, which complemented the less extensive protection provided by Article 14 ECHR with its limited scope of application: see Lord Steyn, Lecture on 18 September 2002 in honour of Lord Cooke of Thorndon, text cited by McCombe J. in *Gurung v Ministry of Defence*, [2002] EWHC 2463 (Admin), [36].

<sup>91</sup> [1999] 1 AC 98, [1998] UKPC 9.

<sup>92</sup> In so doing, the Mauritian Supreme Court said that ‘the notion of equality ... is contained ... in the concept of democracy’, noted that the ‘principle of equality ... permeates the whole Constitution’, and cited the provisions of Article 26 of the ICCPR in support of their interpretation: [1999] 1 AC 98, [7].

<sup>93</sup> [1999] 1 AC 98, [25].

justiciable principle - that it should always be the judges who have the last word on whether the principle has been observed...

Lord Hoffmann's comments about the uncertain scope of the equality principle relate specifically to the issues of constitutional interpretation at stake in *Matadeen* and the potential limits it might impose on the powers of the Mauritian legislature – an issue that is not directly relevant in the UK with its sovereign legislature. Furthermore, they relate to the formal dimension of the equality principle: s. 3 of the Mauritian Constitution contains a specific non-discrimination clause prohibiting discrimination by the legislature on race, gender and other 'status' grounds.<sup>94</sup> However, Lord Hoffmann's concerns about the uncertain scope of the equality principle – and the potential scope it might open up for excessive judicial inference with executive and legislative decision-making - have nevertheless resonated.

This is evident in the most recent UK Supreme Court decision concerning the equality principle, namely *R (Gallagher Group Ltd) v Competition and Markets Authority*.<sup>95</sup> This case involved claims that the Office of Fair Trading ('OFT') had subjected different parties caught up in a price-fixing investigation to unfair and unequal treatment. The Supreme Court reversed the Court of Appeal's finding that *inter alia* these other parties had been treated unequally without objective justification, concluding that the OFT had acted reasonably. However the most interesting element of the judgment was the Court's conclusion that the equality principle did not have free-standing status within the common law.

Giving the leading judgment, Lord Carnwath commented that '[w]hatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law'.<sup>96</sup> He went on to state that '[c]onsistency...is a generally desirable objective, but not an absolute rule', before citing Lord Hoffmann's comments in *Matadeen* as authority for the proposition that there was a need 'to distinguish between equal treatment as a democratic principle and as a justiciable rule of law'.<sup>97</sup> He concluded that issues of consistency of treatment would generally arise only 'as aspects of rationality'.<sup>98</sup>

In his concurring judgment, Lord Sumption took a similar view. In so doing, he clarified his earlier judgment in *Rotherham*, where he had described the equality principle as 'fundamental to any rational system of law, and...part of English public law since at least the end of the nineteenth century'.<sup>99</sup> That passage in *Rotherham* had contained no reference to the principle constituting an aspect of rationality: if anything, it seemed to suggest it was free-standing element of administrative law. However, in *Gallagher*, he was at pains to put the principle back into its *Wednesbury* box:

In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories. To say that a decision-maker must treat persons equally unless there is a reason for treating them differently begs the question what counts as a valid reason for treating them differently. Consistency of treatment is, as Lord Hoffmann

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<sup>94</sup> As noted by McCombe J. in *Gurung*, [39].

<sup>95</sup> [2018] UKSC 25, [50].

<sup>96</sup> [2018] UKSC 25, [24].

<sup>97</sup> [2018] UKSC 25, [26].

<sup>98</sup> *Ibid.*

<sup>99</sup> [2018] UKSC 25, [26].

observed in *Matedeen v Pointu* [1999] 1 AC 98, at para 9 “a general axiom of rational behaviour”. The common law principle of equality is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities...<sup>100</sup>

*Gallaher* thus establishes that the equality principle is, for all its constitutional significance, just an ‘aspect of rationality’.<sup>101</sup> Two sets of justifications are offered for this conclusion. Lord Carnwath cites Lord Hoffmann’s concerns in *Matadeen* about the uncertain scope of the principle: Lord Sumption cites the need to avoid unnecessary multiplication of different categories of review. Taken together, these concerns are invoked to close down the argument that the equality principle should have free-standing status – and to affirm the traditional caution sown by the courts in giving effect to equality as a value through the common law.

However, while *Gallaher* may appear to settle this point, it may not generate the legal certainty and clarity that Lords Carnwath and Sumption are seeking to achieve. As already discussed, the equality principle fits awkwardly within rationality review. Indeed, if anything, *Gallaher* may add to this awkwardness. In his leading judgment, Lord Carnwath described the common law case-law and various HRA judgments involving Article 14 ECHR as reflecting a common commitment to rationality.<sup>102</sup> This could be read as suggesting that a broadly similar approach should be adopted in both Article 14 and at least some common law equality cases – despite the level and type (proportionality) of scrutiny applied in Article 14 claims being viewed as generally more demanding than the scrutiny standards applied in rationality claims. In turn, this suggests that the heightened level of scrutiny applied in cases like *Gurung* is justified. This means that rationality review involving allegations of unequal treatment will continue to have teeth. However, it also means that the current problems of ‘fit’, clarity and coherence will continue to be a problem.

*Gallaher* also leaves other issues open. If equality is ‘not a distinct principle of administrative law’ or a ‘justiciable rule of law’ in its own right, but only a dimension of rationality, what if any role should it play in statutory interpretation? Legislation like the Equality Act 2010 will obviously be interpreted by reference to the underlying intention of Parliament to provide effective protection against discrimination. But should the constitutional significance of the equality principle be taken into account in interpreting other statutes, if for the purposes of the common law it is ‘only’ an aspect of rationality? There is nothing in *Gallaher* that necessarily closes off this possibility. However, the apparent downgrading of equality as compared to access to justice and other recognised free-standing common law principles does raise the question of what weight should be attached to it when it comes to interpreting statutes or reviewing secondary legislation.<sup>103</sup>

Finally, it should be borne in mind that the unequal treatment at issue in *Gallaher* did not generate any concerns from a substantive equality perspective. This leaves open the possibility that the Supreme Court’s approach in *Gallaher* could be distinguished in future cases with a substantive equality dimension. However, there is no explicit basis in the *Gallaher* judgment for making such a

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<sup>100</sup> [2018] UKSC 25, [50].

<sup>101</sup> *Gallaher* did not involve any ‘status’ ground of discrimination: however, there is no indication in any of the judgments that the Court intended to draw a distinction between the formal and substantive dimensions of the principle.

<sup>102</sup> See also *R (MM) v SSHD* [2014] EWCA Civ 985 [95], [153]

<sup>103</sup> Note that the Equality and Human Rights Commission argued in an intervention before the Supreme Court in the case of *P v Commissioner of Police of the Metropolis* [2017] UKSC 65 that the provisions of the Equality Act 2010 should be interpreted in a manner that reflected the constitutional significance of the equality principle. The subsequent judgment did not engage with this argument. (Full disclosure: the author provided assistance to Paul Bowen QC in framing this intervention.)

distinction between formal and substantive equality cases. The Supreme Court did not engage in any substantive discussion of the differing normative requirements associated with these different component elements of the equality principle, beyond acknowledging the well-established rule that certain 'suspect' discrimination grounds such as race would attract more demanding scrutiny.

### **Part V – A Critical Analysis of the Status of Equality within the Common Law**

The cautious approach traditionally adopted by the courts in giving effect to the equality principle in the common law is thus on full display in *Gallagher*. The judgment affirms the importance of the equality principle in the abstract, but denies it free-standing status.

Is this situation satisfactory? Lord Hoffmann's concerns in *Matadeen* have some validity: there are reasons to be wary of opening up government action to review by reference to the equality principle, because of the width of its potential scope of application. As such, the status quo has the advantage of providing an indirect degree of common law protection for the equality principle, and by extension for the related individual right to equality and non-discrimination – while channelling legal challenges through the tried and trusted framework of rationality review.

However, it also has a down side. As discussed, the status quo generates a degree of doctrinal incoherence, and dilutes the status of equality as an important common law value. It also promises more legal certainty than it provides in practice. Jowell's concern that the equality principle would become a 'well-disguised rabbit', to be hauled out of the *Wednesbury* hat as and when judges deem it appropriate, is well-founded – as illustrated by the readiness of the courts to apply a level of scrutiny analogous to that applied under the HRA in cases such as *Gurung*, which would appear to go well beyond the less demanding standards normally applied in rationality review.

Furthermore, keeping equality subsumed within irrationality, while other foundational rights and principles such as access to justice are treated as free-standing common law norms, generates problems of conceptual consistency. It is striking that other core principles have been elevated to the status of common law rights/principles, while equality languishes within its irrationality box.

None of these issues were discussed in the Supreme Court's reasoning in *Gallagher*, which was rather perfunctory.<sup>104</sup> Lord Sumption's desire to prevent an 'unnecessary multiplication' of existing categories of administrative law review is understandable. However, as Mark Elliott has argued in response, 'concern about too much doctrine - too many grounds of review - must ... be balanced with a countervailing concern about too little doctrine'.<sup>105</sup> Keeping the equality principle boxed up within rationality review for the sake of doctrinal simplification risks becoming counter-productive, if it has the effect of further diluting the clarity and coherence of the latter ground of review. Indeed, it may even open the door to the type of *ad hoc* judicial decision-making that both Lord Hoffmann in *Matadeen* and Lord Carnwath in *Gallagher* are so concerned to avoid, by encouraging courts to apply rationality review in an elastic and malleable manner so as to accommodate the normative demands of the equality principle. Jowell had a point in 1994 when he argued that treating the equality principle as a free-standing ground of review would ensure a closer focus on its specific normative requirements, and allow the courts to build up a coherent case-law structured around a direct and

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<sup>104</sup> Counsel for both sides argued the case on the assumption that the equality principle was a free-standing ground of review, meaning that the Court was denied the benefit of counsel's opinion on this issue.

<sup>105</sup> M. Elliott, 'Consistency as a free-standing principle of administrative law?', *Public Law for Everyone Blog*, 15 June 2018, available at <https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-judgment-in-gallagher-consistency-as-a-free-standing-principle-of-administrative-law/> (last accessed 20 April 2019).

systematic engagement with these requirements rather than being refracted through the potentially distorting lens of irrationality.<sup>106</sup>

In general, the Supreme Court's approach in *Gallagher* represents a wasted opportunity. The Court could have elected to treat the equality principle as having a distinct and free-standing status within the common law, and gone on to delineate its substantive and formal dimensions – taking the time to emphasise the greater normative demands and associated higher levels of scrutiny associated with the former as opposed to the latter, along the constitutional significance of equal status and the associated individual right to equality and non-discrimination. This would have helped to remedy the uncertain state of the common law in this context, and provided invaluable guidance to lower courts. It would also have helped to clarify the scope and substance of the equality principle, and given legal actors a better sense of the relative 'demandingness' of its disaggregated formal and substantive elements – which by extension could help minimise the risk of judicial *ad hoc* decision-making in this context. It would also have moved forward the project of modernising the value system of the common law, by ensuring it adequately reflected the constitutional importance of equal status.

However, in *Gallagher*, the Supreme Court clung to traditional orthodoxy – in interesting contrast to its willingness to develop common law norms in other contexts.<sup>107</sup> This leaves the existing status of the equality principle, and legal protection more generally within the common law for the right to equality and non-discrimination, enmeshed in a messy relationship with rationality review.

### **Conclusion – Time to Think Again**

Does it matter that the status of the equality principle within the common law is less than satisfactory? The Equality Act 2010 and the HRA/ECHR provide extensive legislative protection for equality and non-discrimination rights. This covers much of the substantive dimension of the equality principle, which is generally acknowledged to be more 'demanding' and in need of stronger legal protection than the formal equality concerns that form the subject matter of much of the common law case-law. Given this, and the well-established judicial preference for letting the legislature take the initiative in putting legal flesh on the bones of the concept of equal status, is there really much of a need to be concerned with what was said or not said in cases such as *Gallagher*?

The answer to this is 'yes'. There are grounds to be concerned about the current sub-optimal state of the common law.

To start with, the scope of the Equality Act 2010 and the HRA as it applies to equality and non-discrimination are limited in important ways. The 2010 Act only covers discrimination based on certain 'suspect' characteristics: differential treatment based on any other grounds falls outside of its reach. Also, the Act does apply to the performance of public functions, but only insofar as the discriminatory behaviour in question is not 'authorised' by primary or secondary legislation.<sup>108</sup> The HRA is wider in scope, with Article 14 ECHR covering all discrimination based on 'status' grounds. However, it only prohibits unjustified discrimination in the enjoyment of other Convention rights, and does not apply to unequal treatment that is not based upon a status ground, i.e. it has limited

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<sup>106</sup> Elliott has made a similar argument in favour of recognising 'consistency' as a free-standing common law principle: see Elliott, *ibid*.

<sup>107</sup> See e.g. *Unison*, cited at n. 47 above.

<sup>108</sup> See Schedule 23 of the Equality Act 2010.

applicability to formal equality. The jurisprudence of the European Court of Human Rights has narrowed these limits to the scope of Article 14 ECHR, but they remain a restriction its reach.<sup>109</sup>

Furthermore, both the 2010 Act and HRA are ‘just’ legislation, i.e. they are amendable or repealable instruments, with the HRA in particular being the focus of substantial political hostility. In contrast, the equality provisions of EU law benefit from the supremacy of European law. However, they have limited reach outside of the employment context and/or situations where national law is ‘implementing’ EU law – and, of course, they will lose their insulated status when and if Brexit happens.<sup>110</sup>

All this means that the common law has a distinctive role to play in protecting the equality principle and the associated right to equality and non-discrimination. At present, it fills gaps left by the HRA and the anti-discrimination legislative framework, especially in relation to (i) breaches of formal equality and (ii) substantive status-based discrimination that falls outside the ‘ambit’ of other ECHR rights and thus outside the scope of Article 14. By giving legal expression to the constitutionally significant value of equality of status, it also affirms its importance as a key principle of the legal order – thereby also confirming its normative importance as a reference point in interpreting legislation and developing other common law norms in the areas of public and private law. In the future, it may even be called upon to play a greater role in vindicating equality of status, depending on the fate of the HRA and post-Brexit developments.

Given all this, it is unfortunate that the common law equality jurisprudence remains in a less than satisfactory state. Judicial endorsements of the fundamental status of the equality principle have not been matched by a close engagement with its normative specificity, or the distinctions that exist between its formal and substantive dimensions. Instead, it remains enmeshed in a complex and unsatisfactory relationship with rationality review. What Jowell argued back in 1994 thus remains relevant today: it is time to think again about the place of equality and non-discrimination within the common law scheme.

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<sup>109</sup> See in general R. O’Connell, ‘Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR’ (2009) 29 *Leg S* 211-229.

<sup>110</sup> C. O’Cinneide, ‘Brexit and Human Rights’, in O. Fitzgerald and E. Lein, *Complexity’s Embrace: The International Law Implications of Brexit* (CIGI, 2018), 297-307.