

# Constitutional Law and the Right to Equality

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*On 4 and 5 April 2014, the Equal Rights Trust held a Judicial Colloquium on the rights to equality and non-discrimination, in Georgetown, Guyana, in the framework of one of our projects. The Colloquium was co-hosted by our partners the Justice Institute of Guyana and the Office of the Chancellor of the Judiciary of Guyana. This is the text of the speech given by Sir Stephen Sedley, Trustee of the Equal Rights Trust, addressing the judiciary of Guyana.*

Let me start by asking you to reflect on a piece of cultural history. Many of you will know the movie *Carmen Jones*. Bizet's opera *Carmen*, on which the movie was based, was set in 19<sup>th</sup> century Spain but was rewritten during World War II as a musical set in modern America. In 1954 the musical became a celebrated movie, in which – for the first time ever – an all-black cast performed, to Bizet's score, one of the world's great tragic stories, the scenario and libretto rewritten for a new time and place.

Was this, as my generation certainly thought it was, a breakthrough in equality, giving black people the same human dignity as whites – and coinciding, as it happened, with the US Supreme Court's epoch-making desegregation ruling in *Brown v Board of Education*?<sup>1</sup> Or was it just another stage in the long history of racial segregation, with not a single white actor on set, lyrics using stage-African-American speech (“Dere’s a café on de corner”, “Dis flower” and so on) and the vocals being mimed – I’m not kidding – by Dorothy Dandridge and Harry Belafonte to

the dubbed voices of white concert singers? Or could it conceivably be both things: a limited and still prejudice-ridden step in the right direction on a long and stony road towards true equality?

Take another example. Two of the most-objectioned-to books logged annually by the American Libraries Association have been *And Tango Makes Three*,<sup>2</sup> a children's book about an orphaned penguin chick who is cared for by two adult males, and *Huckleberry Finn*.<sup>3</sup> The objection to the first of these is that it normalises same-sex adult relationships. But that is exactly its defence as well: that it is part of a much wider and deeper moral and social argument about the equal treatment of individuals whose sexual choices are, at present at least, unorthodox.

The objection to *Huckleberry Finn* is much simpler and perhaps more troubling. Although the story is profoundly anti-racist, Mark Twain's dialogue, accurately reproducing the speech of the antebellum South, constantly uses the word “nigger” not as a

term of abuse but as conventional vocabulary. Is it better to suppress authenticity in the interests of decency, or to confront and adjust to the massive cultural change that our sense of propriety has undergone in the intervening years?

Although my own somewhat loaded rhetorical questions will have given you an idea of my own response to these issues, my purpose in raising them is not to invite you to resolve them. It is to illustrate two things that are relevant to the work of this colloquium. One is that equality of treatment can be a highly complex business. The other, which is intertwined with the first, is that what we regard as true and inherent differences and what we regard as unacceptable discrimination shifts with history and events. Yet the distinction is fundamental to the practical working of laws against discrimination: true equality means not eliminating but accommodating individuals' inherent and unalterable characteristics – at its most elementary, recognising that wheelchair users can't use stairs; but it also means not pretending or assuming that such characteristics require differentiation when in truth they do not – for example, assuming that men can drive trucks and women can't. When Anatole France remarked on the majestic impartiality with which the law forbade rich and poor alike to sleep under bridges, to beg in the streets and to steal bread he was satirising the effect of a one-size-fits all law on people who are different sizes. When the UK's statute law made it a crime for a Gipsy to camp on a highway, as the Highways Acts did until 1980, it was differentiating unjustifiably between people who were not materially different: that is to say, between campers on the highway who were and who were not Gipsies. It's more than two thousand years since Epicurus pointed out that disparate circumstances

mean that justice does not require the same outcomes for everyone. Indeed it has been argued that the very fact that no two people are the same means that unequal treatment should be the rule, not, as we tend to assume, the exception.

There are no abstract answers to these abstract questions. They have to be answered by a conscientious and practical application of principle to the facts of each class of case.

Until the 1970s, the United Kingdom had no effective laws against racial or sexual discrimination. Unlike Guyana, it had no constitutional guarantees of equality or non-discrimination. The fight not only to secure votes for women but to get the judges to recognise them as legal "persons" had taken two full generations of struggle. When I was a student it was still perfectly legal for employers to refuse to employ women or black or ethnic minority workers, or to sack women who married or became pregnant. It was lawful for landlords to refuse to let to black tenants. It is a source of pride to me that my children, now with children of their own, simply cannot believe it. But what has happened in this half-century to make such a difference?

In 1970 the Equal Pay Act gave employers and unions five years to abolish gender-related pay differentials. In 1975 the Sex Discrimination Act for the first time outlawed both direct and indirect discrimination on grounds of gender in most fields of social and economic activity. The following year a greatly strengthened Race Relations Act did the same for direct and indirect racial discrimination. It was not until 1995 that the even more complex issue of disability discrimination was legislated for, but that too now forms part of the comprehensive codification contained in our Equality Act

2010, along with religious belief (except for schools, which are permitted to practise religious discrimination), sexual orientation and age.

What had happened in these years was, however, far more than the creation of a range of written rights with opportunities to litigate them. The enactment of these provisions was the result of many years of pressure by and on behalf of the victims of discrimination; and one of the principal achievements of the equality legislation, in turn, has been the promotion and consolidation of a long-term change in the public sense of what is tolerable and acceptable in the relations of individuals with each other, with corporations and with the state. A changed public sense of propriety, albeit imperfect and easily ridiculed as “political correctness”, has come about. At its most elementary it has to take sides about the language used in *Huckleberry Finn*. At its most complicated it has to grapple with the kind of multi-layered issues thrown up by *Carmen Jones*. But it is a sea-change which has not come from nowhere: it has been driven by the refusal of the historically marginalised – women, black people, the gay, the disabled, the elderly – to accept society’s conventional wisdom about them. If it is not conceivable that desegregation would have made its modern progress in the US without the legitimisation of the Supreme Court in *Brown*, it is equally inconceivable that *Brown* would have been decided the way it was but for the presence of a powerful and growing civil rights movement which had got underway before the second world war and been propelled by black GIs’ wartime experience of institutional discrimination and segregation by the state they were fighting to protect. Law is not autonomous: it is part of history.

In saying this I do not intend to say that law is no more than a weathervane showing which way the wind is blowing. On the contrary, law is an active ingredient in the mix. It can accelerate or obstruct social change. This alone places on judges a considerable responsibility: are we to resist change simply because it does not conform to the law as we have learned it? Are we to embrace change simply because others demand it? The answer has to be neither. The judicial task is a complex one of implementing in legally principled form the changes that society has decided it wants.

I have mentioned that the UK lacks any constitutional instrument equivalent to Title 1 of Part II of Guyana’s constitution. What it has is an amalgam of statutory provisions, reaching back eight centuries to Magna Carta and coming down to the Human Rights Act 1998, and common law principles such as the requirement on the state to justify any deprivation of liberty. But the processes by which such a constitution operates are slow and erratic. It can say no to certain things, such as imprisonment without charge (save where this is authorised by statute), but it has been historically slow and often reluctant to keep up with society’s demands. The abolition of slavery was a hot potato which Parliament for decades would not touch. The problem was left to the judges, who finally responded to a huge wave of popular anger by freeing slaves who came within the jurisdiction, but not those held in the colonies.

History has thanked the judges for taking the initiative. Lord Mansfield’s judgment in *James Somersett’s*<sup>4</sup> case is regarded as a landmark in the growth of freedom, not least because it responded to a long-term shift away from the centuries-long European view that black people were something less than hu-

man. History, by contrast, has not thanked the English and Scottish judges who for decades (and in parallel, it has to be said, with the judiciaries of the US, Canada and South Africa) tried to hold back the tide of women's emancipation, sometimes in the teeth of Parliament's attempts to move things forward.

The so-called persons cases are not generally taught in our law schools, perhaps because they are an embarrassment to a generally whiggish account of legal history which unblushingly accepts Tennyson's accolade of freedom slowly broadening down from precedent to precedent. The cases start in 1869 with the appeal to the Scottish Court of Session in which Edinburgh University was allowed by a majority of 7 judges to 5 to renege on a change in its own rules to allow women to attend lectures in medicine, on the ground that the admission of women was beyond the university's legal powers. By that date Parliament, by the great Reform Act of 1867, had given all householders the vote. Although the Act used the word "man", Lord Brougham's Interpretation Act provided that the male was to include the female unless the contrary was expressly provided. This gave the judges no pause. They held that the fact that women at common law had never been allowed to vote was enough to rebut Lord Brougham's presumption; and insofar as they sought to challenge their exclusion from the electoral roll as "persons aggrieved", in law women were not persons either.

Two years later Parliament unambiguously legislated to allow women both to vote and to be elected to office in local elections. In 1889 Lady Sandhurst stood for a seat on the London County Council and won by a clear majority. The courts (the chief justice included) held that the right to vote and the right to stand for office were not coextensive,

and that women, albeit they could now vote, could not hold office. When, a couple of years later, Miss Cobden was voted into office, she deliberately delayed taking her seat until the time set by law for bringing a challenge had elapsed. But she was then prosecuted under a statute which made it an offence for "any person" to sit as a councillor when unqualified. Ah, she said, women are not persons: the courts have repeatedly said so, and the statute itself says "he". No, said the Master of the Rolls; this is a clear case for the application of Lord Brougham's Interpretation Act – "he" means "he or she".

On it went. The Scottish courts refused to admit a woman as a law agent because no women had ever been admitted. On the same ground Gray's Inn refused to call Bertha Cave to the English Bar. Then in 1909, on an appeal from Scotland about the continuing refusal of universities to let women graduates exercise the university franchise, the Liberal Lord Chancellor, Lord Loreburn, set about hauling the law backwards. The legal disability of women, he held, was so obvious that "it is incomprehensible (...) that anyone acquainted with our laws (...) can think, if indeed anyone does think, that there is room for argument on such a point".<sup>5</sup> He was not alone. The revered constitutional lawyer Albert Venn Dicey had warned that if women were given the vote, the next thing would be women in the jury box and – God forbid – on the bench.

It's one of the happier ironies of history that Dicey was proved right. But the point I am making here is that the commonsensical, the self-evident, the patently obvious, the sort of thing about which no rational being can see any room for argument, can in the space of a single generation turn into its opposite. In 1918 Parliament finally legislated

in judge-proof words of one syllable to give women over 30 the vote, and ten years later to equalise the franchise between women and men. The following year, 1929, an appeal from Canada reached the Privy Council on the question whether the Governor-General had power to nominate women as senators. Lord Sankey's opinion in *Edwards v A-G for Canada*,<sup>6</sup> delivering an affirmative answer, is a classic text in human rights jurisprudence. Sankey uses the metaphor of a "living tree" to characterise the Canadian constitution – perhaps a mild exaggeration of what was at the time a largely organisational instrument, the British North America Act 1867, but a tool since adopted by the Canadian Supreme Court in interpreting the 1982 Charter of Rights and Freedoms, and by the European Court of Human Rights in interpreting the European Convention.

Addressing the appeal to custom as an answer to change, Lord Sankey said: "Customs are apt to develop into traditions which are stronger than law, and which remain unchallenged long after the reason for them has disappeared." He was addressing the ghost of Lord Loreburn; but he was also speaking to future generations, ours included. Law has to be continuously on the watch for habits of thought which have come to encrust it but which no longer have life. The health of a living tree depends on periodically shedding its dead wood.

Professor Sir Bob Hepple, one of the UK's most distinguished authorities on discrimination and the law (and Chair of the Equal Rights Trust), recently wrote this:

"Equality law is a socially important and intellectually challenging subject. It is important because it seeks to use law as a means of changing entrenched attitudes,

behaviour and institutions in order to secure the fundamental human right to equality. The subject is a challenging one because it involves the construction and development of novel legal concepts and procedures. It is necessary to understand these concepts and the technical structure of the law in order to appreciate their social significance, and to use them effectively in the struggles for equal rights. One cannot simply skirt round the hard professional core of the law and procedure. But equality law is not an intellectual game played in courts by clever barristers or in universities by philosophers and academic lawyers. It is shaped by and has a vital impact on people in their everyday lives. One has to understand the historical and social contexts and the values on which the law is based."<sup>7</sup>

Such vigilance is commonly denounced as judicial activism. I have never been able to understand what judicial activism is. Deciding a case one way, as we all have to do daily, is as active a step as deciding it the other. A judge is either activist or asleep. To describe the five Scottish judges who would have found in favour of the women who sought admission to the Edinburgh medical school as somehow activist and the seven who outvoted them as something else (the critics of judicial activism have not vouchsafed a name for its opposite – perhaps judicial somnambulism) is perverse. If anything, the activists were the majority who allowed the university to renege on its own regulations.

Activism aside, equality is not a simple legal concept. As the Guyanese constitution recognises, banning discrimination is not necessarily the same thing as treating people equally: both things have had to be separately spelt out in your Bill of Rights. The fact is that all laws discriminate: they discriminate between the virtuous and the

wicked, between the permitted and the prohibited, between the duty-free and the taxable. These are grounds of discrimination which are tolerable, indeed necessary, in an ordered society.

We have come a long way from the common sense that told Athenians that the right to vote in the world's first democracy could not include women or slaves. We now see the irony, which escaped the American founding fathers, of proclaiming the self-evident truth that all men are born equal while owning slaves. We cannot anticipate how a future generation will view the things that we consider beyond contest. All we can do is give people what our generation has come to understand as their right to be treated with respect as individuals and without unwarranted differentiation from others who are not materially different from themselves.

You will be looking in the course of the colloquium at a number of practical applications of equality law. Perhaps therefore I can use what time I have left to give an anecdotal account of a few of the discrimination and equality cases which I either argued at the bar or decided on the bench, and which may help to illustrate the practical side of equality litigation, even if they also reveal an old soldier reliving his battles from the comfort of an armchair.

Oxford University, where I now lecture, advertised a specialised scientific post as a post-doctoral research assistant. There were two qualified candidates, one black and one white. The university failed to follow its own procedures: it did not take up references on the candidates, and it only drew up a person specification minutes before the job interviews took place. The interviewing panel saw both candidates and appointed the

white one, Dr Lawrence. The black candidate, Dr Anya, believed that racial prejudice had played a part in the decision, and brought discrimination proceedings against the university. An employment tribunal accepted that his supervisor, who was a member of the panel, had already formed the view that he was unsuitable for the job, and had told the chairman; but they accepted that racial bias had played no part in this. My court held that this was not good enough. We said this:

“The present case is a textbook example of a race discrimination claim...Here we have a shortlist of two candidates, one black, one white, both by definition qualified by training and experience for a specialised post. Whichever is to be chosen, good administration requires that he be chosen fairly; and to this the law has now added for a quarter of a century that the choice must not be affected in any way by his race (...) This was as true for Dr Lawrence as it was for Dr Anya. Very little discrimination today is overt or even deliberate. What [the decided cases] tell tribunals and courts to look for, in order to give effect to the legislation, are indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias.”<sup>8</sup>

What the tribunal had done, however, was stop at the point where they accepted the supervisor's evidence that his view had been based on merit alone. They had accordingly found that the undoubted act of discrimination – that is to say choosing the other candidate – was not racially motivated. What the tribunal had failed to do was consider Dr Anya's evidence of longstanding hostility towards him (a question of pure fact) and, if it was established, to decide what was the reason for it. They had not only failed to go this

distance - they had closed it off by directing themselves that:

“[I]f an employer behaves unreasonably towards a black employee, it is not to be inferred without more that the reason for this is attributable to the employee’s colour; the employer might very well behave in a similarly unreasonable fashion to a white employee.”<sup>9</sup>

We firmly disagreed with this. If such behaviour towards a black employee is not to found an inference of racial hostility, it has to be shown by evidence that the employer behaves equally badly to staff of all races: the fact-finding tribunal cannot simply shrug it off as an equal possibility.

We allowed Dr Anya’s appeal because the tribunal had simply not made the necessary findings about a series of hostile acts alleged by Dr Anya against his supervisor; nor therefore had it been in a position to decide on their motivation if in fact they had occurred. Finding his supervisor credible was not enough: a witness, we pointed out, can be credible, honest and mistaken, especially about his own motivation. We remitted the case to a fresh tribunal to make the necessary findings and evaluate them according to law.

Many years before I took part in deciding Dr Anya’s case, I had argued a very different case at the bar. Eley were a munitions manufacturer in the West Midlands. Their workforce included full-time workers both male and female, and a further body of part-timers who were all women: a very typical employment pattern in the UK. By agreement with the trade unions, when work fell off and redundancies were called for, the part-timers were dismissed first; after that, the accepted

principle of “last in, first out” would apply. A group of them read a booklet issued by the organisation now known as Liberty which suggested that this could be unlawful indirect sex discrimination. They came to see Liberty’s legal officer, who asked me to advise, and we issued proceedings for both sex discrimination and unfair dismissal.

We won one of the claimants’ cases before the industrial tribunal, and both of them on appeal.<sup>10</sup> The reasoning was this. To amount to indirect sex discrimination, a condition or requirement had to have been applied which considerably fewer women than men, among those affected by it, could comply with. Here the condition was that, to avoid ranking for redundancy on the accepted principle of “last in, first out”, a worker at Eley had to be employed full-time. Part-timers could by definition not comply with this, and since they were all women, it followed that women were disproportionately disadvantaged by it.

This was the first time that the impact of traditional industrial arrangements on women in the workforce had been examined for its indirectly discriminatory effects and found wanting. But there was a telling sequel. The tribunal recommended reinstatement, but the employers had no posts to offer, except in the factory’s fire brigade. Brenda Clarke, who was one of the successful claimants, said she would take the job. Sorry, said Eley’s management, we don’t have women in the .... and then they realised that they were about to commit a new act of, this time, direct sex discrimination. So they took Brenda back and she became a firefighter. You could say that she had killed two birds with one stone.

Carole Webb got a clerical job with a small import-export company, replacing an employee who had gone on maternity leave; but

within a few weeks she found that she too was pregnant. The company dismissed her. She brought a claim for direct sex discrimination, based on the simple fact that although men can do a great many things, they can't get pregnant, and pregnancy was the reason for her dismissal.

As you can imagine, this was not an attractive claim. The industrial tribunal, the Employment Appeal Tribunal, the Court of Appeal and the House of Lords all held that the reason for Carole Webb's dismissal was not her pregnancy but her impending unavailability for work. It was irrelevant, they held, that the reason for her unavailability was her pregnancy. But the bar on sex discrimination in employment had a constitutional element: it was contained in the law of the European Union. So the House of Lords referred the question to the European Court of Justice in Luxembourg, and back came the answer: if the reason for the woman's unavailability is pregnancy, then to dismiss her on that ground is to discriminate against her because of her sex.<sup>11</sup>

My junior, Laura Cox (now Cox J) and I had known from the start that we were going to lose at home but would eventually win in Europe. What made the difference was the English courts' focus on conventional wisdom and pragmatism, and the European court's focus on principle and underlying purpose - a form of choice with which courts with constitutional underpinnings are perhaps more familiar than the English courts are, or at least were until the Human Rights Act 1998 came into force.

John Alexander was a prisoner, serving a substantial sentence for an attempted bank robbery in a high security prison on the Isle of Wight. He had applied several times to work

in the prison kitchen, and had repeatedly been turned down. Since he was black and all the prisoners working in the kitchen were white, he suspected that his race had something to do with it. So we brought proceedings under the Race Relations Act against the Home Office, whose principal line of defence was that the Act did not apply to them. Their second line was that it was anyway perfectly legitimate to keep John Alexander away from sharp implements, since he had been convicted of a crime of violence (he had in fact been the driver or lookout man). When we obtained the list of prisoners who were allowed to work in the kitchen, they included a murderer and an arsonist.

We won the case, and the Home Office agreed to retrain its prison staff in race relations. A member of the Commission for Racial Equality sat in on one of the retraining sessions and heard a senior prison officer explain that black prisoners should be respected because some of them knew how to put an evil eye on people who disrespected them. It was what you might call a Pyrrhic victory.

What, if anything, is the moral of these old soldiers' tales?

It is, I would suggest to you, first, that because identifying and challenging discrimination often involves unravelling and examining people's motives, it is risky to take events at face value: inherited assumptions, both on the part of witnesses and on the part of judges, have to be recognised, examined and evaluated against the constitutional and legal principles which our society has adopted. The line between alertness to real discrimination and readiness to see discrimination where there is none is a thin and tricky one which judges have to tread with care. It is made no easier by aggressive claimants or

evasive defendants; but these are characters that judges get to know and allow for.

Secondly, I suggest, it is that winning a legal argument is not always the same as winning the case. Dr Anya lost again when an employment tribunal reheard his claim in accordance with the court's directions. Brenda Clarke, by contrast, succeeded – just – in getting re-employed; she went on, incidentally, to become a city councillor and to chair some of Birmingham's most important council committees. Carole Webb's child will have been almost eight years old by the time the House of Lords finally gave judgment in her favour; but perhaps the compensation she finally recovered

will have paid for a family holiday. John Alexander, so far as I know, was finally allowed to work in the prison kitchen; but whether the conduct of prison staff towards black and ethnic minority prisoners improved as a result of the case is doubtful. One of the things courts need to keep an eye on is that their decisions should have some effect.

Thirdly, non-discrimination and equality law is today fundamental to all democratic societies. Guyana, with its constitutional guarantees and its statutes, is privileged in this respect. But laws are no good if they are not made to work, and making them work is what our colloquium is about.

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- 1 *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).
  - 2 Richardson, J., Parnell, P., Cole, H., *And Tango Makes Three*, Simon & Schuster UK Ltd, 2005.
  - 3 Twain, M., *Adventures of Huckleberry Finn*, Charles Webster, 1885.
  - 4 *Somerset v Stewart* (1772) 98 ER 499.
  - 5 *Nairn v University of St. Andrews* [1909] AC 147.
  - 6 *Edwards v A-G for Canada* [1930] AC 124.
  - 7 Hepple, B., *Equality: The New Legal Framework*, Hart Publishing, 2011, p. vii.
  - 8 *Anya v University of Oxford and another* [2001] EWCA Civ 405, Para 11.
  - 9 *Anya v University of Oxford and another* [2001] EWCA Civ 405, Para 14.
  - 10 *Mrs B Clarke v Eley (IMI) Kynoch Ltd* EAT, 1982, IRLR 482.
  - 11 *Webb v EMO Air Cargo (UK) Ltd* (14 July 1994) EOR57A.