

THE NATURE OF EQUALITY: APPLES AND ORANGES / CHESTS AND BREASTS

Dale Gibson*

"It's nonsensical," say some, "to assert that all humans are equal. No two humans are born with equal attributes; we all differ from each other, sometimes radically, with respect to intelligence, physical capabilities, appearance, social and economic status and every other personal characteristic."

If claims to equality were taken to be representations of fact, this criticism would be entirely justified. But of course human equality is not a physical or social reality; it is an entitlement: a right to be treated with equal respect, and to be accorded equal opportunities of access to life's bounties. It is precisely because all human beings are not born equal in their actual potentialities that section 15 of the Canadian Charter of Rights and Freedoms, and other legal guarantees of Canadians' human rights, embody certain entitlements to equality of treatment.

"But even that is unrealistic", the critics complain, "because human beings and social situations are so infinitely variable that it would be simply impossible in many, if not most settings to treat everyone identically. Men and women require somewhat different washroom facilities; the disabled require somewhat different building access and transportation facilities than others; children require somewhat different restrictions on their activities than adults." Of course. The fallacy here is the assumption that "equal" means "identical". While it does mean that in the world of mathematics, it means something quite different in the realm of human rights. Equality between humans simply means treating as similarly as circumstances permit those persons who are similarly situated to each other in important respects relevant to the treatment. Aristotle described it as treating likes alike; unalikes differently.

One of the chief sources of confusion about the concept of "equality" when encountered in a human rights context is the absolute, mathematical, sense in which we all learned to employ it in early childhood. One plus one equals two. Thirteen minus five, divided by four, also equals two. Therefore, one plus one equals thirteen minus five divided by four. Comprehending this kind of equality is simplicity itself because every "one" is identical to every other "one." Numbers are absolutely interchangeable; "one," "two" or "thirteen" mean exactly the same thing whether used to count dollars or people, whether in Canada or Tibet, whether in 1989, 1889 or 2089.

When we use "equality" to express the right of one person to be treated in a certain manner by others, we speak in highly relativistic terms. People are not ciphers. Women and men are legally equal, but they differ in many important respects. To some extent those differences justify distinctive treatment. Moreover, while some of the justifiable differences in the way men and women are treated can be attributed to

physiological characteristics, many of them are culturally determined, and vary from place to place, time to time. Accepted ideas as to how women ought to be treated (indeed, common understandings of what "woman" means, in terms of social roles) vary between Canada and Tibet, and between 1889 and 1989.

When we ask what kind of treatment "equality" implies for women in such sharply contrasting settings, we stumble over the problem of whether the question should be approached descriptively or prescriptively. If we permit a simple description of prevailing norms to justify in perpetuity the way a particular society treats its women, we rule out progress. Yet significant progress toward an expanded concept of equality, especially for women, is a historical fact. The massive changes that have occurred between 1889 (or even 1959) and 1989 in Canadians' views about women's roles in society demonstrate the mutability of social norms. It also demonstrates the susceptibility of those norms to the educational influence of ideals like "equality."

On the other hand, if we adopt a relentlessly prescriptive approach, we overlook societal inertia. Where vested attitudes are concerned, it takes a long time to move from where we were to where we ought to be. Evolution is a sluggish process. While the egalitarian ideal seems clearly to be a major evolutionary force, it is only one of several, sometimes contradictory, forces. Furthermore, the ideal itself (in the sense of the type and extent of equality to which a given community can realistically aspire at a particular point in its history) is both ambivalent and variable. Ambivalent in that the descriptive and prescriptive approaches are in constant tension; one must look both backward and forward for inspiration: backward to tradition, forward to future improvement. Variable in that the descriptive and prescriptive points of view about equality will never remain acceptably reconciled for long in any given community. No sooner do traditional social norms adjust to the nagging of progress than the new orthodoxy is attacked for falling unduly short of perfection, and the process begins anew.

The type of equality that section 15 of the Charter and other egalitarian human rights standards are concerned with is much more like the equality of apples and oranges than equality of an arithmetic kind. "Apples and oranges?", you ask. That expression is a common metaphor for dissimilarity, and apples and oranges do admittedly differ from each other in many important ways: colour, taste, origin and so on. But they also resemble each other in important ways. They are both tasty fruits, roughly spherical and about the same size. Asking whether apples and oranges are alike will not yield a useful answer unless the

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question is put in a particular context rather than in the abstract. Are they alike in their suitability for planting in a Canadian garden? Certainly not. Will the preservation of both be enhanced by refrigeration? Yes, indeed. Are they equally appropriate for inclusion in a fruit salad? That depends upon the other ingredients of the salad.

Comparing people, or groups of people, or situations in which people find themselves, is much like comparing apples and oranges. Women resemble men in many respects; they differ from men in many other respects. Whether they should be considered alike for a particular purpose on a given occasion will depend upon the precise purpose and occasion.

Consider sun-bathing. Suppose that regulations applicable to a municipal beach prohibit topless sun-bathing by women, but permit it for men, and that the regulation is challenged under section 15 of the Charter. Is this a situation of treating likes differently? Men and women are certainly alike in some relevant characteristics. Many persons of both genders consider an even sun-tan to be attractive, and find the coolness and lack of confinement of toplessness on a fine summer's day to be a pleasurable experience. So far as the latter factor is concerned, in fact, the comfort of occasional toplessness may well be an even greater relief for many women than for most men. There are major differences as well, of course. Some, such as the fact that women bear children, have little relevance to topless sun-bathing, and can be ignored. Highly pertinent, however, is the fact that our society attributes considerably more sexual significance to women's breasts than to men's chests.

Can we conclude, therefore, that men and women are not alike for the purpose of determining the constitutionality of a regulation about topless sun-bathing in public places? Most Canadians in the 1980's would probably do so. It is important to understand, however, that there is a right way and a wrong way to reach that conclusion. The wrong way would be to decide that simply because there is an important difference between women and men which is relevant to the purpose of the regulation in question, the inquiry is complete. That approach would altogether overlook the similarities between men and women which are pertinent to sun-bathing. These must be weighed against the dissimilarities before a conclusion can be reached.

The point may be illustrated by considering another hypothetical sun-bathing prohibition - this one against sun-bathing by black persons in the presence of white persons. Apart from the obvious similarities, blacks and whites differ in some respects that the supporters of such a prohibition might deem relevant. Blacks have less need for tanning than whites. There is also a greater likelihood that certain bigots among Canada's overwhelming white majority would be more offended by scanty attire on blacks than on whites.

There is a greater possibility of racial hostility being directed against blacks than against whites on Canadian beaches. Can we conclude that blacks and whites are therefore not

alike for the purpose of determining the constitutionality of a racially based prohibition on sun-bathing in public places? Most Canadians in the 1980's would indignantly reply: "Certainly not!" Why not? Because the differences between blacks and whites in this context are not nearly as important as the relevant similarities in the opinion of most modern Canadians. Neither differences nor resemblances are conclusive in themselves; what is determinative is the respective weights of the similar and dissimilar factors, measured on the scale of contemporary, but forward-looking, public opinion.

Returning to the question of female toplessness, the "right" way to determine that its prohibition would not violate the Charter would be to weigh relevant gender resemblances and differences in accordance with prevailing progressive social standards, and then to conclude that the problems associated with attitudinal sensitivities about female breasts over-balance the benefits of permitting topless sun-bathing in public places by women. (It might be a different story twenty years from now; the hypothetical ban on black sun-bathing would probably have been thought perfectly justifiable a century ago.) The point is that the task of determining whether any two persons, groups or situations are alike is a comparative exercise. It is only in the wholly abstract realm of mathematics that a single dissimilar factor can be decisive.

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