LAW’S MEANINGS FOR EQUALITY IN THE AMERICAS:
LESS IMPOVERISHED VISIONS FOR CANADA

by

Heather Neun

M.Phil., The University of Sussex, 1987
J.D., The University of British Columbia, 1997

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The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, a dissertation entitled:

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Examining Committee:

Professor Margot Young
Supervisor

Professor Debra Parkes
Supervisory Committee Member
Abstract

Equality is a ubiquitous concept that many assume is intuitively understood. There is however significant contention over its ‘true’ meaning. Following the enactment of constitutionalized equality guarantees under s. 15 of the Canadian Charter of Rights and Freedoms, there were high expectations for judicial interpretation that moved decisively away from a formal equality conception and embraced a substantive understanding. An extensive critique emerged early in response to the Supreme Court of Canada’s jurisprudence and criticism has been sustained. For its part, the Court has consistently framed its approach as that of “substantive equality”. Although its jurisprudence purportedly incorporates substantive elements that extend beyond the formalist “treating likes alike” and “same treatment” approach, the widespread disappointment is generally well-founded, given the gap between aspiration or rhetoric and the Court’s judgments. The arguably contingent nature of equality means that other rights protection systems have generated different conceptions of its meaning. The approach to equality in the Inter-American human rights system (IAHRS) offers one such set of understandings. The objective of bringing together these two different systems is to consider how s. 15 jurisprudence falls short of a substantive equality vision, by considering the regional rights system of which Canada is a member. Critical equality scholarship provides the basis for elaborating key elements of substantive equality. Three such elements are highlighted in evaluating the Court’s jurisprudence and how the IAHRS’s equality law and discourse stands up to a similar analysis, namely, the contextualized methodology, an indivisible approach to social rights, and a strong state responsibility doctrine. The two systems are generating different equality meanings and the IAHRS’s framework is more consonant with redress of pervasive substantive inequalities in the Americas, including through its employment of a deeply contextualized analysis, the development of positive state obligations and ‘indivisible’ approaches to equality in conjunction with other civil, political, social, cultural and economic rights. As such, the IAHRS is of interest to Canadian equality-seeking groups, including those interested in exploring engagement with the system. At a minimum, the IAHRS’s
understandings may stir the legal imagination of advocates assessing future strategies for transformative social change in Canada.
Lay Summary

The right to equality is considered fundamental, yet, as an ‘empty’ concept, it generates disagreement regarding its ‘proper’ meaning. The Supreme Court of Canada’s interpretation of constitutionalized equality rights under section 15 of the Canadian Charter of Rights and Freedoms has been critiqued as falling short of what equality can and should mean. The Court’s approach is more formal than substantive, despite its consistent claim to the contrary. This thesis evaluates key limitations of the section 15 jurisprudence in light of equality understandings in the inter-American regional human rights system, concluding that this system applies a substantive inequality lens to its equality rights analysis, considering contextual realities and perspectives not usually addressed, and applying strong state duties to redress entrenched situations of structural inequality and discrimination. As such, the system’s interpretive frameworks are of interest to social justice and equality-seeking groups in Canada.
Preface

This thesis is original, unpublished, independent work by the author, Heather Neun.
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List of Abbreviations

ACHR: American Convention on Human Rights

ADRDM: American Declaration on the Rights and Duties of Man

CBDP: Convention for the Prevention, Sanction and Eradication of Violence Against Women, known as Convention of Belém do Pará

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CEJIL: Centre for Justice and International Law

CERD: International Convention on the Elimination of All Forms of Racial Discrimination

CPR: Civil and Political Rights

CRPD: Convention on the Rights of Persons with Disabilities

ESCR: Economic, Social and Cultural Rights

IACHR: Inter-American Commission on Human Rights

IACtHR: Inter-American Court of Human Rights

IAHRS: Inter-American Human Rights System

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

LEAF: Legal Education and Action Fund

OAS: Organization of American States

SCC: Supreme Court of Canada

SER: Social and Economic Rights or Socio-Economic Rights
Acknowledgements

Undertaking this course of studies proved much more challenging than expected. I could not have completed this thesis without the support and guidance of my supervisor, Professor Margot Young. Her patience and enthusiasm have been greatly appreciated. I am also extremely grateful to Professor Debra Parkes for agreeing to be my second reader and for her important insights.
Dedication

To Inés Fernández Ortega and Valentina Rosendo Cantú, in recognition of their courage and determination to obtain justice.

And to Vanessa Coria Castilla and my other colleagues at CEJIL in Costa Rica, who also contributed to the inspiration for this project, and whose efforts in defending human rights fuel and further the vision of a more just world.

And finally, to my core team of Brad, Juliet and Nikolai.
Chapter 1: Introduction

1.1 Contestation over Equality in Canada and the Americas

“Equality is a term that, standing alone, means nothing. It has no universally recognized, inherent or intrinsic content.”

So spoke Justice Claire L’Heureux-Dubé, one of Canada’s most important equality rights jurists, sharing a sentiment expressed by other justices of the Supreme Court of Canada (SCC), both on and off the bench. In other accounts, equality has been described as “empty”, “open-ended and indeterminate”, and “capable of giving rise to multiple and often conflicting accounts of its ‘proper’ meaning”. Canada’s experience with the adjudication of entrenched constitutional equality rights guarantees under s. 15 of the Canadian Charter of Rights and Freedoms (Charter) is a testament to the different and often contradictory conceptions of equality that circulate and uneasily coexist. Over three decades of s. 15 jurisprudence and scholarly debate over its meaning and application have demonstrated how varied and disputed are the normative understandings of the legal concept of equality.

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My interest in the contested nature of this “exalted right”\(^7\) arose while researching equality rights for two petitions that came before the Inter-American Court of Human Rights (Inter-American Court or IACtHR) in 2009.\(^8\) The litigation was advanced by two Indigenous women from Mexico, Inés Fernández Ortega and Valentina Rosendo Cantú,\(^9\) whose cases raised profound issues of structural and systemic discrimination in a complex context of violence, poverty and oppression.\(^10\) Their petitions were filed as a last resort pitch for justice from the inter-American human rights system (IAHRS or Inter-American system), a regional rights protection system that is little known in Canada but enjoys a significant presence in the legal culture of Mexico and the central and southern countries of the Americas.

I was struck by apparent differences in the Inter-American system’s approach to equality and other fundamental rights,\(^11\) as compared to Canada. I formed the preliminary view that the IAHRS’s equality analysis is different than that of Canada’s top court, and, as well, potentially more progressive, and ‘truly’, as opposed to rhetorically,\(^12\) substantive.\(^13\) It also struck me as

\(^{7}\) *Law, supra* note 2 at para 2.

\(^{8}\) In 2009, I volunteered with the Centre for Justice and International Law (CEJIL) in its meso-America office in San José, Costa Rica, which is also the site of the Inter-American Court of Human Rights.


\(^{10}\) In separate incidents in early 2002, Fernández Ortega and Rosendo Cantú were raped by members of the Mexican military in their respective geographically isolated and marginalized communities. These communities are situated in a rural, highly indigenous populated region of Guerrero, a state that had experienced a documented pattern of systematic human rights violations and was also subject to intensive militarization. Following a series of difficulties in accessing both health services and the justice system for reasons unique to their status as poor Indigenous women who did not speak Spanish, and after filing complaints in the Mexican non-military (civilian) system, their cases were transferred to military jurisdiction. Both domestic appeals against these transfers failed and the women filed petitions before the Inter-American Commission on Human Rights. Eventually, their cases were transferred to the Inter-American Court in 2009 and the Court heard their cases in 2010. It issued judgments later that year in their favour, along with significant remedies against the state of Mexico, including in the important category of ‘guarantees of non-repetition’.

\(^{11}\) The IAHRS is advancing interpretations that are more consistently substantive and derived from an explicitly structural and critical understanding of the forces of inequality and marginalization in the states of the Americas.

\(^{12}\) This terminology appears in the equality scholarship of various authors. See O’Cinneide, *supra* note 4, which explores whether the right to equality is a substantive legal norm or “vacuous rhetoric”. See also Sheila McIntyre in “Timely Interventions: MacKinnon’s Contribution to Canadian Equality Jurisprudence” (2010-2011) 46 Tulsa L.Rev. 81 at 97.

interesting that this fundamental *jus cogens* right was being approached in such divergent ways by adjudicators in different rights systems, as well as within a single system, given the evident contestation within the SCC itself.

While doing the petitions research and reviewing thematic reports of the Inter-American Commission on Human Rights (Inter-American Commission or IACHR), I encountered a laudatory reference to the SCC’s equality conception, describing its approach in substantive terms. I was cautious about a progressive narrative as I was somewhat aware of the critical Canadian scholarship that disputed how substantive the SCC’s conception really is. I was familiar with several high water marks but questioned the reality of a progressive equality vision in Canada.

Following a closer examination of the "winding course" of the SCC’s jurisprudence, I renewed my impression of the narrowly substantive, if not largely formal, nature of the Supreme Court’s

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14 A definition of the *jus cogens* status of the right to equality is contained in one of the Inter-American Court’s advisory opinions which decided that a principle that is so fundamental forms part of *jus cogens*: “[I]t may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.” *Juridical Condition and Rights of the Undocumented Migrants (Mexico)* (2003) Advisory Opinion OC-18/03, Inter-Am Ct HR (Ser A) No 18 at 100 [*Undocumented Migrants Advisory Opinion*].

15 The IACtHR’s advisory opinion in *Undocumented Migrants*, ibid, held that equality is a *jus cogens* right.

16 My research included the equality jurisprudence of the European human rights system.

17 This contestation is evident in such decisions as the ‘trilogy’ in 1995, where the Court divided in fundamental ways that went to the purpose and ambit of the s. 15 protection: *Egan v. Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan*]; *Miron v. Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron*]; and *Thibaudeau v. Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449 [*Thibaudeau*].


interpretations.  

It confirmed that there are valid questions as to whether the shift in equality understandings in Canada under the Charter is more “abstract and linguistic than real”.  

It seems clear that the SCC has settled on an approach to s. 15 that is quite narrow and does not pretend to significantly advance the redistributive and “transformative” project of remedying serious historical, systemic and group-based socioeconomic inequality in Canada. There is a sound basis for doubting its potential to address pressing and complex inequality problematics, such as the realities of murdered and missing Indigenous women, domestic violence against women, and entrenched socioeconomic disadvantage among certain social groups.

Instead, the SCC’s equality jurisprudence is best characterized as neither ‘purely formal’, nor close to consistently substantive. The Court’s focus has continuously returned to more formalist approaches and aims, despite claiming otherwise. The jurisprudence demonstrates the Court’s penchant for abstract concepts and tests that centre the analysis on protection against discrimination, understood largely in classical liberal (or “corrective justice”) terms, as opposed to redressing social inequality and promoting substantive equality. There is a strong

21 My initial review of the ‘failed promise’ of Canada’s s. 15 equality guarantees was the volume edited by Fay Faraday, Margaret Denike and M. Kate Stephenson, eds, Making Equality Rights Real: Securing Substantive Equality Under the Charter (Toronto: Irwin Law 2009) [Faraday, Denike & Stephenson].


23 This notion is taken up in Chapter 3. For present purposes, various authors have discussed the potentially transformative nature of constitutionalized equality rights in Canada. See for example, Margot Young, “Why Rights Now? Law and Desperation” [Young, “Why Rights Now?”] in Margot Young, Susan Boyd, Gwen Brodsky & Shelagh Day, eds. Poverty: rights, social citizenship, and legal activism (Vancouver: UBC Press, 2007) [Young et al] 317 at 323, discussing the arguably “transformative cast” of section 15 in the Court’s original decision in Andrews, supra note 18. Young frames transformative equality as advancing society towards “a more meaningful equality-oriented redistribution of status and resources”.

24 This issue is explored by Melanie Randall in her article on subjecting state inaction to scrutiny in respect of the issue of domestic violence (under the rubric of equality rights): “Equality Rights and the Charter: Reconceptualizing State Accountability for Ending Domestic Violence” 275, in Faraday, Denike & Stephenson, supra note 21 at 308.

25 As Denise Réaume observes of s. 15 jurisprudence: “it has turned out to be easier to avoid a pure formal equality approach than to articulate the substance of substantive equality.” See “Discrimination and Dignity” 123, in Faraday, Denike & Stephenson, supra note 21 [Réaume, “Discrimination and Dignity”] at 123.


28
tendency to focus on ‘stereotyping’ and ‘prejudice’, and the minimally descriptive “disadvantage”, rather than the proactive advancement of equality through “the amelioration of the conditions of disadvantaged individuals or groups”, in reference to s. 15(2) of the Charter. The Court has been cautious when weighing the potential impact of its decisions on state policies involving the redistribution of significant resources, as well as institutional and policy interventions of a transformative nature. Despite the persistent efforts of equality-seeking groups to foreground the complex realities of inequality and build on the Court’s early references toremedying historic deep-seated disadvantage, the jurisprudence reflects a largely consistent disinterest in examining the de facto social and material conditions of equality rights claimants that would reveal a “world of systemic and pervasive group-based inequalities”. Litigation directed towards addressing these issues has generally failed, particularly when focused on substantive inequality harms arising as a result of, or in conjunction with, inaction by the state. It is also the case that inequality challenges are increasingly rare, although there are exceptions, and they do not generally raise the complex inequality patterns in Canadian society.

28 The terminology of “disadvantage” and “disadvantaged” is problematic for various reasons, including that it does not adequately reflect the systemic and complex nature of social inequality, nor its cultural dimensions. This topic is addressed further in Chapter 3.
29 Section 15(2), Charter [emphasis added]: Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
32 Colleen Sheppard and Ontario Law Reform Commission, Study Paper on Litigating the Relationship between Equity and Equality (1993) Ontario Law Reform Commission 6 at 5, online: <http://digitalcommons.osgoode.yorku.ca/library_olrc/6> (last accessed April 22, 2019). Narrow exceptions have arisen, more commonly in ‘section 7 cases’. See for example, concerning a safe injection site in Vancouver: Canada (AG) v PHS Community Services Society, 2011 SCC 44 [PHS Insite], as well as a lower court decision concerning temporary overhead shelters: Victoria (City) v Adams, 2008 BCSC 1363 [Adams BCSC]. For an analysis of the courts’ treatment of these “subaltern stories” of the marginalized groups in those cases: Margot Young, “Sleeping Rough and Shooting Up: Taking British Columbia’s Urban Justice Issues to Court”, in Martha Jackman and Bruce Porter, eds, Advancing Social Rights in Canada (Toronto: Irwin Law, 2014) 413 [Young, “Sleeping Rough”].
33 This thesis adopts Diana Majury’s terminology of an equality analysis that is “inequality-based”, as opposed to “equality-based”. See “Equality and Discrimination According to the Supreme Court of Canada” (1990-91) 4 Can. J.Women&L 407 at 408, 418 [Majury, “Equality and Discrimination”].
34 Exceptions to the latter include a decision that challenged Ontario’s failure to address the housing crisis in Tanudjaja v. Canada (Attorney General) 2014 ONCA 852 [Tanudjaja OCA], which the SCC declined to hear: Tanudjaja v. Canada (Attorney General), 2015 SCC 9613 [Tanudjaja SCC].
It turns out that what the concept of equality under section 15 can embrace is less determinative than which theoretical or normative framework - among the available and equally ideological framings - ultimately prevails. Despite the concept’s open-ended nature, and s. 15’s potential to be reinterpreted as directed towards social justice ends, the Supreme Court of Canada has taken a different direction. Instead, it is Canada’s “political and social histories”, as interpreted by the Court, that have largely shaped this amorphous and slippery concept and contained its ultimate meanings to more formalist ends. The latter sources are the ideological anchoring points of a particular socio-political order that is comfortable with, and reinforces, the reality of “unequal relations of power and dependence among people”. To quote former Chief Justice Beverley McLachlin in discussing these tendencies, Canada “necessarily tolerates a certain degree of disparity, economic and otherwise”.

In relative contrast, and although there are some considerable challenges in “translating” between the two contexts, as I explore in Chapter 2 on methodology, the Inter-American system’s approach to equality rights is more substantive in important respects. Aside from obvious differences in tone and discourse, the IAHRS incorporates a more expansive and

35 “Can” is used in the sense of being conceptually capable of embracing other equality meanings: Margot Young, “Unequal to the Task: “Kapp”ing the Substantive Potential of Section 15” (2010) 50 S.C.L.R. (2d) 183, at 189 [Young, “Unequal”]. See also Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) at 118, which discusses the “conceptual feasibility” of “liberal rights” being interpreted to allow for social rights claims. Other commentators have taken the position that section 15 is “at least capable” of promoting, for example, women’s equality: Didi Herman, “The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms” (Winter 1994) 14(4) Oxford Journal of Legal Studies 589 at 590, citing, Gwen Brodsky and Shelagh Day, “Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?” (Ottawa: Canadian Advisory Council on the Status of Women, 1989) [Brodsky & Day, “One Step Forward”].

36 The concept of social justice is developed in Young, ibid at 188, citing Nancy Fraser, “Reframing Justice in a Globalizing World” (Nov-Dec 2005) New Left Review 69 [Fraser, “Reframing Justice”]. Under Young’s formulation, inequalities are understood as structural or systemic and equality calls for the redistribution of collective resources by the state (such that this is not left to charity); it recognizes a wide range of resources to be distributed to the level of standards generally enjoyed; and it recognizes a range of injustices, such as socioeconomic redistribution, legal or cultural recognition, and/or political recognition.

37 McLachlin, supra note 2 at 18.
38 Bakan, supra note 35 at 9.
39 McLachlin, supranote 2 at 20.
40 The Inter-American system’s jurisprudence features terms like ‘subordination’, ‘exploitation’ and ‘marginalization’. See for example: María Eugenia Morales de Sierra v. Guatemala (2001), Inter-Am Comm HR, Case 11.625 or No 40.01 [Morales de Sierra]. The Commission describes the impugned legislation as reinforcing the
multidimensional conception of the relevant context of rights claims. Its theoretical framing of inequality and discrimination as a central, subsisting component of that broader context is less individualized and more structural and systemic. The IAHRS problematizes equality and inequality in terms of the societal construction of domination and disadvantage or subordination. The system also firmly situates rights claimants, and the effects of impugned state action or inaction, at the centre of its rich, historical and layered contextual analysis, emphasizing the varied and detailed aspects of their circumstances, including the elements of power differentials, material “maldistribution”, and “misrecognition”. In sustaining its attention to the social conditions and interests of particular ‘vulnerable’ social groups, the IAHRS has tended to avoid formalistic and abstract concepts in the equality analysis, abstract both in content and application: tests such as the enumerated and analogous grounds approach, concepts like human dignity and vulnerability, and the application of comparison and comparative formula.

In avoiding the more categorical formulations favored by the SCC, the Inter-American system has incorporated a recognition of the complex intersections of prohibited grounds and other social conditions of subordinate social groups, such as economic status and poverty. The theorization of poverty and its relation to human rights has developed as a central feature of the system’s substantivist approach to rights interpretation. The system operates on the premise that certain groups in every society (varying by time and place), such as Indigenous women, have historically been the subject of systemic racism, exclusion and marginalization. Moreover, this contextual backdrop operates alongside of contemporary realities, to reinforce the structural and institutional discrimination that Indigenous women (for example) confront in

treatment of women as “subordinate” to men, as well as perpetuating de jure or de facto “economic subordination” (at para 52).

41 As an illustration, see Yatama v. Nicaragua (2005) IACtHR (Ser C) No. 127 [Yatama]. The concurring judgment of Justice Sergio García Ramírez uses the phrase “elimination, exclusion, marginalization or ‘containment’” to describe the historical processes to which Indigenous peoples across the hemisphere have been submitted: Ibid, concurring opinion of Sergio García Ramírez, J., at para 5.

42 The terms, maldistribution and misrecognition, are drawn from the scholarship of Nancy Fraser, “Rethinking Recognition” (May-June 2000) New Left Review 107 at 110-111 [Fraser, “Rethinking Recognition”].
much of the region.\textsuperscript{43} The system’s juridical and theoretical frameworks accept that poverty increases the structural vulnerability of the members of such groups to further discrimination and human rights violations, as well as the converse: their experiences of discrimination and human rights violations exacerbate their socio-economic marginalization.\textsuperscript{44} Inherent in this understanding of social inequality is the recognition and incorporation of the social and material realities of intersectional marginalized identities.

Finally, the IAHRS imposes extensive positive obligations on the state to address these realities. It employs an innovative and relatively indivisible approach to rights that fall within the two generations of civil and political rights (CPR) and economic, social and cultural rights (ESCR) or socio-economic rights (SER).\textsuperscript{45} The system accomplishes this largely through dynamic “social readings”\textsuperscript{46} of CPR, also known as the “indirect”, integrated or interdependent approach to rights adjudication.\textsuperscript{47} Equality and the principle of non-discrimination play a central cross-cutting and structural role in the reinforcement of this approach.\textsuperscript{48} As one system expert

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\textsuperscript{43} This social group and these themes are the subject of the IACHR’s report: OAS, Inter-American Commission on Human Rights, \textit{Report on Indigenous Women in the Americas}, OR OEA/Ser.L/V/II. Doc. 44/17 (2017) at para 81 [\textit{Indigenous Women IACHR Report}]. See also Appendix A: Thematic Reports Concerning Women.


\textsuperscript{46} Victor Abramovich, “From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American human rights system” (2009) 6(11) SUR – International Journal on Human Rights 7 at 17 [Abramovich, “From Massive Violations - SUR”]. Abramovich describes a line of jurisprudence that exhibits a “socially mindful reading of numerous civil rights” in the \textit{American Convention} and also “affirms the existence of duties of positive action and not just negative state obligations”.


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observes, substantive equality is an anchoring principle in the system’s progressive rights agenda and orientation.

In sum, the Inter-American system is generating a more progressive and substantive equality framework that has much to offer in terms of critical reflection on Canada’s s. 15 legacy of a largely failed substantive equality vision.

1.2 Rationale for Bringing the Two Systems Together

As mentioned, the inspiration for this project began with my involvement in the Inter-American system litigation in 2009, and then circled back to contemplating Canada’s most serious substantive inequality problematics. I include within the latter the contemporary realities of Indigenous peoples or First Nations, whose histories of colonial dispossession and successive state efforts to first erase and then subjugate them through various ‘cultural genocidal’ policies, created and now reinforce the socioeconomic conditions for their greater vulnerability to phenomena like gendered and racialized violence, and poverty. A related equality problematic is the broader systemic patterns of social and economic inequality in Canada that correlate to other combinations of marginalized identities. Various scholars and jurists have emphasized that poverty is one of the most glaring inequalities in contemporary Canadian society and is intimately connected to other s. 15 listed grounds like female gender, ‘othered’ or non-dominant racial or ethnic groups, and disability.

50 Also influential were subsequent experiences with the system, for example, in connection with the petition of the Hul’qumi’num Treaty Group (HTG) against Canada. Regarding the latter, see the Commission’s admissibility report for the HTG’s petition: Hul’qumi’num Treaty Group v. Canada (Oct. 30, 2009) Inter-Am. Comm.H.R., Admissibility Report No. 105/90 [HTG Admissibility Report].
51 I use the terms “Aboriginal” and “Indigenous” peoples and “First Nations” interchangeably in the thesis in reference to Canada, while observing that the term “Indigenous” is generally used in Latin America whereas the terms “Aboriginal” peoples and “First Nations”, are not.
53 See for example, Gwen Brodsky and Shelagh Day’s work which emphasizes the well-documented extent of women’s inequality and poverty, which is disproportionate, particularly among certain groups of racialized women or other multiply marginalized groups (including single mothers and women with disabilities), and which
The accounts of Inés and Valentina, the Mexican litigants with petitions in the IAHRS, were thus strikingly distinctive, but also evoked parallels to concerning Canadian realities involving violence against Indigenous women and girls. These groups are subject to similar patterns (as in the rest of the Americas) of disproportionately high levels of exposure to poverty, lack of access to basic services, violence, and other complex manifestations of systemic inequality and discrimination. The situation of violence against Aboriginal women and girls and the acute phenomenon of murdered and missing women whose cases often go unresolved in Canada, were among the parallels that could be readily drawn. In 2010, when the Inter-American Court was hearing Inés’ and Valentina’s petitions, the establishment of a British Columbia government commission of inquiry was underway to examine the disappearances of Indigenous women from Vancouver’s downtown eastside during the 1990s. Part of the inquiry’s mandate was to investigate the police and other state authorities’ indifferent and deficient responses to that situation, as well as to determine what steps should be taken to ensure the protection of women “who are marginalized”. Further to that situation, and of relevance to this project, I note that the IACHR applied its substantive equality rights lens in examining similar patterns of disproportionate and pervasive violence and the crisis of murdered and missing Aboriginal

represents an “extreme manifestation” of women’s inequality, including their economic inequality” [emphasis added]: “Women’s Poverty is an Equality Violation” 319, in Faraday, Denike & Stephenson, supra note 21 at 320-1 [Brodsky & Day, “Women’s Poverty”]. See also Diana Majury’s article, which observes that historical disadvantage is also exacerbated by poverty and assumptions or stereotypes about people who are poor: “The Charter, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 Osgoode L.J. 297 at 330 [Majury, “Equivocation”].

Distinctive in several respects, including the reality and level of militarization in these Mexican communities in relation to the ‘war on drugs’, as well as the inability of the petitioners to speak the dominant language of Mexico (Spanish).

Examples include lack of access to clean water and adequate housing. See David Boyd’s article on access to water, which references the documentation of this egregious situation in many First Nations communities in Canada: “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011) 57:1 McGill LJ 81.

women and girls in British Columbia, at a thematic hearing, followed by a thematic report issued in 2014.\textsuperscript{57}

Former SCC Justice Louise Arbour once commented on Canada’s “very partial and hesitant embrace” of ESCR/SER under the Charter, referencing documentation to the effect that First Nations peoples, single parent families headed by women, persons with disabilities and others “continue to face conditions […] that threaten their fundamental economic, social, civil, political and cultural human rights, the birthrights of all human beings under international law”.\textsuperscript{58} Arbour challenged the tacit suggestion that the realities of “persistent poverty”, “gross inequalities”, “glaring disparities” and “entrenched marginalization” of Canada’s “most vulnerable citizens” could be “dismissed as their fault”.\textsuperscript{59} Her recognition of the interrelatedness of CPR and ESCR is based on a structural understanding of inequality and how the indivisibility of rights is a lived experience for certain groups who are unable to exercise their rights and freedoms in conditions of ‘real’ equality.

In a similar vein, the Canadian Human Rights Commission’s (CHRC) 2013 Report on Equality Rights of Aboriginal People describes the impact of “persistent conditions of disadvantage in the daily lives of Aboriginal people across Canada”.\textsuperscript{60} The CHRC Report examines data in relation to seven dimensions of well-being from an “equality rights perspective”\textsuperscript{61} and compares Aboriginal peoples and non-Aboriginal people across the same spectrum of indicators. The CHRC Report concludes that these comparisons “confirm the persistence of barriers to


\textsuperscript{58} Louise Arbour, “‘Freedom from want’ – from charity to entitlement” (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, 3 March 2005), online: <newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3004&LangID=E> (last accessed April 22, 2019).

\textsuperscript{59} ibid. The notions of fault and choice are taken up in Chapter 3, as these have commonly featured in s. 15 jurisprudence and have drawn a robust critique in terms of their import for the advancement of effective substantive equality.


\textsuperscript{61} The measures are considered to be critical from an equality rights perspective and include economic well-being, education, employment, health, housing, justice and safety, and political and social inclusion: ibid at 4.
equality of opportunity faced by Aboriginal people”, and I would add, to ‘equality of outcomes or results’.  

Other Canadian human rights calamities include the worsening crisis of homelessness and housing insecurity in urban centres, a situation that reflects a predictable correspondence between certain social groups, inadequate housing, and other indicia of socioeconomic disadvantage. There is also a correlation between particular groups and disproportionate levels of violence and abuses of power.

There is thus immense evidence that Canadian society is “characterized by clear group-based patterns of social, economic, and political inequality”. These equality problematics are among the priorities for advocates of transformative social change in Canada. For those committed to addressing such realities, affirmative action by the state to remedy the deeply entrenched and identifiable group-based patterns of inequality, is mandated under a robust vision of substantive equality.

As such, this thesis explores whether the little known (in Canada) inter-American human rights system can speak in a useful or interesting way to pressing equality concerns in Canada. To that end, this thesis undertakes an examination of the Canadian and Inter-American systems'

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62 Ibid.
63 This important distinction is taken up in Chapter 3 of this project, in the examination of formal or liberal equality and of a particular conception of substantive equality that is structural in nature and inquires into the actual realities and conditions of certain groups.
65 The gendered aspects, and the pattern of disproportionate impact on certain groups, of inadequate housing in Canada are considered in Young, ibid at 52-53. This factual context also featured graphically in Vancouver Area Network of Drug Users (VANDU) v. Downtown Vancouver Business Improvement Association, 2018 BCCA 132 [VANDU BCCA]. The case addressed the respondent association’s alleged policy of attacks on the physical and psychological integrity rights and the exercise of other rights by marginalized individuals in downtown Vancouver, with a disproportionate impact on individuals drawn from certain groups identified by enumerated grounds (race, ethnicity, disability), and living in situations of poverty and other forms of social marginalization. The BCCA upheld an appeal of the BCSC’s decision that overturned the BC Human Rights Tribunal’s dismissal of VANDU’s complaint.
66 CHRC, supra note 60 at 4.
understandings of and approaches to equality, from the perspective of their differences and respective levels of substantiveness.

Ultimately, this project argues that Canada’s approach to equality falls far short of what an equality and substantive rights analysis from another rights context looks like. The SCC’s version of equality is purportedly substantive but has thus far captured a relatively narrow band of formal inequality harms. It addresses largely those discrete misrecognition or ‘free-standing identity’ harms and discourses\(^{68}\) associated with the liberal notion of universality\(^{69}\) and the limited concept of ‘direct discrimination’. The SCC’s equality analysis does not commonly address more complex misrecognition harms that can align with the maldistribution of resources and power. These two equality harms frequently combine together to constitute the most serious inequality wrongs, such as the barriers that impede rights claimants’ ability to effectively exercise and enjoy all of their rights and freedoms, and which serve to reinforce their socioeconomic subordination. This interplay is largely absent in the SCC’s equality rights analysis, which has infrequently recognized situations of disparate impact and adverse effects discrimination.

That the SCC’s interpretation of equality should be so disappointing is not entirely unexpected. Early on, there were among the Charter enthusiasts, the critics and skeptics\(^{70}\) who questioned the transformative potential of s. 15. However, given that more than three decades have elapsed since s. 15 came into effect, it is important to be clear about these limits to s. 15’s application, in the interest of advancing “rights without illusions”.\(^{71}\)

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\(^{68}\) I explore this more limited equality harm conception in Chapter 3, which is elaborated by Nancy Fraser in her criticism of ‘identity approaches’ that view misrecognition as a problem of cultural depreciation that functions as a “free-standing” cultural harm or “free-floating discourse”. See Fraser, “Rethinking Recognition”, supra note 42 at 110.

\(^{69}\) The potential for a substantive conception of universality is explored by various scholars, including Kathleen Lahey, who associates “an asserted universality” with de-contextualized thinking, which “obsures particularities of context, and especially particularities that arise from the gendered-ness of social experience.” Lahey, “…until women themselves have told all that they have to tell...” (1985) 23 Osgood Hall Law Journal 519 at 529, cited in Majury, “Equality and Discrimination”, supra note 33 at 416.

\(^{70}\) And even the “denouncers”, to use Didi Herman’s term, supra note 35 at 589. This group is also described in Bakan, supra note 35 at 5-11.

This project further proffers that what the SCC takes to be the natural limits on equality is helpfully unsettled - and the challenge to those limits by critics who understand the potential for different approaches to equality, are helpfully enriched - by reference to an innovative counterpoint system whose equality analysis is spinning on a different axis. What this other rights system demonstrates is that different interpretations of equality and other fundamental rights are equally ‘natural’ in a context where more diverse ideological and social forces are at play.

Furthermore, given Canada’s membership in this regional system whose norms are thus arguably binding on it, the Inter-American system is a natural source of human rights law interpretations and equality understandings; in other words, of less “impoverished” visions of equality. Looking to the Inter-American system is therefore something that equality-seeking groups may wish to consider, to try to disrupt the prevailing common sense equality understandings in Canada.

In sum, my argument is that the inter-American human rights system’s recognition of a broader range of substantive equality aims and complex (in)equality harms; its more deeply contextualized methodology that apprehends those substantive harms; and its tendency to impose broad positive obligations on the state, including in the realm of ESCR or SER claims, are important ‘templates’ for s. 15. The Inter-American system is a useful source of inspiration for those seeking to shift the dominant equality discourse as part of other counter-hegemonic

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72 See Chapter 4 for a further elaboration of Canada’s connection to the IAHRS and the international legal norms by which it is arguably bound.

73 There are several sources of this terminology being used in reference to the state of Charter judicial review and the SCC’s interpretation of section 15. See for example, Sheila McIntyre, “The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review (2005-6) 31 Queen’s L.J. 731 [McIntyre, “A Thin and Impoverished Notion”]; and Randall, supra note 24 at 307. The idea of a “thin and impoverished view” of s. 15(1) also appears in Justice La Forest’s judgment in Eldridge, supra note 19 at para 73.
strategies, with due consideration to the current constraints on constitutionalized equality rights litigation in Canada.

1.3 Structure of Thesis

The paper is developed in five chapters. Following the Introduction chapter, Chapter 2 reviews methodological issues and research limitations, as well as the theoretical framework and assumptions that underpin the thesis.

Further, the chapter elaborates the paper’s framework for understanding judicial determinations of the content of indeterminate legal concepts like equality. I adopt a normative framework that critically examines the largely unarticulated parameters that operate to limit the judicial interpretation of such concepts. The thesis advances the perspective that this interpretive enterprise is relatively unconstrained, and more generally speaking, it is significantly if not fundamentally political and ideological.

My interest in this topic is to situate my normative perspective within a tradition that understands the judicial interpretation of equality as being strongly constrained by the political economy of the society within which the rights adjudication system is embedded. As such, these “political rationalities” and social forces are largely determinative of questions such as the obligations in respect of social inequality that rights-adjudicators will impose on the state in question. This observation also applies to the IAHRS in carrying out its subsidiary role vis-à-vis the states in that system.

74 Hunt, supra note 71 at 326.
75 This is a reference to the socioeconomic and political or political economy forces in Canada: Bakan, supra note 35 at 9. The topic is also explored in Young, “Why Rights Now?”, supra note 23. This project accepts that such forces are never static, further to Alan Hunt’s arguments, ibid.
76 The perspective that judicial decision-making is still fundamentally principled is acknowledged but not explored in the thesis. My preferred theoretical approach is influenced by Joel Bakan’s perspective on judicial review as elaborated in Just Words, supra note 35 at 15-42. Further, I do not subscribe to the view that purposive reasoning contributes significantly to constrain judicial interpretation, and agree that this exercise is fraught, given the challenges of identifying shared purposes for which a social consensus exists: ibid, at 26-7.
77 Hester Lessard refers to the contesting Canadian political rationalities as being “welfare liberal” and “neoliberal”, and identifies these ideological tensions as being at the heart of both the contention and the ultimate constriction of the SCC’s vision for equality: “Dollars Versus [Equality] Rights”: Money and the Limits on Distributive Justice” (2012) 58 S.C.L.R. (2d) 299, at 302 [Lessard, “Dollars”].
I emphasize these theoretical premises of the project because being realistic about the limits and likely interpretations of equality rights, assists in advancing an approach to “rights without illusions” in Canada. I maintain that both a sense of realism and potential innovation in rights strategies are furthered by this project of using a counterpoint rights protection system to reflect more deeply on the deficits in Canada’s equality understandings. I am reinforced in the value of this undertaking by several Canadian equality scholars.

Chapter 3 examines competing conceptions of equality in Canada and the SCC’s approach to equality under s. 15. Section 3.1 elaborates the foundations of equality theory, and begins by reviewing one pole of the equality axis known as formal or liberal equality, which has had such pull for the Canadian courts. I consider both the doctrinal elements and the associated political economy underpinnings. The latter is relevant to deconstructing the aims and ambit of the equality rights protection, a central preoccupation of this thesis, as well as the Court’s approach to the three essential substantive equality elements described below. I trace the major features of the “treating likes alike” or ‘same treatment’ approach and liberal equality’s ideal role for the state, which enjoins it from intervening to address systemic inequalities in the ‘private’ (‘non-public’) social and economic spheres.

Along similar lines, Section 3.2 sets out the features of a substantive equality conception that is ‘truly’ substantive or “structural”, also drawing on the contributions of critical equality

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78 Hunt, supra note 71 at 310, 326.
79 For example, see Randall, supra note 24, who explores this idea by drawing on international case law interpretations. This is further to her critique of the “conceptual straitjacket that the Charter rights legal framework seems to impose”, with specific reference to its application to “state action” and therefore its non-application to ‘private relationships’. Her article considers the inability of s. 15, as conceived thus far, to address the eradication of the complex inequality phenomenon of domestic violence against women (at 291). Her pessimistic assessment of s. 15 is based on the what she frames as the shielding of egregious state inaction or neglect from constitutional scrutiny (at 293). In a similar vein, Melina Buckley advocates for providing “greater space for imaginative legal analysis” and inspiration. She supports efforts to “reimagine and reinvigorate” constitutional equality as a way of “getting unstuck from current section 15 jurisprudence”: “No Shadows in the Fog: Personal Reflections on the Working to Make the Promise of Equality a Lived Reality” (2013) 64 U.N.B. L.J 208 at X [Buckley, “No Shadows”].
80 This terminology is drawn from IAHRS scholarship, specifically, that of Victor Abramovich. Other equality theorists have evolved different conceptions that separate out a robust or ‘real’ conception of substantive equality, such as “substantive social equality”, the term favoured by Nancy Fraser, Justice Interruptus, cited in Young,
theorists. This section elaborates the core commitments of an equality guarantee that provides effective redress of substantive inequality, with particular emphasis on three essential, interrelated components: (1) a deeply contextual and inequality-based analysis that exposes the complex and systemic social patterns of lived inequality, subordination and exclusion; (2) the imposition of extensive positive state obligations to address the varied inequality harms experienced by certain groups; and (3) the incorporation of an indivisible approach to the enforcement of ESCR/SER claims so as to address patterned social and economic inequality.

Section 3.3 turns to the SCC’s s. 15 jurisprudence. It undertakes an assessment in terms of the ambit of protection and the three elements described above. The chapter evaluates the advances and deficits in relation to the Court’s stated commitment to bringing contextualism and substantivism to equality law, and traces the constricted scope of positive state obligations and ESCR/SER claims in the jurisprudence, as part of the Court’s tendency to significantly limit the protective ambit under s. 15.

Chapter 4 introduces the inter-American human rights system, including its two component organs (the IACHR and IACtHR), and their dynamic mandates and modes of functioning. The section provides an overview of the key stages in its historical evolution to the present. This is important background for understanding the system’s development of substantive approaches to rights in general and equality rights in particular. Canada’s relationship to the system is also described for the purpose of considering how its current (and potential future) involvement relates to the project’s themes.

Section 4.2 reviews some of the methodological challenges and choices in respect of research involving the IAHRS.

Section 4.4 examines the system’s foundational texts concerning equality rights, ESCR/SER, and positive obligations, the latter deriving from the system’s taxonomy of state duties to “respect”

and to “guarantee”. The broad strokes of the system’s interpretive approach to each of these areas are elaborated.

Section 4.5 examines the three overlapping elements through providing illustrations from the law and discourse of the IAHRS; this segment covers a selection of equality touchstones in the system’s jurisprudence in terms of the (in)equality harms it redresses and the distinctive features of its approach to the three essential elements of substantive equality. After considering the key doctrinal concepts of the rights to a “dignified life” and to fulfill one’s “life project”, as well the consistent focus on “vulnerable social groups”, the chapter considers cases that address the different vulnerable social groups around which the system has developed its substantive equality rights analysis. The cross-cutting human rights/equality rights concern with poverty is considered throughout.

Chapter 5 concludes by bringing the two systems together, reflecting on points of relevant interface and the broader features of rights thinking in the Inter-American system. The objective is to consider distinctive elements from the IAHRS that resonate in light of the critical scholarship and concerns about substantive equality rhetoric in the Supreme Court of Canada’s jurisprudence.

1.4 Objectives and Expected Contributions of Thesis

This thesis contributes to the critical assessment of the SCC’s s. 15 jurisprudence and its limited advancement of substantive equality. In socializing the richer and interesting equality understandings of the Inter-American system, there is an implicit challenge to a conceptual and methodological framework that seems, at present, unlikely to incorporate them into its analysis.

By way of situating the IAHRS in the ordering of rights protection, the system is one of the oldest human rights systems in the world and sits alongside of the European and African systems, at the regional level of the western hemisphere. It is a supra-national system, as opposed to being at the level of the international human rights system composed of the United
Nations treaty bodies and the International Criminal Court. This project thus examines the equality rights understandings of two of these three levels of rights protection, namely, a regional system and a national state constitutional system.

The thesis considers the doctrinal potential for a dynamic and integrated multiple rights analysis that might, in the current Canadian sociopolitical context, represent a pragmatic approach to the incorporation of ESCR/SER claims in the adjudication of constitutionalized equality rights and other fundamental civil and political rights. The Inter-American system has evolved within diverse historical and social forces. As such, the system’s context has engendered more consistently substantive and integrated interpretations of equality and other rights. The system’s contributions to rights thinking, such as a state responsibility doctrine that is claimant-centred and affords a minimal margin of deference to the state, merit closer examination by the Canadian legal community.

Related to this objective is my interest in foregrounding a rights system of which Canada is a member and whose norms are thus relevant, if not directly applicable or likely to be applied. The Inter-American system is not well known in Canada. It is also occasionally maligned by those who assume that Canada’s legal system and rights protection is superior, such that Canada has little to learn from it. On the other hand, there is growing awareness of the system and clear interest on the part of certain Canadian legal and civil society actors in considering litigation and other forms of involvement.

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81 There are also indications that the system is less deferential with respect to imposing state obligations than its comparator system in Europe. See for example, Jorge Contesse, “Contestation and Deference in the Inter-American human rights system” (2016) 79 Law and Contemporary Problems 123.

82 The thesis does not address issues concerning the application or incorporation of international human rights norms in either customary or treaty law into Canadian domestic law by the courts, a topic that is covered in various publications. See for example, Jennifer Koshan, “International Law as a Strategic Tool for Equality Rights Litigation: A Cautionary Tale” 443, in Faraday, Denike & Stephenson, supra note 21; and Poverty and Human Rights Centre, The Role of International Social and Economic Rights in the Interpretation of Domestic Law in Canada (2008), online: <cwp-csp.ca/resources/resources/role-international-social-and-economic-rights-interpretation-domestic-law-canada> (last accessed April 15, 2018).

83 Based on personal observations and discussions with others who are familiar with the system.

84 Examples include the Canadian Feminist Alliance for International Action (FAFIA) and the Native Women’s Association of Canada (NWAC).
The thesis also contributes to the topic of indeterminacy and how different systems and social forces produce different understandings of important legal concepts like equality. What the IAHRS demonstrates is that the equality frame need not be too narrow,\textsuperscript{85} either to preclude a more complex, intersectional and multidimensional equality analysis,\textsuperscript{86} or to take seriously the forces of socio-economic subordination and domination that operate in a given society and time period. It demonstrates that a ‘substantive structural equality’ framing is conceivable, at least within a different “reconstituted political economy” and social system.\textsuperscript{87} As much effort has been invested in Canada’s constitutionalized equality rights project, the enterprise of formulating realistic, strategic efforts to challenge dominant equality understandings continues to be worthwhile. Although there are reasons to doubt the value of equality,\textsuperscript{88} whether as a means or end,\textsuperscript{89} this will be the case for as long as there are pervasive substantive inequality harms that operate in Canada, with no signs of abatement.\textsuperscript{90}

\textsuperscript{85} Radha Jhappan, “The Equality Pit or the Rehabilitation of Justice” (1998) 10 Canadian Journal of Women and Law 60 at 79.
\textsuperscript{86} Ibid. Professor Jhappan critiques the current s. 15 equality frame as being too narrow to incorporate such an analysis because it is “by nature comparative..., essentialist, and... impossible”.
\textsuperscript{87} Ibid at 81.
\textsuperscript{88} I acknowledge that some scholars reject equality as a concept and form of discourse, for example, Mary Ellen Turpel, Indigenous judge and scholar, has expressed this view: “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences”, in R. Devlin, ed, Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery, 1991) at 503, cited in Majury, “Women’s (In)Equality”, supra note 22 at 104.
\textsuperscript{89} See Diana Majury’s reflections on contention over the goal and strategy of equality, its meaning, and how to attain it, and whether to approach it as a “means or an end or both”: ibid at 101.
\textsuperscript{90} See, for example: The Star. “100 homeless people died in Toronto last year, a report says”, (April 12, 2018), online: <thestar.com/news/gta/2018/04/12/100-homeless-died-in-toronto-last-year-report.html> (last accessed on April 15, 2018).
Chapter 2: Methodology

2.1 Scope of Research

As the thesis examines two systems that have each produced a large volume of jurisprudence and other scholarly materials, decisions were taken to apply defensible methodological limits on the project.

In addition to reviewing key decisions in the SCC’s s. 15 jurisprudence, I reviewed a large portion of the voluminous literature that is critical of the case law. 91 I did not review scholarship such as that of “traditional constitutionalists”, who are critical of interpretative approaches that do not advance their ideal of ‘limiting’ government. 92 The thesis also does not consider the SCC’s equality rights jurisprudence within the statutory human rights framework. Limiting my coverage in this way is justified by the evident differences in their substantive orientations and the arguably regressive effects of s. 15 law on statutory human rights analysis, 93 and for reasons of limiting the project’s scope.

The analysis of s. 15 jurisprudence in Chapter 3 is largely summative; it provides illustrations of the inadequacies in the SCC’s equality vision, supplemented by my observations and based significantly on the extensive critical scholarship. I apply this ‘synthesizing’ approach to review

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91 Two frequent section 15 legal commentators describe the case law as “copious, rather technical and complex”, and note that there is a “great deal of secondary literature”: Jonnette Watson Hamilton & Jennifer Koshan, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 University of New Brunswick Law Journal 19 at 2 [Hamilton & Koshan, “Continual Reinvention”].

92 See Gwen Brodsky, The Transformation of Canadian Equality Rights Law (PhD Dissertation, York University, 1999) [Brodsky, “Thesis”] at 9, referencing inter alia Frederick Lee Morton and Rainer Knopff, who view rights in Canada as having become “invitations to government to intervene in the “private sphere”.

93 The project acknowledges that this statutory human rights jurisprudence generally reflects richer conceptions of equality, a reality that has spawned critical scholarship by s. 15 commentators, such as Andrea Wright, “Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate” 409, in Faraday, Denike & Stephenson, supra note 21. Indeed, the Meiorin judgment, supra note 19, is a human rights decision decided under section 15 that demonstrates this difference, in elaborating a fairly expansive conception of employers’ duty to reject facially neutral discriminatory practices that constitute adverse effects discrimination. Other decisions of note include the SCC’s judgment in Moore v. British Columbia (Education), 2012 SCC 61, where the Court rejected a clearly formalist analysis by the appellate court that upheld the government’s decision to discontinue the provision of appropriate educational services to young people with severe learning disabilities.
of s. 15 jurisprudence because the case law has been already subject to thorough analysis; the inter-American law has not and thus merits closer review.

In the Inter-American system, the range of potentially relevant materials is significant, given that my analysis covers both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. I chose to include the ‘soft law’ materials of the latter body in order to generate a richer description of the discourse and evolving conceptions and legal standards of equality rights. I maintain that this is helpful material in understanding the system’s novel and dynamic rights interpretations.

Other methodological choices and challenges in reviewing the Inter-American system’s large volume of legal materials, including challenges related to language and translation issues, as well as the scope of my literature review, are addressed in Chapter 4.

2.1.1 Methodological Approach to Assessing Equality Understandings

The thesis is an examination of the Canadian and Inter-American systems’ respective equality conceptions from the perspective of levels of ‘substantiveness’. Assessing differences between the systems is relatively simple as there are readily discernible contrasts in discourse and tone, analytical approach, equality aims and outcomes. However, leaving the assessment at ‘difference’ is less valuable to my project of determining what might be gleaned from the Inter-American system to challenge the SCC’s dominant understandings. My approach is to extricate from the critique of s. 15 jurisprudence and critical equality theory, key features of a substantive equality conception. I then consider these three elements in my assessment of both systems. This is for the purpose of evaluating whether and how the IAHRS is producing richer conceptions of substantive equality that challenge those of the SCC.

In general terms, the project’s evaluation of equality focuses on the ambit of protection in terms of the purposes and wrongs or harms addressed, with specific reference to three elements: (1) the contextualized methodology; (2) the approach to positive state obligations; and (3) the approach to indivisibility and ESCR/SER claims.

2.1.2 Parameters of Project’s Comparative Law Exercise: Imposing limits

The exercise in this project is comparative as I am examining equality understandings in two different legal systems. However, it is not strictly comparative or “instrumentalist”, in that my aim is not to propose or even suggest that the inter-American conceptions and interpretive approaches are directly “transferable” to s. 15 litigation in Canada (although I do not discount the value that might be added by making such arguments in Canadian courts).

There are several reasons for this approach. The first relates to the challenges associated with any exercise of ‘translating’ concepts and discursive practices between two legal systems, especially such distinctive ones. The caution issued by various scholars goes to the need to consider relevant differences between the systems under examination, and, I would add, the social forces within which those systems are embedded. Based on insights from scholarship addressing the cultural nature of legal meaning, I do not assume that inter-American conceptions of equality, and its approaches to rights ‘travel well’ and would necessarily find a home in the SCC’s interpretive framework. Equality understandings are unlikely to be easily extricated from one context, legal tradition and culture, and transplanted to another where

95 I am using this concept as developed in Robert Leckey’s paper critiquing “thin instrumentalist” approaches to comparative law analysis. According to Leckey, instrumentalist approaches (or thin ones, at least), are inclined towards “direct constitutional reform” in a particular jurisdiction. That is their aim. Given my methodological and theoretical approaches, my objective is not to advance a suggested path of reform of section 15, but rather to contribute to the critical understanding of how equality understandings evolve and are shaped, limited or amplified, depending on their context and the rights strategies employed to de-naturalize the dominant hegemonic understandings of equality. See Leckey, “Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights” (2009), 40 Columbia Human Rights Law Review 425 at 430.

they will 'take root'. I also do not discount the considerable doctrinal issues that stand in the way of such a passage.

Further, a strict comparative and instrumentalist analysis is not defensible given that the two systems are different in fundamental respects; for example, in terms of their mandates and institutional frameworks. To begin with the obvious points of distinction, the IAHRS is a human rights protection system that advocates for and enforces compliance by member states with regional and international human rights instruments, such as the American Convention on Human Rights (American Convention or ACHR). The SCC is the final court of appeals in a domestic judicial system that interprets the constitution, thereby acting further to its "broad supervisory jurisdiction over the purpose, content and impact of government action" by the Canadian state.

To elaborate, the IAHRS is composed of two organs: a judicial body (the Inter-American Court of Human Rights), which is an international court that presides over contentious proceedings involving nation states; and a quasi-judicial body (the Inter-American Commission on Human Rights), that acts as the first instance for the review of human rights petitions, and also performs rights promotional, monitoring and policy formulation roles. These bodies are institutionally independent but form part of a regional alliance of states in the western hemisphere, known the Organization of American States (OAS). As a supranational rights system, the IAHRS’s jurisdiction is exercised further to the principles of international law,

97 Naomi Mezey theorizes these ideas and the implications of a conception of legal meanings being cultural and embedded: “Law as Culture” (2001) Yale JL & Humanities 35. William Twining also considers the limitations on legal concepts “talking meaningfully” across legal traditions and cultures, introducing the idea that some may ‘travel’ relatively well or poorly: Ibid at 5. Robert Leckey notes this concern as well and suggests that this frailty is particularly common with “thin instrumentalist” approaches to comparative law analysis: Leckey, supra note 95 at 455.


101 Self-described as “the main political, juridical, and social governmental forum in the [Western] Hemisphere” on the OAS website: <oas.org/en/about/who_we_are.asp>.
including, “subsidiarity”, meaning that member states have an opportunity to redress wrongs first within the framework of their domestic legal systems, before the system assumes jurisdiction.\(^{102}\) Other differences include the international law principles that oblige states to remedy all violations of international law rights\(^{103}\) and the less formal proceedings and requirements in relation to standards of proof and the imputation of state accountability that arise under international law.\(^{104}\) I go into more detail about the structure and workings of the IAHRS in Chapter 4.

The question of how the two systems are similar and different is somewhat complex with regard to the respective levels of deference shown to state interests. As a general observation, the IAHRS has been described as applying a lower degree of deference to states and their declared interests than other regional systems, like Europe’s human rights system. This difference has been the subject of comparative commentary\(^ {105}\) in terms of the Inter-American system’s relative boldness in imposing broad positive obligations on states (a subject taken up in Chapter 4). The approach manifests in the system going further than might be expected (as compared to other regional systems),\(^ {106}\) in terms of pressing states to cast off their purported neutrality and intervene to remedy structural inequalities in the socioeconomic spheres. By contrast, the SCC’s level of deference to the other branches of the Canadian state in its interpretation of s. 15 has been critiqued as being undue,\(^ {107}\) a matter taken up in Chapter 3.

\(^{102}\) The principle of subsidiarity as interpreted and applied in the IAHRS is reviewed in Bernard Duhaime’s article, “Subsidiarity in the Americas: What Room is There for Deference in the Inter-American System?” 289 in Lukasz Gruszczynski and Wouter Werner, eds, *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford Scholarship Online: November 2014), online: <oxfordscholarship.com/view/10.1093/acprof:oso/9780198716945.001.0001/acprof-9780198716945> [Duhaime, “Subsidiarity in the Americas”]. This principle is crystallized in the IACHR’s rule of ‘prior exhaustion of domestic remedies’, which requires that potential petitioners satisfy the Commission of this in order to their petitions to be considered admissible and then on their merits: *Ibid* at 290.

\(^{103}\) Feria-Tinta, *supra* note 47 at 436. I suggest by this observation that the IAHRS is bound and thus more inclined to remedy violations of equality and other rights than the SCC.

\(^{104}\) See *Velásquez Rodríguez v. Honduras* (1988) (Merits) Inter-Am Ct HR (Ser C) No. 4 (*Velásquez Rodríguez - Merits*) at para 128, which contrasts the approach to domestic proceedings.


\(^{106}\) Dembour, *ibid*.

\(^{107}\) See for example, McIntyre, “A Thin and Impoverished Notion”, *supra* note 73; and Martin, *supra* note 99.
Again, I highlight this difference, and others, to emphasize the clear limits on the transferability of rights conceptions between the systems under study.

Additional differences concern the respective legal traditions and culture in each system. The IAHRS is a hybrid system of common law and civil law traditions, and its procedures mix elements of both in its proceedings.\(^\text{108}\) Canada’s legal culture is largely common law, apart from Quebec.

Even more distinctively, the IAHRS is unusually open to hearing the varied perspectives, both legal and non-legal, of civil society actors\(^\text{109}\) and particular social groups, like Indigenous peoples.\(^\text{110}\) For example, the Inter-American Court has conducted onsite visits to affected groups or communities.\(^\text{111}\) Another example is that there are no restrictions on the filing of intervenor \textit{facta} with the Inter-American Court, other than timeliness.\(^\text{112}\) Clearly, this contrasts with the nature and level of access by intervenors in cases heard by the SCC.\(^\text{113}\)

\(^{108}\) Sources are the author’s observations of the Commission’s proceeding and Mario Melo’s article, “Voices from the Jungle on the Witness Stand of the Inter-American Court of Human Rights” (2014) 20 SUR – International Journal on Human Rights 282 [Melo, “Voices from the Jungle”] at 289, observing that the system is one where those trained in the common law tradition meet those trained in the “continental European legal tradition”.

\(^{109}\) Abramovich, “From Massive Violations – SUR”, supra note 46 at 13, describing the IAHRS as “an arena of transnational “civil society activism”.”

\(^{110}\) See system litigator Mario Melo’s description of this phenomenon in the context of an Ecuadorian case concerning the Kichwa Indigenous People that came before the Inter-American Court: “Voices from the Jungle”, supra note 108. The judgment in question is Kichwa Indigenous People of Sarayaku v. Ecuador (2012) Inter-Am Ct HR (Ser C) No 245 [Kichwa]. See also Dembour, supra note 105 at 307-308. As I explore further in Chapter 4, the Kichwa decision reflects the relative porousness of the system, including the Inter-American Court; I reference the Court’s efforts to witness the claimants’ realities first-hand in order to understand the world views of the petitioners. In the Kichwa case, this led to an onsite visit by several of the Court’s judges to the Kichwa People’s Amazonian community of Sarayaku, Ecuador.

\(^{111}\) \textit{Ibid}.

\(^{112}\) This also contrasts with the European human rights system, according to Dembour: see the chapter in her text, supra note 105 at 282 entitled “The Voice of the Inter-American Court: Equality as Jus Cogens (Advisor Opinions 16/99 and 18/03)”.

\(^{113}\) Leave to intervene must be sought in all cases, other than by federal and provincial attorneys general (and territorial justice ministers) when the Court states a constitutional question. The \textit{Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act} (dated March 1, 2014) provides: 5.1.3.2. Intervention with leave: “All other interventions require leave of a judge of the Court the filing of a motion by the interested party. Interventions are possible not only in appeals and references, but also at the application for leave to appeal stage. Motions at the leave stage are rare and the granting of leave rarer still.” Further, the Court assesses motions for intervention according to two criteria: (1) the interest of the applicant in the questions raised; and (2) the usefulness to the Court of the proposed intervention. Available online: <ppsc-sppc.gc.ca/eng/pub/fpsdfpg/fps-sfp/tpd/p3/ch16.html#section_5_1_3_2> (last accessed April 24, 2019).
A further difference is the fact patterns reflected in the respective equality claims heard by the two systems. This difference has posed significant challenges to my project in terms of drawing defensible parallels and conclusions. The nature and level of gravity of the cases heard by the Inter-American system is often of a different order, as the system has regularly heard cases involving gross and systematic human rights violations, such as enforced disappearances, torture, and massacres. This is not the exclusive nature of its proceedings, but the general difference in subject matter has caused me to consider whether this extreme nature of the proceedings in the Inter-American system is a major contributor to the more substantive equality outcomes and approaches (and correspondingly, whether the SCC’s responses to such fact patterns would likely differ). In other words, I pose a hypothetical question which cannot be answered as to whether the differences in outcomes and approach are largely attributable to the different subject matter and nature of the equality rights challenges that come before each system. That said, and as Chapter 3 addresses, there are indications that the Canadian system’s response to ‘more serious claims’ that go to threats to physical and psychological integrity or security (and life even) of the individual and members of collectivities, is to treat such claims in substantively different and more formalist ways.

My further response to these constraints on this ‘light’ comparative law exercise is to establish several parameters on what this project attempts. As noted, I am not undertaking a strict and instrumentalist comparative law analysis. Moreover, my interest is in developing a richer and “thicker” description of the approaches and meanings that the IAHRS is generating through its hard and soft law jurisprudence. This “thicker” analysis is intended, as noted in Chapter 1, to pose alternative conceptions that contain the potential to unsettle Canada’s inadequate equality understandings, and inspire efforts to contest what is by its very nature a contestable concept.

114 As Chapter 4 elaborates, the system generates legal standards that might be described as hard and soft, and by the latter, I specifically reference the Commission’s thematic and country reports as well as the merits reports issued further to the individual petitions process.

115 Hunt, supra note 71 at 321.
Finally, the other limitation on the transferability and translation of concepts from one system to the other is the ideological dimension of each system. As noted in the Introduction and as I elaborate next, discursive practices and rights interpretations of indeterminate legal concepts are strongly influenced by the social, political and economic conditions of a given context. As this is my operating assumption, I presume that the respective contexts of the Canadian and Inter-American systems shape and constrain the discursive practices in each system, in complex and varied ways. Canada’s development of its equality mores are thus best ‘read’ within the context of a system of liberal capitalist social relations. The social and historical forces that have influenced the IAHRS are significantly broader and more diverse, as I consider in reviewing the system’s evolution in Chapter 4. For current purposes, it suffices to observe that the IAHRS has evolved in a region that has been and remains subject to strikingly different and often contradictory visions of the ‘just society’ and of the appropriate role of the law and state in relation to inequalities and hierarchies in the social and economic spheres.

2.2 Theoretical Framework of Project

I approach the thesis topic from a largely external law perspective and within the tradition of critical political economy. By the latter, I refer to a theoretical framework that employs class analysis to examine the relations of economic production, the realities of systemic inequality, and the pervasive existence of patterned economic and social subordination. I draw on

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116 Bakan, supra note 35 at 9.
117 Ibid at 8-9.
118 The diversity in the Americas is evident, with obvious reference to Cuba, as well as other states whose governments have at various times, and including at present, directly challenged (neo)liberalism and the international economic order. Other examples include Bolivia, Ecuador, Nicaragua, and Venezuela. Societal contention over these issues is also significantly expansive owing to the historic existence of sustained domestic armed and unarmed movements in parts of the region that challenged the social and economic status quo. Among the examples is most of the countries in Central America and South America at various times over the last century. Current examples are Mexico and Colombia.
119 The notion of an external law perspective is explored by Bakan, supra note 35 at 5-9; he distinguishes it from an ‘internal law perspective’ that focuses on the internal legal analysis of normative questions within a particular legal system. An external law perspective questions “law’s autonomy” from politics, and also does not presume that alternative “progressive” conceptions to the dominant conceptions of a legal system are likely to be adopted just because legal texts have the conceptual ability to be reinterpreted in more progressive ways: Ibid at 60. To the extent that the project suggests there are “templates” for the SCC to consider applying, it enters the terrain of a more ‘internal law’ approach.
theoretical sources such as Ellen Weiksins Wood\textsuperscript{120} and Judy Fudge,\textsuperscript{121} and the broader political economy tradition that understands that there are ‘inherent’ limits within the socio-economic system, namely, capitalist social relations, on the potential for social change through law. My starting premise is that there are ideological\textsuperscript{122} dimensions of law’s discourses and understandings of equality that operate in Canada and the Inter-American system. The basis of such an approach is the assumption that law is not autonomous from the prevailing political and economic forces in a given context, and that the interpretations arrived at by law, whether by the Canadian judiciary or a supranational human rights system, are deeply imbricated with their respective contexts.

Further to its explanatory value, this perspective is essential to deconstructing the varied normative frameworks that operate in the two systems. As part of generating a richer description of equality understandings in the Inter-American system, there is explanatory value in considering such forces that have shaped its evolution, including the wider spectrum of ideological assumptions at play within the broader social system in which it operates.


\textsuperscript{121} In “Law and Social Transformation”, \textit{ibid}, Fudge critiques the idea that \textit{Charter} litigation has social transformative potential in terms of “transform[ing] existing relations of subordination and domination” (at 50). This is because of her view that the latter are created by the capitalist system, its material order and its configuration of social power” (at 50). She further asserts that constitutional litigation requires the assertion of legal rights to be uncoupled from a class analysis (at 58), and is for this reason significantly deficient.

\textsuperscript{122} The concept of ideology is framed as the forms of discourse that help to promote and legitimate the interests of certain social groups in the face of opposing interests. I use this term in the sense employed by legal scholars like Susan Boyd, not as an over-generalized or over-determining idea, but as a theoretical construct that helps to explain certain persistent patterns and reinforcements of social and material relations in a given society. See Boyd’s work on the ideology of motherhood: “Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law” (1991-1992) 10 Canadian Journal of Family Law 79. See also the conception set out in Bakan, supra note 35 at 4, drawn from Terry Eagleton’s \textit{Ideology: An Introduction} (New York: London: Verso, 1994) [Eagleton, “ideology”] at 8, as a term “to indicate that discourses about rights, law and society are “anchored in and help sustain specific patterns of social relations and political order”.”
For these reasons, my decision to explore equality meanings in this other ‘foreign’ rights system is derived from an interest in the contingency of legal concepts that have strong discursive and political force, and yet are commonly presumed to have shared and ‘natural’ meanings.

Examples of such understandings in Canada include the common view that ESCR/SER are not fully or at all justiciable, along with the associated assumption that this determination is itself not political. Another is the view that the SCC and other Canadian courts properly confine their role to a sphere that is purportedly “legal” and within the courts’ competence, and the further assumption that this position is itself ‘neutral’ and not political. Based on this paper’s normative perspective, the latter “dominant understandings” with regard to the law and role of the courts and the state are both ideological and political in the sense that they are “anchored in and help sustain specific patterns of social relations and political order”.

Yet despite my concerns about ‘translating’ as between the systems and my assumptions about their limited transferability, I maintain that the Inter-American system’s rights conceptions are worthy of close study, in the service of the following objectives: (1) to de-naturalize the dominant equality conceptions that circulate within Canadian society and our legal system; (2) to ground our analysis of s. 15 in a realistic understanding of its likely limits; and (3) to stir our imaginings of what is possible in terms of litigation strategies that are effectively integrated into larger social movements.

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124 An illustration of this concern is voiced by the majority in the Ontario Court of Appeal’s judgment in Tanudjaja OCA, supra note 34 [emphasis added] a case that addresses the equality rights and section 7 (right to life) dimensions of the problem of homelessness: “The question is whether there is a sufficient legal component to anchor the analysis.” See dismissal of leave to appeal: Tanudjaja SCC, supra note 34.

Chapter 3: Canadian Constitutionalized Equality Rights Law

3.1 Introduction

3.1.1 Objectives and Introduction to Section 15

This chapter has two objectives.

The primary objective is to first present and then critically assess the SCC’s approach to constitutionalized equality rights in light of its declared commitment to “a single approach to equality rights” that it calls “substantive equality”. I use the three required elements of such a substantive approach for this assessment. The selected elements are a contextualized inequality-based analysis; the requirement of strong affirmative or positive state obligations; and an indivisible approach to the enforcement of ESCR/SER.

S. 15 came into force on April 17, 1985, a delay of three years from the enactment of the Charter. The provisions read:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

S. 15 contained broader wording than comparable constitutional guarantees in other jurisdictions. The inclusion of the three additional rights in addition to the right to ‘equality before the law’, namely, the rights to ‘equality under the law’; ‘equal protection of the law’; and ‘equal benefit of the law’, was an attempt to remedy some of the shortcomings of the

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126 Ryder et al, “What’s Law Good For?”, supra note 30 at 103.
128 Charter, s. 15(1), supra note 5: Appendix B: Rights Provisions.
right to equality under the federal statute, the *Canadian Bill of Rights (Bill of Rights)*.\textsuperscript{129}

In its first foray into interpreting s. 15 in *Andrews v. Law Society of British Columbia (Andrews)*,\textsuperscript{130} the Court purported to embark on an approach that rejected formalism and, specifically, the maligned equality rights interpretations\textsuperscript{131} under the *Bill of Rights*, in judgments like *Attorney General v. Lavell; Isaac et al. v. Bedard (Lavell)*\textsuperscript{132} and *Bliss v. Canada (Attorney General) (Bliss)*.\textsuperscript{133} In *Bliss*, the Court’s analysis was strongly formalist and accepted the defence of ‘nature’ as justification of unequal treatment on the basis of sex.\textsuperscript{134} The cause of the inequality at issue was conceived of as pre-existing and ‘natural’, foreclosing an analysis of the broader context and social construction of deep-seated inequality and discrimination against

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\textsuperscript{130} *Andrews, supra* note 18.

\textsuperscript{131} *Ibid* at p. 167.

\textsuperscript{132} *Attorney General v. Lavell; Isaac et al. v Bedard* (1973), 23 C.R.N.S. 197, 11 R.F.L. 333, 38 D.L.R. (3d) 481 (S.C.C.) [*Lavell*]. The Court employed an extreme formal equality formulation of the ‘separate but equal doctrine’, along the lines of the U.S. Supreme Court decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The idea is that the impugned law does not violate equality rights if it applies equally to those to whom it has application. The claim concerned the egregious *Indian Act* scheme that deprived Indigenous women of their ‘Indian’ status if they married non-Indian men; the impugned provision covered marriage to either non-status Indians or to someone with no Indian ancestry, but there was no parallel provision for Indian men, and, a non-Indian woman acquired Indian status upon marriage to an Indian man. The Court found there was no denial of equality before the law as long as all individuals to whom the law applied were treated the same.

\textsuperscript{133} *Bliss v. Canada (Attorney General)* [1979] 1 S.C.R. 183 [*Bliss*].

\textsuperscript{134} *Bliss* was an equality challenge to provisions of federal unemployment insurance legislation that entitled pregnant women to pregnancy benefits in particular circumstances, but disentitled them to regular unemployment insurance benefits even when they met all the normal eligibility requirements. The legislation also imposed a longer eligibility period for benefits on pregnant workers than non-pregnant workers. This disqualification from regular benefits was based solely on pregnancy and Stella Bliss challenged the legislation on the basis of sex discrimination. The Court found there was no discrimination on that basis of sex and the legislation instead reflected a gender-neutral differentiation between pregnant and non-pregnant persons, as it treated all non-pregnant persons (male or female) the same. The affected group (of pregnant employees) was thus effectively disaggregated from the employee group, and the Court determined that “[a]ny inequality between sexes in this area is not created by legislation but by nature” (*ibid* at p. 190) as the provisions concerned biological conditions from which men are excluded (at 190). The Court further held that any differential treatment was of pregnant persons, not women and that pregnancy was relevant to eligibility for the benefits based on how the comprehensive statutory code was designed (*ibid* at pp. 190-1).
women. The Bliss decision engendered extensive critical scholarship, and has been criticized by the Court itself in the post-Charter era.

The drafting process and final version of the novel provisions of s. 15 seemed to indicate that a rupture from the Court’s formal equality moorings was thus possible. Expectations were certainly high for a shift towards a more expansive and positively oriented right.

In Andrews, a case that addressed the constitutionality of the requirement of Canadian citizenship for admission to the British Columbia bar, the Court declared it would take a purposive approach to interpreting the right, signaling along with other promising elements, a potential break from more formulaic approaches. Optimism stemmed from its recognition that equality does not necessarily require identical (or same) treatment, and identical treatment might even “produce serious inequality”; that differential treatment might be required to advance “true equality”; that the equality analysis must look to the effect and

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136 In a recent s. 15 judgment, Justice Abella described the Quebec trial court’s analysis as falling into the error of the Bliss approach, which she further described as the “paradigmatic example of formalism”: Centrale des syndicats du Québec v. Quebec (Attorney General), 2018 SCC 18 [CSQ] at 25, 28. See also Justice McIntyre’s observations in Andrews, supra note 18 at pp. 167-8.
137 The involvement of various civil society organizations who lobbied to influence the wording of section 15 is commonly viewed as having altered the provision’s final form. Bruce Porter reviews these events in “Twenty Years of Equality Rights: Reclaiming Expectations” (2005) 23 Windsor Y.B. Access Just 145 [Porter, “Twenty Years”]. See also Brodsky, “Thesis”, supra note 92 at 119.
138 Section 15 contained broader wording than comparable constitutional guarantees in other jurisdictions. Hamilton & Koshan, “Continual Reinvention”, supra note 91 at 4. The inclusion of the three additional rights was an attempt to remedy shortcomings of the right to equality in the Bill of Rights: Pothier, “Significance”, supra note 129 at 71. For example, “under the law” was added to protect against decisions made under the Canadian Bill of Rights, where courts had held that “discriminatory exclusions from entitlements to benefits were not covered by the guarantee of ‘before the law’”. The logic was that if equality “before” the law only covers equal administration of the law as it is written in the Bill of Rights, then equality “under” the law must or should be enough to require that the law’s terms be assessed for compliance with substantive equality” (ibid at 69).
139 A common sentiment was that the SCC would move decisively away from formal equality and towards a substantive approach: Porter “Twenty Years”, supra note 137. Some viewed the more expansive wording as having “altered the entire orientation from a negatively oriented guarantee of non-discrimination to a positively oriented right to equality”: Hamilton & Koshan, “Continual Reinvention”, supra note 91 at 4.
140 Andrews, supra note 18.
141 As with other Charter rights and freedoms.
impact of laws on claimants; and that irrelevant personal differences should not be the basis of legal burdens or benefits.\textsuperscript{142}

Jumping forward to its 1997 decision in \textit{Eldridge v. British Columbia (Attorney General)} (\textit{Eldridge}),\textsuperscript{143} the Court stated that substantive equality had been its operating principle since \textit{Andrews}.\textsuperscript{144} It has continued to make that assertion, including for those periods during which it applied frameworks that it later spurned for their formalism.\textsuperscript{145} But, over three decades later, the substantive promise of s. 15 has dimmed. This is due not only to the convolution and confusion reflected in the jurisprudence,\textsuperscript{146} but to the disjunction between the Court’s rhetorical commitment to substantive equality and its implementation – or what one scholar describes as “the implementation of that commitment with any degree of consistency”.\textsuperscript{147} For some scholars, the SCC has advanced at most only a “contextualized, richer form of formal equality” and falls far short of s. 15’s “radical potential”.\textsuperscript{148}

This chapter demonstrates how the Court’s formulations of the constitutionalized equality guarantees have been neither singularly nor consistently substantive, with attention to three areas where the jurisprudence has generally fallen short of what many viewed as its promising start. As noted in Chapter 1, further to the overarching commitment to the redress of avowedly substantive inequalities and harms, the three essential elements include: (i) the application of an adequately framed contextual analysis of claims that seeks out and recognizes substantive inequality in specific contexts; (ii) the imposition of broad positive or affirmative state

\begin{itemize}
\item \textsuperscript{142}Drawn from \textit{Andrews}, supra note 18 at pp. 164-5 and \textit{R. v. Kapp}, 2008 SCC 41, [2008] 2 SCR 483 [\textit{Kapp}] at 15, summarized in Young, “Unequal”, supra note 35 at 203.
\item \textsuperscript{143} \textit{Eldridge}, supra note 19.
\item \textsuperscript{144} Ibid at para 61, citing, \textit{Andrews}, supra note 18. The Court’s stated that the intention of s. 15(1) is “to ensure a measure of substantive, and not merely formal equality” [emphasis added]. This was the first time the terminology was used in a majority judgment, although it had been previously identified in various dissenting judgments, including in Justice L’Heureux-Dubé’s dissent in \textit{Symes v. Canada}, [1993] 4 SCR 695 [\textit{Symes}], cited in Young, “Unequal”, supra note 35 at 183.
\item \textsuperscript{145}See for example, \textit{Withlcr}, supra note 26, when the Court disavowed the “mirror comparator group analysis” without finding that any of its previous, most egregious applications of this approach, were wrongly decided.
\item \textsuperscript{146}This is a common characterization, as in Sheppard, “Equality, Ideology”, \textit{supra} note 6 at 196.
\item \textsuperscript{148}Young, “Unequal”, \textit{supra} note 35 at 193.
\end{itemize}
obligations that promote equality and address those historical and contemporary inequalities; and (iii) an approach to the indivisibility of the two generations of rights that recognizes and enforces ESCR/SER. I pull these elements from my analysis of the critical equality theory scholarship, reviewed in Section 3.2.

Recall that there are two objectives to this chapter. The second objective is to explore the deeper logic and sources of the Court’s hard-wired formalist tendencies – the “enduring grip of formalism”¹⁴⁹ - and to consider why it has struggled and largely failed to implement a substantive equality vision. In this project’s view, an assessment of the Court’s generally unarticulated theoretical orientation is key to understanding its interpretive choices, as well as the likely future interpretations. The objective is to be realistic about what s. 15 has attained thus far because the project’s interest in troubling these limits¹⁵⁰ is best founded on an adequate understanding of how such limits are “both achieved and obscured within judicial discourse”.¹⁵¹ While my first purpose is to convince the reader that the SCC has failed to deliver substantive equality, the second purpose is to show why there has been this failure.

¹⁴⁹ Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verb of Domination”, 99 in Faraday, Denike & Stephenson, supra note 21 [McIntyre, “Answering the Siren Call”].
¹⁵⁰ Melanie Randall, supra note 24 at 308, discusses “transgressing or disrupting the formidable boundaries of equality rights, as a challenge to the dominant construction of liberal, minimalist and non-interventionist capitalist state”, in her article on subjecting state inaction to scrutiny in respect of the complex issue of domestic violence.
3.2 Interpretive Backdrop to Section 15 – Competing Visions of Equality

This section surveys the prevailing and potential equality conceptions in Canada in the lead-up to the Charter’s enactment and thereafter, assessing what they entail, and framing the essential components of a substantive equality approach that lives up to that name. The section relies on equality theory in Canadian and other critical scholarship.

My elaboration of equality theory is extensive for two reasons, one general and one specific. The first is to provide a solid foundation for understanding the political rationality and the ‘juridical rationality’ that shapes particular interpretive outcomes for this empty and contingent concept, whether in Canada or the IAHRS. I want to situate the different tendencies within Canada and the IAHRS within a sound theoretical framework. The second is the significant complexity in pre-Charter and post-Charter Canadian equality law, that latter of which is otherwise challenging to understand.

3.2.1 Binary or Spectrum?

Potential equality conceptions are usually presented as two options, namely, formal equality or substantive equality, and this is how the SCC has characterized the choice. At some level, however, this oversimplified binary has addled the effort to critically evaluate the jurisprudence, and has perhaps even detracted from greater reflexivity on the Court’s part.\(^{152}\) This assessment is based on the contradictory elements in the case law itself, and the fact that the SCC continues to assert that substantive equality is the animating norm of s. 15,\(^{153}\) despite significant disagreement in result and commentary.

\(^{152}\) Several scholars questioned the extent of the Court’s incorporation of the critique, as in the purported course corrections in Kapp, supra note 142 and Withler, supra note 26. See Jennifer Koshan & Jonnette Watson Hamilton, “Meaningless Mantra: Substantive Equality after Withler” (2011-2012) 16 Rev. Const. Stud. 31 at 34 [Hamilton & Koshan, “Meaningless Mantra”]. See also Young, “Unequal”, supra note 35 at 201, in reference to the Court’s understated characterization of the flaws of Law and the rich critique reflected in its footnotes in Kapp.

\(^{153}\) It did so in Withler, supra note 26 at para 2, where the Court describes substantive equality as the “animating norm” of s. 15(1), citing Andrews. The terminology is used at various times in the 2018 pay equity cases, both the majority and dissenting reasons: Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17 [APP] at 25; and CSQ, supra note 136 at para 25.
One equality scholar notes that although the concepts of formal equality and substantive equality represent the primary tension that dominates s. 15 jurisprudence, within this scheme lies a multitude of variations.\textsuperscript{154} Another scholar presents formal and substantive equality as two poles on a spectrum.\textsuperscript{155} Beverley Baines argues that the Court’s jurisprudence reflects elements of substantive equality, along with other elements of more formal conceptions, such as anti-discrimination.\textsuperscript{156} One could argue that there are different ‘versions’ of both formal and substantive equality, and that the Court’s interpretations accord with one or more such versions, but which nonetheless fall short of the substantive equality conception advanced by this project and various equality rights scholars.

Without attempting to resolve this debate, this project presumes there is a distinctive “structural”\textsuperscript{157} substantive equality conception, and ultimately concludes that the Court’s approach to equality does not consistently align in important ways with that, in terms of its methodology, analytical or conceptual framework, and aims or normative outlook.

\subsubsection*{3.2.2 Formal Equality Elaborated}

The paper’s elaboration of formal equality (and legal formalism) is extensive. This is based on the persistence of formalism in Canadian law and the importance of identifying its presence, given its varied forms, and the need to understand the reasons for its continued force. The ‘continual reinvention’\textsuperscript{158} of the constitutionalized equality rights analysis has amply demonstrated the flexibility of legal discourse and “its ability to simultaneously present

\textsuperscript{154} Ryder et al, “What’s Law Good For?”, supra note 30 at 105.
\textsuperscript{155} Young, “Unequal” supra note 35 at 190.
\textsuperscript{157} This is the term that is sometimes used to describe the substantive, non-formal equality approach in relation to the IAHRS: Abramovich, “From Massive Violations - SUR”, supra note 46 and Abramovich, “From Massive Violations - Aportes”, supra note 80.
\textsuperscript{158} Further to the article of Hamilton & Koshan, “Continual Reinvention”, supra note 91.
contradictory stories”. As such, a full appreciation of formalism furthers the objective of achieving analytical clarity concerning the SCC’s real vision for equality.

In elaborating the doctrinal elements of formal or “liberal equality”, I consider political economy underpinnings, as these are vital to deconstructing the Court’s approach to the protective scope of s. 15 (i.e. its aims) and each of the three elements. Further, as the concept of equality is a key component of liberal political theory and a “cornerstone of the liberal concept of democracy”, the legal concept of equality cannot be separated from the prevailing liberal vision of a just society.

To commence this survey of different equality visions, a short-hand schematic of the equality spectrum helps to anchor the discussion, under which, formal equality “makes disadvantage invisible through a consideration of equality in terms of sameness and difference, rather than in terms of dominance and subordination”, whereas substantive equality “takes into account systemic disadvantage and provides for equality of results”.

The classical liberal conception of the modern polity as composed of autonomous, undifferentiated and self-interested individual citizens, is a quintessential feature of the formal concept of equality. Underpinning the liberal theory of ‘modern political life’ is a particular notion of “universality” and the ‘emancipatory ideal of universal citizenship’, which

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159 Lessard, “Mothers”, supra note 147 at 183.
160 The term used by Gwen Brodsky, “Thesis”, supra note 92 at 110.
161 Defined in terms of ‘equality of access to opportunities and the right to equal treatment’: Majury, “Women’s (In)Equality”, supra note 22 at 103.
162 Ibid at 110: The legal concept of equality has liberal roots tied to an “individualistic theory of rights” and an “assimilationist model of formal equality”.
164 Meaning, a society or the state. This section draws heavily on the analysis of Iris Marion Young, “Polity and Group Differences: A Critique of the Ideal of Universal Citizenship” (1989) 99:2 Ethics 250 at 259 [I.M. Young, “Polity and Difference”].
165 Young, “Unequal”, supra note 35 at 190-1, citing Mary Becker, "Patriarchy and Inequality: Towards a Substantive Feminism" (1990) 7 U.Chicago Legal F. 21 at 32-33.
166 A contrasting conception of universality is advanced by Iris Marion Young, “Polity and Difference”, supra note 164, and Hester Lessard, who critiques the notion as focused on “identity injuries” (at 2), and as homogenizing, as
presumes that the “identities of dominant groups are incorporated equally within the diversity”. Under the liberal notion of rights then, individuals (rather than groups or collectivities) hold rights, as the group-based differences between individuals are assumed to be irrelevant and individuals are viewed as “unencumbered by the particularity of history, social location or circumstance”. Further, individuals are not legally defined by their “immutable personal characteristics, such as race, national origin or sex” because they are de jure or “formal equals” in having been assigned the “political legal rights and freedoms of (universal) citizenship”. The notion of universality thus advances the political ideal that universal laws and rules are blind to individual and group differences and apply to all in the same way. Rights under this liberal form are therefore individualist, universal and abstract, in terms of ignoring the aforementioned particularities.

The legal standard of formal equality is typically framed as ‘treating “likes” alike’, with same treatment being its “defining feature”. This is also known as the “similarly situated” test and it assesses whether individuals are sufficiently alike to merit the same treatment or are sufficiently unalike to merit different treatment. Equality is violated when ‘similarly situated’ individuals are subject to different treatment. The questionable assumption is that the sameness/difference test is an unproblematic and simple assessment. Hence, the main

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well as uncoupled from a material or class basis and therefore from material inequalities. Hester Lessard contrasts this from the notion of “substantive universality”, which emphasizes recognition harms that are based in the historically and culturally based struggles for recognition and self-government of certain groups: “Equality, Gender and Poverty: Thinking About Universal Social Rights” (April 19, 2012) Discussion Paper for “The International Initiative to Promote Women’s Right to Social Security and Protection” (webinar) [Lessard, “Equality, Poverty”] at 6.

167 I.M. Young, “Polity and Difference”, ibid at 250.
168 Young, “Unequal”, supra note 35 at 191.
171 I.M. Young, “Polity and Difference” supra note 164 at 250. She writes of two meanings associated with universal citizenship: “With equality conceived as sameness, the ideal of universal citizenship carries at least two meanings in addition to the extension of citizenship to everyone: (a) universality defined as general in opposition to particular; what citizens have in common as opposed to how they differ, and (b) universality in the sense of laws and rules that say the same for all and apply to all in the same way; laws and rules that are blind to individual and group differences.
172 Lessard, “Mothers”, supra note 147 at 173.
174 Sampson, supra note 163, 245 at 246.
question under the vision of everyone as formal equals is to determine whether individuals are sufficiently similar and ‘similarly situated’, but through a lens that is intentionally blind to attributes like race and gender, or other markers of individual difference that are associated with group-based difference.175

At the same time, a formal equality conception separates out those differences viewed as arising within individuals176 that are seen to mark ‘real difference’ and to therefore justify different treatment by the state. These types of real differences are framed as “personal characteristics” and are viewed as a product of either choice or merit or nature.177 ‘Nature’ is understood to cover the different capacities, talents and inclinations of individuals, as well as biological differences, which are viewed as ‘natural’.178 In other words, some differences that are actually socially constructed are framed as inherent. Further, the choices of individuals that mark their difference are understood to be unencumbered by any relevant socially-created forces and constraints that require a critical equality analysis.179 To frame this another way, the individual’s choices are viewed as freely given and unconstrained by social patterns of systemic or group-based disadvantage. This conception of individual choice and autonomy supports such idealized notions as the unimpeded freedom of all to contract or choose a specific status or set of circumstances, like marital status, or an individual’s free choice of economic status, such as

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175 Young, “Unequal”, supra note 35 at 191.
176 The location of sameness and difference within individuals rather than as a product of how social relations constitutes individuals within webs of social and material relations, forms part of the critique of the formalist tendencies seen in the SCC’s s. 15 jurisprudence. Young, “Unequal”, ibid at 193.
177 ibid at 191-2.
178 This sentiment is evident in Justice McIntyre’s statement in Andrews, supra note 18 at p. 165, advancing the idea that there “will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law”. This observation was evidently meant to contrast such ‘relevant personal differences’ from irrelevant ones that should not cause the law to have a more burdensome or less beneficial impact on one than another.
179 Young, “Unequal”, supra note 35 at 193. Various authors have critiqued the SCC’s unexamined and liberal approaches to choice, which have served as the basis for denying equality claims. See e.g. Dianne Pothier, “But it’s for your Own Good”, in Young et al, supra note 23 at 40; Gwen Brodsky, “Case Comments. Gosselin v. Quebec (Attorney General): Autonomy with a Vengeance” (2003) 15 Can J Women & L 194 [Brodsky, “Autonomy with a Vengeance”].
dependence on state social assistance for their means of subsistence, or the choice of an occupation or low-wage job.  

Based on these precepts, the central objective under the liberal equality vision of the just society is the goal of individual well-being, the latter understood to be enhanced to the extent that individual choice and autonomy are expanded. At the same time, individuals are held responsible for the poor choices they make, including ‘choices’ viewed as having produced their adverse socioeconomic circumstances. The concepts of choice and autonomy are both the ideal and the driver of individualized explanations of socio-economic inequality and poverty rather than explanations of a systemic and relational vein.

The ideal role of the liberal state is fixed as non-interventionist in relation to these caricatured individuals (or ‘neoliberal citizens’) as they exercise their freedoms in the so-called non-public and ‘private’ spheres of social relations, including the family and the market. The protection of rights holders under a constitutional framework is thus framed as the people against the government, whilst ignoring their lot within the ‘private’ order. In this sense, the classical liberal conception of equality is both individualist and anti-statist, consistent with the features of what Joel Bakan and others have labelled the “dominant liberal rights form”.

Further to this rights template in which only “state action” is caught and not state inaction -

181 Young, “Unequal”, supra note 35 at 193.  
182 Ibid at 187-8.  
183 Ibid at 187. Hester Lessard’s assessment of Gosselin is that the theoretical question of where responsibility for individual security resides; it “hovers” in the background, shaping the “common sense” of judicial line-drawing, and how much so depends on the level of the Court’s embrace of neoliberal values: Lessard, “Dollars”, supra note 77 at 302, 315.  
184 Young, “Unequal”, ibid at 193.  
185 Ibid at 187.  
which does not trigger rights - a rights claim must be framed in the dyadic form\(^{188}\) of the ‘rights/duties dyad’ between two actors and without reference to the reality of the broader social processes, inequalities, and multiple actors of the ‘private order’ or ‘separate spheres’.\(^{189}\)

Thus, the orientation toward the state’s primary role under a formal equality conception is negative. The state’s main functions are to guarantee equality of opportunity\(^{190}\) to citizens through equal treatment and by ensuring that state interference and restrictions do not unfairly or “arbitrarily”\(^{191}\) impinge on individual choice and freedom.\(^{192}\) The state is not concerned or prescriptive as to the actual outcomes or distributional results in society.\(^{193}\) It focuses instead on process and a form of juridical equality attained through formally equal treatment.\(^{194}\) The state’s assurance of equal opportunity is largely directed at “leveling the playing field so that individuals can ‘prove themselves’ in accordance with their [‘natural or inherent’] merits, inclinations and talents”.\(^{195}\) Further, as noted, there is a normative commitment to state blindness toward personal characteristics that are ‘immutable’ and not within the individual’s control, like race or gender.\(^{196}\)

\(^{188}\) Bakan, supra note 35 at 48. The atomistic dyadic form of rights addresses social conflict in terms of a rights/duties dyad of two actors in relation to one another (at 48, 51). As such the social structures of domination and subordination, and the actual conditions of people’s lives, whose choices and capacities and identities are shaped by complex processes and multiple actors, are not addressed. Bakan argues that these three limitations of the liberal form of rights prevent litigation of equality rights within the dominant ideological form of rights from making “substantial inroads on social inequality” (at 48), as the broader social conflict and injustices cannot be caught by rights strategies.

\(^{189}\) Ibid at 48. See Lessard’s article, “Idea of Private”, supra note 186 at 107, which examines the socially constructed and legally formalized dichotomy of the sphere of “state action” (‘state action doctrine’), which is subject to scrutiny in terms of government intrusions into individuals’ rights in the public sphere, and “separate sphere ideology”, which operates to obscure the private order of subordination and inequality and to deny relief for same (Lessard, ibid at 108-9).


\(^{191}\) The notion of arbitrariness has featured and continues to be cited in the SCC’s jurisprudence. An example is in the 2013 decision in Quebec v. A, supra note 26 where Justice Abella uses the term to qualify “disadvantage”: paras 325-31.

\(^{192}\) Young, “Unequal”, supra note 35 at 192.

\(^{193}\) Ibid at 192.

\(^{194}\) Brodsky, “Thesis”, supra note 92 at 304, which as noted, is concerned with the sameness of treatment.

\(^{195}\) Majury, “Women’s (In)Equality”, supra note 22 at 104.

In terms of the two generations of rights, several pernicious dichotomies operate to confine the state’s role to the protection of CPR but not ESCR/SER. Before examining the latter proposition, a note about how the project conceives of ESCR and SER or social rights, as they are sometimes framed. For the purposes of the project, references to this generation of rights are framed loosely around the rights drawn from international human rights treaties, such as the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, or regional treaties, as in the IAHRS, and also from scholarship, both Canadian, and from a comparative and international text on social rights jurisprudence. Social rights focus generally on social security, health, education, housing, water and food. I also include within the spectrum, labour rights, which are sometimes framed as economic rights, and finally, cultural rights. Canadian scholarship has also incorporated the concept of a right to an adequate standard of living or the means of subsistence.

Within this CPR/ESCR dichotomy then, CPR are framed as negative, imposing duties of restraint on the state and enjoining it from acting, rather than requiring it to act in the private spheres. Further, the ‘neutral’ or ‘pseudo-neutral’ liberal state is not responsible for addressing social and economic inequalities in the ‘private’ social and economic spheres of the family or market.

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201 Langford, “Justiciability of Social Rights”, *supra* note 45 at 3.

202 See for example Jackman & Porter, “Socio-Economic Rights”, *supra* note 45 at 224, which surveys Canadian litigation in the SER thematic areas of housing, health, adequate standard of living, right to work, and right to education.

which are presented as beyond the state’s reach. It follows that the notion of affirmative or positive state responsibility for enforcing ESCR/SER and redressing entrenched socio-economic inequality in its varied forms does not enter the calculation. Whereas CPR are viewed as justiciable and enforceable, ESCR/SER are framed as aspirational and not justiciable and enforceable. The state action doctrine confines the state’s purview strictly to ‘state action’ and the ‘public sphere’ and in respect of CPR alone. One scholar summarizes the essential message of this negative rights doctrine in these terms: “a constitution protects individuals only from violations of their rights by governments and not from violations from other individuals”.

The extensive critical analysis of formal equality provides a rich source of further elucidation of its content and implications, as well as laying the foundation for the project’s substantive equality formulation. As equality scholar Gwen Brodsky notes, what formal equality overlooks in its analysis is as important as what it emphasizes. It disregards the significant differences in societies that are produced by institutions and systemic processes (as well as laws or policies) – as opposed to nature and choice – and which create and sustain relations of inequality between groups in terms of their access to power and material and “symbolic resources”. These social forces maintain the inequality of subordinate groups while the power or ‘advantage’ of dominant groups is reinforced. By focusing on individuals and individual rights, formal equality tends to obscure the group-based dimensions of “disadvantage” and the broader context of the realities of oppression and structural inequality. In Hester Lessard’s words, the norm of formal equality is ‘same treatment’ while remaining “steadfastly blind to the material conditions, attributes, attitudes, structures or norms that instantiate social inequality”.

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205 Ibid.
206 Ibid at 108. Section 32(1) of the Charter is the “ostensible” import of the state action rule. See Appendix B: Rights Provisions.
208 Terminology used in Young, “Unequal”, supra note 35 at 195.
Accordingly, the central features of formal equality analysis are the abstraction from the analytical frame of the social realities of systemic and *de facto* inequality experienced by certain groups, and the insistence on either their irrelevance to equality analysis or the denial of their existence altogether.\(^{211}\) It follows that the formal equality framework is not concerned to examine, at any level, the broader socioeconomic and historical context of the circumstances of an equality claim and claimant. It is rather, acontextual. It does not acknowledge the historical experiences of the inequalities and power differentials that comprise and constrain the relevant context of the claimant’s experiences and opportunities,\(^{212}\) and that of the group or groups with which they are associated.

Commentators have observed that formal equality can be powerful in addressing certain forms of discrimination.\(^{213}\) This has proven true in cases where, for example, the instant difference in treatment is unidimensional\(^{214}\) and the claimant’s difference is viewed as “not really that different”\(^{215}\) from the dominant standard.\(^{216}\) The scholarship observes that when what counts as ‘real difference’ begins to shift in societal norms, formal equality can help to redress the stigmatization that results in the denial of recognition and social regard (and often also results in the exclusion from access to power and resources), to individuals who bear that difference.\(^{217}\)

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\(^{211}\) Sheila McIntyre reflects on the reaction against *Andrews* by theorists who called it the “feminist version” of s. 15. She points out that it was predictable that any judicial attention to context and material inequality would be “denounced as “judicial activism” inconsistent with the appropriate role of course in our constitutional order”: “Answering the Siren Call”, *supra* note 149 at 106.

\(^{212}\) This context structures even, at some level, merits or talents, which are also not neutral concepts: Young, “Unequal”, *supra* note 35 at 198.


\(^{214}\) An observation that is applicable to *Eldridge*, *supra* note 19, for example, which addressed hearing impairment.


\(^{216}\) *Ibid* at 192. The equality claims of groups that are more than one dimension removed from dominant norms or groups, are ironically, often not recognized, as the inequality of their position is understood to flow from “genuine” difference: *Ibid* at 193.

What formal equality cannot do however is to address the persistent inequalities and hierarchies affecting certain groups – and multiply marginalized groups - at different points in time.\(^{218}\)

Moreover, because it does not question the institutional *status quo*,\(^{219}\) formal equality operates to reinforce those substantive inequalities and the asymmetrical distribution of power\(^{220}\) and resources. This is because these lived realities cannot be addressed by simply applying an equality guarantee in *symmetrical*\(^{221}\) form to all citizens, regardless of their social position and circumstances.\(^{222}\)

Significantly, in the ideological sphere, while formal equality operates to abstract individuals out of their concrete experiences of inequality, it also portrays them as formal equals.\(^{223}\) In this way the ‘ideology of formal equality’\(^{224}\) masks and neutralizes structural inequality. For example, the “disparate impact” or “adverse effects” of equal treatment on certain groups and individuals are portrayed as natural or inevitable or a product of choice or consent.\(^{225}\) The way this process operates is that facially neutral rules and procedures that essentially abstract legal rights from social realities are assumed to be fair within classical liberalist assumptions. Formal equality rights and discourse thus serve to “depoliticiz[e] issues of power and dominion” and to “even [render] them invisible”.\(^{226}\) As a discourse that addresses rights, law and society, formal equality ideology both anchors and helps sustain liberal patterns of social relations and political order.\(^{227}\)

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\(^{218}\) *Ibid* at 193.


\(^{220}\) Majury, “Equivocation”, *supra* note 53 at 310.

\(^{221}\) *Ibid*. The asymmetrical approach is an essential feature of substantive equality as conceived by this project.


\(^{224}\) *Ibid*.

\(^{225}\) *Ibid*.


\(^{227}\) Further to Eagleton, “Ideology”, *supra* note 122 at 4.
It should be noted that formalist approaches to legal reasoning are a derivative of the legal conception of formal equality.\textsuperscript{228} The application of formalist legal reasoning to the enterprise of judicial interpretation favours the identification of abstract, bright line categories in support of its assumption of the ‘rule-like certainty of judging’.\textsuperscript{229} The theoretical underpinning of these ‘rule-like legal formula’ is the assertion of a purportedly neutral and objective standard of reasoning that, as noted, disregards the power imbalances that have resulted from years of hierarchy and oppression.\textsuperscript{230} These tendencies are evident in much of the pre-Charter interpretation of equality rights under the \textit{Bill of Rights}.\textsuperscript{231}

Post-liberal challenges to legal formalist reasoning are reflected in the more ‘purposive and policy-based’ interpretive approaches that emerged in conjunction with or in response to political economy shifts in the Canadian post-war social welfare state. Other influences from the legal realist and critical legal studies traditions furthered these challenges to legal formalism, and these developments in legal reasoning should be considered together with the substantive challenge to formal equality rights thinking. Broadly speaking, they reject the privileging of abstract principles over material facts\textsuperscript{232} and are part of the strain of judicial interpretation that embraces ‘contextualism in the law’\textsuperscript{233}.

The content of such challenges to legal formalism is taken up next in the elaboration of the project’s substantive equality formulation. This is followed by an assessment of the ultimate post-liberal inroads into the Court’s analytical framework under s. 15.

\textsuperscript{228} Sheppard, “Equality, Ideology” at supra note 6 at 206.
\textsuperscript{229} \textit{Ibid.}
\textsuperscript{230} \textit{Ibid} at 247.
\textsuperscript{231} Supra note 129. See descriptions of two decisions decided under the \textit{Canadian Bill of Rights} in \textit{Lavell, supra} note 132 and \textit{Bliss, supra} note 133. The tendencies are also present to varying degrees in the s. 15 jurisprudence.
\textsuperscript{233} Shalin M. Sugunasiri traces the evolution of this interpretive development in the SCC’s jurisprudence under the \textit{Charter}: “Contextualism: The Supreme Court’s New Standard of Judicial Analysis and Accountability” (1999) 22 Dalhousie L.J. 126.
3.2.3 Substantive Equality Elaborated

Elements from the foregoing point to the core requirements of a substantive equality analysis. Formulating a coherent analytical framework for equality in substantive terms is still challenging, however, for several reasons.

The first is the Supreme Court’s confusing and contradictory jurisprudence, which makes it difficult to precisely identify the scope of the protection, in terms of its commitments or purposes for s. 15. Moreover, while the Court asserts that substantive equality has always been applied, as one scholar puts it, the s. 15 judgments offer relatively little assistance in elaborating the requisite elements. The jurisprudences reflects largely ‘cryptic, unelaborated’, and often contradictory guideposts to substantive equality.234 This is also true of some of the scholarship;235 few writers have set out precisely what a robust or ‘structural’ conception of substantive equality demands.236 As there are no fully elaborated jurisprudential examples of the ideal approach, and given the requirement that the analysis be flexible and attend to the particularities of the specific claim, it is challenging to present a ‘template’ that provides a sufficient level of guidance.237

Despite these challenges, the essential elements of what substantive equality requires are described in certain s. 15 critiques and broader equality theory.

The foundational theoretical element is the recognition of the existence in society of particular substantive inequality realities and harms as the focus of the equality analysis, as opposed to conceptions grounded in a ‘neutral’ equality, or unclear indicia like “disadvantage”, ‘prejudice’

234 Young, “Unequal”, supra note 35 at 185, and 190: “Too often what goes under the guise of substantive equality is really simply only a contextualized, richer form of formal equality.” Young observes that “while formal equality is often described, substantive equality is typically only invoked” (at 190).
235 Ibid at 185.
236 Young observes that “much has been written of [the] judicial failure to follow through on the Court’s professed commitment to substantive equality...”, but there has been little elaboration of what it requires and how it contrasts with other versions of formal equality: ibid.
237 Ibid.
and (false) ‘stereotyping’. In other words, there are essential theoretical assumptions about the nature of social inequality and inequality harms that the equality guarantee must first recognize and then address in order to qualify the approach as substantive. Broadly speaking, these substantive inequality harms fall within the four dimensions of misrecognition, maldistribution, marginalization and exclusion. Further, their redress covers the four overlapping dimensions of recognition, redistribution, participation and transformation. These are elaborated below.

Further to this critical theoretical foundation, the substantive equality analysis employs a particular methodology in order to apprehend these complex harms in specific equality claims; the requisite analysis is deeply contextualized and duly grounded in the realities of people who experience substantive inequality harms. Returning to the socially constructed and legally reinforced dichotomy of the private separate spheres set out previously, what a substantive equality analysis must do – through focusing on the systemic effects of law and the material facts, rather than primarily on the purpose of a particular law - is to break down the liberal myth of the public/private spheres, and draw into the public sphere the formerly excluded, private context of the substantive particulars of historical and pervasive social conditions of subordination. This movement entails a shift from the liberal emphasis on form to the post-liberal emphasis on substance. Achieving this shift is what gives real material substance to equality rights, and validates the experiences of the victims of such subordination. Without this content for equality, the equality guarantees will, in the historical and material context of “liberal political economies”, tend towards formalist conceptions of equality. As such, an adequate contextual analysis that provides this material content is a particularly essential element.

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238 These reflect the consistently cited concepts or indicia of discrimination in the s. 15 jurisprudence.
239 Elaborated in such scholarship as that of Lessard, “Idea of Private”, supra note 186.
240 See Moon, supra note 27 at 572.
241 Lessard, “Idea of Private”, supra note 186 at 133.
242 Ibid.
243 Ibid.
244 Lessard, “Mothers”, supra note 147 at 177.
The other essential elements for the purpose of redressing these recognized harms is a conception that imposes broad positive obligations on the state to affirmatively address through redistributive and transformative measures the substantive inequality harms in the public and private spheres and to enforce ESCR/SER in response to socio-economic inequalities. Without the clear commitment to forms of redress of this nature by the state, substantive equality cannot be achieved.\footnote{I rely further for this supposition on the previously cited scholarship, including that of Young, “Unequal”, supra note 35 and Brodsky, “Thesis”, supra note 92.}

3.2.4 Element 1: Substantive Inequality Harms and Relevant Context

The sections that follow lay out the requisite components of a substantive equality analysis in more detail. I examine: (a) key conceptual premises for examining complex forms of substantive inequality harms; (b) an expanded set of substantive inequality harms and forms of redress; and (c) the role an adequate contextualized analysis plays in centering these often subaltern realities and harms.

3.2.4.1 Key premises and analytical tools for examining complex inequality harms

Returning to the short-hand schematic for substantive equality, the project’s conception “takes into account systemic disadvantage and provides for equality of results”.\footnote{Sampson, supra note 163 at 246-7, citing Day, “Process of Achieving Equality”, supra note 163 at 18.} A core theoretical premise is recognizing the existence of \textit{de facto} ‘\textit{real life}’ social inequalities,\footnote{Lessard, “Mothers”, supranote 147 at 201, references the “\textit{real life}/law” dichotomy, which corresponds to the private/public split, whereby the perspectives and experiences of subordinated groups are erased, while those of the dominant prevail} which are taken to be pervasive and serious, rather than anomalous and an aberration.\footnote{Sampson, supra note 163 at 246.} This means that the analysis zeroes-in on substantive \underline{inequality} and discrimination, both as part of the context of claims, and as a distinct starting point for the equality analysis.\footnote{Sheppard, “Inclusive Equality”, supra note 187.} The approach considers both the particularized and the contextualized inequality being challenged.\footnote{Majury, “Equality and Discrimination”, supra note 33 at 418.} Importantly then,
the approach is not “neutral” as it acknowledges that parties do not start off in presumed positions of equality.\(^{252}\) Diana Majury calls this framework the “inequality-based analysis”, and contrasts it with “equality-based analysis”,\(^{253}\) which is concerned with superficial sameness and difference between individuals. Majury further observes that the formalist ‘sameness approach’ tends to be self-referential and lends itself to formulaic comparison, which obscures the obvious manifestations of substantive inequality.\(^{254}\) I take up the strong comparativist tendencies and de-contextualizing features of an equality-based approach in my examination of s. 15 jurisprudence in Section 3.3.

Further to this essential theoretical framing are specific understandings of the nature of substantive social inequality. Of particular note is the recognition that systemic social inequality is rooted in ‘multiple sites of oppression’ that intersect and are mediated by ‘multiple sites of domination’.\(^{255}\) The real social conditions and inequality experiences of individuals drawn from subordinated groups are understood to be multi-layered and to take complex forms. Another framing for complex cases of subordination is that of multidimensional layers, which is a conception that builds on the theoretical insights of intersectionality\(^{256}\) as a socio-structural approach.\(^{257}\)

To be adequate then, the conceptualization of substantive inequality is group-based, and, specifically, it focuses on groups whose histories of oppression must be recognized. The approach is necessarily asymmetrical, understanding that grounds (like race, religion, or sex) are not neutral or homogenous, and are more adequately framed in explicit terms by the racial, religious, or sex category (for example) that is subject to subordination and oppression at

\(^{252}\) Ibid at 420.

\(^{253}\) Majury notes that the concept of equality in this understanding is only meaningful in the context of an understanding of and response to inequality: Ibid.

\(^{254}\) An important insight articulated by Sampson, supra note 163 at 251, and which is a strong basis for critical reflection on the role of comparison in equality analysis.


\(^{257}\) For one important theoretical contribution, see Lorena Sosa, “Inter-American Case Law on Femicide: Obscuring intersections?” (2017) Netherlands Quarterly of Human Rights 35(2) 85.
different times in a given society. Overall, the requisite analysis explores the intersectional, multidimensional, and complex nature and details of inequality as it manifests in particular situations and claims.

It also follows, as Gwen Brodsky notes,\footnote{Brodsky, “Thesis”, supra note 92 at 110, 270, 314.} that material or economic inequality are viewed as a core manifestation of social inequality. Further, economic inequality and poverty are understood to be systematically and disproportionately concentrated among particular groups, both historically and at present.\footnote{Gwen Brodsky, “The Subversion of Human Rights by Governments in Canada” 355, in Young et al, supra note 23, at 357.} Whether poverty is framed as a equality violation in itself, as an ‘analogous ground’, or as an aspect of the contextual reality that causes or worsens other rights violations, the substantive approach insists on incorporating these realities within the equality rights analytical frame.\footnote{See articles regarding poverty and equality by Gwen Brodsky and Shelagh Day: (1) “Women’s Poverty”, supra note 53; (2) “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14:1 Canadian Journal of Women and the Law 185; (3) “Denial of Means of Subsistence as an Equality Violation” (2005) Acta Juridica 149 [Brodsky and Day, “Denial of Means of Subsistence”]. Other articles on the subject of poverty and equality, include: Jessica Eisen, “On Shaky Grounds: Poverty and Analogous Grounds under the Charter” (2013) 2:2 C.J. Poverty Law 1; Martha Jackman, “Constitutional Castaways”, supra note 199.}

Finally, a critical theory of difference\footnote{Young, “Unequal”, supra note 35 at 195.} is an essential theoretical component. While differences between individuals and groups are ‘real’, difference is relational and it matters because of how it is historically and socially based and constructed. The applicable analysis is cognizant of power differentials in terms of “how subjects are constituted through structural and hierarchical systems of inequality”,\footnote{Ibid, citing Pascale Fournier, “Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a Comparative Dialogue”, in Susah H. Williams, ed, Constituting Equality: Gender Equality and Comparative Constitutional Law (Cambridge: Cambridge Press, 2009) 157, at 158.} and how individuals are understood by others through a “mesh of material and social relations”.\footnote{Ibid.} Within this conception, every person or group is assumed to be different and the attention thus turns to where and when ‘difference “makes a difference” for some’,\footnote{Ibid at 196, citing Becker, “Patriarchy and Inequality”, supra note 165 at 38.} or to frame it another way, difference is simply that which is viewed as
deviant or deficient in respect of dominant groups and norms. The assumption is that there are privileged or dominant understandings and ways of organizing society that exclude and create barriers to participation and access to power, resources and recognition by certain groups. The characterization, referenced earlier, of group membership traits as ‘irrelevant personal traits’ originates from a position of dominance and privilege. The inadequacy of this perspective stems from the failure to incorporate notions of dominance and privilege into the definition of inequality and discrimination.

3.2.4.2 Specific substantive inequality harms and forms of redress

The companion to these requisite understandings of the nature and harms of substantive inequality is the required commitments under the equality guarantees, which, in the project’s framing, are to ‘redress, minimize or mitigate substantive inequality harms’ - harms and forms of redress that are framed in clear, specific terms, as follows.

Redistributive and transformative aims feature strongly in various formulations of the necessary commitments of substantive equality. The latter is described by one group of feminist scholars in this way:

[Substantive equality] questions the justice of the distribution of rights, privileges, burdens, power, material resources and the basis for that distribution. It requires us to articulate and critically examine previously unspoken assumptions/norms and how these norms are embedded in the laws that structure our relationships. Most significantly, it requires us to transform those legal structures to secure substantive equality.

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265 I.M. Young, “Polity and Difference”, supra note 164.
266 A conception that features, inter alia, in Justice McIntyre’s analysis in Andrews, supra note 18, and per La Forest, J., at p. 193.
269 See for example, Margot Young, “Why Rights Now?”, supra note 23 at 323, discussing the arguably “transformative cast” of section 15 in the Court’s original decision in Andrews, supra note 18.
270 Faraday, Denike & Stephenson, supra note 21 at 10. The editors also refer to the achievement of substantive equality as a “transformative” project (Introduction, at 19). Melina Buckley in her chapter in the same edited collection explores the potentially transformative nature of the equality project for women, arguing that this requires transformation of existing formal and social institutions: “Law and Meiirin: Exploring the Governmental
Another short-hand formulation ascribes to substantive equality “a commitment to redistributive justice and radical inclusion” that also celebrates and creates space for all difference.\(^{271}\) This entails an explicit commitment to change the actual patterned inequalities experienced by the powerless, excluded and marginalized, through redistributive and transformative justice in material and symbolic or representational terms.\(^{272}\) Rather than corrective justice of individual instances of arbitrary treatment or securing equality of opportunity alone, the objective is to secure substantive equality of outcomes for subordinated groups. Transformative aims also encompass a commitment to radical inclusion, which means, the revision of dominant norms and the transformation of structures and institutions, so as to provide for effective inclusion, rather than exclusion or assimilation.\(^{273}\) Substantive equality thus aims to address the barriers that impede the full enjoyment and exercise by certain groups of the full range of their rights and freedoms.\(^{274}\)

‘Transformative equality’ is framed by Margot Young as advancing society towards “a more meaningful equality-oriented redistribution of status and resources”.\(^{275}\) Melina Buckley also frames equality in these terms, arguing that it entails the transformation of existing formal and social institutions, linking the focus on social transformation to positive state obligations and actions, as integral to the substantive equality project.\(^{276}\)

Various theoretical frameworks originating from outside of s. 15 equality scholarship build on the foregoing insights and express a broader range of substantive equality harms and forms of redress than is contained in much of the scholarship. These additions assist in fine-tuning and

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\(^{271}\) Young, “Unequal”, supra note 35 at 195, citing Lessard “Substantive Universality”, supra note 210 at 243.

\(^{272}\) Ibid, citing Nancy Fraser, “Reframing Justice”, supra note 36.

\(^{273}\) Young, “Why Rights Now?”, supra note 23 at 323.


\(^{275}\) Young, “Why Rights Now?”, supra note 23 at 323.

sharpening the project’s analysis of what is present or missing and required to achieve substantive equality in each of the systems.

The first contributions are Nancy Fraser’s, and I consider those of Sandra Fredman and Iris Marion Young, below. Fraser’s framing of, first, the harms and respective remedy includes the harms of “misrecognition” and “maldistribution” whose redress takes the form of recognition and redistribution. Consistent with the Canadian scholarship cited above, Fraser expresses this requirement as the “outcome of distributional equality in material and symbolic or representational resources”. Her subsequent elaboration adds the harm of exclusion through “participation-impeding barriers”, with its counterpart redress of participation, through their removal.

Turning first to misrecognition, this concept is based on the principle that individual identity derives from the social relations with and recognition from others (as opposed to individuals who are self-determining and self-constituting). The theory is that cultural value patterns create social hierarchies of esteem, respect and prestige enjoyed relative to other groups. In furtherance of a critical theory of difference, “misrecognition” harms (also known as “status subordination” harms) occur when some people are constituted as inferior or excluded – and also ‘different’, in a deviant or deficient sense – and their ability to participate fully in social and political life is impeded. By contrast, maldistribution is concerned with hierarchies that correspond to differentials in the social distribution of wealth and power, and that produce concentrations and hierarchies of power, along with oppression and “economic subordination”.

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278 Young, “Unequal”, *supra* note 35 at 195, citing Fraser, “Reraining Justice”, *supra* note 36.
279 Fraser, “Rethinking Recognition”, *supra* note 42.
280 *Ibid* at 118.
281 *Ibid* at 113.
282 *Ibid* at 115.
283 *Ibid* at 117.
Fraser’s addition to the conceptualization of inequality harms goes further to consider the interaction of misrecognition (or status subordination) harms and harms associated with the maldistribution of power and resources (or economic subordination), both of which commonly reinforce one another. Fraser’s analysis emphasizes that the recognition of the harms of subordinated social status should not be de-coupled from concerns about maldistribution, or class, to use another nomenclature. In other words, the fields of status subordination and economic subordination both need to be kept in mind. The critical insight supported by sociological evidence that socio-economic marginalization is concentrated disproportionately amongst groups that experience status-based discrimination or misrecognition, is another important understanding of the complex dynamics of structural inequality. Within this tradition, misrecognition is to be contrasted with “free-standing cultural harm” or “free-floating discourse”, viewed as a problem of cultural depreciation, or “identity injuries”, and which does not understand identities or statuses such as race and gender as being “constituted by [coercive] social structures”. This distinction is germane to the critical assessment of s. 15 jurisprudence.

Fraser’s elaboration thus conceives of the redress of misrecognition as including changes to institutionalized social values and norms that operate to exclude individuals and groups from participating in society and political affairs – or require them to assimilate - by removing those barriers. As noted, her subsequent work adds the harm of exclusion through ‘parity-impeding

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284 Ibid at 118. It is also clear in Fraser’s analysis, that the recognition of the harms of subordinated status cannot be decoupled from the concerns about the realities of economic subordination and maldistribution. In other words, both of the fields of status subordination (with its associated misrecognition injustices) and material misdistribution (with its associated injustice of maldistribution) need to be kept in mind. See also I.M. Young, “Polity and Difference”, supra note 164 at 259.

285 Fudge, “Law and Social Transformation”, supra note 120 at 56.

286 Fraser, “Rethinking Recognition”, supra note 42 at 110.


barriers’, with its counterpart redress of participation, through their removal. As for the redress of maldistribution, such harms speak to the redistributive aspects in terms of material (and symbolic) resources and power.

Sandra Fredman’s multidimensional conception of substantive equality is another construct that brings together maldistribution and misrecognition harms with the transformative and participative dimensions of an expansive equality formulation. Together, the equality objectives of redistribution, recognition, transformation and participation are viewed as overlapping. The first two aims correspond with those set out above.

Fredman’s framing of the “transformative aim” recognizes the need to accommodate differences and to achieve structural change so that the detriment is removed from ‘differences’ that have been treated – and thereby socially constructed - as deficient. The conception thus goes beyond the more familiar Canadian formulation, particularly in the employment sphere, of the legal “duty to accommodate”.

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289 Fraser, “Rethinking Recognition”, supra note 42 at 116.
291 Fredman frames “redistributive aims” as addressing the “cycle of disadvantage” associated with subordinate status or out-groups: Ibid, at 25-26. The focus is on certain groups that have been disproportionately disadvantaged, the concern being less with status or group identity than the detrimental consequences that attach to that status. The objective is to address prejudice as well as disadvantage that corresponds with distributive inequalities in terms of resources and power relations. “Recognition aims” go beyond disadvantage to redress sigma, stereotyping, humiliation and violence due to membership in an identity group: Ibid at 25, 28. This is status-based prejudice and the aim is to promote respect for dignity and worth through recognition.
292 Ibid at 30.
293 See Meiorin, supra note 19, where accommodation permitted the scrutiny of the male constructed test of aerobic fitness for service in firefighting, and essentially reduced the standard rather than scrutinizing the assumptions as to what is required to perform the job and challenging the processes and norms that permitted their institution in the first place.
294 Accommodation of disability in this context is limited first of all by the express ceiling on changes that the employer must make, namely, to the threshold of “undue hardship”. Further, the approach is generally one of making adjustments so as to the individual with disabilities can ‘fit in’ to some acceptable level of providing useful services to the employer. This is in contradistinction to making more radical shifts such that the work environment is built with the idea of meeting the needs of all, not just exceptionally, but in general. See Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?” An Assessment by the Council of Canadians with Disabilities” (January 2004), online: Council of Canadians with Disabilities <ccdonline.ca/publications/20yrs/20yrs.htm#IIIB1ciii> (last accessed August 20, 2018). See also Sheldon, Tess. The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities, July 29, 2010, ARCH Disability Law Centre, online: <archdisabilitylaw.ca/?q=shield-becomes>.
structures and practices so that they are affirmatively inclusive, rather than requiring members of the out-group to conform to the dominant norms and built environments. In this sense, it is particularly relevant to people with disabilities and to “culturally diverse” minorities who are generally required to try to assimilate or are simply excluded, whether from certain benefits, services, or involvement in decision-making and social or political affairs.

Finally, Fredman’s “participative dimension” (which overlaps with the transformative dimension), addresses the important and often under-recognized feature of systemic social inequality based on the blockage of avenues for participation by some groups. It aims to facilitate the full participation of all in society, both socially and politically. Such impediments to participation are usually based on a combination of barriers, including the material (economic status or class), as well as representational and recognition based devaluations, against minority groups.

Iris Marion Young’s insights build on the foregoing and assist in evaluating the jurisprudence of both systems, particularly the IAHRS’s, with her attention to the equality challenge of “accommodating” diversity in societies framed around the generally false concept – or non-substantive version - of universality. Young’s contributions are also valuable in theorizing...
cultural rights, which are often left out of the ESCR equation in Canadian equality discourse, but feature significantly in the inter-American context.  

Advancing her critical theorization of difference and universality, Iris Marion Young starts with the premise that societies are not composed of imaginary autonomous, undifferentiated individuals (ideal neoliberal citizens). The reality is one of significant cultural, racial or ethnic and other forms of diversity. As previously noted in the formal equality elaboration, the application of universal laws and rules to all in the same way is thus in tension with this reality of diverse societies. Young further rejects the patently false notion that the identities of dominant groups are incorporated ‘equally’ within that diversity. Instead, the detriments that commonly attach to certain non-dominant groups and statuses, result in oppression in societies, where some groups are systemically privileged and others are oppressed through the established rules and practices of participation in social and political life. Because formalist universality is inevitably regressive (as the privileged norms derive from socially and economically dominant groups, and difference is understood as deficiency or deviancy), and given that there are no neutral norms in such societies, attention must be focused on the social construction of difference by those with power.

Iris Marion Young contends that in such societies, attention to cultural and other differences is essential, and that “special measures” or “special rights”, as opposed to ‘general rights’, are sometimes required to address real differences in power. In Young’s view, feigning blindness to these differences is incompatible with an “anti-subordination model of equality” that aspires to something other than the continued exclusion of ‘different groups’, or alternatively, cultural

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300 To wit, her contributions are examined in relation to the Inter-American system’s extensive Indigenous rights jurisprudence by Laura Clérico and Martín Aldao, “La igualdad como redistribución y como reconocimiento: derechos de los pueblos indígenas y Corte Interamericana de Derechos Humanos” [Equality as redistribution and as recognition: rights of indigenous peoples and the IACtHR] (2011) 9(1) Estudios Constitucionales 157 [Clérico & Aldao, “Equality as Redistribution and Recognition”].
301 I.M. Young, “Polity and Difference”, supra note 164 at 261; Young, “Unequal”, supra note 35 at 187.
302 I.M. Young, ibid.
303 Ibid at 268.
304 Ibid.
305 Ibid.
306 Ibid.
(or other types of) assimilation, as a requirement of their full social participation.  

Young acknowledges that the notion of special treatment raises concerns, such as fear about acceding to traditional identifications of group difference with deviance, stigma and inequality. However, for Young, engaging critically with difference is part of the terrain of political struggle, which she insists must be undertaken rather than leaving difference to be used to justify exclusion and subordination.

To eliminate the problematic binary of exclusion or assimilation, she insists that the inclusion sometimes requires special rights or differentiated treatment, in order to undermine oppression and disadvantage. This understanding of course goes directly to the required second and third elements of imposing positive, proactive obligations on the state to facilitate such transformation and redress for those groups that experience “lived patterns of exclusion and need”.

Finally, Young combines this understanding of the requisite state measures to address assimilation and exclusion with her insistence on a parallel attentiveness to the distributive harms that frequently coincide with collectivities that are ‘othered’ and subordinated in terms of social status - or misrecognized, to use Nancy Fraser’s terminology. This is an essential antidote to liberal equality’s failure to address class or ‘economic status’ and the reality of patterned disparate impact in the combined realms of social and economic marginalization. Returning to the chapter’s second purpose, the analysis also represents a direct challenge to liberal, and even post-liberal, tendencies in judicial thinking in liberal political economies.

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307 Ibid at 272.
308 Ibid at 273.
309 Ibid at 273.
310 Ibid at 251.
311 Young, “Unequal”, supra note 35 at 193: the substantive equality frame is sensitive to this reality.
312 In reference to a prohibited ground that appears in inter-American and other international human rights law provisions concerning equality and non-discrimination.
3.2.4.3 The requisite contextualized methodology

It follows that a richly detailed contextual analysis is essential to centering these inequality realities and harms that are often subaltern and significantly removed from the dominant norms and experiences of rights adjudicators. Context is the antidote to the usual abstraction of social realities or ‘real life’ from legal formalism and the liberal rights form, which struggles to bring substance and material content to equality rights. In its lineage as a feminist methodology, the contextual approach is viewed as critical for equality rights to be an avenue for redress of serious gendered and other pervasive forms of inequality.

The requisite contextualized analysis attends to how law interacts with the socio-economic environment and is “deeply contextual”. As such, the examination considers both the general context and the specific context of claims: the general, in terms of the history of oppression experienced by the group or groups to which the claimant belongs, as well as the social, economic and legal inequalities currently faced by the group(s). As Martha Nussbaum notes, the close scrutiny of the history and broader context “is more important for the powerless” and essential to challenging the favoured existing interests. Thus, the substantive rights claim is properly assessed within the specific context, including the historic dimensions, and the contemporary cultural, economic and social realities of the complainant, and as noted,

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313 See Young, “Sleeping Rough” supra note 32, discussing the need for ‘subaltern stories’ to “thicken” judicial assessment of harms suffered, in the instant contexts of cases involving homelessness and drug addiction: Adams BCSC, supra note 32 and PHS Insite, supra note 32.
314 Ibid.
315 Lessard, “Mothers”, supra note 147 at 168.
316 Majury, “Equality and Discrimination”, supra note 33 at 416, citing Kathleen Lahey, “...until women themselves have told all that they have to tell…”, Osgoode Hall Law Journal 23 (1985) 519, 529.
317 Ibid at 416. Majury (at 420) views context as “of primary methodological and substantive importance in the assessment of the equality guarantee.”
318 Young, “Unequal”, supra note 35 at 196.
319 Ibid.
where a member of several subordinated groups, considering the full contextual detail in that light.\(^{322}\)

### 3.2.5 Elements Two and Three: Overcoming Dichotomies

Based on the equality theory outlined above, the state must take broad affirmative or ‘positive’ steps to address systemic group-based inequality harms. This include those arising in the ‘private realm’ and from the socioeconomic status of individuals in terms of material inequality - or poverty and extreme poverty, to use the more common terminology in the IAHRS.

Substantive equality directly challenges the restrictive conception of state obligations as negative, along with the paramountcy accorded to, or the privileging of, a government’s stated interests, which can and often do trump rights recognition. In this sense the requisite approach is clearly pro homine, or pro-human or pro-person, to reference an interpretive principle of the IAHRS.\(^{323}\) The pseudo-neutrality\(^{324}\) of the liberal state is challenged, in insisting that law take account of existing differences in power and resources to achieve substantive equality of outcome, through the application of ‘special treatment’ measures. The state must go beyond restraint and same treatment, and instead confront the dominant norms, structures, institutions and social relations that are presented as natural and as private, but which produce the inequality harms and problematics presented above. The core premise is thus to act on the recognition that “‘different and variable” and proactive treatment is often required by equality’.\(^{325}\)

The state is accorded the primary role in this enterprise because the inequality between groups and sub-groups (or embedded grounds) is of such order that it requires government action as

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\(^{322}\) Ibid at 196.

\(^{323}\) See Chapter 4, Sections 4.4 and 4.5.


\(^{325}\) Young, “Unequal”, supra note 35 at 197.
there is no other actor that can accomplish this. The latter insight also recognizes the state’s role in reinforcing inter-group domination and subordination through action and inaction.

Clearly, an expanded state responsibility doctrine directly challenges various constructs such as the classical liberal ‘state action doctrine’ and related dichotomies. This is because the ‘private’ social and economic spheres of the family, social relations, and the marketplace are key sites of structural inequality and cannot be viewed as outside the boundaries of the equality inquiry or the purview of state obligations. Also challenged are traditional conceptions of rights obligations and enforcement as being negative in nature, and as restraining the state or enjoining state interference, as well as the conception of CPR as negative in nature and justiciable, and thus enforceable, whereas ESCR/SER are positive and unenforceable.

The critique of these dichotomies in critical equality scholarship - beyond their ideological dimensions has been extensive. Essentially, the notion of the positive/negative rights dichotomy is understood to be fundamentally (“logically and historically”) flawed, since all rights have negative and positive elements. A more helpful taxonomy is one that recognizes the state obligations of conduct or performance and result, or the obligations to “respect, protect and fulfill” or “to respect” and “to ensure”, in the IAHRS formulation. These taxonomies present a more nuanced perspective that encourages the exercise of finding the relations between “apparently separable” concepts, and the breaking down of lines that are more artificial than real. They allow for a much broader range of state obligations (and liability), that

328 The ideological dimensions were reviewed in the section on the theoretical foundations of formal equality and legal formalism.
332 See Chapter 4.4 (Foundational Elements).
333 Feria-Tinta’s observation, supra note 47 at 432: “Justiciability is no longer a matter of perfectly dissecting and distinguishing the inseparable but of finding the key relations between apparently separate notions.”
are preventive and proactive or promotional in nature, including in situations of ‘state inaction’ or non-performance.

Under international human rights law, which is drawn on by some equality theorists in Canada, equality has incorporated a rejection of these binaries; equality has evolved into a substantive conception that furthers the project of a positive rights orientation, including, indivisibility and the enforcement of ESCR/SER.

Further, the fundamental principle of equality in the international sphere has come to be framed as a “structural principle”\(^{334}\) that represents an immediate and cross-cutting obligation, such that human rights are to be fully exercised and enjoyed by all, in fact and not just \textit{de jure}. International sources such as the ICESCR General Comment 20\(^{335}\) view equality as essential to the enjoyment of ESCR/SER, and positive state action is necessary to achieve the end not just of \textit{de jure} inequality, but \textit{de facto} inequality and discrimination.\(^{336}\) The evolution of non-discrimination and equality under several international human rights instruments\(^{337}\) has also seen greater emphasis on the effects of impugned action on individuals or groups, in addition to considering the purpose, of state action (and inaction); indirect or adverse effects discrimination is thus contemplated. Moreover, differential treatment and special measures are not viewed as an exception to the principle of non-discrimination and equality but as integral to it and essential for its advancement.\(^{338}\)

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\(^{334}\) Clifford, \textit{supra} note 48 at 9.

\(^{335}\) UN Committee on Economic, Social and Cultural Rights (CESCR), \textit{General Comment No. 20: Non-discrimination in economic, social and cultural rights} (Art. 2, para 2, of the \textit{International Covenant on Economic, Social and Cultural Rights}), 2 July 2009, E/C.12/GC/20, online: <refworld.org/docid/4a60961f2.html> (last accessed 16 April 2019) [\textit{ICESCR General Comment No. 20}].

\(^{336}\) Ibid.


\(^{338}\) General Comment 18, UNHRC: cite UN Human Rights Committee (HRC), \textit{CCPR General Comment No. 18: Non-discrimination}, 10 November 1989, online: <refworld.org/docid/453883fa8.html> (last accessed April 16, 2019).
The distinction this project makes between elements two and three, that is, between indivisibility and the enforcement of ESCR/SER, and positive obligations, is the following. Positive measures and action by states are essential not just as a mechanism for adjudicating and enforcing ESCR/SER claims aimed at the redistribution of resources or wealth, whether through the direct provision of services or goods or through other mechanisms for accessing the means of subsistence. In the latter respect, the lack of access to or deprivation of (entitlements to) fundamental needs, including material needs, and the entitlement to distributional consequences, form the basis of ESCR/SER claims, as a central premise of substantive equality,\textsuperscript{339} and requiring state pro-action. In concert with this, positive action is also essential to redressing structural inequality that arises from the denial of CPR to all, including the remedying of such wrongs as historical injustices\textsuperscript{340} and social discrimination, and establishing diversity or proportional group representation, as well as applying special measures where systemic disadvantage has affected certain groups.\textsuperscript{341} This orientation is critical if advances are to be made in addressing their structured exclusion and marginalization. The framing of positive obligations is thus overarching, and includes the indivisible enforcement of rights, meaning ESCR/SER as well as CPR, along with interventions that entail broader participation and transformative dimensions in order to adequately address inequality harms.

\textsuperscript{339} Young, “Unequal”, supra note 35 at 188-9, also framed in terms of social justice, as conceived of in the article.\textsuperscript{340} Or “historic misdeeds”, as the IAHRS frames them, further invoking the notion of “reparative justice” in the system’s jurisprudence concerning Indigenous peoples: see Moiwana Community (Suriname) (2005) (Merits) Inter-Am Ct HR (Ser C) No. 124 [Moiwana], concurring opinion of Judge Cançado Trindade at para 11.\textsuperscript{341} Thomas Antkowiak and Alejandra Gonza, The American Convention on Human Rights: Essential Rights (Oxford: Oxford University Press, 2017), at 33.
3.3 S. 15 Jurisprudence: Openings, Ambivalence, Dim Prospects for Substantive Equality

3.3.1 Overview of Equality Shortfalls

I turn now to examining s. 15 jurisprudence in light of the theory of substantive and formal equality. My choice of s. 15 cases for presentation was guided by the critical s. 15 scholarship and equality theory; I relied on the scholarship’s identification of particular decisions that are paradigmatic illustrations of the deficits in the Court’s analysis in terms of the elements identified as essential to substantive equality. I also considered the tendencies I observed in the Inter-American system’s jurisprudence that shed light on important features of the critique of Canadian jurisprudence.

The overall position is that neither the Court’s analytical or methodological approaches, nor its theoretical or normative commitments - in terms of the purpose(s) and remedial scope of s. 15 - are consistent with the essential elements of a substantive equality vision.

The first and fundamental problem is the SCC’s failure to employ an adequately contextualized analysis, which, as noted, is critical to recognizing substantive inequality and discrimination harms. Instead, the tendency has been to apply as its proclaimed “substantive contextual approach”, a highly restricted set of factors considered “relevant” to the inquiry. To varying degrees, and although not without exceptions, its analysis has served to decontextualize and abstract the relevant particularities and complexity from the context of specific claims. At the same time, in its efforts to avoid a “rigid” approach to its chosen comparative and contextual analysis, the SCC has failed to clearly establish the non-negotiable elements, such as the requirement that the claimant group or groups have

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342 Heavy reliance was placed on the edited collection of Faraday, Denike & Stephenson, supra note 21, and the scholarship of various academics, such as Gwen Brodsky, Judy Fudge, Martha Jackman, Jennifer Koshan, Hester Lessard, Diana Majury, Bruce Porter, Dianne Pothier, Colleen Sheppard, Bruce Ryder, and Margot Young.

343 Withler, supra note 26 at para 43.

344 Ibid at para 66: “At the end of the day, all factors that are relevant to the analysis should be considered.”

345 Ibid at para 45, citing Andrews, supra note 18.
experienced substantive inequality, or to use the SCC’s terminology, historical or pre-existing “disadvantage”. In other words, the Court has not come down firmly on the side of applying an asymmetrical formulation of the equality protection that recognizes and remedies certain substantive inequality harms.

In other general terms, the Court’s contextual approach has been thin in depth and scope, its focus largely trained on the ‘context’ of the particular legislation, rather than the detailed, lived experiences of the claimant’s history and current circumstances and those of the group or groups with which they are associated. Moreover, the Court’s framing of the broader social context has frequently ignored or obscured entrenched inequalities that entail differentials and hierarchies of socio-economic power and relations and patterns of exclusion and need. As a result of its analytical choices, the Court is often challenged to recognize situations of disparate impact and adverse effects discrimination, a substantive form of inequality that necessarily requires an enlarged contextual frame.

The paper further contends that the Court’s failure to employ an adequate contextual approach is a function of its concern, articulated and explored below, to limit the ambit of the s. 15 protection: that is, to restrict what equality or inequality wrongs or harms are recognized and protected and for which groups or beneficiaries. The Court’s ultimately quite narrow, even formalist conception of s. 15’s purposes, determine the elements and details it considers relevant to the contextual inquiry. These two factors are thus iterative and mutually reinforcing.

Moreover, the reality of an ambivalent and even contradictory conception of s. 15’s purposes both reflects and reinforces the Court’s tendency to operate against substantivism and contextualism and towards reinscribing formalism. The contest over s. 15’s purposes is what continues to produce the chronic features of confusion, continual reinvention, and the divergent perspectives reflected in the jurisprudence and within the Court.

The project pays particular attention to the considerable deficiencies in the Court’s contextual analysis because of its central role in determining the SCC’s equality vision. Further, these
failings are interconnected with the other equality rights shortfalls, in terms of state obligations and redress, that is, the second and third elements of positive state duties and enforceable ESCR/SER. The tendencies towards formalism in the Court’s theoretical understanding of equality and inequality, as reflected in the contextual analysis, both reinforce and are reinforced by the SCC’s general failure to: (i) adopt an affirmative positive orientation towards the state’s obligation to remedy or mitigate the applicable inequality harms and, (ii) approach the rights categories as indivisible and make ESCR/SER justiciable and enforceable. The immediate reason for this is because the serious ‘real life’ inequality harms are not generally captured within the Court’s thin contextual and purposive framework.

Further to Chapter 3’s second objective, there are deeper ideological reasons for these shortfalls and incoherence in the Court’s rights analysis, based on its hard-wired legal liberalism and formalism and Canada’s liberal political rationality. The project relies on an existing, rich analysis of these ideological reasons in the literature to illustrate the sources of this disjunction between what the Court espouses and what the Court actually realizes.

3.3.2 The SCC’s Contextual Analysis: Examining the Jurisprudence

3.3.2.1 Ambit of protection: undershooting s. 15’s purpose

This section attempts to synthesize the equality purposes and inequality harms that the Court has placed at the heart of the s. 15 protection. Doing so is not simple, possibly a reflection of the fact that in undertaking a ‘purposive approach’, the Court has been concerned to neither overshoot nor undershoot the purpose. Justice McIntyre registered this concern in *Andrews*, as did Justice Wilson in *R v. Turpin (Turpin)*, and the preoccupation evidently subsists.

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346 The ‘real life/law’ dichotomy is discussed in Lessard, “Mothers”, *supra* note 147 at 201.
347 McIntyre, “Answering the Siren Call”, *supra* note 149, explores the Court’s ambivalence in this regard.
348 *Andrews*, *supra* note 18, *per* McIntyre J., at 169, citing *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at p.134, which held that this was the essential approach to protect the interest that the right or freedom is intended to protect, in order for the Charter provisions to have their full effect.
Former Chief Justice McLachlin’s awareness of the tension around “finding a principled basis upon which to ground the legal meaning of substantive equality”350 is evident in her remarks off the bench about articulating a conception that is neither “too narrow” nor “too broad”. 351 Her much cited article on equality states that since “absolute substantive equality” is not attainable, the exercise is one of “drawing limits to substantive equality”.352 Observing that “rectifying the situation of disadvantaged groups” is the central goal, she frames the more difficult question as “whether, and if so, to what extent, [the ambit of the equality guarantee] should apply outside its traditional discrimination-oriented focus”.353 The attention to imposing limits on s. 15 is thus clear, and the contention over what are the appropriate limits, is evident throughout the jurisprudence, as the review below will demonstrate.354

The early decisions, particularly of Justice Wilson in Andrews and Turpin,355 suggested the potential for a more expansive set of commitments. Turpin was viewed by various scholars356 as reinforcing and even deepening the more progressive and substantive elements of Andrews, including a stronger and clearer expression of the Court’s commitment to the place of group-based disadvantage in s. 15 analysis (i.e. as a required element),357 and by including among the purposes the “remedying or preventing discrimination against groups suffering social, political and legal disadvantage.358

The difference between that more concretized purpose is properly contrasted to the relative abstraction of Justice McIntyre’s two formulations in Andrews, first of, “equality in the

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349 She concluded that to recognize the appellants’ claims would “overshoot the actual purpose of the right or freedom in question”: Turpin, supra note 31 at p. 1333.
350 Fudge “Substantive Equality”, supra note 120 at 238.
351 Ibid, citing McLachlin, supra note 2 at 19.
352 Ibid at 239.
353 Ibid, citing McLachlin, supra note 2 at 24.
354 In the view of Judy Fudge, the drawing of lines was inevitable: Ibid at 238.
357 Ibid.
358 Turpin, supra note 31 at p. 1333 [emphasis added].
formation and application of the law”, 359 which simply begs the question, and further, what one scholar called the “pious abstractions” of, promoting a society “in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.” 361

Along with appearing to affirm the asymmetrical focus and protection of certain groups or subordinate groups within grounds (and not others), Justice Wilson’s addition of the object of remedying disadvantage – and her inclusion of the modifier “social” as a form of disadvantage - arguably added a positive dimension to the state’s obligations. The suggestion is that the state’s obligations might be more proactive and preventive in attending to a broader range of harms experienced by those that are systemically disadvantaged. She also elaborated on the indicia of discrimination as including (non-exhaustively), in addition to membership in a “discrete and insular minority”, “stereotyping, historical disadvantage or vulnerability to political and social prejudice”. 362

Justice Wilson’s addition of a potential requirement of disadvantage (on the claimant group’s part) that pre-exists or exists apart from the impugned legal distinction, 363 was thus viewed as significant. It suggested that pre-existing (social and other) disadvantage might be an absolute requirement, and thus a central, if not the, focus of s. 15. 364 The latter was the position that had been urged on the Court by the Legal Education and Action Fund (LEAF), the organization created to defend equality rights under the Charter, in its factum in Andrews, 365 and some speculated that the Court had accepted this position. LEAF had argued for an interpretation

359 Andrews, supra note 18, per McIntyre J., at 171.
360 McIntyre, “Answering the Siren Call”, supra note 149 at 103.
361 Andrews, supra note 18 at p. 171 (per McIntyre J., for the majority on the s. 15 issue). This aim was confirmed in the restatement in Kapp, supra note 142 at para 15, citing Andrews.
362 None of these indicia arose in the facts of the case and Justice Wilson concluded that to recognize the appellants’ claims would “overshoot the actual purpose of the right or freedom in question”, but she also clarified that the decision did not mean that a person’s province of residence or place of trial could not in some circumstances be a personal characteristic of an individual or group capable of constituting a ground of discrimination: Turpin, supra note 31 at p. 1333.
364 Ibid at 146.
365 Cited in Young, “Unequal”, supra note 35 at 183.
that favoured the promotion of the equality of certain groups, namely, those who have been “historically disadvantaged”, and referencing as examples, women and people of colour, rather than the members of a dominant group.\textsuperscript{366} This of course would be a pivotal line to draw, as it represents a clear asymmetrical understanding of equality (and of difference) and rejects the largely neutrally drawn prohibited grounds\textsuperscript{367} and a false, inevitably regressive conception of universality.\textsuperscript{368}

The \textit{Andrews} decision also prescribed the “enumerated and analogous grounds” test to guide the Court’s determination of what interests the equality guarantees protect. Justice McIntyre reasoned that the grounds listed reflected “the most common and probably the most socially destructive and historically practiced bases of discrimination”,\textsuperscript{369} and further, that the list was not closed, and thus potential additions must be ‘analogous’ to the enumerated grounds.\textsuperscript{370} The interpretation as to which potential new grounds would be analogous was considered to speak to s. 15’s purposes and what the equality analysis requires.

The scholarship thus framed the analogous grounds inquiry as an ‘analytic trend or tool’\textsuperscript{371} to assist in determining whether the interest advanced is of the kind that s. 15 is designed to protect,\textsuperscript{372} and functioning as the Court in \textit{R. v. Swain}\textsuperscript{373} described it, to ensure that the claim

\textsuperscript{366} Cited in Colleen Sheppard, “Recognition of the Disadvantaging of Women: The Promise of \textit{Andrews v. Law Society v. British Columbia}” (1989) 35 McGill L.J. 207, at 227-8, Factum of the Women’s Legal Education and Action Fund (LEAF), submitted to the Supreme Court of Canada in \textit{Andrews}, September 22, 1987 at 14, para 33, emphasis added: “Some of the terms in section 15 indicate clearly the type of disadvantage which is meant to be addressed by the equality guarantees: e.g., mental and physical disability. Others are all encompassing on their face: e.g., race, sex. These latter grounds appear to place on the same footing the equality claims of those who have been historically disadvantaged (like women and people of colour) and those who, traditionally, have been members of the dominant group (men, whites). In assessing claims to substantive equality brought under section 15, it is submitted that a Court should bear in mind that the purpose of the section is to promote the equality of those who have been disadvantaged. While not categorically ruling out the equality claims of members of a dominant group, a purposive approach would lead a Court to interpret section 15 in such a way that these claims would be viewed with caution.”

\textsuperscript{367} With the exception in s. 15’s enumerated list of disability. See Diana Majury’s reflections on this concern with \textit{Charter} rights as symmetrical and universal, particularly, s. 15: “Equivocation”, \textit{supra} note 53 at 310.

\textsuperscript{368} Further to the insights of Iris Marion Young, “Polity and Differences”, \textit{supra} note 164.

\textsuperscript{369} \textit{Andrews}, \textit{supra} note 18, \textit{per} McIntyre J., at p. 175.

\textsuperscript{370} \textit{Ibid} at pp. 179-180.

\textsuperscript{371} Eisen, \textit{supra} note 260 at 6.

\textsuperscript{372} \textit{Turpin}, \textit{supra} note 31 at p. 1333.

\textsuperscript{373} [1991] 1 SCR 933 [\textit{R. v. Swain}].
fits within the “overall purpose [of remedying or preventing discrimination] against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society”. For this reason, the enumerated or analogous grounds test is critical to the purpose/ambit question. I explore the evolution of the Court’s analogousness test below.

Following these apparent openings in the early decisions, contestation within the Court over s. 15’s purpose(s) quickly emerged. Indeed, contention around the topic became perennial, with emphasis on the meaning of the terminology of ‘disadvantage’ and the companion indicia of stereotyping and prejudice.

As the consensus in Andrews/Turpin broke down, culminating in the famous 1995 trilogy where the Court split three ways over the proper s. 15 inquiry, the Court’s unanimous decision in Law v. Canada (Minister of Employment & Immigration (Law) produced another analytical approach. The Law test was reframed around whether the impugned legal distinction (based on an enumerated or analogous ground), “created a disadvantage by perpetuating prejudice or stereotyping”. In an effort to unify the Court, the judgment inscribed human dignity as the value or normative tool to assist in deciding which differential treatments violate equality (since not all did), based on whether there was an impairment of the claimant’s dignity. I address the notion of dignity as utilized by the SCC in more detail below, as a device that both confused and tended to abstract and decontextualize the Court’s analysis (and was eventually jettisoned). However, for present purposes, dignity was framed in contradictory terms; in restrictive formal terms, as addressing the liberal aim of the “realization of personal autonomy”, and also in potentially more substantive terms, as addressing the “marginalization of social groups”. The Law Court continued to reference the indicia of the harms of disadvantage, prejudice and

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374 Ibid at p. 941.
376 Miron, supra note 17; Egan, supra note 17; and Thibaudeau, supra note 17.
377 Law, supra note 2.
378 Withler, supra note 26 at para 30, citing Kapp, supra note 142 at para 17.
379 Law, supra note 2.
380 Ibid at para 53.
381 Ibid; and Lessard, “Mothers”, supra note 147 at 174.
stereotyping. It also advanced four contextual factors as part of a flexible ‘guideline’ to assist with the dignity impairment assessment, also examined further below.

After the Law consensus broke down, the Court’s decision in Withler v. Canada (Attorney General) (Withler)\(^\text{382}\) purported to return to the murky Andrews formulation;\(^\text{383}\) it turned out yet another restatement of the proper test, one that confirmed its earlier eschewal of dignity in R. v. Kapp (Kapp),\(^\text{384}\) and reinstituted the assessment of whether the impugned legal distinction based on an enumerated or analogous ground “create[s] a disadvantage by perpetuating prejudice or stereotyping”.\(^\text{385}\) The equality wrong with stereotyping for the Withler Court, is that the disadvantage imposed by the law is based on a false (i.e. untrue) stereotype “that does not correspond to the actual circumstances and characteristics of the claimant or claimant group”.\(^\text{386}\) The idea is that such ‘false attributions’ of traits (false stereotypes) should be avoided.\(^\text{387}\) This formulation has been critiqued, along with the notion of prejudice,\(^\text{388}\) as failing to capture the harms of inequality and as unreliable concepts to advance a substantive equality analysis. One problem is that determining the truth of stereotypes is highly contestable. This is because the most stereotyped and marginalized individuals are those who appear to be the most ‘genuinely different’ from the dominant norms, which makes it likely that the stereotypes will not be viewed by judges as false.\(^\text{389}\) Despite these concerns, however, in the most recent s. 15 cases,\(^\text{390}\) the indicia of stereotyping and prejudice as a measure of whether s. 15 is engaged, continue to be emphasized.\(^\text{391}\)

\(^{382}\) Withler, supra note 26.
\(^{383}\) Ibid at para 29.
\(^{384}\) Supra note 142.
\(^{385}\) Withler, supra note 26 at para 30, citing Kapp, ibid at para 17.
\(^{386}\) Ibid at para 36.
\(^{387}\) Young, “Unequal”, supra note 35 at 206.
\(^{388}\) See for example, Young, ibid at 204-208; Moreau, “Wrongs of Unequal Treatment”, supra note 375; Brodsky, “Thesis”, supra note 92.
\(^{389}\) Young, ibid at 206-208.
\(^{391}\) See tests in APP, supra note 153, and CSQ, supra note 136. This was the determining factor of the failed equality challenge in Ermineskin, supra note 26 at paras 193 and 201-2, for example.
The Court in *Withler* also corrected the apparent omission in *Kapp* that seemed to confine the inequality wrongs or harms to perpetuating prejudice or stereotyping, confirming that the “reinforcement, perpetuation or exacerbation of disadvantage is also a form of discrimination”. It defined the perpetuation of prejudice or disadvantage as occurring “typically” when the law treats a historically disadvantaged group “in a way that exacerbates the situation of the group”. The Court thus reaffirmed attention to “disadvantage”. Significantly, however, it also allowed for the possibility that a discriminatory impact may arise even if the group has not experienced historical or preexisting disadvantage. This allows for successful claims by comparatively privileged individuals, as in the Court’s decision in *Trociuk v. British Columbia (Attorney General)* (*Trociuk*) (and *Andrews* itself). *Trociuk* was a s. 15 claim brought by a father who successfully challenged the provisions of the British Columbia *Vital Statistics Act* that gave mothers ultimate authority over the surname of their children, thus deciding whether fathers are named on birth registrations. The issue as to whether a claimant needed to show pre-existing disadvantage, which had been a matter of contention since *Turpin*, was thus finally settled in *Withler*.

More generally, the SCC has been imprecise in articulating the meaning of disadvantage itself, in some cases adding the modifier of “arbitrary”, as in *Quebec v. A*, and then omitting to so qualify it in subsequent cases. Another example of inconsistency is the inclusion of “historical” to modify “disadvantage. This is evident as recently as the 2018 pay equity decisions of the majority in *Centrale des syndicats du Québec v. Quebec (Attorney General)* (*CSQ*), while omitting the modifier in the companion case in *Quebec (Attorney General) v. Alliance du*
personnel professionnel et technique de la santé et des services sociaux (APP).\textsuperscript{402} The import of this difference is unclear in terms of whether it narrows, clarifies, or was simply an oversight.\textsuperscript{403}

Even more fundamentally, various scholars have observed that the SCC’s notion of disadvantage does not fully capture the core equality (and substantive inequality) problematic, in terms of “the harm, the animus, and its systemic nature”.\textsuperscript{404} Related concerns include the connotation of passivity, and the critique that disadvantage is a dominant group framing that obscures the experiences of those who experience oppression.\textsuperscript{405} It is also justly criticized for concealing racism\textsuperscript{406} and for the cultural norms embedded within it.\textsuperscript{407}

What the foregoing examples demonstrate is the ongoing imprecision and contestation over the purposes and content of the proper s. 15 analysis, into the fourth decade since enactment. The Court has also passed over opportunities to provide much needed clarification.\textsuperscript{408}

3.3.2.2 Limited embrace of contextualism

The Court’s s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider all context relevant to the claim at hand. The central and sustained thrust of the Court’s s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a

\textsuperscript{402} APP, supra note 153 at para 25.
\textsuperscript{404} Majury, “Women’s (In)Equality”, supra note 22 at 113.
\textsuperscript{405} Ibid.
\textsuperscript{406} Ibid at 111, citing Patricia Monture, “Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah” (1986) 2 CJWL 161, who rejects the term ‘disadvantaged’ for oppressed groups.
\textsuperscript{408} In the face of this continued uncertainty and evident need for a further, “Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination under Section 15 of the Charter” (2015) 19:2 Review of Constitutional Studies 191 [Hamilton & Koshan, “Adverse Effects Discrimination”] at 3, argue that for the sake of a clearer articulation of the scope of the equality rights protection, it is unfortunate that the Court has declined to consider s. 15 claims, in favour of deciding on the basis of other alleged violations, as in Carter v. Canada (Attorney General), 2015 SCC 5 [Carter SCC]. Hamilton & Koshan contend that the B.C. trial court’s judgment in Carter, 2012 BCSC 886 [Carter BCSC] contained a “thorough analysis” of whether the prohibition against assisted suicide has a disproportionate adverse effect on persons with disabilities, which appeared to offer an opportunity to consolidate the analytical approach. However, the Court declined to address the case on that basis, deciding it instead under section 7: Carter SCC, ibid at para 3.
formalistic "treat likes alike" approach. This is evident from Andrews, through Law, to Kapp. When the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation.\(^{409}\)

This section examines the Court’s approach to context and contextual analysis, as stated in its discourse, and in practice.

I first consider the Court’s asserted commitment to a “substantive contextual inquiry”, and then assess the forms this has taken in practice. The section also more closely examines various tests the Court has applied to carry out its s. 15 analysis. I reflect on the critical commentary regarding the implications of these devices for its contextual approach, specifically considering:

(i) the application of the “grounds approach”, including, the determination of analogous grounds and the emphasis on the idea of immutability; (ii) its understanding of grounds, including the stance towards intersectionality and multidimensionality; (iii) the role of comparison and the application of comparative formula; (iv) the non-integrated approach to multiple rights claims; and (v) the much criticized Law test of contextual factors and dignity.

I rely heavily on critical scholarship that considers how these devices have often operated to decontextualize and abstract the substance that lies at the root of s. 15 claims.

3.3.2.3 SCC’s commitment to a “substantive contextual inquiry”

The SCC committed to a contextual analysis in the first s. 15 decisions and has maintained that its s. 15 contextual inquiry is substantive. However, the jurisprudence is, once again, punctuated by sharp disagreement as to what this type of analysis entails, to say nothing about the significant critical commentary. My review of Andrews\(^{410}\) and Turpin\(^{411}\) and later, Law\(^{412}\)

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\(^{409}\) Withler, supra note 26 at para 43 [emphasis added].
\(^{410}\) Andrews, supra note 18.
\(^{411}\) Turpin, supra note 31.
\(^{412}\) Law, supra note 2.
Withler, and the recent pay equity decisions in APP and CSQ shows that while divisions over the content of a “substantive contextual inquiry” have persisted, the Court’s clear tendency is to apply thinner, more formal approaches that are inadequate in their depth and scope.

The Andrews Court instituted the contextual methodology further to Justice McIntyre’s rejection of the “formulic similarly situated test associated with doctrinal versions of formal equality and the more fundamental notion that equality always entails identical treatment”. In doing so, and deciding that equality may also require differential treatment, and further, in framing the analysis as one of determining whether impugned differential treatment is discriminatory, the Court emphasized the importance of examining the larger context. Justice McIntyre found that the “main consideration” in this contextual assessment is the law’s effects on the affected individual or group. He also held that equality is a comparative concept – a contested notion addressed below – that requires a contextual consideration of “the condition of others in the political and social setting in which the question arises”. Justice Wilson affirmed that approach in Andrews, and did so in somewhat stronger terms in Turpin. She set the s. 15 inquiry as follows:

“In determining whether there is discrimination on grounds relating to personal characteristics in the individual or group, it is important to look not only at the impugned legislation (which has created a distinction that violates the right to equality) but also to the larger social, political and legal context.”

413 Withler, supra note 26.
414 APP, supra note 153 and CSQ, supra note 136.
415 Lessard, "Mothers", supra note 147 at 172.
416 Andrews, supra note 18 at p. 165.
417 Turpin, supra note 31 at p. 1332; Andrews supra note 18 at p. 164.
418 Andrews, supra note 18 at p. 165.
419 Ibid at p. 164.
420 Ibid, per Wilson J.
421 Turpin, supra note 31 at p. 1332 [emphasis added].
She further warned that were the larger context not examined, “the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation.”

Justice Wilson also framed the assessment of whether non-enumerated grounds are analogous, as contextual, which was viewed as a potential opening for a positively oriented and substantive conception of equality. Once again, however, these openings were developed in a more restrictive manner, both in relation to the general inquiry as to discriminatory impact and the inquiry concerning the addition of analogous grounds.

Turning to specific analytical devices employed in the Court’s s. 15 framework, my inquiry is guided by the concern with formalism: with its abstraction of social realities (substance) from legal rights (form) and its ‘law/real life’ dichotomy that maintains “the distinction between inequalities produced by law and those produced by nature or reality”. The analysis that follows considers how these devices originate in this foundational dichotomy that “encapsulates the contradiction... between formal, equally distributed legal rights and lived, social, and material inequalities”.

3.3.2.4 Device One: Enumerated and analogous grounds inquiry

One of the “murky” elements of the Andrews framework singled out for extensive criticism is the enumerated and analogous grounds test. The scholarship tracks how this device has kept the door open to formalism and decontextualization of the equality analysis. Recall its centrality because it established the parameters of the s. 15 inquiry in terms of determining which harms or interests and beneficiaries are protected.

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422 Ibid.
423 Andrews, supra note 18, per Wilson J., at p. 152 [emphasis added].
424 See e.g. Porter, “Twenty Years”, supra note 137.
425 Lessard, “Mothers”, supra note 147 at 201, citing, Bakan, supra note 35 at 45-62.
426 Ibid.
427 Young, “Unequal”, supra note 35 at 186.
Justice McIntyre prescribed the approach that the enumerated grounds could be expanded to include grounds analogous to those listed.\footnote{Andrews, supra note 18 at p. 175.} The determination of new grounds was thus originally framed as open-ended.\footnote{Moon, supra note 27 at 577.} However, the Court quickly came to narrow this by focusing exclusively on grounds over social groups, and interpreting the important features of enumerated grounds so as to limit the analogous grounds that would be added. The Court’s restrictive approach established a high threshold for new grounds, or ‘disadvantaged group status’, as Richard Moon frames it,\footnote{ibid at 575.} and the main criticism is its role in ensuring that s. 15 serves limited rather than redistributive or transformative ends.\footnote{Ibid at 575.}

The instant issue before the Andrews Court was to determine whether citizenship (as a requirement of entry into the practice of law) is an analogous ground, an assessment it framed loosely around ‘disadvantage’ and whether the claimant group was a “discrete and insular minority.”\footnote{Eisen, supra note 260 at 28.} The Court determined, with minimal analysis, that it was, as, relative to citizens, non-citizens were a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated.\footnote{Andrews, supra, note 18, per Wilson J., at p. 152.} Justice La Forest’s concurring judgment referenced the trait of immutability as part of the analogousness assessment,\footnote{Ibid, per La Forest J., at p. 330.} which proved to be an enduring feature of the test.

The Andrews grounds framework was otherwise quite undeveloped, as with other elements of the decision.\footnote{Eisen, supra note 260 at 5; Young, “Unequal”, supra note 35 at 186.} However, again, the analogousness assessment originally appeared to frame the protection offered through analogous status, as asymmetric - focused as it was on ‘the disadvantaged’ – so as to preclude claims of the relatively advantaged.\footnote{Eisen, ibid at 6-7.} Justice Wilson’s majority judgment also framed the analogousness assessment as a contextual inquiry; one that should take place not only in the context of the challenged law, but the group’s place in “the
entire social, political and legal fabric of our society". Over the course of the jurisprudence, the analogous grounds test has worked to restrict the range of the groups or social conditions that s. 15 addresses, a trend that was strongly contested within the Court itself.

Justice L’Heureux-Dubé mounted the primary challenge, first, in the 1995 trilogy of decisions; she sustained her preferred approach in subsequent cases. Her position in *Egan v. Canada* (*Egan*) was that the equality analysis should be refocused from a singular focus on grounds to the nature of the group affected and the significance of the affected interest. This approach was based on her concern with the substantive implications of the Court's emphasis on grounds. She framed her concern with the grounds approach as going to a difference with the Court over s. 15’s purpose, as well as the Court’s greater interest in discriminatory potential than the impact on the claimants. She was critical of how the approach conflated distinctions in legislative treatment on the basis of grounds, with a substantive conception of the harms of inequality and discrimination.

Justice L’Heureux-Dubé advocated for a more substantive contextual approach that evaluated the discriminatory impact of the impugned treatment in relation to whether the group members are “socially vulnerable to stereotyping, social prejudice and/or marginalization”.

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438 *Egan*, *supra* note 17; *Miron*, *supra* note 17; and *Thibaudeau*, *supra* note 17.
439 For example: *Corbiere v. Canada* (*Minister of Indian and Northern Affairs*), [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*]; *Gosselin*, *supra* note 67; *Dunmore*, *supra* note 180.
440 *Egan*, *supra* note 17.
441 *Ibid*, *per* L’Heureux-Dubé, J., at p. 541. She properly attributed the divergent outcomes being generated by the SCC to a difference, at a foundational level, over the right’s purpose.
442 *Ibid* at para 38.
443 *Ibid* at paras 47, 52.
444 *Ibid* at para 59, [emphasis added]. In calling for more focus on the specific effects of a distinction on particular groups, she also pressed for greater attention to the affected group and their nature. The analysis should incorporate the idea that the “more socially vulnerable” will experience adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group not similarly socially vulnerable (at para 58). A distinction that may be discriminatory in impact on one group may not be on another. She observed that “it is merely admitting reality to acknowledge that members of advantaged groups are generally less sensitive to, and less likely to experience, discrimination than members of disadvantaged, socially vulnerable, or marginalized groups” (at para 58). This approach was supported by various scholars, including: Margot Young, “Change at the Margins: *Eldridge v. British Columbia* (A.G.) and *Vriend v. Alberta* (1998) 10 Canadian Journal of Women & Law 244 [Young, “Change at the Margins”] at 251, describing the approach as one of abandoning the approach and
In her view, the Court needed to recognize that “[t]reating historically vulnerable, disadvantaged or marginalized groups in the same manner as groups which do not generally suffer from such vulnerability may not accommodate, or even contemplate, those differences.”\footnote{Egan, supra note 17, per L’Heureux-Dubé, J., at p. 555.} Attention should instead be given to the type of (social) group, as certain vulnerable groups will experience adverse effects more acutely. She also wanted to refocus the inquiry on the nature of the affected interest, as a way to determine whether an impugned distinction is discriminatory. Notably, she included within this range of interests an evaluation of both non-economic and economic elements.\footnote{Ibid, although she viewed the Charter as only protecting “economic rights” when such protection is necessarily incidental to protection of the worth and dignity of the human person (i.e. necessary to the protection of a “human right”, at p. 556.} Under this approach, the more fundamental the interest affected or the more serious the consequences of the distinction, the more likely it would have a discriminatory impact.\footnote{Ibid.} The differences in her discourse are of course noteworthy in terms of challenging formal universality, highlighting adverse effects, and promoting a less comparative and more affected interest and inequality-harms based analysis.

The subsequent majority judgment in Corbiere v. Canada (Minister of Indian and Northern Affairs) (Corbiere),\footnote{Supra note 439.} a case that successfully challenged the constitutionality of an Indian Act provision that exempted non-resident band members from voting in band elections,\footnote{The provision at issue was s.77(1) as it applied to the Batchewana Indian Band: Corbiere, ibid at para 3.} established a more restrictive approach to the analogous grounds test. The majority reaffirmed its place within the s. 15 analysis and took a strong stance against Justice L’Heureux-Dubé’s proposed approach, finding that the analogousness inquiry is not contextual.\footnote{Ibid at para 8.} This contradicted the Court’s earlier position\footnote{Turpin, supra note 31.} and instituted an abstract inquiry that works to heavily screen claims for s. 15 protection.\footnote{McLachlin C.J. referred to the approach as “screening” out trivial equality claims: Ibid at para 11.} It makes the equality analysis less about the social
relations and exclusion from power, and thus overlooks the centrality of the context of systemic disadvantage framed as subordination and oppression.

Immutability or constructive immutability of personal characteristics were also taken to be key to the assessment of analogousness;\(^\text{453}\) the majority’s approach focused on the costs associated with changing a characteristic (in addition to the impossibility thereof) and there was no express consideration of disadvantage. As such, the focus remains on the ground and not on a vulnerable social group defined by that ground or the affected interest.\(^\text{454}\)

In this sense, Justice L’Heureux-Dubé’s separate reasons and contextualized analysis in the ultimately successful claim in Corbiere were more in keeping with the requisite layered examination of context for a marginalized claimant group that experiences multiple dimensions of structural inequality harms, including in respect of intra-ground or ‘embedded subordinated groups’, such as the Indigenous female off-reserve residents that were at the centre of her analysis.\(^\text{455}\) In exploring off-reserve residence status, including in terms of its mutability, Justice L’Heureux-Dubé examined the colonial *Indian Act* architecture that has deprived many Indigenous women of “Indian” status, exploring the implications for social precarity, lack of economic opportunity, and other consequences that had a bearing on their ‘choice’ of whether to live on or off-reserve.\(^\text{456}\) She took the position that while immutability could lead to the recognition of an analogous ground, it is also central to the analysis that those defined by the characteristic “are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked.”\(^\text{457}\) The majority however dismissed her form of contextual inquiry of analogousness, in unequivocal terms.\(^\text{458}\)

\(^{453}\) Whereas, Justice L’Heureux-Dubé once again preferred a group-based approach to the analysis: *Ibid*.

\(^{454}\) Eisen, *supra* note 260 at 25.

\(^{455}\) *Corbiere, supra* note 439, *per* L’Heureux-Dubé, J.

\(^{456}\) *Ibid* at paras 72, 83, 84, speaking of separation from other members of the band and reserve as being potentially “undesired or unchosen”.

\(^{457}\) *Ibid* at para 60, citing *Andrew*

\(^{458}\) *Corbiere, supra* note 439 at para 8.
While Justice L'Heureux-Dubé’s approach did not prevail (and it had its scholarly detractors), it garnered support from several judges and other scholars. Certainly, it seems that this more fully contextualized and harms-based approach aligns more closely with a substantive contextual inquiry and inequality ends, since, as Jessica Eisen notes, immutability or constructive immutability do not bear fully on the broader gamut of substantive inequality harms.

3.3.2.5 Device Two: Categorical approaches to grounds

Further to the critique of the Court’s failure to complicate its analysis of analogous grounds - and the maladies of comparative formula, addressed next – its approach to grounds has been critiqued as formalist in other respects as well. The primary critique concerns the tendency to apply a ‘grid-like and categorical approach’ that diminishes the complexity and multidimensional character of inequality experiences. Critics observe that the Court quickly came to view grounds as “rigid constructs of personal identity” – in line with Nancy Fraser’s work - rather than “constituted by [coercive] social structures”. Several decisions suggested that the Court might begin to apply a more nuanced approach, as in Law, and in Corbiere, where the majority pointed to the need for a more analytically flexible approach, suggesting that ‘embedded (analogous) grounds’ might be helpfully added to address “intra-group discrimination.”

However, this orientation has not been developed. Thus, the Court’s s. 15 analysis has largely failed to incorporate an examination intersectionality or multidimensionality, by probing

460 Justices and Gonthier and Iacobucci joined with her in her concurring, separate reasons.
462 Eisen, supra note 260 at 8.
463 Lessard, “Mothers”, supra note 147 at 191.
465 Law, supra note 2.
466 Corbiere, supra note 439.
467 The majority stated that “embedded analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination: Ibid at para 15.
intersections with other grounds or statuses like particular occupational groups (such as migrant workers), or with poverty or economic status, the latter operating either as a justifiable analogous ground or as a marker for same. The Court’s approach to grounds - and comparison, addressed next – is thus one that largely eschews the reality of “a complex set of historically evolving social and material relations”,\(^{468}\) in favour of “a binary relationship between abstracted, essentialized individuals or social groups”.\(^{469}\)

3.3.2.6 Device Three: Role of comparison and comparative formula

Comparison and comparative formula have also featured strongly in the Court’s inadequate contextualized inquiry. The scholarship highlights various concerns with its role and relationship to equality, including; whether equality is properly viewed at all or exclusively in comparative terms; the formula developed to operationalize comparison; and the latter’s reinforcement of the system’s abstract and formalist equality leanings.

The Court has since Andrews steadfastly maintained that equality is inherently comparative.\(^{470}\) This was reaffirmed in Law,\(^{471}\) credited for furthering its formulaic comparator group analysis, which was resoundingly criticized for moving the s. 15 analysis away from substantive (in)equality grounded in contextualized thinking.\(^{472}\) Comparison was again affirmed in Withler,\(^{473}\) where the approach of the “mirror comparative group analysis”, but not comparison altogether, was laid to rest.\(^{474}\)

Various scholars argue that comparison, at least as employed by the Court, reinforces the tendency towards formal over substantive equality ends.\(^{475}\) Whether this is inherent to the nature of comparison, or the determining factor lies in how comparison is deployed, is viewed

\(^{468}\) Lessard, “Mothers”, supra note 147 at 191.
\(^{469}\) Ibid.
\(^{470}\) Andrews, supra note 18, per McIntyre, J., at p. 164, citing “western thought”.
\(^{471}\) Law, supra note 2 at para 56.
\(^{472}\) Sampson, supra note 163 at 248.
\(^{473}\) Withler, supra note 26.
\(^{474}\) Ibid at paras 40, 51, 60-61.
\(^{475}\) Fiona Sampson, supra note 163 at 251.
differently by scholars. Some situate its derivations firmly in formalist elements of law. Others view comparison as potentially serving formalist equality or substantive equality ends. What is common to the scholarship is its vigorous critique of the way the Court’s comparative formula – including the comparator group analysis – have reinforced the tendency to apply ‘sameness/difference’ formulations that strip contextual details from the Court’s purview, including through the categorical nature of comparator group analysis.

This section also considers whether equality is definitionally comparative. In assessing the implications of such an understanding, the paper references scholarship that positions equality claims as not entirely or even generally comparative, or best apprehended through comparative means. In response to this important discussion, the project affirms the view that, at a minimum, ‘comparative information should not be conclusive’ and as many perspectives as possible should be canvassed, and further, that the most significant substantive inequality harms are best framed in non-comparative terms or in terms of anti-subordination and power.

476 See for example Beverly Baines, “Equality, Comparison, Discrimination and Status”, in Faraday, Denike & Stephenson, supra note 21 at 73-98 [Baines, “Equality, Comparison”]. Baines considers whether the activity of comparison is inherently formalist and serves formalist ends. Building on a theoretical work concerning comparison and its different structural features and normative orientations, Baines’ thesis is that the SCC has employed an approach to comparison that inherently serves a more formalist than substantive conception of equality. Baines proposes a comparative analysis focused on the status of anti-subordination, where equality is defined in terms of power: Faraday, Denike & Stephenson, supra note 21 (Introduction) at 18.

477 Wright, supra note 93 at 427, observes that the that the notion of comparison is pervasive in equality thinking and ‘long entrenched in equality discourse’ and scholarship.

478 Young, “Blissed Out”, supra note 135 at 63, pointing out the risks of an analysis that is “definitionally comparative”, as illustrated in Bliss itself: supra note 133.

479 See e.g. Wright, supra note 93, who has questioned the basis of and rationale for comparison and for comparative methodology and formulae in equality analysis.

480 Wright, supra note 93 at 427.

481 Ibid. See also Faraday, Denike & Stephenson, supra note 21 (Introduction) at 18, referencing Beverley Baines’ approach.

482 This critical view is supported by among others, analytic philosopher Sophia Moreau, “Wrongs of Unequal Treatment”, supra note 375, whom the Court cites in Withler concerning comparison, supra note 26 at para 65, but whose arguments to this effect do not appear to have been incorporated into its analysis. Wright, supra note 93, is also cited (at para 65), but, arguably, her view that comparison should not have conclusory status in the Court’s equality analysis is not clearly incorporated.
The main concern with viewing equality as definitionally comparative, is that the right would then address only clearly relative claims as opposed to absolute (or more absolute) claims. This is a proposition that few authors have critically assessed, as equality’s comparative nature appears to be generally accepted, but there are exceptions. Dianne Pothier observes that if this is the singular approach to equality, then it follows that absolute universal or bad treatment will not be caught and only detrimental treatment that is differentially distributed may give rise to an equality claim. Such an approach reflects a significant narrowing of the potential ambit of protection.

The central concern with framing equality as inherently comparative is thus that comparison tends to centre attention on features of similarity and sameness and difference, and thereby detracts from considering inequality. As previously established, an equality-based inquiry displaces the essential inequality-based starting point of the analysis and obscures the substantive inequality harms. As Sampson underscores, in contrast to equality analyses, inequality analyses “do not demand the same referential or comparative examination” and this is because ‘the manifestations of inequality, such as marginalization, oppression, and disempowerment, “are readily apparent.”’ Sampson argues that rather than asking if the rights claimant has experienced differential treatment, the requisite substantive (in)equality inquiry is to consider whether the claimant group was subject to oppression, devaluation, marginalization, or colonization.

Other equality scholars also suggest that rather than viewing equality as comparative, it should be seen as relational and concerning power. Attention is instead given to power relations

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483 Young, “Blissed Out”, supra note 135 at 63.
486 Ibid at 136.
487 Sampson, supra note 163 at 251.
488 Ibid.
489 Ibid at 254.
as the source of discriminatory conduct and the impugned law or (in)action is thus more clearly linked to the relations of domination that perpetuate and rationalize the systemic inequality of oppressed groups. The editors of the collection *Making Equality Rights Real* similarly advocate for a stance that asks not whether an individual has experienced differential treatment, but starts the inquiry from the standpoint of “whether claimants have been subjected to forms of marginalization, oppression, disadvantage, or devaluation”. The intent is to shift the analysis so as to ground equality rights in “the reality of people’s lived experiences”.

Among the decontextualizing tendencies reinforced by comparison and comparative formula are essentialism and assimilation. Assimilation reinforces the dominant norms that are the source of the subject oppression, and in this way, critics argue that the Court’s comparative formula have often reinforced dominant norms, usually male, dominant ethnic or racial group, and able-bodied norms, which is especially problematic for those claimants who are more than one step removed and even various dimensions or layers from those dominant groups or norms. To state this another way, comparison is problematic when there is no obvious ‘other’ group with which to compare, and because comparison requires a base of similarity, those who are marginalized may not have this. First Nations claimants come to mind, for example, as well as other multiply discriminated against groups. In such cases, the Court’s contextual analysis, has been considerably restrictive and the claims have frequently failed.

As for essentialism, the Court’s comparator approach, in conjunction with its approach to grounds, has compartmentalized the analysis such that intra-group or intra-ground differences

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491 To this, Beverley Baines adds, the dismantling of unjust status hierarchies: “Equality, Comparison”, *supra* note 476 at 92.
492 Majury, “Equivocation”, *supra* note 53 at 310.
494 *Ibid* at 25.
496 Jhappan, *supra* note 85 at 63.
498 Wright, *supra* note 93 at 430.
are ignored and “other sites of oppression [are] treated as irrelevant”.\(^{499}\) The case law has led some to conclude that the Court’s comparative framework is incapable of understanding much less addressing intersectional discrimination and the realities of those who are multiply marginalized.\(^{500}\)

The marked tendency towards excessive compartmentalizing or pigeonholing in the Court’s comparative approach means, according to some critics, that formal equality is inevitable. This is because it displaces proper consideration of the different needs (as in ‘real’ needs) and circumstances of subordinate groups.\(^{501}\) “the *sine qua non* of substantive equality”.\(^{502}\) Dianne Pothier observes that comparative formula distract from this recognition through having to choose a comparator, which truncates the equality analysis from the outset.\(^{503}\) Since the claimants who struggle to find comparators are quite unlike dominant groups, their claims fail at the start. Once again, the answer in Fiona Sampson’s view,\(^{504}\) is for the analysis to focus not on difference and whether the claimant has experienced differential treatment, but on the effects of the impugned treatment.

Finally, the scholarship contends that comparison inevitably limits the contextual details that are considered relevant to the claim, as these details are based on the components of the comparison used to formulate the claimant group and the benchmark comparator norm or group.\(^{505}\) Lessard notes how the more explicit the state-generated distinction,\(^{506}\) the less likely the legislative structuring of such groups is to be probed. According to this analysis, under an

\(^{499}\) Majury, “Equivocation”, *supra* note 53 at 306.


\(^{501}\) Pothier, “Equality as a Comparative Concept”, *supra* note 485 at 147.

\(^{502}\) Ibid.

\(^{503}\) Sampson, *supra* note 163 at 254.

\(^{504}\) Ibid.

\(^{505}\) Lessard, “Mothers”, *supra* note 147 at 185-6: “The components of the comparison also shape the claimant group and the benchmark or comparator group. Further, the more explicit the distinction, the more obvious the character of key groups, thereby reducing the chance of probing the legislative structuring of these groups.”

\(^{506}\) The concern with a focus on legislated group classifications is taken up by Beverley Baines, who invokes Owen Fiss’s critique of anti-discrimination analysis in her analysis of whether comparison serves formal or substantive equality ends. Fiss has argued that the equality analysis must be focused on social groups rather than such classifications: in Baines, “Equality, Comparison”, *supra* note 476 at 85, citing Owen Fiss, “Groups and the Equal Protection Clause” (1976) 5 Phil. & Pub. Affairs 107, at 85.
equality approach that focuses on comparison, the “dyadic” feature of the ‘dominant liberal rights form’ \(^{507}\) generally becomes “particularly rigid and inflexible”. \(^{508}\)

This effect was evident in *Auton (Guardian ad litem of) v. British Columbia (Attorney General) (Auton)*, \(^{509}\) where the approach of seeking comparators led to the Court to choose a complainant group of such specificity that there was no basis for an equality argument. The core equality claim advanced in respect of the complainant group of children with autism who were unable to access appropriate medical treatment, was thus cut off at an early stage of the analysis. \(^{510}\) Pothier complained that *Auton’s “brand of formalistic reasoning harkens back to Bliss”*; \(^{511}\) the comparator group reasoning in *Auton* was not just restrictive but circular as the Court effectively argued that there was no breach of s. 15(1) because the services in question were not provided. \(^{512}\) Its comparator group analysis stripped the relevant contextual detail, and thus the substantive inequality and discrimination that were at the heart of the s. 15 claim.

Ultimately, in channeling the focus away from inequality harms in the relevant context, the comparativist analysis restricts the redistributive impact of s. 15, as Judy Fudge notes. \(^{513}\) It does so by decontextualizing claims and deflecting attention away from the substantive inequality harms that need to be first acknowledged and then remedied. Fudge offers the further insight that the disputes in the jurisprudence about comparison (and the relevant pool for comparison) reveal deeper disagreements about the fundamental purpose(s) of equality.

\(^{507}\) Bakan, *supra* note 35 at 47: “The dominant ideological form of rights is composed of the basic tenets of liberal discourse: anti-statism and atomism.” ‘Atomism constructs social conflict in dyadic terms’.

\(^{508}\) Lessard, “Mothers”, *supra* note 147 at 185-6, noting of *Trociuk*, that in the equality context, and even more so when the composition of the social groups making up the equality binary, and their defining features, appear self-evident.

\(^{509}\) 2004 SCC 78, [2004] 3 SCR 657 [*Auton*].

\(^{510}\) Sampson, *supra* note 163 at 262.

\(^{511}\) Pothier, “Equality as a Comparative Concept”, *supra* note 485 at 148: “Although Bliss was expressly disavowed in *Andrews*, the Chief Justice’s analysis in *Auton* would seem able to resurrect it. A denial of health services for pregnancy could sidestep a section 15 sex equality argument on the basis of a lack of appropriate comparator — that there are no men receiving pregnancy services.”

\(^{512}\) Sampson, *supra* note 163, at 263.

\(^{513}\) Fudge, “Substantive Equality”, *supra* note 120 at 244.
namely, whether it requires merely equal treatment or whether it aspires to a greater ambition to achieve a more equal distribution\textsuperscript{514} and other transformative aims.

As for the current jurisprudential conjuncture, the Court’s approach to comparison was thrown somewhat into question following \textit{Withler}.\textsuperscript{515} Although the decision proscribed the use of a “mirror” comparator group analysis, the Court provided little additional direction as to how comparison should be applied.\textsuperscript{516} Moreover, the Court also affirmed once again that comparison is inherent,\textsuperscript{517} which suggests that some of the important critiques are unlikely to be addressed.\textsuperscript{518}

3.3.2.7 Device Four: Analysis of multiple rights claims

Connected to the concern regarding the Court’s tendency to compartmentalize and pigeonhole\textsuperscript{519} is its preferred approach to adjudicating multiple rights claims that include equality claims, and tendency to separate them analytically. According to Kerri Froc,\textsuperscript{520} the SCC has tended to treat the violations as conflicting, rather than reinforcing.\textsuperscript{521} This is evident, for example, in \textit{Carter v. Canada (Attorney General)} (\textit{Carter}),\textsuperscript{522} concerning whether the prohibition against assisted suicide has a disproportionate adverse effect on persons with disabilities; the Supreme Court declined to address the s. 15 argument and focused instead on other rights

\textsuperscript{514} \textit{Ibid.}
\textsuperscript{515} \textit{Withler, supra} note 26.
\textsuperscript{516} The Court held that the correct approach is to comparison is to engage in a “contextual discrimination analysis”: \textit{Ibid} at para 102, where the claim is assessed within the “full context of the case, including the law’s real impact on the claimants and members of the group to which they belong”: \textit{Ibid} at paras 2, 40.
\textsuperscript{517} \textit{Ibid} at paras 52, 62.
\textsuperscript{518} That the \textit{Withler} Court failed to incorporate the core of the critiques is evident in its review of s. 15 jurisprudence, in failing to overturn any of its previous decisions that applied the most extreme version of the mirror comparator group analysis. Two authors who question whether the Court took these critiques “to heart” are Jennifer Koshan & Jonnette Hamilton, “Meaningless Mantra”, \textit{supra} note 152 at 34.
\textsuperscript{519} The trademark of abstract liberal judging: Sheppard, “Equality, Ideology” at \textit{supra} note 6 at 206.
\textsuperscript{520} Gwen Brodsky also develops this view, arguing that s. 15 interpretations can be informed by s.7 rights: “This is a point to which judges should be recalled in future cases as the endeavor to give content to the concept of human dignity continues, as it must.” “Brodsky, “Autonomy with a Vengeance”, \textit{supra} note 179 at 13.
\textsuperscript{522} \textit{Supra} note 408.
violations, missing an opportunity to develop the s. 15 analytical frame. It also manifests in decisions where the Court’s s. 15 analysis was extremely abbreviated, in favor of other rights analyses, with similar thinning effects on the richness of the Court’s equality vision. This approach contributes to removing substance from the contextual frame and it detracts from the effort to explore and understand the complex circumstances of subordination and the complexity of “real people’s real experiences”.

Froc points to the unsuccessful efforts of certain judges to “deepen, complicate, detail, add layers to the analysis of the claimant’s position and the nature of the interest”. (An example, as noted, is Justice L’Heureux-Dubé’s concurring opinion in Corbiere.) In Froc’s view, the experiences of rights violations that arise in complex circumstances of subordination are best viewed as a singular experience – as a multiple rights claim - rather than separating them out. The effect is to further decontextualize, an observation she applies to the majority’s decision in Gosselin, where the section 7 analysis was conducted separately from s. 15. This approach, in her view, had the effect of depriving each right of the substantive content needed in order to really ‘see’ the claimant’s claim. The more compartmentalized approach is thus consistent with the stance towards comparison and grounds. Together, the orientations are consistent with legal formalism, with its strong features of abstraction, formulating tests, and its faith in the ‘rule-like certainty’ of the interpretive enterprise and judging.

3.3.2.8 Device Five: Law’s experiment with contextual factors and dignity

Picking up from the early commitment to a contextual approach to equality rights analysis, several subsequent decisions established frameworks that laid out the relevant contextual factors and potential scope of the ‘proper equality analysis’, each featuring slightly different

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523 Examples include BC Health Services, supra note 180 and Hutterian, supra note 390.
524 Egan, supra note 17, per L’Heureux-Dubé, J., at p. 552.
525 Corbiere, supra note 439.
526 Froc, “Watertight Compartments”, supra note 521 at 133. She also expresses the view that rights violations viewed together have a better chance of engendering judicial recognition of “more severe, complex and intractable oppressions suffered” (at 132).
527 Ibid.
formulations. Two cases are presented, first Law, and then the restatement in Withler, which ostensibly clarified the proper (substantive) contextual analysis.

Because the Law contextual factors are still at play, and given what its aborted dignity analysis says about the Court’s formalist leanings, I consider the much criticized Law test. Combining the four contextual factors and dignity, the framework illustrates the ambivalence and contradiction of s. 15’s protective ends, as well as the tendency to narrow its protective scope; and in the view of some scholars,\textsuperscript{528} the Law test operated to affirmatively strip rather than enhance the contextual analysis.

The Law decision purported to place contextual review at the centre of the s. 15 analysis, providing a guideline for the requisite inquiry, which was to consider whether human dignity is impaired or enhanced by the impugned distinction, tested in part by reference to four contextual factors, to be assessed in a flexible and non-mechanical manner.\textsuperscript{529} The factors were: (i) pre-existing disadvantage and vulnerability of the claimant group; (ii) correspondence (of treatment) with the actual characteristics (of the claimant group); (iii) (ameliorative) impact on other groups; and (iv) the nature of the interest affected. The Court also subsequently clarified that none of the factors was essential.\textsuperscript{530}

The central criticism of the Law contextual factors is that the listed factors pull in different directions, some towards more substantive ends, and others in the opposite direction.\textsuperscript{531} Lessard’s critique is that it preserved tensions between formal and substantive equality through methodological means, by the direction to apply them flexibly, and also normatively, by the use of broad and even vague language as to the aims. In her analysis, the failure to rationalize the incoherence among these aims, and to be clear (in the name of flexibility) about which factors

\textsuperscript{528} Lessard, “Mothers”, supra note 147, for example.
\textsuperscript{529} Law, supra note 2 at para 6.
\textsuperscript{530} See for example, the unanimous decision of Justice Deschamps in Trociuk, supra note 396, examined in Lessard’s analysis, “Mothers”, supra note 147.
\textsuperscript{531} Ibid at 174, observes that actors 1 and 4 are “more amenable to exposing the substantive particulars (or their lack) of the inequality harm experienced by the claimant”; whereas factors 2 and 3 are aimed at “saving” the impugned legislation from a finding that there is an equality rights violation.
were essential, worked to strip context rather than enhance it. Although Lessard’s analysis is specific to the application of *Law test*, and specific post-*Law* cases, like *Trocik*, and *Gosselin*, the critique is arguably extant because, in the project’s assessment, no adequate clarification or correction of these problems has issued. This duality remains unaddressed, despite the Court’s subsequent departure from aspects of the *Law* framework.

The Court’s effort to employ dignity in its equality framework, as noted, was later jettisoned in *Kapp* after much critique. Before situating the *Law* experiment with dignity within the jurisprudence, I thus clarify the rationale for addressing dignity. Dignity (as applied) demonstrates the abstract and ambivalent nature of s. 15’s protective ambit and the Court’s penchant for producing concepts that *could* be given substantive and material content, and are framed in judicial discourse as if they might do, but instead come to reflect the abstract, liberal, and individualized legal formulations with which the Court is more at home.

The Court’s embrace of harm to dignity as the normative core of s. 15 flowed from Justice Iacobucci’s effort to bring an end to divisions within the Court. Dignity’s role was to guide the Court’s determination that had so challenged it as to “which personal characteristics are illegitimate bases for legislative distinctions” and “what kind of deprivations or disadvantaging impacts constitute discrimination”. The need for a normative foundation to firmly anchor s. 15 thus arose from that original Andrews “muddle” over what distinguishes discriminatory

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533 *Ibid* at 185, arguing that the inquiry applied in *Trocik* served to abstract the relevant details of social hierarchies in the ‘private, family’ sphere from what the Court framed as the relevant context (at 185), by focusing on the legislative distinction, and removing “the dross of social and economic relations that underpin inequalities [in order] to pinpoint the legal mechanism of inequality”.
534 *Supra* note 67.
535 *Kapp, supra* note 142.
537 Réaume, “Discrimination and Dignity”, *supra* note 25 at 127: The Court had “fumbl[ed]” in this direction for over a decade and references to the concept appeared for example, in the 1995 trilogy, *supra* note 17.
538 *Ibid* at 129.
539 See P. Westen, “Empty Idea”, *supra* note 3 at 596: “Equality will cease to mystify - and cease to skew moral and political discourse - when people come to realize that it is an empty form having no substantive content of its own.”
from non-discriminatory distinctions.\footnote{Réaume, “Discrimination and Dignity”, supra note 25 at 127.} The dignity analysis was to provide the elusive substantive content,\footnote{Ibid at 130.} and in conjunction with the contextual factors, to forge a more unified approach to s. 15.

Law’s dignity ultimately failed, leading to more convolution, even fewer successful s. 15 claims, and many divided judgments.\footnote{Examples include Gosselin, supra note 67 and Nova Scotia (Attorney General) v. Walsh, [2002] 4 SCR 325.} It was also criticized for instituting an additional and unpredictable threshold for equality litigants to surmount, and most important, for reinforcing formalist analysis and outcomes and the decontextualization and thinning of the Court’s contextual analysis.\footnote{See for example, various articles in Faraday, Denike & Stephenson, supra note 21.}

Some scholars have argued that dignity is “a difficult fit with an analysis of human rights violations that demands the concrete assessment of context and disadvantage”.\footnote{Sampson, supra note 21 at 255.} Others argue that substantive content was conceptually possible through the theorization of “dignity constituting”\footnote{Réaume, “Discrimination and Dignity”, supra note 25 and “Dignity, Equality and Comparison”, in Deborah Hellman and Sophia Moreau, eds, Philosophical Foundations of Discrimination Law (Oxford Scholarship Online: April 2014) 10 [Réaume, “Dignity, Equality & Comparison”]. Christopher Essert reviews Réaume’s notion in light of the understanding that some lives may be “so wretched” as to be undignified - implying “the lesser worth of those excluded” and thus requiring certain resources for them to lead what is considered ‘an acceptable life’: “Global Ethics. Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15” (2006) 19 Can. J.L. & Juris. 407 [Essert, “Global Ethics”] at 414.} or “equality constituting” benefits.\footnote{Brodsky & Day, “Women’s Poverty”, supra note 53 at 329, referring to “equality constituting benefits”; and Brodsky & Day, “Denial of Means of Subsistence”, supra note 260.} Such notions contemplate the incorporation of material content, in the nature of ESCR/SER claims, like an adequate standard of living or the means of subsistence.

Arguably, the notion of dignity is not inherently formalist, as various theorists note.\footnote{Lessard, “Mothers”, supra note 147 at 207 and Réaume, ibid.} However, it is inherently empty and also abstract and malleable, in the same way that equality has no necessary content. Moreover, and consistent with this project’s emphasis on the requisite form of contextualized substantive inequality analysis, it is not inevitably interpreted so as to
reinforce more symbolic and individualist ends. That this is so, is evident in the divided decisions that marked the jurisprudence. As such, like equality itself, the content and application of dignity will serve the ends for which it (and s. 15) is formulated.

Indeed, Hester Lessard observes that dignity, as with the Law contextual factors, was initially and purposively framed in largely abstract and broad terms,\textsuperscript{548} ostensibly to preserve flexibility in the Court’s analysis. As such, the original description of dignity in Law reflected the tension between formal equality and substantive equality ends,\textsuperscript{549} and the dignity test also papered over the fundamental ideological tension in the Law framework.\textsuperscript{550} Dignity was framed, on the one hand, as addressing the liberal aim of the “realization of personal autonomy”.\textsuperscript{551} On the other hand, Justice Iacobucci presented it as addressing the “marginalization of social groups”.\textsuperscript{552} Lessard describes this “duality” as consistent with two kinds of equality harms, one substantive and the other not.\textsuperscript{553} The first addresses harms pertaining “only to individuals and their sense of dignity”, whereas the other is one in which the “individually experienced impairment of dignity is linked to the broader mistreatment in society of the social group to which the individual belongs.”\textsuperscript{554} The parallels to the equality spectrum and theory discussed earlier are clear.

The flexibility and abstraction in Law led to the criticism that dignity simply served the desired ends of the Court.\textsuperscript{555} Based on the scholarship, I conclude that the ‘lack of analytic and discursive clarity’ so common to the s. 15 jurisprudence, reflects the fact that doctrinal choices were not made, such as deciding whether historical disadvantage is a required element of equality claims. The value of flexibility (which is conceivably viewed as an antidote to rigid, formalist legal analysis) has operated, not infrequently, to confine the Court’s interpretations to

\textsuperscript{548}Ibid at 173.
\textsuperscript{549}Ibid at 174.
\textsuperscript{550}Ibid.
\textsuperscript{551}Law, supra note 2 at para 53.
\textsuperscript{552}Ibid; Lessard, “Mothers”, supra note 147 at 174.
\textsuperscript{553}Ibid at 175.
\textsuperscript{554}Ibid at 174-5.
\textsuperscript{555}The Introduction by the editors of Faraday, Denike and Stephenson, supra note 21, summarizes the glaring shortfalls of dignity.
what is most natural to a liberal court. The tendency was thus to frame dignity in an individualized manner, such that it stripped the structural and material features from the context and obscured the social relations and power dynamics at the heart of claims. Rather than locating equality harms and harm to dignity in claimant groups’ exclusion from access to needed significant benefits or protections or in the other systemic dimensions of the claim—

556 — for example, by developing an interpretation of certain benefits as “dignity constituting” or essential to a “life with dignity”—

557 — the Court focused on the personal nature of shame and injury caused by the instant impugned distinction.

558 The Law “reasonable rights holder” test also operated to reinforce these context stripping tendencies.

559 Created to appeal to ‘objective’ elements beyond the claimant’s subjective perspective,

560 in Law and subsequent cases, this perspective was “deployed to construct a rights holder who takes into account the benign purposes and operation of the offending law in relation to their individual sense of dignity.”

561 In this way, the factor of the operational impact of the statute “often function[ed] as a device to discount the systemic dimensions of the issue at hand.”

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The Court’s problematic approach to dignity was on display in the SER claim advanced in

556 Lessard, “Mothers”, supra note 147 at 192.


558 Or what Fraser calls the problem of cultural depreciation that functions as a ‘free-floating discourse or cultural harm’: “Rethinking Recognition”, supra note 42 at 110. This notion of identity injuries is critiqued by various authors, including I.M. Young, “Polity and Differences”, supra note 164, as well as Lessard, “Equality, Poverty”, supra note 166 at 2, as a notion focused on “identity injuries”, and also, drawing on Nancy Fraser’s analysis and the critique of universality as homogenizing, as well as uncoupled from a material or class basis and thus from material inequalities. Lessard contrasts this from the notion of “substantive universality”, which emphasizes recognition harms that are based in the historically and culturally based struggles for recognition and self-government of certain groups (at 6). See also Sampson, supra note 163 at 255.

559 Lessard, “Mothers”, supra note 147 at 192.

560 The Court made references to the broader context, such as “the larger context of the legislation in question, and society’s past and present treatment of the claimant and of the other persons or groups with similar characteristics or circs”: Law, supra note 2 at para 61.

561 Lessard, “Mothers”, supra note 147 at 175.

562 Ibid at 175. See also Gosselin, supra note 67 at paras 53-62.
Gosselin, where the majority found there were no “dignity-wounding” messages sent by the impugned legislation – which reduced the social assistance entitlements to well below the official poverty line - to the claimant group, on the basis of their age. One critique of the Court’s dignity analysis emphasizes how the reasonable rights holder test served to “depersonalize” the effects of the legislation on Louise Gosselin. The dignity harm was one of personal shame, at once individualistic and universal; it also discounted the systemic dimensions of the case. In this way, the concept reinforced the stripping of contextual details and led to a highly formal equality analysis in Gosselin (and other cases).

The unclear parameters and content of the concept not surprisingly led members of the bench to espouse different ends that dignity is capable of serving. The dissenting judges in Gosselin would have found that the impugned legislation offended the claimants’ dignity, rather than respecting and even affirming it. Justices Bastarache and L’Heureux-Dubé rejected the argument that the claimant group was treated with dignity because of government claims that the detrimental provisions were “for their own good”. Justice L’Heureux-Dubé took the position that Louise Gosselin would reasonably have felt an affront to dignity, that she was less valued, and treated as less deserving of respect.

Further, and in keeping with a more substantive conceptions of equality and dignity, Justice L’Heureux-Dubé argued that stereotyping (which the majority found to not be present in the legislation) is not a necessary condition for a finding of an infringement, an issue that continued to remain contentious. Most significantly, she reasoned that the severe impairment of an extremely important interest should be enough to ground a section15 claim; as such, she would

563 Ibid.
564 Ibid, “Mothers”, supra note 147 at 199.
565 Ibid at 199, contrasting this to the Court’s analysis in Trociuk, supra note 396, which did the opposite, in “personaliz[ing] the violative effect of a legislative “message” of disrespect” to the father in Trociuk.
566 Gosselin, supra note 67 at para 69.
567 Judith Keene, supra note 536 at 356-7.
568 Gosselin, supra note 67, per L’Heureux-Dube, J., at paras 130-33. See also Brodsky, “Autonomy with a Vengeance”, supra note 179 at 9, in response to the suggestion that poor young people reliant on social assistance are not a disadvantaged group and that their dignity is not profoundly injured when they are denied subsistence income.
569 Ibid at para 117.
have found access to the means of subsistence to constitute such an interest. Returning to her preferred approach from *Egan*, Justice L’Heureux-Dubé advanced the argument that (absolute) material deprivations can also give rise to harms to dignity, a position that ultimately failed to win the day but was also consistent with critical challenges from without the Court.

3.3.2.9 The Court’s current post-*Law* contextual inquiry

By way of summary, following *Law* and the corrections that ostensibly subsequently took place, neither the *Withler* restatement nor the 2018 successful equality claim in *APP* provide much additional clarity as to the required elements of the s. 15 contextual inquiry.

The Court in *Withler* attempted to address the confusion by elaborating on the application of its affirmed “substantive contextual approach”. In addressing the extensive critique of the Court’s approach to comparison, and specifically, its employment of the “mirror comparator group analysis”, the Court made multiple references to the centrality of contextualism in its s. 15 analysis. It described the contextual approach as its “central and sustained thrust”, having consistently emphasized “the need to consider contextual factors” and apply a “substantive and contextual” examination of equality issues. The *Withler* Court insisted that its s. 15 analysis had been “contextual, not formalistic”, whether the analysis was focused on the perpetuation

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570 Brodsky, “Autonomy with a Vengeance”, *supra* note 179 at 13 also argues that s. 15 interpretations can be informed by s.7 rights: “This is a point to which judges should be recalled in future cases as the endeavour to give content to the concept of human dignity continues, as it must.”
571 *Egan, supra* note 17.
572 *Gosselin, supra* note 67, per L’Heureux-Dube, J., at para 128.
573 Brodksy critiques the suggestion that all harms to dignity are attributable to the operation of mistaken or demeaning stereotypes, and argues that such harms could also arise as a result of material deprivations: “Autonomy with a Vengeance”, *supra* note 179 at 12-13.
574 *APP, supra* note 153.
575 *Withler, supra* note 26 at para 43.
576 *Ibid* at para 43, along with the “corresponding repudiation of a formalistic “treat likes alike” approach”.
577 *Ibid* at para 51. The Court references Chief Justice McLachlin’s judgment to this effect at paragraph 25, where she also invokes Justice McIntyre’s warning in *Andrews, supra* note 18 at p. 168-9 against narrow, formalistic analytical approaches and stressing the need to examine equality issues substantively and contextually, further to the purpose of s. 15(1), which is set as “prevent[ing] the perpetuation of pre-existing disadvantage through unequal treatment”.

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of disadvantage or stereotyping. The Court framed the required analysis this way: “to [look] at the circumstances of members of the group and the negative impact of the law on them”; it “is [...] grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

The restricted nature of the Court’s framing of a substantive contextualized inquiry is evident however when one examines its description of the factors to be addressed, which are confined to those that address the “nature of the legislation” and “the situation of the claimant”. The omissions are stark when compared to the relevant contextual elements previously outlined, such as the economic circumstances and the marginalized historical experiences of the claimant’s group(s).

The Court’s further insistence that its decisions in Law and Gosselin (for example) applied a substantive contextual inquiry is appropriately assessed in light of the narrow equality harms identified through those inquiries. In the instant claim, the Withler Court described the appropriate inquiry as a ‘contextual inquiry’ into “whether the impugned law perpetuated disadvantage or negative stereotyping”. This description of the narrow scope of the analysis demonstrates the correlation between the ascribed purpose of s. 15 – in terms of the recognized equality harms - and the parameters of its contextual analysis. It shows that the Court’s narrow conception of ‘substantive inequality harms’ is closely connected to its contextualized approach.

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578 The issue subsequently focused on whether the harms were confined to these two concerns.
579 Withler, supra note 26 at para 37.
580 Ibid at para 45.
581 Supra note 2.
582 Supra note 67.
583 Withler, supra note 26 at para 47.
Following Withler, confusion over the place of the Law contextual factors was to some degree clarified in the majority decision in APP, with its finding that the “step by step consideration” of the Law factors “is not necessary or desirable”. The Court also held, without providing further guidance, that the emphasis is on the “discriminatory impact of the distinction”. That said, the APP majority’s contextual analysis of the instant claim was relatively expansive in terms of its recognition of the core systemic inequality realities; pay inequity and the concentration of women, and particular groups of women, in the low-wage sector of the labour market. Whether this more substantive contextual framing is likely to be extended to other less known problematics remains to be seen. However, based on the jurisprudence to date, the critical determinant of the depth and nature of the Court’s contextual inquiry appears to be whether the state has already acted to address ‘private-sphere’ social inequality – as in the legislation at issue in the APP and CSQ cases. Where that is so, the contextual inquiry is more enlarged.

3.3.3 Illustrations of the SCC’s Thin Contextual Analysis

With minor exceptions, such as APP, the Court’s s. 15 contextual analyses fail to capture more complex renderings of structural inequality and systemic disadvantage. There is also a tendency to view the state’s legislative purpose as a primary focus of the contextual inquiry, as opposed to the claimant group’s inequality experiences.

This section illustrates these tendencies through a closer examination of specific cases, including SER claims advanced in Law, Withler, Gosselin, and Eaton v. Brant County Board of Education (Eaton). I also examine several decisions that demonstrate the Court’s struggle to recognize adverse effects or disparate impact discrimination, which as noted, is

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585 APP, supra note 153.
586 Ibid at para 28. This was in response to the dissent’s purported application of them.
587 Ibid.
588 Sampson, supra note 163 at 246-7.
589 Supra note 2.
590 Supra note 26.
591 Supra note 67.
itself a significant reflection of the Court’s more formalist contextual analysis. Few such cases have succeeded.

The scholarship is mindful of the minimal consideration given to the broader context in Andrews itself, in terms of, the details of the claimants’ circumstances and the group to which they belong; the concept of “discrete and insular minorities” as applied to non-citizens,\(^{593}\) and the impact of the impugned delay (in admission to the bar) on the claimants. The lack of evident and significant damage to the claimants’ interests, along with their relative privilege,\(^{594}\) has also been emphasized, going as it does to the expectation that s. 15 would attend to the most disadvantaged or marginalized groups in society.\(^{595}\) The claimants were not representative of more vulnerable and marginalized non-citizens or migrants, examples of which abound in Canadian society.

Certainly, the Court’s analysis of the injustices associated with the conception of a discrete and insular minority was minimal. Justice Wilson supplemented that notion with reference to the feature of its relative powerlessness.\(^{596}\) She also advanced the notion of the “vulnerability” of non-citizens as a group, noting that they lack “political power\(^{597}\) and “as such [are] vulnerable to having their interests overlooked and their rights to equal concern and respect violated”.\(^{598}\) She further noted the vulnerability of non-citizens “to becoming a disadvantaged group in our

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\(^{593}\) Justice McIntyre in Andrews, supra note 18 at p. 183 described non-citizens as a good example of a “discrete and insular minority [that] come within the protection of s. 15”.

\(^{594}\) Majury, “Equality and Discrimination”, supra note 33 at 425. Majury notes that the two complainants were similar to the group with which they compared themselves, both white, one an American citizen, and the other, British.

\(^{595}\) The concern about the number of s. 15 claims filed early on by men was addressed in the publication of Gwen Brodsky and Shelagh Day, “One Step Forward?”, supra note 35.

\(^{596}\) In his separate, concurring reasons, Justice La Forest echoes Justice Wilson’s concerns about the relative lack of political power of non-citizens: Andrews, supra note 18 at p. 195. He also references immutability in connection with analogous grounds.

\(^{597}\) She noted in particular, and as the “most obvious example”, their inability to vote in elections: Andrews, supra note 18 at p. 152.

\(^{598}\) She also described non-citizens as being among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending”: Ibid.
Recall that vulnerability is a concept that later appeared in the s. 15 construct, for example, under Law’s first contextual factor, although it has remained underdeveloped.

Law and Withler, too, show the Court giving minimal attention to the specifics the claimants’ social and economic circumstances, while attending closely to legislative purposes. The decisions in both cases concerned a claimant group largely composed of older widows, who, based on existing data, are more likely to experience income insecurity (and poverty even), particularly in their later years. Intervenors in Withler emphasized the barriers to this group’s full participation in society and their lack of economic security. The dissenting decision of Justice Rowles of the B.C. Court of Appeal had also emphasized the claimant group’s economic vulnerability and pre-existing disadvantage, but these concerns were effectively sidelined by the SCC in a judgment that contained no intersectionality analysis or reference to the fact that the claimants were largely female and older. Instead, in these cases and others concerning important benefits and SER decisions, the majority or unanimous decisions in other decisions such as Gosselin, and Auton demonstrate the extent to which the Court’s contextual analysis has devolved into a ‘contextual analysis’ of the legislation and its alleged or declared purpose.

Related to this orientation is the tendency of the SCC’s contextual inquiry to ignore the obvious economic dimensions of a claimant’s situation and that of the group or groups with which they are associated, either historically or at present. This includes consideration of their experience of poverty and the implications of certain impugned treatments in light of those dimensions of economic status and subordination. In addition to the SER decisions in Gosselin, and Law and Withler, other decisions display the pattern of giving minimal consideration to the de facto

599 Her reasons reference the danger of “the interests of the excluded” being overlooked: Ibid.
600 Lessard spoke to the lack of consideration of the circumstances of elderly women who experience marginalization in multiple dimensions in Withler and Law in her article, “Dollars”, supra note 77 at 330.
602 Moreover, the SCC critiqued Justice Rowles’ analysis as being insufficiently contextual: Withler, supra note 26 at para 81.
603 Supra note 67.
604 Auton, supra note 509.
605 See Faraday, Denike & Stephenson, supra note 21 at 21.
material elements of context or to economic status as an analogous ground or as it relates to economic rights.

Advocates for a rights-based approach to poverty and other indicia of marginalization have argued that there is a solid basis for considering poverty as both an analogous ground or as relevant material conditions intersecting with other enumerated or analogous grounds, further to disparate impact analysis.  

The issue of the relationship between ‘economic disadvantage’ and analogousness emerged in *Dunmore v. Ontario (Attorney General) (Dunmore)*, which advanced another potential analogous status, that of the vulnerable occupational group of agricultural workers. The claim concerned this group’s total exclusion from the government’s protective collective bargaining and labour relations regime. *Dunmore* also addressed the violation of s. 2(d) of the *Charter* (freedom of association), which it found was breached, in part, but the majority declined to engage in an equality analysis.

Writing on her own, Justice L’Heureux-Dubé observed that this group “generally suffered a disadvantage” and that the effect of the impugned distinction was to ‘devalue and marginalize them’, and further noted that the group members are “among the most economically exploited and politically neutralized individuals in or society”. She referenced the trial judge’s observations to similar effect. However, the majority gave minimal attention to this aspect of the claimant group’s realities.

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607 Supra note 180.
608 Ibid.
609 Ibid at para 2, finding that to the extent that the exclusion from a regime that protected the freedom to organize, and their exclusion was found to substantially interfere with their fundamental freedom to organize: Ibid at para 48. The majority declined to consider the ‘status of occupational groups’ under s. 15(1): Ibid at para 2. Justice L’Heureux-Dubé would have found that there is a positive duty to assist excluded groups when the claimants are in practice unable to exercise a Charter right: Ibid at para 158.
610 Ibid at para 168.
611 Ibid.
Justice L’Heureux-Dubé also reasserted her preferred group-based over grounds-based approach, and incorporated disadvantage into the instant assessment, finding that the claimant group’s occupational status as agricultural workers was an analogous ground, even under the immutability analysis, and despite the relative heterogeneity amongst the members of the group. In doing so, she compared the claimant group to the claimants in Corbiere, who, as mentioned, were found to fall within the analogous ground of ‘off-reserve residence’ despite the facial mutability of that status.

To reiterate an earlier point, Justice L’Heureux-Dubé had gone further in her separate judgment in Corbiere to consider the structural economic vulnerability of the embedded ground (i.e. within off-reserve residence) of Indigenous women within this mixed gender group, as a factor in determining their status and assessing the discriminatory impact. Three other judges joined in her relatively deeper contextual analysis in that case, but she was alone in her reasons in Dunmore.

However, in Ontario (Attorney General) v. Fraser (Fraser), the case that followed on the facts and remedy issued in Dunmore, Justice Deschamps took on the majority’s immutability approach. She challenged the restrictive approach to analogous grounds taken in Dunmore, arguing that given the economic inequality experienced by the claimant group, it would be more “faithful to the design of the Charter” to recognize more analogous grounds and thereby

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612 *Ibid* at paras 165-170.
613 Justice L’Heureux-Dubé observed that this group “generally suffered a disadvantage” and that the effect of the distinction was to ‘devalue and marginalize them’, and further that they are ‘among the most economically exploited and politically neutralized individuals in or society’, referencing the trial judge’s observations to that effect: *Ibid* at para 168.
614 *Corbiere, supra* note 439.
616 Justices Gonthier, Iacobucci and Binnie.
617 2011 SCC 20 [*Fraser*].
618 *Fraser, ibid* was a challenge to the legislation that the Ontario government enacted after the SCC found its previous legislative scheme that excluded farm workers from the *Labour Relations Act Court*, violated s. 2(d) in *Dunmore, supra* note 180: *Ibid* at para 1.
619 Which she inferred was at the heart of the claim: *Ibid, per* Deschamps J., at paras 315, 318.
“redress” the real issue in *Dunmore*,\(^\text{620}\) which she took to be related to their economic and social subordination – or their economic inequality, as she framed it.\(^\text{621}\) Justice Deschamps’ position represented a challenge to the “artifice”\(^\text{622}\) that was constructed by the majority in *Dunmore* in order to require state intervention (positive action) to ensure the claimant group’s effective exercise of the s.2(d) right. In other words, Justice Deschamps was supportive of Justice Major’s dissenting position in *Dunmore* on the s.2(d) question,\(^\text{623}\) and it should be said, would not have found that employment status was an analogous ground.\(^\text{624}\) That said, her *Fraser* analysis does throw the substantive equality shortfall in the SCC’s s. 15 analysis into sharp relief.

Dianne Pothier’s reflection on the Court’s stance in *Dunmore* points to how a non-equality – the section 2(d) claim - could be both relative (comparative) or absolute (non-comparative), whereas, an equality claim is ‘by definition’ – or more accurately, viewed as - a comparative claim.\(^\text{625}\) As such, under Pothier’s framing, the freedom of association claim succeeded because it could be framed in non-comparative terms, and the equality claim failed because it could not.\(^\text{626}\)

The Court’s decision in *Gosselin*\(^\text{627}\) is the starkest illustration of the scant attention paid to a claimant group’s socio-economic circumstances. The majority’s decision failed to complicate the alleged age discrimination with the intersecting dimensions of economic status (or poverty) or welfare status,\(^\text{628}\) opting instead to overlook the circumstances of the claimant group, and the representative claimant (Louise Gosselin) of the certified class action, in terms of their/her inability to meet basic needs,\(^\text{629}\) along with the consequential threats to other rights.\(^\text{630}\) This is

\(^{620}\) *Ibid.* Justice Deschamps, it should be said, would have found that employment status is not an analogous ground, whilst Chief Justice McLachlin thought the question was premature.

\(^{621}\) *Ibid* at para 319.

\(^{622}\) *Ibid* at para 318.

\(^{623}\) *Dunmore*, *supra* note 180, *per* Major J., at para 208.

\(^{624}\) *Fraser*, *supra* note 617, *per* Deschamps J., at para 315.

\(^{625}\) Pothier, “Equality as a Comparative Concept”, *supra* note 485 at 137

\(^{626}\) *Ibid*.

\(^{627}\) *Supra* note 67.

\(^{628}\) Lessard, “Mothers”, *supra* note 147 at 191.

\(^{629}\) *Gosselin*, *supra* note 67 *per* Arbour J., at paras 371-7, who found that there was no real possibility of the
despite the clear evidence of poverty and other forms of social marginalization and sexual and other forms of exploitation that posed a threat to various of both categories of rights. The majority’s analysis failed to consider the obvious intersectional elements of age, welfare status, disability, and gender, including the gendered dimensions of poverty. The judgment contains no account of the overall impact of the impugned legislation on Gosselin’s ability to effectively exercise any of her rights, including her right to physical integrity.

Instead, the majority’s assessment of Gosselin’s situation displays a (neo)liberal understanding of poverty, blaming her for her situation and attributing the issues she faced to “personal problems” and “personality traits,” rather than arising from systemic issues such as the documented high levels of structural unemployment among youth, and the gendered dimensions of the harms experienced. Thus, its individualized analysis of poverty is consistent – based as it is on classical liberalist premises - with Justice McIntyre’s formulation in Andrews of “blameworthy personal characteristics” that go to “merits and capacities” and are found to fall outside of a critical equality analysis. Indeed, Justice Bastarache, in dissent, questioned whether the Court was “really … undertaking a contextual analysis,” contrasting it with a “genuine” contextual approach. He also questioned the majority judgment’s direction in

applicants excluded from full benefits of the social assistance scheme of meeting their basic needs, per Arbour J. See Brodsky, “Autonomy”, supra note 179 at 13: “When it comes to an interest as fundamental as a person’s ability to meet basic needs, constitutional guarantees of equality should be understood to have an irreducible core that includes an obligation on governments to provide adequate social assistance to people in need. For an individual who is homeless or hungry, the fact that government has decided to turn a “blind eye” because of what it thinks of as long-term emancipatory objectives, is cold comfort.” [footnotes omitted]

631 There was no dispute that the reduced social assistance for individuals under 30 was well below, not just the official poverty line, “but its basic survival amount”: Gosselin, supra note 67, per Bastarache, J., at para 252.
632 Gwen Brodsky, “Autonomy”, supra note 179 at 14, observes: “The autonomy of poor women is profoundly threatened by a lack of access to adequate social assistance. Being forced to survive without the means to meet basic needs increases women’s vulnerability to violence, sexual exploitation, and coercion because it makes them more reliant on relationships with men and simultaneously diminishes their equality in those relationships.” [footnotes omitted]
633 Lessard, “Mothers”, supra note 147 at 191.
634 Gosselin, supra note 67 at para 8.
635 “Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.” Andrews, supra note 18, per McIntyre J., at pp. 174-5, emphasis added.
636 Gosselin, supra note 67, per Bastarache, J. at para 238.
637 Ibid at para 252.
precluding an analysis of the “vulnerability of the appellant’s group as welfare recipients” in the analysis.638

At the same time, the majority judgment failed to probe the obvious adverse stereotyping and stigmatization of welfare recipients and young people that the dissenting judges and commentators readily identified, based on their review of the legislation and broader context.639 Of further note in this regard, the stigmatization at issue went beyond identity injuries or harms (or the attribution of ‘false’ stereotypes) and encompassed a more complex combination of misrecognition harms and maldistributive injustice, as articulated by Nancy Fraser and Iris Marion Young.640

Other decisions illustrate the Court’s inadequate contextual analysis of the harms associated with the exclusion of particular groups from the social and political sphere, including the participation barriers and unmet needs that are more readily identified in positive or absolute rather than comparative terms. This line of cases concerns individuals from ‘different’ groups, such as persons with disabilities, or distinctive minorities, such as Indigenous claimants.

Turning to the former, the Court’s unanimous decisions in the unsuccessful SER claims in Eaton v. Brant County Board of Education (Eaton)641 and Auton,642 either downplay or ignore (respectively), the historical and contemporary trajectories of the highly vulnerable claimants and groups with which they are associated. Eaton concerned an application to find the exclusion of Emily Eaton from integrated education declared in violation of s. 15, seeking the remedy of mandating her inclusion in such services. Auton addressed the lack of appropriate medical treatment available for children with autism within the B.C. medical services scheme.

638 Ibid at para 238.
639 See e.g. Brodsky, “Autonomy with a Vengeance”, supra note 179 at 1, who describes the legislation as embodying the negative stereotype of young people as reliant on social assistance.
640 Nancy Fraser theorizes about how misrecognition can become institutionalized into patterns of cultural value that impede parity of participation, for example, constituting some persons as less than full members; she gives as an example, social welfare policies that stigmatize single mothers as sexually irresponsible scroungers and policing practices like racial profiling that associate racialized persons with criminality: “Why Overcoming Prejudice is not Enough: A Rejoinder to Richard Rorty” (2010) 1(1) Critical Horizons: Journal of Social and Critical Theory 21, at 24.
641 Eaton, supra note 592.
642 Auton, supra note 509.
Both cases contained intersectional elements, as the claimants were young and had disabilities. The decisions speak minimally to the claimants’ circumstances and experiences and the social ramifications of how society constructs disability and has responded to persons, and in this case, children, with disabilities.643

This general tendency of ignoring the significant contextual realities of unmet ‘different’ needs is also reflected in several s. 15 cases involving First Nations claimants, whether for claims of under-inclusion in terms of participation rights, or of benefits and economic resources in cases involving absolute need. This project contends that claims brought by First Nations claimants necessarily call for the deep contextual examination of the general panorama of historical and contemporary realities of marginalization and economic subordination of First Nations peoples (as a result of the dispossession of their lands and resources), and yet the following patterns are evident.

*Ermineskin Indian Band and Nation v. Canada (Ermineskin)*644 features an extremely thin examination of important features of the contexts of First Nations peoples and the appellant bands. The unanimous decision authored by Justice Major is almost completely acontextual. The claim challenged the Crown’s failure to invest the royalties from oil and gas reserves found under the surface of the bands’ reserves which had been surrendered to the Crown. The appellants argued that as “Indians”, they had been deprived by the *Indian Act* of the rights available to non-Indians whose property is held in trust by the Crown,645 through the Crown’s failure to invest the royalties in a diversified portfolio, depriving them of hundreds of millions of dollars since 1972.

Justice Major first underscored the importance of “addressing the broader context of a distinction in a substantive equality analysis”.646 He invoked *Turpin*647 to describe the inquiry as

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644 Supra note 26.
645 Ibid at para 185.
646 Ibid at para 194.
647 Turpin, supra note 31.
to whether there is discrimination, characterizing the approach as reliant on “context”, and establishing the requirement that the Court “[look] beyond simply the legislation in question”. 648

The Court turns to its contextual analysis, however, without providing any historical or deeper background related to First Nations, either generally, or specific to the Ermineskin and Sampson First Nations, and it determines that the relevant context is “aboriginal self-determination and autonomy”. 649 Both indicia have strong liberal connotations, and the absence of a reference to their opposites is striking. Beyond this, there is no elaboration of the clearly relevant instantiations of colonization and post-colonial policies that directly bear on the wealth and power – and the lack thereof – of the First Nations claimants. The decision does not analyze the treatment of or presumptions concerning First Nations in the colonial Indian Act framework. This enables the Court to find that there is no s. 15 infringement under the Andrews/Kapp test, 650 even if there is disadvantage owing to the lack of investment of their monies by the Crown. 651 The Court finds that any disadvantage is not discriminatory because it is not one that “perpetuates prejudice or stereotyping”, 652 returning to that narrow band of inequality harms. The constricted nature of its indicia of inequality or discrimination thus correlates with the Court’s failure to consider the highly relevant components of the context.

There are several exceptions to these tendencies towards thin contextual analysis, including the majority decision on the s. 15 violation authored by Justice Abella in Quebec v. A, 653 and, as previously noted, the majority decisions (also authored by her) in the pay equity cases of APP and CSQ. 654 These exceptions – the latter of which are also examples of successful s. 15 rights

648 Ermineskin, supra note 26 at para 193, citing Turpin, supra note 31 p. 1331.
649 Ibid at para 195. This framing of autonomy is noteworthy, given its liberal connotations. Moreover, the relevant context in Canada reflects the effective opposites of autonomy, in terms of deprivation of and dependence on wealth and power.
650 Ibid at para 202.
651 Ibid at para 192.
652 Ibid at para 192; see the Court’s determination of non-infringement at paras 201-2.
654 APP, supra note 153 and CSQ supra note 136.
claims\textsuperscript{655} - are addressed in more detail below in relation to the second and third elements. I also consider two further exceptions next, as examples of successful adverse effects claims: the cases of \textit{Eldridge} and \textit{Vriend}.

Further to the general thinness of the Court’s contextual approach, and I infer, as a direct result thereof, the Court has struggled to recognize disparate impact or adverse effects discrimination.\textsuperscript{656} This form of discrimination requires that conclusions be drawn connecting single cases to broader patterns. The Supreme Court had indicated in its early s. 15 decisions, that its analysis would be attuned to the adverse impact of legislative distinctions and formally equal treatment on particular, historically disadvantaged groups. The concern articulated went to the potential of the law’s application in ways that would bring about or reinforce the disadvantage of certain groups and individuals.\textsuperscript{657} In addition to requiring a deep contextualized inquiry, such claims require that inferences be made, along with reliance on data or sociological evidence, in order to draw conclusions about the existence of social patterns of disparate impact. These cases involve complex realities that may also be unfamiliar to the judiciary. The challenge of advancing such claims was in fact explicitly affirmed by the Court in \textit{Withler}, which described the task of advancing indirect discrimination as “more difficult”\textsuperscript{658} than other equality claims.

This is borne out by the Court’s jurisprudence, where very few adverse effects claims have succeeded and many more have failed.

The successful decisions include \textit{Eldridge}\textsuperscript{659} and \textit{Vriend v. Alberta (Vriend)}\textsuperscript{660}. In both cases, the Court was commended\textsuperscript{661} for its findings of adverse effects discrimination. For example, the

\textsuperscript{655} In the case of CSQ, \textit{ibid} at paras 54-5, the infringement was found at the rights determination phase under s. 15(1), but it was found to be justified under section 1 of the \textit{Charter}.
\textsuperscript{656} Jennifer Koshan and Jonnette Watson Hamilton argue in “Adverse Effects Discrimination”, \textit{supra} note 408, that the Court appears challenged to identify it when the arguments and evidence are advanced.
\textsuperscript{657} \textit{Andrews}, \textit{supra} note 18, \textit{per} Wilson J., at p. 152.
\textsuperscript{658} The Court framed this in terms of requiring the claimant to do “more work” at the first step of the s. 15(1) inquiry: \textit{supra} note 26 at para 64.
\textsuperscript{659} \textit{Eldridge}, \textit{supra} note 19.
\textsuperscript{660} \textit{Vriend}, \textit{supra} note at 19.
Court in *Eldridge* is credited with demonstrating “unusual flexibility”\(^{662}\) with respect to the connection between government action (or inaction) and a ground of discrimination,\(^{663}\) it recognized the “unconstitutional discriminatory impact of a provincial health scheme’s failure to provide sign language translation for hearing impaired individuals using insured health services”.\(^{664}\) The claim raised the issue of the inferior quality of medical services for the claimants as compared to that of hearing persons, based on the failure to attend to their specific needs. The claim was that this inferiority denied their right under s. 15(1) to the equal benefit of the law.\(^{665}\)

The Court’s analysis required a critical assessment of the facial neutrality of the provision of health services. Although the legislation drew no distinction between the hearing and hearing impaired populations as both groups were denied access to sign language interpreters, the Court found at the first stage of the s. 15(1) analysis, a distinction between the claimant group and other groups.\(^{666}\) The result required the Court consider how non-hearing persons experienced the quality of medical services. To this extent, the analysis of the claimants’ context required an “enlargement of mind” of the judiciary.\(^{667}\) The Court found that the system’s design had a disproportionately adverse impact on the hearing impaired, and, further, that the services needed to be delivered so as to permit communication around such services by all. The B.C. government was ordered to provide sign language interpretation as part of the insured medical services it already provides.\(^{668}\)

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\(^{661}\) See for example, Hamilton & Koshan, “Adverse Effects Discrimination”, *supra* note 408.

\(^{662}\) *Ibid* at 16.

\(^{663}\) Brodsky concludes that a neutral approach would not have led to this result: “Constitutional Equality Rights”, *supra* note 356 at 248.

\(^{664}\) Young, “Change at Margins”, *supra* note 444 at 246.

\(^{665}\) *Eldridge*, *supra* note 19 at para 41.

\(^{666}\) Young, “Change at Margins”, *supra* note 444 at 253.

\(^{667}\) Sugunasiri, *supra* note 233 at 168-9, discusses how the movement towards contextualism and the law was intended to address the understanding that judges come to adjudications with various predispositions. These need to be overcome rather than obscured, and this is done by judges achieving an “enlargement of mind”. See also Dianne Pothier’s “But It’s For Your Own Good”, *supra* note 23 at 42, attributing this concept to Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997), 42 McGill L.J. 92, at 107. Joel Bakan, *supra* note 35 at 33, also discusses the enlargement approach in more skeptical terms, in chapter 1 of *Just Words*. He critically references scholarship that urges judges to “free themselves” of law’s constraints and “reach beyond [their own viewpoints]” to “embrace alternative and oppositional perspectives in making their decisions”.

\(^{668}\) Young, “Change at Margins”, *supra* note 444 at 246.
To somewhat qualify this credit, the claimant group experience and the unidimensional difference at issue in this case is not one that is particularly challenging to recognize. Commentators also emphasized the minimal financial costs associated with the extension of services, as a consideration in the Court’s finding.\textsuperscript{669} The Court made this clear when it rejected the government’s concern that this result would open the way for challenges by those who experience barriers to communicating in one of the official languages when accessing medical services. Such an extension, the government argued (probably quite accurately) would be expensive. The Court dismissed this concern as a defence to the \textit{Eldridge} facts.\textsuperscript{670}

A year after \textit{Eldridge}, the Court decided its second successful adverse effects case, in \textit{Vriend}, a decision that challenged the Alberta government’s decision to exclude sexual orientation as a protected ground in its human rights legislation, and the lack of protection for a teacher fired on that basis, as against his employer. The same outcome could have been reached solely through a direct discrimination analysis as the failure to extend protection for sexual orientation could be compared unfavorably to the extension of protections for subordinated groups reflected in other protected grounds. Nonetheless, the Court helpfully elaborated an adverse effects analysis, finding that the omission of sexual orientation from Alberta’s human rights legislation was not only ‘not neutral’ and underinclusive and directly discriminatory as between LGBTQI persons and other disadvantaged groups - which is the \textit{de jure} or formal equality problem - it was also discriminatory indirectly as between LGBTQI or gender diverse persons and heterosexual persons. The Court reasoned that the omission clearly had a disproportionate adverse impact on the former as opposed to the latter. Appreciating this difference called for the recognition of the historical and contemporary realities of this group, and the various manifestations of their status misrecognition or subordination (and sometimes, their broader socioeconomic marginalization, in terms of abuses of power and difficulties in accessing benefits and power).

\textsuperscript{669} \textit{Ibid}, see also Lessard, “Dollars”, \textit{supra} note 77 at 309, noting that the minimal financial costs played a crucial role in the decision.
\textsuperscript{670} \textit{Eldridge}, \textit{supra} note 19 at para 89.
Since Vriend, there have been no successful adverse effects discrimination cases decided by the SCC.671 Before considering more recent illustrations, I consider two trilogy-era decisions involving adverse effects discrimination - Symes v. The Queen (Symes)672 and Thibaudeau v. The Queen (Thibaudeau)673 - that yielded majority analyses reminiscent of the Court’s approach in Bliss.674 Both addressed facially neutral laws and the socially entrenched and institutionalized gendered norms that disproportionately burden women, in economic and social terms, in the context of their participation in the (private) spheres of the labour market and business. In both cases, the majority demonstrated strong resistance to a contextualized analysis that would reveal the deep and patterned gendered relations in society. The substantive contexts disclosed the deeply discriminatory gendered relations that are reflected in tax laws in the specific contexts of custodial parents (the majority of whom are women) and the tax treatment of business expenses, both contexts that the majorities viewed through the framework of dominant male norms. The “contextual truths” revealed by the claims, as Justice L’Heureux-Dubé described them,675 eluded the Court. Her judgments reflect a more critical and deeply contextualized analysis of the substantive inequality harms in both claims.

Koshan and Hamilton reference several recent cases which were expressly framed, or could be characterized, as adverse effects discrimination claims, and which also failed. Three examples are examined here: Alberta v. Hutterian Brethren of Wilson Colony (Hutterian)676 and Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia (BC Health Services)677 and Kahkewistahaw First Nation v. Taypotat (Taypotat).678

671 Hamilton & Koshan, “Adverse Effects Discrimination”, supra note 408.
672 Supra note 144, concerned business expense deductions under the federal income tax scheme and the claim that child care expenses (in this case, in the form of wages paid to a nanny) should be deductible by a female (law firm partner and lawyer) in her tax returns, and the claim that if they were not deductible as business expenses, it was a violation of s. 15. The Court, as in Thibaudeau, supra note 17 in 1995, split along gender lines, with Justices L’Heureux-Dubé and McLachlin dissenting in respect of the Court’s dismissal of the appeal. The majority’s decision was delivered by Justice Iacobucci.
673 Thibaudeau, supra note 17.
674 Supra note 133.
675 Justice L’Heureux-Dubé was in the dissent in both cases, as was Justice McLachlin (as she then was), both writing separate decisions in each case.
676 Supra note 390.
677 Supra note 180.
Hutterian concerned a challenge to the constitutionality of the Alberta government’s universal mandatory photo requirement for drivers’ licenses in light of the Hutterites’ religious belief that prohibits having their photos taken. The Court found that the policy was “neutral”, a finding that drew the criticism that its equality analysis reflected a wholly formalist and uncritical notion of neutrality within the relevant context. That context is better understood as one in which the claimant group had a history of vulnerability to discrimination, including attacks by the government on their way of life, and for whom the legislation has a clear disproportionate adverse impact. Koshan and Hamilton question how a law with such a disparate and burdensome impact on a vulnerable religious minority was not viewed as an issue of adverse effects and was instead defended as a “neutral” policy choice. The importance of critically assessing claims of neutrality of rules that may have systemic impact was evidently missed in the Court’s extremely brief equality analysis.

In BC Health Services, the Court was also unable to see the disproportionate impact and operation of complex social forces that have led to the disproportionate representation of women in low-wage sectors of the labour market. The Court attributed this reality to the ‘choices’ of women, without considering the socioeconomic forces that influence and often determine what work women do. The case considered B.C. legislation that privatized health services and rolled back gains made by healthcare and social service workers in collective bargaining, and prevented their renegotiation. The appellant unions represented the only workers that the provincial government chose to exclude from the protective statutory collective bargaining scheme. Kerri Froc notes that the membership of the unions was

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678 Supra note 26.
679 A previous exemption for those objecting on religious grounds to this requirement was removed in 2003 and a universal photo requirement was implemented by the province.
680 Hamilton & Koshan, “Adverse Effects Discrimination, supra note 408 at 28.
681 Ibid.
682 The trend towards issuing short equality analyses or declining to address the equality claim at all, where other rights claims are instead addressed, is one noted by several authors: Hamilton & Koshan, “Adverse Impact”, supra note 408 at 3; and Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38:2 UBC L Rev 539.
683 BC Health Services, supra note 180.
disproportionately female (85%-98%), and was also disproportionately, older and racialized. The unions challenged the legislation under section 2(d) of the Charter, and also argued that the legislation violated s. 15(1) “by turning back pay equity gains”. They argued that the legislation was partially targeted against workers for having “excessive” wages, based on a devaluation of ‘women’s work’ and women as workers. The unions also made the Law based argument that the government’s decision that it was not important to respect the workers’ contractual entitlements, perpetuated disadvantage and stereotyping and sent messages that were adverse to their human dignity.

The Court dismissed this equality argument in two paragraphs, reflecting another concerning trend, finding that the “differential and adverse effects of the legislation on some groups of workers” relates “essentially to the work they do, and not to the persons they are.” This questionable distinction between conduct and status aligns with the Court’s narrow parameters for determining analogousness and new analogous grounds, to say nothing of its refusal to consider a vulnerable and subordinated social group.

In effect, the Court declined to consider the social reality and context that constrains the type of work that women, and in particular, certain groups of women, do. It further declined to infer that there was disproportionate impact on these groups, despite the fact that they were the only workers at issue in the government’s ‘reform’ of the impugned legislative scheme. Koshan and Hamilton contend that the Court erred in concluding that this was a coincidence. Another important omission is any reference to the evidence advanced to show that women “remain disproportionately affected by job insecurity, by wage disparity, by a lack of social

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685 Freedom of association.
686 Frog, “Immutability Hauntings”, supra note 288 at 28, citing Factum of the Appellant at paras 129, 142-50, 162-68.
687 Ibid.
687 Ibid.
688 Hamilton & Koshan, “Adverse Effects Discrimination”, supra note 408 at 30, observe the concerning tendency of the Court, in avoiding s. 15(1) adverse effects claims, to decide cases on other Charter grounds when possible (as in BC Health Services and Hutterian), thereby “impoverishing” s. 15 jurisprudence more broadly.
689 Ibid.
690 BC Health Services, supra note 180 at para 165.
691 Hamilton & Koshan, “Adverse Effects Discrimination, supra note 408 at 22.
mobility, by their predominant role in care-giving within the family, and by other negative consequences of the historic and current undervaluing of women’s work”. There was no intersectional and contextual analysis of this group and as a result, an already vulnerable group was consigned to even greater precarity and economic insecurity.

Finally, the Court’s decision in *Taypotat* is another clear illustration of its formalist and deficient approach to adverse effects claims. The case concerned the community election code adopted by the Kahkewistahaw First Nation in Saskatchewan, restricting eligibility for the positions of Chief and Band Councillor to individuals who had completed at least grade 12 education or equivalent. Louise Taypotat was 76 years old and a residential school survivor. He had a grade 10 education, and, as a result, was ineligible to run for these positions. The Federal Court of Appeal allowed the appeal and the SCC allowed the appeal from that decision. The unanimous judgment written by Justice Abella found that the claim of adverse effects discrimination was not established by the evidence. Although the analogous grounds in support of the position were not properly pleaded, the Federal Court of Appeal had accepted that the educational requirement had a discriminatory impact based on age and that it discriminated on the basis of “residence on a reserve”.

In reality, as the SCC acknowledged, the heart of the claim was that the qualification in question, while facially neutral, had a discriminatory impact on a group that has suffered well-documented and egregious harms. Referencing the classic adverse effects decision of the U.S. Supreme Court in *Griggs v. Duke Power Company*, Justice Abella agreed that there was a

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693 *Supra* note 26.
694 *Ibid* at para 12.
698 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) [*Griggs*], cited in *Taypotat, supra* note 26 at para 23. In *Griggs*, the U.S. Supreme Court found that it was discriminatory for an employer to require a high school diploma to work at the power plant, as this had the disproportionate effect of excluding African Americans from obtaining employment with the company.
potential claim on this basis “in certain circumstances”. However, she decided that the claim failed because there was no evidence “linking the requirement to a disparate impact on members of an enumerated or analogous group”.

Aside from demonstrating the formality of the Court’s (analogous) grounds approach and its tendency to displace attention from the systemic contextual facts, the decision is inconsistent with the approach to substantive equality that the Court proclaims within the judgment itself. Justice Abella describes substantive equality as the approach that “recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages”. The Court frames the parameters of the s. 15(1) analysis as “the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group”. The Court also notes that evidentiary requirements are not always fatal and “need not be onerous”.

However, the Court then concludes that there is “virtually no evidence about the relationship between age, residency on a reserve, and education levels”, confining the requisite assessment to the Kahkewistahaw First Nation itself. The claimant is thus unable to demonstrate the operation of such a “headwind” (i.e. attendance at residential school) as the systemic source of educational under-achievements for this group (i.e. older residential school survivors). The Court further declines to accept the statistical evidence relied on by the appellate court, which was not specific to this First Nation, and in the SCC’s view, did not therefore establish sufficient discriminatory impact of the education requirement on the basis of residence on a reserve or age. There is no acknowledgement by the Court of the burden on the claimant of providing such information. Thus, despite the Court’s emphasis on systemic discrimination and an

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699 Ibid at para 23.
700 Ibid at paras 15, 24.
701 Ibid at para 17.
702 Taypotat, supra note 26 at para 18.
703 Ibid at para 34.
704 Ibid at para 24.
ampler relevant context, neither the residential school backdrop to Taypotat’s acquired education (to grade 10) and broader related experiences, nor its connection to his age were addressed, except to state that this particular, clearly significant argument had not been raised by the claimant in the first instances.\textsuperscript{706} As Hamilton and Koshan observe, the decision represented a missed opportunity to “comment on the intersection amongst several grounds of discrimination”; this is especially significant for Aboriginal equality claimants, “whose claims often engage multiple, intersecting grounds of discrimination.”\textsuperscript{707} Thus the decision again raises serious questions as to how thick and substantive the Court’s contextual analysis is.

A final concern, eluded to earlier, is the barriers that the evidentiary threshold for advancing successful disparate impact claims pose to claimants, and the Court’s reference in \textit{Taypotat} to causation.\textsuperscript{708} This issue is material because the analysis of causation and the readiness to draw inferences of patterned inequality from specific claims, is central to adverse effects analysis. Koshan and Hamilton are critical of the Court’s heavy reliance on causal connection in several of the adverse effects claims,\textsuperscript{709} as the Court appears to demand evidence of a direct causal link between the challenged law, through the ground, to the adverse effects experienced by the claimants. In \textit{Taypotat}, the Court held that the “evidence before us… does not rise to the level of demonstrating a relationship between age..., let alone that arbitrary disadvantage results from the impugned provisions.”\textsuperscript{710} In Koshan’s and Hamilton’s view, this “fairly onerous causation requirement” shows the constriction of the Court’s undue attention on this issue “rather than attending to the broader historical and social context of the claim”.\textsuperscript{711} Through this approach and other restrictive approaches, the Court has made it very challenging to mount claims of adverse effects in furtherance of serious substantive inequality claims.

\textsuperscript{706} \textit{Taypotat}, supra note 26 at paras 12-13.  
\textsuperscript{707} Hamilton & Koshan, “Adverse Effects Discrimination, supra note 408 at 4.  
\textsuperscript{708} \textit{Taypotat}, supra note 26 at para 34.  
\textsuperscript{709} Hamilton & Koshan, “Adverse Effects Discrimination, supra note 408 at 29, referencing: \textit{BC Health Services}, supra note 180.  
\textsuperscript{710} \textit{Taypotat}, supra note 26 at para 34, emphasis added.  
\textsuperscript{711} Hamilton & Koshan, “Adverse Effects Discrimination, supra note 408 at 29.
3.3.4 SCC’s Approach to Indivisibility and Positive Obligations

We turn now to the two elements that round out s. 15’s protective ambit and express the state’s essential commitment to realizing substantive equality, namely, positive state duties and enforceable ESCR/SER. In actual rather than rhetorical terms, the provision’s more expansive wording was thought to have “altered the entire orientation from a negatively oriented guarantee of non-discrimination to a positively oriented right to equality”.712 The expectation was for a “broadly framed guarantee” and a “positive social right” that entailed the promotion of equality and the imposition of state obligations to “take positive measures [to] address systemic patterns of socioeconomic disadvantage” and “to incorporate social and economic rights” (like the right to housing, education, and an adequate income).713 In Bruce Porter’s view, the post-Charter expectations for this shift towards remedying pre-existing disadvantage and entrenched inequality,714 and for interpreting the right in light of positive obligations under international human rights law,715 were significant, but not naïve.716

The general notion of equality advocates was that the Charter would be a source of protection for ESCR/SER,717 even though there is no express reference to such rights.718 Rights such as the right to equality and the right to life were to be interpreted expansively, so as to require governments to take action to address the needs of certain vulnerable groups and to remedy systemic socio-economic inequality.719 Thus, it was argued, the renaming of s. 15 from ‘non-

713 Porter, “Twenty Years”, supra note 137 at 151.
714 Ibid at 152.
715 Ibid at 158.
716 There were also detractors and cynics or skeptics from the outset. See also Young, “Charter Eviction”, supra note 64 at 47: “Early criticisms of the Charter as a document stuck in nineteenth century liberalism, blind to material inequality, and thus with no promise of meaningful rights for the economically marginalized, will be confirmed.” Even then, there was an awareness that this would not automatically happen and that other components would need to change if the constitutional protection of equality was to mean something.
718 Ibid at 209. The closest is found in the minimum language education guarantee (s.23), which scholars note has been treated as a “novel form of right” in placing positive obligations on government to “alter or develop major institutional structures”.
719 Ibid at 210.
discrimination rights’ to ‘equality rights’, along with the expansion of the types of equality guarantees and the addition of s. 15(2), would address a broader and more affirmative range of harms than anti-discrimination.

Another assumption was that the addition of disability, imported from Canadian human rights law, would expand the conception of s. 15 to include the failure to take positive measures to accommodate the (‘different’) unique needs of protected groups, even in the absence of discriminatory intent. Although there is nothing in the text of the Charter that affirmatively obliges the state to alter or develop major institutional structures or to undertake other interventions, or to enforce ESCR/SER, the presence of s. 15(2) was also thought to support this orientation.

3.3.5 Positive State Obligations

The issue of the extent of positive state obligations under s. 15 was thus raised early on and expressly left at least partially open. However, when the trajectory of s. 15 is considered, a shift towards a positive orientation in the formulation of state obligations remains quite clearly “at the margins”. The Court’s commitments are increasingly both settled and restrictive in this regard.

Tracing that trajectory from the start, the judgments in Andrews and Turpin sent conflicting signals and set relatively minimal ambitions for s. 15. The Court articulated an opening for the proactive promotion of equality, at the same time as it focused closely and almost exclusively on the articulation of a test for legal distinctions that are ‘without

720 The additions of equal protection and benefit of the law and equality before and under the law.
721 Jackman & Porter “Socio-Economic Rights”, supra note 45 at 210-211.
722 Ibid at 211.
723 Ibid.
724 See e.g. Porter, “Twenty Years”, supra note 137.
725 For example, in respect of s.7, see Gosselin, supra note 67, per McLachlin C.J., at paras 81-83.
726 Young, “Change at Margins”, supra note 444.
727 Andrews, supra note 18.
728 Turpin, supra note 31.
729 Indeed, Justice La Forest observed in his reasons in Andrews, supra note 18 at p. 193, the Court’s aims for section 15 were modest in light of the extensive text.
discrimination’. On the one hand, it set out a potential basis for moving away from purely formal approaches. Its articulation of the provision was expansive in reading s. 15(1) as “constitut[ing] a compendious expression of a positive right to equality in both the substance and the administration of the law.” There were also suggestions of other substantive elements. Examples include Justice McIntyre’s description of the essence of true equality as “the accommodation of difference”, with the suggestion that something beyond refraining from discrimination is required; an obligation to do something to change the situation itself, for example, to ameliorate the position of the disadvantaged. As noted, Turpin also hinted at more far-reaching aims and the potential for positive (equality promoting) obligations.

On the other hand, Andrews limited the protective ambit with its singular focus on the application or operation of the law, as opposed to a “general guarantee of equality”, which it expressly disavowed, and by introducing elements such as the analogous grounds assessment, which, as examined in the previous section, served to restrict the range of beneficiaries, as well as the interests protected. The latter was thus accomplished through articulating imprecise but largely individualist and abstract conceptions of equality’s purposes.

There is little in the case law following the early decisions to cement an expansive view of the references to remedying disadvantage and promoting equality. Thus, while some scholars have underscored the potential openness to breaking down the negative/positive rights dichotomy, the critical scholarship and post-Andrews/Turpin jurisprudence establishes little basis for optimism at present.

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730 This paper does not examine the issue of the Court’s handling of the four equality rights, which it originally addressed collectively and individually, and seemingly viewing equality as distinct from discrimination. This approach fairly quickly collapsed. However, as scholars have noted, the lack of independent development of equality in its own right, separate from non-discrimination, is significant. See for example, Buckley, “Law v. Meiorin”, supra note 19 at 179.


732 Andrews, supra note 18, per McIntyre J., at p. 171.

733 Ibid at p. 161.


735 Andrews, supra note 18 at pp. 163-4.

736 Frequently cited examples include the Court’s recognition in Schachter v. Canada, [1992] 2 SCR 679, 93 DLR (4th) 1 [Schachter] at p. 721, that equality rights, and specifically, the right to ‘equal benefit of the law’ is neither purely negative or positive, and “in some contexts... [it is] proper to characterize s. 15 as providing positive rights”, cited
Subsisting expectations for the potential expansion of the state’s responsibilities under s. 15 have often been based on the dissenting reasons in Gosselin and the high water mark ‘positive rights’ decisions of Eldridge and Vriend, examined in these terms below. Reference is commonly made to Justice Arbour’s dissent in Gosselin, which articulated what Melina Buckley describes as part of the development of a ‘general theory of positive state obligations under the Charter’. Justice Arbour’s judgment is undoubtedly of interest, in articulating a more expansive vision of Charter rights, albeit in the context of s.7 and not s. 15, although with theoretical application to s. 15 as well. As an explicit effort to break down the positive/negative dichotomy, her analysis emphasized that claimants will often be hard pressed to identify positive state acts that constitute an interference with their rights. She instead advanced the position that when the claim is that the state must take some action to ensure a right is fulfilled, the Court should entertain claims that are essentially grounded in a ‘lack of effective state action’. Conceiving of state accountability in terms of the breach of a positive duty of ‘performance’ is of course essential to founding claims in respect of under-inclusive legislation action or state inaction. Another key aspect of Justice Arbour’s analysis was to establish state accountability in instances where the state is “effectively turning a blind eye to, or sustaining, independently existing threats to that right”. Under this approach, the exclusion is reinforced by the lack of effective state action.

The dissenting judgments of Justice L’Heureux-Dubé in various cases, including Gosselin, were also in potential furtherance of a doctrine of positive state obligations, both in respect of

in Jackman & Porter, “Socio-Economic Rights”, supra note 45 at 221. Schachter addressed an underinclusive benefits scheme and the extant issue concerned the remedy. Further, Justice Wilson in McKinney v. University of Guelph, [1990] 3 SCR 229 at p. 412, states in obiter that it is “not self-evident that government could not be found in breach of the Charter for failing to act”.

_737_ Gosselin, supra note 67.
_740_ Ibid at para 362.
_741_ As Buckley frames it in “Law v. Meiorin”, supra note 19 at 185.
_744_ Gosselin, supra note 67, per L’Heureux-Dubé, J.
ESCR/SER and beyond. The failure of her positions (and those of Justice Arbour) to take root is additional confirmation of the Court’s overall rejection of an equality conception that would enlarge state responsibility and hold the state accountable for the redress of the inequality harms of the nature outlined. 745

Several other promising positions were advanced in the Court’s unanimous decisions in Eaton, 746 and the later decisions of Eldridge 747 and Vriend. 748 The Eaton Court issued a strong statement concerning the ‘positive obligation to accommodate’ under s. 15, pronouncing that s. 15(1)’s purpose extends beyond the prevention of discrimination “by the attribution of stereotypical characteristics to individuals”. 749 Speaking for a unanimous Court, Justice Sopinka referenced the need to advance the “amelioration of the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons...”. 750 He articulated the need to transform institutions that perpetuate the exclusion of people with disabilities from the mainstream-determined socially constructed realities. 751 By all accounts, this was an opening for a progressive, substantive equality conception that is critical of the usual accounts of difference and recognizes the need for the state to intervene and carry out transformative change, including in the so-called private sphere. Such interventions might potentially attend not only to identity concerns but to misrecognition harms, and build on a relational understanding of the subordination and marginalization of persons whose differences are treated as deficiency or deviance. As I address below, however, the result did not follow this reasoning to its logical substantive equality conclusion.

745 There were also early statements as to the seemingly uncontested closure of the debate - including by Justice L’Heureux-Dubé, in dissent, both in Egan, supra note 17 at p. 621 and Thibaudeau, supra note 17. She stated in Thibaudeau at p. 655, without equivocation, that there is no state duty under s. 15 “to take positive actions to remedy the symptoms of systemic inequality”. She set out the less ambitious requirement that governments ensure they are not “the source of further inequality”.
746 Eaton, supra note 592.
747 Eldridge, supra note 19.
748 Vriend, supra note 19.
749 Eaton, supra note 592 at para 244.
750 Ibid at para 66-68.
751 Ibid at para 68.
By contrast, *Eldridge* reiterated several of the earlier more substantive renditions of s. 15’s purposes, and in terms of outcome, the decision required the state to act to provide (hearing interpretation) services where it had not done so, essentially finding the state accountable for inaction. The Court’s formulation of two distinct but related purposes\(^{752}\) for equality was, first, the commitment “to the equal worth and human dignity of all persons”, and second, “to rectify and prevent discrimination against particular groups suffering from social, political and legal disadvantage in our society”.\(^{753}\) The latter aim is similar to the purpose articulated by Justice Wilson in *Turpin*.\(^{754}\) The former objective is of course so abstract as to be essentially meaningless,\(^{755}\) as became clear following the Court’s experiment with the dignity test in *Law*. The second aim is more promising. However, the outer parameters of this commitment are also significantly imprecise, and the decision really begs the question as to what concrete actions are required by it.

*Vriend* is viewed as another important and substantive judgment because it addressed legislative omissions, for which state accountability was still unclear.\(^{756}\) Legislative silence, or omission, is not a defence in a context in which the state has acted.\(^{757}\) Speaking directly to this theme, the Court also indicates that the distinction between positive and negative duties or rights is ‘problematic’; it finds that distinguishing between government action and government failure to act is not a valid basis on which to determine whether or to what extent the *Charter* applies.\(^{758}\) The *Charter* is engaged even if the legislature refuses to exercise its authority,\(^{759}\) and the *Charter* applies to all matters within the authority of the legislature. Thus, the provincial

\(^{753}\) *Eldridge* *supra* note 19 at 54.
\(^{754}\) *Turpin*, *supra* note 31.
\(^{755}\) See e.g.: Réaume, “Dignity, Equality and Comparison”, *supra* note at 20-1; Essert, “Global Ethics”, *supra* note 545.
\(^{756}\) *Vriend*, *supra* note 19 at para 4.
\(^{758}\) *Vriend*, *supra* note 19 at para 53.
\(^{759}\) *Ibid* at para 60.
government’s failure to include sexual orientation in its human rights legislation was found to violate s. 15.760

Yet, the Court was not willing to clearly affirm that s. 15 imposes a positive obligation on government.761 Moreover, the majority’s failure to expressly reject Justice Major’s suggestion762 that the government might have revoked the human rights legislation altogether, as opposed to the remedial reading-in of such protection, is further confirmation of the Court’s overall ambivalent orientation towards affirmative duties of the sort reviewed in Section 3.X.X. The Court’s response to this suggestion was to find that the issue did not need to be decided, leaving open the question as to whether governments have any positive and affirmative obligation to provide legislative protection from discrimination by third parties.763

Thus, while the Court in Vriend and Eldridge went further in discussing and affirming the scope of state obligations than it had previously done, the results do not establish a positive obligation essential to realizing substantive equality. The Court in both cases “recognized a wider scope of government responsibility under s15(1)” than had been previously acknowledged by courts.764 This is a critical concession to recognize that independently existing – pre-existing - group-based disadvantage does not preclude state obligations to ensure that such disadvantage does not prevent equal access, for example, to a state benefit.765

Moreover, as Margot Young observes, without this expansion, s. 15(1) would otherwise have “little potential to alter the systemic and historic distribution of disadvantage in Canadian society.”766 She further notes, however, that “[r]ead narrowly”, these high water mark cases stand for a relatively narrow principle, namely: “if the state has decided to confer a benefit – in

760 Ibid at paras 65-6.
762 VRIEND, supra note 19, per Major J., at paras 196-7.
763 Ibid at paras 62-4. See also Jackman & Porter “Socio-Economic Rights”, supra note 45 at 222.
764 Young, “Change at the Margins”, supra note 444 at 257.
765 Ibid at 257-8.
766 Ibid at 258.
one case, medical services and, in the other, protection from discrimination – it must do so in a non-discriminatory manner.”

Following Eldridge and Vriend, the question remained as to whether the Charter obliges the state to take positive action, such that the obligations can be enforced against the state, through providing services or goods to ameliorate symptoms of systemic inequality. In decisions that followed, however, and despite the Court’s failure to clarify the issue, the outcomes are telling; one has only to point to its failure to build upon this type of analysis, despite ample opportunity to do so.

Returning to Eaton, the Court found there was no positive state obligation to transform substantive norms and practices so as to deliver the same quality of educational services that include rather than exclude children like Emily. The Court refused to interpret s. 15(1) to “realize equality’s transformative potential in relation to an exclusionary, and therefore presumptively discriminatory, status quo”. It found no constitutional imperative for the presumption of integration (integrated educational services).

As Young frames the problem with Eaton, by failing to critically address or “destabilize” the unstated understandings of what is normal and exceptional, the Court left unaddressed the larger systemic issues that construct disability in these biological or natural terms. Dianne Pothier observes that, once again, the needs of children like Emily were viewed through able bodied eyes and with deference to educational authorities as to their ability (or desire) to change the educational setting so as to ensure meaningfully equal access by such children. The Court was content, Pothier opines, with a “separate but equal” approach to equality, one that “simply perpetuates the existing relations of difference that are reinforced by social power.

767 Ibid at 257.
768 Ibid at 245.
769 Eaton, supra note 592 at paras 78-79.
771 Pothier, “Significance”, supra note 129.
and continue to marginalize and disempower and exclude certain historically subordinated groups." 772

Other judgments confirm that the state will not be obliged under s. 15 to extend programs intended (or purportedly intended) to address the situation of certain seriously marginalized groups, but not others with similar absolute needs. 773 Indeed, this increasingly inescapable conclusion was further advanced in Kapp, where the Court examined the bifurcation of tasks of ss. 15(1) and 15(2) and found the dual provisions to be, respectively, negative in orientation and permissive, in terms of positive obligations. 774 In this way, Kapp addressed the outstanding uncertainty around the interpretation of the ‘affirmative action’ component of s. 15 and whether it would found an independent state obligation to promote equality and affirmatively address situations of social structural inequality. The Kapp decision established that there is no enforceable “freestanding” requirement 775 or state accountability under either provision, together or apart, to enact responses to ameliorate the social conditions of certain vulnerable and disadvantaged groups. The Court will not mandate such responses and those programs that are offered may be prioritized and designed by the state in ways that are subject to a generous (and deferential) interpretation, including in respect of a design that excludes such groups. 776

The Court’s decision in Native Women’s Association of Canada v. Canada (NWAC) 777 further illustrates the formidable barriers to formulating positive duties, specifically in connection with groups marked by exceptional ‘difference’ (in terms of distance from the dominant norms), and suffering from significant combined harms of status and economic subordination. The decision addressed the issue of participation and exclusion from the political realm and the exercise of political rights for the claimant association that represents a multiply marginalized ‘embedded’

772 Ibid at 77.
774 Margot Young notes that the decision “raises the distressing spectre of freezing out positive rights obligations under s. 15”: Unequal, supra note 35 at 214-215.
775 The language used in APP, supra note 153 at para 42.
776 The low level of scrutiny given to cases like Lovelace, supra note 773 and Cunningham, supra note 773 are cases in point.
group. Along with the previously referenced decisions in *Corbiere* and *Taypotat*, this is the third decision to consider ‘parity-impeding barriers’ to the involvement of certain historically and deeply disadvantaged groups in a policy or decision-making fora and concerning issues of significant interest to the claimants. The claim was a constitutional challenge to the federal government’s decision to exclude NWAC from constitutional consultations surrounding the 1992 Charlottetown Accord (which would have included recognition of the Aboriginal right to self-government). Aboriginal men were represented in the discussions through government funded groups that were not receptive to NWAC’s position on the issues and toward NWAC more generally. NWAC’s only avenue for participation was to convince these groups to carry their concerns forward and express them to government at the constitutional talks. The equality claim failed, as did the s. 2(b) (freedom of expression) claim.

The Court’s analysis has been critiqued by one scholar as an abstract and formalistic construction of (Aboriginal) male domination, and as representing a failure to acknowledge the full harms and the uniqueness and significance of the affected interest to the claimants. Kerri Froc elaborates the fuller contextual backdrop to their interest in being included directly in the talks, namely, to counter their well-documented historical exclusion in the social and political spheres, and other experiences of complex inequality and “patriarchal colonialism”. In Froc’s assessment, the Court failed to appreciate the claimants’ experiences of compounded oppression as a profoundly marginalized group embedded within a larger disadvantaged and

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778 *Corbiere*, supra note 439 was a successful s. 15 challenge based on a finding of direct discrimination, after finding that the claimant group of First Nations band members living off-reserve constituted an analogous ground. 779 *Supra* note 26 was an unsuccessful s. 15 challenge in which the SCC overturned the federal appellate decision, which had found that the impugned requirement of grade 12 education for eligibility to serve in office in band government was discriminatory. The claimant was an older (76-year old), residential school survivor who had not completed grade 12 (he had a grade-10 education). 780 Froc, “Multidimensionality”, *supra* note 256 at 30. As such, these groups were effectively (although not expressly) accorded the ability to speak on behalf of women and NWAC and its members, who were only able to speak to the male dominated organizations and not directly to governments. 781 NWAC, *supra* note 777 at p. 664. 782 This decision is also the subject of a ‘decision’ by the Women’s Court of Canada (August 15, 2008), online: <thecourt.ca/the-womens-court-of-canada-native-womens-association-of-canada-v-canada/> (last accessed April 27, 2019). 783 Froc, “Multidimensionality”, *supra* note 256 at 42. 784 Ibid at 24.
The absence of this substantive content is reflected in the Court’s inadequate contextual analysis, which did not consider the lack of space for NWAC members to have their voices heard in a way that was “neither appropriated nor silenced”. As in Ermineskin, the Court’s analysis also obscured the federal government’s original discriminatory actions and complicity in imposing patriarchal social and political structures – through, inter alia, the Indian Act – that reflects the imposition of dominant cultural expressions of identity and excludes the interests represented by NWAC. These critical understandings of the enlarged structural inequality realities and harms were not acknowledged as relevant to the contextual rights frame. As such, the effort to require the state to take affirmative action to facilitate the participation by Indigenous women in relation to a critical topic and important fora, went unaddressed.

Two decisions concerning the Quebec government’s efforts to amend its pay equity legislation in respect of private (and public) employers, present a recent and unusually frank exchange within the Court over the negative/positive rights dichotomy and the nature of Charter rights and equality rights in particular. The APP and CSQ decisions represent two challenges to the government’s implementation and subsequent amendment of Quebec’s Pay Equity Act, which applies to public and private employers with ten or more employees. The 1996 version of the legislation created a continuous obligation on employers to monitor pay equity and make adjustments to wages in order to achieve it. Employees could enforce these obligations through complaints to the Pay Equity Commission and the Commission had the power to order retroactive employee compensation.

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785 Ibid at 42.
786 Ibid at 46.
787 Supra note 26.
789 APP, supra note 153.
790 CSQ, supra note 136.
791 Pay Equity Act, R.S.Q. 1996 c.43.
792 Koshan, “Pay Equity Decisions”, supra note 403, at 1.
The APP decision considered Quebec’s 2009 amendments of the Pay Equity Act, instituted as a result of “widespread [employer] non-compliance”. The effect of the amendments was to replace employers’ ‘continuous obligations to implement pay equity with a system of pay equity audits to be conducted every 5 years’. The amendments also removed the possibility of retroactive employee compensation unless an employer acted in bad faith, arbitrarily, or with discrimination. Additional provisions deprived employees of the information necessary to challenge their pay on any of the latter grounds. The amendments were challenged by several unions under s. 15. The result was 6:3 and Justice Abella authored the majority judgment, holding that the amendments violated s. 15(1); were not within the scope of s. 15(2); and could not be justified under section 1 of the Charter.

Despite the significant divides reflected within the Court in both cases, in the project’s view, the APP and CSQ decisions articulate what is already known about the Court’s orientation towards positive/negative rights, and the scope of the s. 15 protection.

The government argued that the outcome would mean that the state has a “freestanding positive obligation... to redress social inequalities”. The dissent framed the issue at the heart of both cases as the notion that the claim ran counter to the core nature of Charter rights, which it framed as “fundamentally negative”. Significantly, the majority accepted the dissent’s formulation as to the characterization of Charter rights, but disagreed that its substantive position on the merits ran counter to that notion.

793 APP, supra note 153 at para 16.
794 Ibid at 2.
795 APP, supra note 153 at para 34.
796 Koshan, “Pay Equity Decisions”, supra note 403 at 2.
797 With then Chief Justice McLachlin and Justices Moldaver, Karakatsanis, Gascon, and then Justice Wagner concurring.
798 APP, supra note 153. Justice Côté (with Justices Brown and Rowe concurring) dissented, finding no violation of s. 15(1) and, alternatively, that the legislation was protected under s. 15(2). In a decision marked by sharply worded judgments, particularly by the dissent, the Court strongly defended the importance of the Quebec government’s rectification of the systemic pay discrimination for women harmed by occupational sex segregation in the labour market.
799 Ibid at para 42.
800 Ibid, per Justice Côté J., at para 65 [emphasis in the original].
801 APP, supra note 153 at para 42.
To elaborate on the dissent’s significantly formal position, Justice Côté’s reasons emphasized that Charter rights “do not place the government under an obligation to act in order to obtain specific societal results such as the total and definitive eradication of gender-based pay inequities in private sector enterprises.”\(^802\) Finally, the dissent emphasized that any purported change in the interpretative approach that imposed such a “positive obligation” would change the nature of the Charter, and “confer on the courts the unusual responsibility of overseeing compliance with it”.\(^803\) The dissent argued that the majority’s interpretation led to that consequence;\(^804\) as noted, the majority disagreed that this was the case but otherwise confirmed the dissent’s analysis of the (negative) nature of Charter (including equality) rights.

Further, in CSQ, which addressed the constitutionality of Quebec’s approach to implementing pay equity in workplaces without male comparator job classifications, a process\(^805\) that created a six-year delay in access to pay equity adjustments for women in these workplaces, the dissent claimed it was not within the Court’s authority to find an infringement of s. 15(1), in order to correct legislation that (in its original form) is intended to ameliorate the conditions of the instant group.\(^806\) Its main premise was that because the government did not cause the pay inequity problem in the private sector – in other words, it was ‘pre-existing’ - “it would have been perfectly valid from a constitutional standpoint for the legislature not to intervene”.\(^807\)

The dissent’s position on these issues is concerning enough from a substantive equality perspective, however, the cases are cited because, once again, the majority did not take issue with that proposition or with the dissent’s assertions as to the core nature of Charter rights. Instead, it denied that its finding of a breach of s. 15(1) in CSQ had the effect of imposing a

\(^{802}\) Ibid, per Justice Côté J., at para 65.

\(^{803}\) Ibid.

\(^{804}\) Ibid.

\(^{805}\) This concerned the development of the process, implemented by regulations under 1996 version of Act, for dealing with workplaces with no male comparators, such as child care centres: Ibid at para 71.

\(^{806}\) CSQ, supra note 136, per Côté, J., at para 144.

\(^{807}\) Ibid.
“freestanding positive obligation on the state to enact benefit schemes to redress social inequalities”.

Confirming the Court’s by now longstanding position, the majority has thus affirmed that it is only when a legislature chooses to act that it must do so – i.e. it can be obliged to act - without reinforcing discrimination. The majority’s judgment in CSQ observed that the legislature “so chose” to act; it intervened to address pay discrimination against women, including in the private sector. However, it had then denied access to that remedy by delaying it for a particular group of women (namely, women in low-wage female dominated work), and as a result of that delay, it violated s. 15 by leaving the group paid less for longer in comparison to male workers. It is only because Quebec had passed pay equity legislation in respect of private (and public) employers, however, that it had to act without discrimination in the implementation of that scheme.

3.3.5.1 Summary of the state’s positive obligations

The scholarship addresses the parameters of doctrinal uncertainty with respect to this aspect of s. 15’s scope. For a significant portion of the jurisprudence, the case law is appropriately characterized as uncertain, and certainly, underdeveloped, with respect to the obligation to promote equality. By now it is clear that the SCC has made discrimination the centerpiece of s. 15, such that it is largely an anti-discrimination vision, and thus negatively oriented. Promoting equality has been sidelined and treated as permissive, as well as providing for correction and obligations to act when the state has already decided to act. Despite keeping this question open in situations where preexisting conditions of disadvantage cannot be specifically linked to state action, the concrete development of such a duty seems remote at this stage in s. 15’s evolution.

808 APP, supra note 153 at para 42.
809 Ibid at para 42; CSQ supra note 136 at para 33.
810 It found that “[w]hatever the motives behind the decision, this is “discrimination reinforced by law”, which it noted that the Court had denounced since Andrews (p. 172).” CSQ, supra note 136 at para 33.
811 See e.g.: Porter, “Beyond Andrews” supra note 761 at 81-2.
The case law establishes that the state may not be the source of further inequality or discrimination, and thus, when it decides to act, it cannot do so in a discriminatory manner. This means that positive measures may be required to ensure access by certain groups to services in conditions of equality – as in *Eldridge* – assuming that the latter means that services may not be inferior (i.e. experienced as inferior) in quality. However, the jurisprudence also casts doubt on the Court’s consistent application of this advance in equality understandings, particularly where such findings involve significant expenditures as in *Auton* and *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (NAPE)* - or that it requires major changes to institutions and norms or practices to ensure meaningful access to and inclusion in services or decision-making fora, as in *Eaton* and *NWAC*. According to the SCC, there is thus no clear duty to provide protective legislation or benefits, or inclusive access to services and political participation, or to provide protections where none exist. There is no positive duty of performance that would provide the foothold for the claim that there is state accountability to act because the failure to do so would sustain independently existing threats to the exercise of fundamental rights by certain groups, or to absolute manifestations of inequality. This is demonstrated in decisions such as *Dunmore*, concerning labour protections for vulnerable groups that cannot be brought within a comparative protective framework, and in *Gosselin*, where threats to the rights of a multiply marginalized representative claimant to personal integrity and life – to say nothing of an enlarged ‘dignified life’ – gave rise to no claims of performance on the part of the state.

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813 *Auton, supra* note 509.

814 [2004] 3 SCR 381 [*NAPE*].

815 *Eaton, supra* note 592.

816 *NWAC, supra* note 777.

817 *Dunmore, supra* note 180.

818 See Dianne Pothier’s reflection in “Equality as a Comparative Concept”, *supra* note 485 at 137 regarding *Dunmore*; she contends that it demonstrates how a non-equality (section 2(d)) claim has the potential to be both relative (i.e. comparative) or absolute (i.e. non-comparative), whereas, an equality claim is ‘by definition’ – or more accurately, viewed as - a comparative claim. As such, under Pothier’s framing, the freedom of association claim succeeded because it could be framed in non-comparative terms, and the equality claim failed because it could not.
Ultimately, the theorization of positive state obligations and accountability for ensuring effective equality and redressing systemic inequality, is significantly undeveloped under Canada’s constitutionalized equality rights. There have thus been minimal ‘post-liberal’ inroads into the redistribution of resources and benefits (the latter further explored next under element 3), and in the area of transformative measures to ensure participation and inclusion, and the recognition of diversity or differences, including through the development of variable or positive measures.

3.3.6 Indivisibility and Justiciability of ESCR/SER

The enforcement of ESCR/SER and implementation of an indivisible approach to both generations of rights falls under the umbrella of positive obligations. As with positive duties more generally, efforts to include ESCR/SER within the scope of s. 15 protection have faced serious resistance and minimal success. As noted in the equality theory segment, breaking down the endemic CPR/ESCR binary and opposition to indivisibility and justiciability, obliges the Court to inquire into the substantive outcomes generated by the ‘private’ economic and social structures of society, including within the family and the market. As with other aspects of positive obligations, the obstacles that the law’s liberal orientation and dominant legal rights form pose to such an extension have ultimately proved too significant to surmount.

The Court has largely resisted the redistributive implications of substantive equality as they relate to this essential element of enforcing ESCR/SER and has declined to expand the protective coverage to address the most serious manifestations of structural social inequality. It has generally denied direct ESCR/SER claims in the form of providing or extending (in the case of underinclusive schemes) entitlements to services and goods. I have already considered how the Court has downplayed or refused altogether to address economic inequality and poverty, within the scope of the relevant contextual factors; here I address this refusal to find that poverty falls within the scope of equality rights protection as an analogous ground and a justiciable ‘economic right’.

The Court had an opportunity to interpret substantive Charter obligations, particularly under sections 7 and 15, to include most if not all rights in ICESCR. The expectations were that the adequacy of social programs would be reviewable, as well as claims for implementation of new publicly funded programs. Martha Jackman and Bruce Porter have continued to suggest, as have others, that there is the potential for the Charter and equality rights to be interpreted so as to oblige the state to address socio-economic inequalities through the implementation of ESCR/SER. They argue that there is no doctrinal obstacle to this interpretation, which the project also accepts.

Although the Court has sidestepped answering the direct question of whether there is a positive obligation to provide benefits and programs to address socioeconomic needs of disadvantaged groups, hopes for an interpretive approach that embraces ESCR/SER claims have dimmed. This accords with the overall assessment of the critical scholarship that the Court and lower courts have largely failed to realize the Charter’s promise with respect to these types of rights. Despite the more hopeful prognostications arising from apparent openings in the early decisions, and the later case of Eldridge, the SCC’s response has been poor; some scholars have questioned the value of advancing SER claims, following the “aftermath of Gosselin”.

Surveying the entire jurisprudence, few ESCR/SER claims have been litigated, at all. Whether this is due to the disappointing trajectory of the jurisprudence or timidity on the part of litigators and equality claimants, the small number of such claims is striking. As noted in Chapter 1, this is certainly not a reflection of the severity of the issue of socio-economic

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820 Ibid at 211. Despite their conventional classification as civil and political rights, Porter & Jackman, “Socio-Economic Rights”, supra note 45 at 209, and others, have argued that these two rights are “best understood in the Canadian context as having both civil and political and social and economic dimensions.”

821 Jackman & Porter, ibid.

822 Ibid.

823 As do various authors, such as Lessard and Young (various).

824 As in Vriend, supra note 19 at para 64; Gosselin, supra note 67 at paras 81-83, in respect of s.7.


826 Majury, “Equivocation” supra note 53 at 331-2, noting the very modest claims advanced and the troubling unwillingness of the courts to address socio-economic disparities (at 335).

827 Young, “Why Rights Now?”, supra note 23 at 318; and Jhappan, supra note 85.

inequality rights violations in Canada. As Diana Majury and others have observed, the increase in economic inequality and poverty and its disparate impact on certain groups, is a most pressing equality issue.\textsuperscript{829}

Moreover, of the handful of SER claims brought, exceedingly few have succeeded. The most noteworthy is \textit{Eldridge}, which amounted to a successful redistribution, albeit minor, of government resources in order to provide sign language interpretation services.\textsuperscript{830} The case is also notable because the Court addressed the government’s concern that a positive decision would open the door to further claims for other non-official language speakers attempting to access medical services, arguing that the cost would be prohibitive. In doing so, the Court signaled its concern regarding the issue of government costs, and later cases confirmed that the Court would consider such arguments, either under a lighter section 1 analysis, or indirectly in its assessment of s. 15.\textsuperscript{831} Scholars have also questioned whether the judgment in \textit{Auton} can be reasonably distinguished from the result in \textit{Eldridge},\textsuperscript{832} other than in terms of the high costs associated with the claim in question.\textsuperscript{833}

Following \textit{Eldridge}, the jurisprudence was beset by significant setbacks and illustrations of the obstacles to ESCR/SER claims under s. 15. \textit{Gosselin} is emblematic of this direction. The case raised two related economic rights: the right to an adequate standard of living and the right to enjoy this right without discrimination of any kind.\textsuperscript{834} As the first poverty case to reach the SCC,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{829} Majury, “Equivocation”, \textit{supra} note 53 at 330.
\item \textsuperscript{830} Young, “Change at Margins”, \textit{supra} note 444 at 259. The Court implied that the consideration of cost is relevant by saying minimal cost prevented justification under s. 1.
\item \textsuperscript{831} See Diana Majury’s discussion of the scholarship concerning the interrelation between s. 15 and s. 1 of the \textit{Charter}, and where the limits on equality rights should be applied. She concludes that either way, the meaning of equality and the limits to be placed on it, is what is at issue in terms of limiting equality’s meaning (per s. 15) or the right to equality (per s. 1): “Equality and Discrimination According to the Supreme Court of Canada” (1990-91) 4 Can. J. Women&L. 407, at 411-14.
\item \textsuperscript{832} Several authors observe that \textit{Eldridge} and \textit{Auton} are not different “in any way that is convincing. The outcome of Eldridge could have been identical to the outcome in Auton. One need only observe that the sought-after interpreter services in Eldridge were a non-existent benefit, and Eldridge becomes Auton.” See Gwen Brodsky, Shelagh Day & Yvonne Peters, \textit{Accommodation in the 21st Century}, Canadian Human Rights Commission, 2012, online: <chrc-cdpcc.gc.ca/eng/content/accommodation-21st-century> (last accessed April 26, 2019), at 43; and Brodsky, “Moore”, \textit{supra} note 812.
\item \textsuperscript{833} Lessard, “Dollars”, \textit{supra} note 77; Young, “Unequal”, \textit{supra} note 35 at 291.
\item \textsuperscript{834} Jackman & Porter, “Socio-Economic Rights”, \textit{supra} note 45.
\end{itemize}
\end{footnotesize}
*Gosselin* reflects a strict and clear denial of a ‘direct’ SER claim based on s. 15 (and section 7), although the majority judgment relied on its finding that there was insufficient evidence to establish discrimination.

Because the majority judgment turned on evidentiary issues, its precedential value has been questioned. Some scholars have suggested that the issues regarding insufficient evidence are somewhat specious as the case was a certified class action, and scholars and several judges held the contrary view that there was sufficient evidence to draw the necessary inferences. The decision also speaks more broadly to the kinds of evidentiary barriers that Court assembles in cases where inferences must be drawn to identify adverse impact. As noted above in connection with the *Taypotat* decision, this speaks to the challenges of mounting adverse effects discrimination or disparate impact cases under s. 15.

Despite this, the critical scholarship on the whole treats the majority decision in *Gosselin* as reflecting deeper barriers to the success of the claim. The general thrust of the commentary calls for a ‘critical reassessment’ of the value of asserting ESCR/SER in the current Canadian constitutional context. Hester Lessard characterizes the strong neoliberal strains in *Gosselin* as reflective of a political rationality in which any ‘post-liberal’ consensus about redistributive justice under s. 15 has clearly splintered and dissolved. This assessment speaks to the normative limits on the extension of state responsibility to address and remedy social inequality, referencing my earlier reflections on the extent and ultimate limits of the post-liberal inroads into the Court’s interpretive approach to Charter rights.

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836 See *Gosselin*, *supra* note 67, per Le Bel J., at para 407, observing that “the [impugned] distinction perpetuated the stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently and have no desire to get out of that comfortable situation. There is no basis for that vision of young social assistance recipients as “parasites”.”
837 *Taypotat*, *supra* note 26.
838 See e.g.: Brodsky, “Autonomy with a Vengeance”, *supra* note 179.
840 Lessard, “Dollars”, *supra* note 77 at 300.
The case again demonstrated the SCC’s resistance to claims involving social benefits with high costs of extensions, a theme raised in relation to different judgments in the scholarship. The Court’s concern with budgetary implications in respect of these benefits cases, raises the question of whether a claimant can win an SER equality claim if the cost to government is too high. The answer appears to be that they cannot.

The Auton decision is another clear rejection of a positive or direct ESCR/SER claim for unmet medical needs by a disadvantaged claimant group, with intersectional features in terms of the grounds of age and disability. As noted, the claimant group is one that has suffered historically from significant social exclusion (and presumably, socioeconomic subordination). As in Gosselin, the costs of extending this treatment were evidently of concern to the Court.

Intervenors from the DisAbled Women’s Network of Canada (DAWN) filed a submission that advanced both direct and indirect discrimination challenges in Auton. DAWN argued that the s. 15 breach arose from state inaction, namely, the lack of response of the provincial health care system to the needs of autistic children. The submission also challenged the health care system for disproportionately meeting the needs of the non-disabled population - by privileging services provided by doctors and hospitals and thereby disproportionately failing to meet the needs of the disabled population. DAWN directly challenged the formal equality of the provincial funding policy as well, which funds the list of funded services for all, including children who do not have autism or other disabilities. It further challenged how the health care system produces substantive inequality by not responding to the different needs of children with autism and/or other disabilities. The intervenors argued that this reflects a larger pattern of the health care system not responding to the needs of those with disabilities.

As a direct ‘positive’ SER claim that was denied, the outcome in Auton has been interpreted as holding that state omissions, such as the failure to include coverage that produces differential

842 Ibid.
843 Auton, supra note 509 at para 5.
844 Pothier, “Equality as a Comparative Concept”, supra note 485.
effects amounting to substantive inequality, and the failure to provide specific and adequate, even necessary, medical treatments for certain groups, are immunized from challenge under the equality guarantees.\(^{845}\) Simply put, the state cannot be compelled to implement different or additional services from those already provided. Moreover, even where there is an argument to say that the impugned provision is discriminatory, as in this case, the Court will heavily weigh the costs of such an extension, with the risk or likelihood that the claim will fail. Whether the claim in Auton is framed as an indirect positive claim (i.e. substantive inequality produced by provincial funding policy) or a direct positive claim, critics argue that it effectively erects a wall against such challenges.\(^{846}\)

These general trends towards ESCR/SER claims are evident in several ‘under-inclusion’ cases involving First Nations claimants, where the comparative and absolute needs of clearly disadvantaged claimant groups were unsuccessful in challenges to state initiatives of a redistributive nature, cases that were subjected to the Court’s application of minimal scrutiny of under-inclusive state action. Examples include Lovelace,\(^{847}\) as well as Cunningham,\(^{848}\) both of which involved challenges by similarly positioned and historically disadvantaged Indigenous groups in relation to the government’s failure to extend programs offered to other similarly placed groups. In both cases, the programs had material components that went in some measure towards addressing the social inequality of the recipient groups.

The case law also reflects an uneven approach to the important systemic inequality issue of gendered pay inequity. The Court’s decision to find as justified the infringement of s. 15 in two pay equity cases, is a further demonstration of these general tendencies.

\(^{845}\) Ibid.
\(^{846}\) Ibid.
\(^{847}\) Lovelace, supra note 773.
\(^{848}\) Cunningham, supra note 773. This was an underinclusive legislative scheme case. The claimants challenged the restrictive definition of who is a Métis under the Métis Settlements Act, which definition excluded those who became status Indians after November 1, 1990, the date the legislation came into effect. Jonnette Watson Hamilton framed the equality concern as follows: “Without regard to the effects of the law challenged [...] the intersection of discrimination on the basis of sex and Indian status might not be seen and cannot be appreciated.” “Interpreting Section 15(2) of the Charter: LEA’s Intervention in Alberta (Minister of Aboriginal Affairs and Northern Development) v. Cunningham” (Dec. 16, 2010) (blog) online: <http://ablawg.ca/2010/12/16/interpreting-section-152-of-the-charter-leafs-intervention-in-alberta-minister-ofaboriginal-affairs-and-northern-development-v-cunningham/> [last accessed April 18, 2018] at 3.
The constitutional challenges in both *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (NAPE)*\(^{849}\) and *CSQ*\(^{850}\) failed as a result of the Court’s minimal scrutiny of the state’s defences in each case under s. 1 of the *Charter*.\(^{851}\) Pay equity is a paradigmatic example of the redress of substantive inequality affecting women, and in particular, racialized or multiply marginalized women.\(^{852}\) In each case, the state’s defence of the denial of pay equity to such historically disadvantaged groups of women, succeeded.

In *NAPE*\(^{853}\) the Court accepted the government’s minimally elaborated defence of fiscal crisis,\(^{854}\) justifying the further delay in pay for work of equal value by the women claimants. In *CSQ*, the state’s delay in assessing equal pay for work of equal value in workplaces with no male comparator was found to be a justified infringement.\(^{855}\) That the denial of pay equity based on fiscal crisis, or on the basis of government delay, did not attract the s. 15 protection in this clear systemic inequality scenario, reflects significant deference to the state’s articulated interests.

The more recent *CSQ*\(^{856}\) decision illustrates once again the Court’s willingness to reduce the threshold for state justification in cases involving denials of these most paradigmatic substantive equality claims for women. Justice Abella’s majority decision in *CSQ* readily accepted, with minimal to no scrutiny, the Quebec government’s claim of a reasonable basis for the delay in operationalization of its commitment to achieving pay equity in workplaces where there are no male comparators. As the majority and the dissenting judgments all noted - particularly the majority, in strong terms - these are workplaces that commonly feature among the most low paid and therefore deserving female claimants of pay equity.\(^{857}\) In light of that

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\(^{849}\) [2004] 3 SCR 381 [NAPE].

\(^{850}\) *Supra* note 136.

\(^{851}\) Appendix B: Rights Provisions.

\(^{852}\) Lessard, “Dollars”, *supra* note 77.

\(^{853}\) *NAPE, supra* note 849.

\(^{854}\) Lessard, Dollars, *supra* note 77 at 324, where the Court “was willing to accept an admittedly flimsy amount of evidence”.

\(^{855}\) *CSQ, supra* note 136 at para 55.

\(^{856}\) *Ibid*.

\(^{857}\) *Ibid* at paras 59-60.
compelling reality and conclusion, it is disappointing that only former Chief Justice McLachlin refused to accept the state’s s. 1 defence.\textsuperscript{858}

The most recent successful ESCR/SER related case is the other 2018 pay equity decision in \textit{APP}.\textsuperscript{859} The facts and outcome of the case are reviewed above. As noted, the majority held that the 2009 amendments to pay equity legislation violated s. 15(1); were not within the scope of s. 15(2); and could not be justified under s. 1. In a decision marked by sharply worded judgments, particularly by the dissent,\textsuperscript{860} the Court strongly defended the importance of the Quebec government’s rectification of the systemic pay discrimination for women harmed by occupational sex segregation in the labour market.

After finding that a distinction was drawn on the basis of sex, Justice Abella held that the 2009 amendments had a discriminatory impact on women because they perpetuated their preexisting disadvantage by making the employer’s pay equity obligations “an episodic, partial obligation”,\textsuperscript{861} with any pay inequities between audits “going uncorrected until the next audit” (i.e. five years hence).\textsuperscript{862} She found that the amendments “effectively [gave] an amnesty to the employer for discrimination between audits”.\textsuperscript{863} As noted, additional provisions deprived employees of the information necessary to challenge their pay on the basis of bad faith or other arbitrary or discriminatory decision-making.\textsuperscript{864} Justice Abella rejected the Quebec government’s argument that a finding against it would effectively mean that it could not change the 1996 pay equity scheme, finding that the government could make any changes that complied with equality rights. The impugned amendments, by contrast, she found, “codifie[d] the denial to women of the benefits routinely enjoyed by men – namely, compensation tied to the value of

\textsuperscript{858} \textit{Ibid}, per McLachlin C.J., at paras 154-159. She questioned whether the government’s objective of ensuring employer compliance is “pressing and substantial”, and also found that the infringement failed at the minimal impairment and balancing stages.
\textsuperscript{859} \textit{APP, supra} note 153.
\textsuperscript{861} \textit{APP, supra} note 153 at para 33.
\textsuperscript{862} \textit{Ibid}.
\textsuperscript{863} \textit{Ibid}.
\textsuperscript{864} \textit{Ibid} at para 34.
their work”. In addition to rejecting the argument that the amendments were ‘saved’ or shielded from scrutiny by s. 15(2), Justice Abella held that the amendments were also not justified under s. 1 of the Charter.

Of the two recent pay equity decisions, from a substantive equality perspective, the APP decision is clearly the more positive. The majority took a ‘substantive inequality-based approach’ in each case in its description and shoring up of the pay equity schemes, as critical forms of government response to systemic discrimination in the private sector. The majority took a broad and generous approach to conceptualizing discrimination and inequality harms under s. 15(1).

Notwithstanding these positive features, the APP result does not reflect an expansion in the scope of s. 15 protection in positive rights and ESCR/SER terms. Given the emblematic substantive equality nature of pay equity and the Court’s familiarity with the issue, it was not required to either address unfamiliar realities or to undertake any doctrinal innovation. This raises questions about the replicability of the decision, particularly in light of the barriers to mounting successful disparate impact claims, and the potential ascendency of liberal tendencies evident in decisions like that of the plurality in Quebec v. A, with its emphasis on the ‘freedom’ of women to choose around their marital status and access to marital property, and in the dissenting judgments in the recent pay equity cases.

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865 Ibid at para 38.
866 Ibid at para 32: “Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect and there is no jurisprudential support for the view that it could do so.”
867 Majury, “Equality and Discrimination”, supra note 33 at 419.
868 See Lessard’s analysis of pay equity in her review of NAPE: “Dollars”, supra note 77.
870 Ibid, per minority judgment, on the question of s. 15(1), of LeBel, Fish, Rothstein and Moldaver JJ.
3.3.6.1 Prospects for successful ESCR/SER claims

Bruce Porter summarizes the struggle in relation to s. 15 as one where Eldridge “raised hopes” that a firm foundation would be established for ESCR/SER claims under s. 15. He concludes however that there have been “few applications of s. 15 to issues of poverty, access to food, housing or work”.

Martha Jackman and Porter further note that in denying leave to appeal from various decisions of the lower courts, such as the recent case in Tanudjaja, the SCC has virtually “read out” poverty rights from the meaning of equality. Tanudjaja challenged the situation of housing insecurity and the failed government housing policy in Ontario, asserting positive claims in the nature of ESCR/SER, under sections 7 and 15. The SCC however refused leave to appeal in 2015. Other appellate decisions, such as the B.C. Court of Appeal decision in another housing case demonstrate the refusal of another appellate court to consider any positive claim to adequate housing.

To borrow Judy Fudge’s assessment, the jurisprudence confirms that the SCC is (and Canadian courts are) not so much ambiguous but averse to redistributive action in the socioeconomic realm. The SCC’s normative vision and view of its institutional role is what limits the transformative potential of s. 15. To take just one example, the Court’s experiment with dignity amply demonstrated the outer limits of the provision’s radical and redistributive potential. As the scholarship establishes, dignity could capture such elements, and it need

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873 Ibid.
874 Tanudjaja OCA, supra note 34 and Tanudjaja SCC, supra note 34.
875 See e.g.: Jackman, “Constitutional Castaways”, supra note 199, contending that the Charter has been interpreted so as to impose no positive obligations on governments to protect or promote the rights of poor or other disadvantaged groups; Sheppard, “Inclusive Equality”, supra note 187 at 15; Matas, supra note 123.
876 Leave to appeal denied: Tanudjaja SCC, supra note 34.
877 Victoria (City) v Adams, 2009 BCCA 563, 313 DLR (4th) 29 [Adams BCCA] at paras 9-10, declining at para 97 to accede to the arguments of the Intervenors Poverty and Human Rights Centre, Pivot Legal Society and B.C. Civil Liberties Association, concerning positive rights to adequate housing.
878 Fudge, “Substantive Equality”, supra note 120 at 236.
879 Ibid.
880 Ibid at 241.
not limit equality to identity injuries. However, that was how it was (and other analytical devices have been) generally deployed: “to channel redistributive claims outside of the Charter’s guarantee of equality”, ⁸⁸¹ and to emphasize self-worth and integrity while downplaying material and systemic realities.⁸⁸² True to Hester Lessard’s observations about the contention over the s. 15’s ambit, what lies at the heart of this ‘ultimate constriction of the SCC’s vision’ is the contesting political rationalities in Canada.⁸⁸³ The liberal and post-liberal inroads into shifting from form to substance have thus been cut quite short.

⁸⁸¹ Ibid at 241-2.
⁸⁸² Ibid.
⁸⁸³ Lessard, “Dollars”, supra note 77 at 302. She refers to the contesting Canadian political rationalities as “welfare liberal” and “neoliberal”.
3.4 Conclusion

Understood as [a fundamental principle in Canada] [...], equality has no content other than the highly abstract content of entitlement to respect by the state for one's status as a rights-holder, and it contemplates an individual who is simply and fundamentally a rights-holding self, with no defining attributes, history, economic status, or social location. Equality, then, placed in the historical and material context of liberal political economies is formal equality. Substantive equality, formulated as a legal right, is oxymoronic. However, the substantive inequalities that characterize our daily lives and inform our political perceptions remain as formal equality's unstable subtext, persistently troubling and threatening to disrupt formal equality's ideological grip on the fluid discourses of law. 884

The animating concern of this chapter is equality's empty and contingent nature and the Court's interpretive choices in giving content to this fundamental principle. The Court's failure to deliver substantive equality is not without exceptions, at the margins, but the critical shortfalls in each of the essential elements are clear.

The long travail of equality formulations confirms that a substantive equality vision will not be the product of interpretive will or purposive musings alone. In the Canadian context, equality's "unstable subtext" is the liberal political economy, 885 charged by prevailing neoliberalist tendencies, that have reinforced the grip of formal equality in law. Still, the realities of 'real people's real lives' 886 of substantive inequality and discrimination continually threaten to disrupt that consensus, and the tensions and contradictions in this struggle have been on clear display in the battle for the heart of s. 15. This is clear, despite law's fluid discourses that obscure how the limits on the vision of equality are achieved, in practice. 887

884 Lessard, "Mothers", supra note 147 at 177 [emphasis added].
885 Ibid.
886 Egan, supra note 17, per L'Heureux-Dubé, J., at p. 552.
887 Lessard, "Mothers", supra note 147 at 207.
Chapter 4: Equality Understandings in the Inter-American Human Rights System

4.1 Introduction and Outline

As with the SCC’s jurisprudence, my examination of the Inter-American system’s equality vision commences from the equality theory set out in Chapter 3. However, rather than moving sequentially through each of the three elements and providing illustrations from the jurisprudence, I take a more integrated tack (the logic of which is explained below).

After setting out the methodological choices and research challenges of this chapter (Section 4.2) and introducing the IAHRS (Section 4.3), Part I touches on several foundational elements of the system’s equality approach. The first concerns the constituent elements of equality: the relevant equality provisions; equality’s roles or functions in the system’s rights analysis; and a general description of the analytical framework and where it falls within the equality spectrum. The same approach is applied to the system’s contextualized analysis, presenting key features, followed by the applicable texts and broad strokes of the system’s approach to implementing indivisibility and ESCR/SER, and the state’s positive obligations. This section is summative.

Part II examines jurisprudential highlights of the system’s substantivist approach to equality rights. I consider the system’s settled interpretive principles (evolutive, pro-person, and expansive remedies) that have contributed to this orientation, and two key doctrinal concepts; the rights to harbour a “life project” or “life plan” and a “dignified life”. These concepts emerged from and have reinforced the system’s focus on the suffering and harms experienced by certain vulnerable social groups “subjected to structural patterns of violence and discrimination”. The groups or situations that have held the system’s attention include: children and youth from impoverished backgrounds in urban settings; migrants, including

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undocumented migrant workers; exploited agricultural labourers; Indigenous peoples; persons with disabilities; gender injustices, including violence perpetrated by state and non-state actors. The system’s approach to the essential elements of substantive equality is thus considered in light of its commitment to address the social-structural conditions and vulnerability of such groups.

The order of operation in Part II is to introduce the original ‘life project’ and ‘dignified life’ decisions, before presenting cases drawn from different group-based themes. This is in lieu of presenting case law related to each of the three elements, sequentially, as in Chapter 3. My rationale is to lightly trace the trajectory of an unfamiliar jurisprudence from a relatively unknown system, and to situate equality, as a right or principle that is woven into the system’s unique rights (and multiple rights) analysis.

Finally, I consider throughout the ideological dimensions of the system’s equality jurisprudence. As stated in Chapter 1, there are strong indications that the system has embraced a vision and framework that is expansive in its protective ambit and consistent with the elements of substantive equality. This follows from the system’s unequivocal and substantivist commitments to the injustices it recognizes and requires the state to remedy.

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889 And other ‘ethnically’ diverse groups, such as Afro-descendant communities and Tribal peoples, see e.g.: OAS, IACHR, Report on Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American human rights system, OR OEA/Ser.L/V/II., Doc. 56 (2009) [Ancestral Lands and Resources IACHR Report].
4.2 Methodological Choices and Research Challenges in the IAHRS

4.2.1 Ambit of Sources of IAHRS Jurisprudence and Legal Standards

Chapter 4 draws on sources, beyond judicial decisions, which, in the project’s view constitute the Inter-American system’s legal standards. This includes the Inter-American Court’s decisions, both its advisory opinions and its judgments in contentious proceedings, as well as the Commission’s merits reports and precautionary measures reports. The paper also considers other Commission sources that are not the direct product of contentious proceedings, such as its systematizations of legal standards concerning equality and other related and relevant human rights issues (like poverty and violence), that are contained in thematic reports and country reports. (A further explanation of these different sources is set out below). The description of “soft law” could be extended to several of the latter sources.

The inclusion of sources beyond the Inter-American Court’s judgments is justified on several grounds. This fuller range constitutes the system’s precedent, according to key system observers and the system itself. Related to this is the complementary nature of the IACHR and the IACtHR, both of which influence one another and also express the system’s legal doctrine and its theoretical norms and interpretive approach.

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890 Merits reports set out the Commission’s conclusions with respect to the merits of petitions (filed by individuals and groups from OAS member country states) and contain recommendations to the state in question in terms of ensuring compliance with the violations of the American Convention or the American Declaration or other human rights instrument.

891 One such IACHR report is Legal Standards related to Gender Equality and Women’s Rights in the Inter-American human rights system: Development and Application, Updates from 2011 to 2014, OR OEA/Ser.L/V/II.143, Doc. 11 (2015) [Legal Standards Gender Equality IACHR Report], which reviews the impact of the system on the case law emerging from countries in the hemisphere related to gender equality and women’s rights. The Report focuses on discrimination and violence with gender-specific causes. Another is the Commission’s 2017 report on poverty which sets out the system’s evolving legal framework for the relationship of poverty and human rights: Poverty IACHR Report, supra note 44.

892 See for example, Rosa M. Celorio’s article concerning women’s rights decisions within the broader context of the system’s precedent, which Celorio describes as consisting “a diversity of pronouncements and recommendations issued by the Commission in the realm of thematic reports, country reports, and in the resolution of precautionary measures and a series advisory opinions and provisional measures adopted by the IACtHR”. Celorio, “The Rights of Women in the Inter-American system of Human Rights: Current Opportunities and Challenges in Standard-Setting” (2011) 65 University of Miami Law Review 819, at 821.

893 See e.g. Legal Standards Gender Equality IACHR Report, supra note 891.
Further, these sources reflect the system’s understandings of equality in a discursive sense. The task I have set is to generate a richer or “thicker”\textsuperscript{894} description of equality meanings and discourses in the system. This justifies extending my examination beyond the sources of law that are usually considered in formal law exercises. Because of the system’s broad mandate and dynamic way of operating, the Commission generates a rich equality analysis and discourse that is widely evident in documentation prepared further to its human rights monitoring and promotion functions. The materials deemed relevant contain the system’s theoretical understanding of complex regional inequality patterns like gender-based violence and the differentiated impact of poverty on certain groups.

These wider sources are also frequently cited in contentious proceedings. As such, the materials represent the workings of a rights system that challenges the normally dyadic or interstitial\textsuperscript{895} nature of rights-adjudication and refuses to narrow the contextual lens so as to exclude much of the underlying social conflict and inequality realities.\textsuperscript{896}

A final reason concerns the system’s openness to the input of non-state actors. The additional sources reflect in large part the system’s effort to actively incorporate less commonly articulated perspectives, in order to expand its rights analysis lens. As such, sources that contain the narratives of ‘real life’ and ‘real people’ are relevant to my project’s evaluation of the system’s equality talk and understandings.

\textsuperscript{894} The concept of “thick” description and interpretation as the content of what ethnographers do is a term usually attributed to Clifford Geertz, ed, \textit{The Interpretation of Culture} (1973) New York: Basic Books, 310. Socio-legal and other scholars have taken up this concept and adapted it to the cultural interpretation of law exercise, which is what this project attempts. I attempt what one author has advocated, namely, a “thick instrumental comparative legal research”, contrasted with a ‘thinner’ legal analysis, in part because of the nature of the system under study: Leckey, \textit{supra} note 95.

\textsuperscript{895} Moon, \textit{supra} note 27 at 574, referring to the reality (and associated limits) that equality rights are pursued in this way in Canada, at least in relation to litigation strategies.

\textsuperscript{896} Bakan, \textit{supra} note 35 at 48; Lessard, “Idea of Private”, \textit{supra} note 186 at 107.
4.2.2 Criteria for Selection of IAHRS Decisions and Merits Reports

This is not an instrumentalist or strict comparative law exercise (as noted in the Introduction). Thus, I take a liberal approach to the selection of IACtHR and IACHR cases. In addition, a further research challenge emerged from the system’s ‘multiple-rights framework’; the system’s jurisprudence does not reflect a compartmentalized approach to its rights analysis, such that one can delineate a discrete body of ‘equality jurisprudence’. Rather, the system tends to apply an integrated approach to rights claims with equality operating as a ‘structural’ or cross-cutting principle. While this has complicated the project, in furtherance of advancing a thicker description of the system’s equality meanings, I remained open to considering how equality rights and values are imbricated within the system’s rich substantive rights approach.

I thus examined cases involving an alleged violation of the stand-alone equality rights provision under Article 24 of the American Convention and under Article II of American Declaration. I also reviewed decisions that address violations of the non-discrimination language in Article 1.1 of the American Convention, which is most commonly applied in conjunction with the alleged violations of other fundamental rights. Because the latter ‘equality-related’ decisions are ubiquitous, and the scope of research would otherwise have been too extensive, I relied on scholarship and IACHR thematic reports to identify important equality decisions of this ilk (i.e. not based on the standalone provisions). Commission thematic reports on legal standards regarding equality, ESCR, poverty and human rights, access to justice and various

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897 This approach is critically assessed by Kerri Froc, “Watertight Compartments”, supra note 521 at 132-148.
898 Remaining open is also a function of the “messy business” of the research process and the task of discerning how the two systems might meaningfully talk to each other: Herbert M. Kritzer, “Research is a Messy Business’ – An Archeology of the Craft of Sociolegal Research” in Simon Halliday and Patrick Schmidt, Conducting Law and Society Research: Reflections on Methods and Practices (Cambridge: Cambridge University Press, 2009).
899 American Convention, supra note 98. See Appendix B: Rights Provisions.
900 See Appendix B: Rights Provisions.
901 This would have necessitated a review of most of the Commission’s and Court’s decisions to determine whether equality was a significant determinative issue, as many of the system’s decisions appear to address the principles of equality and non-discrimination at some level.
902 Legal Standards Gender Equality IACHR Report, supra note 891.
904 Poverty IACHR Report, supra note 44.
reports on Indigenous peoples and women, as well as my literature review, assisted with fine-tuning the research.

Ultimately, my case selections were guided by the criteria of significant difference and substantiveness as compared to the SCC’s jurisprudence. It follows that the project’s presentation of inter-American equality law is not exhaustive, but purposely selective and thus reflective of general tendencies.

Two additional observations concerning the project’s parameters are required. First, my literature review is somewhat narrow. The need to limit the project’s scope dictated this limitation, accepting that a closer examination of critiques of the system’s equality analysis would have generated additional insights. In undertaking my scholarship review, I relied on authors who are well-known in the system, such as former IACtHR jurists and Commissioners and system scholars and litigators.

A further challenge arose from the fact that some relevant materials are available only in Spanish. The English translations of certain IACtHR decisions are also not of the highest quality, whereas, the Spanish text of IACtHR judgments represents the original and is considered authentic. As my formal Spanish language training is limited, I mitigated this

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908 To be clear, I have not read all decisions of the IACtHR and IACHRS that touch on equality.
909 Examples of IACtHR jurists and former IACHR Commissioners include Victor Abramovich, James Cavallaro, Diego Garcia-Sayán and Dinah Shelton.
910 Examples include Bernard Dumaime, James Cavallaro, Ariel Dulitsky, Mario Melo, and Tara Melish.
911 This includes the literature, judgments and several reports. As an example, the IACHR’s important Poverty IACHR Report was only available in Spanish at the time I reviewed it: supra note 44.
913 This fact also presented challenges in terms of reading speed, comprehension and translation skills.
challenge by cross-checking English translations (where available) with original documents and consulting with a native Spanish speaker in instances where I was in doubt about the translation of a material issue. I acknowledge that some of the translations - both mine and the system’s - may be imperfect. However, I have taken the care that time permitted and do not believe there are any material issues that detract from my conclusions.

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I also relied on my own informal translations of Spanish-only materials, whilst attempting to limit my reliance on same in terms of direct citations in the text of the paper.
4.3 Introduction to the Inter-American Human Rights System

4.3.1 Organization of American States and the IAHRS

The IAHRS was established by the world’s oldest regional governmental organization, the Organization of American States (OAS), founded in 1948 pursuant to the Charter of the OAS (OAS Charter). The OAS was formed to achieve: “an order of peace and justice, promote solidarity, strengthen collaboration, and defend their sovereignty, territorial integrity, and [...] independence”. All 35 states in the hemisphere, including Canada, have ratified the OAS Charter and are thus OAS member states.

The two autonomous bodies that comprise the IAHRS are the Inter-American Commission on Human Rights (IACHR), headquartered in Washington, D.C., and the Inter-American Court of Human Rights, in San José, Costa Rica. The IACHR was established in 1959. It is a quasi-judicial body and an autonomous organ of the OAS, and has numerous functions. The Inter-American Court of Human Rights (IACtHR) is an “autonomous judicial institution” and was established in 1979. A further description of these bodies is set out below.

The OAS Charter established the purposes, membership and organs of the OAS, and also set out basic human rights principles, including the fundamental rights of the individual to equality,

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915 Antkowiak & Gonza, supra note 341 at 5.
917 Pursuant to Article 1 of the OAS Charter, OAS website: <oas.org/en/about/who_we_are.asp>.
918 This includes Cuba as of June 3, 2009, when a resolution was passed to annul the 1962 resolution that excluded the Government of Cuba from participating in the OAS. Member state OAS ratification information is found on the OAS website: <oas.org/en/member_states/default.asp>.
919 It follows that Canada is a member state, as of January 9, 1980, when it ratified the OAS Charter after having been an observer for 28 years.
921 The Court was created further to the ratification of the American Convention on Human Rights, and its organization, composition, jurisdiction and functions, and procedures are set out in Chapter VIII, Article 52-69 of the Convention. See OAS, Statute of the Inter-American Commission on Human Rights, 1 October 1979, O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 [IACHR Statute].
922 OAS Charter, supra note 916 Article 53: includes, inter alia, the OAS General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs.
human rights, economic rights and education. Additional human rights instruments further develop these principles, the primary of which are the American Declaration on the Rights and Duties of Man (American Declaration or Declaration), and the American Convention on Human Rights "Pact of San José, Costa Rica" (American Convention or Convention).

The American Declaration is not a treaty, and thus is not subject to ratification, in contrast to the American Convention. However, it is recognized as a source of international legal obligations for all OAS member states - and is considered to have ‘binding legal effect’ on all states - including states like Canada that are not a party to the Convention. These obligations arise from the human rights commitments set out in the OAS Charter. Member states are taken to have agreed that the content of the OAS Charter’s general human rights principles is contained in and defined by the American Declaration, as well as the customary legal status of the rights protected under the Declaration’s core provisions. The Inter-American Court has also held that the American Declaration applies to all OAS member states.

923 OAS Charter, ibid: see various provisions in the range of Articles 45-49.
924 Organization of American States, American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States May 2, 1948, OEA/Ser.L./V/II.23, doc. 21 rev.6 (1948) [American Declaration].
925 American Convention, supra note 98.
926 Antkowiak and Gonza, supra note 341 at 6. The thesis does not address the nature of this international law principle, either in relation to treaties or declarations or other questions concerning the force and application of soft law and jus cogens principles.
928 Other member states include many of the English-speaking Caribbean states like Bahamas, as well as Belize, Guyana and the United States. According to the Court’s website, 20 states have done so, and Canada is not among those them: <corteidh.or.cr/tablas/abccorte/abc/B/index.html> (at 6) [accessed 30 August 2018].
929 See e.g. OAS General Assembly Resolution 314, AG/RES. 314 (VII-O/77), June 22, 1977 (entrusting the Inter-American Commission with the preparation of a study to “set forth their obligations to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man”); OAS General Assembly Resolution 371, AG/RES (VIII-O/78), July 1, 1978 (reaffirming its commitment to “promote the observance of the American Declaration of the Rights and Duties of Man”); OAS General Assembly Resolution 370, AG/RES. 370 (VIII-O/78), July 1, 1978 (referring to the “international commitments” of OAS member states to respect the rights recognized in the American Declaration). See also Melish, “IACHR”, supra note 927 at 343.
930 Lare-Reyes et al. (United States) (2002), Inter-Am Comm HR, Case 12.379 or No 19/02, para 46.
The system is known for its tendency to liberally draw on regional and international human rights instruments that are external to the Inter-American system.\textsuperscript{932} Between these regional system\textsuperscript{933} and international human rights instruments, the IAHRS thus addresses a panoply of human rights derived from both generations of rights. And while the American Convention and the American Declaration are commonly viewed as CPR instruments, a wide range of ESCR are expressly referenced in each, and are protected in the IAHRS, both directly and, more often, indirectly.\textsuperscript{934}

To elaborate, in addition to the more ‘traditional’ CPR, such as the right to life (Article I),\textsuperscript{935} and the right to equality (Article II),\textsuperscript{936} the American Declaration expressly protects the rights to housing (Articles IX and XI); health (Article XI); education (Article XII); culture (Article XIII); work, fair remuneration; social security (Article XVI), property (Article XXIII); and special protection for mothers, children and the family (Articles VI and VII).

The American Convention also recognizes an extensive range of civil, political and social and economic rights. Its preamble further acknowledges the indivisibility of all rights\textsuperscript{937} and the Inter-American Court has recognized that ESCR are the “same in substance” as CPR and that “all


\textsuperscript{933} Another frequently cited regional instrument is the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available online at: <refworld.org/docid/3ae6b38f0.html> (last accessed 16 April 2019).

\textsuperscript{934} Melish, “IACHR”, supra note 927 at 340. For example, as noted, the American Declaration protects the rights to culture, work, health, education, leisure time, and social security.

\textsuperscript{935} Article I: “Every human being has the right to life, liberty and the security of his person.” American Declaration, supra note 924. See Appendix B.

\textsuperscript{936} Article II: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” Ibid [emphasis added].

\textsuperscript{937} American Convention, supra note 98. Preamble: “Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; [...]” [emphasis added]
[inalienable rights] must be promoted, guaranteed and protected”. 938 The express ESCR/SER in the Convention include the rights under Article 26 – reflecting one of 23 provisions - within the chapter entitled “Economic, Social and Cultural Rights”. This provision is derived from the rights set out in the OAS Charter,939 which as noted, references economic rights, such as the rights to education, work, to strike, collective bargaining, and to ‘material well-being’. Implicit rights in the OAS Charter include the rights to ‘adequate housing’, ‘proper nutrition’, ‘just labour conditions’, the benefits of culture, and the highest attainable standard of health. 940

Two other treaties are relevant to the case law I examine. These also incorporate both generations of rights: first, the Additional Protocol to the Convention in the Area of Economic, Social and Cultural Rights, known as the “Protocol of San Salvador”941 and second, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará (CBDP). 942 The implementation of the Protocol of San Salvador is not closely addressed, however, as it has been infrequently relied on in the system’s judgments to found specific claims of ESCR/SER. 943 Issues related to the Protocol’s justiciability and enforcement, and those of Article 26 of the American Convention, are not reviewed in depth as part of this project. Instead, I focus on the system’s ‘indirect approach’ to the implementation of ESCR/SER. 944


939 Article 26, American Convention, supra note 98. See Appendix B: Rights Provisions.

940 Articles 34, 35, 49, 50 of OAS Charter in Melish, “IACHR”, supra note 927 at 343-4.

941 San Salvador Protocol, supra note 198.

942 Inter-American Convention for the Prevention, Sanction and Eradication of Violence Against Women, known as, Convention of Belém do Pará [Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer, known as Convención de Belém do Pará] (1994) 33 ILM 1534 [Belém do Pará Convention or CBDP].

943 Melish, “IACHR”, supra note 927.

944 I do not closely address the justiciability and enforcement status of either the Protocol of San Salvador, supra note 198, or Article 26 of American Convention in my case law review. The latter relate to direct approaches to the implementation of ESCR in the system, which are less common and which represent a significantly complex topic in its own right; I focus instead on indirect approaches, as does much of the scholarship.
4.3.2 Inter-American Commission on Human Rights (IACHR)

The Inter-American Commission is mandated to promote and defend human rights in all OAS member states.\(^{945}\) It is comprised of seven independent human rights experts (Commissioners), each elected for four year terms by the OAS General Assembly from a list of candidates proposed by member states.\(^{946}\) The Commissioners serve part-time and in a personal capacity and the Commission meets annually for several ordinary and general sessions,\(^{947}\) usually at its headquarters.\(^{948}\)

The Commission has both contentious and promotional (including human rights monitoring) functions,\(^{949}\) and is competent to exercise its jurisdiction over all OAS member states.\(^{950}\) In terms of the former ‘case-based adjudication’, it acts as the first instance for victims of human rights violations who wish to have specific disputes adjudicated. Complaints by individuals or groups regarding human rights violations allegedly committed by an OAS member state come before the Commission through filing a petition. Petitioners must satisfy the Commission that they have exhausted the effective and available local (domestic jurisdiction) remedies as a key condition of their admissibility.\(^{951}\) The system’s approach to human rights adjudication is based therefore on the international law principle of subsidiarity, by which the system assumes jurisdiction only after OAS member states have demonstrated their inability or unwillingness to

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\(^{945}\) Melish, “IACHR”, supra note 927 at 339.

\(^{946}\) They may be re-elected for one additional term: American Convention, supra note 98: Article 62.3.

\(^{947}\) Melish, “IACHR”, supra note 927 at 339.

\(^{948}\) Commissioners serve on a part-time basis for four year terms: American Convention, supra note 98 Articles 34, 36-37; IACHR Statute, supra note 21 at Articles 2-3, 6; Rules of Procedure of the Inter-American Commission on Human Rights, Article 1.3, OEA/Ser.L.N/I.4 rev. 12 (2008) [IACHR Rules of Procedure]. They are elected by the OAS General Assembly but do not represent their countries.


\(^{950}\) ibid at 339.

\(^{951}\) Melish, “IACtHR”, supra note 938 at 378. In order for petitions to be heard on their merits by the Commission, they must first be admitted, which entails demonstrating that domestic remedies in the petitioner’s state have been exhausted: Article 31(1) of the IACHR Rules of Procedure, supra note 948. Article 31(2) elaborates on exceptions to this principle. Further to this, “[t]he jurisprudence of the Inter-American system clearly indicates that only those [domestic] remedies that are suitable and effective, if pertinent, in resolving the matter in question, must be exhausted.” See HTG Admissibility Report, supra note 50 at para 31.
address human rights challenges.\textsuperscript{952}

Individuals do not have direct access to the Inter-American Court. The Commission receives and processes the individual petitions first, with respect to admissibility\textsuperscript{953} and then on their merits, and where violations are found makes recommendations to the state in question. Where the state does not comply with its recommendations, the Commission will refer the matter to the Inter-American Court, provided that the case meets certain conditions. As of 2000, the presumption is that matters will be referred.\textsuperscript{954}

Where the state is not a party to the \textit{American Convention} and has not acceded to the Inter-American Court’s jurisdiction, the Commission cannot refer petitions to the Court. It follows that Canada is not subject to the Court’s jurisdiction and Canadian petitioners will not see their cases referred, however meritorious.\textsuperscript{955} In such cases, the Commission follows its usual course of issuing merits reports and where it finds non-compliance with the state’s human rights obligations, it undertakes follow-up monitoring (including, holding hearings, if needed) with the state and petitioners regarding its recommendations, with the aim of ensuring compliance and/or reaching a friendly settlement.\textsuperscript{956}

\textsuperscript{952} The Inter-American system’s relatively assertive and non-deferential approach to subsidiarity has been the subject of significant comparative commentary, particularly in relation to the European system.

\textsuperscript{953} The other admissibility threshold requirements include such jurisdictional questions as time and subject matter limitations and a \textit{prima facie} case.

\textsuperscript{954} An amendment to the IACHR’s \textit{Rules of Procedure}, supra note 948, in 2000 has resulted in a shift from the ‘sparing’ referral of cases to the IACtHR, to a requirement of referral by the Commission in all cases in which the State has both accepted the Court’s jurisdiction and has not complied with the Commission’s final merits-based recommendations: Article 44.1 of IACHR’s \textit{Rules of Procedure}. The only exception is for cases where ‘a reasoned decision’ against referral is provided by a majority of the Commission’s members. This has resulted in a significant increase in the Court’s workload, along with other changes in the Court’s own \textit{Rules of Procedure}, which authorize the direct participation of victims and their representatives in all stages of litigation: Melish, “IACtHR”, \textit{supra} note 938 at 372-3. According to the Court’s website, as of April 2018, the Court has adjudicated 354 decisions since its first decision in 1987 in \textit{Velásquez Rodríguez}, \textit{supra} note 104.

\textsuperscript{955} This is true of the United States and several of the English-speaking Caribbean countries (but not Jamaica).

\textsuperscript{956} \textit{IACHR Statute}, \textit{supra} note 921, Article 23(2): “If the friendly settlement referred to in Articles 44-51 of the \textit{Convention} is not reached, the Commission shall draft, within 180 days, the report required by Article 50 of the \textit{Convention}.” The Commission has “advisory jurisdiction” with respect to all OAS member states under Article 64 of the \textit{American Convention}. The case will ultimately be published in the annual report of the OAS: Gloria Orrego Hoyos, “Tools for Academic Research on Human Rights in Latin America: The Inter-American Human Rights System” (2015) Legal Information Management 108 at 110.
In addition to processing and referring petitions, the Commission has the authority to request that member states adopt “precautionary measures” to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition. The Commission has used this authority to intervene in cases raising civil and political rights issues, as well as social and economic rights. Furthermore, under Article 63(2) of the American Convention, in cases of extreme gravity and urgency the Commission may request that the Inter-American Court order the adoption of “provisional measures” to prevent irreparable harm to persons, even when the case has not yet been submitted to the Court. The measures issued by the Commission are not legally binding decisions but can be “influential” for the defendant states and region at large.

Aside from the foregoing, the Commission is the OAS’s main human rights advisory body and undertakes important rights monitoring and promotional activities. In exercising its extensive promotional functions, the Commission’s role is performed in a manner that appears to be flexible and responsive to the concerns raised by different state and non-state constituents. These include monitoring specific human rights situations of member state countries as well as human rights concerns of broader regional application. The Commission carries out on-site visits to member countries and publishes country reports that analyze the overall human rights situation, and help it to “appreciate first-hand the actual conditions in which people live and in which violations unfold”. Further, thematic hearings may be requisitioned by interested civil society or non-governmental human rights actors from member states.

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957 IACHR’s Rules of Procedure, supra note 948, Article 25; IACHR Statute, supra note 921, Article 23(2). These are issuable in serious and urgent cases: IACHR website, point 7: <oas.org/en/iachr/mandate/functions.asp>. Link to description: <oas.org/en/iachr/decisions/about-precautionary.asp>.

958 See e.g. Irene v. Argentina, Precautionary Measure No. 376-15 (July 7, 2016) [Irene], concerning a complaint regarding access to inclusive education; and Jorge Odin Miranda Cortez v. El Salvador (2009), Inter-Am Comm HR, Case 12.249 or No 27/09, a case involving medical treatments for a detainee.

959 Antkowiak & González, supra note 341 at 9.

960 Based on the author’s observations. See also Melish, “IACHR”, supra note 927 at 339, describing it as the “engine” of the system, and describing its exercise of its promotional and monitoring functions as “extensive”; “broad and flexible in scope”.

961 Ibid at 340.

962 Ibid at 340. An important example is the hearing requested by Native Women’s Association of Canada (NWAC) and Canadian Feminist Alliance for International Action (FAFIA) concerning the issue of Indigenous murdered and missing women.
The Commission also publishes thematic reports on important human rights topics, and maintains thematic and special rapporteurships on different human rights issues of regional interest. The Commission’s country and thematic reports make recommendations to states regarding such topics and are also systematize the system’s legal standards in areas such as equality rights, ESCR/SER, violence and access to justice, and poverty. These reports are complementary to issues arising from the system’s adjudication of individual petitions either before the Commission or the Court, and are often cited in such proceedings.

The Commission’s evolution of its role and functions is generally viewed as innovative, with emphasis placed on the dynamic interaction between litigation and the Commission’s monitoring and promotional functions. One commentator suggests that these mechanisms have allowed the Commission, and the system more broadly, to address the “larger structural, contextual or historic dimensionality of human rights abuse that would not necessarily be cognizable on its own, through the individual petition process”. A further observation is that the Commission is itself a source of the sociological evidence of generalized patterns of human rights violations affecting particular social groups, which evidence frequently forms the basis of decisions of the Commission and the Court in contentious and other processes.

Additional relevant features of the Commission’s functioning include its general practice that its merits reports will commonly impose on respondent states the requirement to formulate

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963 Convention, supra note 98, Article 41; IACHR Statute, supra note 921, Articles 9, 18; IACHR Rules of Procedure, supra note 948, Article 64.
964 As of 2018, current rapporteurships cover the rights of: Indigenous Peoples; Women; Migrants; the Child; Human Rights Defenders; Persons deprived of liberty; Afro-descendants and against racial discrimination; Lesbian, gay, trans, bisexual, and intersex persons. There is also a Special Rapporteurship on Freedom of Expression and a Unit on Economic, Social and Cultural Rights. Information at the IACHR’s website accessed on April 3, 2018: <http://www.oas.org/en/iachr/mandate/rapporteurships.asp>.
965 Legal Standards Gender Equality IACHR Report, supra note 891.
966 ESCR IACHR Report, supra note 903.
968 Poverty IACHR Report, supra note 44.
970 Melish, ibid at 340, making an observation made by others: Bettinger-López, “IAHRS Primer”, supra note 100 at 582.
policies to redress the underlying situations that gave rise to petitions. More specifically, the Commission has elaborated a “duty to address the structural problems that are at the root of the conflict analyzed in the case”. In its promotional role, the Commission engages extensively in dialogues with various local and international stakeholders and experts in making recommendations, and is seen to yield influence over the formulation, implementation and evaluation of member states’ public policies. In the view of one former Commissioner, the merits reports and associated processes have “enormous potential to set [legal] standards and principles, and to address situations involving the collective or structural problems that may not be adequately reflected in individual cases.”

4.3.3 Inter-American Court of Human Rights (IACtHR)

The Inter-American Court’s mandate is to apply and interpret the system’s primary regional human rights treaty, the American Convention. The Court has both contentious and advisory functions and its jurisdiction comprises ‘all cases concerning the interpretation and application of the Convention’. As noted, the Court regularly considers other regional system and international treaties. In terms of its relationship to the Commission, as the “ultimate interpreter of the Convention”, the Court is not bound by the Commission’s decisions regarding that treaty.

The Court is comprised of seven part-time ‘independent judges’ elected by the OAS General Assembly and serving a one-time renewable six-year term. The Court sits several times per year for several weeks, with one of these audiences taking place outside of Costa Rica in order

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972 Ibid at 12-13.
973 Ibid at 13.
974 IACtHR Statute, supra note 920, Article 1.
975 Supra note 98.
976 Melish, “IACtHR”, supra note 938 at 372.
977 Article 62.3 of American Convention, supra note 98. Appendix B: Rights Provisions.
979 Melish, “IACtHR”, supra note 938 at 372. The judges are nominated in their individual capacity by the State parties to the Convention.
980 Ibid at 372.
to increase awareness of its work.\textsuperscript{981} As noted, only those member states that have both ratified the \textit{American Convention} and recognized the Court’s contentious jurisdiction are subject to its authority.

The Court’s three spheres of action are the issuance of judgments in contentious proceedings, advisory opinions on general issues, and provisional orders.

The first and most well-known function is the issuance of binding judgments in cases concerning human rights violations by states as contained in petitions referred to it by the Commission. These proceedings are subject to enforcement and monitoring follow-up, including additional hearings concerning the Court’s findings and orders, and the review of additional evidence.\textsuperscript{982}

Second, at the request of member states or OAS bodies, the Court issues advisory opinions regarding the application of regional and international human rights treaties.\textsuperscript{983} Third parties may and frequently do make written representations in these matters. The Court’s advisory opinions are used to examine specific problems that go beyond discrete disputes in contentious cases, and help establish the scope of state obligations derived from the \textit{Convention} and other human rights instruments.\textsuperscript{984} The Court’s advisory function, which has a “broad scope” and is considered “unique in contemporary international law”, is intended to assist the members of the system “in fulfilling their international human rights commitments”.\textsuperscript{985} Several advisory opinions are emblematic in having established the foundations for such particular topics as the

\textsuperscript{982} Caravallo & Brewer, \textit{ibid} at 781. This project does not consider enforcement proceedings and related concerns.
\textsuperscript{983} As of May 2018, the Court has adopted 26 advisory opinions since 1982.
\textsuperscript{984} The purpose of the advisory proceeding is confirmed in the Court’s 2003 \textit{Undocumented Migrants Advisory Opinion, supra} note 14 at para 58: “[i]t is designed [...] to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American States [footnotes omitted].
\textsuperscript{985} \textit{Ibid} at para 64.
treatment of migrants and children, gender identity and expression and same-sex couples, and the framework for the system’s approach to equality and non-discrimination as a *jus cogens* principle. This mechanism has also been used to establish the legal frameworks for state policy development, as in the 2003 advisory opinion which established that undocumented migrants have certain basic human rights in the states to which they migrate.

Finally, the Inter-American Court has the authority to order provisional measures for the protection of individuals in imminent danger of rights violations, under both rights categories. These are described as extraordinary measures of interim protection aimed at avoiding imminent, grave and irreparable harm to individuals. Such measures are available even when the case has not yet been submitted to the Court.

### 4.3.4 Evolution of System’s Rights Agenda: Historical Socio-Political Forces

This overview sets the context for the contingency of the system’s hallmark outcomes and interpretive approaches - further to the project’s interest in the forces that have given rise to substantive understandings of equality. The IAHRs has developed its distinctive equality rights trajectory in response to the intense and competing political-economic forces that mark the region’s historical and contemporary experiences, as well as the level of interface between the system and non-state actors. In short, the IAHRs has evolved within the context of the significant political turmoil that has embroiled the hemisphere for many decades, particularly concentrated in the states of South America, Central America and Mexico. The system has been influenced primarily by developments in these regions, as opposed to the United States and

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986 *Ibid*; and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (2014), Advisory Opinion OC-21/14 Inter-Am Ct HR (Ser A) No 21 [Children Migrants Advisory Opinion].
991 Under Article 63(2) of the *American Convention*, in cases of extreme gravity and urgency the Commission may request that the Inter-American Court order the adoption of “provisional measures” to prevent irreparable harm to persons, even when the case has not yet been submitted to the Court. See Appendix B: Rights Provisions.
992 *Ibid*. 

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Canada. It is thus a predominantly ‘Latin American system’, and this is how the system reads to observers who are removed from that context. What turns on this is that the system’s thematic agenda strongly reflects the human rights challenges and distinctive eras of Latin American history.

Former Commissioner Victor Abramovich describes three distinct phases of the system’s history, viewed as overlapping rather than strictly consecutive. The first formative period focused on the widespread systematic human rights violations characteristic of much of Latin America in the decades of the 1950s through the 1990s. This era was overwhelmingly concerned with the perpetration of human rights violations under “systems of state terrorism” and within the context of armed conflict. The Court’s first decision of its contested cases, issued in 1988, reflects this disturbing reality. Velásquez Rodríguez v. Honduras (Velásquez Rodríguez) dealt with the widespread phenomenon of “enforced disappearances”. Angel Manfredo Velásquez Rodríguez was a university student who ‘was disappeared by’ the state in 1981, the Court determined, reflecting a common practice of enforced disappearances wielded not only by the Honduran state but across Latin America, along with other brutal tactics of repression.

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993 This is not to suggest that events in these regions were unaffected by external forces, such as those emanating from the U.S., which is clearly not the case, given the significant role of successive U.S. administrations in the domestic affairs of most countries in the hemisphere.
994 Nonetheless, many human rights concerns reflected in the system’s agenda reverberate across the Americas, and as such, the system is a rich source of equality rights understandings and legal principles for Canada.
995 See Abramovich, “From Massive Violations – SUR”, supra note 46 at 12, and “From Massive Violations – Aportes”, supra note 80. See also Claudio Grossman, supra note 969 at 50.
996 Dembour, supra note 105 at 509.
997 And earlier in the 20th century, certainly, in countries such as El Salvador and Guatemala.
998 The backdrop of the IAHRS’s evolution has been contrasted to that of the European system in its early years. Former Commissioner and system litigator, James Cavallaro, describes this formative period in these terms: “When the Inter-American Court came into being in 1979, it entered a region characterized largely by authoritarian regimes, mass atrocities, and violent human rights violations, such as massacres in indigenous communities and prisons, as well as widespread forced disappearances of political dissidents.” Caravallo & Brewer, “Reevaluating Regional Rights Litigation”, supra note at 774.
999 Abramovich, “From Massive Violations - SUR”, supra note 46 at 9 [emphasis added].
1000 Velásquez Rodríguez – Merits, supra note 104.
During this era, the IAHRS served as a “last resort of justice” for victims who had no alternative to pursue justice domestically. The Velásquez Rodríguez case is frequently cited as an illustration of the system’s hallmark judicial innovation, and is also considered foundational in developing broad ‘positive’ state obligations that are viewed as groundbreaking within international human rights law. The judgment’s important contributions to the system’s strong state responsibility doctrine are reviewed in Part I (Positive Obligations).

This first phase also spawned the system’s “remarkable pro-homine (‘pro-person’) interpretive approach”. This emphasizes the interests of human beings over state interests, as well as provides a strong methodological basis for delving deeply into the human suffering and lived experiences of vulnerable social groups (and rights claimants) and the context within which disputes or claims arise.

The next phase emerged with the post-dictatorial ‘democratic transitions’ in Latin America during the 1980s and early 1990s. The focus broadened to encompass the monitoring of political processes “aimed at dealing with the authoritarian past and its scarring of democratic institutions”. The system began to delineate the core principles to circumscribe the role of the military, setting limits on amnesty laws and developing the foundations for justice, truth and reparations for these historic patterns of systematic human rights violations. One

1002 At the time, no other system had dealt with the phenomenon of enforced or involuntary disappearances, which among other things, raises challenging evidentiary issues. The Court’s decision was unique in explicitly defining disappearances and establishing that such crimes led to specific actionable violations, in this case of the American Convention: Grossman, supra note 969 at 53.
1004 Dembour, supra note 105 at 509. Dembour contrasts the system’s approach in this regard to that of the European system.
1005 Part II refers to the system’s invocation of the notion of ‘human suffering’, in contradistinction to ‘strictly’ legal language and in express normative terms.
1006 In her comparative text on the European human rights system’s approach to migrants’ issues, Dembour contends that the IAHRS has made the social and political circumstances that exist on the ground the starting point for the conceptualization and realization of rights: Dembour, supra note 105 at 508.
1008 This issue – the necessity of constraining military jurisdiction - was central in the Rosendo Cantú and Fernández Ortega cases, supra note 9, a systemic problem that has thus persisted in countries like Mexico.
observer notes that this period’s focus on procedural requirements proved very useful from a human rights perspective in providing powerless individuals and groups with the means to advocate for their substantive rights.\textsuperscript{1010}

These first two phases had an indelible effect on the system’s contemporary human rights framework. According to Abramovich, the imprint is discernible in the system’s current agenda, which he frames as more varied and also attentive to rights issues viewed within a context of patterned “structural inequality and exclusion”\textsuperscript{1011} and the “attendant institutional deficits of transitioning democratic states”.\textsuperscript{1012} The IAHRS addresses a region that contains tremendous levels of systemic inequality and discrimination.\textsuperscript{1013} According to Abramovich, the system views this reality as “historically-based and reinforced by contemporary social forces that serve to exclude and marginalize certain sectors and groups or collectivities”.\textsuperscript{1014} Another observer describes the developing case law in the current phase as focused on vulnerable groups (like minorities, migrants, indigenous peoples, women, children).\textsuperscript{1015} Commentary appears unified as to the system’s sustained interest and “clear purpose” in centering and protecting particular groups and communities or sectors exposed to “adverse [living] conditions”\textsuperscript{1016} that impede the full and free exercise of various rights and freedoms.

Abramovich also contends that there has been an evolution from the formal equality notions of the second democratic transitional era, to the current equality principle “anchored” in “structural equality” or “material equality”.\textsuperscript{1017} This principle requires the state to abandon its purportedly neutral role in order to address instances of structural inequality through

\begin{itemize}
  \item \textsuperscript{1010} Dembour, \textit{supra} note 105 at 509.
  \item \textsuperscript{1011} Abramovich, “From Massive Violations - SUR”, \textit{supra} note 46 at 16.
  \item \textsuperscript{1012} \textit{Ibid}. Claudio Grossman also describes the current phase of the system as addressing issues of inequality and exclusion, such as poverty, noting that the Americas have “the least equitable distribution of wealth in the world”: \textit{supra} note 969 at 50.
  \item \textsuperscript{1013} \textit{Ibid}.
  \item \textsuperscript{1014} \textit{Ibid}.
  \item \textsuperscript{1015} Dembour, \textit{supra} note 105 at 509.
  \item \textsuperscript{1016} Among these commentators is Isaac de Paz González, whose recent text reviews the Inter-American system’s social rights jurisprudence: \textit{Social Rights Jurisprudence in the Inter-American Court of Human Rights} (Cheltenham, U.K.: Edward Elgar Publishing, 2018), at 1.
  \item \textsuperscript{1017} He uses both terms as an apparent substitute for “substantive equality”.
\end{itemize}
affirmative, positive measures.  

1018 The ‘structural’ or ‘material’ or ‘anti-subordination’ conception of equality is further explored in Part 1, and through case law illustrations in Part II of the chapter.

As a final observation, the role of Latin American civil society actors and non-governmental human rights organizations at the regional, member state and sub-state levels, has been critical to the system’s evolution along the directions outlined. Various authors have written about non-governmental groups’ unparalleled access to and involvement, beginning early in the system’s history. These actors’ ongoing role in driving the system’s human rights agenda and interpretive approach, and in facilitating access to the system by individual petitioners and lesser known but vital local organizations, has influenced the overall system, including, in my view, by incorporating more critical and ‘external law’ perspectives regarding the rights and interests of non-state actors and the voices of members of extremely marginalized and oppressed groups.

The system’s openness to a wide variety of perspectives is also evident in its unusual receptivity to third party written interventions, as well as the Court’s decision to regularly hold hearings and meetings in countries outside of its seat in Costa Rica. In addition to the Commission’s

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1019 Among the preeminent groups is CEJIL, which has been a leading advocate in many contentious cases brought before the IACHR and IACtHR (as in the Rosendo Cantú and Fernández Ortega cases, supra note 9), and in relation to consultations and processes regarding procedural and other substantive issues facing the system. Its role has included the important feature of supporting local human rights and civil society groups in member state countries that wish to access the system.
1020 These actors’ ongoing role in driving the system’s human rights agenda and interpretive approach, and in facilitating access to the system by individual petitioners and lesser known but vital local organizations, has influenced the overall system, including, in my view, by incorporating more critical and ‘external law’ perspectives regarding the rights and interests of non-state actors and the voices of members of extremely marginalized and oppressed groups.
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1022 The system’s openness to a wide variety of perspectives is also evident in its unusual receptivity to third party written interventions, as well as the Court’s decision to regularly hold hearings and meetings in countries outside of its seat in Costa Rica. In addition to the Commission’s
ongoing and direct monitoring functions, judges from the Inter-American Court have conducted onsite visits in relation to ongoing litigation, as in 2012, when several judges visited the Amazonian village of Sarayaku in Ecuador.

4.3.5 Canada and the IAHRS

This project touches on Canada’s relationship to the IAHRS in relation to equality. The cited examples relate to the rights of Indigenous peoples. How the system conceives of specific Canadian (in)equality problematics is relevant to this project’s critique of the shortfalls in the SCC’s framework for substantive equality, as well as contention over dominant equality conceptions in Canada more generally.

Canada ratified the OAS Charter on January 8, 1990, after having been an observer for 28 years. Its involvement in the system has been quite limited and the decision to not ratify the American Convention reflects this minimal engagement. Aside from the major limitation of not being subject to the Inter-American Court’s binding jurisdiction, Canadian petitioners face considerable challenges in surmounting the Commission’s admissibility threshold for petitions, relatively more challenging for Canadians than for petitioners from various other countries in the region. As noted in the Introduction, the system is also significantly unknown in Canada, both amongst civil society groups and within the legal community, which also accounts for the low number of petitions.

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1024 See the following links to review the Commission’s country and thematic investigations of rights realities: (a) for country reports: <oas.org/en/iachr/reports/country.asp>; (b) for annual reports: <oas.org/en/iachr/reports/annual.asp>; (c) for thematic reports: <oas.org/en/iachr/reports/thematic.asp>; (d) for materials arising from the rapporteurships: <oas.org/en/iachr/mandate/rapporteurships.asp>.

1025 This was in the context of the case of Kichwa, supra note 110, where the Court’s stated interest was in understanding the Kichwa people’s cosmology with respect to nature, and specifically the forest and the extractive industry developments that threatened it. For a perspective on the importance of this visit to the litigation, see the article by one of the petitioner’s counsel, Melo: “Voices”, supra note at 287.

1026 An example of this contention is the Canadian state’s theoretical framing of its Missing and Murdered Indigenous Women and Girls Inquiry (MMIWG), which according to some critics, is not adequate or framed in appropriate human rights terms – a view shared by this paper: See Coalition on MMIWG, News Release: “Enough is Enough: Coalition on MMIWG disappointed by Interim Report” (Nov. 10, 2017), online: <http://strandvegenhage.no/interim_report_mmiwg.pdf> (last accessed April 12, 2019).

Of relevance to this project is Canada’s current involvement in the system in respect of three issues that touch on equality: (1) The Hul’qumi’num Treaty Group’s (HTG’s) pending petition before the Inter-American Commission, which alleges that Canada violated the petitioner’s rights to property, culture, equality, and effective judicial remedies; (2) the Commission’s recent thematic hearings, 2014 report, and continued monitoring of the topic of murdered and missing Indigenous women and girls in Canada; and (3) the Commission’s engagement with Bill S3 concerning the remaining vestiges of gender discrimination in Canada’s Indian Act.

The first matter concerns the Canadian state’s alleged failure to address the HTG’s petitions for the return of the ancestral territories of the member First Nations during years of land negotiations with the governments of Canada and British Columbia. After being admitted to the Commission in 2009, the HTG’s petition proceeded to the merits stage. In a rare appearance

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1028 A violation of Article II of the American Declaration is alleged. The HTG matter was the second major point of personal engagement with the IAHRS, following my involvement with the Mexican cases in 2009-2010. I co-researched and wrote an amicus brief concerning the equality rights claim, in support of the HTG petition.

1029 See HTG Admissibility Report, supra note 50. The case addresses the stance of the Canadian and B.C. governments that most of the ancestral territories of the First Nations that make up the HTG are not subject to return and are not the subject of the negotiations that had been ongoing for many years. This position is based on the fact that most of the territories (originally seized by settler governments) were subsequently purchased from the state by bona fide purchasers for value.

1030 Missing and Murdered Indigenous Women IACHR Report, supra note 57.

1031 Bill S3 was passed by Canadian Parliament on December 4, 2017, Bill S-3, An Act to amend the Indian Act, in response to the Superior Court of Quebec in Descheneaux v. Canada, 2015 QCCS 3555.

1032 Indigenous women leaders Dr. Sharon McVor and Dr. Pamela Palmater appeared before the Commission on December 7, 2017 to provide testimony on the Canadian government’s failure to fully eliminate sex discrimination from the Indian Act. This hearing was requested as a follow-up to the 2014 Missing and Murdered Indigenous Women IACHR Report, supra note 57, and the Commission’s finding that this reality is one of the root causes of the crisis of murdered and missing Indigenous women and girls. See Feminist Alliance for International Action (FAFIA). Press Release: “Indigenous Women Leaders will Testify before IACHR on Canada’s Failure to Eliminate Sex Discrimination from the Indian Act” (May, 12, 2017), online: <http://fafia-afai.org/en/press-release-indigenous-women Leaders-will-testify-before-iachr-on-canadas-failure-to-eliminate-the-sex-discrimination-from-the-indian-act/> (last accessed April 3, 2018, 2019) [FAFIA Press Release, “Indigenous Women Leaders will Testify before IACHR on Canada’s Failure to Eliminate Sex Discrimination from the Indian Act”].

1033 The HTG is composed of and represents five communities: Cowichan Tribes, Halalt, Lyackson, Ts’uulaa-asatx, and Penelakut, its traditional territory encompassing part of southern Vancouver Island, and the Gulf Islands. See website, online: <bctreaty.ca/hulquminum-treaty-group>.

1034 HTG Admissibility Report, supra note 50. The Inter-American Commission took the position in its 2009 admissibility report that because Canada had ratified the OAS Charter, Canada is subject to the Inter-American Commission’s jurisdiction (at para 27).
and at the first-ever hearing of an alleged violation of Indigenous land rights in Canada, Canada attended before the Commission in October 2011. A decision is pending. How the Commission rules is of interest to this project, given the system’s progressive Indigenous rights jurisprudence and the petitioner’s equality rights challenge under Article II of the Declaration. I return to these Canadian issues following the review of IAHRS decisions that raise similar equality rights concerns, as well as the Commission’s thematic report (referenced above) concerning murdered and missing Indigenous women and girls in B.C.

1035 Canada has been the subject of a relatively small number of petitions filed against it over the years, even fewer of which have been deemed admissible and subject to a hearing or determination on the merits.

1036 The Canadian government’s representatives objected to the Commission’s jurisdiction on the basis of various limitation defences (including time), as well as by effectively re-arguing that the petitioners did not exhaust their domestic remedies and the matter should thus not have been found admissible. [Source is the author’s observation at the 2011 Commission hearing.] Counsel for Canada did not argue however that it is not subject to the Commission’s jurisdiction: Submission of Canada to the IACHR on the Merits of the Petition of the HTG, Case No. 12.734, dated August 26, 2010.

1037 The hearing was the first Commission hearing into the violation of Indigenous land rights in Canada: available online: <afn.ca/2011/10/27/webcast-of-landmark-international-hearing-into-canadian-land-rights-ca/> (last accessed April 3, 2018).

1038 Missing and Murdered Indigenous Women IACHR Report, supra note 57.
4.4  Part I: Foundational Elements of Equality Rights Framework

4.4.1  Introduction to Equality Rights: General Interpretive and Analytical Framework

This section is summative. It sets out the basic components of the Inter-American system’s equality vision, specifically: the provisions from the applicable human rights instruments; a summation of the system’s analytical framework and conception of its roles or functions; and its overall stance in terms of the equality spectrum introduced in Chapter 3. With two exceptions, the case law illustrations of these points are addressed in Part II.

4.4.1.1 Equality texts

The relevant texts are contained in the American Declaration¹⁰³⁹ and the American Convention.¹⁰⁴⁰

Article II of the Declaration provides for a stand-alone equality right and contains no other equality right of an ‘accessory’ or other nature: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”¹⁰⁴¹

The American Convention contains two relevant provisions, Articles 1.1 and 24.¹⁰⁴²

   Article 1. Obligation to Respect Rights
   1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

   Article 24. Right to Equal Protection
   All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

¹⁰³⁹  Supra note 924.
¹⁰⁴⁰  Supra note 98.
¹⁰⁴¹  Appendix B: Rights Provisions [emphasis added].
¹⁰⁴²  Ibid.
Article 1.1 is known as an “accessory right” and sometimes as the “non-discrimination principle”. It prohibits discrimination with respect to all rights protected in the Convention. As such, the analysis of an alleged violation is carried out in connection with another Convention right or rights. Article 24 is a stand-alone or “independent non-discrimination” clause. It prohibits discriminatory treatment in any action carried out by the state (i.e. all domestic laws enacted and in their implementation) regardless of whether this action falls within the scope of a specific Convention-protected right.

The Court and Commission have relied on both Convention provisions (i.e. either provision, together or separately) in their analyses of equality and non-discrimination. Further to the distinction between the two, some commentators have criticized the system’s lack of clarity regarding the conceptual and doctrinal differences in its determinations as to when either provision is properly invoked. Several scholars express the concern that greater clarity is needed to properly elaborate the right to equality, a perspective that sometimes conflates this dispute over the difference between the two provisions with other concerns, including the critique that the equality ‘test’ or analytical framework is unclear. Other commentators are less critical in relation to this debate. My assessment of this issue is that the lack of clarity, or confusion even, as between the system’s reliance on Articles 1.1 or 24, is not as problematic.

1044 The issue of the precise scope of Article 1.1 is not without contention. See Marianne González Le Saux and Óscar Parra Vera, ‘Concepciones y cláusulas de igualdad en la jurisprudencia de la Corte Interamericana. A propósito del Caso Apitz’ [Equality conceptions and clauses in the jurisprudence of the Inter-American Court. The purpose of the Apitz case] (2008) 47 IAIHRJ 146 at 151.
1045 Ibid.
1046 Antkowiak and Gonza, supra note 341 at 33. See also Norin Catrímán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 279 (May 29, 2014) [Norin Catrímán] at para 199; Yatama, supra note 41 at para 186; Atala Riffo and Daughters (Chile) (2012) (Merits) Inter-Am Ct HR (Ser C) No 239 [Atala Riffo] at para 82.
1047 Ibid.
1048 Le Saux & Parra Vera, supra note 1044 at 163-4. Additional criticisms include what this paper takes to be a legitimate concern, namely that Article 1.1, which contains the ‘without discrimination’ language, is invoked but is not apparently engaged much or at all in the decisions of the IACTHR or IACHR. Another concern is that different positions exist as to whether equality and non-discrimination are the same principle or not and whether they provide different legal protection.
1049 See for an example of the latter, Le Saux and Parra Vera, ibid at 149.
when one considers the outcomes and reparations awarded in specific decisions. To some degree the issue of the difference is also academic for the purposes of this paper, as part of the concern relates to the scope of the domestic application of the system’s legal precedent in respect of laws in member states (like Canada) that are not subject to the Convention. As previously noted, in such cases, the American Declaration (Article II) has application.

More central to this project is the system’s elaboration of its understanding of equality and non-discrimination under all three of the provisions, in terms of its assigned role(s) and where the operative understandings fall in relation to the poles of the equality spectrum.

4.4.1.2 Equality’s Roles: As jus cogens right, anchoring right, structural principle

There are several consonant and potentially overlapping framings of the role(s) of equality. The system has designated the right as a fundamental principle that has entered the sphere of jus cogens, the most authoritative classification under international law. This means that equality is peremptory and binding on all OAS member states, regardless of whether they have ratified the system’s human rights treaties. The system has also determined that the principle is inseparably connected to the state duties to respect and ensure human rights. The latter duties are part of the rights taxonomy considered below and are also said to permeate each act of the state.

The Court’s first articulation of the jus cogens nature of equality is contained in its ground-breaking 2003 advisory opinion, entitled Juridical Condition and Rights of the Undocumented

\[\text{\textsuperscript{1050} Ibid.}\]
\[\text{\textsuperscript{1051} Norín Catrimán, supra note 1046 at para 197: “The Court’s case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of jus cogens. It constitutes the foundation for the legal framework of national and international public order and permeate the whole legal system.” See also Undocumented Migrants Advisory Opinion, supra note 14 at para 101.}\]
\[\text{\textsuperscript{1052} Ibid at para 96: “[…] States must respect and ensure human rights in light of the general basic principles of equality and non-discrimination. Any discriminatory treatment with regard to the protection and exercise of human rights entails the international responsibility of the State.”}\]
Migrants (Undocumented Migrants Advisory Opinion). The opinion begins by referencing the Court’s earlier jurisprudence concerning equality, which was framed around notions such as the individual’s “essential dignity” and the problem of societal hierarchies of privilege and subordination. The centrality of equality is thus expressed not only in terms of the ubiquitous value of dignity, but the proscription against privileged and hostile treatment that is meted out according to the perceived superiority and inferiority of different groups.

The Court described the fundamental nature of the principle at the current juncture in the evolution of international law, “[…] as belonging to jus cogens, “because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws”.

Potential doctrinal differences and the relationship between the jus cogens nature of equality and several of the system’s other formulations, are not closely examined in this paper. These framings of equality’s role(s) appear to be consonant and similar, for example, the notions that equality is a “rule” or “general norm”, an “organizing principle”, an “anchoring principle”, a “structural principle”, and “the platform” on which all other rights are

1053 Ibid at para 101.
1054 Ibid at para 87, citing various earlier decisions.
1055 Ibid, citing various earlier decisions [emphasis added]: “The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights that are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.”
1056 Ibid at para 101.
1057 Ibid.
1059 Undocumented Migrants Advisory Opinion, supra note 14 at para 101: “organizing principle for societies”, and “the upon which legal frameworks are – or should be – built”: Antkowiak & Gowza, supra note 341 at 32.
1061 Clifford, supra note 48 at 9.
erected (especially ESCR). In his concurring opinion in the *Undocumented Migrants Advisory Opinion*, Justice García-Ramírez describes equality and non-discrimination as “reference points, constructive elements, interpretation criteria, for the protection of all rights”. Again, the paper does not decide whether these are essentially the same characterizations, but does consider that equality’s roles or functions appear distinctive and enlarged.

Within international human rights law at large, equality has been characterized as a “structural principle”. Jarlath Clifford contends that it functions as a “conceptual framework” for understanding and analyzing human rights issues and for justifying human rights decisions. Further, under this formulation, equality is said to serve both a procedural function, in terms of prescribing the application of human rights, and a substantive function, “by setting out the scope and nature of human rights obligations”. This formulation appears to be consistent with another international law notion of equality as a “cross-cutting obligation” and essential to the effective enjoyment and exercise of all rights (including ESCR/SER). As Part II demonstrates, these notions are consistent with the inter-American jurisprudence. For example, in the section on Indigenous rights jurisprudence, I consider the analytical framework of several scholars that positions the system’s equality analysis as both a ‘condition’ and an ‘objective’.

I further note the system’s clear preference for a ‘multiple rights’ form of analysis, one that combines the adjudication of multiple rights claims rather than separates out the analysis of the alleged violation of each right, which is consistent with its tendency to integrate the equality principle within its rights analysis.

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1064 Clifford, supra note 48 at 15.
1065 Ibid at 1.
1066 *ICESCR* General Comment No. 20, supra note 335.
4.4.1.3 Where equality sits on the spectrum

In terms of where the system’s equality vision sits on the formal-substantive equality spectrum, several scholars and the IACHR itself contend that there has been a discernible “movement” in the direction of “structural” or substantive equality. The paper forms a similar conclusion.

Narrower versions of equality – which the system has at times framed as ‘arbitrary distinctions and differences in treatment’ - are understood to be of some, often limited, value.

The system has also described its core equality vision as one of anti-subordination, as have some observers. The Commission did so for example in its 2007 thematic report on access to justice by women victims of violence, in the context of the system’s agenda to end “women’s subordination and the perpetuation of gender hierarchy”. The Commission emphasized the limited utility of narrow versions of equality to challenge deeply rooted social concepts regarding women’s role in society.

The anti-subordination approach is seen to support and encourage the critical examination of apparently neutral standards and practices based on the impact on the affected group(s) as a

1068 Abramovich, “From Massive Violations – SUR”, supra note 46 at 17. I note that the terminology of “movement towards” is used, as opposed to a definitive statement to the effect that this is the sole or invariably applied understanding.
1069 “… whereby difference in treatment is understood as any distinction, exclusion, restriction, or preference”: J.S.C.H and M.G.S. v. Mexico (2015), Inter-Am Comm HR, Case 12.689 or No 80.15 [JSCH] at para 83. See also analysis of Le Saux & Parra Vera, supra note 1044.
1070 The Commission has described formal equality as being consonant with the “principle of transactional fairness in the distribution of scarce opportunity among competing candidates where enumerated grounds like gender are not a factor”: Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at para 72.
1071 Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at para 76; For example, Poverty IACHR Report, supra note 44 at para 161.
1073 Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at para 76.
1074 Ibid at para 75.
1075 Ibid at para 98.
whole. According to the Commission, the system has consistently affirmed the principle that indirect discrimination is prohibited, which it defines as taking place ‘when apparently neutral or general formulations of “laws, actions, policies or other measures” exert disproportionate impact on “certain groups”’. The system’s focus on effects or impact on rights-holders and its express consideration of adverse or disparate impact and indirect forms of discrimination is examined in relation to specific cases in Part II. By way of summary, however, there are clear indications that the system is generally attuned to examining systemic patterns of disparate impact.

As noted in my review of the system’s historical stages, former Commissioner Victor Abramovich contends that the current human rights agenda is “anchored” to “material” or “structural equality”. Abramovich attributes this orientation to the IAHRS’s recognition of the region-wide contextual reality that certain social groups and sectors are systemically vulnerable and “disadvantaged in exercising their rights, owing to de jure and de facto obstacles”. According to Abramovich, the system has tended to situate individual claims within the context of these “pervasive patterns of structural inequality, exclusion, and discrimination”. This is a view that has been further developed by several other scholars, upon whose analysis I heavily rely.

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1077 JSCH, supra note 1069 at 90. In addition, in assessing measures that the State claims are neutral, it is important to evaluate the effects of such measures on certain persons and whether they have a disproportionately negative impact. See: IACHR, Application to Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, para 87.


1079 Ibid at 20.

1080 Ibid.

1081 This commentary contends that the system’s increasingly substantive conception of equality, several explicitly considering its redress of both material and symbolic (in)equality harms, and including the dimensions of inequality harms (and injustices to be redressed) that are elaborated by equality theorists like Nancy Fraser and Iris Marion Young. See for example: See for example, Clérico & Aldao, “Equality as Redistribution and Recognition”, supra note 300; Laura Clérico, Liliana Ronconí and Martín Aldao, “Hacia la reconstrucción de las tendencias jurisprudenciales en América Latina y el caribe en materia de igualdad: Sobre la no-discriminación, la no-dominación y la redistribución y el reconocimiento” [Towards a Reconstruction of equality case law trends in Latin American and the Caribbean: on non-discrimination, anti-subordination, redistribution and recognition] Jan-Jun 2013) 9(1) Revista Direito GV115 at 137 [Clérico, Ronconí & Aldao, “Towards a Reconstruction of Equality Case Law”].
As part of the structural re-interpretation of the equality right itself, Abramovich views the IAHRS as having transitioned from a singular focus on the formal notion of equality as non-discrimination – developed during the post-dictatorship phase – to an equality conception that constitutes the “protection of subordinated groups”, 1082 or vulnerable social groups, the more common term. The ambit of protection is thus avowedly asymmetrical and ‘non-universal’. Indeed, Abramovich describes the system’s equality agenda as having broadened to, “[give] voice to the weakest sectors, to those excluded from the system of social or political representation, who are unable to exert a powerful presence in the political sphere, who are beyond the reach of social and legal protection systems, and who feel that the rules of the political game reproduce social injustices rather than remedying them.” 1083

The system has consistently paid attention to this pervasive reality that some groups are unable to effectively exercise their rights and freedoms, not just in de jure but de facto (“real life”) terms. According to Abramovich, the concern with de facto barriers to the effective exercise of human rights by certain vulnerable groups is a central theme of the system’s inequality problematic and agenda. 1084 The paper confirms this stance.

The tendency is thus to unequivocally extend the protective ambit only to certain situations and systemically vulnerable groups. Further to the analysis of Ángeles Barrère Unzueta, 1085 the necessary redress under the system’s vulnerability framework is the achievement of rights and power, as opposed to the more individualized acquisition of resilience. 1086 There is, in other words, consensus regarding the beneficiaries of the protection and relative clarity about its scope, in terms of the harms and interests that engender protection. I consider the types of harms and interests more closely in connection with the system’s approach to the second and

1082 Ibid.
1083 Abramovich, “From Massive Violations – Aportes”, supra note 80 at 29.
1086 Ibid.
third elements, however, I first consider the system’s approach to context and the parameters of its contextualized analysis.

4.4.2 Element One: Place of Context and Contextual Analysis

As noted, the system has unambiguously recognized the pervasive patterned non-exercise or impeded exercise of specific groups’ rights in conditions of de facto inequality throughout the region.\(^{1087}\) It views this reality as a structural feature of these groups’ lived experience and social conditions. The system’s contextualized analysis is thus layered and multidimensional, and pays attention to the historical and contemporary realities of marginalized or multiply marginalized groups. This broader background is taken to be relevant to the social trajectory of an individual claimant\(^{1088}\) in respect of the group or groups with which they are associated. The system’s consistent attention to the rich details of the region’s contexts of structural socioeconomic inequalities is readily observable in the system’s soft law and jurisprudence. Its embrace of contextualism as a methodological framework is thus generally unabridged, although there are critiques of the analysis in certain cases, as being insufficiently intersectional or multidimensional.\(^{1089}\)

Above all, the system’s contextual analysis is claimant-centred (as opposed to state-centred); attention is placed on the claimant’s trajectory and circumstances in terms of that claimant group’s identity, whereas the state’s interests play a largely minor role in the analysis. This is a function of the system’s lauded “pro homine” or ‘pro-person’ interpretive approach, which ensures that the rights of human beings are given central consideration and interpretations are the least restrictive and in their favour.\(^{1090}\)

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\(^{1087}\) Abramovich, “From Massive Violations – Aportes”, supra note 80 at 27.


\(^{1089}\) See e.g.: Sosa, supra note 257 and Acosta-López, supra note 1801.

\(^{1090}\) The principle is drawn from the American Convention’s express interpretation standards in Article 29: Feria-Tinta, supra note 47 at 444. The pro-person principle means that the interpretation of human rights instruments must be undertaken in the least restrictive manner. In addition, the system has taken seriously the prescription in Article 29(b) of the Convention, which precludes the restrictive interpretation of rights: Grossman, supra note 969 at 61. Taken together, the interpretation of provisions is based on the “values the IAHRS seeks to safeguard” from the “best perspective for the protection of the individual.” See also CEJIL, La protección de los derechos
Related to this, there is a clear orientation towards situating apparently singular instances of rights violations (including CPR, such as the loss of or taking of a life), within a broader context. This approach has allowed the system to ‘re-read’ rights claims that appear at first glance to be isolated (individualized) instances of the violation, and in particular of conventional CPR.

Another observation concerning the system’s contextual analyses is the tendency, in attending closely to the concrete details and specificities of the claim, to consciously reject abstract juridical formulations that are common to legal analysis. Indeed, in certain instances, IACtHR justices have expressly eschewed the deployment of a rigid and abstract interpretive approach. In various decisions, judges articulate the Court’s understanding that the requisite interpretive exercise entails significant effort in order to fully understand the dimensions of the harms and suffering at issue in specific claims.

4.4.2.1 Theoretical framework for poverty and human rights

Finally, I consider the system’s general approach to the contextual element of economic inequality or poverty. A unique tenet of the system’s equality vision is its growing emphasis on economic realities as part of the relevant contextual framing and its developing normative framework for poverty and human rights. In September 2017, the Commission issued a report setting out the system’s ‘conceptualization and legal framework for poverty from a human rights perspective’. The Report on Poverty and Human Rights in the Americas (Poverty IACHR Report) represents the IACHR’s effort to systematize the developing efforts to address poverty that are reflected in the jurisprudence. The Poverty Report sets out the system’s human rights based analysis of the entrenched regional patterns of poverty based on social groups,

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1091 Examples include Judges Cançado Trindade, Abreu-Burelli, García-Sayán, García Ramírez.

1092 Poverty IACHR Report, supra note 44.

1093 Ibid.
including Indigenous and Tribal peoples, migrants, racialized women, and people with disabilities.¹⁰⁹⁴

As a brief elaboration of key legal standards that express the system’s recognition of the interrelationship between poverty and equality and other rights protection, the system is analyzing poverty in the following respects: (i) as a generalized violation of all rights and an obstacle to the exercise of other rights in conditions of equality; (ii) a cause and contributor or aggravant to human rights violations and subordination; (iii) a prohibited ground in certain circumstances; and (iv) a consequence of human rights violations, including discrimination and inequality. I consider how this set of evolving standards is playing out in the jurisprudence in Part II.

The Commission maintains that the system has been “progressively addressing poverty and extreme poverty affecting a significant number of people in the Americas”.¹⁰⁹⁵ It reiterates the system’s “longstanding” position that poverty is a “generalized violation of all human rights, civil and political, as well as social, economic and cultural rights. The Commission connects poverty to equality because it creates obstacles to the exercise of human rights by all individuals “in conditions of real equality”.¹⁰⁹⁶ The system characterizes the effective exercise of rights by all persons as the de facto exercise”, which is what the system mandates.¹⁰⁹⁷ The Poverty Report affirms that the high level of structural discrimination and social exclusion experienced by certain groups in a situation of poverty operates to render “illusory their participation as citizens, their access to justice and the effective enjoyment of human rights”.¹⁰⁹⁸ Aside from the concern about human suffering, the system’s preoccupation with poverty from a human rights perspective thus centres on the intensely adverse effects on both CPR and ESCR, in terms of their effective exercise by members of vulnerable groups.¹⁰⁹⁹

¹⁰⁹⁴ It also examines public policies on poverty and human rights and access to justice.
¹⁰⁹⁵ Poverty IACHR Report, supra note 44 at 1.
¹⁰⁹⁶ Ibid [emphasis added]. Note: all translations of this report are informal and the author’s.
¹⁰⁹⁷ Ibid.
¹⁰⁹⁸ Ibid at para 3.
¹⁰⁹⁹ Ibid at para 2.
4.4.3  Approach to False Binaries: Striving for Coherence

The following sections introduce the system’s stance towards several key doctrinal concerns endemic to equality rights conversations. These are: the role of the state; the approach to indivisibility and the justiciability of ESCR/SER; the separation between public and private; and negative-positive rights.

4.4.3.1 Indivisibility and the enforcement of ESCR/SER

Statements of the system’s express commitment to the application of indivisibility and the enforcement of ESCR/SER appear in decisions of both bodies\(^\text{1100}\) and in Commission thematic reports, such as the Poverty Report.\(^\text{1101}\) As noted, the latter sets out the system’s position that the violation of ESCR/SER generally entails a violation of CPR.\(^\text{1102}\) Further, the system’s normative framework has progressively established that poverty and extreme poverty potentially impair both rights categories, and that overcoming these impediments is central to the effective enjoyment of human rights by all.\(^\text{1103}\)

As with most other rights adjudication systems at the national and supranational levels, however, the IAHRS has tended to not embrace the direct implementation of ESCR/SER.\(^\text{1104}\) This is partly for textual and doctrinal reasons\(^\text{1105}\) and there are also pragmatic reasons that this

\(^{1100}\) See, for example, the Court’s decision in IACHR, Villagrán Morales et al. v. Guatemala (“Street Children”) Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999) [Street Children - Merits], concurring opinion of Justice Cançado Trindade at para 4.

\(^{1101}\) Poverty IACHR Report, supra note 44.

\(^{1102}\) Ibid at para 113.

\(^{1103}\) Ibid at para 2.

\(^{1104}\) There are examples of the direct enforcement of rights, but these are not addressed herein.

The system has instead, at some level, enforced ESCR/SER through indirect strategies. This approach reflects its “reinterpretations” or “socially mindful readings” of selected CPR. Although there are exceptions already as well as indications, according to some scholars, of a recent shift towards more direct approaches, this thesis does not closely examine that purported trend.

In essence, indirect approaches entail “the protection of one right through the expansive interpretation of another one”. The strategy is to reinterpret one or more CPR (such as the rights to life or property) to include social rights elements. As part of this orientation, a substantive conception of equality and non-discrimination is applied in a structural, cross-cutting manner so as to interpret other rights claims substantively and expansively.

Scholars criticize the system’s preference for indirect strategies, arguing in favour of a direct approach. Others, however, take the position that the system’s stance is politically approach to the justiciability of ESCR is pragmatic and a defensible approach and that a more direct approach is not likely to yield better results, whereas Melish takes the opposite view.

The reasons are political and relate to the IAHR’s legitimacy, and the significant challenges it faces in a region that continues to experience serious human rights problems and the vestiges of authoritarianism. For insights concerning these challenges, see Cavallaro & Schaffer: “Less is More”, ibid.

Ibid.

Abrahamovich, “From Massive Violations – SUR”, supra note 46 at 17. This is also known as the “indirect approach”: Cavallaro & Schaffer, “Less is More”, ibid at 255. This article conceives of two applications of the indirect approach to advancing ESCR. The first employs the non-discrimination principle, and the second seeks to incorporate ESCR elements within the scope of CPR: Ibid, 263. There has been debate over whether the indirect approach is problematic and should be jettisoned in favour of a direct approach.

See for example, de Paz González, supra note 1016 at 123-145 in relation to health and education. See Melish, “IACHR”, supra note 927 and “IACtHR”, supra note 938.

De Paz González, ibid at 123, notes that apart from what he calls “restorative measures” issued in certain Indigenous rights and children rights case law, the Court had not “focused directly on education, health or labour rights.” Further, he contends that “[i]t was not until 2013, in the case of Suárez Peralta v. Ecuador (2013) (Merits) Inter-Am Ct HR (Ser C) No. 261 [Suárez Peralta] when the IACtHR unveiled guidelines of ESR direct justiciability, in which, for the very first time, Judge Eduardo Ferrer Mac Gregor Poisot proposed a complete theoretical and normative approach to uphold the enforceability of Article 26 ACHR in the context of the right to healthcare and positive State’s obligations.” This latter shift he views as a significant advance towards the direct adjudication and interpretation of SER.

This terminology is used in Cavallaro & Schaffer, “Less is More”, supra note 1105 at 255. His article conceives of two applications of the indirect approach to advancing ESCR. The first employs the non-discrimination principle, and the second seeks to incorporate ESCR elements within the scope of CPR (at 263).

De Paz González, supra note 1016 at 141.

Cavallaro & Schaffer, “Less is More”, supra note 1105 at 263.

Melish, “Rethinking” and “Counter-Rejoinder”, supra note 1105.
pragmatic, and that a direct ESCR/SER enforcement approach is unlikely to succeed.\footnote{Cavallaro & Schaffer, “Less is More” and “Rejoinder”, supra note 1105. See also: Feria-Tinta, supra note 47. This affirms the contingent nature of the IAHRS’s interpretations and confirms that there are outer ideological limits to its rights understandings.} This paper does not examine the merits of this debate other than to indicate that the system’s approach to ESCR/SER appears distinctive, and, importantly, goes a distance towards the recognition and enforcement of elements of ESCR/SER.

According to human rights scholar, Mónica Feria-Tinta, several factors have led to the level of justiciability/indivisibility observed, including key theoretical assumptions.\footnote{Feria-Tinta, ibid.} The central one is the system’s recognition that the separation of the rights categories is patently artificial and not in keeping with reality of certain groups’ lived experience. The system’s theoretical framework acknowledges that CPR and ESCR are interrelated, \textit{in fact}, which allows it to undertake a relatively coherent approach to adjudication. A related essential premise is that the exercise or non-exercise of certain rights (and of ESCR in particular) affects the exercise or non-exercise of rights in the CPR realm.

Feria-Tinta thus confirms the system’s recognition of the “legal fiction” of the rights categories being separated in real life and real cases.\footnote{Ibid at 432, 435.} As she frames it, the system’s acceptance of this reality is based on the evidence that the socioeconomic situations of vulnerable groups profoundly limit their ability to participate in society as “peers”.\footnote{Ibid at 435.} The system’s acknowledgement of this provides the analytical link between these \textit{de facto} material realities and the laboured exercise of human rights more generally.\footnote{Poverty IACHR Report, supra note 44.}

As I explore in Part II, the system has also challenged this dichotomy through the development of an enhanced due diligence doctrine and state responsibility doctrine, which considerably extends state obligations for the acts of private actors and the operation of subordinating ‘societal norms’. The domestic violence jurisprudence is at the leading edge of the system’s deconstruction of the notion that states should refrain from acting in the so-called private,
including the familial sphere. Further, the system has challenged the notion that states are not obliged to act to address pre-existing norms and practices or to proactively act to reverse situations that reinforce same.

Aside from these important theoretical foundations, Feria-Tinta further credits the system’s ability to make ESCR/SER justiciable through an ‘indivisibility of rights approach’,\(^\text{1120}\) to its treaty interpretation principles,\(^\text{1121}\) its state responsibility (or accountability) doctrine, and its expansive approach to remedies.\(^\text{1122}\)

One of these interpretive principles was previously considered, the pro-person approach. A further interpretive foundation is the system’s evolution of the Article 1.1 general state obligations ‘to respect and ensure’, which has led to an expansive state responsibility doctrine and state obligations to develop responses to address ESCR/SER violations. The system’s clear positive rights orientation has moved well beyond the traditional notion of the state simply upholding negative liberties through the restraint of state action.

Observers also point to the system’s distinctive interpretive principles as permitting it to ‘make ESCR justiciable’ by constructing meaningful, proactive and SER-based remedies, rather than pointing to the lack of remedies, which simply begs the question of justiciability.\(^\text{1123}\) The system’s development of expansive reparation measures reflects this determination to effect the justiciability of ESCR. Feria-Tinta opines that the “new era of effectively dealing with violations of ESCR” and the system’s substantive interpretations and “integrated approach to rights”, derives from its rejection of the common idea that ESCR are policies rather than rights.\(^\text{1124}\) In her view, this notion that ESCR are not justiciable because they are ‘rights without remedies’ has been discredited by the system’s production of remedies that address such violations.\(^\text{1125}\)

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\(^\text{1120}\) Feria-Tinta, \textit{supra} note 47 at 437.
\(^\text{1121}\) \textit{Ibid} at 443.
\(^\text{1122}\) Abramovich, “From Massive Violations – SUR”, \textit{supra} note 46.
\(^\text{1123}\) Feria-Tinta, \textit{supra} note 47 at 436.
\(^\text{1124}\) \textit{Ibid} at 432.
\(^\text{1125}\) \textit{Ibid} at 441.
I foreground a further distinction that Feria-Tinta makes, to distinguish it clearly from Canadian constitutional law. She observes that the system is crafting reparation measures in accordance with rules governing state responsibility and reparation for wrongful acts under international law. This includes measures of satisfaction (which are restitutive) as well as guarantees of non-repetition, the latter of which she characterizes as the most dynamic of the measures of justiciability under ESCR. The system’s conception of guarantees of non-repetition is pivotal, in a transformative sense, because such measures are intended to overcome structurally discriminatory and unfair situations through institutional reforms, or what several authors label “subversions” of power relations, as opposed to taking a purely restitutive approach to reparations.

Overall, the system’s extensive reparations and interpretation of Article 63 of the American Convention have been “widely hailed as trailblazing”. The IACtHR is the only international body with binding jurisdiction that has consistently issued the range of reparations that includes measures of restitution, rehabilitation, satisfaction, and guarantees of non-repetition, in conjunction with pecuniary and non-pecuniary damages.

4.4.3.2 Positive-negative duties: strong state responsibility doctrine

This section sets out the relevant texts and summarizes the system’s approach to positive obligations and its taxonomy of rights and duties.

In general terms, the system does not appear to struggle conceptually with the dichotomy of negative and positive duties or rights. As with the CPR/ESCR binary, it does not accept that

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1126 Ibid at 438.
1127 Ibid.
1128 Troncoso Zúñiga & Morales Cerda, supra note 1072 at 142-3.
1129 Appendix B: Rights Provisions.
1130 Antkowiak & Gowza, supra note 341 at 19, citing, inter alia, Thomas M. Antkowiak, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond, 46 Colum. J. Transnat’l L. 351, 386 (2008).
1131 Ibid.
1132 Given its mandate as a human rights protection system, this may seem unsurprising. My comparative review of the European system suggests, however, that the Inter-American system has developed a uniquely unequivocal
there is any factual, logical or necessary juridical basis to the distinction, such that rights and state obligations are solely or primarily negative in orientation.\textsuperscript{1133} This has evidently allowed the system to generate more coherent legal standards because it does not need to rationalize a false and incoherent dichotomy.

Another initial observation, based on the comparative scholarship regarding the European human rights system, is that the IAHRS has been less deferential towards states’ interests,\textsuperscript{1134} a factor that has reinforced these tendencies. Despite the operative international law principle of subsidiarity, the IAHRS is viewed as having driven many of the positive obligations advances that have expanded state obligations (and liability) in the transnational human rights law jurisprudence.\textsuperscript{1135} Critical commentary in this regard, including from within the Court,\textsuperscript{1136} appears largely confined to concerns about the outer limits on the scope of positive obligations - as with ESCR/SER – and the question of whether the system should go further in its requirement for state (pro)action.\textsuperscript{1137}

The source of the system’s lack of equivocation concerning the requirement of positive duties - as with its innovations in respect of the CPR/ESCR dichotomy - is connected to several theoretical pillars of its general rights and equality rights approach, including its substantive understanding of the nature of social inequality. The other \textit{quid pro quo} is the system’s clear normative position on the state’s central role in addressing (pre-existing) structural social inequality and discrimination, further to the distinctive ideological conceptions set out in the equality theory segment of Chapter 3.

doctrinal approach to this issue: see Dembour, supra note 105; Contesse, supra note 81; and Duhaime, supra note 102.
\textsuperscript{1133} The lack of a direct approach to the implementation of ESCR/SER does not in the paper’s view give rise to a different conclusion.
\textsuperscript{1134} Contesse, supra note 81.
\textsuperscript{1135} Shelton & Gould, “Positive Obligations”, supra note 1003 at 13, 15.
\textsuperscript{1136} See partly concurring and partly dissenting opinion of Judge Ramon Fogel, in \textit{Yakye Axa}, supra note 932 at para 33, taking the position that in addition to temporary measures to ensure minimum living conditions, also required are measures to address the “causes that generate poverty, reproduce its conditions, and create additional poor population”.
Turning to the textual and doctrinal underpinnings of the system’s strong state responsibility doctrine, I consider the system’s elaboration of its taxonomy of rights. The development of member states’ duties to enforce the effective enjoyment of rights that ensure actual *(de facto)* results\(^{1138}\) stems from its progressive interpretation of Articles 1.1 and 2 of the *American Convention*.\(^{1139}\) These provisions contain the express direction that state parties “respect” and “ensure” “to all persons [the] free and full exercise” of the rights and freedoms contained in the *Convention* (Article 1.1), including, through the adoption of “such legislative or other measures as may be necessary to give effect to those rights or freedoms” (Article 2).\(^{1140}\) As noted, the reference to ‘all persons’, has been taken to reflect an international human rights law understanding of equality as a structural principle.\(^{1141}\)

As the foundation of the positive state duty to protect and ensure human rights,\(^{1142}\) the Article 1.1 obligations were developed largely under the Court’s evolutive interpretation in *Velásquez Rodríguez*.\(^{1143}\) The principle of respecting human rights is seen to involve legitimate restrictions on state actions, as states and state actors cannot act in a manner that violates a *Convention* right, regardless of their intentions.\(^{1144}\) This is the so-called “negative liberties” right.

By contrast, the obligation to ensure the exercise of all rights to “all persons” entails the states’ duty “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights”.\(^{1145}\) The Court in *Velásquez Rodríguez* held that this implies the state duties of both prevention and investigation.\(^{1146}\) Falling within the latter are state duties to

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\(^{1138}\) Shelton & Gould, “Positive Obligations”, *supra* note 1003 at 9, citing *Velásquez Rodríguez*, *supra* note 104 at para 175. “The requirement extends beyond mere de jure guarantees, however, because the simple fact that a state has designed its legal system in such a manner as to provide for the exercise of rights does not guarantee their free exercise; the existence of legal provisions does not guarantee that states parties and their citizens will not violate human rights.”

\(^{1139}\) Appendix B: Rights Provisions.

\(^{1140}\) *Ibid.*

\(^{1141}\) Clifford, *supra* note 48 at 15.

\(^{1142}\) *Velásquez Rodríguez*, *supra* note 104 at para 164.

\(^{1143}\) *Ibid* at para 164.

\(^{1144}\) *Ibid* at paras 165,169-70.

\(^{1145}\) *Ibid* at para 166.

\(^{1146}\) *Ibid.*
prevent rights violations and, when unable to prevent them, to investigate, punish the perpetrators, and provide the appropriate remedies to victims. This is the core of the state responsibility of due diligence, a doctrine amply developed in the system, to important effect in terms of the project’s themes, as examined in Part II. One international human rights law specialist observes that since the founding of modern human rights law, the Inter-American Commission and Court have been called upon more than other human rights bodies to apply the due diligence standard to decide whether a state has lived up to its positive obligations.

Under this doctrine, states have an obligation “to take reasonable steps to prevent human rights violations”. The Velásquez Rodriguez decision established a broadly framed due diligence doctrine, holding, that, “[the] duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts [...].” The Court further extended this obligation to ensure the free and full exercise of rights in situations where the state does not intervene and instead allows third parties to act with impunity to the detriment of such rights holders.

Article 2 establishes the requirement that states adjust their domestic legislation to the standards of Convention, to ensure the enjoyment of Convention rights. The Court has interpreted this to mean that the legislation “must be reflected in actual results”. What this means is that states are required to proactively undertake the adoption of whatever measures are necessary to give full respect to recognized rights, by guaranteeing them “de facto and de jure...within [a State’s] jurisdiction”. Thus, the requirement extends beyond mere formal guarantees to ensuring that the legal system provides for the exercise of such rights “in fact”. Driving this home in Velásquez Rodríguez, the Court held that “[t]he obligation to ensure the

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1147 Ibid.
1149 Velásquez Rodríguez, supra note 104 at paras 175-76.
1150 Ibid at para 175.
1151 Ibid at para 176.
1152 Yakye Axa, supra note 932 at para 100 [emphasis added].
free and full exercise of human rights is not fulfilled by [...] a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights").

In summary, the system’s strong tendency is to impose extensive “positive” duties on states, including in situations where the state has ‘not acted’, so as to “ensure” the exercise of the rights by all persons, in conditions of actual equality.

Following on these developments, the system has outlined extensive state obligations under the state responsibility doctrine covered above. The system has imposed in particular circumstances significant obligations to protect certain groups and to advance special measures. ‘Affirmative action’, ‘positive action’, and ‘special measures’ are understood as not only permissible but may be essential to address substantive harms and injustices and equalize outcomes.

As a preview of the emerging principles in the case law provides the following:

1) States are enjoined from contributing to situations of de jure and de facto discrimination, the failure of which may give rise to liability, with the further proviso that their policies should “not place a disproportionate burden on the marginalized and most vulnerable sectors of society” (especially people living in poverty).

2) States are required in certain circumstances, to take affirmative action to reverse or change de jure or de facto situations of inequality and discrimination, on the basis that failing to do so can violate the rights to equality and non-

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1154 Velásquez Rodríguez, supra note 104 at 167.
1155 Recognizing that the concept of ‘state action’ is somewhat artificial when one considers that the ultimate sources of all inequality can be traced back to state action: Moon, supra note 27 at 572.
1156 Antkowiak & Gonza, supra note 341 at 42.
1157 A recent case involving the Mapuche Indigenous people of Chile, Norín Catrimán, supra note 1046 at para 201, confirmed the direction in the Court’s advisory opinion in Undocumented Migrants Advisory Opinion, supra note 14 at 103, that the state “must abstain from carrying out actions that are in any way directly or indirectly designed to create situations of de jure or de facto discrimination”. See also Poverty IACHR Report, supra note 44 at para 163.
1158 Poverty IACHR Report, ibid at para 164 [emphasis added], citing Xákmok Kásek, supra note 912 at para 165.
discrimination,\textsuperscript{1159} and with the further caveat that such measures should contemplate the vulnerability of certain groups.\textsuperscript{1160}

3) The analysis or test for when differential treatment must be resorted to is as follows: “whenever equal treatment might suspend or limit access to a service, good or the exercise of a right because of the circumstances affecting a disadvantaged group.”\textsuperscript{1161}

4) Finally, in the development of its robust due diligence doctrine, the system has interpreted the equality provisions to institute a special duty of protection against non-state actors that “create or maintain or encourage discriminatory situations” with the state’s “tolerance or acquiescence”.\textsuperscript{1162}

\textsuperscript{1159} Ibid at para 163. See also Xákmok Kásek, ibid at paras 103, 104 and 106 and the Commission’s merits report in Wallace de Almeida v. Brazil (2009), Inter-Am Comm HR, Case 12.440 or No 26/09 [de Almeida] at para 147, citing Undocumented Migrants Advisory Opinion, supra note 14 at paras 103, 104, 106.


\textsuperscript{1161} Poverty IACHR Report, supra note 44 at para 160, citing Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at paras 89-99 [emphasis added].

\textsuperscript{1162} Norín Catrimán, supra note 1046 at para 201; Undocumented Migrants Advisory Opinion, supra note 14 at para 104.
4.5  Part II: Jurisprudential Trajectories

Part II presents case law illustrations of the system’s approach to making substantive rights real and securing substantive equality. Drawing on the Commission’s thematic reports, which attempt to systematize the system’s jurisprudence, as well as the scholarship and commentary of litigators, academics, and former Commissioners and jurists, I chose cases that illustrate particular substantivist tendencies and innovations distinct to the system.

I consider two doctrinal innovations that reflect the system’s distinctive approach to indivisibility and the justiciability of ESCR as well as positive obligations: the notions of a ‘project of life’ and a ‘dignified life’.

I then present several cases that build on the system’s preoccupation with the conditions of a dignified life and the exercise of all rights for especially vulnerable groups or sectors, examining: first, the criminalization of poverty and the racial profiling of certain groups in marginalized urban contexts; second, the role of poverty as a source and consequence of human rights violations; and finally, the conditions that give rise to vulnerability to exploitation in the context of employment or work.

The remainder of the jurisprudential review is clustered around specific subordinated and vulnerable social groups, each of which illustrates important features of the system’s equality vision: migrants; Indigenous peoples; people with disabilities; and women.

4.5.1  Building Blocks for Substantive Equality: Life Projects or Plans

Two crucial building blocks in the system’s substantive equality trajectory are the notion of an individual’s or community’s “project of life” or “life plan” and the right to a “dignified life” or “decent (or “adequate”) existence”. Both emerged from the system’s preoccupation with the realities of an especially vulnerable sector in Latin America, namely, children and youth in an urban context marked by precarious living conditions, including poverty and unmet basic needs, and the threat of physical violence.
The formulation of the right to harbour a life project or plan represents an initial thread in the system’s evolving social reinterpretation of CPR and its expansive remedial jurisdiction. In the latter regard, the life plan notion reflects the system’s focus on recognizing - for the purpose of redressing - the full and varied dimensions of human suffering and harms, as part of the system’s ‘human centred’ interpretative approach.

The concept’s origins are most closely associated with the Inter-American Court’s decisions in Loayza Tamayo v. Peru (Loayza Tamayo), which dealt with a female Peruvian professor who was illegally detained as a suspected terrorist, subjected to inhumane treatment, and forced into exile. The Court examined the challenge of encapsulating the harm done to the victim in having had her life so irreparably altered. Conceived of as a ‘reasonable and attainable expectation of all persons’, the concept of the petitioner’s life plan provided the doctrinal basis for the Court’s redress of what it characterized as “grave damages”. As a result, Loayza Tamayo is viewed as an important reparations judgment in establishing the theoretical basis for ampler and innovative remedies of rights violations.

The Peruvian State objected that the concept was not cognizable. However, the Court’s rebuttal was based on the need to move beyond private law’s financially focused assessment of suffering and damages, to encompass the “full self-actualization” of a person, in terms of their potentialities, goals, and ‘calling’ in life. In addition, and applying the professed evolutive interpretive approach, Justice Cançado Trindade’s concurring judgment

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1163 Loayza Tamayo v. Peru (1998) (Reparations) Inter-Am Ct HR (Ser C) No 42 [Loayza Tamayo – Reparations] at para 147, confirms that this was a further development to recent doctrine and case law.
1164 The cases respectively are Loayza Tamayo (Peru) (1997) (Merits) Inter-Am Ct HR (Ser C) No 33 [Loayza Tamayo - Merits"] and Loayza Tamayo – Reparations, ibid.
1165 Loayza Tamayo – Reparations, ibid.
1166 Ibid at para 150.
1167 Ibid at para 153.
1168 Ibid at para 145.
1169 Ibid at para 147.
1170 Ibid at para 147.
1171 He was joined by Judge Abreu-Burelli.
emphasized the Court’s position that juridical concepts are “products of their time and are changeable”. 1172

His reasons further explicated the dimensions of a person’s life plan, addressing the ‘non-material’, even “spiritual” dimensions, along with material elements, and also recognizing (in a philosophical flourish) that economic indemnization is not sufficient1173 to address the “marginalized condition of the spiritual being” of the human person.1174 Justice Cançado Trindade framed the life project in terms of autonomy or freedom and as “the right of each person to choose [their] own destiny”.1175

The system’s conception of individual autonomy - which largely contrasts liberal conceptions - entails the idea that an individual is ‘not “truly free” if they do not have the underlying options to pursue in life and to carry that life to its natural conclusion’.1176 The Court finds that such options or lack of options have “important existential value”,1177 based on the further premises that not all persons have such options and can fulfill their life projects, and that this reality is neither natural nor just.1178 The Court in Loayza Tamayo goes on to find that the elimination or curtailment of the possibility of realizing a life plan is a loss that must not be disregarded.1179

The recognition of the concept of a life project also contributed to the system’s evolving understanding of how to ensure the “guarantee of non-repetition” of harmful facts,1180 given that putting an end to violations and mitigating their consequences is an international obligation of states.1181 In summary, the right to harbour a life plan helped to normatively ground the system’s quest to remedy the barriers of material or de facto inequalities in social

1173 Ibid at para 11.
1174 Ibid at para 8.
1175 Ibid at paras 15-16.
1176 Loayza Tamayo – Reparations, ibid, at para 148
1178 Ibid at para 153.
1179 Ibid at para 148.
1180 Loayza Tamayo – Reparations, concurring opinion of Justices Cançado Trindade and Abreu-Burelli at para 12.
1181 Ibid at para 14. See also Loayza Tamayo – Reparations, ibid, at para 86.
conditions that result in strikingly different life trajectories for certain individuals and groups across the region.

4.5.2 Building Blocks for Substantive Equality: Right to a Dignified Life

The concept of the life plan/project was carried over into the context of street children in Guatemala, as the Court solidified the idea that each person, however marginalized their circumstances, has a right to harbour a life plan or project. In the case of precariously situated youth, the life plan came to be framed as a right that requires state intervention to “tend” and “encourage”. The imperative of establishing the conditions for the advancement of life projects also launched the construction of state obligations to address the conditions of those who, akin to at-risk street youth, “live in misery”. To put this another way, the life plan idea spawned another conceptual pillar of the system’s indirect approach to making ESCR/SER justiciable, specifically, the Court’s expansive interpretation of the right to life known as the “dignified life”.

One system observer further observes that the central mechanism for this and other expansive social reinterpretations of CPR is the system’s commitment to protect sociostructurally vulnerable groups whose members are impeded in the exercise of their rights. In other words, these social reinterpretations have been achieved through the latter premise rather than through the recognition of social rights of universal application. This is an important clarification.

Further to Victor Abramovich’s analysis, a core element of the system’s substantive rights/equality rights analysis is thus its decision to centre the vulnerability and the protection of certain groups, meaning, social groups that are in “conditions of (special) vulnerability”. I address this concept more closely in Chapter 5, but for present purposes, equality scholar

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1182 Ibid at para 191.
1183 Ibid at para 191.
1184 Sometimes also referred to as “decent existence” or “adequate life”.
1185 Melish, “IACtHR”, supra note 938 at 388.
1186 Unzueta, supra note 1085.
Lorena Sosa frames the understanding as one in which certain groups are historically marginalized and vulnerable in a “social-structural” sense.\textsuperscript{1187} In other words the concept is not drawn in an abstract way to encompass the ‘human condition’, further, for example, to some of Martha Fineman’s scholarship.\textsuperscript{1188} Rather, it is founded on the recognition of the widespread condition of \textit{de facto} inequality present in social structures and processes and (unequal) relations of power, with adverse implications for important interests and particular groups.\textsuperscript{1189}

\textbf{4.5.3 Street Children: Right to a Dignified Life as Avenue for the Justiciability\textsuperscript{1190} of ESCR}

The specific jurisprudential vehicle for developing the dignified life concept was the Court’s paradigmatic decisions in \textit{Villagrán Morales et al. v. Guatemala (Street Children)}.\textsuperscript{1191} The facts were part of a broader phenomenon of violent attacks on children and youth who lived in precarious socioeconomic conditions in Guatemala City, and concerned the kidnapping, torture and murder of five youth, two of whom were minors, who lived ‘on the street’. In several cases, the victims contributed to the financial support of their families, who evidently lived in circumstances of extreme poverty. The context of ‘street youth’ or marginalized youth in Latin America has been closely studied by the system,\textsuperscript{1192} and features a lack of security, economic marginalization, and as is often true of other vulnerable groups, general social opprobrium and negative stereotypes.\textsuperscript{1193}

Also noteworthy is the evidentiary issue that arose in the case owing to the delayed judicial proceedings and a dispute over whether state mechanisms had failed to address these violations in court and convict those responsible. Direct state responsibility was thus at issue because of the possibility that the State had not carried out the direct acts of violence. In

\begin{footnotesize}
\textsuperscript{1187} Sosa, \textit{supra} note 257 at 100. She contrasts this to the ‘embodied vulnerability’ approach.
\textsuperscript{1188} At least in her earlier work, per, Unzueta, \textit{supra} note 1085.
\textsuperscript{1189} \textit{Ibid.}
\textsuperscript{1190} De Paz González, \textit{supra} note 1016 at 98; Unzueta, \textit{ibid.}
\textsuperscript{1191} \textit{Street Children – Merits, supra} note 1100 and \textit{Villagrán Morales et al. (“Street Children”) (Guatemala) (2001) (Reparations) Inter-Am Ct HR (Ser C) No. 77 [Street Children – Reparations].
\textsuperscript{1192} De Paz González, \textit{supra} note 1016 at 99.
\textsuperscript{1193} \textit{Ibid} at 99.
\end{footnotesize}
highlighting the “extremely precarious socioeconomic conditions” of the youth in question and making key findings based on inferences that the aggression against street children was a “notorious and public fact” in Guatemala, the Court’s merits decision also demonstrates the system’s propensity for drawing inferences of social patterns and its imposition of lower thresholds of evidentiary requirements. This interpretive approach has proven important in the equality analysis more generally.

The case’s central finding is the Court’s determination that the right to life encompasses more than the right not to be deprived of one’s life arbitrarily, whether by state or non-state actors. Specifically, the Court held that such a restrictive, traditional approach to the right to life was impermissible. Describing the youth as victims of “double aggression”, the Court framed the State’s responsibility as a failure to prevent them from living in misery and being deprived of the minimum conditions for a dignified life. An alternative framing is that the State failed to comply with its obligation to generate the conditions for dignified life, in this case for children and youth – and in later cases for others in especially vulnerable circumstances, including adults and collectivities. This lack of, or insufficiency of, positive state actions to address these conditions was thus found to constitute inequality vis-à-vis street children.

Expressly referencing the broader context, with its marked deterioration of living conditions of broad segments of the population of states across the Americas, the Court emphasized the importance of interpreting the right to life in a manner that did not “abstract” this harsh lived reality. In a characteristically philosophical concurring opinion, Justice Cançado Trindade emphasized the importance of the juridical development that had placed the rights-holder

1194 Street Children - Merits, supra note 1100 at para 184.
1195 Ibid at para 189.
1196 Ibid at para 191.
1197 Ibid.
1199 Street Children - Merits, supra note 1100, concurring opinion of Justice Cançado Trindade at para 6. Justice Abreu-Burelli adhered to the opinion

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victim and ‘human suffering’ – as opposed to the state - in the central position in the rights framework, as part of the system’s signature evolutive and pro-person interpretations of international human rights law.\textsuperscript{1200}

Justice Trindade’s concurring judgment elaborated on the layered dimensions of material deprivations, describing the “humiliation of poverty” of those who live in conditions without the means to “create a life project” as a form of destruction of the human being in a physical and non-material sense.\textsuperscript{1201} He pointed to the circumstances these children already faced, prior to their abuse and deaths, in terms of the absence of even the “minimum conditions”\textsuperscript{1202} for “creating and developing a project of life”.\textsuperscript{1203} The concurring judgment emphasized that the life project is “co-extensive”\textsuperscript{1204} with the right to existence, and “requires, for its development, conditions of life with dignity, of security and integrity of the human person.”\textsuperscript{1205} This emphasis on the denial of the development of a life project is a progression that, according to social rights scholar Isaac de Paz González, influenced subsequent future jurisprudential approaches to vulnerable communities and individuals that experience ‘structural barriers to developing their project of life’.\textsuperscript{1206}

The concurring judgment is thus notable for its clear statement of the positive and indivisible nature of rights, and for connecting the “inseparable”\textsuperscript{1207} elements of the arbitrary deprivation of life (through homicide, for example), to the deprivation of a life lived with dignity.\textsuperscript{1208} To put this in affirmative terms, the concurring judgment confirms the state’s duty “to take positive  

\textsuperscript{1200} Street Children - Reparations, supra note 1191, concurring opinion of Judges Trindade and Abreu-Burelli at paras 9-10.  
\textsuperscript{1201} Judges Cançado Trindade and Abreu-Burell's concurring opinion refers to this as a ‘spiritual death’: Street Children - Merits, supra note 1100 at para 9.  
\textsuperscript{1202} Ibid at para 9.  
\textsuperscript{1203} “[...] and even to seek out a meaning for their own existence”: ibid at para 3.  
\textsuperscript{1204} The word in Spanish is “consubstancial”, which essentially means in this context being able to realize one’s life project (or calling) is integral to life itself [author’s translation].  
\textsuperscript{1205} Street Children - Merits, supra note 1100, concurring opinion of Justice Cançado Trindade, at para 8 [emphasis added].  
\textsuperscript{1206} De Paz González, supra note 1016 at 101.  
\textsuperscript{1207} Feria-Tinta contends that “[j]usticiability is no longer a matter of perfectly dissecting and distinguishing the inseparable but of finding the key relations between apparently separate notions”: supra note 47 at 432.  
\textsuperscript{1208} Street Children - Merits, concurring opinion of Justice Cançado Trindade, supra note 1100 at para 4.
measures” in relation to vulnerable persons in situations of risk. Further, in addition to imbuing the idea of dignity with material content, the Court’s formulation of the right to live with dignity expressly frames the right to life “as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.” Coined by one Inter-American system scholar as the “theoretical floor for social rights”, the Street Children decisions represent a theoretical approach to ESCR that has become the “dominant trend of justiciability” in inter-American law.

The Court’s findings also established that the rights to life and physical integrity are violated not only by state omission. Rather, liability is imputed from the State’s lack of positive actions, and specifically, its non-compliance with its obligation to generate the conditions of dignified existence of these young people. Indeed, the failure to do so implies inequality for such children, and the core rights to life and to personal integrity are thus “[re]conceptualized in terms of the state’s positive obligations in a broad sense.”

While no structural measures were ordered to prevent the violation of the right to a dignified existence, as no violation thereof was declared, Justice Cançado Trindade’s concurring judgment on the matter of reparations, unveiled, according to one commentator, “a sui generis approach” that reflects not only “a technical legal concept”, but also a “deep human reflection on judging in a particular scenario of human suffering”. The case is described as unleashing “social sense judgments” and decisions that reflect deeply on “human values” that extend

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1209 Ibid.  
1210 Ibid. This articulation of indivisibility follows from the Court’s finding in the main judgment that the right to life extends beyond a negative restraint conception (to not be deprived of one’s life) to include the right of every human being “to not be prevented from having access to the conditions that guarantee a dignified existence”. Further, the Court held that States have the affirmative “obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it”: Street Children – Merits, ibid at para 144.  
1211 De Paz González, supra note 1016 at 99.  
1212 Ibid at 99.  
1213 And subsequently in relation to other vulnerable social groups: see Melish, “IACtHR” supra note 938 at 390.  
1214 Clérico, Ronconi & Aldao, “Towards a Reconstruction of Equality Case Law”, supra note 1198 at 137.  
1215 De Paz González, supra note 1016 at 100.  
1216 Ibid.  
1217 Ibid at 101 [emphasis added].
beyond the legal. In de Paz González’s view, this first of the children’s rights cases heralded what the Court itself later dubbed the “great juridical revolution,” and gave rise to the ‘first phase of social rights jurisprudence’ whereby ESCR/SER were enforced indirectly through CPR.

Following Street Children, in the 2004 case of Juvenile Reeducation Institute v. Paraguay (Panchito Lopez), the Court clarified that the right to a dignified life extends to all persons, not just children. It further clarified that the concept of a dignified life is grounded in the state taking “measures to ensure [in this case, the detainee minors] a right to life with dignity” and to support them to “build their life plan”. The Court held that there is state responsibility for those who are unable to satisfy “certain basic needs that are essential if one is to live with dignity”. The Panchito Lopez decision specifically confirmed that the rights to education and health care are considered essential attributes of a dignified life under Article 4 of the American Convention. Later cases built on those findings.

The concepts of a collectivity’s dignified life and community life plans were also subsequently developed in important Indigenous rights cases. In this case law, the Court combined its evolutive elaboration of the rights to equality and non-discrimination and the right to life with its expansive critical conception of ‘different’ or non-hegemonic conceptions of property (and the collective right thereto of Indigenous communities). These reinterpretations reflect further expansions in the indivisibility trend. Before addressing the Indigenous rights case law, however,

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1218 Ibid.
1219 Ibid at 102, citing Street Children - Reparations, supra note 1191, concurring opinion of Justice Cançado Trindade at para 16.
1220 Ibid, in respect of jurisprudence from 1999-2001, citing Street Children, for its repercussions in conceptualizing the system’s approach to the right to life and member states’ positive obligations.
1221 Juvenile Reeducation Institute v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004) [Panchito Lopez]. The case concerned a detention facility for youth in Paraguay, where the living conditions were adjudged to be inhuman. A series of fires ultimately forced the closure of the facility and the case dealt with the various violations associated with the state’s conduct. Among the issues were lack of adequate infrastructure, unsanitary conditions, a lack of proper medical care, food, and education.
1222 Melish, “IACtHR”, supra note 938 at 390.
1223 Panchito Lopez, supra note 1221 at para 164.
1224 Ibid at para 152.
1225 Ibid at para 152.
I consider important development from these initial beginnings as the system continued to ‘complicate’ its equality analysis through greater attention to poverty and the economic aspects of the subordination of certain sectors and groups.

4.5.4 Combining Status Subordination with Economic Subordination and Poverty

The Court’s decision in Servellón-García v. Honduras (Servellón-García)\(^\text{1226}\) illustrates the system’s increasingly multi-dimensional approach to equality and contexts of pervasive socio-economic marginalization and poverty. Once again, the case concerned the torture and killing of (four) youth,\(^\text{1227}\) two of whom were children, following a targeted preventive detention operation by Honduran security forces in Tegucigalpa in September 1995.\(^\text{1228}\) One commentator describes the context as reflecting the “atrocity equation” of crime, violence and poverty, along with structural discrimination.\(^\text{1229}\) The victims were both perceived as criminals by society and were criminalized by the police, who commonly employed disproportionate and illegitimate force against the sector at large.\(^\text{1230}\) The further backdrop is that Honduras and other states in the Americas had witnessed, since the beginning of the 1990s, the rise of the horrendous phenomenon of ‘social cleansing’ “perpetrated by institutional acquiescence against street children and youth”.\(^\text{1231}\) Servellón-García displays the system’s concern with how poverty operates as a cause of subordination and other human rights violations and is itself a violation of the right to equality in the context of the right to a dignified life.\(^\text{1232}\) The case is also presented for its rich contextual analysis and the Court’s imposition of affirmative positive state

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\(^{1226}\) Servellón-García (Honduras) (2006) (Merits) Inter-Am Ct HR (Ser C) No. 22 [Servellón-García].

\(^{1227}\) Among those arrested were the four youth submitted to torture and cruel and degrading treatment, and then killed by the police: ibid at paras 91-99.

\(^{1228}\) The victims were Marco Antonio Servellón García (16 years old), Rony Alexis Betancourth Vásquez (17 years old), Diomedes Obed García Sánchez (19 years old), and Orlando Álvarez Ríos (32 years old).

\(^{1229}\) De Paz González, supra note 1016 at 103.

\(^{1230}\) Ibid at 104.

\(^{1231}\) Ibid at 104.

\(^{1232}\) Clérico, Ronconí & Aldao, “Towards a Reconstruction of Equality Case Law”, supra note 1198 at 155.
obligations to prevent and address harmful societal mores and patterned situations of social risk and exposure to insecurity and violence.\textsuperscript{1233}

Scholar Laura Clérico underscores how the facts might have been approached as an isolated episode of police violence involving violations of conventional CPR.\textsuperscript{1234} However, characteristically, the IAHRS situated the complaints within the framework of: (i) systematic state practices of repression of a particular sector; and (ii) the deeper realities of their impoverishment and marginalization. In the former regard, the Court made findings based on data that established a pattern of poor youth being targeted and killed by state security forces.\textsuperscript{1235}

In the latter regard, the Court’s analysis addressed the factual basis for the varied forms of the victims’ status and economic subordination. The status-based subordination (or misrecognition) manifested in what the Court framed as a context marked by societal stigmatization of the youth in question through the attribution of stereotypes of vagrancy or delinquency and increased public insecurity.

The economic-based subordination derived from their status as poor youth in conditions of social risk,\textsuperscript{1236} that is, “poor, in situations of vagrancy, without stable employment\textsuperscript{1237} or that suffer from other social problems”.\textsuperscript{1238} The Court made findings based on the evidence of high levels of poverty among youth, as well as expert evidence regarding the state’s inability (or failure) to improve the situation of youth owing to a lack of strategic policies and plans.\textsuperscript{1239} The Court referenced, for example, the Honduran state’s failure since 1980 to ‘adopt actions or

\begin{footnotes}
\item[1233] De Paz González, \textit{supra} note 1016 at 104, describes the context as one in which “exclusion, economic deprivation, institutional violence, and discrimination are the permanent threats to their lives and provoke children’s rights violations”.
\item[1234] \textit{Ibid.}
\item[1235] Servellón-García, \textit{supra} note 1226 at para 104.
\item[1236] \textit{Ibid} at para 117.
\item[1237] Either unemployed altogether or lacking stable employment.
\item[1238] Servellón-García, \textit{supra} note 1226 at para 110.
\item[1239] \textit{Ibid} at para 37.
\end{footnotes}
extraordinary budgets to [...] attend to the [children’s] needs. A concurring opinion cited U.N. documentation showing that a majority of Honduran children live in conditions of vulnerability, and “affected by “the poverty and insecurity” derived from “social, political, and economic injustices”.  

The Court thus conceived of the harms to the victims as extending beyond the immediate loss of life, to encompass their experience of general and more ‘structural violence’. This included being in a situation of social risk, understood both as uncertainty and insecurity, and their inability due to these structural obstacles to advance any form of an individual life plan or project.

The Court further found a pattern of state conduct which included the “dangerous stigmatization” that certain ‘poor children and youth’ are “conditioned to delinquency”, the overall phenomenon of which was characterized (in a concurring opinion) as the “criminalization of poverty”. The Court held that this was evident in what might have been viewed as isolated violations of the right to life, by linking the individuals’ societal stigmatization to the creation and reinforcement of a climate found to be “propitious” to the risk of violence for particular groups. The Court concluded that these adverse societal perceptions of the youth were promoted or reinforced, rather than counteracted by the state. To frame this differently, the Court established a connection between the physical

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1240 *Ibid* at para 114, noting that this is the year Honduras returned from a military dictatorship to a constitutional order.
1241 *Servellón-García, supra* note 1226, concurring opinion of Judge Cançado Trindade, at para 29.
1242 The *Indigenous Women IACHR Report, supra* note 43 at para 84 develops this concept in the context of Indigenous women, referencing the Report of the U.N. Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz: “[T]he endemic violations of collective, civil and political, and economic, social and cultural rights can be seen as constituting a form of structural violence against indigenous women. Structural violence results in women being victimized by the realities of the circumstances of their everyday life and routinely excluded from the rights and resources otherwise guaranteed to citizens. Structural violence is interlinked and mutually reinforcing with other forms of violence [...]”: 6 August 2015, A/HRC/30/41, para 46.
1243 *Servellón-García, supra* note 1226 at para 117.
1244 *Ibid*.
1247 *Ibid* at para 112.
1248 *Ibid*.
violence directed towards this group and the poverty and insecurity of their life conditions and
experiences.\textsuperscript{1249}

As Laura Clérico observes, in so doing, the Court introduced the question of equality into this
seemingly narrow set of repressive practices that clearly raised conventional ‘negative’ right to
life violations.\textsuperscript{1250} It decided there was discriminatory action based on the targeted arrest of a
group as a result of their age and economic situation, finding the latter reason to be a
proscribed basis for action.\textsuperscript{1251} It held that the State “cannot act against a group for reasons like
their economic situation.”\textsuperscript{1252} The judgment thereby establishes a bar against the state acting -
whether through its agents or by promoting (or not counteracting) social mores - to reproduce
stigma against poor youth, emphasizing that such stigmatization creates situations of (known)
risk.\textsuperscript{1253} Clérico helpfully frames the Court’s assessment of this factual context as one that
recognizes the cycle by which, “existing material inequality becomes a cause of stigmatization,
that at the same time preserves and reinforces the existing and original inequality.”\textsuperscript{1254}

In the result, the State’s obligations were found to include the positive duty to create the
conditions to avoid human rights violations in such circumstances,\textsuperscript{1255} including, to counteract
stigma in the society. It based this finding the State’s duties to respect and to guarantee, and
further to the equality and non-discrimination principle.

The Court found that the State failed to adopt the measures necessary to change this broader
context of violence against the youth.\textsuperscript{1256} It relied on the evidence of the State’s failure to adopt
appropriate action (‘to take actions or adopt extraordinary budgets to protect and attend to the
needs of the children’), and the Court invoked Street Children for its finding that when a state is

\textsuperscript{1249} \textit{Ibid}, concurring opinion of Judge Cañçado Trindade at para 29.
\textsuperscript{1250} Clérico, Ronconi & Aldao, “Towards a Reconstruction of Equality Case Law”, \textit{supra} note 1198 at 157.
\textsuperscript{1251} Servellón-Garcia, \textit{supra} note 1226 at 95, citing \textit{Undocumented Migrants Advisory Opinion}, \textit{supra} note 14 at
paras 100-1.
\textsuperscript{1252} \textit{Ibid}.
\textsuperscript{1253} \textit{Ibid}.
\textsuperscript{1254} Clérico, Ronconi & Aldao, “Towards a Reconstruction of Equality Case Law”, \textit{supra} note 1198 at 158.
\textsuperscript{1255} Servellón-Garcia, \textit{supra} note 1226 at 108.
\textsuperscript{1256} \textit{Ibid} at para 109.
aware of children or youth in high-risk situations, the state “must assume its special position of protector with greater care and responsibility”, and it “must take special measures oriented toward the principle of the child’s greater interest”. 1257

The Honduran State was thus directed to refrain from promoting social mores and practices that reproduce stigma regarding poor children and youth.1258 Moreover, the Court established the duty to adopt special measures to address the environment of such youth affected by poverty and social alienation1259 by creating the conditions to allow for an ‘adequate life’. 1260 Further, this positive duty was framed as one of “‘stopping” the conditions that allow for the recurrence of these arbitrary deprivations of life and their lack of investigation’. 1261

The result in Servellón-García clearly builds upon Street Children’s principle of a dignified life.1262 By making the link between victims’ experience of economic subordination, status subordination, and violence and insecurity,1263 the State’s obligations were extended to incorporate the protection of young people affected by poverty and social alienation through the requirement to apply special measures.

The State’s failure to fulfill its ‘duty to ensure’ was based on its failure to adopt positive measures – to take proactive, concrete steps to address the social conditions that made such youth vulnerable to abuse, and to provide ‘special assistance’ – in order to protect their right to “an adequate life style.”1264 The Court framed the interpretive basis for state accountability in unequivocal terms: “The State has the duty to adopt positive measures to fully ensure the

1257 Ibid at para 116.
1258 Clérico, Ronconi & Aldao, “Towards a Reconstruction of Equality Case Law”, supra note 1198 at 157-58; see Servellón-García, supra note 1226 at para 112.
1259 Ibid at para 116: The State has the obligation to ensure the protection of children and youngsters affected by poverty and socially alienated and, especially, to avoid their social stigmatization as criminals.
1260 Ibid at para 108.
1261 Ibid.
1262 Supra note 1191.
1263 Servellón-García, supra note 1226 at para 111: “Regarding that link between poverty and violence directed to children and youngsters, the Special Rapporteur of the United Nations for Extrajudicial, Summary, or Arbitrary Killings, stated in her report of June 14, 2003 regarding Honduras, that “[e]ven though children are vulnerable and they are exposed to abuses and to crime due to lack of autonomy, juvenile delinquency can never be used to justify the killing of children by security forces in order to maintain public order.”
1264 Ibid at paras 114, 117.
effective exercise of the rights of the child.”\textsuperscript{1265} A state’s obligation is to “ensure the protection of children and youngsters affected by poverty and socially alienation and, especially, to avoid their social stigmatization as criminals”.\textsuperscript{1266}

Significant orders were issued, and contrary to \textit{Street Children}, the Court extended measures under the non-repetition guarantee and ordered the State to adopt all essential, administrative and institutional measures, to protect children’s rights.\textsuperscript{1267} The orders included the creation of public policies and programmes to provide training for police and public prosecutors, in accordance with international standards to respect children’s rights in detention centres, and procedures and training to focus on the special protection and treatment for children and youngsters, based on the principle of equality and non-discrimination.\textsuperscript{1268} The Court also ordered Honduras to create a nation-wide campaign to change public opinion about street children. This was the basis for its order to ‘inform the population of the specific duties for [the children’s] protection that correspond to families, society, and the State, and ‘make’ the population see that children and youngsters in situations of social risk are not identified with delinquency’.\textsuperscript{1269}

The Court did not however order special measures to directly ameliorate the discriminatory conditions for children and young people, for example, inclusive measures with respect to education, work, and other opportunities. This is despite the strong concurring judgment of Justice Cançado Trindade which emphasized the extreme poverty and poverty that lay at the root of these youth being ‘abandoned and submitted to the abuse of the streets’.\textsuperscript{1270} This result points to tensions around the ‘progressive realization’ formulation for ESCR/SER and the potential outer limits of the system’s indirect approach to their enforcement.\textsuperscript{1271}

\begin{flushright}
\textsuperscript{1265} \textit{Ibid} at para 114. \\
\textsuperscript{1266} \textit{Ibid} at para 116. \\
\textsuperscript{1267} De Paz González, \textit{supra} note 1016 at 105. \\
\textsuperscript{1268} Servellón-García, \textit{supra} note 1226 at para 200. \\
\textsuperscript{1269} \textit{Ibid} at para 201. \\
\textsuperscript{1270} \textit{Servellón-García}, \textit{supra} note 1226, concurring opinion of Judge Cançado Trindade at paras 32-33. \\
\textsuperscript{1271} Note re Justice Jackman’s critique of the failure to place poverty prevention first in \textit{Gonzales Lluy et al. (Ecuador)} (2015) (Merits) Inter-Am Ct HR (Ser C) No 102/13 \textit{[Gonzales Lluy]} at para 290.
\end{flushright}
A case that displays similar tendencies is the Commission’s merits decision concerning the alleged violation of Article 24 of the American Convention in Wallace de Almeida v. Brazil (de Almeida).\textsuperscript{1272} Again, the claim involved the violation of conventional CPR, and specifically, the police killing of an Afro-descendant young male who lived in a marginalized neighbourhood in Rio de Janeiro. The merits report contains an expansive contextual analysis and enlarged conceptualization of the claim, and is also noteworthy for its adverse effects analysis, the low or flexible threshold for evidentiary requirements and the drawing of inferences, and its strong state duties analysis.

The Commission’s analysis commenced by recognizing the broader context of the claim. It referred to the highly uneven distribution of wealth and opportunities in the country, and the poverty that strongly features in the claimant’s context - a reality it describes as the “principle expression of these racial disparities” in Brazil.\textsuperscript{1273} Employing an intersectional analysis and drawing on the historical and contemporary experience of the groups with which the victim was associated, the Commission described the victim as belonging to “an especially vulnerable social group due to its racial and social condition”,\textsuperscript{1274} as a young man of African descent and member of a “historically marginalized group in comparison with the white population that is politically and economically dominant”.\textsuperscript{1275} The Commission invoked the Court’s previous characterization of vulnerability to a “state of uncertainty and insecurity” for the victim.\textsuperscript{1276} Relying on sociological data and analysis\textsuperscript{1277} which confirmed that this multiply marginalized group was affected by violence in greater numbers and with “greater intensity”,\textsuperscript{1278} the Commission inferred (from its contextual analysis and the particular circumstances of the victim) that the repressive tactic known as racial profiling and the targeting of poor youth\textsuperscript{1279} was at

\textsuperscript{1272} Supra note 1159.  
\textsuperscript{1273} Ibid at para 141.  
\textsuperscript{1274} Ibid at para 146.  
\textsuperscript{1275} Ibid at para 141.  
\textsuperscript{1276} Ibid at para 150, citing the Court’s decision in Yean and Bosico (Dominican Republic) (2005) (Merits) Inter-Am Ct HR (Ser C) No 130 [Yean and Bosico] at para 227.  
\textsuperscript{1277} Ibid at para 143.  
\textsuperscript{1278} Ibid at para 16.  
\textsuperscript{1279} Ibid at para 143.
play in police actions against the victim.\textsuperscript{1280} It concluded that race and socioeconomic status were preponderant factors relating to the police violence.

In finding a violation of Article 24,\textsuperscript{1281} the Commission found that the State failed to fulfill its obligation as “guarantor of rights”\textsuperscript{1282} to implement the protective “positive measures” required, given the victim’s “special situation of belonging to a group that is considered vulnerable (of African descent, poor, living in an favela”).\textsuperscript{1283} Citing various of advisory opinions and the Court’s contentious decision in \textit{Yatama v. Nicaragua (Yatama)},\textsuperscript{1284} considered later, the Commission found that the State was required to adopt distinctions and “to give [de Almeida] different treatment necessitated by his status”,\textsuperscript{1285} based on \textit{de facto} inequalities, as an individual who must be protected according to their status and circumstances.\textsuperscript{1286} The case law was thus found to have settled the issue of liability, namely, that a state’s failure to undertake affirmative measures to \textit{reverse or change de jure or de facto} discriminatory situations harmful to specific groups, produces international responsibility on the state’s part.\textsuperscript{1287} The Commission put it this way:

\begin{quote}
The Federal Government and the state of Rio de Janeiro should have adopted adequate measures so that Wallace de Almeida would not be subject to rules, practices, actions or omissions that, directly or indirectly, violated the general prohibition against discrimination. In addition, it was imperative for these states to provide the subject with effective and equal protection against discrimination and, in order to do so, should have taken the necessary steps to give him the different treatment necessitated by his status as an Afro-descendant.\textsuperscript{1288}
\end{quote}

\textsuperscript{1280} \textit{Ibid} at para 143.
\textsuperscript{1281} \textit{Ibid} at para 152.
\textsuperscript{1282} \textit{Ibid} at para 150.
\textsuperscript{1283} \textit{Ibid} at para 150.
\textsuperscript{1284} \textit{Ibid} at para 145, citing \textit{Yatama, supra} note 41 at para 201.
\textsuperscript{1285} \textit{Ibid} at para 157.
\textsuperscript{1286} \textit{Ibid} at para 157.
\textsuperscript{1287} \textit{Ibid} at para 147, citing \textit{Undocumented Migrants Advisory Opinion, supra} note 14 at paras 103, 104, 106.
\textsuperscript{1288} \textit{Ibid} at para 157 [emphasis added].
Among the Commission’s recommendations to the State was the adoption and implementation of measures to educate court and police officials related to racial discrimination in police operations, investigations, proceedings and in criminal convictions.

Proceeding from Servellón-Garcia and de Almeida, several additional decisions illustrate the system’s evolving analysis of the intersections between claimants’ economic marginalization and other cross-cutting circumstances or statuses that combine in complex ways to aggravate harms that flows from human rights violations, as well as giving rise to further violations. This form of analysis is of course derived from focusing on the effects on certain groups of underlying contextual realities, combined with state action and inaction.

One such case that examines the contextual realities of economic inequality for those with disabilities is the Court’s 2015 decision in Gonzales Lluy and others v. Ecuador (Gonzales Lluy). The facts concerned a child named Talía and her family, whose poverty significantly affected multiple facets of the family’s challenges arising from the Talía’s contraction of HIV through the negligence of a private blood supply service. The themes of structural discrimination and material inequality run through the Court’s analysis of the many violations of the petitioners’ rights. The Court also employs an expressly intersectional and, I argue,

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1289 This is in addition to the measures of satisfaction and restitution and the obligation to conduct a thorough, impartial and effective investigation of the facts by independent judicial bodies.
1290 Servellón-Garcia, supra note 1226 at para 168.
1291 Another such decision is Furlan and Family v. Argentina (2012) Inter-Am Ct HR (Ser C) No 246 (Furlan), concerning a family whose child experienced a serious set of physical and other impairments as a result of the state’s negligence. The decision is noteworthy for its attentiveness to the confluence between various types of barriers encountered by people with disabilities and the specific challenge arising from socioeconomic barriers to social inclusion. The Court in Furlan explicitly draws the connection between poverty and its reinforcement of social exclusion: at para 201. It also considered the adverse impact of the family’s poverty in light of the state’s remedy, found to be inadequate in those circumstances: at para 217.
1292 Supra note 1271.
1293 The Court also found that this private service was inadequately regulated by the State, which was another foundation for state responsibility in the deemed to be important field of health services: Ibid at paras 175-184.
1294 Ibid at para 1, setting out the Commission’s allegations: “[...] the State had not complied adequately with its obligation to ensure rights, specifically, it had failed to perform “its role of supervision and control over private entities that provide health care services.” The Commission also concluded that the State’s failure to respond adequately, mainly by failing to provide specialized medical care, has continued to affect the exercise of the rights of the presumed victim, and it considered that the domestic investigation and criminal proceedings did not meet the basic standards of due diligence to provide an effective remedy for the presumed victim and her family, Teresa.
In highlighting the ways that poverty and the social conditions of the petitioners - along with Talía’s gender (as a girl), age (as a minor), ethnicity (Indigenous) and disability (living with HIV) - shaped and facilitated the many violations of her rights and those of her family. The latter included the family’s challenges in accessing health services, education, employment, and housing.

The Court further held that examining these intersectional and overlapping elements was essential to fully comprehending the scope of the harms and injustices suffered by Talía and her family. The Court refers to how “numerous factors of vulnerability and risk of discrimination intersected and were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV”.  

It notes that the discrimination experienced was a function not only of numerous factors, “but also arose from a specific form of discrimination that resulted from the intersection of those factors”. The Court concludes that had just one of those factors not been present, “the discrimination would have been different”. It concludes by referencing the institutional, structural dimension: “Indeed, the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV.”

The Court then considers the further impact of poverty in impeding Talía’s fulfillment of her life plan and the exercise of the petitioners’ ESCR, including, the difficulties in her accessing the education system and the implications of the latter, given the societal stereotypes and associated subordination in respect of her gender and disability, and the obstacles to “lead[ing]
a decent life”. The Court expands on these additional dimensions of harm and suffering following her contraction of HIV in an adverse effects form of analysis:

[...] because she was a child with HIV, the obstacles that Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she required greater support from the State to implement her life project. [...] In sum, Talía’s case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups.

The Court was thus preoccupied with the disproportionate impact of the initial wrong committed – which itself arose as a result of the state’s failure to adequately regulate the delivery of health services to all - on the already marginalized. Moreover, a concurring opinion in a subsequent decision, Hacienda Brasil Verde v. Brazil (Hacienda Verde) contends that poverty was found in the Gonzales Lluy case to have been a further basis of the discrimination suffered. The decision is thus extant in illustrating the system’s evolving analytical framework, with its attention to the complex intersections of various elements, including the consequential effects of poverty on the subsisting violations. Justice Ferrer Mac-Gregor Poisot underscored the importance of this stance in his concurring judgment in Gonzales Lluy, and the need to further develop and deepen this ‘new dimension’ of equality analysis in future cases:

In sum, in this case, intersectionality is fundamental in order to understand the specific injustice of what occurred to Talía and to the Lluy family, which can only be understood in the context of the convergence of the different forms of discrimination that occurred. Intersectionality constitutes a different and unique

1300 Ibid [emphasis added].
1301 Ibid [emphasis added].
1302 Hacienda Brasil Verde (Brazil) (2017) (Merits) Inter-Am Ct HR (Ser C) No. 337 [Hacienda Verde].
1303 See concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot in Hacienda Verde, ibid at para 43.
1304 Ibid [emphasis added]. Judge Ferrer Mac-Gregor Poisot also indicates that further definition of the scope of this approach will assist in adding “a new dimension to the principle of non-discrimination in certain kinds of cases” (at para 12).
1305 Gonzales Lluy, supra note 1271, concurring opinion of Judge Ferrer Mac-Gregor Poisot, at para 12.
harm, which is distinct from the discriminations [sic] assessed separately. None of the forms of discrimination assessed independently would explain the particularity and specificity of the harm suffered in the intersectional experience.\textsuperscript{1306}

4.5.5 From Criminalization of Poverty to Exploitation and Labour Rights

Connecting the lack of access to the means of subsistence, structural discrimination, and poverty for members of marginalized groups, the Court has issued several decisions concerning employment and labour rights.\textsuperscript{1307} This includes its previously referenced \textit{Undocumented Migrants Advisory Opinion} on the labour rights of undocumented migrant workers.\textsuperscript{1308} The latter carved out expansive principles for an equality based-protection of labour rights from exploitative practices by third party employers for workers who are distinguishable from other workers by their migratory status (and national origin).

The Court’s 2017 decision in \textit{Hacienda Verde}\textsuperscript{1309} further solidified the system’s concern with collections of individuals linked through their vulnerability to exploitation, and specifically, workers immersed in situations of economic marginalization. \textit{Hacienda Verde} is the system’s first decision concerning the right not to be subjected to enslaved\textsuperscript{1310} work. The case concerned the working conditions of labourers at a privately-owned cattle ranch. The Court held that poverty and economic circumstances made the affected individuals more prone to recruitment into enslaved work.\textsuperscript{1311} As the State was aware of these circumstances, its failure to address the

\textsuperscript{1306} Ibid [emphasis added]. He also indicates that further definition of the scope of this approach will assist in adding “a new dimension to the principle of non-discrimination in certain kinds of cases”.


\textsuperscript{1308} \textit{Undocumented Migrants Advisory Opinion, supra} note 14.

\textsuperscript{1309} \textit{Hacienda Verde, supra} note 1302.

\textsuperscript{1310} The Inter-American Court explored the meaning of modern-day slavery, and decided that it originates from, but no longer directly tracks or mimics the historical practice of ownership of persons as property: Irit Weiser, “Inter-American Court Issues its First Decision on Modern Day Slavery: Case of Hacienda Brasil Verde” (2018) 2 PKI Global Just J 4 (unpaginated), online: <kirschinstitute.ca/hacienda-brasil-verde/> (last accessed April 21, 2019).

\textsuperscript{1311} Ibid.
workers’ vulnerability was found to amount to discrimination, contrary to the American Convention.1312

The judgment exemplifies the Court’s evolving analysis of the conditions that give rise to the exploitation of certain sectors in the important sphere of employment, which the system has also framed as a means of subsistence.1313 It is also cited for the progressive analysis of poverty and economic status as a source or ‘ground’ of discrimination, along with strengthening state responsibility to address such situations. Aside from poverty and the shared living conditions or circumstances in which the 85 workers found themselves at Hacienda Brasil Verde, the group was heterogenous, in the sense of not having enumerated grounds in common, such as migratory status or ethnic origin or sex.

The concurring opinion of Justice Ferrer Mac-Gregor Poisot (joined by Justice Elizabeth Odio Benito) elaborates further on the ratio. He helpfully reviews the ‘juridical progress’ in recognizing structural discrimination in relation to this form of injustice (i.e. poverty) within various rights systems, including the IAHRS.1314 In doing so, he emphasizes the importance of states paying attention to such systemic situations of discrimination and inequality within their societies.1315

Based on his review of the IACtHR’s jurisprudence,1316 Justice Ferrer Mac-Gregor Poisot makes several observations about the contextual realities of “situations of exclusion and marginalization” derived from the victims’ poverty, noting that poverty is identified as “a factor of vulnerability that deepens the impact of human rights violations on victims subjected to this

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1312 Hacienda Verde, supra note 1302 at para 341.
1314 Hacienda Verde, supra note 1302, concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot at para 56, who observes that not all human rights violations present as isolated events and instead correspond to “systemic situations” that correspond to specific and institutional contexts of denial of human rights.
1315 Ibid.
1316 The concurring opinion reviews the law in connection with Indigenous rights, as well as the earlier precedents of Servellón-Garcia, and concerning other children from marginalized backgrounds in institutionalized settings who are vulnerable to serious human rights violations: contexts involving vulnerable individuals with mental health issues and other disabilities, and migrant children.
condition”.\footnote{1317} He concludes that the IAHRS recognizes that “people living in poverty are persons protected by Article 1.1 of the \textit{American Convention} because of their economic position”.\footnote{1318} He further contends that the Inter-American system\footnote{1319} has thereby added “one more way to understand poverty”, as a “special protection category”.\footnote{1320}

Returning to the \textit{Hacienda Verde} judgment itself, Justice Ferrer Mac-Gregor Poisot frames the finding as one in which “the discriminatory facts [...] were derived from economic position - because of the situation of poverty - of the 85 victims who were inside the Hacienda Brasil Verde”.\footnote{1321} He observes, based on the Court’s previous decisions and its conclusion in the instant case, that there is “generally, normally or almost always” an association of poverty with historical discrimination on the basis of various categories (of race, gender, etc.), including multiple or composite or intersectional situations of discrimination.\footnote{1322}

The Court thus establishes that the instant agricultural workers had several identical characteristics, namely, their situation of poverty or extreme poverty, their origins from the poorest communities in Brazil (with less job prospects and employment), and their minimal or non-existent schooling.\footnote{1323} The Court goes on to connect these circumstances to their increased susceptibility to exploitation.\footnote{1324} In addition to their vulnerability to exploitation and human rights violations, the Court also recognizes that this situation constitutes discrimination on the basis of their economic position.\footnote{1325}

Justice Ferrer Mac-Gregor Poisot emphasizes the Court’s conclusion that there is a “link between work, poverty and new forms of slavery”;\footnote{1326} its finding that “people who are living in
poverty are more likely to be trafficked” (as in the case of the 85 workers at Hacienda Verde Brasil).\textsuperscript{1327} The Court based this determination on expert evidence showing that people living in poverty “are faced with unemployment or underemployment and casual work without guarantees, with low wages and unsafe and degrading working conditions.” The evidence further showed that “[t]hese people usually work outside the formal economy and without social security benefits, for example, without maternity leave, sick leave, pensions or disability benefits.”\textsuperscript{1328}

Justice Ferrer Mac-Gregor Poisot next considers the framing of the term “economic position” under anti-discrimination law, finding that it refers to “structural situations of denial, for various reasons, to a sector of the population, of general needs for a dignified and autonomous life”.\textsuperscript{1329} The starting point for setting the parameters of the (necessary) “conditions of dignity”, is the types of situations that ‘prevent the development of a dignified life’, such as access to and enjoyment of the most basic social services.\textsuperscript{1330}

Finally, in perhaps the most enlarged and indivisible expression of the concept of a dignified life, he expounds the conditions of dignity:

[...] In this sense, [they] refer to the possibility, for example, of [having] a job or the enjoyment of goods, such as housing, education, health, recreation, public services, social security, culture, given that it is the situation facing them that shapes the social economic condition of the individual. The above is more evident in Latin America with respect to women, due to the lack of economic autonomy and more acute circumstances of the incidence of poverty in relation to men, which requires that States adopt specific actions to solve that situation of gender inequality in terms of the impact of poverty.\textsuperscript{1331}

Returning to the Court’s analysis of discrimination by “economic position”, Justice Ferrer Mac-Gregor Poisot observes that this ground or status is not interpreted as an addition to the

\textsuperscript{1327} Ibid.
\textsuperscript{1328} Ibid at para 51.
\textsuperscript{1329} Ibid at para 54.
\textsuperscript{1330} Ibid.
\textsuperscript{1331} Ibid [author’s translation].
categories of special protection (as with gender identity or sexual orientation), but serves instead to “delimit the scope and content of the prohibition of discrimination” on the basis of economic position “by analyzing the circumstances of poverty” in which the victims were found. On the basis of Article 1.1’s “any other social condition”, he frames the Court’s finding as one where “poverty is part of the content of the prohibition against discrimination due to economic position” of a person or group.\footnote{Ibid at para 50.} He further expands on the nature of poverty, as “being a multidimensional phenomenon”, that can be addressed from different categories of protection in light of Article 1.1”.\footnote{Ibid at para 50 [author’s translation].} This is because “as it can be the economic position, the social origin or through another social condition, that attracts in a separate, multiple or intersectional way the protection of these categories of protection.”\footnote{Ibid.}

To conclude then, the arc of the Court’s jurisprudence is such that the ‘categories’ or ‘criteria’ of discrimination are being interpreted in ways increasingly responsive to social realities, as where the individual members of a group of claimants are not “linked individually”, for example by grounds, and instead face various “social and cultural factors and barriers together”.\footnote{Ibid at para 55.} Justice Ferrer Mac-Gregor Poisot further contends that the situation of poverty, “as part of the economic position”, are similarly analyzed in the context of workers, where, as with irregular migrant status, their disadvantaged situation is owing to the situation of poverty as part of the economic position.\footnote{Ibid: “In short, the Inter-American Court has been expanding and defining the content of the categories by which individuals or groups of people cannot be discriminated against, which in some cases have responded to the social realities that have arisen with the evolution of the same; where, in addition, they are not linked individually but respond to various social and cultural factors and barriers together, as has been the condition of HIV that can be a generator of disability, infertility as a form of disability that has other repercussions on gender, or the disadvantaged situation of a worker, because of his irregular migrant status and, now, the situation of poverty as part of the economic position.” [author’s translation].}

In terms of the state duties that flow from this analysis, the Hacienda Verde judgment affirms earlier jurisprudential directions that negative rights and restraint do not suffice, and instead establish that states adopt positive measures. The decision further clarifies that such measures

\footnote{Ibid at para 50.} \footnote{Ibid at para 50 [author’s translation].} \footnote{Ibid.} \footnote{Ibid at para 55.} \footnote{Ibid: “In short, the Inter-American Court has been expanding and defining the content of the categories by which individuals or groups of people cannot be discriminated against, which in some cases have responded to the social realities that have arisen with the evolution of the same; where, in addition, they are not linked individually but respond to various social and cultural factors and barriers together, as has been the condition of HIV that can be a generator of disability, infertility as a form of disability that has other repercussions on gender, or the disadvantaged situation of a worker, because of his irregular migrant status and, now, the situation of poverty as part of the economic position.” [author’s translation].}
should be “determined in accordance with the particular needs of protection of the subject of law”. 1337 Moreover, the basis for this assessment of positive measures is either “their personal condition or because of their specific situation in which [the subject] finds itself, such as extreme poverty or marginalization.” 1338 In other words, the main considerations are the conditions and the affected interests of the subordinated group in question.

Finally, as a way of closing the circle with the Court’s first decision in Velásquez Rodríguez, 1339 and my summation in Part I of positive obligations, Justice Ferrer Mac-Gregor Poisot encapsulates the obligation of special protection and special duties for those in situations of vulnerability, as one that derives from the general obligations of respect and guarantee of human rights. 1340 To the extent that Justice Ferrer Mac-Gregor Poisot’s summation in Hacienda Verde is an accurate systematization of the Court’s jurisprudence, the system has developed an equality framework that recognizes a broad range of inequality harms and interests to be remedied and protected, including material inequality as it intersects with other indicia of vulnerability to exploitation and other abuses.

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1337 Ibid at para 49 [author’s translation].
1338 Ibid: “[...] The Inter-American Court recalled that it is not enough for States to refrain from violating rights, but it is imperative to adopt positive measures, which can be determined in accordance with the particular needs of protection of the subject of law, either because of their personal condition or because of their specific situation in which it finds itself, such as extreme poverty or marginalization.” [author’s translation].
1339 Supra note 104.
4.5.6 Multiply Marginalized Out-Groups: The Case of Migrants

The line of cases presented in this section concerns a social group whose structural vulnerability to rights violations and other abuses combines intense forms of status and economic subordination. As a parallel to Canada’s first equality decision, the regulatory framework for ‘foreigners’ has been closely tested in the Inter-American system. Indeed, during the system’s ‘third phase’, migrants (including undocumented migrants\textsuperscript{1341} and migrant children\textsuperscript{1342}) were among the first groups to attract and sustain its attention. The lengthy jurisprudence consistently treats migratory status as one of vulnerability, requiring special protection, and unequivocally asserts that this status may never be the basis for the deprivation of fundamental rights. Four advisory opinions since 1999\textsuperscript{1343} have addressed the confluence of the elements of socio-structural vulnerability that come together in the context of migration. This area of law has also given rise to comparative analysis vis-à-vis the European human rights system,\textsuperscript{1344} commentary addressed below that assists with deconstructing the central premises of the system’s equality analysis.

Further to this jurisprudence, a series of cases has attended to the adverse conditions of Haitian-born migrants or migrants of Haitian origin living in the Dominican Republic. As an intensely ‘othered’ group in that country, their historical and contemporary experiences of structural inequality and discrimination have been the subject of various Commission reports, as well as contentious decisions.

\textsuperscript{1341} Undocumented Migrants Advisory Opinion, supra note 14.
\textsuperscript{1342} Children Migrants Advisory Opinion, supra note 986.
\textsuperscript{1343} Juridical Condition and Human Rights of the Child (2002), Advisory Opinion OC-17/02, Inter-Am Ct HR (Ser A) No. 17 [Rights of Child Advisory Opinion]; and Undocumented Migrants Advisory Opinion, supra note 14, cited by de Paz González, supra note 1016 at 96. The 1999 advisory opinion concerned the issue of whether consular information is a human right and the Court held in the affirmative. Its finding was based on the recognition that the judicial process must recognize and correct any real disadvantages that certain groups might have (at para 289), holding that the presence of real disadvantages necessitates countervailing measures to reduce or eliminate obstacles that impair an effective defence: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Mexico) (1999), Advisory Opinion OC-16/99, Inter-Am Ct HR (Ser A) No. 16 [Consular Assistance Advisory Opinion] at para 289.
\textsuperscript{1344} Dembour, supra note 105.
Prior to delivering its important equality decision concerning girl-children of Haitian migrant origin in *Yean and Bosico v. Dominican Republic* (*Yean and Bosico*),\(^{1345}\) considered next, the Court issued advisory opinions in 1999 and 2003 concerning the situation of migrants and undocumented migrant workers.\(^{1346}\) These decisions have been described as “broad, humanistic and visionary” in one comparative commentary that considers the respective approaches of the Inter-American human rights and the European human rights systems.\(^{1347}\)

The Court’s previously cited 2003 *Undocumented Migrants Advisory Opinion*\(^ {1348}\) addressed the special condition of the vulnerability of migrant workers based on *de jure* and *de facto* inequalities. The decision is considered groundbreaking for having determined that the observance of equality and non-discrimination cannot be subordinated to the goals of public policies, including those that concern a state’s migratory policy.\(^{1349}\) The Court was asked by Mexico to establish, first, whether under contemporary international law, labour rights legislation (in this case, of the United States) could make distinctions in its treatment of legal residents or citizens as compared to undocumented migrant workers, such that their migratory status impeded their enjoyment of such rights,\(^{1351}\) and second, whether this deprivation of the enjoyment of certain labour rights was compatible with equality principles.\(^{1352}\) A related question concerned the State’s obligations *erga omnes* to third party (non-state) employers.

\(^{1345}\) *Supra* note 1276.


\(^{1347}\) Dembour, *supra* note 105 at 313.

\(^{1348}\) *Undocumented Migrants Advisory Opinion*, *supra* note 14.

\(^{1349}\) As noted, the IAHRS has acknowledged the broader discriminatory context for and treatment of Haitians in Dominican Republic and established that affirmative measures are required to ensure the effective right to equality.

\(^{1350}\) *Undocumented Migrants Advisory Opinion*, *supra* note 14 at para 4. The Court framed the questions and issues as follows: a) The obligation to respect and guarantee the human rights and the fundamental nature of the principle of equality and non-discrimination; b) The application of the principle of equality and non-discrimination to migrants; c) The rights of undocumented migrant workers; and d) State obligations in the determination of migratory policies in light of the international instruments for the protection of human rights.

\(^{1351}\) *Ibid* at para 4.

\(^{1352}\) *Ibid* at para 1: The specific request concerned the “deprivation of the enjoyment and exercise of certain labour rights [of migrant workers,] and its compatibility with the obligation [of member states] to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights. The request dealt with “the meaning that the principles of legal equality, non-discrimination and the equal and effective protection of the law have come to signify in the context of the progressive development of international human rights law and its codification”.

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The Court framed the instant context as one concerned with the vulnerability of undocumented migrant workers as ‘easy targets’ for human rights violations; in a situation of inequality as regards the effective enjoyment and exercise of their rights.\textsuperscript{1353}

Aside from its earlier referenced propositions concerning equality’s role(s) in the system’s rights analysis\textsuperscript{1354} and its \textit{jus cogens} status,\textsuperscript{1355} the Court concluded that states must refrain from actions that directly or indirectly create situations of \textit{de jure} or \textit{de facto} inequality and discrimination.\textsuperscript{1356} States are also obliged, under their special duty to protect,\textsuperscript{1357} to take affirmative action\textsuperscript{1358} that will actually reverse or change discriminatory situations affecting certain groups.\textsuperscript{1359} In other words, the advisory opinion established a state obligation to first identify and then address pre-existing discriminatory situations, regardless of the state’s role in (directly) creating them. The decision is also significant in establishing \textit{erga omnes} responsibility as a positive obligation to ensure effective respect for private or family life’,\textsuperscript{1360} addressing the problematic spheres of public/private action.\textsuperscript{1361}

In the specific context of migration, the advisory opinion highlights the intrinsic vulnerability of migrants, and in probing the sociological causes and consequences of migration, expressly recognizes the power differentials at play.\textsuperscript{1362} Justice García-Ramírez’s concurring opinion observes that “sizeable interests” dominate the political context of migration.\textsuperscript{1363} The Court also acknowledges the existence of \textit{de jure} and \textit{de facto} inequality, defining the latter as structural inequality situations that lead to differential access by certain groups to public resources of the

\textsuperscript{1353} \textit{Ibid} at para 2.
\textsuperscript{1354} The Court held that there is an inseparable connection between the state’s obligation to respect and ensure human rights and the principle of equality and non-discrimination. These principles are seen to permeate every act of the state: \textit{Ibid} at para 85.
\textsuperscript{1355} \textit{Ibid} at para 101.
\textsuperscript{1356} \textit{Ibid} at para 103. Justice García-Ramírez further stated in his concurring opinion, at para 18, that true equality must take into account true conditions (factual inequalities) of those subject to law.
\textsuperscript{1357} \textit{Ibid} at para 104.
\textsuperscript{1358} \textit{Ibid} at para 67: These are framed as the adoption of “compensatory measures” or “correction factors” for parties who are socially and economically unequal for equality of outcome.
\textsuperscript{1359} \textit{Ibid} at para 104.
\textsuperscript{1360} \textit{Ibid} at para 141.
\textsuperscript{1361} \textit{Ibid} at para 147.
\textsuperscript{1362} \textit{Ibid} at para 112.
\textsuperscript{1363} \textit{Ibid}, concurring opinion of Judge García-Ramírez at para 43.
In examining the extreme vulnerability of migrant workers, the Court establishes that exploitation and taking advantage of that vulnerability cannot be tolerated.\textsuperscript{1365}

The Court also asserts the interdependency of ESCR and CPR and their equivalent status, which it held is demonstrated by the right to work itself. Reflecting on their interrelationship,\textsuperscript{1366} Justice García-Ramírez makes the important connection between employment and a decent life, describing work as “a condition of a decent life, and even of life itself”. Going so far as to frame employment as “a subsistence factor”,\textsuperscript{1367} he elaborates the implications for the quality of life of the denial of access to work or from receiving its benefits:

If access to work is denied, or if a worker is prevented from receiving its benefits, or if the jurisdictional and administrative channels for claiming his rights are obstructed, his life could be endangered and, in any case, he would suffer an impairment of the quality of his life, which is a basic element of both economic, social and cultural rights, and civil and political rights.\textsuperscript{1368}

The Court’s 2005 contentious equality rights decision in \textit{Yean and Bosico v. Dominican Republic} (\textit{Yean and Bosico}),\textsuperscript{1369} builds on the foregoing. The case concerned two female minors of Haitian origin named Dilcia Yean and Violeta Bosico who were living unregistered in the Dominican Republic, having been born to a Dominican-born mother and to fathers who were Haitian migratory workers. The claim challenged the State’s failure to process the late birth registration requests on behalf of both girls who were under 13 years at the time of the applications.\textsuperscript{1370} The petitioners were asked to supply additional documentation and their applications were ultimately denied. The Court held that the state had violated the petitioners’ equality rights, among other rights, including the right to nationality and the rights of the child, and it made extensive orders of reparation.

\textsuperscript{1364} \textit{Ibid} at para 112.
\textsuperscript{1365} \textit{Ibid} at paras 169-70.
\textsuperscript{1366} \textit{Ibid}, concurring opinion of Judge García-Ramírez at para 28.
\textsuperscript{1367} \textit{Ibid}.
\textsuperscript{1368} \textit{Ibid}.
\textsuperscript{1369} \textit{Yean and Bosico}, supra note 1276.
\textsuperscript{1370} \textit{Ibid} at para 109(14).
The judgment is presented for several reasons.\textsuperscript{1371} The first is its expansive contextualized approach, that closely examines the historical and contemporary complexity and multidimensionality of the subordinate situation suffered by migrants and individuals of Haitian origin who live in the Dominican Republic. As an Article 24 case, where equality rights are analysed \textit{in conjunction} with other rights (such as the right to nationality, and the rights of the child), the Court recognized how the petitioners’ lack of access to conditions of equality affected other rights that together provide for the conditions of a dignified existence.\textsuperscript{1372} The Court’s attention to the special intensity of suffering for school age children in a situation of inequality and poverty has also been a matter of comment by various scholars.\textsuperscript{1373} The case illustrates the system’s general approach to an integrated multiple rights analysis and its evolving multidimensional and intersectional analysis.

Moreover, further to the incipient framing in \textit{Street Children}, the rights at issue were found to be violated not only by state omission but by its non-compliance with the positive obligation to generate the conditions of dignified existence.\textsuperscript{1374} The decision affirms and extends the principle that the instant rights are violated by non-compliance or insufficient compliance with the positive obligation to address pre-existing discriminatory situations of subjugation.\textsuperscript{1375} The final reason for its significance is the Court’s orders of important reparation measures advanced to change this situation, including those in the realm of ESCR/SER.

As a strong example of the Court’s contextual approach and adverse effects analysis, I review its findings regarding the social context in detail. Before delving into the specifics of the claim and the petitioners’ circumstances, the Court presents the proven facts it considers to be relevant and “form part of the background and context of this case”.\textsuperscript{1376} It presents a detailed

\textsuperscript{1371} Analysis drawn in part from the article of Clérico, Ronconí & Aldao, “Towards a Reconstruction of Equality Case Law”, \textit{supra} note 1198.
\textsuperscript{1372} \textit{Ibid} at 137, citing \textit{Street Children}.
\textsuperscript{1373} \textit{Ibid} at 126.
\textsuperscript{1374} \textit{Ibid} at 127.
\textsuperscript{1375} \textit{Yean and Bosico, supra} note 1276 at para 109.
\textsuperscript{1376} \textit{Ibid}.
description of the “social context” and lived conditions of Haitian migrants, in general, beginning with the historical immigration patterns of Haitians towards the Dominican Republic for the purpose of working on the country’s sugar plantations, starting in the first third of the twentieth century. The Court subsequently considers the contemporary situation of this group, observing that most Haitians and Dominicans of Haitian origin “live in conditions of poverty in areas known as “bateyes”, which consist of settlements of agricultural workers located around the sugar cane plantations”. The Court’s review of the living conditions extends to the lack of basic public services in these settlements and the failure to maintain the roads, such that communication between the bateyes and the towns could be cut off for several days during the rainy season.

The Court cites data showing that most Haitians live in “precarious conditions of extreme poverty”. It finds that the status of the majority, including children of Haitians who were born in the country (like Dilcia and Violeta), is undocumented. The Court concludes that the population confronts “a general hostile political and social situation, without the possibility of legal assistance”, as well as “limited access to health, sanitation and education services.”

Other features of their marginalized status include their effective confinement to sectors of the labour market “assigned” to this group, employment “characterized by low salaries and appalling working conditions”. Based on its assessment of the evidence and findings of fact, the Court concludes that because of their Haitian ancestry, the children petitioners “form part of a vulnerable social group” in Dominican society.

The Court found it was common for Haitians and Dominicans of Haitian origin to use the late declaration procedure to declare their children born in the state. There were multiple reasons for this, including that the mothers usually had home births and faced other obstacles,
such as travelling to access health services (owing, for example, to the geographic and other obstacles outlined previously), their economic circumstances, and their fear of encountering police and other officials in the cities and possibly being deported, the latter having been carried out at significant levels at different time periods. In other words, the claimant group’s socio-economic realities led to both a higher incidence of late birth registration requests, as well as disproportionate adverse impacts associated with the challenges of the birth declaration process and the consequences of denied applications.

Both direct and indirect discrimination claims were advanced and *Yean and Bosico* is important for its clear application of a disparate impact or adverse effects analysis. The petitioners and the Commission alleged that what was at issue and in evidence were deliberately discriminatory” policies and practices, and further that the State’s policies had discriminatory impact. The State defended on the basis that there was no proven deliberate intention or act to not grant birth certificates, and that State officials were complying with the requirements required of Dominicans and foreigners “without any form of distinction” for late declarations of birth.

The Court examined various state practices framed as neutral on their face, paying close attention to the evidence of discrimination and social exclusion of this group, as it assessed the ‘social trajectories’ of the individual petitioners. The Court found that the ‘practical consequence of the [State’s] onerous requirements and bureaucratic red tape [for late birth registration] was to increase the number of undocumented children who had no way to prove their nationality’; for children of (im)migrant parents, “the effect was to exacerbate their deprivation by denying them access to social benefits and rights”.

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1386 The Court also referenced the high levels of historic deportations of Haitians: *Ibid* at 109(10).
1387 *Ibid* at para 112(b), emphasis added. The State also defended on the basis that there was no proven deliberate intention or act to not grant birth certificates, and that state officials were complying with the requirements required of Dominicans and foreigners “without any form of distinction” for late declarations of birth: at para 122.
1388 *Ibid* at para 122.
1389 *Ibid*: see review of social context beginning at para 109(1) of the proven facts.
1390 *Ibid*. 

As a general observation, the Court’s intersectional and multiple rights analysis of the rights to nationality and the rights of the child (Articles 20 and 19, respectively) is carried out in conjunction with its equality analysis. The Court commences the analysis by observing that as children, the petitioners had special rights corresponding to specific obligations of the family, society and the state that required the “special protection of the State”. The Court finds that the violations of the children’s rights were especially serious, and also as “girl children” who belong to a vulnerable social group.

The Court went on to find that the failure to grant the children nationality, which left them stateless, was arbitrary and discriminatory, and violated Articles 20 and 24, in relation to Article 19, and also in relation to Article 1.1 of the Convention. Its analysis was as follows. The Court found that the State had adopted different positions on requirements and had no standard criteria, and as such, by applying different requirements to the children from those requisite for children under 13 years of age, the state acted arbitrarily and without using reasonable and objective criteria, contrary to the “superior interest of the child”.

Finding that the right to nationality is a fundamental and non-derogable right, the Court invoked the peremptory principle of the equal and effective protection of the law and non-discrimination. It confirmed that states must not only abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights, they “must combat discriminatory practices at all levels, particularly in public bodies, and finally, must adopt the affirmative measures needed to ensure the effective

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1391 Ibid at para 133.
1392 Ibid at para 134.
1393 Appendix B: Rights Provisions.
1394 Yean and Bosico, supra note 1276 at paras 173-4, emphasis added: “The Court finds that for discriminatory reasons, and contrary to the pertinent domestic norms, the State failed to grant nationality to the children, which constituted an arbitrary deprivation of their nationality, and left them stateless for more than four years and four months, in violation of Articles 20 and 24 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico.”
1395 Ibid at para 166.
1396 Ibid at para 136. The Court emphasized that although the determination of the right remains within a state’s domestic jurisdiction, international human rights law limits the discretion of states (at para 140).
right to equal protection for all individuals”. The Court is explicit in finding that the obligation to guarantee Convention rights implies not only respect as a negative obligation, “but also that it must adopt all appropriate measures to guarantee them (positive obligation)”. The Court thus paid close attention to the effects of the State’s practices, which it found effectively allowed statelessness, thereby depriving individuals of the possibility of enjoying CPR and “[placing them] in a condition of extreme vulnerability”. The Court held that this constituted discriminatory treatment and that the State’s practices had the effect of excluding a particular vulnerable social group from the state’s juridical system, “which placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights”. The decision thus reaffirms the principle that the obligation to respect and ensure the right to equal protection and non-discrimination is irrespective of the person’s migratory state in a state.

In addition to having impeded access to their rights and to the special protection to which they were entitled, the Court squarely situated the discriminatory treatment imposed on the children within the context of the vulnerable situation of this population, specifically relying on evidence of their limited and discriminatory lack of access to housing, education, and health services. The Court examined the other consequences (of these violations) for these already vulnerable children, including the effects on Violeta’s ability attend school during the day. As a result of the lack of a birth certificate, she was unable to attend school during the day for one day.

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1397 Ibid at para 141 [emphasis added].
1398 Ibid, at para 173.
1399 Ibid at para 142.
1400 Ibid at para 166, citing supra note 1340 at para 56.
1401 Ibid at para 155. The Court confirmed that the migratory status of a person is not transmitted to the children and that the only fact that needs to be proven for the acquisition of nationality is that the person has been born on the territory of the State (at para 156). The Court confirms that the migratory status of a person is not transmitted to the children and that the only fact that needs to be proven for the acquisition of nationality is that the person has been born on the territory of the State.
1402 Ibid at para 167.
1403 Ibid at para 168.
1405 Ibid at para 185.
year and had to enroll in night school.\textsuperscript{1406} The Court further held that the State is obliged to provide free primary education to all children in an appropriate environment and in conditions necessary to ensure their full intellectual development, based on Article 19, interpreted in light of various human rights instruments, and in relation to Article 26.\textsuperscript{1407}

In addition to pecuniary and non-pecuniary damages, the Court ordered measures of satisfaction and guarantees of non-repetition. It required the State to institute simple, accessible birth registration processes along with an effective recourse for cases in which the request is refused. It further held that in establishing requirements, the State must consider the particular vulnerability of this population; the requirements must not “constitute an obstacle for obtaining Dominican nationality”.\textsuperscript{1408} Other orders included human rights training programs for state officials responsible for registering births, including training on fostering a culture of tolerance and non-discrimination.\textsuperscript{1409}

As with other system decisions, the concurring opinions in \textit{Yean and Bosico} are noteworthy in several respects, particularly, in providing further insights into the Court’s substantive outcomes but also its interpretive logic and legal reasoning.

Justice Cançado Trindade’s concurring reasons again point to the centering of human suffering in the Court’s analysis, in furtherance of maximizing the protection of human rights.\textsuperscript{1410} He emphasizes the lived realities of migrants, in general terms, as a growing global phenomenon, and the “disturbing […] manifestations of statelessness”, which he describes as a “disturbing picture” and a “widespread contemporary tragedy”.\textsuperscript{1411} He affirms the importance of the Court’s care in emphasizing the position of the petitioners as children, “which increased their vulnerability, and jeopardized the development of their personalities, making it impossible to

\begin{footnotes}
\footnote{1406} Ibid at para 109(35).
\footnote{1407} See Appendix B: Rights Provisions.
\footnote{1408} Ibid at para 240.
\footnote{1409} Ibid at para 242.
\footnote{1410} He applauds the 'broad scope of the general obligations of Articles 1(1) and 2 of the American Convention, and expresses his regret were the Court to move away from this case law that “maximizes the protection of human rights under the Convention”: concurring opinion of Justice Cançado Trindade at para 22.
\footnote{1411} Ibid at para 11.
\end{footnotes}
grant them the special protection of their rights to which they were entitled”.  

Of further note are Justice Cançado Trindade’s reflections on the Court’s explicit rejection of formula that apply a “restrictive, atomized and disaggregated vision of a general obligation to guarantee under the Convention as a whole”. He emphasizes that compliance with the “comprehensive scope” of the general obligation in Article 1.1, necessitates a “series of measures”, including “the adoption of legislative and administrative measures designed to remove obstacles, fill in lacunae, and enhance the conditions for the exercise of protected rights”.  

His reasons also point to the importance of “inter-relating” the violated rights to the right to equal protection. He contrasts this to an analysis that deals with multiple rights violations “in an unusually compartmentalized way” [emphasis added]. He characterizes the Court’s preferred approach as “the best hermeneutics for the protection of human rights”, namely, “that which interrelates the indivisible protected rights – and not that which seeks incorrectly to separate them, rendering the bases of protection unduly fragile”.  

As a final contribution to evaluating the Inter-American system’s approach to migrants and migratory status, the system’s substantive rights orientation is contrasted to the European human right system’s in a comparative text entitled, When Humans Become Migrants. Marie-Bénédicte Dembour contends that the IAHRS has taken a different, largely substantive equality approach to its treatment of this highly vulnerable population. The volume describes the earlier referenced advisory opinions as wide-ranging and unequivocal, “humanistic”, and as reflecting a different ‘tipping point’ in terms of the recognition of human suffering by law. Querying why the outcomes in the two regional systems are so different, Dembour identifies

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1412 Ibid at paras 10-11 and 13.
1413 Ibid at para 16.
1414 Ibid at para 17.
1415 Ibid at para 22 [emphasis added].
1416 Ibid.
1417 Dembour, supra note 105.
1418 Ibid at 283.
1419 Ibid at 503.
the Inter-American system’s ‘greater pro-person approach’, which she reformulates as “thinking of migrants as human beings” rather than first as foreigners - the latter approach attributed to the European system. She cites in support of her thesis the reasons of Justice Cançado Trindade, and his emphasis on the importance of the final addressee of human rights norms being the vulnerable human being.  

Dembour draws further contrasts with the IAHRS’s approach to remedies or reparations, the notable features being their breadth and their reflection of an interrelated or integrated (multiple rights) approach to rights.

The Inter-American system is not immune to criticism of course. The Court has been critiqued for its failure to decide in several cases that the state’s conduct rose to the level of indirect or structural discrimination. The Court had determined in those decisions it did not need to decide this as there was evidence of direct or de facto discrimination. Critics thus concede that the Court highlighted the discriminatory context within which the conduct took place and it confirmed its readiness to address indirect discrimination. The same commentators also acknowledge that the Court addressed the structural character of discrimination in its handling of reparations, wherein special affirmative positive obligations flowed from the Court’s assessment of the petitioners as vulnerable, along with migrants more generally.

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1420 She references another common theme in comparative pieces on the system, which is their distinctive approaches to their subsidiarity role. In general, Europe is more deferential to the states’ declared interests than the IAS’s.

1421 Dembou, supra note 105 at 313.

1422 The cases in question concern migrants issues, in one case, violence against such groups, and in the other, forced deportations - respectively: Dorzema, supra note 1058; and Expelled Dominicans and Haitians, supra note 1076.

1423 Dorzema, ibid at para 152.
4.5.7 Theorizing Difference and Challenging ‘Universality’ through Indigenous Rights

The system’s reformulation of Indigenous rights is another focal point of its substantivist rights theorization and social readings of CPR and the further development of its strong state responsibility doctrine.

Expressing a common view, Isaac de Paz González calls this case law the “most advanced regional model of indigenous and tribal [groups’] protection”;1424 many judgments, orders, reparations, and measures granted are more progressive than counterpart measures issued by other international and regional courts.1425 He further observes that much of the Indigenous rights jurisprudence “links civil, political and social rights to encompass new categories of collective rights.”1426

This section draws heavily on the scholarship of Laura Clérico and Martín Aldao, and Victor Abramovich. Clérico and Aldao contend that the Indigenous rights jurisprudence is only comprehensible when framed in structural or substantive equality terms, and conceiving of equality both as a condition and an objective.1427 Their work applies the insights of various equality theorists to analyze the IAHRS’s approach to the equal protection of the rights of Indigenous peoples, with particular emphasis on Roberto Saba’s characterization of equality in express anti-subordination and transformative terms.1428 This framework is appropriate to contexts with very complex systems of injustice that combine elements of misrecognition, maldistribution and non-participation, such as those involving Indigenous rights – contexts that significantly challenged the system in its early jurisprudence as it attempted to apply more conventional and individualized rights analysis. Clérico and Aldao also apply insights from Nancy

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1424 De Paz González, supra note 1016 at 37.
1425 Ibid at 40-1.
1426 Ibid at 36.
1427 Clérico & Aldao, “Equality as Redistribution and Recognition”, supra note 300.
1428 Roberto Saba’s framework is cited in Clérico & Aldao, “Equality as Redistribution and Recognition”, supra note 300 at 169; he emphasizes the reversal of systematic social practices of subordination, exclusion and the “perpetuation of inferiority situations” by other groups. See Saba “(Des)igualdad Estructural” [Structural Inequality], in Alegre, Marcelo, & Gargarella, Roberto, eds, El derecho a la igualdad. Aportes para un constitucionalismo igualitario (Buenos Aires, LexisNexis, 2007) at 28.
Fraser’s and Iris Marion Young’s critical engagement with diversity, to examine the contexts of ‘very different groups’ and the choices they face when difference is used to justify their exclusion and subordination or assimilation. Applied to the Indigenous rights jurisprudence, this interpretive framework challenges the “pseudo neutrality” of universality and formal equality, based on the understanding of that approach as reflecting “hegemonic but not universal or neutral cultural and material patterns”. The IAHRS has in their view incorporated an ‘enlarged’ conception of inequality that extends beyond anti-discrimination and embraces the conception of equality as non-domination or non-subordination “interpellated by the causes that generate this inequality”. Clérico and Aldao further emphasize that this conception of structural inequality goes beyond material inequality and challenges the problem of dominant socioeconomic and cultural (social values) patterns.

Relying on these conceptual tools, I examine highlights from two lines of cases. The first concerns Indigenous peoples’ access to their ancestral territories and natural resources. Two scenarios are considered: first, where an Indigenous community has suffered historical exclusion from their lands, through violence in many cases and often in combination with the lack of state recognition and demarcation of communal title to those lands; and second, cases arising in the context of state and non-state (private actors) carrying out extractive projects that cause damage to indigenous territories and culture. Together, these cases reflect the system’s embrace of a distinctive ‘indigenous conception of property’, which touches on not only the material, but the spiritual or cultural dimensions of ‘property’ for this historically subordinated population. This line of cases has produced significant affirmative state obligations to change and reverse the instant situations of exclusion and subordination, and in certain circumstances, to directly address basic unmet (material) needs.

The second group of cases addresses issues of exclusion or social subordination that manifest in Indigenous peoples’ lack of access to institutional structures or processes that make important

1429 Clérico & Aldao, supra note 300 at 157 [author’s translation].
1430 Ibid [author’s translation].
1431 De Paz González, supra note 1016 at 51.
1432 Ibid at 51.
decisions that affect them. These cases concern the system’s interpretation of political rights or rights of participation through a structural equality lens, putting to rest false notions of universality (and laws of ‘general application’), which either exclude or insist on the assimilation of such ‘different’ groups.

4.5.7.1 Context-setting: taking the long and deep view

I first consider the system’s well-honed contextual approach to Indigenous rights cases as a particularly exemplary illustration of the system’s contextual inquiry. As with the migrant cases, a striking feature of the system’s approach to Indigenous rights cases is its detailed, historical, and deeply structural inequality framing of the context. The basis of this approach is the recognition that abstract, formal approaches impair the system’s understanding of the injustices it needs to address.  

The system’s contextualized approach has itself been the subject of reflexive analysis – by the Court, in particular. Various judgments and concurring opinions from the cases presented display a self-conscious effort on the judiciary’s part to ‘enlarge the mind’ and expressly rejecting the stance of false neutrality and criticizing the analytical ills of abstraction, inflexibility, and acontextualism.

One commentator describes the aperture of the system’s contextual lens for Indigenous peoples as trained on the realities of “lost lives, integrity, identity, land, means of subsistence, and cultural recognition, and subject to secular processes of domination, exploitation and discrimination”. Mario Melo, counsel for the petitioners in Kichwa People of Sarayaku v. Ecuador (Kichwa), contends that the system’s recognition of the historical context of

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1433 A view expressed best by Judge Cançado Trindade in Street Children – Merits, supra note 1191 at para 6.
1434 Melo, “Recent Advances”, supra note 929 at 32.
1435 Supra note 110. The case concerned the Ecuadorian state’s granding of a concession for an oil project affecting 65% of the ancestral lands of the Kichwa people, without informing, consulting or obtaining their consent: Melo, “Voices”, supra note 108 at 285.
systemic and structural discrimination in its innovative series of Indigenous rights cases, has been critical in undertaking the significant conceptual shifts in rights interpretation.\textsuperscript{1436}

Among other noteworthy traits is the attention paid to perspectives and experiences that are not usually articulated and acknowledged.\textsuperscript{1437} As an example, in the \textit{Kichwa} case, the Court decided to closely explore the impact on this community of an oil project concession that the state granted without consultation or consent, to appreciate the generally unarticulated or ignored perspectives of the Kichwa People. Melo contends that the system’s response led it to connect Indigenous peoples’ historic experiences of colonization to the continuing forms of exploitation and discrimination that are perpetrated through the direct actions and omissions (failures to perform) of the states of the region.\textsuperscript{1438} Melo details the testimony heard in the \textit{Kichwa} case, where several judges of the Court travelled to the region, and for the first time heard testimonies from Indigenous victims in their own territory.\textsuperscript{1439} The Court framed its effort as an attempt to fully comprehend the dimensions of the Kichwa People’s experiences and world views through hearing the Indigenous community members in their territory (and in the testimony of various members in the proceeding itself). The interpretive exercise was thus framed around the critical objective of understanding the ‘true’ dimensions of the harms experienced through the impact of the project on their territory, further to their ‘different’ world view. The implication of this self-conscious interpretive effort is that, as members (largely speaking) of dominant groups, the judiciary (as with other ‘outsiders’) is inherently challenged to comprehend these groups’ real experiences.

More generally, in Melo’s view, the system’s methodological choices and form of contextualized analysis are rooted in the system’s understanding of the region as beset by serious racial, social and economic discrimination and exploitation.\textsuperscript{1440} The level of attention to the region’s Indigenous peoples is a function of the system’s recognition of the troubled history

\textsuperscript{1436} Melo, “Recent Advances”, \textit{supra} note 929 at 32.
\textsuperscript{1437} Melo, “Voices”, \textit{supra} note 108.
\textsuperscript{1438} Melo, “Recent Advances”, \textit{supra} note 929 at 32.
\textsuperscript{1439} Melo, “Voices”, \textit{supra} note 108 at 287-288. Chief Justice Diego García Sayán and Judge Radhis Abreu went to the territory in 2012.
\textsuperscript{1440} Melo, “Recent Advances”, \textit{supra} note 929 at 32.
of these communities and their interactions with settler populations and governments. And when assessing individual claims, the system frequently references general and specific aspects of this history, citing colonization, displacement, genocide, and other policies of assimilation and subordination as the backdrop and still relevant context of the community in question.  

_Yakye Axa v. Paraguay_ (Yakye Axa)\(^{1442}\) serves to illustrate. The Court made findings of various historically significant dates in the progressive non-indigenous occupation of the Yakye Axa people’s territory. The Court’s findings include the sale of large parts of their territory on the London Stock Exchange toward the end of the nineteenth century, at the beginning of the Anglican Church’s evangelization and “pacification” effort of the Paraguayan Chaco region.  

Other examples are the Court’s findings in a decision concerning a ‘tribal people’ in _Moiwana Community v. Suriname_ (Moiwana),\(^{1444}\) and their history further to slavery and European colonization.\(^{1445}\) The Court links these “historic misdeeds”\(^{1446}\) and “historic injustices”\(^{1447}\) to the evidence of continued “human suffering”, “in [the community’s] constant struggle against domination”.\(^{1448}\) It concludes that this history contributed to their subsequent and contemporary experiences of poverty, marginalization, social exclusion, and insecurity.\(^{1449}\)

In another Paraguayan case, _Sawhoyamaxa Indigenous Community_ (Sawhoyamaxa),\(^{1450}\) several concurring opinions describe the injustices and “historical roots of the situation of want”,\(^{1451}\) which they attribute to the “plunder”, “dispossession of the community”,\(^{1452}\) and their “forcible

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1441 _Ibid._
1442 _Supra_ note 932.
1443 _Ibid_ at para 50.10.
1444 _Supra_ note 340.
1445 _Ibid_: findings set out at para 86(6).
1446 _Ibid_, concurring opinion of Judge Cançado Trindade at para 11.
1447 _Ibid_ at para 27.
1448 _Ibid._
1449 _Ibid_. A similar pattern concerning the historical background of the Afrodescendant community is evident in _Saramaka People v. Suriname_. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) [Saramaka] at 85. The Court recognizes their historical experience of slavery, in extending the analytical framework of Indigenous peoples to such collectivities.
1450 _Sawhoyamaxa_, _supra_ note 1340.
1451 _Ibid_, concurring opinion of Judge Cançado Trindade at para 8.
displacement” from their territory. The opinions conclude that the latter phenomena led to “extremely severe and deep damage” to this community, and to ‘consequences that are still seen’, in terms of their current experience of inhumane conditions.

The system has thus analyzed these ‘historic misdeeds’ as giving rise to the recognition of Indigenous peoples’ rights pursuant to certain basic principles, such as the right to (effective) equality and non-discrimination. This is done in express recognition of “the debt that humankind owes to indigenous peoples” and the corresponding duty to “undo the wrongs” done to them. The overall framework is encapsulated as one of “reparative justice”, by former U.N. Special Rapporteur on Indigenous People, James Anaya in direct application to the IAHRS’s approach to the protection of Indigenous peoples’ rights. This formulation is consistent, the project contends, with the essential elements of substantive equality.

4.5.7.2 Trajectory of Indigenous rights jurisprudence

Tracing the evolution of the system’s substantivist rights analysis, Indigenous peoples are the group for which the Inter-American system has: recognized the largest range of harms (misrecognition, maldistribution, and non-participation); imposed the most extensive range of affirmative positive state obligations; and developed the most expansive approaches to reinterpreting CPR, including equality rights, and elements of ESCR/SER.

Despite this now-consistent approach towards how to adequately situate Indigenous peoples and similar collectivities in the hemisphere (like Tribal peoples and other ethnic minorities)
within its human rights analysis, it is helpful to consider former Commissioner Dinah Shelton’s reflections on how the IAHRS initially struggled to find a sound theoretical and normative basis for the “very real differences” between Indigenous peoples and (non-Indigenous) others. 1462 While the system has now largely settled its understanding of how these hemispheric historic and contemporary realities should figure in the formulation of their rights, Shelton notes that the limited nature of the notions of non-discrimination and individual equality rights were thought to be incongruent with these extremely complex realities. 1463 The Commission spoke to this in a 2000 report on the regional human rights situation of Indigenous peoples, which concluded that the law was incoherent and had failed to adequately protect them.1464 The Commission considered that the law “failed to recognize the nature and complexity of Indigenous peoples” and that the protection of their rights through “the concepts of ‘minorities’ or ‘prohibition of discrimination’”, was “incomplete and reductionist, and therefore inadequate”.1465

As part of the system’s evolution of a more coherent approach to Indigenous rights, in 1971, the system decided that Indigenous peoples require – and there is a duty to provide – “special legal protection” as a result of their history of severe and structural discrimination.1466 The assignment of this special status to this sector was accompanied by the institution of (progressively ampler) corresponding state obligations, which became a recurrent theme in this jurisprudence.

Further to the Article 1.1 obligation to respect and ensure the rights of Indigenous peoples on the basis of full and effective enjoyment in equality with other persons, the system determined that, given the states’ special obligations towards Indigenous peoples, actions or omissions by

1461 Dinah Shelton was a Commission member from 2010-2014.
1463 Ibid.
public authorities can generate international state responsibility.\textsuperscript{1467} The Commission and Court have also held that the equality dimension of states’ obligations is enhanced by their special obligations towards Indigenous peoples. This enhancement means that states may be required to adopt special and specific measures aimed at protecting their exercise of their human rights “fully and equally with the rest of the population”.\textsuperscript{1468}

To reiterate, the basis for this requirement of (enhanced even) special protection and special measures is what the Commission describes as “the greater vulnerability of these populations, their historic conditions, their historical conditions of marginalization and discrimination, and the deeper impact on them of human rights violations”.\textsuperscript{1469} As a general rule, this includes the “identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.”\textsuperscript{1470} A further refinement is that “the positive state duty of adopting special measures is enhanced when it comes to indigenous children and women, given that their level of vulnerability is even greater.”\textsuperscript{1471}

Finally, this notion of special protection has been applied in relation to several rights and freedoms and at its foundation is the principle that in order to ensure Indigenous peoples’ effective and full enjoyment of their human rights, there must be “consideration of their particular historical, cultural, social and economic situation and experience”.\textsuperscript{1472}

\textsuperscript{1467} Ancestral Lands and Resources IACHR Report, supra note 889 at para 48.
\textsuperscript{1472} Ibid, citing: Dann, supra note 1470 at para 125; and Maya Indigenous Communities, supra note 1468 at para 95.
What this establishes is a recognized state duty in this context to take account of the specificity of a community’s diverse needs and expressions. The Court has thus enjoined states “to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs.”\textsuperscript{1473} The requirement entails that the measures chosen be aimed at protecting their human rights and promoting their social inclusion, once again, based on recognizing their status as “historically excluded groups”.\textsuperscript{1474}

The system has also clearly established that such special measures are not discriminatory in respect of the rest of the population. This is further to two advisory opinions\textsuperscript{1475} that decided that “unequal treatment towards persons in unequal situations” does not amount to impermissible discrimination.\textsuperscript{1476} In tandem with this, in this context, the Court’s further direction is that such measures are “necessary in order to ensure the survival of Indigenous peoples and Tribal peoples in accordance with their traditions and customs”.\textsuperscript{1477}

4.5.7.3 First line of cases: \textit{sui generis} conceptions of the right to property

Attention to the notion of distinctive – as in, non-dominant and suppressed - conceptions of an Indigenous community’s relationship to their land and resources have come to occupy a central place in the system’s substantive equality rights understanding. According to one commentator, the idea of indigenous (and communal) property “lies at the intersection of a critical, [non-dominant or hegemonic] understanding of possession and title [and use of land], on the one hand, and the material and spiritual basis of identity on the other.”\textsuperscript{1478}

\begin{itemize}
\item \textsuperscript{1473} \textit{Ibid} at para 54, citing, \textit{Yakye Axa}, \textit{supra} note 932 at para 63.
\item \textsuperscript{1476} \textit{Ancestral Lands and Resources IACHR Report, supra} note 889 at para 53.
\item \textsuperscript{1477} \textit{Ibid}, citing \textit{Saramaka, supra} note 1449 at para 103.
\end{itemize}
In another application of its socially minded reinterpretation of CPR, the system decided that the obligation to ensure that members of Indigenous communities enjoy the full exercise of their rights includes the duty to adopt “special, effective measures” to ensure their exercise of [communal] property rights over their ancestral lands and natural resources. Such measures are for the purpose of ensuring the enjoyment of the full and equal exercise of their right to their traditional territories.

Several cases, beginning with the landmark case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Awas Tingni), paved the way for the establishment of the sui generis doctrine of collective property. The system’s innovative re-take on property rights and notions of land ownership and use relied on the introduction of social, material and cultural or spiritual elements; it required a reinterpretation of property that integrated between civil rights and laws and economic, social and cultural rights and laws. As Justice García Ramirez observed in a concurring opinion, the tie between Indigenous people and their collective property rights is “the point where civil laws and economic, social and cultural laws converge. In other words, it stands at that junction where civil law and social law meet’.

The Court in Awas Tingni decided that the right to property under Article 21 of the Convention, which on its face was an individual right, could be interpreted in non-classical terms, and more expansively and “autonomously”, as including the rights of Indigenous peoples to

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1479 Saramaka, supra note 1449 at para 85.
1481 Saramaka, supra note 1449 at para 91.
1482 Awas Tingni, supra note 1480.
1483 De Paz González, supra note 1016 at 45.
1484 Ibid at 51.
1485 Awas Tingni, supra note 1480, concurring opinion of Judge Sergio García Ramírez.
1486 Ibid at para 17.
1487 Appendix B: Rights Provisions.
1488 The system has applied the interpretive principle that provisions in the human rights instruments have “autonomous” meaning in respect of domestic legislation. Confirmed for example in the Court’s decision in Saramaka, supra note 1449 at para 146.
collective or “communal property”.

The system determined that property must be expanded to encompass understandings that are specific to Indigenous peoples. It decided that cultural distinctiveness, as much a feature of non-Indigenous peoples as Indigenous peoples, had to be recognized and proactively protected - rather than devalued, misrecognized and viewed as inferior, so as to legitimate patterned exclusion and need.

The claim concerned the State’s decision to allow the logging of timber on Indigenous territories, without notice or consultation. The Court accepted the Commission’s determination that Indigenous people are entitled to special legal protection as a result of their history. The case confirmed that the State’s failure to act to protect Indigenous rights by failing to demarcate and title the community’s territories (in a collective sense), could be as violative of their rights as direct action.

Another central premise was the Court’s recognition that while an Indigenous property system does not preclude other forms of land ownership, the dominant property system has effectively done so in foreclosing a “pluralistic” spectrum of rights. As such, the State’s failure to recognize collective property constitutes an injustice. Further, the injustice is explicitly framed in a concurring opinion, in terms this paper views as falling within a substantive or structural conception of equality. Referencing the hegemonic property system laws and rights common to most of the region’s states, Justice García-Ramírez emphasized that:

[...] To ignore the idiosyncratic versions of the right to use and enjoy property, recognized in Article 21 of the American Convention, and to pretend that there is only one way to use and enjoy property, is tantamount to denying protection of that right to millions of people, thereby withdrawing from them the recognition and protection of essential rights afforded to other people. Far from ensuring the equality of all persons, this would create an inequality that is utterly

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1489 Awas Tingni, supra note 1480.
1491 Ibid at 955.
1492 Awas Tingni, supra note 1480 at paras 14-15.
antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights.\textsuperscript{1494}

Similar outcomes emerged in subsequent cases, as the system’s analysis has continued to evolve in substantive rights and substantive equality terms.

For example, the Commission’s 2002 decision in \textit{Mary and Carrie Dann v. United States} (\textit{Dann})\textsuperscript{1495} determined that by its efforts to remove the Western Shoshone people from their ancestral territory, the State had violated their rights to property, effective judicial remedy, and equality under the law, pursuant to, \textit{inter alia}, Article II the \textit{American Declaration}.	extsuperscript{1496} The basis of this finding was the State’s handling of the issue of land title and its determination (through its Indian Claims Commission) that the title of the Western Shoshone people had been “extinguished”.\textsuperscript{1497} The petitioners had attempted to advance their right to their traditional territories, which were also used for particular activities.\textsuperscript{1498}

The petitioners alleged in the Inter-American litigation that there was discrimination in the theory upon which extinguishment was based (namely, “gradual encroachment by non-indigenous settlers”), and that it constituted “a nonconsensual and discriminatory transfer of property rights in land away from indigenous people... in favor of non-indigenous interests”.\textsuperscript{1499} They also argued that the absence of substantive protection for indigenous property rights (including those derived from aboriginal title) “that are equal to the protections accorded to non-indigenous forms of property”, was a further source of discrimination.\textsuperscript{1500}

The Commission found that the petitioners were not provided equal treatment under the law in the determination of their property interests in the ancestral lands in question, contrary to Article II.\textsuperscript{1501} The Commission interpreted the equality provision as “provid[ing] for the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{1494} \textit{Ibid} at para 13 [emphasis added].
  \item \textsuperscript{1495} \textit{Dann}, \textit{supra} note 1470.
  \item \textsuperscript{1496} \textit{Ibid} at para 172.
  \item \textsuperscript{1497} \textit{Ibid} at paras 142-3.
  \item \textsuperscript{1498} \textit{Ibid} at para 2.
  \item \textsuperscript{1499} \textit{Ibid} at para 54.
  \item \textsuperscript{1500} \textit{Ibid} at para 55.
  \item \textsuperscript{1501} \textit{Ibid} at para 145.
\end{itemize}
\end{footnotesize}
application of substantive rights and the protection to be given to them in the case of acts of
the state or acts by others”. 1502 Interpreting the State’s actions to constitute effectively
different treatment, the Commission concluded that such treatment was not a permissible
distinction and nor did it further a legitimate objective or comply with means reasonable and
proportionate to the end sought. 1503

In a similar case brought by a group of Indigenous communities in southern Belize, Maya
Indigenous Communities v. Belize (Maya Indigenous Communities), 1504 under the American
Declaration, the Commission addressed the state’s granting of logging and oil concessions on
their territories, and the State’s failure to recognize and secure the territorial rights of the Maya
people in those lands. 1505 The petitioners argued that their rights to property (Article XIII) and
to equality before the law under Article II of the Declaration had been violated based on the
State’s failure to “recognize as legally valid the Maya people’s own system of landholding and
resource use”. 1506

Dinah Shelton describes the emergence of a “consensus” expressed by the Commission in
terms of the states’ duty to apply “special measures” in order to compensate for the
exploitation of and discrimination against Indigenous peoples. 1507 The Commission applied its
position that the Article II right does not mean equal or same treatment, but rather that “the
application of the law should be equal for all without discrimination”, 1508 and that the
protection “does not necessarily preclude differentiations between individuals or groups of
individuals”, and further, it may require affirmative measures to diminish or eliminate
conditions that perpetuate discrimination, including “vulnerabilities, disadvantages or threats

1502 Ibid.
1503 Ibid at para 143.
1504 Supra note 1468.
1505 Ibid at para 2.
1506 Ibid at para 157.
1507 Shelton, “Inter-American Law of Indigenous Peoples”, supra note 907 at 956, citing Maya Indigenous
Communities, supra note 1468 at para 97.
1508 Maya Indigenous Communities, supra note 1468 at para 166.
encountered by particular groups”. The Commission concluded that this claimant group of Mayan communities warranted special protection.

A related significant equality rights development is the Commission’s decision that the State failed to establish the legal mechanisms needed to clarify and protect their communal property rights, and to take the steps through state policies to recognize and guarantee their rights. This was found to violate Article II, “by failing to provide them with the protections necessary to exercise their right to property fully and equally with other members of the Belizean population”.

The Commission’s merits report recommended that the State provide an effective remedy in the form of a mechanism to “delimit, demarcate and title” the territory in which the communal property existed, and “in accordance with the customary land use practices of the Maya people”.

The Commission also ruled that the State had failed to engage in consultations with the communities, in violation of the right to property and equality, and recognizing a novel form of inequality (non-participation) harm. By not taking effective measures to delimit the boundaries and recognize the right to communal property – the failure to engage in consultation was thus found to engage the rights to life and to equality. The connections between the right to territories, to ESCR, to consultation, which raises issues of participation, were thus drawn.

These outcomes were replicated and further amplified in other decisions, several of which are presented below, both in this respect and in terms of their integration of expansive readings of CPRs and the specific redress of social and economic rights violations (to which I now turn).

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1509 Ibid [emphasis added].
1510 Ibid at para 171. This is an argument that is advanced in the HTG petition against Canada: supra note 50.
1511 Ibid at para 6.
1512 De Paz Gonzalez, supra note 1016 at 154-155.
1513 Melo, “Recent Advances”, supra note 929 at 43.
4.5.7.4 Dignified life comes together with collective property

The case law also reflects the system’s connection of territorial issues with ESCR/SER, the protection against ‘living in misery’, and the need to ensure the conditions of a dignified life that accords with a community’s cultural preferences – its ‘communal life project’ - and to address socioeconomic injustice together with cultural injustice.\footnote{The conception framed by Clérico & Aldao, “Equality as Redistribution and Recognition”, supra note 300 at 173.} Based on the system’s recognition of the importance of ancestral territories and resources to Indigenous (and Tribal) peoples\footnote{Ancestral Lands and Resources IACHR Report, supra note 889.} and the need to protect the rights thereto, the system went on to recognize other rights within this overarching context.

The evolution of the system’s formulation of the interconnection of property with ESCR/SER is based on its recognition that the special relationship to their territories is fundamental both to their cultural (rights and) integrity – their diversity as it were - and to their material subsistence or the means of subsistence, subsumed further within the concept of the right to a dignified life.\footnote{Ibid at para 56.} For this reason, the system has been intent on remedying instances where this central relationship was severed through the displacement of Indigenous or Tribal peoples’ communities, or through other threats to their territory and resources. The system’s jurisprudence also directly draws the link between the impeded or lack of access to land and resources, and the creation of conditions of extreme poverty and related harms for affected communities.\footnote{Ibid at para 57.}

Various states have been held responsible for their inaction in response to the initial threats to access to land (whether instigated by state or private actors) and the ensuing serious adverse consequences. In a series of Paraguayan cases, the Court squarely addressed the State’s responsibility and held it internationally accountable in light of the exposure of specific
Indigenous communities to “precarious or sub-human living conditions in the fields of access to food, water, dignified housing, basic utilities and health”, \textsuperscript{1518} entailing violations of their rights to life, \textsuperscript{1519} personal integrity, a dignified existence, food, water, health, and education. \textsuperscript{1520} The Court also addressed the effects of such circumstances on the “collective right to cultural integrity, or the right to collective survival of communities and their members”. \textsuperscript{1521}

The Paraguayan cases that illustrate these points are \textit{Yakye Axa}, \textsuperscript{1522} \textit{Sawhoyamaxa}, \textsuperscript{1523} and \textit{Xákmok}. \textsuperscript{1524} The Indigenous communities in each case had been driven off their lands as part of a privatization drive, and the communities were unable to access their territories for any of their normal uses, including, to obtain food. The petitioners had previously made claims under state processes for the return of their lands, without success. In each case, the Court held that the Paraguayan State was obliged to adopt positive measures to protect “life with dignity”, particularly in cases of people who are in a situation of vulnerability or risk, \textsuperscript{1525} and it made important affirmative and even transformative orders of reparation.

The Court in \textit{Yakye Axa} highlighted how the State’s failure to protect ancestral territorial and other rights made the community extremely vulnerable to various deprivations in terms of food, health, sanitation, and other necessities. It also held that the State was aware of not only of their forced displacement, but their extreme poverty and deprivation in terms of basic living conditions. \textsuperscript{1526}

The Yakye Axa community’s lack of access to their territory gave rise to these precarious

\textsuperscript{1518} Ibid.
\textsuperscript{1522} Supra note 932.
\textsuperscript{1523} Supra note 1340.
\textsuperscript{1524} Supra note 912.
\textsuperscript{1525} In each case, the communities were unable to access their territories for the purpose of obtaining food.
\textsuperscript{1526} De Paz González, supra note 1016 at 55.
conditions in their current place of settlement, which was on the periphery of a public road. The Court found that the material deprivations were directly linked to the lack of access to their land, which foreclosed their reliance on the means of subsistence provided by hunting and other resources on that territory, and had adverse implications as well for housing, as well as education of their youth and the practice of their cultural activities and rights. Finding violations in relation to due process, equal protection, access to justice, property rights and the right to life, the Court found a direct causal connection between their lack of property and access to natural resources – or more properly, the recognition and protection of their collective right to their property – and the vulnerability of the community, in terms of its inability to enjoy conditions compatible with a dignified life and in furtherance of its life project.\footnote{1527}

The Court made far-reaching orders, calling on the State to identify and demarcate the Yakye Axa community’s lands by adopting the necessary legislative, administrative measures and other steps to grant and make indigenous property rights effective, and in the interim, to provide them with adequate basic services and goods required for their subsistence. Additional orders included establishing a fund to purchase back the lands from the private company; operating a communitarian programme and creating a development fund, to provide drinking water and sanitary infrastructure, and the implementation of education, housing, agricultural and health programmes.\footnote{1528}

One scholar notes that the Court invoked the State’s general duties to respect the ‘progressive development set forth in Article 26 of the \textit{Convention}', which includes the right to health, food, education, etc.\footnote{1529} Despite this direct “ESCR approach”, however, no violation of Article 26 was declared.\footnote{1530} This result however is consistent with the system’s predominant ‘indirect effect’ approach towards indivisibility and making ESCR justiciable.

\footnote{1527} \textit{Yakye Axa}, supra note 932 at para 168.  
\footnote{1528} \textit{Yakye Axa}, supra note 932 at para 205.  
\footnote{1529} Articles 10 (right to health), 11 (right to a healthy environment), 12 (right to food), 13 (right to education), and 14 (right to the benefits of culture)  
\footnote{1530} De Paz González, supra note 1016 at 123.
Similarly, in Sawhoyamaxa, the Court examined the community’s social exclusion, poverty, diseases, exploitation of labour, and inadequate housing, within a similar context of an unsuccessful territorial claim. The Court elaborates on the communal property recognition in cultural, religious and economic or material terms, in ways seen to further the equal protection of their conception of property.\footnote{1531}{Ibid at 119-20. According to de Paz González (at 61), a more assertive approach was taken to state liability than in terms of positive obligations, in Yakye Axa, supra note 932.}

In the most recent of the cases, Xákmok Kásek Indigenous Community v. Paraguay (Xákmok Kásek), the Court expressly found that Paraguay had violated the community’s right to non-discrimination based on the condition of the extreme vulnerability of its members, and the State’s failure to adopt the necessary measures to reverse the marginalization and exclusion of the community.

The facts were that the State had failed to process the community’s territorial claims to their ancestral property, as in previous cases. By contrast to the other cases, the title of the property was held by a private owner.\footnote{1532}{These facts are similar to those advanced in the HTG petition against Canada: supra note 50.} Despite the community’s efforts beginning in 1990 to have their claim to title recognized, no progress was made. As a result, the community had not been able to access their territory to carry out hunting, fishing or gathering, which were a means of subsistence. The Commission argued that, as a result, the community was in a “vulnerable situation with regard to food, medicine, and sanitation”, which was a continuous threat to its integrity and survival.\footnote{1533}{Xákmok Kásek, supra note 912 at para 2.}

Building on its “right to a decent existence” jurisprudence, the Court made findings on the evidence of the inhuman conditions,\footnote{1534}{Ibid at para 41.} including the inaccessibility of public services, and the community’s lack of access to potable water,\footnote{1535}{Ibid at para 194.} concluding that the State had taken insufficient measures to ensure access to water of sufficient quantity and adequate quality.\footnote{1536}{Ibid at para 196.}
The Court went on to assess the evidence with respect to lack of access to an adequate diet and health care services. In regard to the latter, the State defended that public health services are free in Paraguay. However, the evidence indicated that the community members lacked effective access to healthcare, owing to the lack of transportation (as well as geographical isolation and distance), or the availability of appropriate medicine. In each respect, the Court found that the State had not met its obligations to guarantee access to health care services, and it had failed to take positive measures to ensure that medical supplies and services would be accessible. The Court made similar findings with respect to the inadequate provision of education (that is also culturally appropriate) to the children in the community.

Finally, in a further evolution of the equality arguments from the earlier cases of Dann and Maya Communities, the Court engaged in an extensive reinterpretation of the right. The Commission and the petitioners’ representatives made submissions that there was a pattern of structural discrimination with respect to the protection of the ownership of the Xákmok Kásek’s ancestral territory. This situation was further to the “discriminatory functioning of the State system” because it gave preference to the protection of the right to private property over the protection of the territorial rights of an indigenous population. The petitioners’ representatives also argued that a policy of discrimination had led to a “systematic pattern... which is leading rapidly to the extreme deterioration of the living conditions of the indigenous communities in general, and in this [specific] case”.

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1537 Ibid at paras 197-202.
1538 Ibid at para 203.
1539 Ibid at para 204.
1540 Ibid at para 207.
1541 Ibid at paras 206-8.
1542 Ibid at para 208.
1543 Ibid at para 213.
1544 Supra note 1468.
1545 De Paz González, supra note 1016 at 58.
1546 Xákmok Kásek, supra note 912 at para 265.
1547 Ibid at para 266. The representatives further argued that “the supposed factual and legal impossibility [of granting title to the land,] mentioned by the State of Paraguay, is nothing more than the deliberate application of a racist and discriminatory policy [...]. It is an ingrained situation that has not changed substantively even today, a fact revealed by the Government’s positions in this case.”
Finding an “indissoluble connection between the obligation to respect and ensure human rights and the principle of equality and non-discrimination”,\textsuperscript{1548} the Court elaborated the essential interconnecting elements. It found that the Xákmok Kásek community’s situation was a function of the lack of adequate and effective remedies protecting their rights and the state’s failure to provide supplies and services (such as food, water, health care and education). It also held that their situation was due to the “prevalence of a vision of property that grants greater protection to the private owners over the indigenous peoples’ territorial claims”.\textsuperscript{1549} The Court found that, viewed in its totality, the situation constituted \textit{de facto} discrimination against the community.\textsuperscript{1550} It further held that the State had not taken the necessary positive measures to reverse the situation.\textsuperscript{1551}

As reparations, the Court ordered that the claimed traditional territory be returned to the community, and that the State consult with the community to identify the territory and its borders.\textsuperscript{1552} Significantly, the Court ordered that the State eliminate all obstacles to granting title to the lands on which the community was residing.\textsuperscript{1553} There were associated orders relating to ensuring that the land was protected and not damaged or de-forested.\textsuperscript{1554} In addition, orders were made for the provision of goods and basic services until the community could relocate to permanent territories, including, adequate water, food, sanitation, and education that was respectful of the community’s traditions and native language.\textsuperscript{1555} It ordered Paraguay to supply medical services, drinking water, food and educative services with adequate human and material resources.\textsuperscript{1556}

\textsuperscript{1548} \textit{Ibid} at para 268.  
\textsuperscript{1549} \textit{Ibid} at para 273.  
\textsuperscript{1550} \textit{Ibid} at para 274.  
\textsuperscript{1551} \textit{Ibid} at para 274.  
\textsuperscript{1552} \textit{Ibid} at para 283.  
\textsuperscript{1553} \textit{Ibid} at paras 292-3.  
\textsuperscript{1554} \textit{Ibid} at para 291.  
\textsuperscript{1555} \textit{Ibid} at para 301.  
\textsuperscript{1556} \textit{Ibid} at para 303.
De Paz González observes that despite the Court’s important stance towards the cultural identity and the living conditions of the Xákmok Kásek community, the IACtHR only declared that Paraguay violated the communities’ right to property, access to justice, the right to life, and children’s rights recognised in Article 19 of the Convention. The protection of social rights was thus implicit rather than explicit, in keeping however with the dominant jurisprudential trend.

A more recent decision in Kaliña and Lokono Peoples v. Suriname (Kaliña and Lokono) reflects the culmination of these land rights cases to date. The decision addresses, more directly than Xákmok Kásek, the right to collective indigenous property and the equal protection of a non-classical conception of property.

The case dealt with the State’s failure to consult over strip-mining activities and the imposition of an urban subdivision project on the Kaliña and Lokono Peoples’ territories. In this case, individual titles to third parties had been granted, and the Court found there was a patent failure to apply equal protection of a non-classical conception of property (without discrimination) through the State’s failure to delimit, demarcate, and grant title. Further, there was an absence of effective participation by means of consultation with regard to the mining concessions on part of the ancestral territory.

The Court conducted a review of its evolving position on the unequal protection under Article 21 (of the Convention) of non-classic or hegemonic conceptions of property use and tenure. Significantly, it heavily underscored the widespread disregard for different versions of use and enjoyment of property, and determined that if sanctioned, this would be tantamount to holding that there is only one way of using and disposing of property. The Court found that such a

1557 Ibid, Operative paras 1-8, pp. 76-77. The Court ordered Paraguay to supply medical services, drinking water, food and educative services with adequate human and material resources: para 303.
1558 De Paz González, supra note 1016 at 59.
1559 Kaliña and Lokono Peoples (Suriname) (2015) (Merits) Inter-Am Ct HR (Ser C) No 309 [Kaliña and Lokono].
1560 Under Article 1.1 of the American Convention.
1561 Kaliña and Lokono, supra note 1559 at para 98.
1562 Ibid at para 129.
1563 Ibid at para 127.
position would render protection under the said provision “illusory for these communities”. 1564
Citing once again the State’s failure to delimit, demarcate and grant title for effective
ownership 1565 the Court held that territorial rights encompass a different and broader concept
for Indigenous people, related to their collective right to survival, 1566 and their right to
implement their life prospects or life plans. 1567 In the face of State’s failure to recognize the
right to collective property, 1568 the Court held that the conflict between the interests of both
must be decided by the State without any discrimination. 1569 It further held that State had to
consider various criteria, including taking into account the “special relationship” that
Indigenous peoples have with their lands. 1570

4.5.7.5 Second line of cases: equality dimensions of participation and political rights

Turning to the second line of cases, the system has addressed another central dimension of the
experience of Indigenous peoples under a ‘systematic and structural’ – as domination or
submission 1571 – and an ‘reconstructed or enlarged conception of inequality’, 1572 namely,
impediments to social participation or “participative parity”. 1573 Victor Abramovich traces the
system’s responsiveness to the regional reality that certain historically excluded groups are
often “denied their rights to participation and expression”. 1574 According to Abramovich, the

1564 Ibid at para 129, citing Sawhoyamaxa, supra note 1340 at para 120.
1565 Ibid at para 133.
1566 Ibid at para 128.
1567 Ibid at 156, citing Yakye Axa, supra note 932 at para 146: “[…] states must take into account that indigenous
territorial rights encompass a different and broader concept that is related to the collective right to survival as an
organized people with control of their habitat as an essential condition for the reproduction of their culture, for
their very survival, and to implement their life projects. The ownership of the land ensures that the members of
the indigenous communities conserve their cultural heritage.”
1568 Ibid at para 153.
1569 Ibid at para 156.
1570 Ibid, citing Yakye Axa, supra note 932 at para 146 and Kichwa, supra note 1435 at paras 145-6. See possible
options for criteria at para 158 and the Court’s exploration of effective participation by means of a consultation
process at para 204.
1572 Ibid at 167.
1573 Ibid, at 183-4, invoking Nancy Fraser’s terminology.
1574 Abramovich, “From Massive Violations – Aportes”, supra note 80 at 25.
system has recognized the source of this experience as one of “institutional or social violence or barriers to access to the public sphere, the political system, or social or legal protection”.

Clérico and Aldao characterize the system’s efforts to address the problem of non-participation in the public sphere as one of ‘achieving equality “as an objective”’ (as opposed to a condition, as in the first line of cases). This situation derives, in their view, from the widespread societal non-recognition of these groups as “valid interlocutors” concerning policies and decision-making processes that affect their important interests. The core concern in Indigenous communities is thus their inability to exercise the right to “collective autonomy”, in conjunction with the inability to effectively exercise their rights to collective property and a dignified existence, both as individual members of such groups and as collectivities attempting to further their ‘community life plan’.

For Clérico and Aldao, the critical analytical premise is the system’s understanding that equality requires the participation of those who are in concrete situations of disparity and deprivation. They frame the requisite analysis as two-fold. First, Indigenous peoples are viewed as subject not only to “cultural or symbolic injustice, but also [...] socio-economic injustice”. Second, inequality continues to be perpetuated through ‘the combined failure’ to consider their identities and to transfer their lands’. These recognition and distributive issues thus act together and are mutually reinforcing, so as to continue to produce inequality.

Because of the interdependence of the “wrongs of socio-economic maldistribution” and “insufficient cultural recognition”, the necessary remedy is for “cultural recognition... to be

1575 Ibid.
1576 Clério & Aldao, “Equality as Redistribution and Recognition”, supra note 300 at 186.
1577 Ibid at 174.
1578 Ibid at 174.
1579 Ibid at 169.
1580 Ibid at 173-4 [author’s translation].
1581 Ibid [author’s translation].
1582 Ibid at 168.
integrated with the claims of socio-economic redistribution”. According to Cléric and Aldao, the system has understood that “neither redistributive solutions or recognition solutions are sufficient in and of themselves”. Moreover, it recognizes that “the only solutions that are respectful of the rights of Indigenous peoples are those solutions that imply a better distribution of the economic and social goods [and...] include them in the process of making decisions and taking into account their interpretation of their needs, interests and projects as a community.”

With this theoretical framework in mind, I turn to two of the Court’s contentious decisions, beginning with the leading decision regarding political or participation rights: Yatama v. Nicaragua (Yatama). The paper contends that the Yatama analysis is based on a substantive or structural equality lens, as defined by the project.

Yatama dealt with the socio-political participation of ‘minority ethnic and Indigenous groups’ concentrated in the northern region of the Nicaraguan Atlantic coast, groups that had experienced an extended history of systemic discrimination and marginalization. Their claimant group’s specific interest in the instant case was to participate in the country’s electoral system, having been rebuffed in efforts to effectively participate in processes or structures that made decisions of interest to them.

The claim turned on the group’s ability to participate in this primary platform for policy decision-making through their distinctive forms of political organization and in accordance with their values and customs. The decision’s significance rests in part on the Court’s understanding that effective barriers to participation, including processes with requirements that are essentially assimilative, are as significant as de jure and more direct forms of exclusion. In the result, the Court found that the system was discriminatory in effect and it obliged the

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1583 Ibid. What is required includes both the demands of redistribution and of recognition in order to address material and symbolic inequalities.
1584 Ibid at 174.
1585 Ibid at 173-4 [author’s translation].
1586 Yatama, supra note 41.
Nicaraguan State to adopt affirmative measures to ensure that such groups can effectively participate in political affairs, on an equal footing.\textsuperscript{1587}

The immediate events that gave rise to the case took place in 2000. YATAMA\textsuperscript{1588} is an association created by these Indigenous and ethnic communities in the 1970s. It had its own organizational structure called “community democracy”, based on various levels of assemblies, as its decision-making body.\textsuperscript{1589} This was their principle organization for defending the historical right to their traditional territories and to promote self-government.\textsuperscript{1590} YATAMA had participated in various elections in the 1990s under the category of ‘public subscription organization’ under then-existing electoral laws.\textsuperscript{1591} The new impugned law eliminated this category from the groups that could participate in elections, confining participation to the legal category of political party.\textsuperscript{1592} As the Court found, the latter is a type of organization not characteristic of these communities.\textsuperscript{1593} Another requirement was that political parties had to register their candidates in at least 80% of the municipalities and have at least 80% of the total number of candidates.\textsuperscript{1594} The YATAMA was subsequently constituted as a political party,\textsuperscript{1595} and it was granted status as a regional political party.

As a regional indigenous political party, however, YATAMA’s candidates were ultimately not permitted to participate in the November 2000 municipal elections held in the northern and southern Atlantic autonomous regions, after state organs decided there was purported non-compliance with the electoral legislation because the party had not fielded candidates in 80% of the municipalities in the southern region. This requirement was not one the party could comply with because it had neither the connections nor interest (nor resources, presumably) to enter candidates in non-indigenous ridings. Because YATAMA covered the municipalities of the

\begin{flushleft}
\textsuperscript{1587} Ibid.
\textsuperscript{1588} YATAMA is the acronym for \textit{Yapti Tasba Masraka Nanih Asla Takanka} and means-“the organization of the sons of Mother Earth”.
\textsuperscript{1589} \textit{Yatama, supra} note 41 at para 124(13).
\textsuperscript{1590} \textit{Ibid} at paras 124(9) and 124(11).
\textsuperscript{1591} \textit{Ibid} at para 124(18).
\textsuperscript{1592} \textit{Ibid} at para 124(20).
\textsuperscript{1593} \textit{Ibid}.
\textsuperscript{1594} \textit{Ibid} at para 124(24).
\textsuperscript{1595} \textit{Ibid} at para 124(26).
\end{flushleft}
northern autonomous region, there was an 80% abstention level during the subsequent election in that region due in part to the lack of adequate representation of those (indigenous) voters by the national parties.\textsuperscript{1596}

After their appeals under the national state law were unsuccessful, a petition was filed with the Commission and was subsequently referred to the Court. The issue was the scope of political rights under Article 23 of the \textit{American Convention},\textsuperscript{1597} in conjunction with YATAMA’s (and its members’) rights to equality and non-discrimination under Article 24, and in relation to Articles 1.1 and 2. The Court thus squarely considered the significance of political rights in light of the principle that states must ensure that these rights can be exercised effectively, respecting the principles of equality and non-discrimination.\textsuperscript{1598}

The Court first explored the nature of political participation\textsuperscript{1599} and characterized the right to have access to public office under general conditions of equality as one of protecting access to a direct form of participation in the design, implementation, development and execution of the state’s political policies through public office.\textsuperscript{1600}

Confirming that states are obliged to guarantee the enjoyment of political rights, the Court affirmed that the regulation of such rights must be in keeping with the principle of equality and non-discrimination. The Court held that the latter obligation requires more than formal recognition, and that the State had to adopt the necessary measures to guarantee their \textit{full exercise}, “consider[ing] the weakness or helplessness of the members of certain social groups or sectors”.\textsuperscript{1601} Further to this latter stipulation, the Court underscored the necessity of taking into account the distinctive nature of these communities, in cultural terms as well as in their historical experiences and current social conditions:

\textsuperscript{1596} \textit{Ibid} at para 124(69).
\textsuperscript{1597} Appendix B: Rights Provisions, Article 23 (Right to Participate in Government).
\textsuperscript{1598} \textit{Yatama, supra} note 41 at para 195.
\textsuperscript{1599} \textit{Ibid} at para 196. It considers the potential range of broad and varied activities involved in interventions to decide such questions as who will govern a state or be responsible for managing public affairs, as well as influencing the elaboration of state policy through direct participation mechanisms.
\textsuperscript{1600} \textit{Ibid} at para 200.
\textsuperscript{1601} \textit{Ibid} at para 201 [emphasis added].
When examining the enjoyment of these rights by the alleged victims in this case, it must be recalled that they are members of indigenous and ethnic communities of the Atlantic Coast of Nicaragua, who differ from most of the population, inter alia, owing to their languages, customs and forms of organization, and they face serious difficulties that place them in a situation of vulnerability and marginalization.\textsuperscript{1602}

Based on the foregoing, the Court ruled that Nicaragua had violated the political rights and equality rights of these communities during the 2000 elections\textsuperscript{1603} under its amended regulatory framework.\textsuperscript{1604} It found that the establishment and application of the electoral laws created “an undue restriction of the exercise of the right to be elected and [that the state] regulate[d] these provisions in a discriminatory manner”.\textsuperscript{1605} The Court allowed that minimum standards to regulate political participation could be established by a state, but ruled they had to be reasonable, and they also had to consider that “promoting and fostering diverse forms of political participation strengthens democracy” [emphasis added].\textsuperscript{1606}

In response to the State’s defence that neither Articles 23 or 24 were violated because its electoral law was applied equally to all citizens,\textsuperscript{1607} the Court found that the reforms only permitted participation in electoral processes through political parties, which is a form of organization not characteristic of these indigenous communities.\textsuperscript{1608} The Court found that the State had introduced through the restriction a form of organization “alien to their practices, customs and traditions as a requirement to exercise the right to political participation”.\textsuperscript{1609}

Considering the concrete implications of this finding, the Court held that the resulting exclusion of the YATAMA candidates placed the voters in the affected communities in a position of

\textsuperscript{1602} Ibid at para 202.
\textsuperscript{1603} Ibid at para 223.
\textsuperscript{1604} Ibid.
\textsuperscript{1605} Ibid at para 229.
\textsuperscript{1606} Citing Article 6 of the Inter-American Democratic Charter, ibid, at para 207.
\textsuperscript{1607} The State argued that the law provided special protection in the candidate nominations process but that once nominated, the candidates had to comply with the remaining requirements of the law which was of general application”: Ibid at para 180.
\textsuperscript{1608} Ibid at para 214.
\textsuperscript{1609} Ibid.
inequality as indigenous voters could not vote for persons they chose in their assemblies to represent their interests in accordance with their traditions and customs.\textsuperscript{1610} As such, the restrictions constituted an “undue limitation of the exercise of a political right” in the circumstances of the case.\textsuperscript{1611} It further held that the 80% requirement constituted a “disproportionate restriction that limited unduly the political participation of the candidates proposed by the YATAMA for the municipal elections of November 2000 [and...] did not take account that the indigenous and ethnic population is a minority in the [southern region] or that there were municipalities in which they did not have the support to present candidates or where they were not interested in seeking this support.”\textsuperscript{1612}

The Court further found that the State had not justified that the restriction advanced a useful purpose and held that it impeded the full exercise of the right to be elected of the members of these communities.\textsuperscript{1613} It concluded that the participation in public affairs of organizations other than parties, is “essential to guarantee legitimate political expression and necessary in the case of groups of citizens who, otherwise, would be excluded from this participation, with all that this signified”.\textsuperscript{1614} Moreover, because the State also failed to adopt the necessary measures to guarantee the candidates’ enjoyment of the right to be elected of the candidates, the candidates were found to be “affected by legal and real discrimination, which prevented them from participating, in equal conditions” in the elections.\textsuperscript{1615} It followed that the State was required to adopt all necessary measures to guarantee the enjoyment of the right to participation in decision-making on matters of importance to these communities under conditions of equality.\textsuperscript{1616}

As its primary reparations order in the non-repetition sphere, the State was required to enact legislation to promote the political participation of Indigenous groups; enact laws to establish

\textsuperscript{1610} Ibid at para 227. It further held that this violated domestic laws requiring respect for the forms of organization of these communities and negatively affected the electoral participation of these candidates: at para 218.
\textsuperscript{1611} Ibid at para 219.
\textsuperscript{1612} Ibid at para 223.
\textsuperscript{1613} Ibid.
\textsuperscript{1614} Ibid at para 217.
\textsuperscript{1615} Ibid at para 224.
\textsuperscript{1616} Ibid at para 225 [emphasis added].
simple, fast, effective mechanisms to challenge decisions of the state electoral council; and adopt the necessary measures to ensure members of the affected communities “may participate in electoral processes effectively and taking into account their traditions, practices and customs, within the framework of a democratic society”.

The Court held that the established requirements should “permit and encourage the members of these communities to have adequate representation that allows them to intervene in decision-making processes on national issues that concern society as a whole, and on specific matters that pertain to these communities; therefore, these requirements should not constitute barriers to such political participation.”

Before reflecting further on the significance of Yatama, I consider a subsequent counterpart case by which the system cemented its substantive equality approach to political rights. In Castañeda Gutman v. Mexico (Castañeda Gutman), an independent candidate for the Mexican presidency was excluded from participating under that state’s electoral laws on the basis that he was an independent and not from a political party. The legislation was challenged by the Commission on the basis that there was no remedy to contest the constitutionality of the purported violation. However, the petitioner’s representatives alleged additional violations of his rights under Articles 23 and 24, the provisions at issue in Yatama.

The Court applied a different level of scrutiny to the instant electoral system. Having found in Yatama that at least minimum standards of regulatory restrictions on the rights of political participation are permissible, the Court decided that the requirement of party affiliation for candidacy is reasonable and within the margin of appreciation for the regulation of the democratic political system. It determined, that ‘despite the problems of representation

1617 Ibid at paras 252-9.
1618 Ibid at para 259.
1620 Ibid at para 2. Specifically, the referral by the Commission alleged the violation of Mr. Castañeda Gutman’s right to judicial protection under Article 25, in relation to Articles 1.1 and 2 of the American Convention: para 3.
1621 Castañeda Gutman, supra note 1619 at para 4.
1623 Yatama, supra note 41 at para 207.
1624 Castañeda Gutman, supra note 1619 at paras 180-181.
affecting political parties, the measure is justified, since that the intensity of the infringement of
the plaintiff’s right is not enough to justify the suspension of the measure’. 1625

The resulting norm of the two decisions with respect to ‘regulatory restrictions on the rights of
political participation’, 1626 according to Clérico and Aldao, is based on the concept of
participative parity.1627 By introducing the criterion of structural inequality “as a relevant
variable”1628 in Yatama, the Court modulated the intensity of its scrutiny based on whether the
claimants are “underrepresented groups”. 1629 The petitioner in Castañeda Gutman was not part
of a disadvantaged group, and further, he was a known member of the Mexican political
elite.1630 On those facts, the Court declined to find a violation of his political and equality rights,
deferring to the Mexican State’s design of the electoral system, according to Clérico and Aldao,
on the basis that he was not from a subordinate group, and no such issues were therefore
engaged.1631

Returning to commentary concerning Yatama, the scholarship highlights the Court’s extension
of the obligation to adopt positive measures to ensure effective participation of subordinated
groups on equal footing, in processes that lead to decisions and policies that could affect the
community in question.1632 The effect of the ruling is to establish the obligation to consider how
such communities can integrate themselves into state institutions and participate in a direct
manner and through their own political institutions and in accordance with their values,
customs and means of organization.1633 In effect, the ruling recognizes that there is a ‘special

1625 Clérico & Aldao, “Equality as Redistribution and Recognition”, supra note 300 at 188.
1626 Ibid at 186-7.
1627 Ibid at 190.
1628 Ibid at 188.
1629 Ibid at 188
1630 Ibid at 185.
1631 Ibid at 190. Clérico and Aldao understand the Court’s ‘double standard’ to have been confirmed by its
application of little or lax scrutiny to those state regulations of the electoral system, which are presumed to be
legitimate provided that they fit the parameters of representative democracy. This is despite the plaintiff having to
bear the burden of proof. However, the Court also recognized “an exception in the case of groups obviously
disadvantaged, so that an intensive examination is applied to such measures and the State must demonstrate that
the measure does not violate equality principles”.
1632 Ibid at 188.
group right’ for certain minority groups that helps them to preserve their autonomy and also ensures their effective participation in the State’s political structures. This is of course consistent with the imperative advanced by Iris Marion Young.

The decision establishes that structural inequality and discrimination arise when Indigenous peoples or other ethnic minority groups are required to assimilate - in other words, to abandon their traditional participatory and organizational structures in order to access political structures and participate in politics. As former United Nations Special Rapporteur on Indigenous People, James Anaya, observed of Yatama: “for a culturally differentiated group, ongoing self-determination requires a democratic political order in which the group is able to continue its distinct character and to have this character reflected in the institutions of government under which it lives”.

From a structural or substantive equality perspective, the Court’s flexibility in interpreting (universal and ‘pseudo-neutral’) norms of general application to allow for the accommodation and expression of the cultural identity of these long-subordinated groups is significant. Indeed, one of the concurring judgments (that of Justice Sergio García-Ramírez) articulates the view that this decision and the longer line of the system’s Indigenous rights jurisprudence “contribute to addressing the violation of principles of equality and non-discrimination in different areas of social life, and further translating into the violation of numerous rights”.

Another significant feature of Yatama is its strong adverse effects discrimination analysis. In attending to the effects of the impugned action on the affected groups and their affected interests, and the significance of those interests (in varied regards), the judgment is both effects-based and claimant centred. It employs the type of contextual analysis that encompasses the petitioners’ historical and deeply structural experiences of inequality. As a case primarily focused on misrecognition and non-participation or exclusion, the Court’s

1634 Yatama, supra note 41 at para 218.
1636 Yatama, supra note 41, concurring opinion of Judge García-Ramírez, at para 5.
analysis is attentive to how the framing of the affected communities’ interests and cultural attributes or elements of identity as ‘different’ has been framed as deviance and relied on to their detriment. In other words, the judgment centres the realities of how the interests and characteristics of certain groups have been traditionally ignored and also relied on as the basis for enforcing exclusion, or the alternative of assimilation. The decision’s outcome thus reflects a conception of advancing equality that has the potential to be transformative as well.

In considering the appropriate state responses that would advance material or structural equality and effective non-discrimination (in such contexts of status and economic subordination and barriers to participation), Justice García-Ramírez’s concurring opinion calls for careful deliberation that considers the potential different responses that misrecognition sometimes calls for. Along the lines set out previously of ‘special group rights’, he identifies the options of the redress of real limitations, discrimination or restrictions through the potential reparative elements of ‘compensation, equalization, development or protection’. 1637 He bookends this inquiry around an expressly non-formal and ‘material equality’ conception that views equality as an end,1638 rather than an abstract pseudo universal starting point:

Here, I refer, as I have already said, to material equality and effective non-discrimination, not to a mere formal equality that leaves intact – or scarcely hides – marginalization and maintains discrimination. This type of equality tends to be obtained through factors or elements of compensation, equalization, development or protection that the State provides to the members of the communities, by means of a juridical regime that recognizes the facts relating to a certain cultural background and is established on the basis of a genuine recognition of real limitations, discriminations or restrictions and contributes to overcoming, suppressing or compensating them with appropriate instruments; not merely with general declarations of an non-existent and impracticable equality.1639

He concludes by expressly framing equality as an objective or outcome (of results):

Equality is not a starting point, but a finishing point to which the State’s efforts

1637 Ibid at para 27.
1638 Clériceo & Aldao, “Equality as Redistribution and Recognition”, supra note 300 at 183.
1639 Yatama, concurring opinion of Judge García-Ramírez, supra note 41 at para 27.
should be addressed. In the words of Rubio Llorente, the “Law attempts to be fair, and it is the idea of justice that leads directly to the principle of equality, which, in a way, constitutes its essential content.” Nevertheless, “equality is not a starting point, but rather a goal.”

Several of Justice García-Ramírez’s observations are also revealing in their self-reflexivity as regards the Court’s self-conscious discipline of “having to learn”, or as he puts it, “understand”, when deciding these cases. Akin to the ‘enlargement of mind’ that scholars sometimes call for from the judiciary, he provides insights into the Court’s methodology for undertaking the required analysis in specific terms. The realities of such groups are to be examined “in their own circumstances – in the broadest meaning of the expression: current and historical”. This approach he asserts “not only contributes factual information to understand the events, but also legal information through the cultural references – to establish their juridical nature and the corresponding implications.”

His concurring opinion further cautions against analytical analyses that extract the instant cases of these groups from the context within which they occur, calling this approach “useless” and warning that it leads “to erroneous conclusions”. Continuing with his admonition about the problems of acontextual and abstract rights analysis, Justice García-Ramírez describes the Court’s approach as one of ‘considering these rights in the circumstances in which the rights-holders must assume and exercise them’. He concludes: “It is not possible, even now, to consider rights in abstract, as empty, neutral, colorless formulas provided to conduct the life of imaginary citizens, defined by texts and not by the strict reality.”

Finally, speaking indirectly to Iris Marion Young’s thesis in Polity and Difference, Judge

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1640 Ibid at para 27.
1641 Ibid at para 6.
1642 The Spanish version of this opinion reads “actual e histórica” and there is an error in the English translation. It should read “present and historical”, not ‘actual and historical’.
1643 Yatama, concurring opinion of Justice García-Ramírez, supra note 41 at para 7 [emphasis added].
1644 Ibid.
1645 Ibid at para 29.
1646 Ibid at para 29.
1647 Supra note 164.
García-Ramírez urges a reparative approach by which the state is obliged to focus on the design of public action that is favourable to the exercise of political rights of members of indigenous communities “so that they are, truly, as much “citizens as the other citizens””. 1648 In articulating the suggested approach to differences or diversity, states are enjoined to examine the situations before them to establish how to allow this to happen. As part of this, they are to assume the perspective that just because rights “are of a universal nature does not mean that the measures that should be adopted to ensure the exercise of the rights and freedoms have to be uniform, generic, the same, as if there were no differences, distances and contrasts among their possessors”. 1649

In effect then, the Court’s judgment in Yatama establishes that states must do more than present to historically excluded and subordinated groups the options of exclusion, with all of the injustices that entails, or alternatively, assimilation. The challenge reflected in this decision (and others) is to address the issues and interests of the affected subordinated groups at that level.

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1648 Yatama, concurring opinion of Justice García-Ramírez, supra note 41 at para 31.
1649 Ibid.
4.5.8 Social Construction and Misrecognition of ‘Difference’: The Case of Disability

This section continues to track the system’s understanding of misrecognition, in the specific context of societal constructions of disability. I touch on several cases that address social exclusion and lack of access to basic services, like appropriate health care services and treatments, as well as adequate, inclusive education. As with the previous section, the system’s evolving approach to the formal notion of ‘universalism’ – what several Latin American scholars describe as the “perspective that confuses universality with predominance”\(^{1650}\) – is especially relevant to the issue of societal responses to individuals with disabilities.

Some scholarship\(^{1651}\) suggests the IAHRS has moved toward a more expansive analysis of the ‘disability right’; beyond formal notions of the right to equal treatment to incorporate more critical and substantive conceptions; and establishing proactive state obligations to institute transformative changes that remedy patterns of exclusion and need. There are indications of steady progression, particularly recently, towards “an expansive interpretation” of Inter-American and international treaties\(^{1652}\) to protect disability rights.\(^{1653}\) This shift is evident in several recent decisions that require states to address the societal response to the reality of different needs and abilities.\(^{1654}\)

Another measure of this substantivist approach is the system’s incorporation of an intersectional and multi-dimensional understanding of the experiences of persons with

\(^{1650}\) Clérico & Aldao, “Equality as Redistribution and Recognition”, supra note 300 at 192 [author’s translation].


\(^{1652}\) Including, the Convention on the Elimination of all forms of Discrimination against Persons with Disabilities [Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (adopted 6 August 1999, entered into force 14 September 2001) OAS AG/RES 1668 (XXIX-O/99) (1999) (CIADDIS)], which entered into force in 2001. This IAHRS instrument defines disability in a manner that “combines the biomedical model of disability as it refers to physical, mental or sensory impairment, with a social approach that includes economic and social factor as causes of aggravation”, but, according to Guarnizo-Peralta, supra note 1651 at 45 and 49, appears to emphasize the impairment and the environment as relevant as a cause or factor of aggravation of same, rather than “the interaction with society as key elements of disability”. Further, Guarnizo-Peralta observes that the IACHR began to take a more ‘decisive role’ following the adoption of the U.N. Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/ RES/61/106 (CRPD).

\(^{1653}\) Ibid at 43.

\(^{1654}\) Ibid at 45.
disabilities. The soft law and jurisprudence reflect a concern with restrictions on autonomy, participation, self-realization and life-plans,\textsuperscript{1655} as well as patterned disparate impact in terms of vulnerability to human rights violations and other abuses. The system has also considered as part of its monitoring and promotional work (complementary to its legal standard-setting for persons with disability), the confluence of various factors, and specifically, the evidence of the disproportionate experience of poverty.\textsuperscript{1656} The system’s interest in the impact of poverty and its interaction with disability is also evident in cases reviewed below.

While the system’s shifting approach towards a more fulsome, critical conceptions of disability is viewed as (at times) more theoretical than concrete,\textsuperscript{1657} the discernible progression has led to more decisions in favour of petitioners, including several of broader note.

In its early decisions, the approach mirrored the simplistic recognition that persons with disabilities are entitled to the same rights as all persons.\textsuperscript{1658} The system issued judgments and recommendations that obliged states to extend the provision of basic health care services, specific medical treatments, and the promotion of health (including mental health) to all persons.\textsuperscript{1659} According to Diana Guarnizo-Peralta, however, there was no deep analysis of disability rights and what they entail.\textsuperscript{1660}

An illustration is the Court’s 2006 decision in Ximenes Lopes v. Brazil (Ximenes Lopes),\textsuperscript{1661} its first judgment regarding disability rights. At issue, aside from the extreme vulnerability of individuals with mental health issues, was the effective treatment of and provision of health care services, in this case in a private institution. The Court found there was a duty to provide basic health care services for every individual, including the broader requirement related to the

\textsuperscript{1655} The system has examined the paradigm shift required in viewing persons with disabilities not as mere objects but rather as subjects of rights: Poverty IACHR Report, supra note 44 at para 426.
\textsuperscript{1656} See Poverty IACHR Report, ibid, which examines the many serious physical and social obstacles that persons with disabilities confront in their attempts to exercise their rights, including the dimension of poverty.
\textsuperscript{1657} See for example, Guarnizo Peralta, supra note 1651.
\textsuperscript{1658} Ibid at 43.
\textsuperscript{1659} Ibid at 128, citing Ximenes Lopes v. Brazil, (2006) Inter-Am Ct HR (Ser C) No 149 [Ximenes Lopes].
\textsuperscript{1660} Ibid at 52.
\textsuperscript{1661} Ximenes Lopes, supra note 1659.
apparently positive promotion of mental health.\textsuperscript{1662} This recognition that all persons, including those with disabilities (and with mental illnesses) should have access to appropriate and effective health care services that were appropriate to the individual was significant in its own right.\textsuperscript{1663} Moreover, the decision also affirmed in this context the system’s now established position that the state’s obligations were \textit{erga omnes} to third party/private health care service providers.\textsuperscript{1664} That said, Guarnizo-Peralta views Ximenes Lopes as limited in its development of a structural equality conception of disability, because the state’s duties were not developed in terms of services specifically related to disability, and nor was it clear what specific services should be enjoyed.\textsuperscript{1665}

From 2012 onward, a series of precautionary measures reports issued and there was an increase in the number of decisions in favour of claimants.\textsuperscript{1666} Moreover, of interest from a social rights perspective, the Commission declared a state duty to provide appropriate health care.\textsuperscript{1667} However, the system still refrained from establishing ‘how such services should be provided or how they should be adapted to meet the claimants’ needs’.\textsuperscript{1668}

Decisions in several recent cases indicate a progressively more concrete formulation, and contain elements of transformative and participative forms of redress, as well as gains in the area of SER, including by more direct methods of interpretation. The recent precautionary measure report against Argentina in a case called \textit{Irene v. Argentina (Irene)},\textsuperscript{1669} is a case in point. The anonymous girl-child has severe disabilities and was being denied access to integrated, inclusive education. The child has dystonic cerebral palsy and visual-auditory disorders, and

\textsuperscript{1662} \textit{Ibid} at para 128.
\textsuperscript{1663} Guarnizo Peralta, supra note 1651 at 55, citing Ximenes Lopes, \textit{ibid} at para 128.
\textsuperscript{1664} Ximenes Lopes, supra note 1659.
\textsuperscript{1665} Guarnizo-Peralta, supra note 1651 at 55-56. It also did not employ a “disability rights perspective”.
\textsuperscript{1666} Again, the analysis has been critiqued as being limited in these reports, according to Guarnizo-Peralta, \textit{ibid} at 52.
\textsuperscript{1667} Guarnizo-Peralta, supra note 1651 at 53, citing cases in which the Commission declared that there is a State’s duty to provide appropriate health care to detainees, but it did not indicate how such services should be provided or how they should be adapted in order to meet the victims’ needs.
\textsuperscript{1668} \textit{Ibid} at 53.
\textsuperscript{1669} \textit{Irene (Argentinea)} (July 7, 2016), Inter-Am Comm HR, Resolution No 38/2016, Precautionary Measure No. 376-15 OR [Irene].
required a school therapeutic companion to help her integrate into the classroom and assist with her studies. The Argentinian state had provided this assistance for some years and then stopped it without warning.

The Commission requested that the State issue precautionary measures to ensure that the child was permitted to participate in inclusive education, on the basis that this was essential to address Irene’s (and the larger group’s) historical exclusion from vital services like education and other forms of social participation. The decision thus reflects a breakthrough in terms of providing clear direction on what is required of states to ensure that the needs of persons with disabilities are satisfied.\footnote{\textit{Ibid} at para 53.}

Specifically, the requirement is for the State to guarantee access to integrated education, in response to efforts to exclude her owing to the extent of her ‘impairments’. The report is explicitly framed in “psychosocial terms”,\footnote{Guarnizo-Peralta, \textit{supra} note at 1651 at 53: The Commission cited the UNESCO’s definition of ‘inclusion’ which is ‘a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education’: UNESCO, \textit{‘Guidelines for Inclusion. Ensuring Access to Education for All’} (2005) 13 ["UNESCO Guidelines for Inclusion"].} and recognizes a model of ‘social integration and inclusive education’ under the principles of equality and non-discrimination.\footnote{Irene, \textit{supra} note 1669 at para 25.} The Commission’s analysis further focused on the implications that the State’s cessation of special support would have for the child’s rights to life and personal integrity, and it recognized that such a lack of attention would otherwise impact her education. Indirectly then, the case provided protection to the right to education, and specifically, to integrated or inclusive education.\footnote{\textit{Ibid} at para 53.}

In a departure from previous cases, the IACHR called for the recognition and adoption of a “model of social integration for persons with disabilities on equal terms and under the principle of non-discrimination”,\footnote{\textit{Ibid} at para 24.} and indicated that the way to achieve the psycho-physical

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development of persons with disabilities is based on inclusive education.\textsuperscript{1675} In defining the latter, the IACHR applied a psychosocial perspective by citing UNESCO’s definition of ‘inclusion’.\textsuperscript{1676} As part of the measures, the State was enjoined to “preserve the life and integrity of Irene, taking into account, her disability and health in order to access all the special support recommended by the specialist in light of international standards”.\textsuperscript{1677} The decision thus incorporated a clear disability perspective and is an important precedent in the protection of the right of education for persons with disabilities and in the advance of a more transformative understanding of the appropriate and fulsome ambit of protection.\textsuperscript{1678}

The Inter-American Court’s multi-dimensional framework for engaging with disability, along with poverty and equality rights was addressed earlier in relation to the \textit{Gonzales Lluy} decision. The case also considered the denial of health or education services based on disability or a medical condition, and provided a framework for considering when such denials are discriminatory.\textsuperscript{1679}

In terms of health services, the Court confirmed in a context of the private delivery of health services that states have the obligation \textit{erga omnes} to private providers, to respect and ensure the norms of protection and the effectiveness of human rights.\textsuperscript{1680} The obligation to ensure rights thus extends beyond the relationship between state agents and persons subject to their jurisdiction, to include “the obligation to prevent third parties, in the private sphere, from violating protected legal rights”.\textsuperscript{1681} De Paz Gonzalez contends that the \textit{Gonzales Lluy} decision represents an overall confirmation of the need to ‘redirect’ public health policies and education for vulnerable sectors especially if it involves marginalized people, women, and children.\textsuperscript{1682}

\textsuperscript{1675} \textit{Ibid} at para 25.
\textsuperscript{1676} “UNESCO Guidelines for Inclusion”, cited in Guarnizo-Peralta, \textit{supra} note at 1651 at 53.
\textsuperscript{1677} \textit{Irene, supra} note 1669 at para 31, cited in Guarnizo-Peralta, \textit{ibid} at 53: CRPD’s later published General Comment No 4 on the right to inclusive education: CRPD, ‘General Comment No 4 on the Right to Inclusive Education’ (2016) CRPD/C/GC/4.
\textsuperscript{1678} Guarnizo-Peralta, \textit{ibid} at 54.
\textsuperscript{1679} \textit{ibid} at 60.
\textsuperscript{1681} \textit{ibid} at para 170.
\textsuperscript{1682} \textit{ibid} at para 169.
In terms of education, the Court found that there were violations of the right under Article 13 of the Protocol of San Salvador\textsuperscript{1683} in relation to the Rights of the Child under Article 19 of the American Convention.\textsuperscript{1684} The Court developed the notion of ‘attitudinal barriers experienced by the minor in educational environment’,\textsuperscript{1685} holding that the ‘educational environment’ should be adapted in respect of her medical condition’.\textsuperscript{1686} In establishing this duty, the Court referenced several General Comments of the U.N. Committee on Economic, Social and Cultural Rights.\textsuperscript{1687} It further emphasized the state’s lack of action to combat prejudices, and in effect it recognized the state duty to “guarantee the adaptability of schools to the changing conditions of children and to guarantee reasonable accommodation in the educational environment”.\textsuperscript{1688}

In Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica (Artavia Murillo),\textsuperscript{1689} a recent case that addressed disability, the Court found that the State’s prohibition of the particular fertility treatment of in-vitro fertilization (IVF) violated the petitioners’ rights, including the equality rights of the women petitioners. Employing an intersectional framework that incorporated a class analysis, along with gender and disability,\textsuperscript{1690} the Court held that the IVF ban violated the petitioners’ rights based on disability, gender, and financial situation, finding that the ban had a disproportionately adverse effect on women with disabilities with lesser financial resources.\textsuperscript{1691}

The Court first affirmed that involuntary infertility is a disability.\textsuperscript{1692} In so concluding, it referred to the ‘bio-psycho-social model’ of disability\textsuperscript{1693} and highlighted the social element of the latter, “according to which disability is a result of the interaction between the impairment and

\textsuperscript{1683} Supra note 941.
\textsuperscript{1684} Gonzalez Lluy supra note 1271 at para 291.
\textsuperscript{1685} Guarnizo-Peralta, supra note 1651 at 60.
\textsuperscript{1686} Gonzalez Lluy, supra note 1271 at para 262.
\textsuperscript{1687} Ibid, citing Committee on the Rights of the Child. General comment No. 1, The Aims of Education. UN Doc. HRI/GEN/1/Rev.7 at 332, para 9.
\textsuperscript{1688} Gonzalez Lluy, supra note 1271 para 262, cited at Guarnizo-Peralta, supra note 1651 at 61.
\textsuperscript{1689} Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica (2012) Inter-Am Ct HR (Ser C) No 257 [Artavio Murillo].
\textsuperscript{1690} Ariel Dulitsky and Hannah Zimmerman, “Case Note: Indirect Discrimination, Reproductive Rights and the In Vitro Fertilisation Ban” (2013) 10 The Equal Rights Review 123.
\textsuperscript{1691} Artavia Murillo, supra note 1689 at para 287.
\textsuperscript{1692} Ibid at para 289.
\textsuperscript{1693} Ibid at para 291, cited in Guarnizo-Peralta, supra note 1651 at 57.
environmental barriers".\textsuperscript{1694} It affirmed, in other words, that disability is not so much an attribute of the person but a result of the interaction between the impairment and barriers or limitations in society affecting the individual’s ability to effectively exercise their rights.\textsuperscript{1695} The express recognition of the social model of disability and the application of international understandings\textsuperscript{1696} is thus an important step in the evolution of the requisite substantive equality understanding of disability, by which the state’s concern must focus on relational issues rather than ‘the differences’ that inhere in people for whom their abilities are the source of adverse treatment.\textsuperscript{1697}

In terms of gender, the decision is somewhat nuanced in considering different aspects of the impact of the IVF ban on women. The judgment frames gender inequality in terms of ‘disparate impact on women’,\textsuperscript{1698} contending that the ban disproportionately burdened the social group of women, owing to engrained social stereotypes about women’s reproductive function. The ban was also found to impede their reproductive autonomy, the latter having traditionally been highly regulated and obstructed, and the Court notes, reinforced various inequality harms for women.\textsuperscript{1699} The decision contains a broad contextual analysis of socio-cultural patterns related to gendered expectations for motherhood and prevailing societal assumptions (in many states) about femininity. It draws out the dominant gender stereotypes by which women’s biological reproductive attributes are framed so as to over-emphasize their procreative function and to essentialize motherhood for women.\textsuperscript{1700} According to the scholarship,\textsuperscript{1701} the Court examines

\textsuperscript{1694}Ibid.
\textsuperscript{1695}Ibid, citing Furlan, supra note 1291 at 133.
\textsuperscript{1696}The Court referenced the elements of the World Health Organization definition, according to which “[disability] entails one or more of the three levels of difficulty in human functions: a physical-psychological impairment; a limitation of activity owing to an impairment (activity limitation), and a participation restriction owing to an activity limitation. Guarnizo Peralta, supra note 1651 at 56-7, citing WHO, ‘Towards a Common Language for Functioning Disability and Health: the International Classification of Functioning, Disability and Health’ (2002) 10.
\textsuperscript{1697}Guarnizo-Peralta, id at 57.
\textsuperscript{1698}Artavia Murillo, supra note 1689 at paras 287-299.
\textsuperscript{1699}Ibid.
\textsuperscript{1700}Teresinha Teles Pires, “Procreative autonomy, gender equality and right to life: the decision of the Inter-American Court of Human Rights in Artavia Murillo v. Costa Rica” (2017) 13(3) Rev.Direito GV 1007 at 1011.
\textsuperscript{1701}Ibid, and Dulitsky & Zimmerman, supra note 1690. There is a general body of criticism of the system’s jurisprudential support for the essentialization of the motherhood, not explored closely in this thesis, in part, because some of this critique is founded on earlier trends. See e.g.: Cecilia M. Bailliet, “From the CEDAW to the American Convention: Elucidation of Women’s Right to a Life’s Project and Protection of Maternal Identity within
the existence of this stereotype, not in order to endorse it, but to contend rather that its “existence represents a greater burden for women, especially in the context of IVF prohibition”. 1702

Indeed, several authors have emphasized the importance of the Artavia Murillo decision in advancing the reproductive autonomy of women.1703 Speaking to that contention, Teresinha Teles Pires interprets the Court’s admission that “motherhood is an important value to women” not as an assumption that “being a mother is a mandatory goal”. In her view, the recognition and deconstruction of an existing stereotype is, as she puts it, “a positive action towards a special consideration of women’s interests concerning their procreative rights.”1704 The challenges of addressing essentialism in the equality framework, are not perfectly resolved in this paper’s view, however the Court’s discussion is at least relatively nuanced.

The Court also held that the total ban had a disproportionate effect on those (couples) for whom access to IVF is the only way to have children.1705 The Court concluded that the ban’s effect was that poorer women could not access the treatment by obtaining it in another country, which was the only option for Costa Ricans.

The Court’s analysis is thus one of adverse effects discrimination,1706 based on the disproportionate impact of the denial of this purportedly neutral or universal treatment on women, who also have a disability, as well as those with less financial resources. The right to access this specific health treatment was achieved indirectly through linking the claimants’ gender, disability, and financial circumstances.

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1702 Ibid at 1011, citing Artavia Murillo, supra note 1689 at para 296.
1703 Ibid at 1011 and 1013.
1704 Ibid at 1013.
1705 Artavia Murillo, supra note 1689 at para 314.
1706 The Court’s analysis is explicit in this regard: ibid at paras 255-287.
Of further note is the Court’s direct challenge to the dominant social norms at play in the society in question (which favoured the conception of embryos as ‘lives’ and the protection against embryonic loss).\textsuperscript{1707} The Court required the State to jettison its prohibition of IVF treatment and to instead (proactively) protect the right of women to access treatments/services in the area of sexual and reproductive health.

Further then to its finding that the petitioners were in a situation of vulnerability and thus subject to special protection (as women with disabilities who could not afford to seek treatment elsewhere), the Court issued the following direction. Formulating an obligation on the state to facilitate the inclusion of those with disabilities,\textsuperscript{1708} and noting that other fertility treatments were available through public programs,\textsuperscript{1709} the Court found that Costa Rica had violated their rights to non-discrimination through lack of access to the instant treatment, based on this indirect discrimination analysis.\textsuperscript{1710} The concurring judgment of Justice García-Sayán further observed that the State had not proved that economic or budgetary considerations justified the lack of provision.\textsuperscript{1711} From an SER perspective, the decision is thus important in founding or affirming the right to free or affordable health care.

\footnotesize{\textsuperscript{1707} The Court had regard to these conceptions, from moral, philosophical, and religious perspectives, as well as medical and biological, and having recognized the different perspectives and the view of some that view fertilized eggs as complete human life, it concluded the following, at para 185: “Such concepts cannot justify preference being given to a certain type of scientific literature when interpreting the scope of the right to life established in the American Convention, because this would imply imposing specific types of beliefs on others who do not share them.”}

\textsuperscript{1708} \textit{Ibid} at para 292.

\textsuperscript{1709} The IVF was the only method excluded from the state’s public programs to treat reproductive health problems: \textit{ibid}, concurring opinion of Justice Diego García-Sayán at para 11.

\textsuperscript{1710} \textit{Ibid}.

\textsuperscript{1711} \textit{Ibid}.
4.5.9 Gendered and Multidimensional Forms of Subordination and Discrimination

Another regional reality that the IAHRS has paid close attention to is entrenched gender hierarchy and discrimination. The non-contentious materials are extensive\(^{1712}\) and noteworthy for explicating the varied harms and particular social contexts that are conducive to the increased vulnerability of women and girls to different forms of abuses and violence\(^{1713}\) and other rights violations. As noted, in centering social groups in a vulnerable situation, the system has emphasized states’ general obligation as rights guarantors to continuously identify and ascertain the situation of such groups – which are understood to potentially vary by society and over time - in order to devise appropriate inclusive policies to ensure the free and full exercise of their rights.\(^{1714}\)

This section examines several high water mark cases in two recent lines of case law involving women/girls with “complex identities”\(^{1715}\) who are significantly and disproportionately affected by intersecting systems of oppression.\(^{1716}\) The cases address systemic gender-based discrimination that manifests in complex and harmful ways, with emphasis on violence perpetrated by state and non-state actors. The decisions illustrate the system’s attention to how such patterns are reinforced by institutionalized practices and sociocultural norms, and different forms (direct and indirect) of state condonation. The cases also commonly examine related (ESCR/SER) rights violations, such as various barriers to accessing justice and appropriate services, like health care and education. Finally, further to the evolving due diligence duties for which the system is well-known, affirmative state obligations feature strongly in this case law, including in relation to the failure to act to address and alter subordinating societal norms.

\(^{1712}\) Thematic reports regarding women are listed in Appendix A.
\(^{1713}\) See framing of violence as structural, institutionalized, spiritual, in the IACHR’s *Indigenous Women IACHR Report*, *supra* note 43.
\(^{1714}\) *Access to Justice for Women Victims of Violence IACHR Report*, *supra* note 13 at para 118.
\(^{1715}\) This reference is to multiple grounds of race or ethnic origin, age, and other identifying features, as well as poverty or socioeconomic status. The concept of “complex identities” and “complex cases of subordination” is drawn from Froc, “Multidimensionality”, *supra* note 256 at 23.
\(^{1716}\) Drawing here on a theoretical conception of systems of oppression, framed by Froc as “multidimensional theories”: *ibid*.
Before turning to the gender-based violence jurisprudence, I recognize an important representative case that called for the application of a ‘standard’ formal equality analysis to address patently _de jure_ unequal treatment, but went on to address the adverse effects and _de facto_ inequalities that are less evident but no less critical. I present the _Maria Eugenia Morales de Sierra v. Guatemala (Morales de Sierra)_ decision for several reasons. The first is its clear articulation of the systemic subordination of women, with its elaboration of the various sources and the adverse implications lying at the root of the claim. This decision was considered in the Commission’s subsequent anti-subordination analysis of gender inequality. The case is also an indirect ESCR claim, as it addressed the socio-cultural barriers to women’s autonomy and well-being as a result of the subordinating gender stereotypes that permeated the impugned legislation, in such crass form. Finally, the decision is noteworthy for having directly challenged the misconceived private-public divide on the basis that it reinforces the continued socioeconomic subordination of women.

At issue were provisions in the _Civil Code of Guatemala (Civil Code)_ that defined the respective gender roles of married spouses and created distinctions between males and females within the ‘private’ familial sphere. These were alleged to be discriminatory and in violation of Articles 1.1, 2, 17, and 24 of the _American Convention_. The provisions established, for example, that male spouses wield power over the marital property and set out a division of responsibilities within the household such as the assignment to women of the care of children and the home. The provisions had been upheld by the Guatemalan Constitutional Court.

The Commission examines the operative ‘sex role gender stereotypes’ which it finds ‘reflect and reinforce the social construction of gender that devalues women and sustains the existing

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1717 Supra note 40.
1718 Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at paras 11 and 60.
1719 Caravallo & Schaffer, “Less is More”, supra note 1105 at 256.
1720 Article 17 concerns the right to the physical and moral integrity of the person.
1721 Appendix B: Rights Provisions.
1722 Morales de Sierra, supra note 40 at para 37.
power relations as between men and women’. The roles are prescriptive in advancing the roles of women as mothers, homemakers, and caregivers, as well as the notion that women are vulnerable and need protection by men. Similarly, the roles of men are reinforced so as to severely limit the ability of women to present and define themselves, and instead degrade them and reinforce their dependence on men. The Commission’s ruling establishes the requirement that states remedy such subordinating sex roles as part of their duties to respect, protect and fulfill.

The Commission found that the scheme violated various rights, including Articles 1.1, 2, and 24. In making the rather inevitable determination that the provisions were discriminatory and in contravention of the petitioner’s right to equal protection and to be free from discrimination, and in applying the Court’s analytical framework, the Commission expounded on the nature of equality in a compelling, substantive manner. First, the Commission cited the definition of discrimination against women in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), expressly favoring it because of its responsiveness to “specific causes and consequences of gender discrimination”, and finding that it, “covers forms of systemic disadvantage affecting women that prior standards may not have

1724 Morales de Sierra, supra note 40 at paras 2, 35, 37.
1725 Ibid at paras 12, 35, 44.
1726 Ibid at para 36.
1727 Ibid at para 37.
1728 Cook, supra note 1723 at 193.
1729 Morales de Sierra, supra note 40 at para 52. The decision articulates the Court’s approach to Articles 1.1 and 24, beginning with the established principle that differences in treatment are not necessarily discriminatory (at para 13) and distinctions based on “reasonable and objective criteria” may serve a legitimate state interest in conformity with the terms of Article 24 (at para 14). It also confirms that differential treatment may be required “to achieve justice or protect persons requiring the application of special measures” (at para 15). However, it goes on to state that a distinction based on reasonable and objective criteria, “pursues a legitimate aim and employs means which are proportional to the end sought” (at para 31). The Commission concludes by finding that the state is required to bring the Code into compliance with the Convention (at para 84).
1730 CEDAW, supra note 337, cited in Morales de Sierra, supra note 40 at para 32: Discrimination against women is defined as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.


contemplated”. The Commission proceeded to consider the “abject subordination” of women that lies at the base of the Civil Code provisions, underlining “the historically unequal power relations between men and women, which left and still leave women in a position of inferiority vis-à-vis men in society”.

The Commission went on to contrast the latter situation with a person who enjoys the equal protection of (and recognition before) the law and “is empowered to act to ensure other rights in the face of public or private acts”. By contrast, it found that “gender-discrimination operates to impair or nullify the ability of women to freely and fully exercise their rights, and gives rise to an array of consequences.” The provisions are found to have the further effect of “reinforcing systemic disadvantages which impede [the victim’s ability] to exercise a host of other rights and freedoms.” This extended beyond the restrictions reflected in the Civil Code, such as the assignment of the administration of property to the husband.

In a subsequent thematic report, the Commission relies extensively on Morales de Sierra in its calls for the re-examination of the traditional dichotomy between public and private acts, where “the family is regarded as the geographic epicenter of domestic matters and a realm into which the State is not to intrude”. This dichotomy is seen to guarantee the continued social and economic subordination of women. Further, the Commission characterizes as “misguided reasoning”, the notion that “private, domestic, or intimate matters are considered beyond the purview of the State”, “out of respect for personal autonomy”. The Commission critiques this traditional view of the state’s role as “a notion that implicitly

\[1731\] Ibid at para 32.
\[1732\] Ibid at para 38.
\[1733\] Description contained in the Commission’s Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at 60.
\[1734\] Morales de Sierra, supra note 40 at para 52.
\[1735\] Ibid at para 39.
\[1736\] Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at para 60.
\[1737\] Ibid.
\[1738\] Ibid.
\[1739\] Ibid.
\[1740\] Ibid.
recognizes a hierarchy between the sexes and that condones or tolerates the *de facto* oppression of women within the family*, emphasizing that “the inequality of the sexes and the tolerance of oppression of women are largely perpetuated by the supposed neutrality of the law and public policy and the inaction of the State.”

The Commission connects this overarching reality and the implications of the impugned provisions to other aspects of gender subordination, including violence and coercion. Gender violence is found to be “a manifestation of the historically unequal power relations between women and men.” The Commission further deconstructs gendered social roles, denouncing, “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse....”

The Commission closes the analytical circle by connecting the foregoing ‘attitudinal’ dynamics to the material, observing that “[d]e jure or *de facto* economic subordination, in turn, ‘forces many women to stay in violent relationships.’” The Commission’s analysis is thus consistent with the system’s broader monitoring of the relationship between gender-based inequality and gender-based violence, a subject of numerous IACHR reports on the situation of particular groups of women.

4.5.9.1 Response to gender-based violence and barriers to accessing justice

Turning to the system’s legal standards concerning gender-based violence, several commentators characterize its normative treatment of violence against women as the “most

1743 *Ibid*, citing *CEDAW, General Recommendation 19, “Violence against women,” U.N. Doc. HRI\GEN\1\Rev.1, p. 84, at para 11 (1994), and CBDP, supra note 942 Article 6(b).*
1745 *Ibid* at para 63.
well developed” of the regional human rights systems. 1746 The IAHRS has consistently situated gender-based violence within the context of the right of women and girls to live free of violence and discrimination. It also frames the problem as the most extreme and pervasive form of discrimination. 1747 Findings in contentious decisions are consistent with the position that discrimination against women exposes them to various forms of violence and is a serious human rights problem with negative consequences, among which are the obstacles it poses to the full exercise of all rights. 1748

In articulating the appropriate range of state responses, the system’s reports and decisions emphasize the concern that discriminatory sociocultural patterns operate to reinforce the common view of such violence as private and a low priority for states. The Commission observes that an acontextual or non-structural approach is often taken to such cases, and as with the Court’s approach to the criminalization of poverty in Servellon Garcia, 1749 the cases have increasingly addressed the broader pattern of societal tolerance and perpetuation of discrimination and violence against women. 1750

Regarding the foregoing, the system has developed principles in support of “reinforced state obligations” to respect and ensure the human rights of women, 1751 and specifically groups of women at particular risk of human rights violations and violence, such as Indigenous women, and other vulnerable groups, including women with disabilities, and those whose socioeconomic conditions are precarious. 1752

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1747 Jessica Lenahan (Gonzales) v. United States (2011), Inter-Am Comm HR, Case 12.626 or No 80/11 [Lenahan], at para 24.
1749 Servellón-Garcia, supra note 1226.
1750 Access to Justice for Women Victims of Violence IACHR Report, supra note 13 (Executive Summary) at para 8.
4.5.9.2 Domestic violence and state duties of prevention and due diligence

System litigator Caroline Bettinger-López reviews two lines of inter-American law that established the fundamentals of the current analytical framework in this context. *Maria da Penha v. Brazil (da Penha)*\(^{1753}\) is the leading decision in the “first generation” of gender equality cases.\(^{1754}\) Under Bettinger-López’s characterization, the second line (decided between 2006–2011), gave more content to the existing standards and opened up new ground for subsequent Court rulings focused on violence by state and non-state actors against members of certain vulnerable social groups of marginalized women and girls.\(^{1755}\) Bettinger-López observes that the Court was a “late bloomer” but eventually became a “trailblazer” within international human rights jurisprudence,\(^{1756}\) developing an “expansive and critically-important international human rights jurisprudence on violence against women.”\(^{1757}\)

*Da Penha* was also the first major domestic violence case considered by IACHR and represents the system’s first application\(^{1758}\) of the *Belém do Pará Convention*.\(^{1759}\) The decision is considered significant for its focus on impunity and general societal patterns and reinforcement of violence; its articulation of an enhanced due diligence principle in context of domestic violence; as well as its ampler remedies, including judicial and law reinforcement reforms’.\(^{1760}\)

The facts concerned the petitioner’s attempted murder by her husband, which rendered her paraplegic, as well as impunity in the State’s prosecution of the case. By the time the Commission issued its decision, the perpetrator had still not been sentenced. The petitioner

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\(^{1753}\) *Maria Da Penha Fernandes v. Brazil* (2001), Inter-Am Comm HR, No 54/01, Case 12.051 or No 54/01 [da Penha].

\(^{1754}\) Bettinger-López, “VAW: Normative Developments”, *supra* note 1746 at 176: The cases decided between 1994 and 2001 focused largely on discrimination and violence perpetrated by state actors, along with impunity toward those acts, in violation of the *American Convention*.

\(^{1755}\) *Ibid*.


\(^{1757}\) *Ibid* at 178-9.

\(^{1758}\) *Ibid* at 176-7.

\(^{1759}\) *CBDP, supra* note 942.

\(^{1760}\) Bettinger-López, “VAW: Normative Developments”, *supra* note 1746 at 177.
alleged that this was not an isolated case and there was a pattern of impunity. The alleged violations included Article 24 of the *Convention* and Articles II and XVIII of the *Declaration*.

In applying the *Belém do Pará Convention* for the first time, the Commission established Brazil’s responsibility for failing to fulfill its obligation of due diligence to prevent, punish and eliminate domestic violence in a case involving a perpetrator that it failed to convict or punish for over 15 years. The Commission found violations of Articles 8 and 25 in relation to Article 1.1 of the *American Convention*, due to judicial delay and the long wait for decisions on appeals, which was found to reveal conduct on the part of judicial authorities that violated the right to prompt and effective remedies.

The Commission determined that the State’s actions formed part of a ‘general pattern of negligence and lack of effective action in prosecuting and convicting aggressors of domestic violence’, and that the State’s tolerance was not limited to this case. The Commission determined that this pattern of tolerance towards domestic violence violated the State’s duty to exercise due diligence that extends beyond the duty to prosecute and convict. As such, the State had not only violated the obligation to prosecute and convict the aggressors, as ‘part of a general pattern of negligence and lack of effective state action’, but also (given its finding of a pattern), its obligation “to prevent these degrading practices” (of domestic violence). The Commission went on to find that this “general and discriminatory judicial ineffectiveness [...] creates a climate [...] conducive to domestic violence, since society sees no willingness by the State, as a representative of the society, to take effective action to sanction such acts”.

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1761 *Da Penha, supra* note 1753 at para 20.
1764 *Da Penha, supra* note 1753 at para 255.
1765 *Ibid* at para 41.
1766 *Ibid* at para 56.
1767 *Ibid* at para 55.
1768 *Ibid* at para 56.
1769 *Ibid* at para 56: “Given the fact that the violence suffered by Maria Da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the
It found that “such widespread tolerance of domestic violence in Brazil” constituted a violation of the duty to “condemn all forms of violence against women” established in Article 7 of the Belém do Pará Convention.\textsuperscript{1770} The Commission’s subsequent Access to Justice Report\textsuperscript{1771} underscored its finding in da Penha that the Brazilian system’s condonation of this situation “only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.”\textsuperscript{1772}

The Commission determined that Brazil must adopt comprehensive measures to redress patterns of societal and state tolerance of domestic violence against a discriminated against social group, in order to comply with due diligence in such cases.\textsuperscript{1773} This included such measures, in addition to a serious, impartial and exhaustive investigation to determine responsibilities for the irregularities in the prosecution of the perpetrator\textsuperscript{1774} the continuation and expansion of reform processes to put an end the State’s condonation of domestic violence.\textsuperscript{1775} In addition, the Commission recommended specific training measures and various institutional reforms to the criminal justice system, curriculum units, and the establishment of special police units to address the rights of women and provide for the effective investigation of

\begin{itemize}
\item Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.”
\item \textit{Ibid} at para 58, cited in Bettinger-López, “VAW – Normative Developments”, \textit{supra} note 1746 at 177.
\item Access to Justice for Women Victims of Violence IACHR Report, \textit{supra} note 13.
\item Da Penha, \textit{supra} note 1753 at para 55, also cited in Access to Justice for Women Victims of Violence IACHR Report, \textit{supra} note 13 at para 66.
\item \textit{Ibid} at para 61. These themes were taken up in the Commission’s important 2011 decision in Lenahan, \textit{supra} note 1747, involving the U.S. government’s inaction in response to violence against a female victim of domestic violence and her girl children, who were killed by their father.
\item Da Penha, \textit{supra} note 1753 at para 61, point 2, in addition to recommendations to address the individual needs of the victim.
\end{itemize}
all such complaints. Counsel in a later domestic violence case, Bettinger-Lopez, has also written about the extensive reform efforts that followed.

Victor Abramovich underscores the da Penha decision’s import in founding these special duties of protection, given the structural pattern and social tolerance for violence against women. In his view, this outcome derives from the system’s interpretation of the rights in question, including the rights to life and physical integrity, through the lens of substantive equality. He emphasizes that it is the structural pattern of domestic violence involving this particular group that grounds the state’s affirmative prevention duties and justifies the Commission’s strong general recommendations and reparation obligations.

Lenahan v. United States (Lenahan) is the Commission’s second ‘landmark decision’ concerning state responsibility for acts of domestic violence. It represents a further development of the state’s due diligence obligations to prevent, investigate, and punish acts of domestic violence, and to protect and compensate victims. This was also the system’s first pronouncement on the issue of inequality and discrimination against women under Article II of the American Declaration, in this instance addressing inaction by the U.S. government toward a female victim of domestic violence, as well as against her three young daughters, who were killed by their father.

The facts of the case are tragic. Jessica Lenahan (formerly Gonzalez) is an American citizen of Native American and Latin American descent, who had obtained first a temporary and then a permanent restraining order in May 1999 against her ex-husband, Simon Gonzales, after she

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1776 Da Penha, supra note 1753 at para 61.
1777 Ibid. For commentary on the extensive reforms in Brazil further to this case and the Maria Da Penha legislative framework and the post-case progress with implementation, see Bettinger-López, “VAW: Normative Developments”, supra note 1746 at 190.
1778 Abramovich, “State Responsibility for Gender Violence”, supra note 888.
1779 Ibid at 168.
1780 Supra note 1747.
1781 Bettinger-López, “VAW: Normative Developments”, supra note 1746 at 188.
1782 See Appendix B: Rights Provisions.
and her son and three daughters experienced abusive behavior and violence. The events took place in Castle Rock, Colorado, where the family lived and Ms. Lenahan worked as a part-time cleaner for the Castle Rock Police Department. The restraining order clearly provided that Gonzales was not to come within a certain distance of the family home and his access to the girls for a mid-week dinner visit was to be pre-arranged with Lenahan ahead of time. The order also included provisions for the mandatory arrest law details for the police.

In the early evening of June 22, 1999, Lenahan discovered that her daughters were missing and she contacted the Castle Rock Police Department multiple times over the course of the evening, and advised them of the restraining order. She also requested that they assist her with locating her daughters. The police did little to respond and displayed an attitude of indifference, including suggesting that the children had a right to be with their father. After she attended at the police station at 12.30 a.m. on June 23, the police appeared to act to locate Gonzalez, but the appropriate steps were never taken. At 3:25 a.m., Gonzales drove to the police station and fired shots, which led to an exchange of gunfire that resulted in him being killed. The deceased bodies of the three girls were found in his truck but no investigation was ever initiated to determine whether they were killed by their father or in the crossfire.\(^{1783}\)

The importance of this case is several-fold. It is of special interest to Canada, given the application of the equality provision in the *American Declaration*, as well as its potential applicability to a direct equality challenge to the problem of domestic violence against women in Canada\(^ {1784}\) and issues raised by the Missing and Murdered Women and Girls Inquiry. The case is also interesting because the issue of a state’s obligations to take affirmative action in the face of ‘private’ acts within the familial sphere presented, rather paradigmatically, as a direct

\(^{1783}\) *Lenahan*, supra note 1747 at paras 71-85.

\(^{1784}\) Melanie Randall considers this issue – independently, and not in light of the IAHRS – in terms of the potential for a direct section 15 challenge; she expresses skepticism about its likely success, given that there has been no comprehensive equality rights challenge to this endemic phenomenon: *supra* note 24. See also Jennifer Koshan’s blog, “State Responsibility for Protection against Domestic Violence: The Case of Jessica Lenahan (Gonzales)” (Oct 10, 2011), (blog) online:https://ablawg.ca/2011/10/10/state-responsibility-for-protection-against-domestic-violence-the-case-of-jessica-lenahan-gonzales/ (last accessed April 22, 2019) [Koshan, “State Responsibility for Domestic Violence”].
challenge of the prevailing American juridical framing of the state’s role as one of restraint and negative liberties.

The Commission found that the State’s “systemic failure” to offer a coordinated and effective response to protect Lenahan and her daughters from intra-family violence, constituted an act of discrimination, a breach of the obligation to not discriminate, and a violation of equality before the law under Article II. It specifically found that the state’s failure to act with due diligence violated these duties.\textsuperscript{1785} It further decided that the State apparatus was “not duly organized, coordinated, and ready to protect these victims from domestic violence by adequately and effectively implementing the restraining order [...] [and that these] failures to protect ... constituted a form of discrimination in violation of [...] the \textit{American Declaration}.\textsuperscript{1786}

The Commission also found that these “systemic failures” were especially serious “since they took place in a context where there has been a historical problem with the enforcement of protection orders; a problem that has disproportionately affected women – especially those pertaining to ethnic and racial minorities and to low income groups – since they constitute the majority of the restraining order holders.”\textsuperscript{1787}

The case provides another illustration of the deepening of reinforced state obligations to respect and ensure the human rights of women, and of particular groups of multiply marginalized women whose conditions heighten their vulnerability.\textsuperscript{1788} The Commission emphasized its concern regarding the (U.S.) domestic context of high levels of domestic violence, reinforced by widespread under-enforcement of domestic violence laws by law enforcement, reinforced by discriminatory attitudes.\textsuperscript{1789} The Commission considered Lenahan’s ethnic origins to be relevant as well as the fact that she worked as a part-time cleaner for the

\textsuperscript{1785} Specifically, the state’s obligation not to discriminate and to provide for equal protection before the law under Article II of the \textit{American Declaration}.\textsuperscript{1786} \textit{Lenahan, supra} note 1747 at para 160.\textsuperscript{1787} \textit{Ibid} at para 161.\textsuperscript{1788} \textit{Celerio, supra} note 1751 at 844.\textsuperscript{1789} \textit{Lenahan, supra} note 1747 at paras 92-100.
police department (that failed her). The Commission also focused on her daughters’ status as minority girl children.

The Commission’s decision on the merits sets out a clear direction to the respondent State regarding the positive actions required in situations that compel due diligence, which is not unlimited in cases of violence by non-state parties, but is rigorous in the appropriate circumstances. The U.S. Supreme Court had held in the domestic proceeding that there were no such positive obligations on the state’s part to act to prevent violence between non-state actors. The Commission found that the State was well aware of the danger posed to the petitioner and her daughters and it failed to fulfil its obligations of protection and prevention, in violation of its international responsibilities. The case once again established that states can be liable for omissions related to the actions of ‘private’ non-state actors, and that a state’s failure to comply with its duty to protect and the due diligence obligations in spite of the recognized risk to the claimant represents a systemic and insufficient response. Invoking da Penha, the Commission’s finding is also significant in concluding that this type of state response “reproduces social tolerance towards these actions”, and that state inaction towards violence against women fosters impunity and promotes the culture of tolerance and thus repetition of violence.

In terms of the Commission’s recommendations to the respondent State, Bettinger-López describes them as “well developed ... for both individual and policy-focused remedies”, and including, *inter alia*, the recommendation to “conduct a serious, impartial and exhaustive

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1790 *Ibid* at paras 71, 94.
1792 *Ibid* at para 39: “The [U.S.] Supreme Court held that despite Colorado’s mandatory arrest law and the express and mandatory terms of her restraining order, Jessica Lenahan had no personal entitlement to police enforcement of the order under the due process clause.”
1793 This flows from the sustained attention that the Court and Commission have given to the obstacles to justice by victims of domestic and other violence, including that perpetrated by non-State and State actors. There are various thematic reports on this topic: see Appendix A.
1794 *Lenahan, supra* note 1747 at para 119.
investigation into systemic failures that took place related to the enforcement of Jessica Lenahan’s protection order, to reinforce through legislative measures the mandatory character of the protection orders and other precautionary measures to protect women from imminent acts of violence, and to create effective implementation mechanisms”. Among the more systemic of the Commission’s recommendations was that the State establish programs and practices aimed at restructuring the stereotypes of domestic violence victims and to promote the eradication of discriminatory sociocultural patterns that impede women’s and children’s full protection from such acts.

4.5.9.3 Systemic patterns of violence by third parties: Cotton Field

Turning to systemic violence perpetrated outside of the family, the Court’s decision in González v. Mexico (known as Cotton Field) is widely viewed as among the system’s most progressive, in terms of applying a strong gender analysis that is intersectional and based on an ‘anti-subordination’ conception of gender discrimination, and establishing expansive obligations for states related to gender-based violence committed purportedly by non-state actors who were likely strangers to the victims.

Cotton Field concerned the unresolved investigations of the disappearances and murders of three young women in the city of Ciudad Juárez, Mexico. The bodies of Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárrez were found in a cotton field on November 6, 2001. Their deaths took place within a highly publicized context of other

1798 Ibid, drawing on paragraph 200 (Recommendations) of Lenahan, supra note 1747. Bettinger-López also reviews the post-case progress with implementation at 190.
1799 Recommendation #6 of Lenahan, supra note 1747 at para 200, cited in Koshan, “State Responsibility for Domestic Violence”, supra note 1784 at 8: “To continue adopting public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims, and to promote the eradication of discriminatory socio-cultural patterns that impede women and children’s full protection from domestic violence acts, including programs to train public officials in all branches of the administration of justice and police, and comprehensive prevention programs.”
1800 Supra note 1137.
1802 This was not determined, but the alleged role of state actors in the criminal acts was not found to be supported by the evidence: Cotton Field, supra note 1137.
disappearances and murders, as well as irregularities, delays, and impunity in the state’s investigations. The Commission had monitored this horrific phenomenon in the years leading up to the Court’s decision, producing reports\textsuperscript{1803} and addressing various individual petitions.

The Court began by establishing the broader socio-economic context, which included a clear pattern of violence since 1993, accompanied by a pattern of deficient state response to these crimes.\textsuperscript{1804} In addition, the Court addressed the specifics of Ciudad Juárez, located on the Mexican border with El Paso, Texas, and featuring a concentration of manufacturing and assembly plants, known as ‘sweat shops’. It references evidence of the notoriously high levels of insecurity and violence, based on a convergence of factors such as social inequalities, and the international border, which has contributed to different types of organized crime, such as drugs and people trafficking, arms smuggling and money laundering.\textsuperscript{1805}

The murders of the three women, as noted, were not isolated incidents. Beginning in the early 1990s, a large number of murders and disappearances began to occur. The victims tended to be young girls or women between the ages of 15 and 25 and were usually students or worked in either the \textit{maquila} or other local businesses. The common pattern was that the victims were evidently abducted and kept alive for some period of time. Their relatives reported their disappearances, and then their bodies were discovered on empty lots several days or months later, with signs of violence, including various forms of torture and sexual violence.\textsuperscript{1806} At the time the decision was issued, around 113 women (including these three victims) were part of this pattern known as ‘\textit{las muertas de Juárez}’ (the ‘dead women of Juarez’).\textsuperscript{1807}

Of further note is the Court’s finding of patterns of gender-based violence perpetrated by non-state actors and its determination that these were a function of widespread structural

\begin{itemize}
  \item \textsuperscript{1804} \textit{Cotton Field, supra} note 1137 at para 114.
  \item \textsuperscript{1805} \textit{Ibid} at para 113, citing various reports.
  \item \textsuperscript{1806} \textit{Ibid} at para 125.
  \item \textsuperscript{1807} \textit{Ibid} at para 127.
\end{itemize}
discrimination and inequality affecting women and girls. The Court’s contextual analysis included a socioeconomic element, both at the level of the individual victims and their families, and in the broader context of a community in the cross-fires of liberalized trade under the then newly implemented North America Free Trade Agreement. In his article concerning state responsibility for gender violence and the *Cotton Field* decision,\(^{1808}\) Victor Abramovich applauds the Court’s contextual approach, which is further he says to its notion of “material or structural equality” in examining the individual cases as forming part of a broader context of structural inequality and violence against young women from this sector of society.\(^{1809}\) He concludes that this framing was essential to determining the extent of the state’s responsibilities for crimes committed by non-state actors, through its failure to comply (either by act or omission) with its protection function.\(^{1810}\) Scholars Camila Troncoso Zúñiga y Natalia Paz Morales Cerda affirm that assessment, contending that the Court’s close review of contextual elements made possible its recognition of collective patterns of exclusion, oppression and domination.\(^{1811}\)

Although the state made a partial acknowledgement of responsibility, the Court’s findings and reparation orders were extensive. A preliminary issue was whether the situation rose to a level that qualified it as “femicide” or “feminicide”, as the petitioners’ representatives alleged,\(^{1812}\) a question was ultimately left undecided.\(^{1813}\) The Court did find that many of the murders might have been committed for reasons of gender, based on the common elements of the crimes and its assessment of this wider context of violence against women. It relied on various national and international reports to support its characterization of the context and pattern as structurally

\(^{1808}\) Abramovich, “State Responsibility for Gender Violence”, *supra* note 888.

\(^{1809}\) *Ibid* at 170 [author’s translation].

\(^{1810}\) *Ibid* at 173. Another scholar however is critical of the Court’s failure to significantly develop this framing of the context: Acosta-López, *supra* note 1801 at 46-47. She observes: “Accordingly, it seems that the Court was unable to address intersectionality. There seems to be an implicit universal voice of feminism behind the case...”, based on the failure to further prove the confluences of sources of marginalization.

\(^{1811}\) Troncoso Zúñiga & Morales Cerda, *supra* note 1072.

\(^{1812}\) *Cotton Field*, *supra* note 1137 at para 222. The petitioners’ representatives went further than the Commission’s submission and described the killings as “crimes of hate against the girls and women of Ciudad Juarez, misogynous crimes born from immense intolerance – and social and State encouragement – of general violence against women”: *ibid* at para 222.

\(^{1813}\) *Ibid* at paras 138 and 144. See also Acosta-López, *supra* note 1801 at 29, expressing disappointment that no finding was made. However, Acosta-López also opines that the Court is not entirely to blame for this omission, and she attributes the failure in part to the litigation strategy of the petitioners (at 33).
embedded and representing a “social and cultural phenomenon deeply rooted in customs and mindsets”.

The Court accepted the conclusions of this research that “these situations of violence are founded in “a culture of violence and discrimination” and that the violence could only be understood in the context of “socially entrenched gender inequality”.

The Court thus ultimately established that the violence suffered was gender-based and constituted violence against women under both the American Convention and the Convention of Belém do Pará.

The Court’s liability findings relied on the foundational commitments of states under Article 1.1 in the American Convention, with responsibility flowing from acts or omissions that violate the Convention.

It reiterated the foundational principle that the legal obligation that forms part of the duty to ensure (also framed as the ‘obligation to guarantee’) is “to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishments on them, and to ensure the victim adequate compensation”.

The Court clarified that the central question is determining whether the violation in question “occurred with the support or the acquiescence of the government” and “whether the state has allowed the act to take place without taking measures to prevent it or to punish those responsible”.

In the instant case, although alleged by the Commission and the petitioners’ representatives, the Court decided there was no evidence to support direct state responsibility for violations of the substantive rights, including inter alia, the right to life (Article 4), on the basis of direct or indirect state involvement in the actual murders of the victims. The State denied any

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1814 Ibid at para 133, referencing a CEDAW report on Mexico.
1815 Ibid at para 134.
1816 Ibid at para 231.
1817 Ibid at para 234.
1818 Ibid at para 236, citing Velásquez Rodríguez, supra note 104 at para 166.
1819 Ibid, citing Velásquez Rodríguez, ibid at para 173.
1820 Ibid at paras 240, 242.
involvement by public officials, and the Court declined to conclude that the involvement of state actors could be inferred from the fact of impunity.

However, in elaborating on the obligations that flow from the duty to guarantee (which includes the duty of prevention), the Court affirmed the following with respect to the specific features of the state’s obligation – which requires it to “adopt positive measures”, such measures “to be determined based on the specific needs of protection of the subject of law, either because of his or her personal situation or because of the specific circumstances in which he or she finds themselves”. The state’s obligation under Articles 1.1 and 2 of the American Convention is premised on ensuring that it creates the conditions for the free and full exercise of rights and freedoms. This latter obligation arises further to the state’s role as the ‘guarantor of rights’, as established in the Undocumented Migrants Advisory Opinion and in da Penha, and arises in contexts where third party or private actors’ conduct and broader societal patterns and norms are at play.

The concurring opinion of Justice Diego García-Sayán confirmed that the source of this expanded or reinforced conception of due diligence and ‘positive duties’ is also based on the Court’s earlier jurisprudence in emblematic cases such as those involving Indigenous peoples. Relying on those precedents, the Court in Cotton Field concluded that “the absence of a general policy that should have been initiated in 1998 is a failure of the State to comply with its obligation of prevention” and that the State “did not prove that it had adopted

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1821 Ibid at para 241.
1822 Ibid at para 242.
1823 Ibid at para 243, citing, inter alia, Sawhoyamaxa, supra note 1340 at para 154.
1824 Supra note 14.
1825 Supra note 1753.
1826 Acosta-López, supra note 1801 at 30. This reinforced due diligence prevention duty is combined with the “created risk” doctrine.
1827 Cotton Field, supra note 1137, concurring opinion of Justice Diego García-Sayán, at para 8. In that line of cases, the Court established the parameters of a state’s responsibility for human rights violations committed erga omnes (between individuals), based on the two conditions of establishing state awareness of a situation of real or imminent danger for a specific individual or group of individuals, and the reasonable possibilities of preventing or avoiding that danger: see Acosta-López, supra note 1801 at 31.
reasonable measure, according to the circumstances surrounding these cases, to find the victims alive.” 1829

The Court proceeded to consider whether the State took adequate steps to prevent the disappearance, abuse and deaths of the victims, and whether it investigated these facts with due diligence. 1830 In carrying out this assessment, the Court relied on the da Penha finding that a state can be responsible for the failure to exercise the obligation of due diligence to prevent, punish and eliminate violence. As noted, the Court further held that in da Penha the state was obliged to also prevent the “degrading practice at issue” (i.e. domestic violence) as part of its due diligence obligations. 1831

The Court decided that Mexico had not complied with its obligation to guarantee, and in particular, with the obligation of prevention. Relying on the reports of various national and international bodies, it found that the state’s efforts to prevent the murder of women in Ciudad Juarez, and to respond to these particular killings, had been ineffective and insufficient. 1832 The Court held that the state was fully aware of the danger for women of being subjected to violence, but it did not adopt effective measures of prevention to reduce the risk factors for women. 1833 The actions it did take, which included legislative and administrative measures, were found to not be sufficient or effective to prevent the violence that occurred at the time of the case. 1834

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1829 Ibid at para 284, cited in the concurring opinion of Judge García-Sayán at para12.
1830 Ibid at para 252. The Court considered whether the State complied with the obligation to guarantee Articles 4, 5 and 7 of the Convention in relation to Article 1(1) and Article 7 of the CBDP (para 248), emphasizing the state’s obligation of prevention, which encompasses all measures of a legal, political, administrative and cultural nature that ensure the safeguard human rights (at para 252).
1831 Ibid at para 258. The Court thus framed the basis of Mexico’s liability in broad terms, as failures to: establish an appropriate legal framework for protection that is enforced effectively, and a comprehensive prevention policies and practices that allow effective measures to be taken in response to the respective complaints; ensure that the prevention strategy is comprehensive, such that it prevents the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence against women; adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence.
1832 Ibid at para 273.
1833 Ibid at para 279.
1834 Ibid at para 279. The State was also found to have failed to adopt reasonable measures in the circumstances of the cases to find the victims alive (ibid at para 284). Based on this, the Court found that the State violated the
The case is therefore noteworthy for founding responsibility of the Mexican state for the disappearances and murders perpetrated by non-state actors in its failure to act, in the form of taking appropriate affirmative measures in response to a situation well known to it.\(^{1835}\)

In addition, the decision reflects a substantive equality analysis. The state’s liability derived from an expanded conception and the development of the due diligence prevention duty and the “created risk doctrine”,\(^{1836}\) further to a state’s obligations to adopt prevention and protection measures in response to gender-based violence. Abramovich contends that this conception derives directly from the system’s framing of the state’s role as active rights guarantor of equality (and thus “guarantor against patterns of violence that affect subordinate groups” in relation to situations of social inequality that are structural).\(^{1837}\)

The Court made findings with respect to the discriminatory attitudes that featured in the investigative failures of the three cases. The evidence showed that the lack of attention and seriousness in the State’s attention to the situation specifically and more generally was a function of the general (societal) “culture of discrimination” against women. The Court held that this factor influenced not only the fact of the murders but also the indifference of the state in investigating the violence, which investigations featured derogatory, gender-stereotyping and victim-blaming statements by public officials about the victims, such as the suggestion that they were “flighty” or “had run away with their boyfriends”.\(^{1838}\) The Court drew the inference from these facts and the State’s inaction in the investigation that “this indifference reproduce[d] the violence that it claims to be trying to counter”, and that this indifference constituted discrimination regarding access to justice.\(^{1839}\) The Court went on to condemn the cycle of impunity that is perpetuated by the State’s attitudes and inaction, along with social acceptance of women’s violence.

\(^{1835}\) Abramovich, “State Responsibility for Gender Violence”, supra note 888 at 173.

\(^{1836}\) Ibid at 173-4.

\(^{1837}\) Ibid at 182 [emphasis added] [author’s translation].

\(^{1838}\) Cotton Field, supra note 1137 at para 400.

\(^{1839}\) Ibid.
of the phenomenon of violence against women, and the distrust that women have in the system of the administration of justice in Mexico.\textsuperscript{1840}

In elaborating on the socially dominant gender stereotyping that was evident in the state’s policies and practices as well as the reasoning and language of the authorities, the Court referred to the contribution that such stereotypes make in terms of causing and being a consequence of gender-based violence against women.\textsuperscript{1841} The Court went on to find that the violence against the women victims constituted a form of discrimination, and held that the state had violated the obligation to not discriminate under Article 1.1 of the Convention in relation to the obligation to guarantee the other substantive rights (including the rights to life and physical integrity).\textsuperscript{1842}

The Court relied on its previous elaboration of the states’ general duties to ensure and also protect, to elevate the obligations to act proactively to prevent and respond to gender-based violence. Abramovich describes the doctrine of predictable and avoidable risk as being such that states cannot ignore such situations - as their duty is to monitor such social realities - and when they “contribute with their actions, policies, practices and omissions, to the creation and configuration and consolidation of social risk situations”.\textsuperscript{1843} The findings in the case were not confined therefore to the various failings of the state to adequately respond to the reports of the disappearances (which were considerable)\textsuperscript{1844} or to properly investigate the crimes, thereby ensuring impunity and the further perpetration of these criminal acts.

Finally, the case is noteworthy for what at least one commentator has called the transformative\textsuperscript{1845} nature of the reparations ordered. Although some commentary critiques the

\textsuperscript{1840} Ibid.
\textsuperscript{1841} Ibid at para 401.
\textsuperscript{1842} Ibid at para 402.
\textsuperscript{1843} Abramovich, “State Responsibility for Gender Violence”, supra note 888 at 174-5 [author’s translation].
\textsuperscript{1844} Cotton Field, supra note 1137: see analysis of these deficiencies, beginning at para 287.
\textsuperscript{1845} Acosta-Lopez, supra note 1801 at 37.
Court for not going far enough, the reparations ordered were, as noted, ‘transformative’ to the extent that they were designed to remedy the structural discrimination against women that underlay the state’s response to these social and cultural phenomena. The Court set out its overall approach to reparations in the following (guarantee of non-repetition) terms:

... bearing in mind the context of structural discrimination in which the facts of this case occurred [...] the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.”

The Court also established the requirement to adopt a gender perspective in the design of measures that identify and eliminate the factors that cause discrimination. In addition to ordering measures specific to the victims’ families, including the obligation to carry out adequate investigations with the purpose of identifying, prosecuting and punishing those responsible for the disappearance, ill-treatment and murders of the victims, there were orders for the investigation of complaints by the victims’ next of kin related to their treatment, and of having been harassed and persecuted during their efforts to obtain justice.

In terms of issuing guarantees of non-repetition, the State insisted that it had subsequently implemented a “comprehensive and coordinated policy, supported by adequate public resources, to ensure that the specific cases of violence against women were adequately prevented, investigated, sanctioned and redressed by whosoever was found responsible” and provided details of the many actions it purported to have taken. After evaluating the myriad of measures that the State had implemented, the Court acknowledged these efforts but determined it could not rule on whether they were adequate, and in particular it could not rule on the existence of an integral policy “to overcome the situation of violence against women,

1846 Ibid.
1847 Cotton Field, supra note 1137 at para 450.
1848 Ibid at para 451.
1849 Ibid at para 452.
1850 Ibid at para 461.
1851 Ibid at para 476.
1852 Ibid at para 493.
discrimination and impunity, without information on any structural defects that crosscut these policies, any problems in their implementation, and their impact on the effective enjoyment of their rights by the victims of this violence.\textsuperscript{1853} As such, and lacking sufficient arguments and evidence to rule on whether the policies being implemented really represented a guarantee of non-repetition, it is likely that this aspect of the case will be followed closely through the implementation phase.

The Court issued specific detailed directives for the criminal prosecutions, requiring a gender perspective approach that obliges lines of inquiry into corresponding patterns of violence in an area, and requiring that the investigation be undertaken by officials highly trained to respond to victims of discrimination in the form of gender-based violence.\textsuperscript{1854}

4.5.9.4 Context of violence and marginalization: barriers to justice for Indigenous women

I turn finally to two cases that followed the \textit{Cotton Field} ruling and were the initial inspiration for this project: \textit{Fernández Ortega} and \textit{Rosendo Cantú} issued in August 2010.\textsuperscript{1855}

The decisions addressed the sexual assaults\textsuperscript{1856} of these two women by members of the military in the state of Guerrero, Mexico, in early 2002. The primary issues concerned the lack of investigation and sanction of these crimes, as well as the complex multiple and intersecting barriers to their access to justice on a non-discriminatory and equal basis by these women as a result of their social location and various aspects of their identities as poor, Indigenous (both of the Me’phaa Tlapanec people), and non-Spanish speaking women.

Another important feature of these cases particular to the victims’ status as Indigenous women living in a militarized area of the country was their vulnerability to patterned violence and

\textsuperscript{1853} Ibid at para 495.  
\textsuperscript{1854} Acosta-López, supra note 1801 at 40.  
\textsuperscript{1855} Supra note 17.  
\textsuperscript{1856} The Court decided that the sexual assaults constituted torture under international human rights law, which has held that in certain circumstances such as where the victim is interrogated and confined by State officials, rape amounts to torture.
sexual abuse as a weapon of control in the conflict. Finally, the Court once again applied its ample conception of state obligations to address discrimination and violence against these women through the use of positive measures to prevent, investigate, sanction, and offer measures of reparations for these inactions.

In general terms, the decisions are noteworthy in terms of the Court’s contextualized analysis, which struck me as significantly expansive in terms of the detailed historical and contemporary evidence that was advanced by the petitioners’ representatives and that the Court entertained. As Bettinger-Lopez notes, the Court “dove into an intersectionality analysis”, giving special emphasis to the particularly vulnerabilities of these multiply marginalized women.

Fernández Ortega was 27 years old and Rosendo Cantú was 17 years old at the time of the incidents. The petitioners’ representatives argued in each case that the victims had been discriminated against on the basis of their sex, race, and economic status, by state authorities involved in the investigation of the acts and the collective of evidence. The facts illustrated the particularly significant challenges that these women faced in attempting to exercise their rights to gain effective access to justice as victims of sexual assault. The Commission and the representatives also underlined the pattern of violence of this nature in such communities, and the use of rape as a form of torture against Indigenous women, as well as the impunity surrounding such incidents. Impunity was reinforced by the fact that the women were unable to access a civilian and independent tribunal. This is because the investigation of their

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1857 A central question in the litigation, not analyzed herein, concerned the breadth of military jurisdiction in investigating human rights violations and crimes allegedly committed by members of the armed forces, and the Court’s ultimate judgment and orders to restrict that their illegitimately expansive scope.

1858 These observations are drawn from the author’s observations.


1860 Rosendo Cantú, supra note 9 at para 82: “The representatives argued [...] In this case, the rape constituted a form of violence against women and as a consequence, an extreme form of discrimination aggravated by her condition as a minor in a situation of poverty, “making her the victim of a convergence of discriminations.”

1861 Fernández Ortega, supra note 9 at para 92: The representatives argued [...] that the rape “was an expression of extreme discrimination [...] owing to her condition as an indigenous person and owing to her condition as a woman” and it sought “to humiliate and to terrorize, and to send a warning message to the community.”

1861 Celerio, supra note 1751 at 838.
cases was transferred from civilian to military jurisdiction, and their subsequent appeals of those decisions were denied. In making its findings against the state, the Court relied on reports by international agencies to confirm the facts of these patterns of abuses.  

In the case of Rosendo Cantú, the incident occurred on February 16, 2002, and Valentina filed a complaint with authorities on March 8, 2002. Evidence was presented concerning the challenges she faced in filing the complaint, and having to deal with authorities who did not speak her language, as well as her difficulties in accessing medical attention, which she attempted to do on February 18, 2002. She travelled to the nearest health clinic in Caxitepec, but was not seen by the physician on duty to his stated fear of the army. She was then forced to travel on foot to the nearest city in Ayutla on February 26, an eight hour walk from her community. She alleged that she was refused service until the following day because she did not have an appointment.

The Court made findings of discrimination in both cases, and in Rosendo Cantú’s case on the basis of various grounds, including her socioeconomic status and status as a girl child at the time of the incident. Given her status as a minor, the Court highlighted the State’s obligation to conduct a serious and effective investigation as soon as it learned of the sexual violence because it put her at particular risk for human rights violations.

In considering the obstacles and social dynamics associated with the mistrust of these women towards the justice system, the Court found that the assaults took place despite Rosendo

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1862 Fernández Ortega, supra note 9 at para 78, describing the indigenous communities as having high levels of marginalization and poverty and being in situations of “extreme vulnerability”, noting that this takes various forms, including in the administration of justice and health care services; and para 79, noting the existence of “institutional military violence”, placing the women in particular, in extreme vulnerability, and referencing a pattern of sexual violence.
1863 Rosendo Cantú, supra note 9 at paras 72-3.
1864 Ibid at para 130.
1865 Ibid at para 75.
1866 Ibid at para 168.
1867 Ibid at paras 179, 201.
1868 Ibid at para 201. The Court reiterated the line of reasoning of the duty of states to safeguard the best interests of the child with special measures of guarantee and care. It also listed some of the contents of these reinforced obligations.
Cantú’s failure to report the incident to authorities, on either occasion of her first medical consultations.\textsuperscript{1869} The Court held that this factor needed to be contextualized in the circumstances of the present case and of the victim, considering issues of cultural and social particularities in Indigenous communities, as well as the fact that she was a child at the time of the events and there were other reasons for why she would not have felt safe.\textsuperscript{1870}

In terms of reparations with respect to access to justice in both cases, the Court held that the reparations had to take into account that the victims were Indigenous women, and that measures with ‘community reach might be necessary in such cases.'\textsuperscript{1871} It ordered the State to implement capacity-building programs to enhance the investigation of sexual violence cases from an ethnic and gender perspective and to continue the standardization process of protocols pertaining to the investigation of sexual violence cases.\textsuperscript{1872}

The decisions are noteworthy for the Court’s enlarged examination of the petitioners’ circumstances and location within their broader context. It situates them as members of the most marginalized and multiply discriminated against populations in Mexico, and further, within a complex social context marked by significant levels of deprivation, exclusion, militarized violence, including patterned sexual violence, and geographical distance from (urban centres and) basic services. Fernández Ortega and Rosendo Cantú were disproportionately affected by social conditions, such as poverty, racism, sexism, and discrimination in the extreme form of violence and they faced multiple barriers in their efforts to access justice and various services. These barriers were a result of their affiliation with a non-dominant and ‘othered’ culture and language, and included financial impediments and geographic distance from basic services. Together, these discriminatory barriers thwarted their efforts at every level to attain justice from the state for violence done to them, and to fully carry out their life projects.

\textsuperscript{1869} Ibid at para 95.  
\textsuperscript{1870} Fernández Ortega, supra note 9 at paras 137 and 268.  
\textsuperscript{1871} See for example, Rosendo Cantú, supra note 9 at para 206, and Fernández Ortega, supra note 9 at para 224.  
\textsuperscript{1872} Fernández Ortega, ibid at paras 256, 259-60 and Rosendo Cantú, ibid at paras 242, 249.
4.5.9.5 Patterned discrimination and violence against Indigenous women in Canada

This section concludes by considering the system’s treatment of the Canadian problematic of murdered and missing Indigenous women and girls, a topic that the Commission has addressed in a thematic hearing, thematic report, and through its monitoring functions.

The Commission’s thematic report on the British Columbia situation is expressly framed as an effort to probe the root causes of the high levels of violence and “existing vulnerabilities” that make Indigenous women and girls in Canada more susceptible to violence. The Commission finds that this phenomenon is a consequence of the “historical discrimination” in Canada, “beginning with colonization and continuing with inadequate and unjust laws and policies such as the Indian Act and forced enrolment in residential schools that continue to affect them”. It adds to this compendium of the sources of discrimination and serious harms, the residential school programs that separated children from families, communities, cultural heritage.

The IACHR further relates this historical discrimination to the “disadvantage” and poverty that Indigenous women and girls currently experience. As “one of the most disadvantaged groups in Canada”, the Commission emphasizes their poverty, inadequate housing, “economic and social

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1873 Missing and Murdered Indigenous Women IACHR Report, supra note 57.
1874 Indigenous women leaders Sharon McIvor and Pamela Palmater appeared before the Commission on December 7, 2017 to provide testimony on the Canadian government’s failure to eliminate sex discrimination from the Indian Act. This hearing was requested as a follow-up to the 2015 Report of the IACHR, Missing and Murdered Women in British Columbia, Canada, supra note 57 and the Commission’s finding that this is one of the root causes of the crisis of murdered and missing Indigenous women and girls: FAFIA Press Release, “Indigenous Women Leaders will Testify before IACHR on Canada’s Failure to Eliminate Sex Discrimination from the Indian Act”, supra note 1032.
1876 Ibid at para 8.
1877 Ibid at para 7.
1878 Ibid at para 7.
1879 In a separate report, the system characterizes the discrimination under the Indian Act as a contributor to the rates of violence, and a form of “spiritual violence”: Indigenous Women IACHR Report, supra note 43 at para 80: “Spiritual violence takes place when acts of violence and discrimination against indigenous women not only harm those women individually, but also negatively impact the collective identity of the communities to which they belong. In this regard, the IACHR (citing its Missing and Murdered Indigenous Women IACHR Report, supra note 57 at para 69, and its 2012 thematic hearing on Indigenous Women in the Americas) understands the barriers to securing Indigenous status classification in Canada as rising to the level of cultural and spiritual violence against Indigenous women.” [footnotes omitted].
“relegation”, and adopts an analysis that attributes these systemic realities to increasing vulnerability to violence.\textsuperscript{1880} It also emphasizes the existence of “prevalent attitudes of discrimination – mainly relating to gender and race – and the longstanding stereotypes to which they have been subjected”, as exacerbating their (socio-structural) vulnerability.\textsuperscript{1881}

The Commission sets out the regional standards that apply to Canada in respect of this complex situation, and the following are of note. The jurisprudence obliges states to guarantee Indigenous women’s rights to equality, non-discrimination and non-violence.\textsuperscript{1882} The Commission affirms that the principles of due diligence include the idea that the lack of due diligence in cases of violence against women is a form of discrimination.\textsuperscript{1883} It cites the jurisprudence that recognizes the “strong connection between the greater risks for violence that Indigenous women confront and social and economic inequalities they face”, the implication of which is that when applying the due diligence standard, the state “must implement specific measures to address the social and economic disparities that affect them”.\textsuperscript{1884}

The Commission emphasizes that Canadian state [efforts to] address violence against indigenous women are not sufficient “unless the underlying factors of racial and gender discrimination that originate and exacerbate the violence are also comprehensively addressed”.\textsuperscript{1885} The Commission lays out what a comprehensive holistic approach to violence against Indigenous women in Canada would mean:

“[...] A comprehensive holistic approach applied to violence against indigenous women means addressing the past and present institutional and structural inequalities confronted by these women. Elements that must be addressed include the dispossession of their land, as well as historical laws and policies that

\textsuperscript{1880} Ibid at para 8.  
\textsuperscript{1881} Ibid at para 8.  
\textsuperscript{1882} Ibid at para 9.  
\textsuperscript{1883} Ibid at para 9.  
\textsuperscript{1884} Ibid at para 10.  
\textsuperscript{1885} Ibid at para 11.
have negatively affected indigenous women, put them in an unequal situation, and prevented their full enjoyment of civil, political, economic, social and cultural rights.”

No petition has been filed before the Commission in respect of these matters, but the Commission continues to be engaged in follow-up monitoring with the civil society groups who requested the thematic hearing. In the project’s view, the process to date further demonstrates the potential relevance of the Inter-American system for Canadian actors that desire more substantive approaches in the face of rights deficits and injustices in Canada.

1886 Ibid at para 11 (emphasis added).
1887 FAFIA Press Release, “Indigenous Women Leaders will Testify before IACHR on Canada’s Failure to Eliminate Sex Discrimination from the Indian Act”, supra note 1032.
4.6 IAHRS Equality Understandings: Assessment

Equality is not a starting point, but a finishing point to which the State’s efforts should be addressed. In the words of Rubio Llorente, the “Law attempts to be fair, and it is the idea of justice that leads directly to the principle of equality, which, in a way, constitutes its essential content.” Nevertheless, “equality is not a starting point, but rather a goal.”

The following conclusions briefly summarize the distinctive and substantive features of the IAHRS’s equality vision in respect of each of the three essential elements of substantive equality.

The jurisprudence confirms the project’s position that the system is clearly tracking a distinctive and substantive approach to equality, in terms of its roles or functions and content. There are a number of interesting developments in the doctrinal, analytical or methodological, and theoretical spheres. Among these, and of special note, is the system’s expansive approach to context and contextualized analysis. This is the driving force of its claimant and human-suffering centred outcomes and the increasingly complicated constructions of the lived realities of certain groups.

The system’s interpretive approaches, which undoubtedly reflect its institutional mandate, are nonetheless of interest and appear distinctive among transnational human rights systems even. In particular, the pro-person and evolutive approaches have been applied in ways that push outwards on the limits of law and legal talk and directly challenge inflexible and abstract legal reasoning, in favor of an approach that is deconstructive and critical. The interpretive process is understood to be inherently non-neutral, and one in which adjudicators are challenged to know or understand the real experiences of certain subordinated groups and ‘different’ realities.

As a consequence of the system’s enlarged conception of the ambit of rights protection and the associated contextual inquiry, the system’s approach to indivisibility and the justiciability of ESCR/SER is also generating significant outcomes. The system has made considerable strides in integrating the rights categories through its innovative social rights readings of civil and political

1888 Concurring judgment of Judge Sergio García-Ramírez in Yatama, supra note 41 at para 27.
rights. The advances are evident in each of the lines of cases presented, despite the apparent outer limits and the gaps in remedial orders that would ensure the conditions of a dignified life. Directly related to these advances are the analytical deconstruction of public and private acts or spheres, the ‘law/real life’ and the negative/positive rights dichotomies. Of particular note in terms of a positive rights stance, are progressive developments in the system’s due diligence doctrine, which has resulted in expansive orders to redress the varied harms set out in Chapter 3, in circumstances where the state has not already intervened to redress such situations, and where the actions of private actors are at play.

The theoretical premises in evidence within the system’s soft law and jurisprudence are clearly pivotal to the foregoing: the system’s substantivist understanding of the nature of social inequality and the associated harms, both in terms of their sources and manifestations in concrete circumstances. This normative starting point allows the system to imbue concepts like dignity and vulnerability with de facto material content. Other foundational premises include the system’s relative non-deference towards state interests, the expansive framing of the state’s role as guarantor of rights, and its challenges to the idea that the state’s role is neutral and the false premises of formal universality. Without these foundational understandings, the system’s forays into deep contextual analysis and its readiness to impose strong positive rights duties on the state to redress patterned complex inequality harms, are inconceivable.
Chapter 5: Reflection on Equality Visions in Canada and the Americas

5.1 Dialogue of the Systems: What the IAHRS has to say to Canada

At the heart of the two systems respective visions for equality lie largely divergent theoretical understandings - critical premises that frame everything from the understanding of difference and universality, to conceptions of choice and autonomy, and the role of the state.

Central to the Inter-American system’s equality vision is recognition of the key features of substantive inequality: the pervasive realities of patterned exclusion and need, disparate impact, and de facto inequalities. These are core concerns: they determine whether individuals enjoy the free and full exercise of all rights and are able to create and fulfil their life plans. Such clear foundational assumptions allow the Inter-American system to consistently frame the ambit of equality protection as asymmetric and as centered on particular groups whose circumstances and interests are central to the system’s concerns. The types of harms this system recognizes are thus wide-ranging and combine different dimensions of misrecognition, maldistribution, exclusion, and cultural and socioeconomic injustices. By contrast, the SCC’s jurisprudence is ambivalent as to the beneficiaries of equality and it is both unclear and restrictive as to the harms recognized and remedied under s. 15’s protective scope.

Parallel to its openness to complex subaltern realities and in furtherance of less abstract formal legal reasoning, the Inter-American system’s interpretive approaches challenge the formalist ills of abstraction, compartmentalization, decontextualization, and pseudo-neutrality. The IAHRS’s deployment of ‘social sense’ and more philosophical reflections on the nature of human suffering suggest that the law’s recognition of human suffering is at a lower tipping point.

The respective approaches to substantive equality thus determine the scope of the contextual inquiry. The Inter-American system’s soft law and jurisprudence clearly demonstrate an analytical framing that attends to the multiple layers and confluences of human inequality.

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experience; the system pays close attention to the particularities of claimant circumstances, including, economic dimensions and vulnerability to exploitation by others. The system, simply speaking, is much more porous and open to the perspectives and experiences of marginalized groups.

In contrast to s. 15 jurisprudence, the case law of the IAHRS pays less attention to formulating frameworks or tests; its approaches are flexible, and less rigid. Comparison features little in its analysis, as do questions of sameness and difference. The interest in understanding the obvious harms and manifestations of inequality thus confirms the less referential or comparative nature of this inequality-based analysis. The system also pays minimal attention to discrete enumerated grounds; its approach to adding grounds has been flexible, and uncontentious; issues such as mutability of status and heterogeneity within claimant groups have featured far less; and the system has incorporated an understanding of poverty and economic status as a meaningful component of the substantive rights and equality analysis. Concepts like dignity and vulnerability are given substantive, material content, and, as such, the harms explored in these terms correspond well to socio-structural patterns of need and systemic disadvantage.

The concept of vulnerability has featured minimally in the SCC’s jurisprudence. Justice L’Heureux-Dubé invoked this notion in Egan, as part of her unsuccessful effort to advance a less singular focus on and constrictive approach to discriminatory grounds and to the Court’s assessment of what constitutes substantive inequality. For her, centering attention on the structural vulnerability of the most historically disadvantaged or marginalized groups in Canadian society was essential to giving them “access to s. 15 relief”, and ignoring such vulnerability was likely to compound disadvantage.

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1890 Sampson, supra note 163 at 251 [emphasis added].
1893 Egan, supra note 17, per L’Heureux-Dubé, J.
1894 Ibid at p. 555.
conception of patterned vulnerability, among other harms like, powerlessness, devaluation, and marginalization, is one that the critical commentary also advanced. Although later referenced in the Law contextual factors, the notion remains undeveloped. Thus, the robust approach to adverse effects analysis in the IAHRS further solidifies the differences in the systems’ respective contextualized substantive rights approaches.

The Inter-American system’s contextualized analysis and interest in probing complex realities has allowed it to foreground patterned experiences of status and economic subordination and exclusion, often combined, such that adverse effects and disparate impacts are recognized within its widely cast contextual analyses. In such cases, there are minimal barriers to drawing inferences from the individual case to the systemic pattern. The case law indicates that the system is comfortable with reaching conclusions based on documented patterns of disproportionate adverse impact on groups affected by various “social conditions” and forms of social and economic subordination.  

The system’s facility with ferreting out adverse effects is on display in the migrant cases and marginalized youth cases involving apparently discrete violations of conventional CPR. This stance is also amply demonstrated in the system’s assessment of laws of general application that regulate access to political affairs in the context of subordinated groups that organize themselves differently and are faced with the options of exclusion from participation, or assimilation. Similar constructs have been applied to the system’s analysis of the operation of property rights formulations that suppress other conceptions of land use and tenure, and, in unearthing the intersecting systems of oppression that combine to create patterned exclusion and absolute need amongst historically oppressed peoples. The differences between the systems’ contextual inquiries thus could not be more striking. The restrictive parameters of the SCC’s narrow contextual inquiry are evident in most of its judgments, with more promising examples making appearances in a small number of judgments, dissents or judgments that fail

1895 I acknowledge that this is a function of the system’s different procedural, interpretive and substantive commitments under international human rights law.
to carry the day. The contrasts are especially evident in the cases that address First Nations claimants; the thinness of the Supreme Court’s inquiry in *Ermineskin*\(^{1897}\) and *Taypotat*\(^{1898}\) sharply contrasts with the system’s Indigenous rights jurisprudence, which connects historic ‘misdeeds’ to its close “social sense”\(^{1899}\) readings of contemporary realities of those communities. However, complex patterns of gendered discrimination have been increasingly recognized and addressed in the IAHRS. Cases like *da Penha*, \(^{1900}\) *Lenahan*, \(^{1901}\) and *Cotton Field*\(^{1902}\) show the system’s interest in understanding and addressing institutionalized patterns of subordination that take societal form in a culture of discrimination and violence against women and girls. The Inter-American system’s interpretive framework confirms that what is surfaced through the contextual inquiry is what will be addressed and remedied. Similarly, the concern to limit the harms recognized and the scope of the protection determines what the Supreme Court surfaces in its contextual analysis.

The limits of the liberal rights model and its ultimate constraints in terms of positive duties and social and economic rights take form in the SCC’s discourse on choice and autonomy, as well as this Court’s relative lack of openness to examining the fullness of claimant groups’ experiences. Amendments of the concepts or tests the Supreme Court uses have not fundamentally changed this and have sometimes narrowed the Court’s analysis. What this project concludes is that the approach of continually refining the analytical tools will make no difference if the ultimate purposes and aims to which s. 15 aspires are not clear as well as precisely focused on the inequality harms and equality vision to which a substantive equality approach is addressed and for which substantive state commitments are required.

\(^{1896}\) More nuanced contextual analyses are contained in various dissenting judgments such as those of Justice L’Heureux-Dubé in *Symes*, supra note 144 and *Thibaudeau*, supra note 17, and in the decisions of Justice Abella in *Quebec v. A*, supra note 26, where a plurality then upheld the impugned legislation, as well as in *APP*, supra note 153.

\(^{1897}\) *Supra* note 26.

\(^{1898}\) *Supra* note 26.

\(^{1899}\) De Paz Gonzalez, *supra* note 1016 at 101.

\(^{1900}\) *Supra* note 1753.

\(^{1901}\) *Supra* note 1747.

\(^{1902}\) *Supra* note 1137.
On that score, the SCC’s jurisprudence reflects both limited remedies and a general refusal to impose positive duties other than in cases where the state has acted and either failed to see difference or there was discriminatory under-inclusion.

The Supreme Court’s striking disinterest in the fate and suffering of Louise Gosselin, and others in her position, is thrown into particularly sharp relief in light of the IAHRS’s formulation of ‘vida digna’, the conditions of a dignified life, and the right to ‘harbour a project of life’. Some of these elements are reflected in the dissenting decisions in that case: the failure to consider the exposure of the claimants to further harms, including human rights violations (such as gender based violence); the presence of mental health issues; the gendered reality of the feminization of poverty; the threat of extreme poverty; and the inability to provide for subsistence or basic needs. All of these omissions are striking in light of the Inter-American system’s approach to groups and situations that raise concerns about the minimum conditions for a dignified life.

The Gosselin1903 decision stands in contrast to any number of Inter-American decisions and the system’s orientation towards taking into account the de facto realities and circumstances that threaten important human interests and the exercise of rights.

For the SCC, socio-economic rights claims in respect of a lack of access to services or resources will not be admitted if the government has not already acted. The Supreme Court has not required the state to act, for example, in furtherance of providing medically equal outcomes. This is demonstrated by Auton1904 whose result is appropriately contrasted to Murillo,1905 where the state was ordered to provide a benefit on the basis of the adverse impact of its failure to do so on a vulnerable group.

The Inter-American Court’s decision in Artavia Murillo1906 and other cases stand in contrast to this Canadian jurisprudence, as state duties have been imposed in respect of access to basic needs, like water, food, health services, and education. This is demonstrated in the cases

1903 Supra note 67.
1904 Supra note 509.
1905 Supra note 1689.
1906 Ibid.
involving Indigenous peoples, migrants, and the dignified life cases. It is also evident in the system’s handling of labour and economic rights protection claims advanced by labourers and undocumented migrant workers.

The contrast in the approaches of the respective courts in the SCC NWAC\(^{1907}\) and the Inter-American Court *Yatama*\(^{1908}\) reveals important differences in how the (in)equality problematic is conceived. The SCC did not frame the equality issue in *NWAC* as concerning the aim of ensuring participation and inclusion of a group whose members are multiply disadvantaged and reflect an interest that had great historical and contemporary significance. The distinctiveness of the petitioners’ circumstances in *NWAC* was not closely explored in relation to this interest in determining the shape of future First Nations to Canadian government relations, and the broader context. In other words, the SCC did not attend closely to the difference that difference was making for the female Aboriginal claimants. Thus, the SCC decided that the state had no obligation to facilitate direct and meaningful access to the decision-making process where important, relevant decisions were being made.

By contrast, the Inter-American Court in *Yatama*\(^{1909}\) started from the recognition of the importance of the interests and the context, including the historical patterns of exclusion experienced by these particular and distinctive petitioners. It explored the ways in which the claimant group expressed their identities and preferences, and it imposed positive, broad duties on the state to ensure that the government’s ‘universalist’ processes facilitated a right to access political affairs on terms that recognized their distinctiveness, historical and contemporary injustices, and that enabled participation on an effectively (*de facto*, and not just *de jure*) equal footing. In this sense, the *Yatama* judgment advances a participative, transformative agenda, in addressing the claimant group’s exclusion and misrecognition, along with maldistributions of resources and power.

\(^{1907}\) *Supra* note 777.

\(^{1908}\) *Supra* note 41.

The Yatama decision and other Indigenous rights cases are of particular interest in reflecting on the Inter-American system’s strong jurisprudence and that system’s evolving doctrine of state responsibility and of special state obligations. The Yatama judgment is infused with a deep understanding of historic and contemporary injustices involving Indigenous peoples that contemplate the range of the misrecognition and maldistribution harms. The breadth of this framework is also demonstrated in the system’s involvement in thematic hearings and follow-up on the situation of murdered and missing women and girls in Canada.\textsuperscript{1910} The system’s indigenous land rights jurisprudence concerning property rights and equality is of direct thematic relevance to the Hul’qumi’num Treaty Group’s petition regarding Canada’s failure to demarcate the title of the HTG’s territories and the Canadian state’s conduct in having sold much of their lands to third party purchasers.\textsuperscript{1911}

The treatment of difference in the SCC’s decision in Eaton\textsuperscript{1912} is appropriately contrasted to the Commission’s issuance of precautionary measures in Irene,\textsuperscript{1913} where the Commission applied the principle that inclusion advances effective equality and non-discrimination in respect of children with disabilities. There is a clear contrast with the SCC’s failure in Eaton to apply a transformative approach that challenges dominant norms and ways of organizing services and institutions. Instead, the Supreme Court effectively located the deviance or deficiency in Emily herself rather than in the privileged able-bodied norms that are at play in many institutions. The Supreme Court’s reference to ‘tinkering’ with the system confirms its lack of understanding of the substantive equality harms and realities at play in this case, and the need for the state to take transformative steps to address historically entrenched status subordination. It also confirms the Supreme Court’s failure to approach the stated requirement of “accommodating difference” as the ‘essence of equality’\textsuperscript{1914} through a substantive equality lens, because it is not

\textsuperscript{1910} Missing and Murdered Indigenous Women IACHR Report, supra note 57, and issues related to the remaining vestiges of sex discrimination in Canada’s Indian Act.
\textsuperscript{1911} To reiterate, the IACHR’s decision on the merits of the HTG’s petition remains outstanding at the date of writing.
\textsuperscript{1912} Supra note 592.
\textsuperscript{1913} Irene, supra note 1669.
\textsuperscript{1914} Andrews, supra note 18.
prepared to require that the state act proactively and in furtherance of claims strong positive rights and SER dimensions.

The Inter-American system’s unambiguous jurisprudential direction in terms of the substantial commitments required of states is that negative rights and restraint do not suffice. The system’s equality rights vision requires states to take affirmative action to reverse or change de jure or de facto situations of inequality and discrimination, on the basis that failing to do so can violate the rights to equality and non-discrimination.\textsuperscript{1915} States are obliged to adopt positive measures, with the further stipulation that such measures be “determined in accordance with the particular needs of protection of the subject of law”.\textsuperscript{1916} Further, as part of the development of its robust due diligence doctrine, there is a special duty of protection against non-state actors that “create or maintain or encourage discriminatory situations” with the state’s “tolerance or acquiescence”.\textsuperscript{1917} Finally, the ‘test’ of when positive measures or differential treatment must be resorted to is “whenever equal treatment might suspend or limit access to a service, good or the exercise of a right because of the circumstances affecting a disadvantaged group.”\textsuperscript{1918} The requirement arises either because of their “personal condition or because of their specific situation in which [the subject] finds itself, such as extreme poverty or marginalization.”\textsuperscript{1919} In other words, the main considerations in requiring affirmative action are the conditions and the affected interests of the subordinated group in question.

Several equality scholars have commented on the underdevelopment of equality rights in Canadian law in the context of social inequality issues, like violence against women\textsuperscript{1920} and

\begin{footnotesize}
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\item See \textit{de Almeida, supra note 1159 at para 147}, citing \textit{Undocumented Migrants Advisory Opinion, supra note 14} at paras 103, 104, 106.
\item \textit{Hacienda Verde, supra note 1302, concurring opinion of Justice Eduardo Ferrer Mac-Gregor Poisot, at para 49: “[…] The Inter-American Court recalled that it is not enough for States to refrain from violating rights, but it is imperative to adopt positive measures, which can be determined in accordance with the particular needs of protection of the subject of law, either because of their personal condition or because of their specific situation in which it finds itself, such as extreme poverty or marginalization.”
\item \textit{Norin Catrimán, supra note 1046 at para 201; Undocumented Migrants Advisory Opinion, supra note 14 at para 104.
\item \textit{Poverty IACHR Report, supra note 44 at para 160}, citing \textit{Access to Justice for Women Victims of Violence IACHR Report, supra note 13 at paras 89-99} [emphasis added].
\item \textit{Hacienda Verde, supra note 1302, concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, at para 49.
\item Randall, supra note 24.
\end{enumerate}
\end{footnotesize}
complex subordination problematics, such as those involving murdered and missing Indigenous women in Canada.\footnote{1921} In such cases, the primary concern would be the state’s failure to ensure effective equality for women and particularly vulnerable groups, for example, facing structural violence or barriers to accessing services and institutions. Melanie Randall’s work considers the idea that s. 15 gives rise to the state’s obligation to promote social conditions conducive to substantive equality in circumstances that reflect the most extreme manifestations of gendered subordination.\footnote{1922} Randall evaluates the proposition that there is a state duty under s. 15 to positively provide the conditions to actualize equality, and to ensure: that other rights (like s. 7 rights) have a material basis;\footnote{1923} to protect certain groups in specific circumstances; and to take proactive measures to prevent violence against women. She concludes that the capacity of s. 15 jurisprudence to address these complex situations is unlikely, given the “arid, anemic, and abstract interpretations” and narrowed focus on legal equality.\footnote{1924}

IAHRS case law indicates that the system is comfortable with reaching conclusions and drawing broad remedial orders based on documented patterns of disproportionate adverse impact on groups affected by various “social conditions” and forms of social and economic subordination,\footnote{1925} for the purpose of requiring that they be remedied. I conclude that drawing such inferences is an exercise that Canadian courts will only undertake,\footnote{1926} when the remedies being sought in response are within the ambit of what it regards as justiciable and within its institutional competence.

Clearly though, the ultimate limits on the respective spheres of the courts and the other branches of the Canadian state in respect of equality rights are largely or wholly determined by the political and social histories of the country.

\footnote{1921} Buckley, “No Shadows”, supra note 79 at 216.
\footnote{1922} Randall, supra note 24.
\footnote{1923} Ibid at 300.
\footnote{1924} Ibid at 291, 293.
\footnote{1925} See de Almeida, supra note 1159; Servellón-García, supra note 1226.
\footnote{1926} As we see in PHS Insite, supra note 32 and Adams BCSC, supra note 32.
5.2 Conclusions

I turn now to an assessment of what this project contributes to the current research in the field. Situating the thesis first in relation to s. 15, the existing scholarship regarding the SCC’s constitutional equality rights analysis and the critique of the jurisprudence from the perspective of this project, are extensive. My research is a synthesis of the scholarship, incorporating the more helpful analyses of a substantive analysis, including insights from equality theory, to establish the essential elements of substantive equality. This is key to a critical examination of both jurisdictions’ equality law.

In addition, the thesis reveals that there are narrow possibilities for successful SCC challenges to state inaction with respect to ESCR/SER, especially if the challenge has financial implications, and the same is true of efforts to engender more expansive formulations of positive state obligations. The project’s contribution thus lies in consolidating themes and elements that have been amply elaborated, and considering the most recent decisions of the SCC in light of these critical elements.

As for the Inter-American system and the comparative aspect of the project, I am not aware of research concerning the system’s equality jurisprudence that attempts to examine it in relation to SCC s. 15 law. There are examples of comparative pieces within the IAHRS that consider equality rights across member state constitutional systems as part of the Commission’s efforts to systematize and promote legal standards in relation to certain issues. As noted in the Introduction, it was through this entry point that I encountered the system’s mention of Canada in connection with equality rights, however, there are no close examinations of Canada’s approach.1927

1927 There are works that have considered equality rights analysis in Canada that consider international human rights standards, as for example, in several articles in the collections in Faraday, Denike & Stephenson, supra note 21 and Young et al, supra note 23. In addition, Martha Jackman and Bruce Porter evaluate SER claims in Canada in the international and comparative volume edited by Malcolm Langford, supra note 45: Jackman & Porter “Socio-Economic Rights”, supra note 45.
It appears, therefore, that Canada and IAHRS have only rarely been brought together. Of more direct interest is a legal memorandum authored in connection with the Murdered and Missing Indigenous Women and Girls Inquiry, although this is a somewhat limited analysis of the Inter-American law and its application to the phenomenon of murdered and missing Indigenous women and girls in Canada. There does not appear to be any critical analysis of Canadian equality law in light of inter-American jurisprudence, and thus, this paper is a contribution towards filling that gap and to increasing familiarity in Canada with the system and its rights approaches.

One of the project’s goals was to explore whether this regional human rights system had interesting and useful contributions to make to equality thinking in Canada. I conclude that the Inter-American system is a source of inspiration for those seeking to shift the dominant equality discourse as part of other counter-hegemonic strategies, with due consideration to the current constraints on constitutionalized equality rights litigation in Canada, as well as the limits on the ‘transferability’ of concepts and instrumental comparativism.

A second objective was to examine the equality rights conceptions and approaches in a state constitutional system and a progressive regional human rights system, and to consider their respective approaches in light of a substantive equality conception that contains significant commitments.

As the foregoing comparative summary establishes the IAHRS’s approach to equality rights clearly lies closer to the substantive equality pole of the spectrum, increasingly falling within an anti-subordination formulation. The differences in theoretical and methodological approaches

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1928 I reference a recent blog reflection by a noted Canadian equality scholar concerning the Lenahan decision: Jennifer Koshan, “State Responsibility for Domestic Violence”, supra note 1784 at 11: “The IACHR decision in Lenahan undoubtedly has other implications in Canada (for example, in relation to state responsibility for missing and murdered Aboriginal women, which is the subject of an inquiry currently underway in BC). It is to be hoped that the federal government and provinces will closely review Lenahan to determine whether they are in compliance with this very important ruling on state responsibility for preventing violence against women and girls.”

1929 Long, Katherine and Alessandra Hollands, Legal Memorandum: Murdered and Missing Women Legal Strategies, prepared for the Legal Strategy Coalition on Violence Against Indigenous Women (July 14, 2014) [Legal Memorandum MMIWG].

1930 Hunt, supra note 71 at 326.
are particularly striking, as are the inroads made in breaking down formalist and classical liberal dichotomies that have limited the development of a strong state responsibility doctrine and the development of indivisible approaches to the two generations of rights.

The equality rights discourse and hard and soft jurisprudence of the IAHRS reflect equality understandings that are both different and more substantive than Canada’s. The system is producing juridical and normative innovations that are of potential interest to the Canadian legal community, such as the creative social readings of rights, including ‘conventional’ CPR, a more integrated multiple rights approach, and a fluid weaving of substantive equality principles into the analysis of other fundamental rights and freedoms, and the openness to recognizing subordinated and generally subaltern perspectives and realities.

Another objective was to contribute to reflection on contingency and indeterminacy, and how different systems and social forces produce different understandings of important concepts like equality. Clearly, the Inter-American region’s historical and social forces have been a major driver of the tendencies outlined, with its rich intellectual base, strong civil society movements, and the political panorama of deep conflict over visions of the good society. The dramatic backdrop to the Inter-American system’s development has undoubtedly served to focus the attention of the system and its actors on the structural patterns and forces at play during a given era.

A final objective was to consider how equality framings have the potential to be less narrow, and incorporate more complex and intersectional equality analysis, and take forces of socioeconomic subordination and domination more seriously. In the paper’s assessment, the Inter-American system also demonstrates that substantive structural equality framings are conceivable (at least within a different political economy.)

Despite the considerable challenges of the project, this exploration of the IAHRS has yielded more than expected, in terms of interesting jurisprudence and doctrinal innovation. The thesis
set modest ambitions regarding the applicability and transferability of norms or approaches as between the systems, and these cautions were certainly due.

The invocation of the Inter-American system is an imperfect but valuable lens for evaluating equality understandings in Canada. The intention was to stir the imagination and dislodge the common assumptions of legal reasoning and the conceptual straightjacket\textsuperscript{1931} imposed on this fundamental legal concept by the SCC. The contrasts thrown up by such a different system provide an opportunity to reflect on the potential for different and richer meanings for equality. They also reinforce the importance of maintaining a critical perspective regarding the outer limits of contestation of contestable concepts like equality.

On the other hand, the challenges and limitations of the project were considerable and range from the mundane to the substantive. In examining two systems and sets of case law, there were difficulties connected to language, translation, and the prevalence of equality related decisions in the system, as well as unexpected challenges in researching the inter-American law. The research process was particularly “messy”\textsuperscript{1932} because it required a certain level of immersion into the approaches of both systems to explore the equality themes that resonated, to the extent that time allowed. What I encountered in trying to identify a defensible range of cases and themes were elements of dissonance and consonance.

The primary limitations and challenges relate to the broader value of the exercise, however. The task of “translating” as between the two systems has been challenging in several respects. Despite the decision to not undertake a strict comparative and instrumentalist analysis, the differences are such that I questioned the value of the exercise at times. Moreover, getting these two systems to speak to each other about equality proved difficult. Finding the points of interface, given the relative gulf between the respective approaches, the discourses, and the content of the claims (i.e. fact patterns), caused me to question the utility of the exercise.

\textsuperscript{1931} Randall, \textit{supra} note 24 at 291.  
With due realism, the Inter-American system has addressed comparably more complex patterns of inequality and has drawn inferences about state responsibility in the face of state inaction that are unlikely to be viewed as cognizable in the Canadian context.

The large number of challenges to state-provided benefits cases (as opposed to more complex equality problematics) in the s. 15 jurisprudence, prompted the question as to whether that is a function of the equality problems alone or of the jurisprudence itself in dissuading other types of claims. In other words, is Canada generating less complex equality claims because of the disappointing jurisprudential parameters or results, or is this simply due to the different nature of equality realities in the respective and quite distinctive respective contexts? This is a question that might be considered in future research.

In terms of more immediate potential applications of the research findings, I am aware of research that has been undertaken in connection with the murdered and missing women’s inquiry, that might be helpfully supplemented, or support other efforts to promote a substantive human rights approach to that complex of issues.

Reviewing the IAHRS jurisprudence and other materials has prompted additional future research questions such as to how the system would view claims arising from complex structural inequality situations in Canada. Examples include its likely response to a petition based on the longstanding systemic lack of access to potable water on First Nations reserves, or a systemic discrimination claim in respect of the state’s deficient and patterned response to the high and disproportionate numbers of murdered and missing Aboriginal women and girls. At least one Canadian equality scholar has referenced the potential lessons in the Inter-American system’s approach to domestic violence, summarizing that obligation, inter

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1934 David Boyd, supra note 55.
alia, as mandating a contextual approach as well as measures to prevent and respond to the underlying discrimination against women that is inherent in this problem.¹⁹³⁵

Other questions of interest are further research on the Inter-American system’s multiple or integrated rights approach along with a closer assessment of the SCC’s approach.

There are numerous additional lines of future research with respect to the IAHRS itself; among these, an in-depth review of critical scholarship, to gain better insights into the system’s rights approaches, as well as the basis for a more critical assessment of the inter-American law in terms of remedies and theoretical rigour.

⁵.３  Final Thoughts

Inés Fernández Ortega and Valentina Rosendo Cantú, the two Mexican women who sought to exercise their rights in full, under conditions of equality, were rights-holders who did not (as is true of many rights claimants), conform to the idealized, abstract liberal subjects of equality rights cases under the dominant liberal form of rights. Their lived experiences placed them among the least autonomous and self-realizing ‘neoliberal citizens’. Yet they were not without agency, and but for their determination to have their cases heard by the Inter-American system, their complaints would have languished in impunity. In the IAHRS, they were not confronted with the rights bind or ‘equality pit’ that resist a reframing that acknowledged their experiences of injustice. Their cases and others from the system raised the question for me as to what it would mean for a rights system to employ elements of an equality analysis that better approximated the vision of (substantive) equality, one that recognizes and addresses the widespread inequality realities and subordinating experiences of groups in Canada. European observers concerned with one ever-vulnerable population, have asked a similar question as to why the Inter-American system treats migrants ‘as humans rather than foreigners’.¹⁹³⁶ These are compelling questions for rights advocates because if law’s fundamental task is to determine

¹⁹³⁶ Dembour, supra note 105.
which human suffering is deemed legitimate and which suffering is not,\textsuperscript{1937} it is of interest to acknowledge the suffering that is untouched and beyond the law’s concern, as it were. When a rights system is pushing on those lines to incorporate human suffering that is often not seen or heard, it demands closer examination.

\textsuperscript{1937} As is argued by Louis Wolcher, \textit{supra} note 1899 at 503.
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Appendix B: Rights Provisions

American Convention on Human Rights

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal
Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 63.

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

American Convention on Human Rights

Article II. Right to Equality before the Law
All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article XXIII. Right to Property

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.