

Class Act

An International Legal Perspective
on Class Discrimination

ANNE-MARIE MOONEY COTTER

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The Social Security Disability Law Firm, USA



ASHGATE

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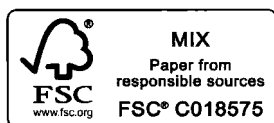
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Biography

Dr. Anne-Marie Mooney Cotter, Esq. is a Montrealer, fluent in both English and French. She earned her Bachelor's degree from McGill University at age 18, her Juris Doctor law degree from one of the leading civil rights institutions, Howard University School of Law, and her Doctorate degree (Ph.D.) from Concordia University, where she specialized in Political Economy International Law, particularly on the issue of equality. Her work experience has been extensive: Chief Advisor and later Administrative Law Judge appointed by the Prime Minister to the Veterans Review and Appeals Tribunal in Canada; Supervising Attorney and later Executive Director for the Legal Services Corporation in the United States; National Director for an environmental network in Canada; Faculty for Business Law at the Law School, Law Society of Ireland; Associate at the law firm of Blake Cassels and Graydon L.L.P. with a secondment as in-house counsel with Agrium Inc. in Canada; Attorney with the Disability Law Center of Alaska; and Solo Practitioner of the Social Security Disability Law Firm. She is also a gold medallist in figure skating. Dr. Cotter is the wife of Mark Badger and the proud mother of Bill and Jill.

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Chapter 1

Introduction to Class Act

So we come here today to dramatize a shameful condition. In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every (human) was to fall heir. This note was the promise that all ... would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness ... A check which has come back marked insufficient funds. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.¹

In our universal quest for justice in general, and tolerance for class distinctions in *Class Act*, we may learn from the immortal words of one of the greatest civil rights leaders and human rights activists Dr. Martin Luther King Jr. This book, *Class Act*, focuses on the goal of class equality, and the importance of the law and legislation to combat class discrimination in these troubling times. The aim of this book is to better understand the issue of inequality and to improve the likelihood of achieving class equality in the future and ending class inequality, using education levels as the determining factor for class differentiations. *Class Act* examines the primary role of legislation, which has an impact on the court process, as well as the primary role of the judicial system, which has an impact on the fight for class tolerance. This is the ninth book in a series of books on discrimination law. Other titles in the series are *Gender Injustice* dealing with gender discrimination, *Race Matters* dealing with race discrimination, *This Ability* dealing with disability discrimination, *Just A Number* dealing with age discrimination, *Heaven Forbid* dealing with religious discrimination, *Ask No Questions* dealing with sexual orientation discrimination, *Pregnant Pause* dealing with maternity discrimination and *Culture Clash* dealing with ethnic discrimination. A similar approach and structure is used throughout the series to illustrate comparisons and contradictions in discrimination law.

Fundamental rights are rights which either are inherent in a person by natural law or are instituted in the citizen by the State. The ascending view of the natural law of divine origin over human law involves moral expectations in human beings through a social contract, which includes minimum moral rights of which one may not be deprived by government or society. The competing view is that courts operating under the Constitution can enforce only those guarantees which are

1 King Jr., Martin Luther, *March on Washington*, 28 August, 1963.

expressed. Thus, legislation has an impact on the court system and on society as a whole. Internationally and nationally, attempts have been made to improve the situation of those who are members of all classes and outlaw class discrimination through acceptance and accommodation.

In looking at the relationship between "Class Act" and the law, the book deals comprehensively with the issue of class discrimination throughout its chapters by outlining important legislation in the area, with no particular position argued necessarily but with the intent to give the reader the knowledge to make up their own mind; also, for the most part, the countries examined were chosen because of their predominant common law background, because of their predominant use of the English language in legislation and case law, and because of their predominant role in the fight against discrimination: Chapter 1 introduces the reader to the core area of class inequality; Chapter 2 covers class inequality in human relations around the world; Chapter 3 looks at the United Nations; Chapters 4 and 5 examine class inequality in Australia and New Zealand, and Africa and South Africa, respectively; Chapters 6 and 7 examine class inequality in Canada, Mexico and the United States, and the North American situation with the North American Free Trade Agreement regarding class discrimination, respectively; Chapters 8 and 9 examine class inequality in the United Kingdom and Ireland, and the European situation with the European Union Treaty regarding class discrimination, respectively; and Chapter 10 concludes this overview of class inequality.

The globalization process and the various economic agreements have a direct impact on people's lives as key players in the labor market today. This study seeks to comparatively analyze legislation impacting class equality in various countries internationally. It also examines the two most important trade agreements of our day, namely the North American Free Trade Agreement and the European Union Treaty in a historical and compelling analysis of equality. Although an important trade agreement with implications for labor, the North American Free Trade Agreement has a different system from the European system in that it has no overseeing court with jurisdiction over the respective countries. Further, the provisions for non-discrimination in the labor process are contained in a separate document, the North American Agreement on Labor Cooperation. On the other hand, the European Union Treaty takes a different approach, by directly providing for non-discrimination, as well as an overseeing court, the European Court of Justice, and the treaty is made part of the domestic law of every Member State, weakening past discriminatory laws and judgments. Further, the European process actively implements equality by way of European Union legislation.

North America, as the new world with its image of freedom and equality, is considered to have made great strides in civil rights. However, the American philosophy of survival of the fittest, the pursuit of materialism and the search for the fountain of youth have slowed down the process. With the advent of the European Union, the coming together of nations has had a very positive influence on the enforcement of human rights, much more so than that of North America, because of the unique European approach.

All parties must cooperate, and governments need to work with businesses, trade unions and society as a whole, so together they can create an environment where all humans can participate at all levels of political life and decision-making. Indeed, combating class inequality and achieving class equality requires a strong “Class Act” focus on class neutrality in constitutional, legal, judicial and electoral frameworks for all humans to be actively involved at the national and international levels.

According to liberal democracy, the rule of law is the foundation stone for the conduct of institutions. *Class Act* offers a defense of the notion that social reform is possible and plausible through key institutions, which include the legal system and its use of the law. For liberal democracy, the legislative system is the core for the governance of society in the way it functions toward social equality of opportunity. It is clear that if we initially reform our legislation and our laws and in the end our way of thinking, then there will be a change in the institutions of society and their functioning, which will be a major step forward in societal reform.

The law is of central importance in the debate for change from class inequality to class equality. Actionable and enforceable rights are legal norms, which represent social facts demarcating areas of action linked with universalized freedom.² Law is a powerful tool, which can and must be used to better society. Associated with command, duty and sanction, and emanating from a determined source, law is a rule of conduct enforced by sanctions, and administered by a determinate locus of power concentrated in a sovereign or a surrogate, the court. Therefore, the justice system and the courts play a vital role in enforcing the law.

Legitimacy has subjective guarantees of internalization with the acceptance and belief in authority, and objective guarantees of enforcement with the expectation of reactions to the behavior.³ Therefore, the law must recognize equally all members of society, in order for it to be effective. Further, in order for a law to be seen as legitimate from society’s point of view and accepted by the people, in general to be followed, a process of inclusive interaction by all affected must first be realized. When creating laws, this means that input from various groups, including all humans regardless of class, is critical.

Thus, laws have two components: namely, facts, which stabilize expectations and sustain the order of freedom, and norms, which provide a claim of approval by everyone. Law makes possible highly artificial communities whose integration is based simultaneously on the threat of internal sanctions and the supposition of a rationally motivated agreement.⁴ Class discrimination and injustice can be undercut through the effective use of both the law and the courts.

The facticity of the enforcement of law is intertwined with the legitimacy of a genesis of law that claims to be rational, because it guarantees liberty. Laws can go a long way in forbidding inequality and providing for equality; where one ends

2 Habermas, Jürgen, *Between Facts and Norms*, Massachusetts, 1998, p. xii.

3 Fried, Morton, *The Evolution of Political Society*, New York, 1967, p. 23.

4 Habermas, Jürgen, *Between Facts and Norms*, Massachusetts, 1998, p. 8.

the other begins. There are two ranks of law, namely ordinary law of legislation, administration and adjudication, and higher constitutional law affecting rights and liberties, which government must respect and protect. The latter encompasses the constitutions of the various nations as interpreted by the supreme courts. Law holds its legitimacy and validity by virtue of its coercive potential, its rational claim of acceptance as right. It is procedurally constructed to claim agreement by all citizens in a discursive process purported to be open to all equally for legitimacy with a presumption of fair results. The legitimate legal order is found in its reflexive process. Therefore, we must all believe that equality is a good and necessary thing, which is essential to the very growth of society and to the ending of **class** discrimination.

Thus, conflict resolution is a process of reasoned agreement where, firstly, members assume the same meanings by the same words; secondly, members are rationally accountable for their actions; and thirdly, mutually acceptable resolutions can be reached so that supporting arguments justify the confidence in the notion that the truth in justice will not be proven false.⁵ Disenchantment with the law and the legal process only serves to undermine the stabilization of communities. By legitimizing the legal process and holding up the ideals of equality in the fight against class discrimination, the law and the courts can bring about change.

All humans have had to fight in the formulation of laws and in the enforcement of equality in the courts. Human differences rest on economic determination and historical change. Inequality in the distribution of private property among different classes of people has been a characteristic of society. The ruling class loathes that which it is not, that which is foreign to it. The patriarchal system has freely fashioned laws and adjusted society to suit those in power, and this has traditionally been young white Anglo-Saxon Protestant men.

Relationships, opportunities, attributes and preconceived notions are socially constructed and are learned through socialization processes. They are context and time-specific but changeable, since the physical and the mental determine what is expected, allowed and valued in a given situation. In most societies, there are differences and inequalities between humans in the decision-making opportunities, assignment of responsibilities, undertaking of activities, and access to and control over resources with class part of the broader sociocultural context. There are important criteria for analysis, including class, poverty, gender, race, ethnicity, disability, age, religion and sexual orientation, and hence all these can, alone or combined, amount to discrimination.

The concept of equality is the ignoring of difference between individuals for a particular purpose in a particular context, or the deliberate indifference to specified differences in the acknowledgement of the existence of difference. It is important to note that assimilation is not equality. The notion of rights and of equality should be bound to the notion of justice and fairness. Legal freedom and rights must be seen as relationships not possessions, as doing, not having.

5 Ibid., p. xv.

While injustice involves a constraint of freedom and a violation of human dignity through a process of oppression and domination, justice involves the institutional conditions necessary for the development and exercise of individual capacities for collective communication and cooperation.⁶ Discrimination is the withholding from the oppressed and subordinated what enables them to exercise private and public autonomy. The struggle must be continued to bring about psychological, sociological and institutional changes to allow all members of the human race, regardless of class, to feel equal and to recognize all as being so. Solidarity and cooperation are required for universal and global equality.

Though humans are mortal and civilizations come and go, from biblical times to our days, there has been a fixed pivot for the thoughts of all generations and for humans of all continents, namely the equal dignity inherent in the human personality.⁷ Even Pope John XXIII described the United Nations Declaration of Human Rights in his 1963 Encyclical *Pacem in Terris*, as “one of the most important acts of the United Nations” and as “a step towards the politico-judicial organization of the world community”; “In social life, every right conferred on man by nature creates in others (individuals and collectivities) a duty, that of recognizing and respecting that right.”⁸ Further, Pope John Paul II described the importance of work and of just remuneration in his 1981 Encyclical *Laborem Exercens*:

Work bears a particular mark of ... humanity, the mark of a person operating within a community of persons ... While work, in all its many senses, is an obligation, that is to say a duty, it is also a source of rights on the part of the worker. These rights must be examined in the broad context of human rights as a whole, which are connatural with man, and many of which are proclaimed by various international organisations and increasingly guaranteed by the individual States for their citizens. Respect for this broad range of human rights constitutes the fundamental condition for peace in the modern world: peace both within individual countries and societies and in international relations ... The human rights that flow from work are part of the broader context of those fundamental rights of the person ... The key problem of social ethics ... is that of just remuneration for work done ... Hence, in every case, a just wage is the concrete means of verifying the justice of the whole socio-economic system and, in any case, of checking that it is functioning justly.⁹

An improvement in equality of opportunity is sought for all rather than a utopian state of equality. No one should misunderstand this. Clearly, oppression exists. Rather, this book *Class Act* seeks to add to the list of inequalities to be considered, in this context class discrimination, and does not rule out other forms of injustices.

6 Ibid., p. 419.

7 Cassin, René, *From the Ten Commandments to the Rights of Man*, France, 1969.

8 Pope John XXIII, *Pacem in Terris*, Rome, 1963.

9 Pope John Paul II, *Laborem Exercens*, Rome, 1981.

Generalities are not presumed nor are they made here, for this would detract from the very purpose of this book, to bring to the forefront of discussion the reality of injustice, not to create further injustice, in the pursuit of “Class Act”.

Chapter 2

Class Act in Class Discrimination

Introduction

In the quest for tolerance of class distinctions in *Class Act*, this chapter will examine discrimination, including the World Summit and Declaration on Social Development, and the World Summit and Declaration on Education for All: Meeting Basic Learning Needs. All human, civil, cultural, economic, political and social rights, including the right to development, are universal, indivisible, interdependent and interrelated. Governments and others must not only refrain from violating human rights, but must work actively to promote and protect these rights.

The word “discrimination” comes from the Latin *discriminare*, which means to “distinguish between”. Discrimination is action based on prejudice resulting in unfair treatment of people. Social theories of egalitarianism claim that social equality regardless of class issues should prevail. Unlawful discrimination can be characterized as direct or indirect: direct discrimination involves treating someone less favorably, because of the possession of a prohibited attribute such as class than they would treat someone without the prohibited attribute who was in the same circumstances; and indirect discrimination involves setting a condition or requirement that a smaller proportion of those with the prohibited attribute can comply with than those who do not have the prohibited attribute without reasonable justification. Forms of invidious discrimination include distinctions based on class, gender, race, ethnicity, disability, age, religion and sexual orientation. If the justification is rational, then the discrimination is not invidious. Many governments have attempted to control discrimination through civil rights legislation, equal opportunity laws and institutionalized policies of affirmative action. Within the equal opportunities/individual merit approach can be found a spectrum of tests for discrimination: at one end of the spectrum there is the “equality as mere rationality”, where arbitrary and unreasonable behavior is deemed discriminatory, but justifications for discrimination are accepted at face value; at the other end of the spectrum there is the “equality as fairness”, where justifications are examined critically, the possibility of indirect discrimination is recognized, and burdens of proof may be shifted; and a third conception of equality is the “equality of opportunity”, which argues for institutional and structural changes to remove the barriers to equal participation of people belonging to different groups. Further, prejudice is the process of pre-judging something, and refers to existing biases toward the members of certain groups, based on social stereotypes. Many prejudicial behaviors are picked up at a young age by children emulating their elders’ way of thinking and speaking. Overall, equal opportunity refers to the idea

that all people should start out in life from the same platform, in that all should have equal opportunities in life, regardless of where they were born or who their parents were. Egalitarianism is the moral doctrine that equality ought to prevail throughout society, and according to legal egalitarianism, everyone ought to be considered equal under the law. Tokenism occurs when a small group is invited to participate in an initiative to demonstrate that a program is progressive or to show someone has consulted the constituency, but in fact has ignored their views, which is discriminatory in itself.

Standards or rules of behavior are norms, which help us to predict the behavior of others and, in turn, allow others to know what to expect of us, with our culture defining what is proper and improper behavior, what is right and wrong, and what we are expected to do and not to do.¹ The concept of minority group has long provided a valuable frame of reference for understanding the experiences of groups of people in society who are singled out, based on some cultural or physical characteristic, for discriminatory treatment.² In terms of class and culture, they are a cross-cutting determinant, since cultural values and traditions determine to a large extent how a given society views class.³ Culture is a key factor in whether or not co-residency with others is the preferred way of living. There is cultural diversity and complexity within countries, and among countries and regions of the world. Policies and programs need to respect current cultures and traditions, while de-bunking outdated stereotypes and misinformation. Moreover, there are critical universal values that transcend culture, such as ethics and human rights. While the significance of national and regional particularities, and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms of all people. The implementation of these principles of equality, including through national laws, strategies, policies, programs and development priorities, is the sovereign responsibility of each State, in conformity with human rights and fundamental freedoms.

There must be immediate and concerted action by all to create a peaceful, just and humane world based on human rights and fundamental freedoms, including the principle of equality for people and from all walks of life, and to this end, broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice. Success will require a strong commitment on the part of governments, international organizations and institutions at all levels, and will also require adequate mobilization of resources from multilateral, bilateral and private sources for the advancement of all humans for strengthening the capacity of national, sub-regional, regional and

1 Harris, Diana K., "Age Norms", in Erdman B. Palmore, Laurence Branch and Diana K. Harris, *Encyclopedia of Ageism*, New York, 2005.

2 Wirth, L., "The Problem of Minority Groups", in R. Linton (ed.), *The Science of Man in the World Crisis*, New York, 1945, pp. 347–72.

3 United Nations, Beijing Platform for Action.

international institutions; a commitment to equal rights, equal responsibilities and equal opportunities for the equal participation of all regardless of class issues in all national, regional and international bodies in the policy-making processes; and the establishing or strengthening of mechanisms at all levels for accountability to the world's population in general. As globalization continues to influence economic opportunities worldwide, its effects remain uneven, creating both risks and opportunities for different groups. For many, globalization has intensified existing inequalities and insecurities, often translating into the loss of livelihoods, labor rights and social benefits. Organizations and networks are taking on issues of social justice and equal rights to influence economic policies and decisions at the micro, meso and macro levels.

Even with economic growth, conditions can arise which can aggravate social inequality and marginalization. Hence, it is indispensable to search for new alternatives that ensure that all members of society benefit from economic growth based on a holistic approach to all aspects of development: equality between people, social justice, conservation and protection of the environment, sustainability, solidarity, participation and cooperation, peace and respect for human rights. The rapid process of adjustment due to downsizing in sectors has led to increased unemployment and underemployment. Only a new era of international cooperation among peoples based on a spirit of partnership within an equitable international social and economic environment, along with a radical transformation of the relationship to one of full and equal partnership will enable the world to meet the challenges of the twenty-first century. Non-governmental organizations (NGOs) have played an important advocacy role in advancing legislation or mechanisms to ensure the promotion of all people, and have become catalysts for new approaches to development.

Actions to be taken at the national and international levels by all governments, the United Nations' system, international and regional organizations, including international financial institutions, the private sector, non-governmental organizations (NGOs) and other actors of civil society, include the creation and maintenance of a non-discriminatory as well as class-sensitive legal environment through review of legislation with a view to striving to remove discriminatory provisions. Problems continue to persist in addressing the challenges of equalities, empowerment, poverty eradication, and advancement of all. Political, economic and ecological crises, systematic or *de facto* discrimination, violations of and failure to protect human rights and fundamental freedoms, and ingrained prejudicial attitudes towards different groups are impediments to equality. It will be critical for the international community to demonstrate a new commitment for the future to inspire a new generation to work together for a more just society.

Class mobility is the movement of people between social classes, and mobility can be upward or downward. A number of things, such as wealth and money, education and occupation, can influence one's social class. Other factors such as race, ethnicity, gender, disability, age and language, can be a hindrance or a help for class mobility. Many societies are loosely divided into a lower, middle, and

upper class: the lower classes are typically laborers of low income with limited education and few opportunities for educational or economic advancement; the middle classes are more economically stable, with more education and many more social opportunities as a result of their elevated class status; and the upper class, usually the smallest group, includes people with established social positions which include great prestige, along with economic security.

More than 1 billion people in the world today, the great majority of whom are women, live in unacceptable conditions of poverty, mostly in the developing countries. Poverty has various causes, including structural ones, and is often related to class issues. Poverty is a complex, multidimensional problem, with origins in both the national and international domains. The globalization of the world's economy and the deepening interdependence among nations present challenges and opportunities for sustained economic growth and development, as well as risks and uncertainties for the future of the world economy. The uncertain global economic climate has been accompanied by economic restructuring as well as, in a certain number of countries, persistent, unmanageable levels of external debt and structural adjustment programs. In addition, all types of conflict, displacement of people and environmental degradation have undermined the capacity of governments to meet the basic needs of their populations. Transformations in the world economy are profoundly changing the parameters of social development in all countries. Macroeconomic policies need rethinking and reformulation to address such trends.

Poverty has various manifestations, including lack of income and productive resources sufficient to ensure a sustainable livelihood; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increasing morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterized by lack of participation in decision-making and in civil, social and cultural life. It occurs in all countries, as mass poverty in many developing countries and as pockets of poverty amidst wealth in developed countries. Poverty may be caused by an economic recession that results in loss of livelihood or by disaster or conflict. There is also the poverty of low-wage workers and the utter destitution of people who fall outside family support systems, social institutions and safety nets. Poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit, land ownership and inheritance, lack of access to education and support services and the minimal participation in the decision-making process of those affected by poverty. In countries with a high level of school enrolment of girls, those who leave the educational system the earliest, without any qualification, are among the most vulnerable in the labor market. Sustainable development and economic growth that is both sustained and sustainable are possible only through improving the economic, social, political, legal and cultural status of all human beings. Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development.

In terms of the economy, there are considerable differences in women's and men's access to and opportunities to exert power over economic structures in their societies. In most parts of the world, women are virtually absent from or are poorly represented in economic decision-making, including the formulation of financial, monetary, commercial and other economic policies, as well as tax systems and rules governing pay. Since it is often within the framework of such policies that individual men and women make their decisions, *inter alia*, on how to divide their time between remunerated and unremunerated work, the actual development of these economic structures and policies has a direct impact on a person's access to economic resources, their economic power and consequently the extent of equality between them at the individual and family levels as well as in society as a whole.

Therefore, governments should enact and enforce laws and introduce implementing measures, including means of redress and access to justice in cases of non-compliance, to prohibit direct and indirect discrimination on grounds of class or social origin, in relation to access to employment, conditions of employment, including training, promotion, health and safety, as well as termination of employment and social security of workers; and enact and enforce laws and develop workplace policies against class or social origin discrimination in the labor market, in hiring and promotion, and in the extension of employment benefits and social security, as well as regarding discriminatory working conditions. Further, governments and Corporations should develop leadership training and opportunities to encourage all to take leadership roles both as students and as adults in civil society; develop appropriate education and information programs with due respect for multilingualism, particularly in conjunction with the mass media, that make the public, particularly parents, aware of the importance of non-discriminatory education for children and the equal sharing of family responsibilities by girls and boys; promote life-long education and training to ensure the availability of a broad range of educational and training programs that lead to ongoing acquisition by women and girls of the knowledge and skills required for living in, contributing to and benefiting from their communities and nations; and finally, create flexible education, training and retraining programs for life-long learning that facilitate transitions between women's activities at all stages of their lives.⁴

Overall, the promotion and protection of all human rights and fundamental freedoms is essential for the creation of an inclusive society for all. Specifically, tolerance toward class and social origin requires a political, economic, ethical and spiritual vision for social development based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values, and cultural backgrounds of people. On the national level, innovation, mobilization of financial resources and the development of necessary human resources should be undertaken simultaneously. Progress should be contingent upon effective partnership among governments, all parts of civil society and the private sector, as well as an enabling

4 Ibid.