

**DISCRIMINATION LAW ASSOCIATION, 13 December 2004**

**'Understanding equality: the need for discrimination'**

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*Equality of esteem: the ethical basis for human rights*

I have always been very nervous about the concept of equality. In a book I did recently on human rights law, for a long time I thought I would have a chapter on equality but it got ditched when I realised I did not know what to put in it. Then for a while I thought that equality might be one of the underlying principles that I was trying to develop to explain what I thought underpinned the Human Rights Act. But whereas I could come up with three which seemed to me to work – protection of civil liberties, the principle of legality, and respect for human dignity – I could not for the life of me see how I could squeeze in something about equality. True there is article 14 of the European Convention with its qualified prohibition of certain kinds of discrimination. But it seemed to me that this was little more than an application of something rather than the something itself. So equality did not make it into the final list of principles. This has worried me – and it might yet worry some reviewers.

It is only in the last little while, and since I wrote that book, that it has begun to dawn on me where equality fits. It is neither a chapter nor a principle: I was right about each of these. Instead it is the meta-principle, the fundamental ethical insight from which the rest of what we now think of as human rights flows. So late in the day, and with all the enthusiasm of a recent convert, I have become fanatical about equality. Having grasped what it means for me, I want everybody to share in my excitement and to see it in the same way as I do.

So how do I see it? The human rights story is the latest in a long line of historical narratives which seek to give verbal expression to a feeling which, though battered and bashed, subverted and submerged from time to time, seems to be joyfully ineradicable and unexpugnable. This is the feeling that we are all, each and every one of us, worth something – and worth something not in view of what we are, how we look, whether all our parts (physical and mental) are working – but worth

something simply in view of our humanity. I don't think it is necessary now to go on to reflect on how it is that from time immemorial, successive generations of men and women have sought to reflect – in their actions; in their art; in their projects for life; and also in their words – the imaginative idea of a sympathetic connection with the other. Nor need we pause for too long on the question why this 'other' has not stopped at sexual partners; at blood relations; at the limits of wider family circles; at communities or provinces or states; at people of the same gender or colour or social origins; or anything else. Of course the limits of many people's horizons are restricted in this way, to variously expansive or narrow mirror-images of themselves. But this is not true of the thread of civilization that I am concerned with this evening, the spark that when encountering the stranger has insisted from time immemorial not 'pull up the ladder' but 'throw out the lifeboat', that when faced with tragedy says not 'Glad its not me' but rather 'what can I do to help'.

Wondering why we express ourselves like this is not the same as looking at how this sentiment has unfolded through time. In earlier ages it was through the medium of religious belief and authority that the web of human interconnectedness was spun. Later it was the ethic of the enlightenment that preached 'do unto others as you would have done to yourself' without (as it soon transpired) the need for Deistic authority: translating the famous Sermon from the mount to the philosophy classroom. Now it is clear that both these big movements in our history, the pre-modern and the modern for want of better descriptive phrases, contained ugly exclusivities within them: a sense of spiritual superiority over the Pagan in the first, and of intellectual superiority over the savage in the second. That we know these nasty sides existed does not mean that we cannot now appreciate the positive legacies these eras have bequeathed us: they were early purveyors of our precious commitment to human equality, to the dignity of each and every individual *qua* individual, without the existence of which (however transiently) we could not make the words we deploy today express the commitment to equality that we want them to exhibit.

And how is this meta-principle of equality manifested today? Neither the pre-modern nor the modern explanations fit well with what drives the ethical actions of our contemporary culture: we are now too sceptical, too anti-foundational for this. As a

culture we neither believe in religion nor trust in our minds to guide us to objectively right answers. That there is plenty of good is plain for all to see, but we live in an era of relativism when nothing is true or false, good or bad except what we happen to agree to describe as such. How can any kind of ethic come out of such a morass of inter-subjectivity? This is where human rights as an idea has its most decisive contribution to make, as the best metaphor around with which to express the enduring civilising thread that I have been discussing, our empathetic openness to the other.

If we don our contemporary garb of post-modern scepticism, shedding God and reason along the way, we can see that the great breakthrough in equality was achieved by Charles Darwin. From him was deduced the pivotal post-religious and post-philosophical insight that we are all little more than (as Nietzsche put it) 'clever animals'. From this perspective there is no extra bit of us called soul or brain of which some of us (men, priests, rulers, believers, Enlightenment philosophers, imperialists) might have more than others. We are all in this life project together, made up by rather than tethered to our bodies, all seeking collectively and individually to do the best we can. Each of us matters, no more nor no less than any other.

Working through this large insight has given our culture many of the good bits that we enjoy today. The *collective* has come to be reflected in our commitment to the democratic form of government, the best system available for identifying what actions are most likely to lead to the general flourishing of the community, and by far the best suited to an era in which the search for objective truth has been set aside as either wrong in principle or impossible of achievement. But the *individual* also matters because of the recognition that none of us can any longer be guaranteed to be, or be required to be, heading on the same path towards some objectively verifiable theological or rational truth. So radical pluralism becomes not only intellectually viable but an essential component of this new pragmatic world. This is why the idea of a zone of private amorality, a space where you can do what is right for your own private flourishing so long as it interferes with no else, is of central ethical importance to so many contemporary civil society and political activists. (Note the point here is to do what suits you, not some notional comparator against whom you should compare

yourself. I will return to this when I come back to discrimination law at the end of this talk.)

But why care about any individual's life projects? If the analogy with animals is exact, then we are forced reluctantly to observe that there are not many cats, dogs and the like out there working to ensure that every such creature has the best feline or canine chances available to this or that litter. It is not that easy to deduce from an empirical observation (we are all the same; we are all animals) the ethical proposition that we must *therefore* work together towards collective and individual human flourishing. That *therefore* simply doesn't work; it is a bridge which without further support simply collapses for trying to connect across too wide a chasm. The idea of human rights is brought in at this point to provide this essential support. It helps to turn the *fact* of our equality into the basis of an *ethical theory* as to how we should act. We are equal; *therefore* we have a *right* to equality of respect; *therefore* we each deserve a chance to do the best we can with our lives, according to our own lights. In this way, as Richard Rorty puts it, the usefulness of human rights lies in the way the phrase explains 'our actions by identifying ourselves with a community of like-minded persons – those who find it natural to act in a certain way'.

Now this does not begin to explain whether human rights is right or wrong, merely that they are an indispensable tool in supplying an ethic for selfless action in our post-modern age. The words capture a commitment to equality that older terms – like Christ, Socialism, and Moral Obligation – no longer quite pull off. The indispensability of the phrase 'human rights' derives from the fact that contemporary western culture cannot bear the consequences of its own post-modernism, its addiction to the nothingness of 'discourse as the only truth'. Human rights talk is the way we articulate the reaching out for the other that has been part of our civilisation through first pre-modernity and then modernity and which is also consistently to be found (albeit in other forms) in different cultures as well. I hope that it is more than merely an appealing echo of two previous eras when first God and then reason said what we want to hear, that there is right and wrong, that there is truth which can make us good, that life is worth something more than our own skin, our instinct, and the noises that we call talk. Echoes dissipate over time, and we must all work to ensure that this sound is kept alive.

## *Putting Equality into Practice: the proposed Equality and Human Rights Commission*

With this thought about the desire for durability in our minds, I want now to consider the interrelationship between theory and practice, the application of my meta-principle of equality in the so-called 'real world', first of politics and then of law. In the context of the first of these, our natural port of call is the new Equality and Human Rights Commission that the UK Parliament is soon to be asked by the Government to create. One of the criticisms of New Labour that will be most puzzling for historians will be the assertion that the Party has lacked any kind of ideological convictions. True, the beliefs that have governed the organisation over the past ten years have not been traditional, but that is not to say that they have not existed, nor been deeply entrenched. The Party in its current brand has been the epitome of a post-philosophical movement: it has fitted well with its times which may be why it is proving so robust and so politically durable: eight years in and still the only ideological show in town. The White Paper that lay behind this Commission initiative tells us more about what makes New Labour tick than we are used to discovering in the froth generated by spin and political point-scoring. Entitled *Fairness for all: A New Commission for Equality and Human Rights*, it was the Government at its most spiritual, and most ideologically determined as well. Note a new term here, completing a triangle of fundamentals: *fairness* added to *human rights* and *equality*.

The immediate motivation for the proposed legislation was an EU-inspired deepening in the range of persons who can in future look to the law for protection against discrimination. As everyone here knows I am sure, in its present form we have statutes covering gender, race and disability, and we are soon to have analogous laws prohibiting discrimination on the basis of sexual orientation, religious belief (and non-belief), age, and the fact of undergoing or having undergone gender reassignment treatment. Race, gender and disability each have their own supportive – and statutory – commission to back up their cause and it would have been unwieldy to have added another four commissions to the mix. On the other hand a protected category without a commission would have seemed a second-class product. So the Government went for the solution of a mega-commission, covering all of the new grounds of discrimination, and with powers of investigation, enforcement and so on similar to those currently enjoyed by the bodies already in place.

Matters could have been left there, with the relevant authorities presenting the change as being merely a tidying-up operation imposed by Brussels. But the Government has chosen to go much further, embracing the project with enthusiasm and expanding into entirely new terrain. According to the White Paper, equality law is important because 'fairness for all is the basis for a healthy democracy, economic prosperity and the effective delivery of our public services' and for this same reason respect for human rights is also vital. Human rights is in this context a woollier phrase than equality, but the White Paper roots the term in 'fairness for all, establishing basic principles of dignity, respect and protection for everyone, regardless of our differences.' Human rights 'are inclusive and affect everyone'; as such they 'will give the work of the [new Commission] a real impact at ground level'. The promotion of a 'wider culture of respect for human rights will also be important in developing strategies to promote good relations between different groups of people, building and encouraging cohesive communities.' While the Commission's role with regard to human rights will be more passive than in the area of equality, it will have important responsibilities in driving the human rights agenda in this country.

But what is the nature of that agenda? What does it mean to assert that we should have a better 'human rights culture'? That classic new Labour word fairness is the key here, with both equality and human rights being subsets of an overarching vision of a fair society. New Labour's view of humanity is informed by three assumptions, only one of which – the importance of globalisation and migration as productive of a more ethnically and culturally diverse Britain – is on explicit display in this White Paper. But Labour also implicitly accepts that fairness can be achieved neither via a closer identity with class and through collective action on the one hand, nor by the unregulated interplay of market forces on the other. With these options off the agenda, fairness becomes an insistence that we respect the diversity that now permeates our society – a diversity rooted in the multiplicity of our identities (gay/gender/ethnicity etc), in the variation in our national and cultural backgrounds, and in our different needs as users of public services.

We are back in the realm of philosophy. The equality and human rights agenda is about welding these various diversities into a coherent cultural whole. A key goal is to

ensure 'successful integration, through promoting inclusive, cohesive communities based on a common culture of shared values'. Human rights will help 'shape and promote the shared values that underpin citizenship ... providing a language that we can all share'. They function 'as a framework of core values that can underpin cohesive communities'. The new Commission will set about '[c]reating a society that is cohesive and at ease with itself, that is able to respect and celebrate differences while at the same time recognising and challenging discrimination or unfair treatment'.

Labour's vision of civilised values is more about being able to disagree than it is with whether one is right or wrong: what matters is that we respect each other even where we think each other off-beam. But as to whether we actually are wrong or right, Labour is silent, embarrassed perhaps even to raise the point. The foundational underpinning of Labour's ethic of mutual respect is so ephemeral as to be hardly foundational at all, and as such sits easily in a post modern world of uncertainty and of doubt, where to agree to differ is to muster as much moral energy as is appropriate in a truly civilised society.

It is because this approach to morality chimes so well with the broader societal picture that the proposed Commission is likely to be a great success. The EU is already engaged in the fascinating project of trying to get people to commit themselves to diversity the way they once did only to countries and their immediate communities. The Human Rights Act 1998 is in many ways a hymn to diversity, and earlier this year produced a major decision in the House of Lords in favour of the succession rights of a homosexual partner in a long-term relationship (*Ghaidan v Mendoza*). You know an idea is becoming well-embedded in a culture when the judiciary begin to take it for granted as self-evidently right.

#### *A false friend of equality: discrimination?*

Mention of the Human Rights Act reminds me of my promise to connect my meta-principle of equality with the real world of law as well as of politics. How does our law on equality chime with the diversity agenda that I have been describing as unfolding

in both the (post-) philosophical and the political worlds? Does its version of equality not sit very uneasily with the pluralism and celebration of difference that my meta-principle seems to demand? Does not UK discrimination law push in exactly the opposite direction, towards homogeneity, the legalisation of difference, the fusion of all into a single standard comparator? It is to this issue that I now turn, in the final part of my talk.

I want to approach this subject by talking about a remarkable book published last year by Professor Tim Macklem at King's College London, *Beyond Comparison: Sex and Discrimination*.<sup>1</sup> Macklem's argument in this absorbing, well-written and provocative book is that sexual difference exists and matters but not in the way we have tended to assume that it does. His thesis is that the idea of sexual equality needs to be reinterpreted so as to be rooted not in any gender comparator as such but in the idea of what is involved in leading a successful life, and in particular what it means to be a woman. So you can see that it fits very much with what I have been saying here, as a practical application in one sphere of the broader issues of equality and human diversity with which I have been concerned this evening.

Macklem's perspective on his subject requires him to cast a sharply critical eye on two of the intellectual leaders of feminism, Catherine MacKinnon and Drucilla Cornell. The first is condemned for her over-preoccupation with power to the exclusion of gender, and for her consequent insensitivity to human difference. The second, on the other hand, is so committed to deconstruction that she has nothing to say about what it means to be a woman: the metaphors and re-metaphors have taken over completely. Having to my mind delivered a stinging critique of both these writers, Macklem then turns to diversity, saying that 'the release of women from their present predicament is dependent on an escape from the straitjacket of masculine values, and a consequent recognition of and respect for the distinctive meaning of women's existence as women, as one element, if perhaps the most significant element, in a general acknowledgment of human diversity'. The differences that count are those 'already present in the world' which have hitherto been 'neglected, overlooked, undervalued' and suppressed in society's 'ongoing construction of what is normal

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<sup>1</sup> Cambridge: Cambridge University Press, 2003, xi + 208pp pb £19.95, hb £45.00



and what is valuable'. But 'a failure to affirm human difference cannot be the correct explanation of women's disadvantage'; everything depends on purpose, on the value of the activities which make us think difference (in particular this difference between genders) both possible and desirable.

What matters therefore is to work out what it means to be a woman, to connect that conception of womanhood to the culture under consideration, and then to identify the value that flows from pursuing this idea of womanhood within that culture. 'The question of feminism, put simply, is a question of the ways in which our conception of sexual identity has been misconceived so as to impose an illegitimate set of disadvantages upon the lives of a whole category of people, namely women'. Macklem believes that 'sex discrimination arises when we mistake the meaning of sexual identity, so that the conceptions we hold of men and women are either false or irrelevant to our culture, and then invoke that mistaken picture either comprehensively or in realms of activity that are critical to the success of women's lives'.

This has implications for our current laws. It follows from what Macklem says, and indeed from what I was saying earlier at a more abstract level, that anti-discrimination laws which compel equality might themselves be discriminatory if their commitment to a level playing field denies women the chance to lead successful lives. Everything depends on how we characterise disadvantage and this in turn flows from what we mean by a valuable or successful life and the role of sexual identity in shaping such a life. Macklem tackles these issues in the three powerful chapters with which the book concludes, covering the ground in detail and supplying helpful illustrations of what his perspective entails. His analysis of the implications of his approach for orthodox equality law is refreshingly heretical, and I commend it to all enthusiasts for the legislative status quo. Reform is required in most jurisdictions where we care to look. I end, though, by returning to the bigger picture. Macklem is the first to admit that the law is not key; it is 'only rarely in the vanguard of social change and when it is, it never acts alone'. Change 'needs to be thought of ... in terms not only of institutions, or even of individuals, but also of attitudes that are embodied in our beliefs and our actions'. Ultimately, 'it is up to each of us, in the conduct of our own lives, to acquire the knowledge and concern for others that will enable us to avoid discrimination. The

law may help us to meet this responsibility, but it cannot discharge it for us'. It may be that at the moment the tensions that are legion in our discrimination law are derived from a lack of fit that I hope we can all now at the end of this lecture see: between the law's devotion to a comparator as the route to equality on the one hand and society's commitment to the same goal via a concentration not on sameness but on individual flourishing and diversity on the other. It will be in seeking to resolve these tensions that the new Commission for Equality and Human Rights will meet its first and perhaps greatest challenge.