

CAN HUMAN RIGHTS DELIVER REAL EQUALITY?

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The Equality and Human Rights Commission (EHRC) finally got under way on 1 October this month. As an knowledgeable audience like this one is of course aware, the Commission combines the old Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission into a grand new super-commission, one that also (as its web site puts it) 'takes on responsibility for the other aspects of equality: age, sexual orientation and religion or belief, as well as human rights.' The body is to act 'not only for the disadvantaged, but for everyone in society,' and promises to 'use its new enforcement powers where necessary to guarantee people's equality'. These are the Commission's own words, and they are powerful and ambitious. Its 'vision' is of a 'society built on fairness and respect' with '[p]eople confident in all aspects of their diversity'. It aims to 'reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights'. As though all this were not enough, the EHRC also plans to 'campaign for social change and justice'. There is quite a menu for action here: it is as though all the ethical elements that have been floating about in the New Labour ether since 1997 have been grabbed and bottled and are now to be distributed under the EHRC label, a compulsory vintage with which all policy initiatives are henceforth to be washed down. Among the points I want to address this evening is whether this EHRC wine is designed to complement the New Labour meal, or on the contrary to cover up its bad taste. Do we consume Chateau EHRC the better to enjoy our Brown food or the more determinedly to forget what we are being forced to eat? If it is the latter, is the strength of this wine such that it can override the taste of the meal.

To draw the metaphor to a close with a succinct question – how transformative is Chateau EHRC?

My point of departure requires me to look again at the Commission's title, the Equality and Human Rights Commission. Now the big story has of course been the decision to change the order of the words, from the Commission for Equality and Human Rights to the Equality and Human Rights Commission. This is easily lampoonable, though quite possibly entirely sensible, and in any event not something that I plan to discuss. I am interested in the two phrases, 'Equality' and 'Human Rights'. Why not a 'Commission for Equality' or a 'Commission for Human Rights'? Why the need to have not one or other but both with no 'therefore' in between: it is not 'Equality and (therefore) human rights' or 'Human rights and (therefore) equality'. The terms are taken to mean different things, complementary possibly, but different. Now of course we all know the surface reasons for why this name has been chosen: the need to reflect the work of the old commissions in the title while also acknowledging fresh areas of engagement in the anti-discrimination field and acknowledging (at the same time) the new world of human rights inaugurated by Labour's Human Rights Act, passed in 1998. But why, at a deeper level, in this burgeoning politico-legal bureaucracy of equality and human rights do we now understand these terms as seemingly entailing different things? What are the implications of this difference for the way we understand equality and human rights today? Does it tell us something about how we as lawyers, and the EHRC and Legal Action Group practitioners in particular, should approach our work in this field? My colleague Francesca Klug, who is a commissioner as well as a professorial research fellow at LSE, has spoken of the need for 'an holistic vision' of the Commission's

remit and one of my purposes tonight is to argue that not only is this is so, but also that the success of the organisation – how effective its taste – depends on this point being properly grasped.

I turn in a moment to history in order to develop my central points. But first, since I am talking about titles, what of my own, ‘Can Human Rights deliver Real Equality?’ I want to apologise for the term ‘real’ here; it was a naked piece of marketing designed to drag you here in search of truth. In the secular world in which we are all gathered this evening (this is a religious meeting certainly but not one of a Deistic or spiritual bent), we are limited by the method of communication upon which we have chosen to rely – language – and to push words further than they can go, past agreed meanings and shared stories into some kind of ‘truth’ outside words, is to seek a reality which words cannot find, even if it is out there somewhere (albeit not waiting to be discovered). History gives us not a true and then a set of false versions of ‘equality’ and ‘human rights’; rather it gives us a series of *different* ‘equality’ and ‘human rights’ stories. I want to recover one version of the story and then see if I can fit it in to today in a way which gives ‘equality’ and ‘human rights’ the meaning that I desire to attach to them, the one that answers the questions I have just asked and supports my vision of a successful commission. So this evening’s lecture is an exercise not in finding some kind of transcendental reality but rather in recovering from the past one version of equality and human rights that I then hope to persuade you can also be put to work for today, and tomorrow as well.

I say ‘one version’ advisedly because the story to which I am about to turn applies equally to both ‘equality’ and ‘human rights’: it celebrates each term as

emancipatory, as radical, as progressive, even as revolutionary, but above all as challenging of power and as, in combination, immensely effective twin battlers against the forces of oppression. To me, this is not just any strand of the equality/human rights story, it is the primary version, the one that most readily springs to mind when we look at the effect of these terms in history, their power when used to mobilising effect. The price of the success of these words used in this sense has been to unleash forces of reaction: hence the multiplicity of meanings. The enemies of progressive change, who throughout the ages are by definition powerful, have sought through various means to avoid the emancipatory consequences of the language of equality and human rights. Sometimes of course they have sought to destroy the terms altogether, but failing successful obliteration their tactics have become more subtle. The danger to 'true' equality and 'true' human rights (now using the word 'true' as a shorthand way of describing the version of the two terms that I prefer) lies precisely in not being disowned by power, but rather in being turned into double agents on behalf of power, being feted and celebrated as evidence of the ethical worth of the powerful while the core progressive mission is left to fade away in the background, rotting under a cover of these noisily high-faluting words. This lecture is also about these enemies of real equality and human rights and what to do about them.

Now to my rather hectic, and certainly selective, romp through history. I leave to one side religious assertions about the equality of all human beings under God and the consequent right of all members of the species to respect and dignity, though obviously in the early history of our two phrases this was very important. At very least, I should pause to note that even in its time of hegemonic power, the

Roman Catholic and (in Britain and the Empire) the Anglican churches had strands of thinking within them that focused on the powerless and the marginalised (as, even more clearly, did outsider churches like the 18th century Methodists). This perspective has naturally become more obvious within such faith groups as secular power has seeped away from them: as they have joined the powerless themselves, so empathy has become easier to achieve. What began as an exercise in imagination by certain elements within a powerful set of institutions gradually became a core part of their brief in these newly secular and therefore chastening times. So it should not surprise us at all that among the leading proponents of my true version of equality and human rights these days, pushing a preference for the poor and the needy as well as the outcasts of society, should be the churches. But the history of equality and human rights in its modern, post-religious form starts in the 1640s, with Thomas Hobbes and the progressive forces to which his work was, among other things, a reaction.

As Michel Foucault has observed in a brilliant essay on 17th century England, Hobbes found a culture in which various race battles begun with the Conquest of 1066 had yet to be concluded. The political conflicts of the day were reflected in the monarch's commitment to the Norman victory, countered by Parliament's nostalgic yearnings for return to an Anglo-Saxon Golden Age. Hobbes grabbed these elements in the culture and subjugated them to a basic point: each and every one of us faced the same set of challenges wherever we were from; whoever we were, we were all in this 'nasty, brutish and short' life together. Of course his reasoning then led him to argue for an absolute ruler to whom we all must sacrifice our freedom so as better to be able to survive. Crucially this Leviathan was not one that worked by coercion, by the victory of one over the other, but by the exercise of individual

choice. Such a despotic ruler may have been the wrong answer to the questions Hobbes had posed, an effort to abolish historical forces by the erection of a mythic truth rooted in a phantom social contract, but that it was possible at all was due to a new understanding of the radical equality of the individual. We were each equal in the natural rights that we held in the anarchic state of nature from which the only escape was voluntary subjugation to Leviathan.

The progressive implications of this egalitarian turn could be seen even at the time that Hobbes was writing his great work. In 1647, the proposals of the Levellers that generated the Putney debates called for, among other reforms, universal male suffrage, complete religious toleration, and, crucially, '[t]hat in all laws made or to be made every person may be bound alike, and that no tenure, estate, charter, degree, birth, or place do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected.' This was because 'as the laws ought to be equal, so they must be good, and not evidently destructive to the safety and well-being of the people.' Of course as we all know the army radicals were crushed and Hobbes's *Leviathan*, published just four years later, transformed equality into what I have briefly described above: a vehicle for oppression rather than for freedom. Over the course of the next two hundred years or so, however, it is the radical, progressive version of equality and human rights that enjoys an ascendancy.

There are three stages to this historical process. First there are the revolutionary documents themselves, the bill of rights of 1688 in England, the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and the Citizen in 1789: all committed to visions of equality rooted in

natural or (as they were coming to be called) human rights as tools of emancipation, as modes of thought underpinning action against oppression – and all seeing violence as potentially necessary en route to a better future. A modern counterpart of these rights' instruments is the Universal Declaration of Human Rights with its ringing declaration of the 'inherent dignity ... of all members of the human family' but also its incendiary, non-pacifist reminder to us that the proper protection of human rights is the means by which we can avoid the necessity of having recourse 'as a last resort to rebellion against tyranny and oppression'. (The language of equality and human rights is therefore, we can see clearly, certainly capable of mobilising violent actors against state power, but in light of a recent trend to use this language to support third party interventions of this sort ostensibly on behalf of victims of human rights abuses, we should perhaps pause to note here both the requirement for good faith in the use of the terms and also the fact that at the important historical moments that gave rise to the foundational human rights documents I have just mentioned, it was the oppressed peoples themselves who were acting, and not some imperial power supposedly intervening on their behalf: France did not impose the declaration of independence on America via a few compliant Ben-Franklin-exiles so as to steal a march on the British.)

Returning to the historical narrative, following upon the foundational instruments, there were, secondly, the further reforms that flowed out of their commitment to equality. What I am referring to here is the social progress that was achieved in the nineteenth and early twentieth century by deploying the rhetoric of equality more generally than the newly powerful might like but which use – due to their own success of the back of this very same idea a generation before – they were

unable to resist for long. So we see the universalisation of the franchise during this period and in the United States (after a disastrous war precipitated in part by a judicial effort to dehumanise Black Americans) a constitutional guarantee of the equality of all before the law. In other words, the double-standards thrown up by the appropriation of power by the few in the name of equality and human rights produced a strong momentum towards the extension of their privileges to all: not for the first or the last time, we see hypocrisy generating an irresistible case for change. (In this way are double standards often to be welcomed, not as a backward move but rather as a staging post on the way to greater freedom.)

The result of this second large trend was, thirdly, the emergence for the first time of a version of equality that takes the shape of a demand for non-discrimination, for a call for an end to double standards that only made sense to its listeners if they could first be persuaded of the equal rights of all. The democratic movement, the demand for the right to vote, was essentially an equality movement, rooted in the principles of non-discrimination. Drawing on the strength of the concept of equality as the intellectual under-pinner of the successful bourgeois revolutions of the past, first the Labour movement and then the dedicated female activists we remember as suffragettes were able to say, 'why not us as well?' Both campaigns were, as we all know, successful, with the vote being secured for all.

This is where, at the pinnacle of its success, the progressive power in the equality story begins to ebb away, and the divide between equality and human rights, so close throughout this progressive era, gradually becomes apparent. I am talking about the period of enfranchisement, between about 1880 and 1930.

The Levellers' assumption had been that 'as the laws ought to be equal, so they must be good, and not evidently destructive to the safety and well-being of the people.' The word 'must' here suggests not only moral obligation ('ought') but an inevitability flowing from the equal laws that 'ought' to be put in place: it is a word of causation as well as of obligation. If we have equal laws, which we should have, we will definitely get good laws. In the 19th century there was a similar confidence that laws that would emerge from the democratic process that was being fought for were bound to be just, that equality understood in these democratic participatory terms (ie as 'civil liberties' or, to give them their modern term, 'civil and political rights') guaranteed a good life, or to use contemporary phraseology again, were certain to deliver 'social and economic rights.' This was the space that the social democrats of the 1880s and 1890s carved out in opposition to their more militarily inclined and anti-democratic communist colleagues. It is what persuaded the British labour movement to throw itself into politics rather than revolution. For many years too, it has proved to be the case, in this country at least. The reforming Liberal administrations of first Henry Campbell-Bannerman and then H H Asquith made the years from the election of 1905 through to the first world war seem revolutionary, at least to those whose wealth and privilege was being seriously challenged for the first time. The emergence of a Labour Party dedicated to securing power on behalf of the labouring masses rendered the Liberals largely redundant and kept the social and economic interests of the majority at the forefront of politics through the class wars of the 1930s and once again (though now more successfully electorally) in the radical Attlee administration of 1946-51. After that, it was the Cold War that kept capitalism on its toes, business being always mindful of the need to fight communism not only

with the threat of weapons of mass destruction but also with evidence of its (social democratic) largesse on the home front.

The critical point in this well-known overview from the perspective of tonight's lecture is this: in these circumstances it was natural to assume that the good life, or to put it another way 'social and economic rights', were best achieved, and were broadly speaking being achieved, via the democratic process, that the majority left to themselves could and would deliver, via their elected representatives, the various progressive policies and wealth-sharing initiatives that together amount to a programme of 'social justice'. Given these new and largely benign social conditions, the idea of 'human rights' dropped out of the political vocabulary and that of 'equality' increasingly took legal shape as a tool for fighting discrimination, with the focus now being not on securing the same voting rights as everybody else (already achieved of course) but on ensuring that everybody was also *treated* the same. There was not much point being able to vote if you were then regarded as a 'second class citizen', turned down for work, refused services, denied opportunities for personal growth and so on, simply on account of some objective characteristic over which you had no control. In the 1960s, therefore, and building on US case law, we had the beginnings of our race relations legislation and after that the various equal opportunities initiatives that were aimed at closing the 'gender gap'. Since then, we have had disability discrimination law and via the European Union the range of other initiatives in the field which I mentioned at the start of this lecture. Equality is now recast as a field of anti-discrimination law with its bureaucracies, its judgments and its enforcement machinery, all designed to crack down on discrimination: my colleague at Matrix Karon Monaghan's recently published account is the definitive

legal text. It is this part of its remit that the EHRC is acknowledging in its statutory promise to work to ensure that 'people's ability to achieve their potential is not limited by prejudice or discrimination' and that each individual should 'have an equal opportunity to participate in society'.

And yet this is now increasingly recognised as no longer a complete account of the equality story, with human rights having made a dramatic comeback – via the 'Trojan Horse' gift of the Human Rights Act 1998, a seemingly innocuous offering to the political process but one that we will come to appreciate over the coming years had many human rights warriors within it that were well hidden from view at the time, the Joint Committee on Human Rights was one, the EHRC itself another. The incompleteness of the equality/non-discrimination story is recognised in the other of the EHRC's goals, which are to encourage and support the development of a society in which 'there is respect for the dignity and worth of each individual,' in which 'there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights', and in which 'there is respect for and protection of each individual's human rights'. Human rights is specifically defined in the parent Act as covering 'other human rights' as well as those to be found in the European Convention on Human Rights, thereby opening the door to the whole range of human rights instruments to which the UK is committed and, even as Francesca Klug has observed, to the possibility of involving human rights values as well.

This is the kind of society for which the EHRC is statutorily obliged to work. And far from being a creature of democratic government, acting under instruction to

deliver outcomes to which the whole administration is wedded, the Commission at the request of those responsible for designing it and in order to comply with international norms in this area, has specifically insulated itself from government, has created a kind of autonomous quasi-governmental role for itself, as the protagonist of a far wider agenda than the old equality/discrimination agenda would have required. This explains the breadth of the remit that I referred to at the start of this lecture. What is going on here? Why has equality burst the banks of anti-discrimination, and emboldened by the renewal of its partnership with human rights why is it now threatening to flood the playing field of politics with its own, non-political version of what a good life requires? What happened to the old leveller/social democratic/labour movement assumption that the universal franchise would do all the ethical work that a society needed, apart from the occasional mishaps on the margins that anti-discrimination law could be relied upon to find and rectify?

I think the answer lies in the collapse of confidence in the democratic ideal. This goes well beyond anxiety about the oppression of minorities which all democratic systems have been concerned about since the Nazi era: the old equality-as-discrimination framework deals reasonably well with this, especially when given the wider range now to be found in the Human Rights Act (evidenced in the Belmarsh detention case of December 2004) with perhaps an even stronger such law to come if the UK signs up to the new Council of Europe version that is presently on offer. The collapse that matters here relates to the apparent inability of the democratic system to deliver social justice. The democratic method of governance is no longer seen to be capable of delivering by itself the just society that the democratic activists of the past presumed would be the natural consequence of their

campaigning success. Whether this is because the end of the Cold War has re-emboldened the rich, or because we all think we might be rich one day, or because union power has been eviscerated, or because the truly poor have no advocates on the political stage, or because our political process is now so malfunctioning that it is in fact dominated by wealth and power under the loosest of loose democratic camouflages, whether it is for any or all of these reasons need not concern us now.

The fact is democratic governance no longer delivers a just society if by that term we mean a country with an egalitarian bent, genuine social mobility and true equality of opportunity. For a country of Britain's wealth, the gulfs between rich and poor are too great. The facts are well-known: as a study by the Joseph Rowntree Foundation found earlier this year, poor and wealthy households in Britain are becoming more and more segregated from the rest of society, with the UK facing the highest levels of inequality for 40 years. In areas of some cities, more than half of all households are now 'breadline poor', on a level of relative poverty with enough to live on but without access to opportunities enjoyed by the rest of society, yet above the level of absolute poverty, or 'core poor'. Between 1991 and 2002, the personal wealth held by the richest 1 per cent has grown as a proportion of national share from 17 per cent to 24 per cent. Other data show that while as a community we are concerned about these findings, we are not concerned enough to do anything about it: in the most recent survey (2004) 73 per cent of those asked thought the income gap too large but only 32 per cent agreed that the 'government should redistribute income from the better off to those who are less well-off' – more than 40 per cent actively disagreed with this proposition. So we get revealing events such as the Labour/Tory competition to claim credit for the scandalously regressive, wealth-gap-

reinforcing inheritance tax proposals that are currently on the table: a naked auction of the life chances of the poor, and for what: to secure the benevolent attentions of the selfish rich (and the selfish aspirants to wealth) for a few moments in the electoral cycle. But Labour may well be right: a decent manifesto for a just society – higher tax rates for the rich; better safeguards for workers especially immigrant labour in non-unionised work; VAT on those private schools that make no contribution to society; strong inheritance and corporate taxes – might well in the current climate lose the Party a general election.

This is where the Trojan Horse of human rights comes in. The government has accepted this gift from civil society. It has caused enactment of the Human Rights Act, just as it has facilitated the establishment of the Joint Committee on Human Rights, and has now engineered this new commission, with its wide remit, its decent budget and its unusual degree of independence from ministers and civil servants. The democratic blockage that has produced the social justice failure I have been discussing is one that many of those in leadership positions within politics feel acutely but which they believe themselves incapable of properly addressing. This combination of failure and awareness of failure – something that is unique to the Labour Party I would say with its background in progressive politics and its historical commitment to socialist and egalitarian values – explains both the otherwise puzzling return of human rights to centre-stage and the extraordinary responsibilities that have been given the EHRC to enable it to push its equality and human rights agenda. The EHRC is being asked to do far more than be just the latest quango: its job is to act as moral outrider to government, as the conscience of a Party that fears it is losing its way, and, when the time eventually comes for a new government, to

act as a perpetual witness to the values of human rights, equality and social justice, even in the face of hostility from what by then may be a new political order.

What in practical terms does this mean for the EHRC and for campaigning lawyers? First, the discrimination agenda remains an excellent one through which to tackle the systematic violations of the human rights of minority groups: if evidence were thought to be needed for this, it is supplied by the remarkable Strasbourg decision of just a couple of weeks ago (*DH v Czech Republic*) on the iniquity of educating Roma children in segregated schools for children with disabilities. Albeit not so extreme as this, there must be many spaces still remaining within British society which would benefit from the anti-discrimination spotlight, of either a structural or individual type. Test cases, tribunal rulings, informal advice, reports, campaigns and so on – all these remain important. Second, the human rights dimension to the Commission's work gives it the broader remit I have been discussing, gives it the locus to engage in our culture in a different, more visionary kind of way. It may be that it will be via the EHRC and the very broad definition given there to 'human rights' that the term human rights will re-enter the progressive vocabulary in a way that we have not seen since it was overtaken by the democrats in the nineteenth century and captured by the lawyers in the twentieth. The signs for this are very good. At a public meeting in LSE the EHRC chair Trevor Phillips spoke of social justice as being a first task of the new body. Of course there will be tension in the EHRC between the discrimination/lawyer based work and the quasi-political activist human rights engagements of the wider body: that is as it should be. Lawyers both within and outside the commission can help the process by being activist in a

double sense, activist lawyers pushing the anti-discrimination front and activist citizens providing support on the wider issues.

And now finally to the role of Chateau EHRC in the Labour meal. Well, the answer has emerged in the course of the talk. I think many of the Labour cooks know the meal is tougher than they'd like, know that it is not the best they can do, but feel constrained by the conditions in the kitchen to offer only this. But with the meal they send in this bottle of EHRC wine in the hope that it does more than cover up the taste but actually also works to give the meal a different, better shape. Should equality and human rights activists play along with this? Obviously the whole tone of this lecture is that they should. But why? In an article in the *London Review of Books*, 'Resistance is Surrender' (flagged up on the cover as 'What to do about Capitalism'), the writer Slavoj Žižek insists that the truly intelligent thing for protestors to do is 'not to insist on "infinite" demands we know those in power cannot fulfil.' He goes on to say explain why: 'Since they know that we know it, such an "infinitely demanding" attitude presents no problems for those in power.' Rather 'the thing to do is .. to bombard those in power with strategically well-selected, precise, finite demands, which can't be met with the ... excuse' that they are unachievable. Not a bad mission statement for the EHRC I would suggest.