KO NGĀ TAKE TURE MĀORI

One Law for All: Reconciling Indigenous Rights and the Right to Equality Before the Law

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The concept that there should be "one law for all" is often considered a bed-rock of the rule of law. In recent times, this concept has often been used to critique indigenous rights and other race-based laws. Are these critiques in the name of constitutional principle sustainable in modern Western democracies? This paper considers three interpretations of the right to equality before the law and analyses their application in respect of indigenous rights. Ultimately the paper concludes that true equality before the law is not only consistent with the concept of indigenous rights, but may in fact require the implementation of such rights.

I ONE RULE FOR ALL

> The indigenous culture of New Zealand will always have a special place in our emerging culture, and will be cherished for that reason.
>
> But we must build a modern, prosperous, democratic nation based on one rule for all.
>
> — Dr Don Brash, Orewa, January 2004[1]

With these words, Dr Don Brash concluded his notorious Nationhood speech at the Rotary Club of Orewa in 2004. The speech captured a particularly tense moment in New Zealand race relations, following the controversial Court of Appeal decision in *Attorney-General v*

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1 Don Brash, leader of the National Party "Nationhood" (speech to the Rotary Club of Orewa, Auckland, 27 January 2004).

Ngati Apa[2] and the associated public debate about ownership of the foreshore and seabed. In the wake of that speech, the National Party's ratings soared by 17 per cent, overtaking the Labour Government for the first time since the 1999 election.[3] The mantra of "one law for all" subsequently became a major policy platform in the National Party's 2005 election campaign.[4]

Few topics generate public controversy and ill-will to the same extent as race-based laws. This issue is raised periodically in New Zealand, often by politicians who gain considerable traction among some voters with their remarks.[5] Laws that make particular allowances for Māori are typically denounced as discriminatory and irreconcilable with the principle of equality before the law.

Antipathy towards indigenous rights is not unique to New Zealand, as was highlighted when the United Nations Declaration on the Rights of Indigenous Peoples was adopted in 2007.[6] The Declaration affirmed a number of indigenous rights, including the right to self-determination[7] and the right to self-government in respect of "matters relating to [indigenous people's] internal and local affairs".[8] Only four countries refused to endorse the Declaration: New Zealand, Australia, Canada and the United States.[9] These four countries are not unique in having indigenous populations, but there are obvious similarities between them. Each is a Western liberal democracy, within which people of Anglo-Saxon heritage form the dominant cultural group. Each has a small but significant indigenous population. Each was also a colony of Great Britain and, therefore, has inherited British legal ideals.

This last point is of particular interest when considering the reactions of these countries to the Declaration. The Minister of Māori Affairs at the time, the Hon Parekura Horomia MP, described the Declaration as being "fundamentally incompatible with New

2 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

3 Newstalk ZB "Poll puts National ahead of Labour" *The New Zealand Herald* (online ed, Auckland, 15 February 2004).

4 See, for example, New Zealand National Party "The Mapp Report" (press release, 9 September 2005) Scoop <www.scoop.co.nz>.

5 See, for example, comments made in the 2014 general election by Jamie Whyte, Act Party leader: Adam Bennett "Act's Whyte calls for end to race based laws" *The New Zealand Herald* (online ed, Auckland, 29 July 2014); and, most recently, the emergence of the Hobson's Pledge Trust, which is dedicated to "a society in which all citizens are equal before the law, irrespective of when they or their ancestors arrived in this land": Hobson's Pledge "Welcome" (2016) <www.hobsonspledge.nz>.

6 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

7 Article 3.

8 Article 4.

9 United Nations General Assembly "General Assembly adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President" (press release, 13 September 2007). Note, however, that all four countries have since endorsed the Declaration.

Zealand's constitutional and legal arrangements".[10] The Canadian Minister of Indian Affairs and Northern Development, the Hon Charles Strahl, described the Declaration as being "inconsistent with the Canadian Constitution, the Charter, several acts of Parliament and existing treaties".[11] In Australia, the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough, argued against the Declaration on the basis that "[there] should only be one law for all Australians".[12]

This article explores whether such opposition in the name of constitutionalism is sustainable in the 21st century. In particular, the article focuses on objections made in the name of equality before the law. Is a "one law for all" approach really the only way to achieve this fundamental value?

In answering that question, the article considers three interpretations of the right to equality before the law. The article begins, in Part II, by examining a strict rule-of-law approach to the issue of equality before the law. Part III explores post-Second World War developments in relation to equality and, in particular, the notion that law can discriminate between individuals to promote equality of outcomes. Finally, Part IV contemplates an interpretation of equality before the law that takes into account the specific difficulties faced by indigenous peoples in modern democratic societies. The article ultimately concludes that each of these interpretations of the right to equality before the law can be consistent with the concept of indigenous rights.

II LEGAL EQUALITY AND THE RULE OF LAW

The rule of law is a fundamental value in Western liberal democracy. Christopher May describes the rule of law as "the common sense of contemporary global politics".[13] In its 1995 report *Our Global Neighbourhood*, the Commission on Global Governance poetically described the rule of law as:[14]

> … a civilising influence in every free society. It distinguishes a democratic from a tyrannical society; it secures liberty and justice

10 New Zealand Government "Māori Party's head in the clouds" (press release, 14 September 2007) Scoop <www.scoop.co.nz>.

11 "Canada votes against UN aboriginal declaration" (13 September 2007) CTV News <www.ctvnews.ca>.

12 "Indigenous rights outlined by UN" (13 September 2007) BBC News <http://news.bbc.co.uk>.

13 Christopher May "The Rule of Law: Athenian Antecedents to Contemporary Debates" (2012) 4 HJRL 235 at 235.

14 Commission on Global Governance *Our Global Neighbourhood: The Report of the Commission on Global Governance* (Oxford University Press, Oxford, 1995) at 303.

> against repression; it elevates equality above dominion; it empowers the weak against the unjust claims of the strong.

As this description suggests, one of the core values underpinning the rule of law is the concept of equality before the law, sometimes known as legal equality.

The Concept of Legal Equality

The grandfather of modern scholarship on the rule of law, including the role of legal equality, is Albert Venn Dicey. In his seminal work, *Lectures Introductory to the Study of the Law of the Constitution*,[15] Dicey identified three main meanings of the rule of law:

(1) The supremacy of the established law over arbitrary executive power: "Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but … nothing else".[16]
(2) Every person is equal before the law: "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".[17]
(3) The role of constitutional conventions: "whereas under many foreign constitutions the rights of individuals flow, or appear to flow, from the articles of the constitution, in England the law of the constitution is the result not the source of the rights of individuals".[18]

The second meaning is, of course, the subject of this article. At first glance, Dicey's assertion that the law should apply equally to every person, "whatever be his rank or condition",[19] appears to be consistent with the concept of "one law for all". However, such an interpretation is overly simplistic and, if taken literally, would undermine the legal system. Law, by its very nature, distinguishes between individuals.[20] This differentiation is necessary to produce a safe and functional society. Consider, for example, the issuing of driver licences: the law distinguishes between individuals based on their age and skill level, which serves to maintain a minimum level of safety on the roads.

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15 AV Dicey *Lectures Introductory to the Study of the Law of the Constitution* in JWF Allison (ed) *The Oxford Edition of Dicey* (Oxford University Press, Oxford, 2013) vol 1.
16 At 119.
17 At 100.
18 At 160.
19 At 100.
20 See *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 168–169 per McIntyre J.

Over time, various courts attempted to develop a more nuanced interpretation of legal equality by focusing on the ways in which existing law was applied to individual cases. The Canadian case of *Regina v Gonzales* exemplifies this approach.[21] The case concerned s 94(a) of the Indian Act, which made it illegal for an Indian person to be in possession of intoxicants off a reserve.[22] Section 1(b) of the Canadian Bill of Rights affirmed "the right of the individual to equality before the law and the protection of the law".[23] In the British Columbia Court of Appeal, Tysoe JA rejected an interpretation of the Bill of Rights that would examine whether a law was in itself discriminatory on the basis of race.[24] Instead, he employed the "similarly situated" test:[25]

> … "equality before the law" has nothing to do with the application of the law equally to everyone and equal laws for everyone … but to the position occupied by persons to whom a law relates or extends. They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends.

Tysoe JA went on to explain that the right to equality granted "a right to be subject … to the same processes of law … and to the same penalties and punishments" as any other person to whom the law applied.[26] Applying that test to the case before him, Tysoe JA found that there was no violation of the right to equality before the law, since all Indians were subject to the same law.

For many years, the United States Supreme Court took a similar approach to the interpretation of the Fourteenth Amendment, which guarantees the equal protection of the laws to every person within the jurisdiction of the United States.[27] The Court was prepared to strike down legislation that implied some races were legally inferior to others.[28] However, the Court considered that it was possible to enact a law which validly discriminated between individuals on the basis of race without making any judgement of inferiority. This led to the infamous "separate but equal" doctrine which pervaded the southern United States from the latter part of the 19th century. In the

21 *Regina v Gonzales* (1962) 32 DLR (2d) 290 (BCCA).
22 Indian Act RSC 1952 c 149, s 94(a) (repealed).
23 Canadian Bill of Rights SC 1960 c 44, s 1(b).
24 At 294.
25 At 296.
26 At 296.
27 US Const amend XIV, § 1.
28 One of the first cases to be heard under the provision was *Strauder v West Virginia* 100 US 303 (1879). In this case a majority of the United States Supreme Court held that a law allowing only white men to sit on a jury amounted to a denial of the equal protection of the laws to black citizens and was therefore a violation of the Fourteenth Amendment: at 310.

1896 case *Plessy v Ferguson*, the Supreme Court held that a law requiring racial segregation on public trains did not violate the constitutional right to equal protection of the laws.[29] Justice Brown, for the majority, held that the Amendment "could not have been intended … to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either".[30] This state of affairs continued throughout the Jim Crow era, until the landmark case *Brown v Board of Education of Topeka*, in 1954.[31]

Paul Gowder refers to this general approach as the "weak version of the rule of law".[32] It defines equality before the law according to the principles of regularity and due process, rather than more substantive principles, such as generality. Nevertheless, this interpretation was arguably endorsed in New Zealand in the 1985 White Paper that preceded the New Zealand Bill of Rights Act 1990.[33] The White Paper recognised that equality was "a central and paramount value",[34] but it rejected the possibility of including a specific right to "equality before the law" or to "the equal protection of the law" on the basis that such a right could allow the courts to enter into areas of substantive policy.[35] Instead, the White Paper proposed a preamble affirming New Zealand as "a democratic society based on the rule of law", which was said to encompass the general notion of equality before the law.[36] Elias CJ, writing extra-judicially, notes that New Zealand courts have tended to follow suit, cautiously interpreting the right to equality before the law "as a formal concept inherent in the nature of law".[37] As a result, judicial references to the concept of equality before the law have been a rare occurrence in New Zealand case law, while in-depth consideration of the right has been almost non-existent.[38]

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29 *Plessy v Ferguson* 163 US 537 (1896). Compare *Yick Wo v Hopkins, Sheriff* 118 US 356 (1886), in which a municipal ordinance of the city of San Francisco was declared unconstitutional on the basis that it enabled discrimination against citizens of Chinese descent.

30 At 544.

31 *Brown v Board of Education of Topeka* 347 US 483 (1954). The case is discussed in Part III, below.

32 Paul Gowder "Equal Law in an Unequal World" (2014) 99 Iowa L Rev 1021 at 1027. Modern scholarship regarding the rule of law often takes a broader perspective, one that is closer to the discussion of equality in Part III below.

33 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

34 At 85.

35 At 86.

36 At 10 and 86.

37 Sian Elias "Equality Under Law" (2005) 13 Wai L Rev 1 at 3.

38 The notable exception to this was the judgment delivered by Thomas J in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 531–533.

Legal Equality and Indigenous Rights

In modern times, the concept of legal equality is invoked as a means of criticising laws that are perceived to accord preferential treatment to indigenous or other minority groups. However, for many years, race-based laws were considered to be entirely consistent with the rule of law. The principle of legal equality can equally be applied to justify laws that discriminate in favour of indigenous peoples. If the law makes special provision for Māori, for example, then legal equality requires only that all Māori be treated equally under the provision and all non-Māori be treated equally under the normal law (that is, without the special provision). Although it might appear counter-intuitive, equality before the law in this sense can be compatible with race-based law, including indigenous rights.

This approach to law is not as foreign to New Zealand as some might think. For many years following the Treaty of Waitangi, it was common — and even expected — that some laws would apply differently to settlers and Māori respectively. Governor Gore Browne documented the attitude of the British Government "that even colonization must be a subordinate consideration to the duty of maintaining the substantial rights of the Aborigines",[39] an attitude reflected in early colonial legislation. The New Zealand Constitution Act 1852 allowed for the gazetting of Māori districts within which Māori laws and customs would be observed, provided that these were "not repugnant to the general principles of humanity".[40] Colonial law also recognised that problems would arise from cultural difference in relation to crime. Early penal provisions, for example, recognised that it would be unreasonable to hold Māori to the same standard as Pākehā settlers in relation to dishonesty offences, since Māori notions of property were different.[41]

The crucial question, however, is whether legal equality should be an appropriate measure of legislative legitimacy in modern democracies. It is clear that legal equality is compatible with significant and unacceptable discrimination in the law. This is not a recent realisation: as early as 1910, Nobel Prize-winning poet Anatole France sarcastically praised the "majestic even-handedness of the law, which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread".[42] The Supreme Court of Canada in

39 Gore Browne "Further Papers Relative to the Purchase and Inheritance of Native Lands" [1860] I AJHR E-06A at 4.

40 See the preamble to s 71 of the New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72. This provision remained in effect for most of the 20th century until the passing of the Constitution Act 1986.

41 Elias, above n 37, at 6.

42 Anatole France *Le Lys Rouge* (1894), ch 7 as cited in Elias, above n 37, at 9.

Andrews v Law Society of British Columbia went even further, noting that a literal application of legal equality could condone the Nuremberg Laws of Nazi Germany.[43] In the face of such comparisons, a constitutional yardstick of legal equality seems unappealing.

Legal equality can be reconciled with indigenous rights. However, it can also be reconciled with significant human rights abuses. For this reason, a strict interpretation of equality before the law has been rejected in favour of a more substantive approach.

III SUBSTANTIVE EQUALITY BEFORE THE LAW

The notion that human beings should be treated equally is long-standing. The idea was widely accepted in Ancient Greece and has reappeared in various incarnations since that time.[44] At its heart, equality requires that like cases should be treated alike. However, over the course of the 20th century, the concept of being "alike" shifted radically. Differentiating between individuals on the basis of gender or race became less acceptable and, in some cases, illegal. Instead, courts and society began to move towards a more substantive interpretation of equality.

Developments in the Law

Key international agreements of the 20th century demonstrate this shift towards substantive legal equality. The Universal Declaration of Human Rights was signed in 1948, following the Second World War.[45] Article 7 of the Declaration affirmed the right to equality before the law:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Almost 20 years later, the International Covenant on Civil and Political Rights similarly affirmed that:[46]

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43 *Andrews v Law Society of British Columbia*, above n 20, at 166 per McIntyre J.

44 See generally Stefan Gosepath "Equality" (27 June 2007) Stanford Encyclopedia of Philosophy <http://plato.stanford.edu>.

45 *Universal Declaration of Human Rights* GA Res 217 A, III (1948).

46 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Both documents link the concept of equality before the law to ideas of anti-discrimination. This was representative of a general trend that occurred in a number of jurisdictions in the 20th century.

1 Legal Developments in the United States

From the outset, the United States has paid homage to the concept of equality. The Declaration of Independence famously held it to be a "truth self-evident, that all Men are created equal" and that "they are endowed by their Creator with certain unalienable Rights".[47] Despite this proclamation of equality, slavery remained an accepted practice and, perhaps unsurprisingly, the original United States Bill of Rights contained no explicit protection of a right to equality before the law.[48] The Fourteenth Amendment was adopted in 1868 and incorporated the so-called Equal Protection Clause, which prohibited states from denying to any person the equal protection of the laws.[49] However, the Supreme Court interpreted the Clause narrowly in *Plessy v Ferguson* and for many years the Clause offered only limited protection against discrimination in the law.[50]

One of the first significant steps towards a new, substantive definition of equal protection came in the case *United States v Carolene Products Co*.[51] The Supreme Court recognised the problematic consequences of discriminatory legislation, noting that:[52]

> … prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

47 The Declaration of Independence, para 2 (US 1776).

48 The United States Bill of Rights consists of US Const amends I–X. Note, however, that the Fifth Amendment included the right to due process — a key aspect of the rule of law. It could also be argued that the First Amendment rights to freedom of speech, religion and association protected legal equality to some extent.

49 US Const amend XIV, § 1.

50 *Plessy v Ferguson*, above n 29.

51 *United States v Carolene Products Co* 304 US 144 (1938).

52 At 153, n 4.

Aaron Belzer suggests that the key outcome of this decision was the understanding that "socially disfavored groups classified by the law were entitled to judicial intervention".[53]

The famous Supreme Court decision in *Brown v Board of Education of Topeka* was such a case of judicial intervention and marked a turning point in United States race relations.[54] *Brown* was the culmination of four class actions brought by black students seeking admission to white-only schools in Kansas, South Carolina, Virginia and Delaware. Although it was not the first case of this kind to come before the Supreme Court,[55] it was unique in that the separate schools were more or less equivalent in respect of material factors, including the buildings, curricula and the qualifications of the teachers.[56] The case therefore turned on whether the practice of segregation itself violated the constitutional right to the equal protection of the laws. The Supreme Court ultimately concluded that the right could not be adequately observed by providing separate but equal educational facilities. The segregation of black students on the basis of race deprived those students of equal educational opportunities and was therefore a violation of the Equal Protection Clause of the Fourteenth Amendment.[57] The case was a major victory for the Black Civil Rights Movement. Over time, the protection of the Fourteenth Amendment has been extended to prohibit unreasonable discrimination on the basis of other factors, such as gender[58] and sexual orientation.[59]

Now, the question of whether or not a particular legislative act violates the Equal Protection Clause of the Constitution is a matter for judicial review.[60] Where a classification is made on the basis of race, this will be subject to strict scrutiny — the most rigorous form of review available in the United States.[61] In order to survive strict-scrutiny review, a law must satisfy two key requirements. First, the law "must be justified by a compelling governmental interest".[62] Secondly, the law must be "narrowly tailored" in order to achieve the compelling interest,[63] or, alternatively, the law should be the "least

53 Aaron Belzer "Putting the 'Review' Back in Rational Basis Review" (2014) 41 W St UL Rev 339 at 343.
54 *Brown v Board of Education of Topeka*, above n 31.
55 See *Cumming v Richmond County Board of Education* 175 US 528 (1899); and *Gong Lum v Rice* 275 US 78 (1927).
56 At 492.
57 At 493 and 495.
58 *Reed v Reed Administrator* 404 US 71 (1971).
59 *Romer, Governor of Colorado v Evans* 517 US 620 (1996).
60 See *United States v Carolene Products Co*, above n 51, at 153, n 4.
61 *Adarand Constructors Inc v Peña* 515 US 200 (1995).
62 *Palmore v Sidoti* 466 US 429 (1984) at 432 as cited in *Wygant v Jackson Board of Education* 476 US 267 (1986) at 274.
63 *Fullilove v Klutznick, Secretary of Commerce* 448 US 448 (1980) at 480 as cited in *Wygant v Jackson Board of Education*, above n 62, at 274.

restrictive alternative" available.[64] This test has been described as "'strict' in theory and fatal in fact".[65] However, it has permitted some forms of racial classification, including, for example, affirmative action policies.[66]

On one view, strict-scrutiny review is designed to flush out unconstitutional motivations for law-making. In the 2005 case *Johnson v California*, Justice Sandra Day O'Connor held:[67]

> Racial classifications raise special fears that they are motivated by an invidious purpose. … We therefore apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[68]

An alternative way of rationalising strict-scrutiny review is the weighted-balancing theory, in which:[69]

> … the court weighs the costs of a law in terms of its impact on individual rights against the law's benefits to society as a whole … with a heavy thumb on the scale in favor of the individual rights claimant … .

If one examines the United States approach holistically, it is clear that the right to equality before the law is satisfied in some substantive sense. The Supreme Court has not only accepted that legislative discrimination is undesirable; it has also taken significant steps to prevent the kinds of discrimination permitted during the Jim Crow era.

2 Legal Developments in Canada

As discussed in Part II above, the Canadian Bill of Rights 1960 affirmed the right to equality before the law. From an early stage, the Supreme Court of Canada interpreted the right as requiring substantive equality in the law.

The landmark case in this area was the 1969 case *The Queen v Drybones*.[70] Drybones had been convicted by a magistrate of being intoxicated off a reserve (albeit in a private residence), in violation of

64 See *United States v Playboy Entertainment Group, Inc* 529 US 803 (2000) at 813.
65 Gerald Gunther "The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86 Harv L Rev 1 at 8.
66 See *Grutter v Bollinger* 539 US 306 (2003); and, most recently, *Fisher v University of Texas at Austin* No 14-981 slip op (US 23 June 2016).
67 *Johnson v California* 543 US 499 (2005) at 505–506.
68 *City of Richmond v JA Croson Co* 488 US 469 (1989) at 493.
69 Adam Winkler "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts" (2006) 59 Vand L Rev 793 at 803 (footnotes omitted).
70 *The Queen v Drybones* [1970] SCR 282.

s 94(b) of the Indian Act.[71] The conflict with the right to equality before the law arose from the fact that in the Northwest Territories it was not an offence for a non-Indian person to commit the same act.[72] Additionally, the minimum penalties imposed under the Indian Act were more severe than the penalties faced by a person found to be intoxicated in a public place.[73] Ritchie J, for the majority, expressly disagreed with the reasoning advanced by Tysoe JA in *Regina v Gonzales*.[74] In determining whether or not the respondent's right to equality before the law had in fact been breached, Ritchie J held:[75]

> … without attempting any exhaustive definition of "equality before the law" I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

In a concurring opinion, Hall J suggested that the requirement of equality before the law could only be fulfilled if it was "seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex".[76] The Court held that s 94(b) of the Indian Act was inconsistent with the Canadian Bill of Rights and was therefore rendered inoperative. This was a significantly greater step towards substantive equality than the approach taken in *Regina v Gonzales*; however, not all subsequent cases of discrimination applied the *Drybones* approach. *Bliss v Attorney General of Canada*, for instance, was decided 15 years after *The Queen v Drybones* but essentially applied the "similarly situated" test to determine whether or not the respondent's right to equality before the law had been breached.[77]

The modern judicial approach to the issue of equality before the law was established in a line of cases considering s 15(1) of the Canadian Charter of Rights and Freedoms.[78] The subsection is similar to s 1(b) of the Canadian Bill of Rights and provides:[79]

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71 Indian Act RSC 1952 c 149, s 94(b).
72 See the discussion at 289–290 per Ritchie J.
73 At 289–290 per Ritchie J.
74 At 296–297, citing *Regina v Gonzales*, above n 21, at 296.
75 At 297, citing the Canadian Bill of Rights SC 1960 c 44, s 1(b).
76 At 300.
77 *Bliss v Attorney General of Canada* [1979] 1 SCR 183.
78 Canadian Charter of Rights and Freedoms, which consists in pt I of the Constitution Act 1982, being sch B of the Canada Act 1982 (UK).
79 Section 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.

Section 15(2) of the Charter provides an exception to the general prohibition against discrimination in respect of "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups".[80]

The first proceeding to be heard by the Supreme Court under the Charter was the 1989 case *Andrews v Law Society of British Columbia*.[81] The plaintiff, Andrews, was a British national who was denied admission to the Canadian bar on the basis that he lacked Canadian citizenship. The majority held that the right to equality before the law under the Charter encompassed four distinct rights: the right to equality before the law; the right to equality under the law; the right to the equal protection of the law; and the right to the equal benefit of the law.[82] Whether or not these rights had been breached would be assessed at the point of impact.[83] McIntyre J defined the scope of the Charter right on behalf of the Court:[84]

> Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

It is interesting to note that the Canadian Supreme Court went further than the United States Supreme Court in relation to this issue, investigating the substantive effect of an otherwise neutral law. One possible reason for this is the inclusion of the words "without discrimination" in s 15(1), words that the Court paid considerable heed to and which are absent from the Fourteenth Amendment. McIntyre J defined discrimination thus:[85]

80 Section 15(2).
81 *Andrews v Law Society of British Columbia*, above n 20.
82 At 170.
83 At 165.
84 At 165.
85 At 174.

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

Ultimately, McIntyre J adopted a three-pronged approach to the s 15(1) analysis:[86]

(1) Did the law in question impose differential treatment between individuals?
(2) Was the basis of the differential treatment one of the factors enumerated in s 15(1) (or an analogous ground)?
(3) Did the law have a discriminatory effect?

McIntyre J also emphasised that the outcome of this analysis would be determined by the impact of the law, rather than the formal content thereof, since in some cases equal treatment might produce inequality, and vice versa.[87]

Subsequent cases affirmed the general approach taken by the majority in *Andrews* and emphasised the importance of human dignity as a value underpinning the right to equality before the law. The 1999 case *Law v Canada (Minister of Employment and Immigration*) concerned age discrimination under the Canadian Pension Plan.[88] The Court's approach to determining whether or not there had been a s 15(1) breach was similar to — but more detailed than — that taken in *Andrews*. The Court held that there would be differential treatment under the first element of the inquiry in two circumstances: first, if the law in question formally distinguished between individuals on the basis of a personal characteristic; or, secondly, if the law failed to take into account the claimant's disadvantaged position within society, "resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics".[89] The Court also developed the third element of the *Andrews* test, holding that the existence of discrimination would need to be shown in a substantive sense, bearing in mind the purpose of the guarantee "in remedying such ills as prejudice, stereotyping, and historical disadvantage".[90]

86 At 178–183.
87 At 163–164.
88 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.
89 At 524.
90 At 524.

The Supreme Court later refined the law from *Andrews* to a two-stage test:[91]

(1) Does the law create a distinction based upon a prohibited ground?
(2) Does the distinction lead to a disadvantage by perpetuating prejudice or stereotyping?

However, in *Quebec (Attorney General) v A*, a minority of the Supreme Court of Canada expressed contrasting views on the second element of the two-stage test.[92] McLachlin CJ and Abella J each held that a distinction could breach s 15(1) even if it did not perpetuate prejudice or stereotyping.[93] Rather, they argued, the analysis should focus on whether the law has a negative effect on the complainant group. This may signal a future shift towards a broader interpretation of s 15(1).

Like the United States approach, the Canadian approach encompasses notions of substantive equality that act to protect against racially discriminatory legislation. However, the approach taken by the Canadian courts is arguably more permissive of legislative racial classifications, since the claimant must show that the law is discriminatory as a prerequisite to a finding that the right to equality before the law has been breached. In comparison, the United States strict-scrutiny review requires that the classification must be justified by a compelling government interest before it is considered acceptable.

3 Legal Developments in New Zealand

As has been discussed, New Zealand has no formal commitment to observing the right to equality before the law.[94] Furthermore, New Zealand's constitutional arrangements preclude the courts from substantively reviewing the content of legislation enacted by Parliament. As a result, there is little judicial comment on the concept of equality before the law. However, New Zealand courts have applied similar reasoning to that employed in Canada and the United States when determining cases under the right against discrimination.[95] The

91 See *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483; and *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396.
92 *Quebec (Attorney General) v A* 2013 SCC 5, [2013] 1 SCR 61.
93 At [327] per Abella J and at [418] per McLachlin CJ. Deschamps J generally supported Abella J's interpretation of s 15(1) but did not explicitly address the second stage of the test: see at [382] and [385].
94 New Zealand is a party to the International Covenant on Civil and Political Rights. Article 26 affirms the right to equality before the law. The Covenant is mentioned in the long title to the New Zealand Bill of Rights Act 1990 and is cited in judicial decisions, but it is not binding.
95 This right is enshrined in s 19 of the New Zealand Bill of Rights Act 1990 and is given effect by the Human Rights Act 1993.

most recent and high-profile example of this was the 2012 case *Ministry of Health v Atkinson*.[96]

The case concerned a Ministry of Health policy that excluded family members who provided disability support services to disabled children from receiving full remuneration for their services. The Court of Appeal set out a two-stage approach to analysing issues of discrimination under the New Zealand Bill of Rights Act 1990. First, there would need to be discriminatory treatment. Treatment would be considered discriminatory, rather than differential, if a classification (a) was made on prohibited grounds; and (b) imposed a material and more than trivial disadvantage on the person or group subjected to the differentiation.[97] If this first requirement was satisfied, the Court would determine whether or not the classification was a reasonable limitation of the right against discrimination under s 5 of the New Zealand Bill of Rights Act. Relevant factors under this part of the analysis would include the objectives of the policy, the connection between those objectives and the relevant discrimination and the overarching principle of proportionality.[98] Interestingly, the Court of Appeal took a more lenient approach than the United States Supreme Court, holding that it would be sufficient if the policy fell within a range of reasonable alternatives.[99]

As noted above, the principle of parliamentary sovereignty prevents the New Zealand courts from reviewing the substantive merits of legislation. However, the subject of the appeal in *Ministry of Health v Atkinson* was a government policy. As such, the Court of Appeal's decision may give some insight into how, under different circumstances, the New Zealand courts might approach the issue of equality before the law.

Substantive Equality and Indigenous Rights

It appears that indigenous rights can be consistent with the concept of substantive equality before the law. As noted above, courts from around the world have accepted that substantive equality before the law does not require equal treatment in all cases. In some situations, it will be acceptable for the law to differentiate between groups of people based on an appropriate and relevant characteristic.

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96 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

97 At [109].

98 This is the general approach in New Zealand to assessments under s 5 of the New Zealand Bill of Rights Act 1990. The Court of Appeal in *Atkinson* cited *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 as the authority for this test. However, it is also sometimes known as the *Oakes* test, after the Canadian case *R v Oakes* [1986] 1 SCR 103, which first established the test.

99 At [151]. Compare this approach to the "least restrictive alternative" requirement under strict-scrutiny review in the United States courts.

However, determining whether or not the distinguishing characteristic is appropriate is a complex matter, one that can only be assessed within the relevant social or political context.[100] Sedley LJ, speaking extrajudicially, raised this point in his 1998 Hamlyn Lecture, *Freedom, Law and Justice*:[101]

> [All laws] discriminate between the virtuous and the wicked, between the permitted and the prohibited, between the taxable and the duty-free. They discriminate, too, on grounds which from era to era are taken to be so obvious that they do not even require justification. It was obvious that the right of all Athenian citizens to vote did not include women or slaves. Among the American founding fathers who proclaimed the self-evident truth that all men are born equal were several slave-owners. In this country until well into the twentieth century the unsuitability of women to vote, sit on juries or join the professions was regarded—at least by men—as too obvious for argument.

Sedley LJ's examples illustrate that substantive equality before the law does not guarantee an absence of legal disability. Rather, substantive equality requires that the reason for any disability should be culturally acceptable. This is perhaps the single greatest challenge to a general acceptance of indigenous rights.

Possible justifications for indigenous rights are wide-ranging. Some justifications are unique to specific states or peoples, while others are derived from the unique position occupied by indigenous minorities. Several of these justifications are canvassed in Part IV below and so will not be discussed in depth here. They arise from the difficulties that are presented by the fact of minority status in modern, "one person, one vote" democracies. Within the New Zealand context, there is also an argument for indigenous rights on the basis of the Treaty of Waitangi, particularly art 2 which reserves to Māori the right of rangatiratanga, usually translated as sovereignty.

One of the clearest justifications for indigenous rights generally (excluding unique factors, such as the Treaty of Waitangi) is the amelioration of the disadvantaged position occupied by indigenous minorities. The way in which this disadvantage is defined is relevant here. If disadvantage is measured according to socio-economic markers, then indigenous rights will cease to be acceptable when socio-economic parity between indigenous and non-indigenous peoples is achieved. On the other hand, if disadvantage is defined as a

100 See *Andrews v Law Society of British Columbia*, above n 20, at 164 per McIntyre J.
101 Stephen Sedley *Freedom, Law and Justice* (Sweet & Maxwell, London, 1999) at 40.

consequence of minority status itself, then the justification could continue to exist in perpetuity.

These justifications would be relevant under the United States' approach to assessing whether or not the right to the equal protection of the laws has been breached. Subjecting indigenous rights to strict-scrutiny review would require, first, that the rights were justified by a compelling government interest; and, secondly, that the observance of these rights was the least restrictive method of achieving that compelling interest. Whether or not either of these tests is met is a matter of subjective judgment. Some scholars and judges believe that positive action is required in order to achieve true equality,[102] while others believe that the law will adapt organically to take indigenous viewpoints into account.[103] Those belonging to the latter school of thought are more likely to consider that indigenous rights breach the right to equal protection of the laws. Unfortunately, there is no guidance from the United States Supreme Court on this issue, since Native Indian tribes are considered "domestic dependent nations"[104] and are not subject to the Bill of Rights contained within the United States Constitution.[105]

The Canadian approach might be more favourable towards the recognition of indigenous rights. While indigenous rights are undoubtedly the result of differential treatment on the basis of a prohibited ground, it seems unlikely that a court would consider indigenous rights to have a discriminatory effect. The following extract from *Law v Canada* is relevant:[106]

> … differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

Opponents of indigenous rights, including Dr Brash, often paint these rights as irreconcilable with the principle of equality before the law. This analysis suggests, however, that the existence of indigenous rights is not itself a violation of the right to equality before the law;

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102 See, for example, Luke McNamara "'Equality Before the Law' in Polyethnic Societies: The Construction of Normative Criminal Law Standards" (2004) 11(2) eLaw Journal: Murdoch University Electronic Journal of Law.

103 See, for example, Paul Heath "'One Law for All': Problems in Applying Māori Custom Law in a Unitary State" (2010) 13–14 Yearbook of New Zealand Jurisprudence 194.

104 *The Cherokee Nation v The State of Georgia* 30 US 1 (1831) at 17.

105 *Talton v Mayes* 163 US 376 (1896) at 384–385. Indian tribes are instead bound by the Indian Civil Rights Act of 1968, which consists in Title II of the Civil Rights Act of 1968 Pub L 90–284, 82 Stat 73 (1969), in turn corresponding with 25 USC §§ 1301–1304.

106 At 529.

rather, it is the *justification* for these rights that determines whether or not there has been a violation. In other words, the first task is to ascertain whether or not indigenous rights are justified. If they are justified, the differential treatment is not inconsistent with the concept of equality before the law. Under this approach, indigenous rights are reconcilable with a substantive interpretation of equality before the law.

IV EQUALITY BEFORE THE LAW AND RESPECT FOR HUMAN DIGNITY

The interpretations of equality before the law that have been discussed thus far are ultimately grounded in Western liberal notions of universalism and formal equality. However, many modern scholars in the area of indigenous rights question whether these criteria allow for any meaningful engagement with the issues facing indigenous minorities. This section explores the difficulties arising from minority status within modern Western democracies and seeks to reconceptualise the understanding of equality before the law in such a way as to take the needs of indigenous minorities into account. Ultimately, it is argued, the achievement of true equality before the law is not only consistent with but in fact *requires* the recognition of indigenous rights.

The Effect of Minority Status in Western Liberal Democracies

Indigenous minorities in Western societies face a number of unique challenges. Some of these challenges are the result of historic oppression which has resulted in material disadvantages. However, indigenous minorities also experience difficulties arising from the Eurocentric cultural bias that pervades Western societies and social institutions. This bias is inherent in the current legal system and is exacerbated by the effects of a "one person, one vote" democracy. The end result is a system that privileges the values and traditions of the dominant cultural group over those of indigenous minorities. This constitutes a different kind of inequality before the law, one that originates at an institutional level rather than at the point of application.

In its current form, the law as an institution is not well-equipped to handle the clashes of cultural values that occur in multicultural societies. This is perhaps unsurprising, considering the

historical origins of the common law system. In contrast to many of its colonies, Victorian Britain was largely a monocultural society.[107] Its legal institutions were neither required nor designed to address the dilemmas which have arisen in countries such as New Zealand, Australia and Canada when attempting to accommodate large indigenous populations. As a result, the common law system is vulnerable to cultural bias and is ill-equipped to achieve meaningful recognition of indigenous values or concerns.

A lack of true impartiality in the law is apparent in both the human and philosophical faces of the law. The human face of the law is represented by judges, each of whom endeavours to determine the shape and meaning of the law using objective legal reasoning. But, like every other member of society, judges are vulnerable to unconscious biases. Elias CJ, writing extrajudicially, notes that:[108]

> In cases involving equality, cultural values and gender and class assumptions may distort impartiality unconsciously. … Such premise is often based on values and attitudes which have been absorbed by the judge through his or her own experiences in life.

Elias CJ illustrates her point in the context of early matrimonial property legislation, noting that although the exclusively male judiciary was filled with judges who prided themselves "in their mastery of legalism", they held an unconscious hostility to the legislation that, in hindsight, is obvious for all to see.[109]

The values and language that define the law further demonstrate its partiality. Consider, for example, the legal concept of a "reasonable person". This concept appears regularly in the law as an objective means of determining a reasonable outcome. However, the reasonable person is characterised according to Eurocentric attributes and attitudes, which do not necessarily transcend the cultural divide.[110] The concept of the reasonable person also illustrates the power of language. The term "reasonable" implies a particular method of logical analysis which excludes alternative narratives for certain

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107 There is very little reliable data regarding the true number of non-Caucasian individuals in colonial Britain. However, it seems likely that the number was small relative to the overall population. For example, modern scholarship estimates the number of black people in Britain in the late 18th century through to the mid-19th century to be between 10,000 and 20,000, comprising less than 0.5 per cent of the total population at that time: see discussion in Norma Myers *Reconstructing the Black Past: Blacks in Britain 1780–1830* (Frank Cass, London, 1996) at 18–21.

108 Elias, above n 37, at 9.

109 At 9–10. Elias refers to one unnamed separation case in particular which the judge had stated: "You only have to look at the photographs of the home to see that the respondent is a good husband and provider." Any attempt to use such reasoning in a modern separation case would be met with disbelief.

110 Margaret Davies "Exclusion and the Identity of Law" (2005) 5 Macquarie Law Journal 5 at 20.

behaviours. Delgado and Stefancic identify this type of lingual bias as a significant factor weighing against change:[111]

> Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. Now, deliberation within that language, purporting always to be neutral and fair, inexorably produces results that reflect their interests.

Margaret Davies suggests that this is a typical example of socio-political bias in legal doctrine, where "[s]tandards assumed to be normal, universal, even common-sensical, are often derived from specific socio-political locations where power to define and legislate for others is concentrated."[112] In modern English-speaking democracies, indigenous minorities are governed by laws that are derived from a Eurocentric socio-political location, namely imperial Britain. The modern legal system is descended from laws that were created when colonial powers dominated the world and when indigenous peoples were regarded as "savages". It is hardly surprising, then, that true legal impartiality is so difficult to achieve.

The other main source of bias in the law is founded in the so-called fundamental values that continue to define the law. Legal discussion often assumes these values — liberty, equality, universality and so forth — to be universal and culturally neutral concepts.[113] However, this approach ignores the historical, cultural and linguistic influences that have shaped the modern Common Law system. Luke McNamara notes with frustration the continued and inflexible assumption that fundamental standards and norms of the law are "off-limits" when it comes to accommodating diversity.[114] He argues that, while there is a general acceptance of the need to adapt to modern cultural diversity, any true reform has been limited by adherence to traditional principles — such as equality before the law — and by a reluctance to undertake any active reform. Although there have been efforts to improve access to the legal system and to prohibit discrimination against minorities:[115]

> … such changes do not bring into question the legitimacy of fundamental legal principles and standards for a culturally diverse society. Procedural reforms of this sort often proceed on the

111 Richard Delgado and Jean Stefancic "Hateful Speech, Loving Communities: Why Our Notion of 'A Just Balance' Changes So Slowly" (1994) 82 CLR 851 at 861 (footnotes omitted).
112 Davies, above n 110, at 20 (footnotes omitted).
113 See Ferran Requejo "Introduction: 'It is so very late that we may call it early by and by" in Ferran Requejo (ed) *Democracy and National Pluralism* (Routledge, London, 2001) 1.
114 McNamara, above n 102.
115 At [8].

> assumption that so long as access is provided in a manner which is sensitive to cultural diversity, the legal system-and the rules, norms and values which are enforced within it-is more than capable of dispensing justice to all parties regardless of identity.

However, justice itself is a culturally defined concept. In the criminal context, for example, cultural values determine whether or not a certain act is regarded as requiring criminal censure. Yet within Western democracy, the criminal law is almost exclusively determined according to the wishes of the cultural majority.[116]

Margaret Davies addresses this issue from a slightly different perspective of social exclusion.[117] She argues that the law defines itself by the exclusion of alternative definitions of law and of certain legal subjects. For example, the Western approach to law excludes practices such as custom and culture from the definition of the law. This definition, in turn, excludes indigenous normative practices from being named as "law". Similarly, Western legal theory has traditionally required "that law must be single and sovereign in a particular geo-political space".[118] This is embodied in the refrain of "one law for all", and, as Davies points out, "exiles entire cultures from law".[119] The combined result of these exclusions means that while indigenous minorities are formally and literally included in the definition of the law, members of these groups may still be disempowered and effectively disenfranchised.

These problems are exacerbated by the effect of "one person, one vote" democracy, which is inherently disadvantageous to minority groups. The disadvantage arises from the fact that minorities are significantly outnumbered by a dominant group holding different cultural values. In New Zealand, for example, Māori comprise only 15 per cent of the total population.[120] This is a high proportion compared to other indigenous populations. In Australia, Aboriginal and Torres Strait Islander peoples comprise 2.5 per cent of the population.[121] In Canada, Aboriginal peoples constitute 4.3 per cent of the total population.[122]

This numerical imbalance places indigenous minorities at a significant disadvantage. Achieving any meaningful recognition of indigenous concerns depends on the acquiescence of the dominant

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116 See *Masciantonio v The Queen* (1995) 183 CLR 58 at 74 per McHugh J.
117 Davies, above n 110.
118 At 21.
119 At 21.
120 Statistics New Zealand "2013 Census ethnic group profiles: Māori" <www.stats.govt.nz>.
121 Australian Bureau of Statistics "2011 Census QuickStats" (28 March 2013) <www.censusdata.abs.gov.au>.
122 Statistics Canada "Aboriginal Peoples in Canada: First Nations People, Métis and Inuit" <www12.statcan.gc.ca>.

group, which may not be forthcoming. This is especially the case where the interests of the two groups conflict. Without any further action, indigenous priorities or concerns are consistently forced to give way to the wishes of the majority. As a result, the minority culture is devalued. James Anaya illustrates how this affects recognition of cultural sensitivities, comparing the actual decision to build a ski field on land that is sacred to American Indian nations to a hypothetical decision to construct a Ferris wheel in the middle of St Peter's Square in Vatican City.[123] He notes that while the latter action would be considered immensely disrespectful and would provoke international outrage, complaints of Indian nations in relation to the former were ignored and construction went ahead.

A New Concept of Equality

Clearly, the law as a social institution does not treat each person equally. This is problematic, since equal treatment (or lack thereof) goes to the heart of equality before the law. Yet no existing interpretation of the right to equality before the law provides a solution. If left unaddressed, this problematic state of affairs can lead to the marginalisation of entire cultures, which in turn can cause disillusionment and dissociation from society. Indeed, members of the minority grouping:[124]

> … are likely not to have faith in social and political institutions which enhance the participation of individuals and groups in society, or to have confidence that they can freely and without obstruction by the state pursue their and [their families'] hopes and expectations of vocational and personal development.

This in turn has a negative effect on the community as a whole:[125]

> Alienation of minority groups threatens social stability and squanders human talent. … Cultural groupings which are not recognised, which have no sense of mutual expectation with others in the community and which feel isolated or denigrated, are not positive forces within our community. The validity our society gives to its cultural minorities is therefore very much in the wider community interest.

123 Professor James Anaya "Indigenous Peoples Rights and Business Responsibilities: Lessons from Six Years as UN Special Rapporteur on the Rights of Indigenous Peoples" (public lecture hosted by the New Zealand Centre for Human Rights Law, Policy and Practice and the University of Auckland Faculty of Law, 21 July 2014).

124 *Kask v Shimizu* (1986) 28 DLR (4th) 64 (ABQB) at 71. The quoted paragraph was also cited in *Andrews v Law Society of British Columbia*, above n 20, at 197 per La Forest J. *Kask* concerned a law that was discriminatory on the basis of citizenship.

125 Elias, above n 37, at 4.

The challenge, therefore, is to consider whether there is any alternative way of conceptualising equality before the law that takes these institutional inequalities into account.

The key to finding a way forward may lie in the concept of human dignity. The contemporary philosophical approach to equality before the law has become strongly connected with the idea that all human beings have an innate worth or dignity. The atrocities of the Second World War were significant in driving this change of attitude.[126] The United Nations officially came into existence on 24 October 1945.[127] One of its first actions was to draft the Universal Declaration on Human Rights.[128] The supreme importance of human dignity is affirmed many times throughout the Preamble to the Declaration, which announces that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace". The Declaration also states that "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women".[129] Article 1 further emphasises:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

This commitment to human dignity is again stated in the Preamble to the International Covenant on Civil and Political Rights.[130] However, neither of these international documents defines what human dignity entails.

A focus on human dignity is also apparent in Canadian jurisprudence regarding the Charter right to equality before the law.[131] The Supreme Court of Canada has attempted to define what is required in order to respect human dignity. In *Andrews v Law Society of British Columbia*, McIntyre J held:[132]

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at

126 Charter of the United Nations, preamble: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind".

127 By virtue of Charter of the United Nations, art 110(3); see generally Charter of the United Nations, Introductory Note.

128 *Universal Declaration of Human Rights*, above n 45.

129 At paras 1 and 5.

130 International Covenant on Civil and Political Rights, above n 46.

131 Canadian Charter of Rights and Freedoms, above n 78, s 15(1).

132 *Andrews v Law Society of British Columbia*, above n 20, at 171.

> law as human beings equally deserving of concern, respect and consideration.

In *Miron v Trudel*, the Supreme Court went one step further and linked the concept of equality with the concept of human dignity.[133] This link was discussed in greater detail in *Law v Canada*:[134]

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

The link between equality and human dignity accords with the views of philosophers such as Ronald Dworkin, who suggests that recognition of human dignity requires that every individual be treated as an equal.[135] This is not the same as requiring equal treatment. The latter would entail the equal distribution of opportunities and resources amongst the population. A right to treatment as an equal, however, demands that every person should be treated with the same respect and concern as every other person. Errol Mendes argues that this approach is compatible with true justice and springs "from a compassionate understanding of one's own privileged or disadvantaged position and how it relates to the position of others".[136] Understanding justice in this way, he suggests, leads to two conclusions. First, achieving true equality may in some cases require differential treatment, which "should be promoted as … society's expression of compassion and its fundamental sense of justice".[137] Secondly, equal dignity requires positive action to eliminate under-inclusivity. Mendes writes that "[s]ocial and economic systems should be designed to be inclusive from the outset, rather than be stretched to fit marginalized groups into the margins."[138]

The law can incorporate such concepts if the right to equality before the law is interpreted as requiring the law, so far as possible, to give equal weight to the human dignity of every individual in society. In some cases, this would require positive steps to be taken in order to counteract institutional biases. Indigenous rights would be an example

133 *Miron v Trudel* [1995] 2 SCR 418 at 486–487.
134 *Law v Canada*, above n 88, at 529.
135 Ronald Dworkin *Taking Rights Seriously* (Bloomsbury, London, 2013) at 273.
136 Errol P Mendes "Taking Equality Into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12 NJCL 3 at 22.
137 At 22.
138 At 22–23.

of such a step. As has been outlined, the current power imbalance in Western social institutions devalues indigenous minorities. It conflicts with the ideal that all persons should "enjoy equal recognition at law as human beings" and that every person is "equally capable and equally deserving of concern, respect and consideration".[139] Recognition of indigenous rights would assist in remedying this imbalance.

In summary, implementation of indigenous rights promotes the recognition of equal human dignity, which in turn promotes true equality before the law. This approach is consistent with art 43 of the United Nations Declaration on the Rights of Indigenous Peoples, which states that "[t]he rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." Understanding equality in this way also justifies the ongoing recognition of indigenous rights, even after socio-economic parity has been achieved.

V CONCLUSION

It has been said that "[t]he quest for equality expresses some of humanity's highest ideals and aspirations".[140] It is unsurprising, then, that indigenous rights and other race-based laws should be the subject of such fierce debate. There are real issues of equality before the law at stake upon which opinions might legitimately differ. However, while memorable catchphrases like "one law for all" lend themselves to sound bites on the evening news, they also tend to oversimplify the issues at hand, clouding legitimate debate and hindering constructive discourse. Instead, this article has sought to examine the implications of equality before the law in a more meaningful way, in order to identify whether indigenous rights can be reconciled with this fundamental constitutional principle.

There are at least three separate interpretations of the right to equality before the law. The first, legal equality, represents the most formal approach to equality before the law but, perhaps surprisingly, offers no real resistance to the concept of indigenous rights. As various commentators have noted, however, legal equality is also compatible with outrageous human rights abuses. Recognition of this limitation has led to a second interpretation, substantive equality before the law.

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139 *Law v Canada*, above n 88, at 529.
140 *Law v Canada*, above n 88, at 507 per Iacobucci J.

This interpretation is interesting because the existence of differential treatment is considered separately from the right to equality before the law. So, while recognition of indigenous rights undoubtedly constitutes a form of differential treatment, this does not necessarily violate the right to equality before the law — a conclusion that is at odds with the idea of "one law for all". Different jurisdictions have taken different approaches to determining whether or not the right to substantive equality before the law has been breached. In each case, there are convincing arguments in favour of indigenous rights that weigh against finding such a breach.

The final interpretation of equality before the law approaches this issue from the perspective of human dignity. This approach acknowledges the institutional biases that arise in a democracy controlled by a dominant cultural group. It also recognises that bias is inconsistent with the principle that every person is entitled to equal respect for his or her human dignity. Indigenous rights are acknowledged as a legitimate means of counteracting societal bias and thus achieving true equality before the law. In an age where cultural relativism is becoming more and more obvious, defining equality before the law in terms of human dignity may provide the most appropriate and culturally neutral way forward.

In his Nationhood speech, Dr Brash claimed that the key to a "modern, prosperous, democratic nation" would be found in "the essential notion of one rule for all".[141] However, this approach represents an outdated, monocultural and closed-minded way of thinking about the law which should be the antithesis of modern democracy. The most successful modern societies will be those characterised by tolerance for different cultures and a genuine commitment to treating every person as an individual equally deserving of respect and consideration. When viewed from this perspective, indigenous rights no longer pose a threat to equality before the law. Instead, indigenous rights become the vehicle by which society gives effect to the concept of equal human dignity. In this way, true equality before the law is achieved, leading to a more just outcome for all.

141 Brash, above n 1.