**PUBLIC LAW PROJECT CONFERENCE**

**DISCRIMINATION LAW FOR PUBLIC LAWYERS**

**PUBLIC LAW FOR DISCRIMINATION LAWYERS**

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**OPENING ADDRESS**

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Too much of a good thing can be bad for you, as the saying goes, and democracy is no exception. As our voluminous law reports show, long before the political upheavals of recent years the excesses of democracy have frequently led to judicial intervention - and frequently to controversy. The remedy for the excesses of democracy is judicial review, but your view of this remedy rather depends which side of the argument you are on.

Politicians have not exactly embraced it, an uncomfortable number of them deriding it as a massive growth industry, proving burdensome to government and public authorities and needing to be checked. Many will publicly lambast these pesky, unelected activist judges for failing to show due deference, and for wielding their considerable power to invalidate the actions of the elected representatives of the people! We all know where this leads: to media headlines depicting judges as the “*enemies of the people*” and to the abject failure of a Lord Chancellor to condemn such serious constitutional impropriety.

Others strongly defend the judges as the guardians of fundamental and enduring principles in the face of temporary, popular passions and prejudices. They argue that judges should always stand firmly in the way of democratic majorities, in order to prevent majority rule from degenerating into majority tyranny.

Obviously the proper course in this country, in constitutional terms, is for judges fearlessly to ensure compliance with the rule of law while avoiding over-interventionist judicial activism, difficult as it may sometimes be to know where the line is to be drawn. And, despite the controversy, most reasonable people agree that it is essential for the health of our constitutional democracy that judges continue to provide a strong bulwark against unlawful executive action, ensuring that executive decisions conform to the requirements of the rule of law and that the exercise of governmental power is constrained by legal principle.

Over the years, there have been a number of executive attempts to curtail the reach of judicial review, or to reduce the ability of citizens to have access to it. It’s not that long ago, for example, that the coalition government proposed in 2013 the complete abolition of some oral applications for permission. The judges however, stood firm. “*Judicial Review is increasingly essential if we have an increasingly powerful executive….”* said Lord Neuberger in 2013, responding to the proposals, *“….it is an irritant to the executive, but it is a very important, fundamental control on the executive…any attack on judicial review, or any attempt to limit it, has to be looked at very critically.*”

Since judicial review is often used by those who are the most vulnerable in society, to challenge decisions that may have a significant impact on their lives, Lord Neuberger was right to emphasise the important and fundamental nature of the remedy. And historically, certain groups of people with particular characteristics have been amongst the most vulnerable in society, experiencing discriminatory treatment which robs them of an equal opportunity to make the most of their lives, or consigns them to poorer life chances because of their gender or race, or sexuality, or because of where they come from, or when they were born, what they believe, or whether they have a disability.

It is therefore fitting that this important, inaugural conference for public lawyers and discrimination lawyers marries the fundamental nature of judicial review with that most fundamental of human rights – the right to equality. And as we approach the tenth anniversary of the Equality Act 2010 it’s worth just spending a moment or two on the nature of that right.

I do so because of what I firmly believe is the fragility of our current equality laws, the need for constant vigilance, the need to avoid complacency, and the ever increasing importance in the years to come of you - the lawyers – identifying, understanding, formulating and carefully presenting inequality and discrimination issues before our courts, so as to enable the judges to determine them properly. The fundamental right to equality requires constant attention. It is so easy to lose the gains made over many years and your role, as lawyers, will be instrumental in ensuring that judicial review cases involving equality issues are carefully prepared and argued before our courts. How to identify inequality and discrimination issues, how best to evidence and present them, how to use international human rights instruments and the Equality Act effectively, how best to tackle the funding problems and to manage tactical issues and damages claims, all these are the subject of today’s conference – and rightly so. I shall not refer to specific topics, which will be covered in detail by others. Instead I offer some general thoughts on the problems facing us – principally facing you, the lawyers, and the judges before whom you appear.

The principal problem is that, unlike most jurisdictions, the United Kingdom lacks a fully-formed constitutional equality guarantee to underpin statutory equality rights. Such a guarantee would provide important background principles to enable judges to develop the common law in a coherent way, to tackle structural inequalities effectively, to adopt a principled approach to interpreting equality legislation and to avoid narrow, technical or parsing techniques, which have so often proved a stumbling block and which fail to breathe life into what is one of our most fundamental rights.

Instead, our anti-discrimination and equality laws have developed ad hoc over the years on a statutory basis, starting effectively from the position that discrimination is lawful unless expressly prohibited under the legislation. Commencing in the mid 1960s, these laws have now culminated in the 2010 Equality Act. This important 2010 Act was said to herald the start of a period of transformative equality. It harmonized and simplified the complex set of previous anti-discrimination enactments, clarified definitions of discrimination, harassment and victimization, and prohibited public authorities from discriminating in the performance of their public functions, unless specifically authorized to do so by primary legislation. In addition, many people saw the prospect of real societal change through the public sector equality duty provisions in section 149, and through the operation of the positive action provisions in relation to recruitment and promotion in section 158 and 159.

So now, almost ten years later, can equality be described as a constitutional principle? What legal weight is attached to the idea of equality? Does our public law provide effective protection against inequality? In answer to the first question I say ‘not really.’ To the second and third I say ‘it all depends – on the facts and on the judge.’ We need, I think, a push – on the constitutionality of the equality principle.

Twenty-five years ago, Professor Jeffrey Jowell published a paper in which he posed the question: “*Is Equality a Constitutional Principle?”*

He described it as self-evident that equality is a fundamental principle in a democracy, but he noted that there was barely a mention of equality in any of the leading English works on constitutional and administrative law, contrasted with books on the public law of most other countries. He concluded from his review of the case law that although a number of decisions established the existence of a common law principle of equality, that principle was being used in our public law essentially as a test of the rationality of official action, adding little to existing public law controls on the behaviour of public authorities. The focus was thus on process rather than substance.

He argued, however, that equality was a principle which our courts should treat expressly, and that it should be extended to cover situations where a denial of dignity, respect or ‘equal worth’ was at issue. “*Our constitution….*” he said, *“….rests upon an assumption that government should not impose upon any citizen any burden that depends upon an argument that ultimately forces the citizen to relinquish her or his sense of worth. This principle is deeply embedded in our law, although it is rarely made explicit. The scope of equality is too great to be contained within the interstices of the Rule of Law. Its aims are too important to be obscured under vague definitions of irrationality. These aims summon far more than nebulous conceptions of reasonableness; they are integral to our democratic system*.”

Powerful words indeed, and they have since found echo in some of the judgments of the early 21st century, acknowledging that equality constitutes a core value of our constitutional order. As Baroness Brenda Hale observed in 2004, for example, “*democracy is founded on the principle that each individual has equal value*” (Ghaidan v Godin-Mendoza [2004] UKHL 30). The rule of law is itself based on a similar assumption that individuals should enjoy equality of status. So the whole constitutional structure of the United Kingdom is predicated on respect for the formal equality of its citizens, even if many of those with the characteristics protected under the Equality Act have, in reality, been the victims of discrimination over many years.

However, in my view the status and exact content of this equality principle remain unclear. The appellate courts have not proved consistent in their approach to inequality and discrimination. And this seems to me to reflect, not only the nature of our equality laws, but also the lack of expertise and experience in equality law and the principles underpinning it among members of the judiciary, especially at the senior levels where the most important equality issues are litigated. Training in equality law (except for employment tribunal judges) has been minimal: one day was all that was allotted to training on the Equality Act for judges in the County Court, most of whom had never previously had to consider discrimination or inequality issues. And a short, after-court session one evening was available for the senior judges in the RCJ. The judicial skills training courses offered by the Judicial College, where some equality and unconscious bias issues are tackled in realistic role-plays and case studies, have always been optional. When I was chairing these courses, very few members of the senior judiciary ever opted to attend this training, although those who did were quick to say how much they had gained from it. Roger Toulson, who did attend one of them, told me afterwards that he thought the training should be mandatory for every judge at every level. It isn’t!

These difficulties seem to me to go to the heart of judicial impartiality. Lord Bingham, giving the Judicial Studies Board’s annual lecture in 1996, opened it with these words: “*It is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence and an impartial hearing*.” He focused in his lecture on the essential requirements of an independent and impartial judiciary, in order to ensure that there is no discrimination in the administration of justice. And all judges would vigorously endorse the duty to be, and to appear to be, completely impartial during the conduct of a case. But what is the extent of that duty?

Obviously it includes the duty to recuse yourself, when necessary, to avoid bias or the perception of bias; the duty not to make disparaging remarks about the parties in the case being tried; the duty not to court publicity or seek public acclaim; the duty not to have ex parte communications about the issues in a case after reserving judgment; and the duty not to do anything to obstruct a legitimate appeal.

But to this list must surely be added the duty upon every serving judge to know something about structural inequality and disadvantage, to understand something of those matters which are central to the lives of the diverse range of people appearing before them every day in their courts and tribunals, particularly when the issues in the case they are determining concern alleged discriminatory treatment. It was particularly appropriate that Lord Bingham should begin his lecture with what is probably the most famous phrase from the works of a late 18th century novelist, who understood more than most the characteristics, attitudes and prejudices of those amongst whom she lived. Judges, deep down, are human beings. They are all creatures of their upbringing, education and life experience. They hold differing views and are all subject to different prejudices, to varying degrees. When they sit as judges the need for awareness, and avoidance of those prejudices is essential if they are to comply with their judicial oath, to “do right to all manner of people… without fear or favour, affection or ill will.”

This is of particular importance when, despite the creation of a Judicial Appointments Commission, there is still a distinct lack of personal experience of inequality or disadvantage among our judiciary, most of whom at senior level remain predominantly male, almost exclusively white and not otherwise disadvantaged, by reason of social class for example. Gender, race, class and other defining personal characteristics inform the life experiences and world views of judges in just the same way as they do society at large, and it is wrong and unhelpful, in my view, to argue as some of my judicial colleagues do, that these factors are irrelevant to our system of justice. As Ruth Bader Ginsburg said in her inaugural speech, on being appointed as a Justice of the United States Supreme Court, “*A system of justice will be the richer for diversity of background and experience. It will be the poorer, in terms of appreciating what is at stake and the impact of its judgments, if all of its members are cast from the same mould*.”

Without a more diverse and properly trained judiciary, there is a greater burden in terms of case preparation and presentation upon those who pursue these cases. No assumptions should be made as to the level of knowledge or experience of inequality and discrimination law or of the concepts which underpin it.

There are of course a number of reasons for the current fragility of our equality laws and for the constant need to avoid complacency. EU law has played a crucial role over the years in protecting against the erosion of equality rights and in pushing forward expansion, in relation for example to protection against pregnancy discrimination, or the right to equal pay for work of equal value, or to protection against discrimination at work on grounds of sexual orientation, age and religion.

In this way, EU law has performed a similar function to a constitutional protection in other countries. But without it, and notwithstanding promises being made now as to the post Brexit position, the reality is that the future remains uncertain. The right to equality in this country will depend entirely on Parliamentary legislation and it is vulnerable, in my view, to subtle but substantial undermining of the protections afforded under the Equality Act, of the kind currently being referred to in a number of quarters as placing “unreasonable burdens” on business or on public authorities: the increasing of qualification periods, for example; the narrowing of the definition of “worker”; the decreasing of compensation levels; or the shortening of limitation periods.

There are substantive concerns too. There is an obvious deficit in the failure to bring into effect the provisions in section 14 of the 2010 Act allowing for multiple discrimination claims. The public sector duty regarding socio-economic inequalities has not yet been brought into force and it seems unlikely that it ever will be. The positive action provisions do not appear to have had the transformative impact anticipated. There is inherent complexity in the wording and operation of the provisions of section 159 – the “tie-break” provision as it is known - and research suggests that many employers see themselves as potentially exposed to the risk of claims if they try to apply them.

There is, otherwise, growing disappointment that the public sector equality duty, intended to prevent institutional discrimination and to advance equality in practice, has not had the impact anticipated. Austerity has obviously meant that authorities have had fewer resources to invest in carrying out that duty. But there are other factors at play.

Section 149 requires public authorities, in the exercise of their functions, to have “*due regard*” to the need to eliminate conduct prohibited by the Act and to advance equality of opportunity and foster good relations between persons who share a relevant protected characteristic and persons who do not. “*This…*.” said the then Solicitor General when the Act came into force, *“….puts the onus firmly on public authorities to consider how to prevent and protect against discrimination in the first place*.” “*This…*.” said the late and much missed Professor Sir Bob Hepple, one of the principal architects of the Act, *“….will facilitate a more pro-active approach that focuses on making progress in outcomes*.”

The Act does not however identify what is meant by the requirement to have “*due regard.*” There is now a raft of case law which spells out the practical content of the duty and you will no doubt be hearing more about these cases today. But there is a significant mismatch, in my view, between the principles identified by different judges in different cases, using different wording, and the actual impact of the duty. As Professor Sandra Fredman has noted, *“…although judges consistently refer to a settled group of principles, their application to the facts yields far from consistent outcomes.*”

The public sector duty clearly has the potential to be an effective means of ensuring greater fairness and equality, but so far we have not seen even the green shoots of the transformative, societal change anticipated. In addition, the Coalition Government’s “Red Tape Challenge” of 2012 had a serious and chilling effect when the then Prime Minister announced that he was “calling time” on equality impact assessments, which he regarded as burdensome and unnecessary. Although not required by the Act, these assessments were a really useful way for public authorities both to think about and demonstrate compliance with their statutory duty. Without doubt, his comments sent a clear signal across Whitehall and through public authorities generally, that carrying out an impact assessment was a waste of time and resources.

It is true that Article 14 of the ECHR partly compensates for the gap left by EU law, in that it has incorporated important principles of EU law, such as indirect discrimination for example. However, it is binding only on the state; it does not cover all rights, such as the employment field; and it only comes into play when the facts in question fall within one or more of the other Convention rights. In addition, as political pronouncements, media articles and this year’s Reith lectures tend to suggest, the continued existence of our Human Rights Act is itself precarious. In such circumstances, the commitments that the United Kingdom has made to the right to equality contained in international human rights instruments will, in my view, become of increasing importance in litigation.

It is in these circumstances, when we are living in interesting times, where there is no constitutional guarantee of equality and where the protection offered against discrimination is patchy and uncertain, that there are clearly opportunities for the further development of the principle of equality into a clear constitutional norm at common law, a fundamental public law obligation as a way of challenging public decision-making. Judges have the power and the duty to protect the disadvantaged and minorities against both procedural and substantive inequalities and their ability to do so will depend a great deal on the way that these cases are evidenced and argued before them.

Collaborating with a wide rage of individuals and organisations and establishing networks to share the workload and assist in gathering any necessary expert evidence can be pivotal in this respect. So too, for those representing claimants, can ensuring that sufficient time is spent in managing the client’s expectations and ensuring that they are properly supported throughout what can be a very stressful and anxious time.

I wish you all well for the rest of this day and in the months ahead. Be bold, be creative, and be resolute! I can think of no better way to draw these opening remarks to a close than with the words, in her judgment in **Ghaidan,** of Baroness Hale, a judge from a non-traditional background who has so often demonstrated a full understanding of discrimination and structural disadvantage, who has been a consistent voice for the disadvantaged and who, sadly, will be retiring at the end of this year:

“…*Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being…. Second, such treatment is damaging to society as a whole…. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily…. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members or minority groups, even when they are unpopular with the majority. Democracy values everyone equally, even if the majority does not.”*

Thank you.