

# Grenfell and the Limited Reach of Equality within the UK Constitutional Order

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## Abstract

Grenfell demonstrated the existence of deep inequalities in British society. Across the UK, inequality shapes lives – and, as Grenfell shows, also often selects for death. And yet equality – or, to be more precise, the principle of equality of status – is widely acknowledged to be a fundamental value of the UK constitutional order, receiving extensive legal protection via instruments such as the Equality Act 2010 and Article 14 of the European Convention on Human Rights. This paper analyses the disjuncture between these legal and constitutional commitments and the raw inequality exposed by Grenfell. It argues that this disjuncture is generated by the obscuring of the socio-economic dimension of inequality within UK political and legal discourse. It concludes by exploring ways of challenging the limits of the principle of equal status, as currently understood within the UK constitutional order.

## Keywords

Equality – Dignity – Non-discrimination – Article 14 ECHR – Equality Act 2010 – Socio-Economic Rights.

## 1. Introduction

The Grenfell disaster demonstrated the existence of deep inequalities in British society. Inequality was manifested in the cramped, run-down and ultimately life-endangering living conditions of the tower’s inhabitants, especially when compared to the housing conditions enjoyed by many living in their near proximity. It also was expressed in the socio-economic and ethnic composition of the tower’s population, the difficulties they faced in challenging the safety of their living conditions before the fire, and the housing issues faced by survivors navigating the aftermath of the disaster.<sup>1</sup>

Thus, in multiple ways, Grenfell serves as a symbol of inequality. It shows the embeddedness of structural distinctions between privileged and non-privileged groups based on the interplay of factors such as socio-economic disadvantage, ethnicity, national origin, educational levels and so on, as well as the way in which vulnerability

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<sup>1</sup> See the ‘Voices from Grenfell’ contribution to this special edition.

and powerlessness are inextricably bound up with such distinctions. Across the UK, inequality shapes lives – and, as Grenfell shows, also often selects for death.<sup>2</sup>

And yet equality – or, to be precise, the principle of equality of status – is generally recognised to be a fundamental value of the UK constitutional order. It is regularly referenced in political and legal discourse, and also receives wide-ranging legal protection via instruments such as the Equality Act 2010 and Article 14 of the European Convention on Human Rights (ECHR). This paper explores this disjuncture between these legal and constitutional commitments and the raw inequality exposed by Grenfell. It analyses how this disjuncture is generated by the obscuring of the socio-economic dimension of status equality, and analyses how it may be challenged in the future.

More specifically, Part 2 of this paper examines how status equality has become a core constitutional value, which is affirmed as such in both political rhetoric and legal regulation. Part 3 makes the argument that the Grenfell disaster highlights the existence of a substantial gap between the formal importance assigned to status equality within the UK's constitutional scheme of values and the social reality on the ground. Part 4 analyses how this gap is generated by the marginalisation of the socio-economic dimension to status equality, in both politics and law. Part 5 explores ways of closing the gap between normative aspiration and the brutal reality exposed by Grenfell.

## 2. Status Equality as Core Constitutional Value

Since the decline of *ancien régime* concepts of aristocratic superiority, and the erosion of notions of ethnic, racial and gender hierarchy, all liberal democracies have formally embraced the notion that no morally significant differences exist between different categories of human being – and, by extension, the idea that all persons should be treated as if they possess a shared degree of intrinsic dignity.<sup>3</sup> This concept of 'status equality' has become central to contemporary concepts of democracy, rights and good governance.<sup>4</sup>

The UK is no exception in this regard. Plenty of lip service is paid to the idea that everyone enjoys 'equality before the law', and that every citizen has an equal say through the ballot box in the governance of their country. Successive governments have embraced the idea of equal opportunity for all, while proclaiming their desire to combat discrimination. Thus, for example, Theresa May MP, speaking as Home Secretary and Minister for Women and Equalities in 2010, asserted that there were 'moral, social and economic' reasons to recognise equality (framed in terms of equal status) as 'essential to our wellbeing as a society' and to combat discrimination with

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<sup>2</sup> For an analysis of the immediate circumstances of the disaster, see the *Grenfell Tower Inquiry: Phrase 1 Report*, HC 49-1, 30 October 2019.

<sup>3</sup> J. Waldron, *One Another's Equals: The Basis of Human Equality* (Harvard University Press 2017). See also S. Moreau, 'Equality and Discrimination', in J. Tasioulas (ed.), *The Cambridge Companion to Philosophy of Law* (Cambridge University Press 2019), forthcoming.

<sup>4</sup> Waldron, *ibid.* See also T. Christiano, 'The Authority of Democracy' (2004) 12(3) *Journal of Political Philosophy* 266-290.

'the full force of Parliamentary law'.<sup>5</sup> David Cameron MP, speaking as Prime Minister in 2015,<sup>6</sup> and Gordon Brown MP speaking as Chancellor of the Exchequer in 2004,<sup>7</sup> made similar arguments - while Tony Blair MP, speaking as Prime Minister in 1999, described the 'nation's only hope of salvation' as being the achievement of 'true equality: equal worth, an equal chance of fulfilment, equal access to knowledge and opportunity...'<sup>8</sup>

This commitment to status equality is particularly pronounced within the public discourse of the British state, i.e. in the way that the values underpinning the design, functioning and interaction of state structures are articulated, and by extension how the exercise of state power through these structures is legitimated. The British machinery of state was not originally designed with equality in mind. Instead, it reflected traditional class hierarchies, as for example embodied in the role of the monarchy, franchise restrictions based on income, and the unelected composition of the House of Lords. Residues of that period remain. However, over time, central elements of the UK constitution have been retrofitted to conform better to the ideal of status equality.

Thus, for example, with the introduction of universal franchise, representative democracy is now structured around the assumption that all citizens should enjoy 'political equality', i.e. formal equality of status as participants within the democratic process.<sup>9</sup> Key aspects of the UK's political system, such as the primacy of the Commons, the sovereign law-making authority of Parliament, and the functioning of parliamentary accountability mechanisms, are all ultimately justified by reference to this value: each time tropes such as 'democracy', 'the electorate', or even 'the will of the people' are invoked to justify a particular institutional dynamic, the underlying argumentative logic is rooted in an affirmation of political equality as the basis for majoritarian rule.<sup>10</sup>

The concept of status equality is also central to contemporary understanding of the rule of law. Writing in 1885, Dicey argued that the equal application of the law to all persons, irrespective of their social or political status, was a central pillar of the British rule of law tradition: '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

<sup>5</sup> Theresa May MP, 'Equality Strategy Speech' (17 November 2010) <<https://www.gov.uk/government/speeches/theresa-mays-equality-strategy-speech>> accessed 8 November 2019.

<sup>6</sup> David Cameron MP, 'The Conservatives have become the party of equality' (*The Guardian*, 26 October 2015) <<https://www.theguardian.com/commentisfree/2015/oct/26/david-cameron-conservatives-party-of-equality>> (accessed 8 November 2019).

<sup>7</sup> Gordon Brown MP, Full text: Gordon Brown's Speech, (*The Guardian*, 27 September 2004) <<https://www.theguardian.com/society/2004/sep/27/politics.business>> accessed 11 November 2019.

<sup>8</sup> Tony Blair MP, Tony Blair's Full Speech (*The Guardian*, 29 September 1999) <<https://www.theguardian.com/politics/1999/sep/28/labourconference.labour14>> accessed 11 November 2019.

<sup>9</sup> For a classic analysis of this concept, see R. A. Dahl, *On Political Equality* (Yale University Press 2006). Note that this essentially formal concept does not necessarily translate into substantive equality of status – as evidenced by, for example, the restrictions imposed on prisoner voting by legislation such as Section 3 of the Representation of the People Act 1983. Similar formal/substantive gaps are discussed further below.

<sup>10</sup> As Gordon puts it, 'it is this notion of the political equality of citizens which gives force to, and is manifested by, the extra-constitutional and intra-constitutional aspects of democracy': M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) 34.

tribunals'.<sup>11</sup> This was a highly formalist conception of status equality, requiring little more than consistent application of the law.<sup>12</sup> However, Dicey's limited take on equality before the law has given way over time to a much more expansionist understanding of the concept. Consistency of treatment as between similarly situated categories of persons is now generally acknowledged to be a key element of the rule of law – and to reflect a commitment to status equality more generally.

Thus, for example, in his influential analysis of the rule of law, Lord Bingham argued that 'the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.<sup>13</sup> Similarly, Lord Sumption in *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* suggested that status equality, in the specific sense of similar treatment of similarly situated persons, was 'fundamental to any rational system of law'.<sup>14</sup> In line with this logic, the UK courts have been prepared to review decisions of public authorities for compliance with a common law principle of equality, understood to constitute an aspect of the overarching requirement for such authorities to act in a rational manner.<sup>15</sup>

In general, as Jowell argued back in 1994, both the political and legal dimensions of UK constitutional governance are now premised upon the 'fundamental precept' that persons should be treated as having equality of status.<sup>16</sup> This principle is viewed as being both 'constitutive of democracy'<sup>17</sup> and as an integral aspect of the rule of law – and has been recognised as such by constitutional theorists, key political actors, and leading judges alike. Thus, Baroness Hale in the case of *Ghaidan v Godin-Mendoza* affirmed the link between democracy and status equality in the following terms:

Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being.<sup>18</sup>

Similarly, in the Privy Council case of *Matadeen v Pointu*, Lord Hoffmann suggested that the principle of status equality 'is one of the building blocks of democracy and necessarily permeates any democratic constitution'.<sup>19</sup>

The UK is also bound by provisions of various international human rights treaties that require respect for the fundamental right of individuals to equality and non-discrimination as an aspect of a wider commitment to status equality. Thus, for example, the UK has agreed to be bound by the non-discrimination clauses of Articles

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<sup>11</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed., Macmillan 1959, ed. E.C.S. Wade) 193.

<sup>12</sup> As Craig notes, Dicey's analysis provides little if any insight as to when it will be legitimate to apply different rules to different groups of individuals. See P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467-487, 472-3.

<sup>13</sup> T. Bingham, *The Rule of Law* (Allen Lane 2010).

<sup>14</sup> [2015] UKSC 6, [26].

<sup>15</sup> See eg *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin).

<sup>16</sup> J. Jowell 'Is Equality a Constitutional Principle?' (1994) 47 *Current Legal Problems* 1.

<sup>17</sup> *Ibid* 7.

<sup>18</sup> [2004] UKHL 30 [132].

<sup>19</sup> [1999] 1 AC 98 [1998] UKPC 9 [8].

2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR), along with similar provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Racial Discrimination (CERD), and a range of other UN human rights treaties. It is also bound by Article 14 of the European Convention on Human Rights (ECHR), which requires it to ensure individuals enjoy the protection of other Convention rights without being discriminated against on the basis of 'status grounds' such as race, ethnicity, gender, sexual orientation and so on. This requirement has been incorporated into national law via the provisions of the Human Rights Act (HRA) 1998, which makes Article 14 ECHR enforceable by UK courts.

UK law also protects the rights of individuals to non-discrimination via the Equality Act 2010 and associated legislation. This prohibits discrimination on a number of specified personal characteristics, such as race, gender, age, disability and religion or belief. It also imposes a positive duty upon all public authorities to give 'due regard' to the need to eliminate unlawful discrimination and promote equality of opportunity on the basis of all these protected characteristics.<sup>20</sup>

So status equality is acknowledged to be a core value of UK constitutional governance, underpinning the legitimacy claims of both the representative organs of the state and the legal system more generally. Furthermore, equality and its corollary, non-discrimination, are acknowledged to be fundamental rights – and are protected as such by a range of legislative measures, which work in tandem with the more limited protection afforded by the common law in the form of the above-mentioned 'equal treatment' dimension to rationality review. As with other liberal democracies, status equality has become the 'sovereign virtue'<sup>21</sup> underpinning the claims to authority of the British state: politicians, judges and constitutional commentators all pay obeisance to its fundamental importance.

Furthermore, organs of the state are expected to manifest respect for status equality in how they discharge their public functions: both in the narrow legal sense of complying with the requirements of the positive equality duty and other legislative provisions, and also more generally in how they interact with individuals and give effect to public policy. The political rhetoric cited above from former prime ministers about the importance of equality to the well-being of society at large is not just hot air. It reflects a widely shared understanding that the exercise of public power should reflect the fundamental importance of status equality, as well as 'offshoot' concepts such as equality before the law, equal opportunity and the individual right to equality and non-discrimination.

### **3. Grenfell: The Gap Between Normative Aspiration and Raw Reality Exposed**

And yet Grenfell happened. The tower burnt, many of its inhabitants died, and a spotlight was shone on the persistence of raw, stark inequality in the UK – sufficiently raw and sufficiently stark to kill.

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<sup>20</sup> S. 149 Equality Act 2010.

<sup>21</sup> R. Dworkin, *Sovereign Virtue* (Harvard University Press 2002).

So, what to make of the disjuncture between the affirmed importance of equal status as a core constitutional, legal and political principle and the inequality that made Grenfell possible? If equality is a core structuring norm of the UK democratic order, then why were the inhabitants of the tower unable to obtain better and safer living conditions? If equality before the law is a fundamental aspect of rule of law, why were they unable to find a way of effectively challenging the safety and adequacy of their housing conditions<sup>22</sup> – when the courts of England are occupied every day with disputes about property boundaries, freehold ownership, and planning conditions for expensive housing developments? If equality is a fundamental right guaranteed by law, then why did the tower's population reflect wider structural inequalities so precisely – and why did they end up housed in such vulnerable conditions, so close to some of the most expensive and best-appointed real estate on the planet?

One response to these questions would simply be to roll one's eyes up at the naivety of the questioner. No one with a passing awareness of Marxist theory, or of the multiple strands of critical legal scholarship that highlight how legal/constitutionalist discourse often operates so as to mask deep inequalities in the distribution of power and wealth, will be surprised at the gap between appearance and reality exposed by Grenfell. Anatole France's famous line about the majesty of the law permitting the rich and poor alike to sleep under bridges resonates today just as it did in late 19th century Paris.<sup>23</sup> Grenfell confirms that we live in a society marked by unjustifiable inequalities, which can take stark, brutal and life-swallowing form despite all the high-toned rhetoric associated with the idea of equality.

However, there is also something banal about this insight. It is important to be reminded that a gulf exists between legal/constitutional discourse and socio-economic reality – and Grenfell casts new and shocking light on the depths of that gulf. But, by itself, this reminder adds little by way of tangible analysis or critique, at least from the perspective of anyone who already looks at the interface between legal/constitutional norms and political economy with a critical eye. The Grenfell disaster is a visceral and tragic affirmation of what should be common knowledge: namely the truism that the discourse of non-discrimination, political equality and status equality more generally does not necessarily translate over into a just social order. However, by itself, this truism does not get us very far.

Indeed, there is a danger that viewing Grenfell in this way - as just another confirmation of the inevitable limits and associated hypocrisies of legal/constitutional discourse - may limit how we respond to the disaster. When conceptualised in these terms, the temptation is to treat such discourse as having little if any free-standing influence of its own. This can lead to the conclusion that it is a waste of time interrogating such discourse, or seeking ways to improve its substance. Such a passive view of legal/constitutional discourse generates fatalism about its potential as a mechanism of social change.<sup>24</sup> It also tends to reinforce narratives to the effect that

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<sup>22</sup> 'Residents Warned of "Catastrophic" Grenfell Tower Block Fire Three Years Ago – But Pleas "Fell on Deaf Ears"' (*The Telegraph*, 14 June 2017), <<https://www.telegraph.co.uk/news/2017/06/14/grenfell-tower-residents-warned-catastrophic-fire-three-years/>> accessed 11 November 2019.

<sup>23</sup> A. France, *Le Lys Rouge* [*The Red Lily*] (1894), ch. 7, <<https://www.gutenberg.org/files/3922/3922-h/3922-h.htm#link2HCH0007>> accessed 11 November 2019.

<sup>24</sup> For a powerful critique of this dynamic as it relates specifically to human rights, see P. O'Connell, 'Human Rights: Contesting the Displacement Thesis' (2018) 69(1) Northern Ireland Legal Quarterly 19.

legal/constitutional tools can and should play a very limited role in attempts to achieve a more just society, with arguments from a left-critical perspective about law's *incapacity* in this regard often overlapping with arguments from more conservative perspectives about law's inherent *unsuitability* for such a task.

However, such fatalism underestimates the extent to which legal/constitutional discourse can impact on wider social dynamics. Any serious account of the functioning of legal and constitutional systems recognises their relative autonomy from the background structure of socio-economic power relations, and their partial ability to influence the functioning of such relations.<sup>25</sup> As a consequence, arguments rooted in legal/constitutional discourse have the potential to change – or at least to problematise – certain elements of the status quo.<sup>26</sup>

Of particular importance in this regard is the way in which state action is supposed to harmonise with certain legitimating norms, which constitute the foundational basis of the legal/constitutional system – with equality of status looming large, as discussed previously. Behavior by public authorities which appears to contradict or undermine these legitimating norms is vulnerable to political and/or legal challenges. Highlighting a contradiction between the professed norm and the actual reality of applied state power can operate as a lever, opening up the state action in question to demands for justification.<sup>27</sup> Such demands can be challenged through political activism. Alternatively, they can be channeled through legal routes, in particular via administrative law review, human rights law or (in certain limited circumstances) anti-discrimination law.<sup>28</sup>

The language of equality has a particular potency in this respect. Appeals to the linked concept of political equality and equality before the law, and invocation of 'rights talk' as it relates to the human right to equality and non-discrimination, can have considerable normative 'bite' - not least because of their foundational status (as discussed above) to modern liberal democracy. It is important not to overstate the transformative potential of such equality claims: their normative appeal is often unable to overcome the gravitational pull of other competing considerations, including the inertia appeal of the status quo. But even failed challenges can have an impact: they can leave question marks over established practices, and provide the basis for subsequent new political and legal forms of activism.

As a result, reactions to Grenfell should go beyond the usual genuflections to the limits of legal and constitutional discourse. Yes, it is important to recognise how limited equality rights are - and to acknowledge the gap that so often exists between the abstract promises of legal/constitutional discourse and reality. But is also important to feel justifiable anger at the existence of that gap, and to consider how normative resources of UK constitutionalism and public law might be mobilised to help narrow it. Grenfell should be a call to action in this regard: a call not just to condemn, but also to

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<sup>25</sup> For an influential Marxist analysis of this dynamic, see N. Poulantzas, *State, Power, Socialism* (Verso 1980 [1978]). Poulantzas also emphasises the limits of such relative autonomy: in that regard, nothing in this paper should be read as suggesting that legal/constitutional discourse can provide a sufficient and/or total solution to the problem of socio-economic marginalisation.

<sup>26</sup> O'Connell (n 24).

<sup>27</sup> In this respect, see the interesting analysis of 'protestant constitutionalism' in J. Balkin, 'Respect-Worthy: Frank Michelman and the Legitimate Constitution' (2004) 39(3) *Tulsa L. Rev.* 485.

<sup>28</sup> For a context-specific analysis of this process, see L. Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge University Press 2011).

engage in legal and constitutional creativity aimed at exposing and bridging the gap between normative aspiration and sordid reality.

So, what might such a creative response look like? As a first step, it is important to identify how existing legal and constitutional norms are falling short, by reference to the facts and surrounding context of Grenfell. Then attention can turn to re-imagining these norms, and finding apertures within existing legal and political frameworks to contest the status quo.

#### **4. The Obscured Socio-economic Dimension to Status Equality**

To start with, it is important to bear in mind that the principle of equal status - while acknowledged to be of fundamental importance (as discussed above) – is potentially thin on substance. It precludes differential treatment which denies equal worth. But what qualifies as such treatment? The answer is often not very clear.

Various attempts have been made to put theoretical flesh on the bones of this principle, usually invoking notions of personal dignity and/or autonomy as a benchmark for determining what counts as a denial of equal worth – or, in the alternative, putting forward egalitarian accounts of how resource allocation should reflect the normative commitment to equality of status.<sup>29</sup> But, in common with much such post-Rawlsian theorising, these attempts to give substance to the equal status principle are often couched in very abstract terms.<sup>30</sup> Furthermore, they often find little purchase in the day-to-day reality of how politics and law play out against the background of contemporary forms of politico-economic structuring.<sup>31</sup> At that level, very little consensus exists as to what respect for equality of status entails – beyond (i) generalised commitments to certain abstract norms (such as e.g. ‘equal opportunity’ and ‘fair treatment’), and (ii) a few specific commitments to carefully delineated and circumscribed baseline standards (such as e.g. non-discrimination on the protected grounds set out in the Equality Act 2010, no charges for UK residents to access the NHS, and so on.) Beyond that, the meaning of equal status as a core legitimating value remains contested.

As a consequence, the equal status principle has limited ‘bite’. Its normative importance is acknowledged - in the abstract. However, it only exerts a tangible impact on public authority decision-making in certain limited circumstances.

##### **A. The Limited Reach of Status Equality in the Political Sphere**

In the political sphere, the principle is often invoked in support of redistribution or recognition claims, usually but not exclusively by left-leaning politicians and social movements. However, in the absence of any real consensus about the substantive content of this principle, it serves more as a rhetorical trope than as an agreed common

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<sup>29</sup> For an excellent overview, see S. Gosepath, ‘Equality’, in E. N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/entries/equality/>> accessed 11 November 2019.

<sup>30</sup> N. Sultany ‘What Good is Abstraction?: From Liberal Legitimacy to Social Justice’ (2019) 67(3) *Buffalo Law Review* 823.

<sup>31</sup> K. Forrester, *In the Shadow of Justice* (Princeton University Press 2019).

point of reference. As such, its impact is often muted. As discussed above, politicians like to acclaim its importance – but such acclamation tends not to carry with it much in the way of substantive commitments.<sup>32</sup>

Thus, for persons in the situation of the inhabitants of Grenfell Tower, the way the democratic system is structured around the principle of ‘political equality’ has little meaning. Their voices will inevitably not count much within the democratic process, either at local, regional or national levels, for all the usual reasons that the views of socio-economically disadvantaged groups are discounted in the political process.<sup>33</sup>

In general, status equality may constitute the underpinning principle of the UK’s democratic system, but it is understood primarily in abstract terms: the principle receives universal lip-service, but little of this translates over into substantive commitments. In particular, it is not assumed to entail the type of democratic citizenship advocated by R.H. Tawney amongst others, which was predicated on the need for state action to enable everyone to participate as meaningful equals in the fashioning of collective life.<sup>34</sup> Instead, the system’s commitment to equality is often understood to be exhausted in its formal commitment to ‘one person one vote’. Outcomes of elections, including the type of policy decisions that contributed to the vulnerability of Grenfell’s residents, are sanctified by being generated by a political system formally predicated upon status equality.<sup>35</sup> However, this glosses over the substantive thinness of the concept of political equality underpinning the system, and helps to perpetuate a politically malnourished understanding of what meaningful equality should entail.<sup>36</sup>

This is not to suggest that issues of socio-economic inequality do not feature in contemporary political debate. Indeed, at the time of writing, the current Labour Party leadership is making such issues the focus of its 2019 general election campaign. However, there tends to be strikingly little discussion of the integrity of the current political system from an equality perspective, and what a substantive commitment to amplifying the political voice of marginalised socio-economic groups might entail in practice.

## **B. The Limited Reach of Status Equality in the Legal Sphere**

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<sup>32</sup> As an indicator of this gap between rhetoric and substance, see the statistical analysis of income inequality levels in F. McGuinness and D. Harari, *Income Inequality in the UK*, Commons Briefing Papers CBP-7484 (House of Commons Library, 2019) <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7484>> accessed 11 November 2019.

<sup>33</sup> For the impact of negative poverty on social participation and influence in general, see E. Ferragina et al, *Poverty, Participation and Choice* (Joseph Rowntree Foundation 2013) <<https://www.jrf.org.uk/report/poverty-participation-and-choice>> accessed 11 November 2019.

<sup>34</sup> R.H. Tawney, *Equality* (Allen & Unwin 1931).

<sup>35</sup> Scott Veitch has accurately identified ‘the dispersal and disavowal of responsibility’ for human suffering as a feature of legal/constitutional discourse: S. Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish 2007). However, the same charge could also be levelled at the *de facto* functioning of the political process

<sup>36</sup> See M. Loughlin, ‘What Would John Griffith have made of Jonathan Sumption’s Reith Lectures?’ (2019) *Political Quarterly*, Early Access, <<https://onlinelibrary.wiley.com/journal/1467923x>> accessed 11 November 2019.

In the legal sphere, the principle of equal status is given tangible effect in two distinct if inter-connected ways. However, both these ‘modes’ of giving legal expression to the principle are again limited in scope and substance. They can impact upon public authority decision-making in a way that opens up limited accountability channels for persons in analogous situations to the Grenfell residents. However, these channels ultimately constrain the flow of equality reasoning in a way that deprives it of much socio-economic impact.

First of all, the equal status principle is given effect by legal rules mandating sameness of treatment between similarly situated categories of person. Examples of such rules include the ‘one person one vote’ rule that applies to UK nationals over the age of 18 who are not serving time in prison or otherwise subject to a legal incapacity,<sup>37</sup> or the abovementioned rule regarding NHS access,<sup>38</sup> or the baseline entitlement standards applied in the social welfare context.<sup>39</sup> Such rules often take the form of legislative requirements. Alternatively, they can arise as a by-product of administrative/common law requirements mandating consistent treatment.<sup>40</sup> Either way, these rules are concerned with guaranteeing formal equality of treatment before the law and in accessing ‘prized public goods’<sup>41</sup> – with equal worth assumed to be reflected in the consistency of treatment.

However, the formal equality approach underpinning such rules provides little in the way of meaningful guidance as to when individuals and groups are ‘similarly situated’, i.e. when they should be treated in a consistent manner. This reflects how the concept of ‘equality before the law’ and related notions are inherently opaque: their substantive meaning needs to be fleshed out by appeals to other values and norms.<sup>42</sup> This ensures that formal equality is rarely a useful tool by itself in identifying who should be treated on a similar basis.<sup>43</sup> Only patently unreasonable differences of treatment, whose ‘wrongness’ can be easily demonstrated to a court, will generally be vulnerable to attack for falling foul of formal equality concerns. This is illustrated, for example, by the rarity with which the common law principle of equal treatment has been successfully invoked in administrative law cases.<sup>44</sup>

All this means is that legal requirements rooted in formal equality do not have much to offer individuals and groups in analogous situations to the inhabitants of Grenfell – or, to be more precise, that the equality dimension to such rules adds little beyond requiring consistency of treatment and adherence to basic principles of rationality, and thus is of limited value to individuals and groups arguing for a much more substantive understanding of the principle of equal status.

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<sup>37</sup> S. 1 Representation of the People Act 1983.

<sup>38</sup> See eg s. 1(4) of the Health and Social Care Act 2012 and associated legislation.

<sup>39</sup> See eg s. 3 of the Welfare Reform Act 2012 and associated provisions.

<sup>40</sup> *R (Rotherham Metropolitan Borough Council) (n 14)*.

<sup>41</sup> C. McCrudden, ‘Equality and Non-Discrimination’, in D. Feldman (ed), *English Public Law* (OUP 2004), paras. 11.04-11.07, p 582-583.

<sup>42</sup> P. Westen, ‘The Empty Idea of Equality’ (1985) 95(3) *Harvard L. Rev.* 537.

<sup>43</sup> As McColgan has argued, much discrimination has been ‘widely regarded as acceptable, even common-sensical’ until prohibited by statute: its ‘irrationality’ has rarely been self-evident: A. McColgan, *Discrimination, Equality and the Law* (Hart 2014), 12.

<sup>44</sup> See in general C. O’Cinneide, ‘Equality – A Core Common Law Principle, Or “Mere” Rationality?’ in M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (CUP 2020), forthcoming.

This is not to suggest that this formal equality dimension is valueless or lacking in utility. Formal equality backbones the baseline standards set out (for example) in housing, social welfare and access to justice legislation, while rationality review constrains the freedom of public authorities when using the wide discretionary powers they possess in these areas. It thus serves a useful structuring function, while also protecting disadvantaged groups from arbitrary neglect or ill-treatment. However, beyond that, formal equality contributes little to protecting the equal worth of disadvantaged groups within society. It affirms their 'sameness' before the law, and offers some protection against overtly inconsistent treatment: beyond that, it provides no tangible standards for testing the adequacy of baseline levels of social provision, or the justifiability of the categories used to determine who does or does not benefit from these baseline standards. The formal equality approach also provides no normative guidance as to when dissimilar treatment may be required to meet the needs of particularly disadvantaged groups. Furthermore, as with 'political equality', it can sanctify decisions reached under its rubric, even when their impact may actually deepen substantive inequalities within society.<sup>45</sup>

The second avenue for giving legal expression to the equal status principle is through 'substantive equality' requirements, i.e. legislative and case-law rules that protect individuals and groups against specific forms of discrimination which have a historic link to exclusionary social practices predicated on the subordination of particular groups.<sup>46</sup> The above-mentioned provisions of the Equality Act 2010 are an example of such measures, including the positive equality duty set out in s. 149 of the Act. Similarly, Article 14 ECHR as interpreted and applied by the UK courts and the European Court of Human Rights (ECtHR) is in effect a substantive equality measure, as state action which involves differences in treatment based on 'suspect' grounds such as race and gender is subject to more exacting scrutiny under the proportionality test than applied to other grounds.<sup>47</sup>

This second mode of giving effect to the status equality principle has generated a range of specific legal controls, which in turn have had considerable social impact. The combined effect of the Equality Act 2010 and Article 14 ECHR is that state action that discriminates on the basis of a suspect ground will be subject to a high degree of scrutiny – and may even be prohibited outright, as is the case with direct discrimination on grounds of most of the protected characteristics covered by the Equality Act 2010. These requirements have impacted on multiple different areas of law and policy.<sup>48</sup> They have also had a material impact on the lives of many socio-economically disadvantaged individuals and groups, with this being particularly true in relation to sex, race and disability discrimination law. In general, they represent the most tangible manifestation of the equal status principle.

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<sup>45</sup> See Poulzantas (n 25) for a Marxist analysis of this dynamic.

<sup>46</sup> Different authors use the term 'substantive equality' in different ways. I use it here to refer to all non-discrimination legal requirements that focus on particular 'suspect' grounds of discrimination – which by virtue of this focus acquire more substance than more abstract guarantees of formal equality. See O'Cinneide (n 44).

<sup>47</sup> See eg *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 (UK House of Lords); *Carson and Others v United Kingdom* (2010) 51 EHRR 13 (ECtHR).

<sup>48</sup> See eg the prohibition of pregnancy discrimination in line with the requirements of ss. 17 & 18 of the Equality Act 2010 and preceding case-law.

However, once again, the scope and substance of these substantive equality standards is subject to certain significant constraints. These are of particular relevance to the inhabitants of Grenfell and individuals and groups in analogous situations, i.e. in situations of heightened socio-economic vulnerability.

To start with, the substantive equality standards only apply to discrimination linked to specific characteristics – or, when it comes to the wider scope of Article 14 ECHR, particular forms of discrimination linked to a specific ‘status’ ground. Intersectional forms of discrimination are not covered, at least when it comes to the Equality Act 2010.<sup>49</sup> The situation with Article 14 ECHR remains unsettled – a general problem with many aspects of the Article 14 case-law.<sup>50</sup>

Furthermore, socio-economic status is not a protected characteristic under the Equality Act. Nor are analogous grounds such as ‘social origin’ that are protected in other legal systems.<sup>51</sup> The one provision in the Equality Act 2010 that directly engaged with socio-economic inequalities was s.1 of the Act, which made provision for a positive duty to be imposed upon certain public authorities requiring them to take account of the impact of their policies on socio-economic disadvantage. However, outside of Scotland the provision was never brought into force by ministerial order. Even if it had, the impact of this duty would be fairly circumscribed: it is weaker in effect than the general equality duty set out in s. 149 of the 2010 Act, which imposes more demanding obligations on public authorities to promote equality of opportunity across the specific protected characteristics protected by the Act.

This is not to say that socio-economic inequalities are completely insulated against challenges arising from the substantive equality dimension of UK law. In contrast to the 2010 Act, Article 14 ECHR is capable of being applied to discrimination on the grounds of socio-economic status and related forms of vulnerability.<sup>52</sup> Furthermore, the prohibition on indirect discrimination on the basis of the protected characteristics covered by the 2010 Act is capable of being leveraged to challenge certain forms of poverty-linked disadvantage.<sup>53</sup>

However, the extent of this leverage is limited. Both the UK and European courts in applying Article 14 ECHR have made it clear that governments enjoy a wide margin of deference when it comes to resource allocation decisions.<sup>54</sup> A similar leeway is granted by the courts when applying the objective justification leg of the test for indirect discrimination under the 2010 Act.<sup>55</sup> In general, the UK courts in particular have been reluctant to review government decisions touching on the allocation of housing, welfare and other forms of social support, unless such decisions are

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<sup>49</sup> S. 14 of the Equality Act 2010 introduced a prohibition on ‘combined discrimination’, consisting of less favourable treatment based on a combination of two of the protected characteristics covered by the Act. However, the Ministerial order needed to bring this provision into force has not been forthcoming.

<sup>50</sup> See eg App no. 29518/10, *N. B. v. Slovakia*, Judgment of 12 June 2012.

<sup>51</sup> Section 351 of the Australian Fair Work Act 2009 prohibits discrimination in employment on the basis of ‘social origin’.

<sup>52</sup> See eg *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] AC 311; *Hurley v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin).

<sup>53</sup> See eg the sex discrimination dimension to *R (Unison) v Lord Chancellor* [2017] UKSC 51.

<sup>54</sup> See eg *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33; *Andrejeva v Latvia* (2009) 51 EHRR 28.

<sup>55</sup> See eg *R (Rutherford) v Secretary of State for Work and Pensions* [2016] UKSC 58.

‘manifestly without reasonable foundation’<sup>56</sup> – a bar set so high as to effectively nullify the potential of using either Article 14 ECHR or the 2010 Act to challenge such decisions, except in exceptional circumstances.

The case-law on this point remains fluid: in the recent case of *JD v UK*, the European Court of Human Rights elected to apply a more demanding standard in assessing the proportionality of the UK’s ‘bedroom tax’ and its impact on women, and in particular female victims of domestic violence.<sup>57</sup> However, for now, the general pattern of the case-law is set: legal guarantees of substantive equality, even if they are capable of being applied to socio-economic disadvantage, will generally have little ‘bite’ in this context.

### **C. *The Limited Scope of Status Equality as a Core Constitutional Value***

In general, the principle of status equality has been understood and applied within UK law and politics in a half-hearted manner. As an abstract concept, it underpins the UK constitutional order and serves as the foundation stone for both its democratic system and the rule of law. As a political totem, it attracts plenty of rhetorical veneration. As a legal norm, it is given effect through both ‘formal’ and ‘substantive’ routes. However, it only acquires much in the way of tangible content when it comes to the latter route – and, even then, its impact is largely confined to combating discrimination on the specific ‘identity’ grounds set out in the Equality Act 2010.

It is hard to escape the conclusion that the equal status principle is applied in the UK context subject to certain implicit presumptions about its addressees. The individuals whose dignity it protects are in essence assumed to be free-standing monads, possessing all the necessary inherent autonomy to participate as equals in society - as long as their formal equality is acknowledged at the legal and political levels, and they are protected against certain specific and tightly-defined types of discriminatory treatment. The role of the state in generating the necessary conditions for meaningful equality of participation is largely glossed over, or reduced to an empty trope of political rhetoric. Equality is understood in predominantly negative terms, as involving the protection of individuals against measures that would deny them sameness of treatment in the political and legal spheres. In contrast, the concept of equality as a positive process, lifting individuals up and securing their capacity to participate in shaping their society, barely enters the picture.

It is thus fair to characterise the dominant UK political and legal take on equality as embedded in a classically bourgeois mindset, that assumes individual self-sufficiency and participative capacity to be the default norm rather than something that (for so many people) has to be generated, supported and maintained by proactive state intervention. Furthermore, the political and legal accountability structures built up around the equal status principle are similarly structured around this assumption. No political accountability mechanisms exist which open up specific ways for vulnerable socio-economic groups to articulate their concerns, and no particular political duties are assumed to exist to the poor that are not similarly owed to the population as a

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<sup>56</sup> *Ibid* [28]-[38].

<sup>57</sup> *JD and A v UK*, App no. 32949/17 and 34614/17, Judgment of 24 October 2019.

whole. Similarly, legal accountability mechanisms make little or no provision for socio-economic inequalities to be challenged through law. Indeed, various ‘containment’ doctrines exist in administrative, discrimination and human rights law that effectively seal off socio-economic issues from legal challenge – principally through the framing of resource allocation decisions *in toto* as a judicial ‘no go’ area.<sup>58</sup> Instead, such challenges are diverted into the political sphere – where they often end up finding no meaningful purchase.

All this helps to explain why the equal status principle was of such limited practical relevance to the inhabitants of Grenfell. In the abstract, they enjoyed equal worth in the eyes of the law. However, beyond the formal manifestations of this principle, it had little to say to their specific situation – either in the political or legal realms. It gave the tower’s inhabitants little if any political purchase when it came to their attempts to focus local authority attention to their living conditions. Few if any legal avenues were open to them either. For Grenfell’s inhabitants, equality meant little beyond the formal application of baseline standards - which appear to have been inadequate in this case, specifically in respect of the tower’s cladding and more generally in relation to the protective measures that should have been in place for its vulnerable residents.<sup>59</sup>

## 5. Giving Substance to the Socio-Economic Dimension of Status Equality

So, given the radically circumscribed nature of the equal status principle as applied in UK law and politics, is there anything to be done about this? The limits of the status quo are apparent – but how to create something new? What form should the creative and critical response that is warranted by Grenfell take in this context?

The first step should be to acknowledge the limits of the equal status principle as it is given effect in the UK law, in both its political and legal dimensions. The limits of its substantive dimension, its lack of ‘bite’ in relation to socio-economic discrimination, and the manner in which formal equality can serve to disguise deep and rooted inequalities are all significant. By extension, complacent affirmations of the adequacy of existing law and politics as they relate to equality of status need to be rejected – and a cold eye cast on claims that the democratic origins of the status quo constitute an adequate justification for the inequalities it harbours.

But this does not entail abandoning faith in the idea of equality as an animating, substantive norm capable of influencing the shape and functioning of the political system, or of being given effect through law. As already discussed, giving up on equality in this way would constitute an unjustified foreclose of the potential for legal/constitutional discourse to be an agent of change. Instead, an appropriate creative response to the Grenfell disaster would be to seek new ways of giving more substance to the idea of equal status, and in particular to give it much greater legal and political ‘bite’ in the socio-economic context. This can be done by building on the

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<sup>58</sup> C. O’Cinneide, ‘The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review’, in L. Lazarus, C. McCrudden and N. Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014), 297-315.

<sup>59</sup> See the papers by Susan Bright and Douglas Maxwell, and by Daniela Nadj, in this special edition.

critical analysis set out above as to the blind spots of how equal status is currently conceptualised, and opening up new apertures within existing legal and political structures with a view to making state actors more accountable to those at the bottom of the social ladder.

What might such new apertures consist of? There is plenty of academic work being produced at present that can be drawn upon for inspiration. The following outline aims to give a sense of the possibilities that exist.

First of all, there is the growth of interest in the concept of social rights, and of finding ways to give such rights greater substance within the UK's constitutional order. NGOs such as Just Fair have been campaigning strongly on this issue,<sup>60</sup> while various academics have argued the case for such rights to be protected in law through legislation and/or a HRA-style mechanism.<sup>61</sup> Giving such rights greater 'bite', however achieved, would be a way of strengthening the baseline standards that are supposed to protect status equality within the UK.

So too would the general activation of the s.1 Equality Act 2010 duty to consider the socio-economic impact of public policies, as has been done in Scotland.<sup>62</sup> While this duty would be limited in scope and substance, it might have the potential to focus more political and legal attention on socio-economic inequalities – as well as giving campaigning organisations an additional legal lever with which to press for greater accountability from public bodies.

Other lines of analysis focus on enlarging the scope of existing anti-discrimination law. Arguments have been made that the prohibition of discrimination on the basis of the standard protected characteristics set out in the Equality Act needs to be enlarged by taking the intersectional impact of poverty into account.<sup>63</sup> This list of protected characteristics could also be enlarged by extending the scope of anti-discrimination law to cover discrimination on grounds of 'social origin', 'socio-economic background' or some similar formulation.<sup>64</sup>

These are all valuable lines of argument. However, a deeper shift may be required before any of these proposals become law – or, if they become law, before they acquire real impact. As long as socio-economic concerns are viewed as marginal to the equal status principle as it is conceptualised in UK legal/constitutional discourse, forms of legal regulation that try to alter this situation will inevitably be regarded with suspicion. Furthermore, the 'containment' doctrines that limit legal accountability in the resource allocation sphere may still insulate public authority decision-making from substantial challenges on socio-economic equality grounds – even if legislative reforms opens up new formal possibilities in this regard.

Thus, the real challenge is to find ways of highlighting the missing socio-economic dimension to status equality in both political and legal discourse, and to find ways of articulating when the treatment or neglect of marginalised groups has crossed

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<sup>60</sup> See the outline of their activities at <<http://justfair.org.uk>> accessed 11 November 2019.

<sup>61</sup> See eg J. King, *Judging Social Rights* (OUP 2012); P. Hunt, 'How to Advance Social Rights without Jeopardising the Human Rights Act 1998' (2019) 90(3) *Political Quarterly* 393.

<sup>62</sup> The Equality Act 2010 (Commencement No. 13) (Scotland) Order 2017, 2017 No. 403 (C. 30). See also K. Boyle and E. Hughes, 'Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights' (2018) 22(1) *International Journal of Human Rights* 43.

<sup>63</sup> S. Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 *Human Rights Law Review* 411-440.

<sup>64</sup> See the contribution to this special edition by J.C. Benito Sánchez.

the line into dignity-denying territory. Some of the developing Article 14 ECHR case-law as it relates to the treatment of vulnerable categories of women or persons with disabilities show how such arguments can be articulated even within the limits of the existing law.<sup>65</sup> The careful documentation of the drastic failings of current UK anti-poverty strategy set out in Philip Alston's 2018 report is another example of such analysis.<sup>66</sup> Such argumentation both exposes the limited conception of status equality that prevails in the UK at present, and also highlights its internal contradictions by shining a spotlight on the gap between form and substance. It asks an inescapable question: how can the fundamental importance of status equality as a constitutional principle be reconciled with this reality? And, in so doing, it makes it more difficult to gloss over the socio-economic dimension to equality, and the gap this leaves in UK legal/constitutionalist discourse.

There is much more work to be done. The boundaries of existing legal protection could arguably be stretched further – especially now that the *JD v UK* judgment of the European Court of Human Rights (referred to above) may have undermined the 'manifestly without reasonable foundation' test that has limited the reach of Article 14 into socio-economic terrain in the past. Developments within the devolved regions may also encourage new thinking, especially with the implementation of the s.1 socio-economic duty in Scotland. But there is also a need for fresh thinking, that goes beyond the limited parameters of what exists at present. Can legislation be designed to give effect to a UK-specific approach to social rights, as proposed by Paul Hunt<sup>67</sup> – which may put flesh on the bones of status equality as it relates to the socio-economically marginalised? At the political level, might existing parliamentary arrangements be shaken up, to ensure the perspectives of vulnerable groups become front and centre in accountability procedures – perhaps through new committee structures, or the establishment of special 'public advocate' positions whose role should be to highlight the concerns of the socio-economically excluded? Can regional and international social rights standards play a role in this regard – and how might they link with the well-established 'identity' protection standards already recognised in UK law via the 2010 Act? And, finally, how might the terrible lessons of the Grenfell disaster and its aftermath serve as a prod to re-think what a serious commitment to status equality should entail – in a context where the principle has often been deprived of anything resembling real substance?

## 6. Conclusion

It bears repeating that the Grenfell disaster shows that inequality kills. It restricts life chances, limits redress mechanisms, and creates life-endangering vulnerabilities. However, despite the central importance of status equality to the scheme of UK constitutional values, the type of socio-economic inequalities that lead to Grenfell are

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<sup>65</sup> See eg the *R (Rutherford) v Secretary of State for Work and Pensions* (n 55) and *JD v UK* (n 57).

<sup>66</sup> P. Alston, *Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights*, London, 16 November 2018, <[https://www.ohchr.org/Documents/Issues/Poverty/EOM\\_GB\\_16Nov2018.pdf](https://www.ohchr.org/Documents/Issues/Poverty/EOM_GB_16Nov2018.pdf)> accessed 11 November 2019.

<sup>67</sup> Hunt, (n 61).

glossed over in both legal and political discourse. This has to be challenged, by leveraging the gap between normative aspiration and the brutal reality of embedded inequalities in contemporary Britain. This paper outlines the type of critical and creative approach that may be required to mount such a challenge. Grenfell demands no less.