Using section 26 Equality Act 2010 to combat institutional antisemitism: a critical race perspective on Fraser v University and College Union

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Using s. 26 Equality Act 2010 to combat institutional antisemitism: a critical race perspective on *Fraser v University and College Union*[1]

On 25th August 2011 Ronnie Fraser, acting through his lawyer Anthony Julius, brought a claim in the Central London Employment Tribunal against the University and College Union under sections 57 and 26 Equality Act 2010. He alleged institutional antisemitism in the union which harassed him as a Jew. On 22nd March 2013 the Tribunal delivered a lengthy judgment dismissing all ten grounds of Fraser's complaint as unfounded and mostly time-barred.

There is a widely held belief in the UK that Jews benefit from the protection of the equality legislation. While this is certainly true in theory, this does not appear to be the case in practice. To date, every Jewish claimant in a reported discrimination case has failed in their claim against a Christian defendant.[2] According to critical race theorists, anti-discrimination legislation does not effectively oppose and combat racism because it fails to understand the nature of racism; it is interpreted by judges who fail to understand the experience of racism; and because the racism that pervades our society also pervades our legal system and may be uncovered in analytical approaches and judicial decisions. This paper attempts to consider two specific critical race theory claims in relation to antisemitism and the judgment in *Fraser v UCU.* My concern is not so much with the construction of the legislation as with the wider institutional and ideological context in which it functions.

1. <u>The courts' adherence to legal formalism resulting in the law's failure to address the experience and nature of racism</u>

In her book, *An Unfortunate Coincidence: Jews, Jewishness, & English Law*[3]*,* critical legal scholar Didi Herman notes the practice of English courts to adhere to legal formalism in a variety of cases involving Jewish litigants and Jewish issues. She believes that legal formalism is a judicial route that is consciously chosen "in order to marginalise extrinsic political factors."[4] It imposes Christian norms and values[5] on the law making the Jewish experience and Jewish commitments marginal or deviant with the result that the claims of Jewish litigants are defeated and their lived experiences are marginalised. Thus, she claims, legal formalism is ideologically driven by 'extrinsic' projects of racialization[6]. Here, she draws on the work of critical

[1] Fraser v UCU was decided by the Central London Employment Tribunal on 22nd March 2013 and the full judgment can be found at: http://www.judiciary.gov.uk/media/judgments/2013/fraser-uni-college-union

[2] Didi Herman, "An Unfortunate Coincidence: Jews, Jewishness & English Law," (OUP 2010), Chapter 6.

[3] Herman, ibid.

[4] Ibid. p. 106

[5] These have become synonymous with English secular norms and values, ibid. p. 106

[6] Ibid. p. 107

race theorist Peter Fitzpatrick who has written about the privileging of legal formalism in cases involving anti-black racism.

Legal formalism is the liberal position that says that law can be separated from the social world in which it is embedded. It draws a distinction between pure law and its social, economic and political contexts and denies the importance that context has in understanding the law. The privileging of formalism in cases involving race prevents the law from addressing racism because race or ethnicity is an account of social being; it is the lived experience.

A good illustration of the privileging of legal formalism resulting in the law's failure to address the experience and nature of racism is to be found in the Tribunal's interpretation of the statutory test for "harassment" in *Fraser v UCU*. Section 26 Equality Act defines "harassment" as "unwanted conduct related to a relevant protected characteristic." To qualify as harassment, the conduct must "violate the victim's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment" for him. In deciding whether the conduct has had that effect, the tribunal must take into account the victim's perception under s. 26 (1) (b). This is a subjective test. It must also take into account the other circumstances of the case, and whether it is *reasonable* for the conduct to have that effect under s. 26 (4) (c). This is an objective test.

To interpret the subjective component of s. 26, the Tribunal was required to focus on Fraser's *realm of experience* in the UCU. This it obtained from his written account in his witness statement and his oral evidence during examination and cross-examination. The Tribunal then had to decide whether his written and oral account of his experiences in the union satisfied the statutory language of s. 26(1) (b) so as to amount to unlawful harassment.

The Tribunal decided to give the statutory language a strict, narrow construction so as to deny Fraser's experience of antisemitism in the union. Stressing that it "must not cheapen the significance of [the] words [used]", it declared that an effect capable of amounting to harassment had not been made out by Fraser who had used words such as "upsetting", "disappointment," "troubled" "hurt", "saddened and amazed," to describe the effect the union's conduct had on him. The Tribunal thought that these words indicated "minor upsets" caused by "trivial acts" rather than antisemitic harassment (para 38). This was despite the fact that Fraser impressed the Tribunal as a "sincere witness" whose "displays of emotion" during his evidence had not been synthetic (para. 147). The Tribunal attributed Fraser's emotion to the fact that the litigation was important to his "passionate belief" in the pro-Israel political campaign within the union, rather than to his reliving his experiences of antisemitism while giving evidence (para 147).

In this way the Tribunal denied Fraser's experiences of antisemitism within the UCU because he did not speak his perception and relay his experiences using the correct

language. This is the privileging of legal formalism. By denying that Fraser's subjective account of antisemitism satisfied the statutory language, the Tribunal imposed Christian norms and values on the law permitting the marginalisation of the minority experience. These Christian norms and values have, according to Herman, become synonymous with English secular norms and values. The lack of recognition or misrecognition of Fraser's suffering within the union is deeply problematic. Indeed, it has been observed by critical legal philosophers that the "[L]aw's abstraction and formalism is a type of disrespect that calls for greater sensitivity to social context and to individual need and desire."[7]

The question is why did the Tribunal construe the statutory language so narrowly? It did, after all, have a choice. It is acknowledged by critical legal scholars that while the meaning of legal text appears to be determinate, the judge is free to interpret it as he chooses. This is particularly the case with statutory wording, where even the literal interpretation of a word can yield several different meanings. Is it the case that the Tribunal wanted to deny Fraser's claim because it really did believe that his professed experiences of antisemitism did not amount to anything more than "minor upsets" caused by "trivial acts"? If so, then this might suggest that the Tribunal could not grasp Fraser's subjective experience of anti-Semitism within the union because his reality was outside their realm of experience. Critical race theorists have observed that judges cannot understand racial discrimination because it is positional, that is, it requires an understanding of the lived reality of race. Or it could be that the problem lay with the statutory wording. Critical legal theorist Clare Dalton has noted that the law shapes all stories into particular patterns of telling, that it favours certain kinds of stories, disfavours others, and even makes it impossible to tell certain kinds of stories. It may be on this view that antisemitism is one story that is impossible to tell because it is not considered to be a serious problem (as in this case), and because it is not as readily recognisable as, say, anti-black racism, sexism, or homophobia. Antisemitism is a complex phenomenon. Its interpretation demands a subtle and nuanced approach that resists easy conclusions.

A more plausible explanation is that the Tribunal chose to construe the statutory wording so as to deny Fraser's subjective experience of antisemitism because it disliked the allegation of contemporay antisemitism, preferring to regard the UCU's irrational hostility to Israel in terms of free political speech. This preferred explanation has wide support within the judgment. The Tribunal refused to rule on a meaning or definition of antisemitism on the grounds that there were legitimately held differences of view on what constitutes antisemitism and thought that where the line should be drawn in relation to when criticism of Israel becomes antisemitic is the "stuff of political debate" (para 53). The Tribunal discredited Fraser's witnesses' evidence of antisemitism as the mere ventilation of opinions and, indeed, dismissed all the evidence of antisemitism in the union with the words "[…] we had to remind

[7] "The Colour of Law: Identity, Recognition, Rights" p. 186 in Costas Douzinas & Adam Gearey, 'Critical Jurisprudence: The Political Philosophy of Justice" (Hart Publishing, 2005).

ourselves frequently that despite appearances, we were not conducting a public inquiry into antisemitism but considering a legal claim for unlawful harassment" (para 180). It was a claim for unlawful *antisemitic* harassment but this did not prevent the Tribunal from ignoring all the evidence of antisemitism. This amounts to a denial of antisemitism.

The Tribunal's three references to the Holocaust[8] emphasised the legitimacy of this denial. Herman claims that English judges frequently use the Holocaust as a "mnemonic device" in cases involving Jews to achieve certain purposes, such as to delegitimize claims of contemporary antisemitism. According to Fine and Seymour a Holocaust reference helps to do this because it associates antisemitism with state-sponsored genocide in the 'old' Europe, consigning it to history as a result of the defeat of fascism and the rise of the 'new' postnational Europe and the development of the European Convention on Human Rights[9].This constructs Jews as deserving victims of persecution in the past but not in the present.[10] Additionally, as Herman notes, a Holocaust reference helps to portray judges as sympathetic, or at least as not indifferent to, Jewish persecution and suffering, while at the same time denying a claim for discrimination.[11]

To return to the privileging of legal formalism, critical race theorists claim that formalists use abstract concepts like "reasonableness" to mask choices and value judgments. This can be illustrated in the Tribunal's interpretation of the objective component of s. 26. The Tribunal said that even if it was satisfied that Fraser's subjective perception satisfied the statutory test for harassment under s. 26 (1) (b), it would not be *reasonable* for it to have that effect under s. 26 (4) (c). This was because Fraser was a willing participant in the political arena. The Tribunal stated, "[Mr Fraser] is a campaigner. He chooses to engage in the politics of the union in support of Israel and in opposition to activists for the Palestinian cause. When a rugby player takes the field he must accept his fair share of minor injuries. Similarly, a political activist accepts the risk of being offended or hurt on occasions by things said or done by his opponents (who themselves take on a corresponding risk) [….]"[12]

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[8] At the beginning, the Tribunal introduced Fraser as "the child of Jewish refugees who fled Nazi Germany in 1939" and advised us that "[M]embers of his family died in the Holocaust" (para 2); and later made an oblique reference to it with the words "[S]o long and terrible has been the persecution of the Jewish people through history […] (para 51).

[9] Robert Fine, *Nationalism, Postnationalism, Antisemitism: Thoughts on the Politics of Jurgen Habermas,* Osterreichische Zeitschrift fur Politikiwissenschaft (OZP) 39. Jg. (2010) H. 4, 409-420 and Robert Fine, 'Fighting with Phantoms: a contributuontto the debate on antisemitism in Europe', *Patterns of Prejudice,* vol. 43, No. 5, 2009, p 459-479; David Seymour, *Critical Theory: the Holocaust, Human Rights and Antisemitism,* CLT Conference Paper, Harvard Law School, March 2013; David Seymour, *Holocaust Memory: Between Universal and Particular,* unpublished paper, June 2014..

[10] Herman, op. cit. fn. 2, p. 101

[11] Id. Herman also notes also that judicial deployment of the Holocaust may reinforce particulalry English understandings of Jews and Jewishness, thereby acting as a "racializing aid to remembering what it is that judges find 'unattracitve' and 'alien' about the Jew,, op. cit. fn 2, p. 101

[12] The Tribunal continued, "These activites are not for everyone. Given his election to engage in, and persist with, a political debate which by its nature is bound to excite strong emotions, it would, I think,

(para 156). The Tribunal interpreted the statutory requirement of "reasonableness" from the perspective of a political activist rather than from the perspective of a Jewish union member with a connection to Israel or, indeed, from the perspective of a victim of antisemitism. The Tribunal had a choice as to *whose* reasonableness to adopt. Its choice wrongly assumes that minorities who are politically active in the fight against racism have greater thresholds of fortitude than those who are not. This shows a marked failure to address the experience and nature of racism.[13]

2) The pervasiveness of racism in the legal system: uncovering the racism in judicial discourse and decisions.

Critical race theorists claim that racism can be uncovered in judicial discourse and decisions. Herman notes the practice of "orientalising" and "racializing" in a range of English cases involving Jews and Jewish issues. She uses the term 'orientalism' to signify a particular way of characterising Jews and Jewish issues so as to mark them out as 'eastern' and un-English. This frequently involves comparing Jews and Jewish practices to those of other civilisations, especially the Christian one, which is held up as eminently superior and is equated with that which is 'English'. This is a "racializing" discourse because Jews and Jewish practices are understood and represented as inferior to Christianity. It is also a racializing discourse, in my view, because it relies on, and reproduces, anti-Semitic ways of thinking. There are several examples of orientalising and racializing judicial discourse in *Fraser v UCU.*

The Tribunal characterised the case as one in which Fraser, his Jewish lawyer, and his witnesses wanted to abrogate free political speech in the union in order to shield Israel from criticism. It said "[A]t heart, [this litigation] represents an impermissible attempt to achieve a political end by litigious means" (para. 178). This is David Hirsh's Livingstone Formulation.[14] It may be said to be racializing discourse because it involves accusing those who raise legitimate concerns about contemporary antisemitism - usually Jews - of acting in bad faith. They are playing the "antisemitism" card merely to prevent Israel from being criticised. On this view contemporary antisemitism is denied and all criticism of Israel is regarded as legitimate. The Livingstone Formulation is a common trope of contemporary antisemitism and its central role in the Tribunal's attitude to Fraser's case illustrates

require special circumstances to justify a finding that such involvement had resulted in harassment." (para 156).

[13] David Hirsh has noted that "this reasoning results in the position that since Fraser took on the responsibility of defending Israel, he should accept some antisemitism as part of the game", https://engageonline.wordpress.com/2013/04/18/fraser-v-ucu-tribunal-finds-no-antisemitism-at-all; The idea that the Jewish claimant brought the trouble on himself is a theme in other cases, see Herman *op. cit.*, p. 139.

[14] David Hirsh, 'Accusations of malicious intent in debates about the Palestine-Israel conflict and about antisemitism', *Transversaal,* January 2010, Graz, Austria.

the critical race theory claim that the racism that pervades society pervades the judicial process[15].

The Livingstone Formulation also invokes the spectre of Jewish particularism, which was a strong theme throughout the judgment. The Tribunal thought that Fraser's Jewish particularism was so strong that he and his team had been willing to abuse the Employment Tribunal as well as misuse the Equality Act in their self-serving pursuit of preventing the union from criticising Israel. It said "[T]he Employment Tribunals are a hard-pressed public service and it is not right that their limited resources should be squandered as they have been in this case" (para 178).

Specifically, the Tribunal characterised the case as one of Jewish particularism versus the universal right to freedom of expression, a right enshrined in Article 10 of the ECHR and protected under sections 3 & 12 of the Human Rights Act 1998, and concluded that "[T]he *narrow* interests of [Mr Fraser] must give way to the *wider public interest* in ensuring that freedom of expression is safeguarded" (para. 156).

This reasoning suggests that freedom of expression cases, or *cases that are characterised as freedom of expression cases,* will - and indeed, should - work against Jewish claimants. I say cases that are characterised as freedom of expression cases because this was not a speech harassment case at all. Fraser's primary case was that the UCU had persistently failed to do things for him contrary to its assurances that it would and was based on a series of acts and omissions.

Jewish particularism raised its ugly head further in the Tribunal's characterisation of Fraser and his team as opposed to pluralism and tolerance. The Tribunal said it was "troubled by the implications of the claim" because "[U]nderlying it we sense a worrying disregard for pluralism, tolerance and freedom of expression" (para 179).

The pitting of Jew against freedom of expression, pluralism and tolerance amounts to an orientalising of the Jew because these are universal rights and values that are associated with western Christian Europe. In this way Jews are represented and understood as inferior to Christianity and as Eastern in the sense of 'un-English'. Further, because human rights are associated with the Enlightenment and with democracy, Jews are represented and understood as not fully enlightened and as un-democratic. This is a racializing discourse which echoes the Tribunal's view that Fraser was trying to interfere with the democratic processes within the union, which merely wanted to uphold the principle of free speech and provide an arena for members to engage with each other on matters of pressing political concern, such as the Israel/Palestine conflict.[16]

[15] The construction of the Jewish claimant as bringing a fasle claim of antisemitism was noted in *Seide* and *Garnel,* two cases in the early '80s, Herman, op. cit., p.43.
[16] It's as if the UCU is representative of a Christian Euopre that seeks to uphold and protect universal freedoms and rights.

It was the spectre of Jewish particularism that was also responsible for the Tribunal's rejection of Fraser's claim that an attachment to Israel is relevant to his Jewish identity (para 150). By rejecting the attachment of Jews to Israel, the Tribunal rejected Jewish nationalism and Jewish particularism in favour of a "race-less" post-national post-Holocaust Europe with its guarantee of universal rights. This reinforces the Tribunal's denial of contemporary antisemitism. In the post-national, post-Holocaust Europe, antisemitism is a thing of the past. I also believe that that the failure to acknowledge Jewish national rights is evidence of the anti-Zionist leanings of the Tribunal.

Other racialized thinking about Jews is evident in the Tribunal's application of unattractive characteristics to Fraser and many of his witnesses. Herman notes that judicial assessments of 'character' are often dependent on notions of race. Their unattractiveness is found in their "un-English" behaviour, such as 'playing to the gallery', 'scoring points', 'ventilating opinions', behaving in a 'tactical' manner and being 'untruthful'. In an echo of Fraser's Good Jew /Bad Jew distinction, the Tribunal indulged in a Good Witness/Bad Witness distinction by juxtaposing their behaviour against that of the UCU witnesses, each of whom gave careful and accurate evidence and stuck to the facts (para 149). The notion of 'playing fair' is a Christian one, and the exclusion of emotional witnesses for Fraser avoided the political colouring of their testimony, which was problematic for the Tribunal.

Conclusion.

A common thread in my analysis has been the exclusion of the 'political', albeit with 'political' as a dangeously free-foating factor. Fraser's passion[17] is merely 'political'; hostility to Israel is merely 'political'; Fraser is merely a 'political campaigner.' We have seen the 'political' excluded at the *general level of the law* with a strict, narrow interpretation of s. 26 (1) (b) Equality Act which insulated it against policy and thereby prevented different forms of linguistic expression from satisfying the subjective test for 'harassment'. We have also seen the exclusion of the 'political' at the *specific level of evidence,* with evidence of antisemitism treated as inauthentic or irrelevant. This type of exclusion, at the specific level of the evidence, is central to critical race theory critique because it is a strategic blindness to facts on ideological grounds. The mixture of the general and specific exclusion of the political in *Fraser v UCU* sensitises us to the different ways in which the judicial application of dominant Christian norms is harmful, exclusionary, and racist.

[17] There is a long tradition in judicial discourse of constructing the Jew as over-emotional and feminising him, see, Herman, op. cit., Chapter 2.