

**Basic equality and discrimination: reconciling theory and law**  
**Nicholas M Smith**

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The idea of Equality, Nicholas Smith observes in his insightful new book, *Basic Equality and Discrimination Reconciling Theory and Law*, is both concrete and ambiguous at the same time. It is concrete in that the elemental outlines of what basic equality is can be recognised and understood, in spite of the fact that in particular circumstances it may be difficult to determine whether a chosen legal or political action respects basic equality. It is ambiguous because it is used to justify and often substantiate the moral, substantive and instrumental aspects of vastly different divergent philosophical and jurisprudential perspectives. At the same time, it is used as rhetorical lubricate for all types of political programs or legal decisions. This rhetoric finds proponents of gay marriage, affirmative action for ethnic Malays, aboriginal autonomy in Bolivia, women advocating for the equal rather than the 'complementary' nature of the sexes advocated by religious conservatives in the Tunisian constitution, the expiration of a law that allowed thousands of ultra-Orthodox Jews to be exempted from military duty, and support for traditional family values, all using the language of equality and equal rights for vastly different political and social programs.

For Smith, such muddle obfuscates the underlying moral dimension of what he calls 'Basic equality.' This equality is a 'deep principle', a universal moral principle which transcends the idea that only classes of individuals need to be treated alike or that some version of substantive equality is the appropriate measure of equality. Rather, it requires policymakers to take into account the interests of all affected parties, including the whole good of the parties whose interests are taken into account, as a moral imperative when making law. Basic equality is an independent value against which policy and law may be measured as well as a structural value because it 'has something to say in the construction and application of all our values'<sup>1</sup> such as liberty and the fundamental freedoms, which are prized in the liberal state. In order to promote Basic equality, law may be enacted to restrain private practices by making these practices conform to its equality provisions in certain areas of communal life or 'aim at achieving a particular equality with provisions that may apply to both government and private parties.'<sup>2</sup>

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<sup>1</sup> Nicholas M Smith, *Basic equality and discrimination: reconciling theory and law* (2011) 49.

<sup>2</sup> Ibid 109.

Armed with this moral concept of Basic equality, Smith carefully analyses the justifications and affects in the most philosophically and jurisprudentially problematic areas of public policy and law: where various groups seek exemptions from a general rule because of specific cultural beliefs or practices, the determination of what constitutes 'discrimination' or inequality under various Bill of Rights, and affirmative action. He grounds his discussion with various Bill of Rights and legal decisions in a way which illustrates the problems faced by courts and policy makers when confronting these issues.

For Smith, the justification and concern of Basic equality is the individual as a moral being. Our nature as individual moral beings is a large part of how and why we consider ourselves each other's equals despite our differences. It is the individual then, who has a moral entitlement to equal consideration of her interests by policy-makers and the law. It is the individual who suffers discrimination, due to for example race or sex, an unfair moral assessment of her actual behaviour or beliefs, or membership in a particular racial, ethnic or religious group. As such, the remedies which may be used to rectify discrimination and inequality must be scrutinised for the inequalities they may create for individuals who may bear a disproportionate share of the cost of remedying the inequality. From this perspective, Smith insists that both the class of individuals who suffer an alleged inequality and the purportedly discriminatory act be rigorously defined and analysed to avoid excluding other individuals or creating additional inequalities in the remedy for those individuals. This definitional rigor is evident in his discussion of those situations where discrimination is alleged against a group or where a group presses claims for exemptions to general rules (commonly things such as religious holidays, Sunday closing laws, conscientious objector exemptions to military service) because of their cultural or religious distinctiveness. These claims have increased in recent years with the official embrace of multiculturalism by many governments as well as the idea each culture is *sui generis* and as such immune from moral assessment of its particular practices. Smith quite rightly argues that cultural differences can and should be accommodated 'but we should still think carefully before accepting proposals for different treatment on these grounds because they too have been grounds on which people are typically discriminated against.'<sup>3</sup> Moreover, in these cases policymakers should consider whether the exemption should only apply to the particular group but also to other individuals who may be burdened by a rule for other equally valid reasons based on alternative beliefs and individual consciences.

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<sup>3</sup> Ibid 100.

Similarly, Smith is leery of far reaching claims finding of discrimination or anti-discriminatory remedies which trench upon an individual's moral right to Basic equality. This is not so much because the principle itself is abstract and difficult to apply. Rather the determination of what constitutes 'inequality' or 'discrimination' in an admittedly unequal world of unequal individuals and groups where other concomitant or antithetical values are affected is less readily apparent than political rhetoric, jurisprudential theorising and legal rules generally acknowledge. Moreover, remedies to such inequalities may impermissibly trench upon the fundamental precept of 'basic equality' even where it is apparent that individuals and groups have be subject to discrimination. For example, while he rightly dispenses with justifications for affirmative action programs based on past discrimination, such as that suffered by African Americans in the United States, he finds that such programs may be morally justified and factually substantiated by the present day de facto segregation and structural difficulties of black Americans. Nevertheless, policymakers embarking on an affirmative action program need to consider that while the program may provide general social benefits and long term racial justice due to improved social integration, 'they do sacrifice the more immediate interests of some' to achieve those results. Thus if the program is effective, it is justified and moral. If not, Smith argues attempt some other approach which burdens furthers the Basic equality of individuals, without resorting to intellectual legerdemain to support a particular political or ideological program.

The pragmatic, empirical and balanced nature of Smith's thought is evident throughout the book. This is evident in his discussion regarding the relationship between equality and liberty:

...[L]iberty and equality must be taken seriously, together, at the same time. We are in danger of losing sight of something important, not when we fail to take seriously proposals which promote a certain equality or liberty and which are justified without reference to countervailing concerns. We are, rather, at peril when we pursue liberty without thought of equality, or some procrustean equalizing project without regard for the autonomy of persons. (p70)

He does not seek to provide a general remedy to these difficult issues but his justifications for equality and analysis of various programs to address discrimination and inequality would be useful to any policy-maker and legal theorist. Moreover, his analysis and conclusions in this book provide basic and fundamental insights which are often lost in the spirited jurisprudential and political debates surrounding the issue of equality. First, that Basic

equality and the objections to inequality have a humanist moral dimension. Second, Law and legal decision-making in this area is bound up in this moral process. Legal puzzles in Bill of Rights and human rights law which he cites from Canada, New Zealand, South Africa and the United States are jurisprudential and moral puzzles which reflect the difficulty of translating and justifying abstract concepts into concrete rules and decisions. And finally, that when crafting legislation or deciding legal disputes, decision makers should consider the costs and burdens which a proposed action will have on each individual's Basic equality as well as the benefits.

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