

# Palliation or protection: How should the right to equality inform the government's response to Covid-19?

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# Palliation or protection: How should the right to equality inform the government's response to Covid-19?

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## Abstract

This article examines what role equality law can play in addressing the inequalities created and exacerbated by the British government's response to the Covid-19 pandemic. We argue that while there is great potential in existing legislation, there is a need for both policy-makers and courts to apply a more searching and nuanced understanding of the right to equality if this potential is to be realised. We begin by examining how the burdens of confronting this pandemic as a society fall more heavily on those already at the bottom end of the scale of inequality. We then ask whether and to what extent the current legal structures protecting the right to equality can be mobilised to redress such inequalities, paying particular attention to the Public Sector Equality Duty under the Equality Act 2010 and on the Human Rights Act 1998. Finally, we argue that, to fulfil the requirements of both these legal duties, the courts should subject policies and practices to close scrutiny under the four-dimensional approach. When making and operationalising policies around Covid-19, substantive equality requires account to be taken simultaneously of the four dimensions of inequality to the greatest extent possible.

## Keywords

Substantive equality, Article 14 of ECHR, Public Sector Equality Duty, Covid-19, status and economic inequality

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## Introduction

Covid-19 will not be the great leveller but the great revealer.<sup>1</sup> It is true that this pandemic draws attention to our shared humanity by virtue of that fact that no-one is immune from the disease, including the British Prime Minister. But this virus does not generate equality simply because it is blind and unbiased. Rather, this pandemic has exposed and exacerbated the inequalities that are already obvious as well as those that are often hidden from view.<sup>2</sup> While government measures have certainly been helpful in some areas, they have also maintained and even deepened some of the existing fractures in society. The question of equality must be front and centre of a social justice response to the disease. This is all the more so because if some in society cannot be looked after and treated, both medically and economically, everyone suffers.

This article examines what role equality law can play in addressing these inequalities. We argue that while there is great potential in existing legislation, there is a need for both policy-makers and courts to apply a more searching and nuanced understanding of the right to equality if this potential is to be realised. Most importantly, it should be recognised that the right to equality consists in more than treating likes alike regardless of their race, gender, disability or other similar protected characteristics. It requires an appreciation of the complex ways in which disadvantage, stereotyping, lack of voice and structural obstacles interact to cause and sustain inequality. This means that the right to equality must be multidimensional, simultaneously redressing disadvantage; addressing stigma, stereotyping prejudice and violence; facilitating participation; and accommodating difference and addressing the need for structural change.<sup>3</sup>

To redress disadvantage (the first dimension), when any policy is being formulated to deal with Covid-19, steps must be taken to ensure that the most disadvantaged are among the prime beneficiaries especially those with intersectional identities, such as Black women, disabled, poor or old women, single mothers and others. To address stigma, stereotyping, prejudice and violence (the second dimension), stigmatic characterisations, such as those of benefit claimants, and stereotypical assumptions, such as women being the primary carers, should be redressed. Most importantly, gender-based violence must be recognised as an inequality issue and addressed. The third dimension focuses on voice and participation. Those that are affected need to be included as far as possible in decisions. This is because policies work better when we know what people's needs are, because it promotes more ownership, and because it affirms the value of every person and every voice. The fourth dimension recognises that inequality is more than many individual acts of prejudice. It is about the structures of society, and particularly the power imbalances, which create and perpetuate inequality. Substantive equality requires not only the accommodation of difference, but also its valorisation and the transformation of structures that perpetuate inequality. When making and operationalising policies around Covid-19, substantive equality requires account to be taken simultaneously of all these dimensions to the greatest extent possible.

Under the spotlight of this multidimensional conception of the right to equality, it can be seen that inequalities based on status, such as gender, race or disability, both cause and are caused by economic disadvantage, bridging the traditional divide between discrimination law and socio-economic policy. This in turn means that, when taking socio-

economic policy decisions, policy-makers should be aware of the impact on inequalities, and take steps to mitigate this. Similarly, courts should scrutinise government policies closely to prevent them from breaching the right to equality understood in this multi-dimensional way.

The article will examine the challenges presented by Covid-19 for equality law and consider how the law should respond. In Part I, we examine how the burdens of confronting this pandemic as a society fall more heavily on those already at the bottom end of the scale of inequality, with a particular focus on women, children, and ethnic minorities. We show how stigma, stereotyping, prejudice and violence both cause and are perpetuated by socio-economic disadvantage, and how this is intensified by the lack of voice and structural obstacles. In Part II, we ask whether and to what extent the current legal structures protecting the right to equality can be mobilised to redress such inequalities, focusing on gender inequalities. There are two main legal vehicles to address these challenges. The first is the duty imposed by the Equality Act 2010 on public bodies to have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity in carrying out their functions (the Public Sector Equality Duty or PSED).<sup>4</sup> The second falls under the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR). Under Article 14 ECHR, the State has a duty to secure the enjoyment of Convention rights without discrimination. Examining a select number of cases on gender and social benefit reforms from the UK Supreme Court, we show that current judicial application of these sets of duties is unduly deferent to public authorities. In Part III, we argue that, to fulfil the requirements of both these legal duties, the courts should subject policies and practices to close scrutiny under the four-dimensional approach.

## **Part I: How the pandemic has exacerbated inequality**

The spread of Covid-19 has led governments around the world to implement social and economic restrictions in order to slow the spread of the pandemic.<sup>5</sup> In the UK, as in many other countries, these decisions were made very quickly and there were few opportunities to fully assess their consequences. However, some of these choices very clearly had the potential to exacerbate existing inequalities and to create new ones. Below we focus on early evidence regarding how these social and economic restrictions have affected inequalities within three intersecting key areas: incomes and non-standard work; violence; and poverty. Throughout, we pay particular attention to how gender inequalities are affected by the changes in these areas.<sup>6</sup> Together, this evidence clearly reveals the interactions between the four dimensions of substantive equality: disadvantage; stigma, stereotyping and violence; lack of voice; and structural barriers.

### ***Incomes and non-standard work: A female recession?***

The shock to incomes as a result of the economic shutdown has been profound. While the government has put in place robust measures to protect incomes over the short-term, it is also clear that some groups are facing greater economic uncertainty than others, and it

seems women have faced a substantial portion of these shocks. The burden placed on women exacerbates their already existing disadvantage.

Early evidence suggests that the impact of the economic shock has fallen most severely on those in non-standard working conditions, including temporary, non-salaried and part-time workers, many of whom are women.<sup>7</sup> Even by early April, over 30% of people in temporary work had lost their jobs because of Covid-19 compared with about 14% of permanent workers.<sup>8</sup> Similarly, the proportion of non-salaried workers who lost work was double (20%) that of salaried workers (10%). Among part-timers, who are predominantly women, the disparities in impact have been equally striking. Data collected by YouGov suggests that around 11% of part-time workers have lost their jobs compared to 6% among those in full-time work. Moreover, approximately 22% of part-time workers have seen their hours or income reduced compared with only 10% among full-time workers.<sup>9</sup> Younger women compared to older women have been particularly likely to experience reduced hours and earnings.<sup>10</sup> These job losses have also been concentrated in particular parts of the economy, with facilities management, personal care work (hairdressers), food preparation and service, and construction being particularly hard hit. Unsurprisingly, these are all sectors where non-standard work is common. While the self-employed have not been more likely to lose their jobs, they have been particularly hard hit by reductions in income.<sup>11</sup> By early April, 12% of the self-employed were reporting that they were already facing significant financial difficulties.<sup>12</sup>

Women have also been hard hit because, while recessions typically affect work that is dominated by men, this crisis is different.<sup>13</sup> Social distancing is disproportionately affecting sectors of the economy that are dominated by women. This is compounded by the closure of schools and nurseries, which increased childcare needs, particularly for working mothers.<sup>14</sup> Initially, it even seemed women had been more likely than men to lose their jobs over the first weeks of lockdown (around 2–4% points higher for women compared with men).<sup>15</sup> More recent data suggests the risk of job loss and income losses have been similar for both women and men.<sup>16</sup> But, even this is atypical. Recessions usually affect men more than women and so the absence of any difference still represents an unusually large shock to female employment.

These patterns reflect the interaction between the continued stereotyping of women as the primary carers (the second dimension of substantive equality) and the disadvantages women face in the labour market that mean they are more likely to be employed in precarious, low-status and low-paid jobs (the first and third dimension). The fact that caring work is still largely regarded as ‘women’s work’, whether paid or unpaid, means that women continue to have primary responsibility for childcare and domestic work and devalues caring work when undertaken in the labour market. During lockdown, mothers were spending less time on paid work and more time on household responsibilities while their time doing paid work, according to the Institute for Fiscal Studies, was more likely to be interrupted with household responsibilities.<sup>17</sup> Even mothers who are higher earners than their partners, performed more childcare.<sup>18</sup>

This affects not just women’s access to non-precarious work, but also devalues ‘women’s work’ in the paid workforce. Continuing job segregation, with women congregating in lower paid work, has exacerbated the effect of the lockdown. Mothers, for example, have been more likely to have had their careers disrupted by lockdown and they

are bearing most of the extra childcare.<sup>19</sup> Moreover, the Government's measures to off-set the economic impacts of lockdown repeat patterns of inequality as the salary retention scheme is based on pre-pandemic earnings. Furthermore, women on zero-hour, other casual contracts, or part-time workers are, according to the Women's Budget Group, more likely to not be offered shifts or their hours are reduced rather than to be furloughed and eligible for the salary retention scheme.<sup>20</sup>

These multiple forms of inequalities are particularly pronounced in the social care sector, where the longstanding undervaluation of caring work has been further exacerbated by the pandemic. The Institute for Public Policy Research showed that in 2018, half of all care workers were paid below the real living wage.<sup>21</sup> There are approximately 900,000 workers whose main job is in frontline care work, with at least 100,000 more doing this work as their second job. As many as 83% of frontline care workers are women, with a disproportionate representation of Black and ethnic minority workers (BAME). Many of these have their own caring responsibilities: one third are parents and as many as 13% are single parents.<sup>22</sup> Particularly worrying are the high numbers working in precarious conditions. At least 10% work on zero-hours contracts (compared to 2% of all workers),<sup>23</sup> and some estimates show that this figure is as high as 24% in England.<sup>24</sup> For care workers in domiciliary care services (home care) in England, an astounding 58% work on zero-hours contracts.<sup>25</sup> These workers are highly vulnerable to workplace exploitation, such as below minimum wage pay for sleeping-in time, unpaid travel time and insecure contracts.<sup>26</sup> The structural dimension of substantive equality (the fourth dimension) should also be kept in mind in understanding these patterns. The poor working conditions in the care sector are not an unfortunate accident. They are a result of over 10 years of austerity measures, where funding for the sector was consistently cut year on year.

Such precarity means that frontline care workers have had to make difficult decisions as to how to protect their health and that of their families at the same time as protecting their livelihoods. Eligibility for Statutory Sick Pay (SSP) is confined to those under a contract of employment (including agency workers), who have earned at least £120 per week and is only payable if the worker has been ill, self-isolating or shielding for at least 4 days in a row. SSP is not payable for the first 3 days. For workers on the margins, this constitutes a serious dent to their income, and this is already starting to have troubling implications for well-being. Women seem to have been more likely than men to have used savings or to have borrowed money (either from the bank or from family/friends) to have mitigated income loss over this period.<sup>27</sup>

### *Isolation and violence: Women are less safe now than they used to be*

The second dimension of substantive inequality – stigma, stereotyping, and violence – has also been impacted by the lockdown measures, leading to a spike in domestic violence against both women and children.<sup>28</sup> One of the immediate effects of the social distancing measures was to put women at greater risk of violence within the home and it also potentially limits their ability to seek outside help, often trapping them at home with the abuser. While detailed data on this is hard to come by at this point, there are some early indications that are troubling. One charity that supports victims of domestic

violence has been receiving ~400 calls per day since the lockdown began on 23 March, a 49 per cent rise, while traffic to its website has gone up by over 400 per cent.<sup>29</sup> On average, around 100 people have been arrested on charges of domestic violence by the London Metropolitan Police alone since the lockdown began. Dame Vera Baird has said that this is only the tip of the iceberg because we know the number of abuse cases is 'far higher than what is being reported'.<sup>30</sup> Domestic abuse killings appear to have even doubled during the early part of the lockdown.<sup>31</sup>

The warning signs were already there. Male job loss – one predictor of domestic violence<sup>32</sup> – has been rising and there is some evidence that increased alcohol consumption among some groups may have increased conflict within the home.<sup>33</sup> Around 20% of people are drinking more during the lockdown but what is particularly concerning is that around 18% of those who were already daily drinkers are now drinking more. Indeed, 7% of respondents said their own or someone else's alcohol consumption in the household had led to increased tensions, and this is even higher in households with children.<sup>34</sup> There are reasons to expect that these economic measures may put some women at greater risk of harm, exacerbating this second dimension of inequality.

### *Poverty: How women and children are inadequately protected*

One of the worries is that these economic shocks will stop people from being able to make ends meet.<sup>35</sup> There are clear indications that people are experiencing severe food insecurity, that is, people who are going without food for economic reasons.<sup>36</sup> The number of adults who are food insecure in Britain is estimated to have quadrupled under the Covid-19 lockdown.<sup>37</sup> Among unpaid carers specifically, a practice largely dominated by women, almost a quarter of a million unpaid carers have had someone in their household go hungry during lockdown while more than 100,000 performing unpaid caring for older or disabled relatives have been using foodbanks to make ends meet.<sup>38</sup> Again, female unpaid carers seem to be harder hit. Female carers were nearly twice as likely as male carers to report being hungry and to report using a foodbank.<sup>39</sup>

This is especially concerning because many of these families losing work or seeing reduced earnings have children in their homes, and this is not just households with caring responsibilities. Around 42% of households with children are finding it harder to make ends meet. Adults with children eligible for free school meals are at heightened risk of food insecurity arising from a lack of money. Moreover, 30% of households eligible for free school meals have not received a replacement and this is particularly concentrated among the poorest households.<sup>40</sup> While the government's economic response has been expansive in many ways, there has been a surprising blind spot in relation to families with children, revealing the kind of structural barriers that exacerbate inequality. Financial support has been made available for the self-employed, for businesses and for furloughed workers. At same time, some cash benefits have been increased. But there has been very little aimed at children specifically.

Consider the benefit cap, which sets a limit on the total amount of money claimants can receive in benefits. The benefit cap itself is a reflection of the interaction between stigma and disadvantage, being based on the notion that unless there are financial penalties to benefit claimants, there will be no incentive for them to seek employment.

The background assumption that benefit claimants are work-shy and even ‘scroungers’ has consistently informed benefit rules such as the benefit cap, discussed in detail in Part II. Government has gone further and defended the cap and other benefit related sanctions on the basis that it is not in children’s best interests to grow up in households in which no-one is in paid employment.<sup>41</sup> The fact that children might suffer from food insecurity and other severe material deprivations has not weighed against this conclusion.<sup>42</sup>

Despite the increases in other forms of social security, the benefit cap remains in place. In November 2019 alone, around 76,000 households were subject to the cap, the vast majority of whom are single parents (often women) with dependent children.<sup>43</sup> These households, on average, lose around £2600 per year. Even if we accept that the benefit cap is an effective way to help people back into work (although the evidence for this claim is not incredibly strong),<sup>44</sup> finding new employment has become almost impossible under the economic lockdown. Capped households are, in effect, being punished for their failure to find work, despite there being no work for them to take. Being set up to fail is inherent in the structure of the benefit cap. Lady Hale observes in *DA and DS*, that requiring single mothers to find the number of hours of work to escape the cap does not take account of the difficulty in finding part-time work and securing, paying and organising the logistics of adequate childcare.<sup>45</sup>

Why then has the cap persisted? Neil Couling, the Change Director General for the Department of Works and Pensions, in a recent webinar with the Resolution Foundation pointed to the ongoing role of stigmatic assumptions about benefit claimants. He suggested that the cap continues in part because the government wanted to distinguish between Covid-19 affected claimants and existing claimants – the deserving and the undeserving. But doing this would have been technically very difficult and slow to introduce.<sup>46</sup> The benefit cap already allowed a grace period of 9 months for those who have had a stable work history and therefore this allowed the government to informally (and imperfectly) distinguish between those who might be capped because of Covid-19 (those with more complete work histories) and those unrelated to Covid-19. Irrespective of the motivation, the perpetuation of the cap’s conditionality during lockdown is a new manifestation of the structural inequalities embedded in the system. That the cap endures even while wider forms of welfare conditionality are (albeit temporarily) suspended is a stark structural inequality (the third dimension) that will disproportionately harm larger and single parent families, fuelling existing inequalities yet further.

On top of this, the number of capped households is likely to have risen because of the lockdown. Parents who lose their job as a result may find their benefits suddenly capped. This would be especially true if those households who had only recently moved into work before losing their jobs due to the lockdown. These households will not benefit from the 39-week exemption from the cap, which requires 12 months’ continuous employment prior to moving out of work.<sup>47</sup> Single parent households (which are already mostly single mothers) are – again – likely to be disproportionately affected as the industries most affected by the lockdown have been female dominated industries.

The benefit cap also reduces the effectiveness of the government’s support for families affected by the shutdown. For the approximately 76,000 families already living under the benefit cap, the additional protections offered by government will have no effect at all. Most notable here is the £1000 increase in the standard allowance in



Universal Credit, which has rightly been lauded as a step in the right direction. But this step will be of no help to those already subject to a benefit cap. In fact, for some households, it will actually push them into being capped, perhaps for the first time. Take a woman with children who lives outside of London, who currently receives £19,500 in social security payments over the year, including to help with the costs of housing. Because she is subject to a benefit cap of £20,000 per year, she will only receive £500 of this additional payment because the cap will remove the other £500. This increased generosity has, as the Resolution Foundation have recently shown, increased the number of people potentially affected by the cap.<sup>48</sup>

The lockdown has had a profound effect on children. However, while all children are being asked to bear a huge burden during the lockdown, this burden varies greatly depending on family circumstances and resources. The lockdown has meant isolation from their friends, but some are also unable to get enough to eat because their parents cannot afford enough food and the free school meals replacement system is not working properly.<sup>49</sup> The lockdown means no sports or games, but for some children it also means hunger and having no respite from the threat of violence in their households.<sup>50</sup> The lockdown has meant less interaction with teachers but some children have received more help than others (in part from private tutors but also from the schools themselves).<sup>51</sup> On top of this, while all children feel some uncertainty about the virus, the children in more disadvantaged areas are more likely to be personally affected by family members falling seriously ill or dying from Covid-19.

It is still too early to tell the precise scale and scope of these inequalities and which groups have been most keenly affected, particularly when we think about intersectional inequalities which are very often difficult to see in the data that is currently available. But the picture that is starting to emerge suggests women with children are particularly hard hit. The government moved quickly to shut down the economy and slow the spread of the virus but in so doing has very likely exacerbated inequalities across key protected characteristics. More than this, these policies have likely deepened inequalities between these intersectional inequalities.

## **Part II: Redressing the interaction between status and economic inequalities?**

Part I used the rapidly emerging picture that comes from social scientific data to map how Covid-19 has both created and exacerbated pre-existing inequalities. What is most striking is that the government's response has failed to fully appreciate the complex relationship between status inequalities and economic inequalities. Through the prism of substantive equality, it is clear that this is not only about economic disadvantage. This disadvantage is intensified for those who are already subject to prejudice, stigma and stereotyping in society: women who are still regarded as primarily responsible for caring and domestic roles, older people and younger people, Black and ethnic minority people, migrants, persons with disabilities and others, many of whom are already in precarious work. These groups also have less voice in the planning and operation of policy. Similarly, structural inequalities already existing have exacerbated disadvantage, exclusion and prejudice. Given that the burdens of Covid-19 are disproportionately shouldered by

individuals with characteristics that are protected in equality and anti-discrimination law, the question becomes: can law play a role in ameliorating these inequalities? This section canvasses the potential within UK legal frameworks.

### *The Public Sector Equality Duty (PSED)*

This year the Equality Act 2010 (EA) celebrates its 10th anniversary. This landmark piece of legislation expands and consolidates the proactive duty to promote equality, which had originally been introduced in 2000, after the findings of institutional racism in the Metropolitan Police Force highlighted the insidious effects of racist culture within institutions. Under section 1 of the EA public authorities must have due regard to the need to reduce inequalities of outcome resulting from socio-economic disadvantage, the Public Sector Socio-Economic Duty. This is a requirement to give weight to the need to redress economic inequalities. In theory this could be a foothold to tackle the synergy between status and material inequalities. However, this duty was never brought into effect in England, Wales and Northern Ireland. Scotland has recently implemented this duty, but its impact has not yet been fully mapped out. More promising is the Public Sector Equality Duty. This duty is innovative in moving beyond the limitations of a complaints led model, which depends on individuals to contest specific acts of discrimination directed against them. Individual complaints are financially and socially costly and the individualised focus leaves structural and institutional inequalities unaddressed.<sup>52</sup> By contrast, section 149 of the EA, commonly known as the Public Sector Equality Duty (PSED), places a proactive duty on public authorities to promote equality. Specifically, a public authority must, in the exercise of its functions, have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between persons who share a relevant protected characteristic and persons who do not share it. In s149(3), the Act provides some clarity on the meaning of 'equality of opportunity'. This provision draws on the four-dimensional understanding of substantive equality, which was accepted by the Government Green Paper, which informed the EA.<sup>53</sup> According to Section 149(3), having due regard to the need to advance equality of opportunity involves having due regard to the need to: (a) remove or minimise disadvantages connected to a protected characteristic (the first dimension); (b) meet those needs which are different to the needs of those who do not share the relevant characteristic (the fourth dimension); and (c) to encourage the participation in public life of individuals or any other activity in which participation by persons with a relevant characteristic is disproportionately low (the third dimension). Section 149(5) explains that 'good relations' requires the public authority to have due regard to tackling prejudice and promoting understanding (the second dimension).

The main critique of the PSED is that it 'lacks teeth'.<sup>54</sup> This is because the duty is only to 'have due regard' to these needs, not to 'take steps' to meet them.<sup>55</sup> In the last 10 years, it is clear that the obligation to have due regard is only a procedural duty; it has been interpreted and applied in an exceptionally light-touch manner; and is too easily discharged. In judicial review proceedings, courts have stressed that it 'is not a duty to achieve a result, i.e. eliminate unlawful racial discrimination or promote equality of opportunity. It is a duty to *have due regard to the need* to achieve these goals'.<sup>56</sup>

Similarly, in *Brown*, the Court stated that ‘no duty is imposed to take steps’.<sup>57</sup> On the other hand, courts have attempted to give some robustness to the procedural requirements. Thus the key message has been that the duty must be exercised in ‘substance and with rigour’.<sup>58</sup> It should be approached in an open-minded manner, rather than as a ‘tick-box’ process.<sup>59</sup> More specifically, this means that the risk must be assessed before adopting the policy and not as a rear-guard action.<sup>60</sup> All the steps taken should be recorded,<sup>61</sup> and the duty should be on the Minister personally.<sup>62</sup>

### Article 14 of the ECHR

The other key legal regime is the Human Rights Act 1998 (HRA) which domesticates the ECHR. Article 14 holds

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Importantly, Article 14 is triggered when the factual matrix of the case ‘falls within the ambit’ of the rights in the Convention, even if the right itself has not been breached.<sup>63</sup> Moreover, it ‘applies to those additional rights, falling with the general scope of any Convention Article, for which the State has voluntarily decided to provide’.<sup>64</sup> This has made it possible to challenge a wide range of measures which may not fall within the scope of the EA. For example, it has been held that social security benefits fall within the ambit of the right to peaceful possession of property, or the right to respect for home, family and private life. This means that the UK benefits scheme and any Covid-19 economic measures must comply with Article 14.<sup>65</sup> The potential of Article 14 is further evidenced by the breadth of the protected grounds, which include the possibility of addressing intersectional discrimination. Thus, it has been held that ‘single parents with young children’ can constitute a protected ground.<sup>66</sup> The inclusion of ‘national or social origin’ could in theory be interpreted to redress socio-economic discrimination.<sup>67</sup>

However, as with the PSED, courts in the UK have been highly deferent in their interpretation of Article 14, especially in relation to claims challenging social policy. This can be seen by a close examination of Article 14 challenges to two major austerity motivated reforms to social security – the benefit cap and the bedroom tax. Although these cases touch upon disability and age-based discrimination, the analysis focuses on the gender dimensions of the claim. The narrow analytical focus allows for a more detailed assessment. It demonstrates that courts have failed to apply the rich multidimensional concept of equality and this, in part, explains the failure of the courts to appreciate the synergies between status and economic inequalities.<sup>68</sup>

There have been two major benefit cap cases in the UK Supreme Court. In the first, *SG and others v. Secretary of State for Work and Pensions*, the claimants argued that the social benefits cap indirectly discriminates against women because it affects more women (60 percent) than men (3 percent).<sup>69</sup> A few years later, in *DA and DS v. Secretary of State for Work and Pensions*, the claimants argued that the work conditions to escape the

benefit cap are discriminatory against single parents with young children. The majority judgments in both these cases understood the discriminatory impact of the benefit cap and conditions only in terms of material or economic inequalities: women living below the income threshold and were struggling to house, feed, clothe and warm themselves and their children.<sup>70</sup> There was virtually no engagement with the other dimensions of equality beyond noting that women will mathematically suffer greater income poverty. Although the Court concluded the cap and working conditions to escape the cap are *prima facie* discriminatory, the majority held that this was justifiable. In neither of these cases was there an appreciation of the different dimensions of substantive equality, and especially the interaction of stigma and stereotyping with gendered disadvantage, creating structural barriers to women's equality. In particular, the majority gave no weight to women's disproportionate role in care work and how this can create structural barriers in accessing paid employment, nor with the prejudicial attitudes that women in poverty need negative economic incentives to find work.

Article 14 permits *prima facie* discriminatory treatment to be justified, making the standard of justification crucial to the outcome. This balancing, however, is skewed as the Court does not fully interrogate the discriminatory and unequal treatment. The gendered structures, prejudices and stereotypes that underpin the laws on social benefits remain in the shadows. On the other side, the Court undertakes a detailed, almost microscopic-level assessment of the government's rationale for limiting women's human rights. The degree of difference in unpacking both sides of the claim de-calibrates the balancing scales in the justification analysis. It permits the Court to easily accept that any reduction in income is 'not too high a price to pay'.<sup>71</sup>

The light touch balancing review is also linked to the Court's assumption that social welfare and economic policy are not a matter of rights but of the legislative or executive welfare policy. Thus, Lord Reed stated in the first benefit cap case: 'The question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. . . .'<sup>72</sup> Therefore, 'unless manifestly without reasonable foundation, their assessment should be respected'.<sup>73</sup> On this view, due to the separation of powers, the Court has neither the democratic mandate nor expertise in the complexity of economic and social policy.<sup>74</sup> Thus, it is inappropriate for the Court to question the allocation of resources. However, judicial deference on social policy, especially in relation to social security benefits simply disguises the close enmeshment of status and economic inequalities.<sup>75</sup> The benefit cap cases adopt this conventional approach and regard pure economic inequality as beyond the purview of law. In *SG*, the Court repeatedly explains that the benefit cap is a matter of 'political judgment' and holds that 'it is not the function of the courts to determine how much public expenditure should be devoted to welfare benefits'.<sup>76</sup> In *DA*, Lord Carnwath concludes that the impact of the cap is 'undoubtedly harsh', but accountability for any negative impacts on women must be in the 'political rather than legal arena'.<sup>77</sup> Without adopting and applying a sophisticated model of equality, the Court solely understands these claims as the distribution of resources and fails to identify the status-based discrimination embedded in social security laws and regulations.

The dangers of a thin model of equality are also apparent in the ‘bedroom tax’ case. Benefits are capped if social housing is under-utilised. Through negative financial incentives, the scheme aims to encourage benefit claimants to move to smaller and cheaper housing. In *Carmichael et al v. Secretary of State for Works and Pensions*, the UK Supreme Court recognised that the bedroom tax disproportionately affected certain types of disabilities where there is a medical need for extra space. However, a majority of the Court concluded that women who were in specially adapted homes under the Sanctuary Scheme to protect them from gender-based violence and had their benefits capped for the additional bedrooms were not discriminated against. Unlike a disabled person who has a verifiable need for additional space, women in homes under the sanctuary scheme ‘have no objective need for three bedrooms’.<sup>78</sup> Again, this is a stripped down and incomplete assessment of the prejudicial effects or discriminatory impact of the bedroom tax on women. Lady Hale in dissent and a majority of the European Court of Human Rights (ECtHR), on the other hand, held that the bedroom tax was discriminatory against women who experienced gender-based violence.<sup>79</sup>

The ECtHR stressed the UK’s duty to protect ‘the physical and psychological integrity’ of women who experience gender-based violence and that this duty extended to the right of women to enjoy her home free of violent disturbance. Unlike the highly deferential review by a majority of the UKSC, the ECtHR applies a robust justification analysis. The need to prevent discrimination against women, including in the economic and social policy, reduces the degree of deference owed by the Court.<sup>80</sup> This implicitly recognises that substantive inequalities can be embedded in social benefit regulations and to root out these inequalities the courts must meticulously interrogate the government’s rationale. Applying economic incentives, via the bedroom tax, to women who experienced violence and were living under the Sanctuary Scheme would undermine their physical and psychological integrity. The ECtHR concluded that the UK had not provided sufficiently weighty enough reasons to justify undermining women’s integrity. While this is a more contextualised assessment and the ECtHR is correct to apply a more searching justification, there is still significant room to unpack the relationship between equality, gender-based violence and housing.<sup>81</sup>

### **Part III: The aspirations for equality law in a time of pandemic**

It is argued here that, despite the limited interpretation of UK courts, both the PSED and Article 14 require the government to promote the right to substantive equality, as set out in a four-dimensional approach to equality, which is mirrored in s149(3) EA 2010. In this Part, we set out the aspirations for the legal framework, while critically appraising the ways in which the current legal framework has obstructed such an understanding.

The most important way in which the government should have fulfilled its duties under the PSED is to conduct an equalities impact assessment and take relevant mitigating steps. In fact, the impact assessment appended to the Coronavirus Act does state that an equality impact assessment was carried out separately as part of the PSED. However, the government has refused to publish it. Under the Equality Act 2010 (Specific Duties) Regulations 2011, the government must ‘publish information to demonstrate its compliance with the’ PSED and this information must include how those with a protected

characteristic are affected by the policy or practice.<sup>82</sup> Refusing to publish the equality impact assessment, the primary method for complying with the PSED, runs afoul of the regulations and is antithetical to the participation dimension of substantive equality. Fulfilling the PSED through an equality impact assessment should not be a closed process but rather open to different, particularly marginalised voices. In the past, the Government's equality impact assessment has only consulted powerful voices, MPs or sophisticated think-tanks and by-passed talking and listening to the voices of those directly affected by the law.<sup>83</sup> In evidence to the Parliamentary Women and Equalities Committee, the Women and Equalities Minister Liz Truss justified the lack of publication because of the potential 'chilling effect on being frank in those assessments' if those who prepared the equality impact assessment knew it would be published.<sup>84</sup> This goes against a key rationale for such a duty. As Caroline Nokes, Chair of the Women and Equalities Committee put it in a letter to Liz Truss: 'Surely, in a fair and democratic society, it is only right that we are able to have an open conversation about the equality assessment; to allow Committees such as ours, individuals and other groups to scrutinise the Government's work and contribute to mitigating any negative consequences'.<sup>85</sup> Given the lack of transparency surrounding so much of government decision-making in the context of Covid-19, not least in relation to the scientific advice so often alluded to but never revealed, this failure to fulfil the Equality Act 2010 (Specific Duties) Regulations 2011 and publish the equality impact assessment does seem to cast doubt on how thorough or rigorous it is.

A full and clear application of the equality impact assessment, in line with s149(3), should have considered all the dimensions of substantive equality and taken relevant mitigating steps. Given the rapid changes in policy, this is an ongoing duty, with the need for such an assessment at all stages in the process. A clear precedent for this is Lady Hale's dissenting opinion in the bedroom tax case.<sup>86</sup> One consequence of this limit was that a small number of women would have to move out of their homes even though the homes had been specifically fortified to protect them against a former partner or other person who had previously subjected them to sustained and violent abuse. Lady Hale, unlike her colleagues on the Court, made the crucial connection between gender-based violence and this substantive understanding of equality. Gender-based violence, she held, 'is undoubtedly a disadvantage suffered by people, namely women, who share a relevant protected characteristic within the meaning of section 149(3)(a) and produces needs that are different from those of people who do not share it within the meaning of section 149(3)(b). This brings it within the need to enhance equality of opportunity to which due regard is to be had under section 149(1)(b)'.<sup>87</sup>

The empirical evidence described in detail above demonstrates what we would expect from the government's equality impact assessment, to fulfil its duty under the PSED. The need to redress disadvantage means that policies for social distancing should make provision for those whose housing circumstances do not permit such action. Equally, social distancing assumes access to the internet as a key vehicle for public health information, keeping in contact, applying for social security, distance working and distance learning. But digital access is lower among older people, women, poorer people and disabled people, particularly in light of closures to libraries. Policies need to be

adapted for this. This is also true for the social security net, especially, as we have seen, the benefit cap.

Here the interaction with stigma and stereotyping of claimants as unwilling to work unless penalised has intensified the disadvantage. The cap should be immediately removed. Also crucial is that caring work, which is now intensified during lockdown, is properly valued. One way to properly value unpaid childcare work and support families with children would be to increase the child benefit.<sup>88</sup> The child benefit is not means-tested and can reach families who are just above benefit levels and therefore not receiving means-tested benefits.<sup>89</sup> It is paid directly to the person responsible for a child under 16. In August 2019, 87% of families in receipt of child benefit had a woman as the registered claimant.<sup>90</sup> It can be delivered quickly through existing infrastructure. It would immediately benefit large numbers of women and other primary carers whose unpaid caring work has increased during the lockdown. Similarly, the two-child limit which prohibits the availability of child tax credit for any third child born into a household after April 2017 should immediately be removed. Many families with three or more children will not only have lost their jobs but will need to maintain childcare and home schooling for their children during the crisis. They should not be penalised when they are facing even greater challenges than others.

Similarly, the second dimension requires particular attention to be paid to the risk of domestic violence, which, as we have seen has spiked during the pandemic. Although the government has said victims may leave home to seek help and that support services remain open,<sup>91</sup> there are a range of further steps that should be taken to fulfil their due diligence requirements.<sup>92</sup> In particular, government should develop mechanisms so that women can safely contact protection services during lockdown, and that adequate shelters, which are safe both from the abuse and from the virus, are made available to them and their children.

Care also needs to be taken not to cause and exacerbate stigma. During the course of the pandemic, government has introduced its new points-based system for immigration. The hostile environment already in place has ignored the central role of migrants in delivery of health and other services, as well as in agriculture etc.

It is crucial too that even in times of crisis, procedures for voice and participation are included. This makes the suppression of the equality impact assessment, which is meant to be based on involvement and consultation with those affected, even more worrying. There are many things about people's lives that the elites do not hear and need to know. Grenfell Tower should be a wake-up call. Only if we have full buy-in from every single person, can these measures work. Particular attention needs to be given to those with the least political power, the least access to the internet and other means of communication.

All of this, however, will be merely palliative unless attention is also paid to the fourth dimension, the need for structural change. A decade of austerity has undermined the resilience of our central social institutions. This is accompanied by a punitive and consequently bureaucratic social security net, including for disabled people, and a highly stigmatising approach to migrants. There needs to be proper spending on the public health system, social care and social security, putting in place resilience for future crises. Privatisation and decentralisation have splintered the response, and the commitment to social care, social housing, access to justice and social security has been hollowed out.

The devastating impact on the economy should not mean that the pretexts for austerity after the financial crisis are revived.<sup>93</sup>

A similar argument can be made about Article 14.<sup>94</sup> The UK case law on the benefit cap and the bedroom cap reveals that the policies not only are divorced from real people's real experiences but are riddled with prejudice, stereotypes and structural obstacles. Remedying pernicious cultural attitudes and ensuring that every person has an equal opportunity is at the heart of UK equality law under the HRA. Thus, the Courts should have a strong role in interrogating and flushing out these inequalities. The fact that recognition and structural harms are within the realm of economic decision-making does not negate the discriminatory effect. Currently, the majority of the Court's simplistic understanding of equality as being purely economic or material both ignores the complexity and interlocking dimensional nature of inequalities and obscures the role of the Court. Judges are tasked with upholding the commitment to equality and non-discrimination. They must ensure that social benefits law redress stereotypes and transform oppressive institutions as this is the core of substantive equality. Greater attention to the nuances of equality can more accurately diagnose the discriminatory effects of the law and more accurately calibrate the scales for the justification-proportionality analysis to ensure that due weight is given to equality rights.

## Conclusion

We could have weathered the pandemic better in a more equal society. We argue that the deep disturbance to the foundations of society represented by the pandemic should signal the importance of a greater commitment to reducing inequalities going forward, rather than reverting to the ideology of austerity. The intrinsic importance of the right to equality should be central to decision-making as to the allocation of resources even in the straitened form. This pandemic shows that every individual's health is also key to the health of the community. We should not forget that.



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