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"In the Eye of the Law: The Jurisprudence of Equality"

by

the Hon. Justice Mary Gaudron
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At the first Mitchell Oration, Dame Roma observed that, looking back over her "more than fifty years experience in the legal profession", advances in the field of human rights and equal opportunity had been "tremendous". Looking forward, she said, "there [was] still much to be done".

I don't look quite as far back as Dame Roma, but, looking back, I find it difficult to believe that so much happened so quickly. I was never an optimist. Now, still lacking in optimism, I think that the easy part has been done; the way forward may involve the extremely difficult. My natural want of optimism leads me to think that further advances - at least those that might be thought to involve qualitative change - may well not happen unless those who are concerned to see such change engage in some serious analysis of what is meant by "equality".

It is only if the concept of "equality" is given some comprehensible content that the objective embodied in the expression "equal opportunity" can be fairly evaluated. It is only when the concept is given content that it is possible to determine whether, and, to what extent the objective has been achieved. And, without some such content, it is impossible to make a critical appraisal of modern anti-discrimination legislation.

To make a critical appraisal of modern anti-discrimination legislation we need to know whether that legislation describes and proscribes every form of treatment as between individuals that constitutes or may result in the social or economic exploitation of an individual by reason of some characteristic (real or imagined) not generally found in the powerful and influential part of the community. It may be that modern anti-discrimination legislation does just that, but, I suspect that very few concerned to promote equality believe that to be the case. After all, if it does proscribe every form of treatment that constitutes or may result in social or economic exploitation, it can only be a matter of a very short time until it can properly be said: "well, if you have availed yourself of the benefit of anti-discrimination legislation, you have achieved all the equality of which you are capable; if you have not availed yourself of it, you do not want equality". I should here interpolate that, in the absence of some meaningful theory of equality by reference to which we can evaluate the legislation, that comment cannot properly be made. But, as many of us here tonight know, that and similar comments are already

frequently made and the finer points of logic have not often been known to carry persuasive force with those who believe that one can identify classes of individuals who are inherently something less than equal, or, more interestingly, classes of individuals content to enjoy less than equal status. It is partly because such statements are already made and, with the passage of time, will attract some degree of plausibility that I believe the way forward involves an attempt to come to grips with the concept of "equality".

Outside the field of mathematics, "equality" is an infuriatingly elusive concept. It is hard to describe, even more difficult to define. As a concept, it flatly contradicts the facts: we are all different, and in our differences there lie patent inequalities. As a social objective, it flies in the face of those all-pervasive customs and mores by which we are continuously and comprehensively ranked one against the other, our inequalities determining our relative positions in this or that particular pecking order.

Given these difficulties, the view that "equality" is best left as an idea lacking precise content has much to commend it. After all, even if it is no more than a convenient rallying call conveying all things to all who want to hear, it is a call with a message that no one is any longer seriously concerned to dispute. Moreover, there is federal anti-discrimination legislation and complementary legislation in a number of States. And, subject to one qualification, that legislation, as modern and up to date as any, has been seen to have worked fairly well. That qualification relates to what is commonly referred to as "indirect discrimination"[i] to which it will be necessary to return. But even allowing for recent criticism[ii] of the legislative provisions dealing with "indirect discrimination", the legislation has not been productive of any greater degree of confusion than might reasonably be expected to be inherent in concepts such as "equality" and "discrimination".

Until comparatively recent times neither the law not legal theory had occasion to seriously concern itself with the notion of "equality". Of course, all legal systems are predicated upon the idea that the law is applicable to all and that, in turn. is dependent on some notion of equality such as that embodied in the expression "all are equal before and under the law", or, more commonly, "no one is beyond the law".[iii]

The notion of equality which lies behind the elegantly simple statement "equality before and under the law" is very similar to the mathematical concept of equality. or, as the song would have it "one is one and ever more shall be so". Any particular individual has the same right as any other individual to invoke the protection of the law and the same liability as any other individual to be judged according to it. Such a notion is fundamental to any civilized legal system. It is the very foundation of what is called "the rule of law". But it has little, if anything, to do with substantive equality.

On the traditional English legal view, the content of the law is irrelevant to any question of equality before or under the law. According to English legal theory, all are equally subject to a law which says, for example, that red heads shall be given preferential treatment in every field of social, economic and political endeavour.[iv] Some other legal systems and theories proceed

from a different theoretical base. For example, the American Declaration of Independence, 1776 and, hence, American legal theory assert that "all men are created equal" and are "endowed..... with inalienable rights". Subject to one small qualification, even the form of legal theory embodied in the U.S. Declaration of Independence requires no real analysis of the concept of "equality". Rather, all that it requires is an identification of the "basic" or "inalienable" rights. In the Declaration of Independence they are identified, although not exhaustively, as "life, liberty and the pursuit of happiness". Once identified every person is entitled to those rights and, by corollary, every person must respect them.

The one situation which necessitates that legal theory engage in a consideration of "equality" is if the "basic" or "inalienable" rights are identified as including "equality". That was done in the Declaration of Rights prefixed to the French Constitution of 1793. The right of equality thus declared took its content from the Declaration of Rights, 1789 which provides:

> "…all...are equally eligible for all honours, places and employments, according to their different abilities, without any other distinction than that created by their virtues and talents".

I shall come back to the French Declaration of Rights, but, first, I wish to elaborate the difference between notions such as those embodied in the Declaration of Independence and the Declaration of Rights and traditional English legal theory.

The theory behind the assertion of "basic", "inalienable", "fundamental" or "human" rights, as in the American Declaration of Independence and in the French Declaration of Rights, was described by Jeremy Bentham, the founder of traditional English jurisprudence, as "nonsense on stilts".[v] The theory thus dismissed was predicated on a view of equality, albeit not one articulated in precise terms, that determined the content of the law, at least in relation to "basic" or "inalienable" rights. That theory was not a French invention. The Stoic philosophers of Ancient Greece had taught that all persons had a spark of divine reason by which they could comprehend fundamental principles of natural right. A similar idea was inherent in the *ius gentium* of Roman Law, and, of course, in St Thomas Aquinas' exposition of "natural law". Bentham taught the very reverse. He taught that the content of law is no more and no less than what the dominant group in society determines. This was no cynical description of the then state of affairs. Rather, in Bentham's view, superior power was its own moral justification. Thus he taught that the superior legal rights of men were justified because they had physical power and because women were "delicate, inferior in strength and hardiness of body, in point of knowledge, intellectual powers and firmness of mind".[vi]

The Bentham teachings remain an intractable part of our own legal thinking and legal traditions. Even his disciple J. S. Mill, who advocated the equality of the sexes,[vii] did not assert any overarching absolute principle of equality. Rather, he asserted that "the principle which regulates the existing social relations between the two sexes... ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side nor disability on the other".[viii]

The views of John Stuart Mill as expressed in his essay, *The Subjection of Women*, attracted some criticism from the English legal profession. Sir James Fitzjames Stephen Q.C., doubtless familiar to the lawyers here present as the author *of Stephen's Commentaries* and the person responsible for the Stephen Criminal Code, in "Liberty, Equality and Fraternity", 1873 criticized Mill's theory of equality pointing out that, as a matter of objective fact, there are inequalities between individuals. He referred, by way of example, to education and the powers of educators saying (at p.210):

> "Is not this a clear case of inequality of the strongest kind, and does it not at all events afford a most instructive precedent in favour of the recognition by the law of a marked natural distinction? If children were regarded by law as the equals of adults, the result would be something infinitely worse than barbarism. It would involve a degree of cruelty to the young which can hardly be realized even in imagination."

Stephen rejected any notion of the equality of parties to a marriage. In opposing that notion he gave expression to some matters which have a poignant relevance even as we near the end of the 20th century. Stephen asked whether the law should regard marriage as "a contract between equals", which would seem to be the consequence of a theory of equality, or as "a contract between a stronger and a weaker person". He answered his own question saying:[ix]

> "…a law which proceeded on the former and not on the latter of these views would be founded on a totally false assumption, and would involve... injustice... especially to women".

He added that a law which proceeded on the basis of a contract between equals "would make women the slaves of their husbands", pointing out that upon marriage, a man "incurs no doubt, a good deal of expense, but he does not in any degree impair his means of earning a living", whereas, by contrast "[w]hen a woman marries she practically renounces in all but the rarest cases the possibility of undertaking any profession but one . . .".

Leaving aside the social changes that have been wrought since Mr Stephen published his criticism of Mill's theory, he did identify a number of issues which must be taken into account in any general theory of equality.

This excursus into traditional English jurisprudence was undertaken to emphasize that our legal theory not only has no developed notion of "equality", but its philosophical base is, to a large extent, quite antipathetic to the development of such a notion. Yet, to the extent that the realization of equality depends upon antidiscrimination legislation and, particularly, the legislative provisions which deal with "indirect discrimination", it is necessary that such a notion be developed. If it is not, the provisions relating to "indirect discrimination" may easily be misconceived as provisions which are themselves discriminatory. And, should that happen,

it is inevitable that those provisions will prove insufficient to secure the legislative intent that inspired them.

Let us return to "Equality".

It is necessarily the task of others to identify the content of the notion of "equality". However, it may be possible to suggest an intellectual framework for that exercise.

The notion of "equality" must accommodate what is expressed in the French Declaration of Rights: it must allow for the fulfilment of the potential of every individual. From that starting point, certain propositions may be deduced, although they are mainly negative in form:

(i) Artificial, irrelevant distinctions cannot be the basis upon which rights and privileges are assigned.[x]

(ii) "Equality" does not involve uniformity. In particular, it does not involve uniformity by reference to the lowest common denominator.

The notion of "equality" must accommodate the criticism of Sir James Fitzjames Stephen based on what it still objective fact, namely, that society is composed of individuals with their individual and idiosyncratic inequalities. Stephen makes the quite valid point that treating unequals as equals involves cruel injustice. From this it follows that real, relevant distinctions should and must constitute the basis on which rights and privileges are assigned. Even so, it does not follow that rights and privileges may be assigned other than in a manner that is appropriate to the distinction that has been identified as real and relevant.

It may be that it makes more sense to speak of "inequality" rather than "equality". In another context,[xi] I have described "inequality" in a manner which, for present purposes, may be paraphrased as "the different treatment of persons who are equal and the equal treatment of persons who are different". It is a by far from perfect exposition of what is involved in "inequality". However, it does provide a framework so that, at least, we can ask the critical questions, namely:

(i) Is there a relevant difference?

(ii) If so, what is the appropriate manner of dealing with that difference?

And, by reference to the proffered description of "inequality" we can say a number of things about modern anti-discrimination legislation. We can say:

(i) That the legislation purports merely to assert that some distinctions are not relevant in some situations.

(ii) That it lays down two, and only two, tests for determining whether an irrelevant distinction has been, or, may be taken to have been the basis selected for denying some person a right or privilege.

However, as a matter of logic, those tests do not exclude the possibility that an irrelevant consideration has been taken into account or that a relevant difference has been excluded from consideration in a manner that those tests cannot detect.

(iii) The legislation does not expressly deal with the problem involved in the equal treatment of unequals. That problem is dealt with only to the extent that it might be revealed by operation of the provisions which are usually described as dealing with "indirect discrimination".

I must leave matters in this rather inconclusive state for a number of reasons, including the fairly obvious reason that our general understanding of "equality" is as yet imperfect. I hope, however, that I have said enough to suggest that, if equality is to be secured by enforcing legal rights and obligations, a notion of equality which provides a coherent rationale for the existence of those rights and obligations and constitutes a sufficient explanation of the nature of those rights and obligations will, at least, promote the objective of legislation designed to ensure equality. Moreover, the articulation and exposition of an idea of "equality" is, I suspect, a worthy challenge for those who wish to see and experience "equality" in some greater measure than is presently to be detected in our society.

END NOTES

[i] Modern anti-discrimination legislation works, in general terms, by decreeing that identified characteristics (e.g. sex, race, age) are irrelevant in defined circumstances (e.g. employment, access to goods and services). It then says, again in very general terms, you have acted in a discriminatory manner, if you have treated that characteristic as relevant, either by imposing different conditions, or by imposing a condition that one group can satisfy more easily than the other group. The latter is generally and inaccurately, called "indirect discrimination". What is involved is not indirect discrimination. Rather, it is direct discrimination which is measured indirectly. What is measured is something which is thought to be statistically indicative of the characteristic.

[ii] See, for example, Pannick, *Sex Discrimination Law,* Clarendon Press, 1985, pp.40-42.

[iii] This notion is better expressed in terms of "universal subjection" rather than "equality".

[iv] That is so because the law would be equally violated if a brunette were given preferential treatment, as much as it would be if the red head were denied preference.

[v] Bentham, *The Principles and Morals of Legislation.*

[vi] Ibid

[vii] J. S. Mill, *The Subjection of Women, 1869.*

[viii] Ibid.

[ix] *Liberty, Equality, Fraternity,* Holt and Williams, 1793, pp.214-215.

[x] For an early and still persuasive critique of artificial distinctions, see M. Wollstonecraft, *Vindication of the Rights of Women 1792,* Ch. 9, *Of the Pernicious Effects which Arise from the Unnatural Distinctions Established in Society.*

[xi] *Street v. Queensland Bar Association (1*989) 63 A. L.J. R. 715, at p. 759.