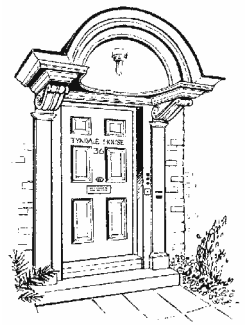

Ethics in Brief

formerly The Whitefield Briefings

Summer 2006 (Vol.11 No.1)

The Abuse of Equality

Julian Rivers

'*In this way equality-arguments become the politicians' alchemy, producing the gold of judgment from the straw of non-committal stances*.' Oliver O'Donovan

Introduction

Equality is becoming the supreme value of our political and legal discourse, yet its nature and requirements remain remarkably elusive. Aristotle famously stated that distributive justice takes the form of equality. By equality, he understood proportionality between some relevant characteristic of persons and the way they are treated. Thus those who are slaves by nature are appropriately treated as slaves, or to use another chilling example, the motto 'to each that which is his own' could appear over the entrance to Auschwitz. In tension with this concept of equality as proportionality, with all its attendant debates about which characteristics of persons are relevant to what forms of treatment, we can place the words of Paul: 'From one man he made every nation of men …' (Acts 17:26) and 'there is no longer Jew or Greek, there is no longer slave or free, there is no longer male and female, for all of you are one in Christ Jesus' (Galatians 3:28). This is equality as identity: the insistence that all human beings are at root the same, that distinctions are ultimately irrelevant.

Jeremy Waldron has argued cogently that it was a specifically Christian conception of equality that underpinned John Locke's political thought. But many debates about equality reproduce the tension between these two ancient conceptions of equality as proportionality (requiring respect for difference) and equality as identity (insisting on sameness). At the same time, modern debates display two expansive and worrying tendencies. The first is to understand equality as ultimately requiring equality of lifestyle. The second is to extend the scope of the obligation to act with equality from the public into the private sphere. These two tendencies combine together to produce a dangerous mixture of tyrannical amoralism.

I. Four concepts of equality

(1) Formal Equality

The most basic concept of equality to figure in modern legal and political thought is that of formal equality. This is expressed in a number of familiar maxims, such as the requirement that there should be equality before the law, that one should have no respect for persons, or that like cases should be treated alike. The underlying idea is that in applying any standard or rule, bias and irrelevant considerations should be excluded. The rule may itself draw a distinction which from another perspective is unjust, but it is to be applied impartially. Thus formal equality requires a rule stating that women are not eligible to stand for public office to be applied, to permit all men otherwise qualified to be elected and to disqualify all women.

(2) Equality of Treatment

Formal equality requires nothing of the content of the standards to be applied in decision-taking. Equality of treatment, by contrast, requires that all individuals should be treated in the same way unless there is a reason for a difference of treatment. It is strongly rooted in the idea of equality as identity. It is equality of treatment that underlies the legal obligation to avoid direct discrimination. Typically, the law has proceeded by identifying specific personal characteristics which have historically underlain difference of treatment, but which are to be outlawed as objectionable, such as sex or race. Of course, even here some distinctions may be justifiable, such as the use of women attendants in women's changing rooms, or Chinese waiters in Chinese restaurants. And sometimes the distinction may appear harmless enough until further research reveals that it has more problematic implications. Differential employment rights between full- and part-time workers seem perhaps less than ideal, but are shown to be deeply problematic once the different gender-balance of these two groups is taken into consideration.

The obligation to avoid direct discrimination need not be limited to certain suspect classes. If one proceeds on the basis of equality as identity, there could be a general legal duty to avoid all unjustifiable distinctions. Equality as a human right tends to be understood in this way. Of course, the law is full of distinctions, but they must all be rationally defended.

(3) Equality of Outcome

No two people identically treated will experience that treatment in the same way. A £1000 fine will vary from personally disastrous to entirely trivial. For this reason, it might be argued that what matters is not equality of treatment but equality of outcome. It is this idea that lies behind legal notions of indirect discrimination. In the classic example, a rule requiring all motocyclists to wear a helmet impacts more harshly on Sikhs, who consider themselves under a religious obligation to wear a turban. An exception therefore needs to be made for their benefit.

Equality of outcome therefore represents a partial shift in the Aristotelian direction in that it requires difference of treatment. But the shift is only partial, because it assumes that there is some test by which one could establish that the impact of differential treatment on different persons is identical. The requirement of identity is taken to a deeper level. It is a desire for equality of outcome that drives the critique of an economic and political system that secures equal treatment, perhaps through the 'neutral' rules of the free market, but produces great disparities of wealth. A preferential option for the poor is justified precisely because it produces equality at the level of social inclusion and affirmation.

However, fixing the precise content of equality of outcome is notoriously difficult. Not only is human diversity very great, but there are also aspects of that diversity that we assume lie within the responsibility of the individual and for which the rest of society should not bear the cost. Many secularising writers question why it is that a religious reason for refusing to wear a motorcycle helmet should be privileged whereas a mere personal fancy for the thrill of an unprotected ride should be discounted. The debate about the extent to which the workplace should accommodate different patterns of childbearing and family responsibility in pursuit of 'equality' is another familiar example of this problem. Is having a child a lifestyle choice or a social good?

Not only is the relevance of human responsibility for differential outcomes problematic: we are not even sure what outcome we want. To name only a few contenders, is it equal freedom, equal welfare, equal resources, equal opportunities or equal well-being that we are trying to achieve? For all the attractiveness of equality of outcome, this uncertainty results in substantial instability.

(4) Equality of Lifestyle

When the desire to achieve equality of outcome is coupled with uncertainty about the type of outcome to be achieved and the degree of personal responsibility for differential outcomes, it is tempting to seek a solution in liberal agnosticism. Liberal agendas often seek to guide political and legal action by principles of neutrality with respect to conceptions of the good. The requirement that each person should be treated with 'equal concern and respect' is understood to require that public action not be based on a controversial lifestyle preferences. This concept of equality requires that every possible lifestyle be identically accommodated by the legal order. Of course, no plausible liberal theory demands complete equality with respect to moral judgment; that would be to render law impossible. There must be limits. Thus there should be a correct public framework of right, and

neutrality with respect to different conceptions of the good life within that public framework. Within the public framework of right, each lifestyle choice should be equally unconstrained. The question is whether this distinction between the right and the good is sustainable.

The difficulties in this respect are well illustrated by considering in what sense the passage of the Civil Partnerships Act 2004 was a requirement of equality. The Civil Partnerships Act creates a legal relationship virtually indistinguishable from marriage, but limited to same-sex couples. It was generally assumed that the exclusion of homosexual partnerships from the law of marriage was discriminatory. But extending the law of marriage was neither a requirement of formal equality, nor of equality of treatment, since there is no criterion of sexual orientation in the law of marriage. In terms of the content of the law of marriage, sexual orientation is actually irrelevant. It is not even clear that the law of marriage resulted in inequality of outcome for homosexual persons. Of course, it excludes a homosexual couple who wish to enter into a marriage-like legal form and are only excluded by the fact that they are of the same sex. But the law of marriage also excludes siblings, heterosexual couples and polygamous groups who for various other reasons cannot satisfy the requirements of marriage. From a purely numerical point of view it is quite unclear which group is the larger.

The argument that the law of marriage produces inequality of outcome for homosexual partners actually depends on the hidden assumption that homosexual partnerships are morally the same as marriage and morally distinguishable from other excluded relationships. The law of marriage is based on a distinctive vision of the good of sexual relationships, which has come to be questioned. The equality argument against it is an argument that certain other lifestyles, hitherto accepted to be morally distinguishable, should now be treated as morally equivalent.

But equality of lifestyle has no clear limits; or rather, it only reaches its limits when all individual desires are satisfied and each person is free to live as they please. The Civil Partnerships Act, which is supposed to have achieved equality, continues to exclude all sort of couples or people groupings who may wish to benefit from the legal incidents of marriage, and it continues, by exclusion, to stigmatise all sorts of sexual activity and relationship. It can only be characterised as a shift in the public conception of the good lifestyle from one (more or less) controversial position to another. But the language of equality relieves us of the responsibility of making positive arguments for this new conception of the good, merely legitimising arbitrary shifts of moral sentiment and silencing their opponents.

II. The privatisation of equality

If the first tendency of Western legal and political discourse in the last century or so has been to move from commitments to formal equality, through equality of treatment and equality of outcome to an amoral equality of lifestyle, the second tendency has been to apply equality-based obligations to private and more personal relations.

The initial campaign to secure gender equality focused largely on the removal of limitations on women, such as those relating to property ownership, and on public and political rights, such as the rights to vote and to enter professions. Debates in the 1960s about the scope of race and sex discrimination legislation displayed a certain sensitivity in extending the range of action covered. Of course, decision-taking by governmental and professional regulatory bodies was to be covered, and there was now agreement that private sector commercial activity such as employment, the provision of goods and services to the general public, and education, would be covered too. Private members' clubs, such as working-men's clubs, were, however, excluded, as were charities to a very large extent.

More recent equalities legislation has extended further into the private sphere. Under recent European Union legislation, the definition of 'employment' has been extended to cover appointment to offices in religious associations, which has in turn necessitated exceptions to obligations not to discriminate on religious grounds. The 12th Protocol to the European Convention of Human Rights extends the original limited equality provision to cover 'any right set forth at law'.

The Equality Act 2006 contains new and substantial regulations relating to discrimination on grounds of religion or belief. It marks a considerable widening of the scope of religious discrimination legislation. It makes unlawful direct and indirect religious

discrimination in the provision of goods, services and facilities to the general public or a section of the public, whether charged for or not, as well as discrimination in access to premises, in education and in advertising. It creates exceptions, in some cases rather narrowly drawn, for the administration of personal property, religious organisations, religious charities and faith-based schools.

The Act marks a subtle but substantial shift in the political values of the United Kingdom. Whereas in the past one was free to act as one pleased except in so far as one was limited by specific obligations not to discriminate, the new legislation favours equality over liberty. It creates wide-ranging general obligations of equality with limited exceptions for the free exercise of religion. Concern about the implications of this legislation are only compounded by the wide-ranging power it gives government ministers to make regulations in respect of sexual orientation discrimination.

It is, of course, generally accepted that purely personal relationships cannot be regulated by requirements of equality. We set our love on individuals not without reason but on account of their uniqueness. Indeed, the ability to draw fine distinctions is still prized among gourmets and artists. That fact, familiar to us all, is yet incomprehensible to the modern mindset of equality. Discrimination has become a private virtue, but a public vice.

It is thus hard not to see in recent political and legal developments a collapse of faith in the possibility of public moral judgment. Under the rhetoric of equality, moral distinctions become suspect and thus vulnerable to collapse under the pressure of individual desire. The only sphere in which the individual is free to make and act on such judgments is the non-legal sphere of personal relations. If we wish to combine to express our collective judgment, this is barely tolerated at the level of the private association, and quite impossible in the public realm. So equality has come to rob us of any possible anchor in a sea of public moral relativism, instead oppressing us with a tyranny of amoralism.

For further reading

Brian Barry, *Culture and Equality*, Polity Press, 2001.

Ronald Dworkin, *Sovereign Virtue: the Theory and Practice of Equality*, Harvard University Press, 2000.

Duncan Forrester, *On Human Worth*, SCM Press, 2001.

Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002.

Oliver O'Donovan, *The Ways of Judgment*, Eerdmans, 2005, ch. 3.

Jeremy Waldron, *God, Locke and Equality*, Cambridge University Press, 2002.

Dr. Julian Rivers is Senior Lecturer in Law at the University of Bristol. He is a Trustee of the Universities and Colleges Christian Fellowship and Chairman of the Kirby Laing Institute for Christian Ethics Advisory Committee .