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SPECIAL ISSUE: HUMAN RIGHTS AND EQUALITY

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THREE MODELS OF EQUALITY AND EUROPEAN ANTI-DISCRIMINATION LAW

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1. Three Models of Equality

Since the European Court of Justice first declared, in the 1976 *Defrenne ('No. 2')* case,[1] that the principle of equal pay between men and women for the same work stated in Article 119 of the EEC Treaty should be recognized a direct effect in the relationships between private parties, at a time when the European legislator had just started to implement that provision of the Treaty of Rome,[2] European law has made considerable progress in outlawing different forms of discrimination. In order to evaluate both what has been achieved thirty years later and which questions still remain, this article seeks to map the territory of European anti-discrimination law by locating its *acquis* within a broader theoretical framework. There are of course a number of ways to classify competing understandings of the requirement of equality, in order to identify the different "models" into which the principle of equal treatment may translate at the level of concrete legal rules. In this article, I seek to distinguish three such models, which I believe may serve to highlight the most important dilemmas facing European Law in its treatment of that principle.

The three models are defined on the basis of two questions which, I would submit, remain to a large extent open at the current stage of development of European anti-discrimination law. A first question concerns the aim of this body of law. In the implementation of the principle of equal treatment, do we seek to protect all individuals from being discriminated against, or do we seek to ensure an equal representation of the diverse social groups composing society in its different sectors, and to ensure a roughly equal distribution of all social goods among those groups? This alternative is sometimes presented as an alternative between formal (or *de jure*) equality and substantive (or *de facto*) equality, to which, indeed, it may intuitively correspond: it is not enough, we tend to say, to protect individuals from discrete acts of discrimination (whether they originate in the legal rules or whether they have their source in the behaviour of public officials or of other private persons); it is also necessary that all the groups of society have generally equal access to the scarce social goods, and that no fraction of the population is more or less permanently excluded from such goods.

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[1] Case 43/75, *Defrenne* v *Sabena (No. 2)* [1976] ECR 455 (judgment of 8 April 1976).

[2] Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 1975, p.19.

However, this latter distinction is not particularly helpful, especially because it is strongly biased in favour of the second branch – who, after all, would not want equality to be "substantive", rather than merely "formal"? A much more enlightening approach is the one proposed by Amartya Sen in his *Inequality Reexamined*, where he insists that the central question is not whether or not we want equality, formal or substantive,[3] but *with respect to what* the requirement of equality is imposed. The ineliminable (and indeed desirable) differences between individuals mean that, if equality is imposed with respect to one good, that requirement will necessarily result in inequalities with respect to the distribution of other goods. For instance, if we insist on all individuals being treated equally (i.e., without discrimination) in the recruitment process in the context of employment, we necessarily must accept that this may result in certain groups (generally white, neither too young nor too old, mostly male at least in certain professions, and belonging to the upper or middle social class) will be overrepresented in certain sectors or at certain levels of the professional ladder. This imbalance is perfectly compatible with a strict enforcement of the prohibition to commit any discrimination in the selection of job applicants: it is simply the mechanical result of the fact that the qualities which may legitimately be rewarded in the examination of job candidacies (in particular, certain levels of educational achievement or the mastery of cultural codes) are unequally distributed among different groups of the population. So we must choose between insisting on equal treatment in the recruitment process (so that the chances of all are equal) and insisting on equal treatment in the allocation of jobs (so that all groups are roughly represented in each sector and, within each sector, at each level of the hierarchy, in proportion to their representation within the population).

A second question on the basis of which we may seek to identify models of equality relates to the visibility – versus the invisibility – of the "suspect" characteristics attached to individuals, and which may give rise to discriminatory attitudes or treatment. Here again, we may have to choose between two routes. Either we consider that shielding such characteristics from the view of others, through a strict understanding of the requirements of personal data protection rules, will protect individuals presenting those traits from the risk of discrimination – if she ignores the religion of one person, for instance, the employer will not be able to commit a discrimination against that person: even if she intended to do so, her discriminatory impulse would have nothing to hold upon. Or we consider, instead, that "suspect" characteristics should be considered explicitly if equality is to be effective. The choice in favour of taking characteristics such as, for instance, race or ethnic origin, or age, into account – whether in the decisions to be taken by the rule-maker or in the formulation of public policies, or in the decisions of the private employer or of the educational institution – may be motivated, first, by the recognition that there is no other way to proceed. Age, for instance, or even to a large extent race or ethnic origin, just like gender, simply cannot be hidden. They are made visible in the course of everyday

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[3] Indeed, as Sen notes, "every normative theory of social arrangement that has at all stood the test of time seems to demand equality of something – something that is regarded as particularly important in that theory" (Sen, *Inequality Reexamined* (1992), p.12).

social interactions as well as in procedures such as job interviews. Better, then, to recognize that these characteristics may play a role in decision-making and that, therefore, the impact of decisions which may have been influenced by those factors should be carefully monitored in order to guard against discrimination, than to ignore the influence they may be exercising. Second however, and more importantly, the choice to take these traits into account may be justified by the desire to move from a negative approach to equality to a positive approach: while the negative approach may be understood as a prohibition to commit acts of discrimination, the positive approach should be seen as imposing an obligation to affirmatively promote equality, through tools such as affirmative action policies, action plans in favour of diversity, or other positive action measures.[4]

By combining these two alternatives, we arrive at a very simple matrix of "models of equality". These models refer both to different understandings of the requirements of the principle of equal treatment and to precise legal regimes which implement these different understandings:

	The aim of imposing a requirement of equal treatment		
Combination of the principle of equal treatment with the requirements of privacy		**Non-discrimination**	**Proportionate representation**
	Invisibility of suspect characteristics	Prohibition of discrimination	
	Visibility of suspect characteristics	Prohibition of discrimination, including disparate impact discrimination	Affirmative equality

In this matrix, one of the cells is empty. This simply expresses the fact that an understanding of equal treatment as proportionate representation (or as a requirement of a fair distribution of social goods among different groups of the population) – rather than simply as a requirement of non-discrimination – may not be reconciled with an absolute prohibition of processing data relating to the characteristics which define these different groups. Indeed, such an absolute prohibition would not allow even to gain a clear understanding of the access different segments of the populations have to the scarce social goods (housing, education, employment, health care) which are to be fairly distributed along those groups – let alone, to act in order to remedy any imbalances which could be identified. This is what both the Council of Europe's European Commission against Racism and Intolerance (ECRI) and the Advisory Committee created under the 1995 Council of Europe Framework Convention for the Protection of National Minorities

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[4] On the distinction between affirmative action and positive action more generally, see *infra*, s.4.1.

seem to recognize, when these bodies insist on the need for States to dispose of precise data as to the situation of minority groups, in order to combat discrimination more effectively.[5]

We are left, then, with three models. Under a first model, discrimination is prohibited, but there is no obligation to ensure a proportionate representation of the diverse social groups whose members are protected from discrimination. Nor is there an effort to monitor the situation of these groups with respect to the global allocation of social goods in order, if necessary, to take remedial action where imbalances are found to exist. Such imbalances as such are not seen as problematic, as long as each individual has not been discriminated against in identifiable ways, by particular agents. Under a second model, the prohibition of discrimination extends to the prohibition of disparate impact discrimination: any measure which disproportionately and negatively impacts upon certain groups which are already underrepresented (or which already receive a less-than-proportionate share of the social good to be allocated), should be revised, unless it can be demonstrated that such measure, although presumptively suspect, aims to realize a legitimate objective by means which are both appropriate and necessary. Under a third model, that of affirmative equality, the aim of ensuring equal treatment is not only to avoid instances of discrimination, but also to make progress towards a fair share of social goods among the different segments of the population. Under this model, affirmative policies are pursued which seek to improve the representation of certain groups in the areas or at the levels where they are underrepresented, and to arrive not only at a situation where discriminatory rules, policies or practices are outlawed, but where, moreover, social goods are distributed more equitably between the diverse groups composing society. Indeed, as clearly illustrated by the debate concerning the admissibility of affirmative action policies, still sometimes referred to as "reverse" or "positive" discrimination, the objective pursued under the model of affirmative equality may conflict with the objective of non-discrimination: where the application of neutral rules or procedures does not fulfil the objective of ensuring a fair distribution of social goods among different groups of the population, it will be required to make further steps towards the full realization of equality; and this may imply treating differently individuals because of their membership in certain groups defined by "suspect" characteristics they present.

It is the thesis of this article that although European anti-discrimination law belongs to the first model of equality described, the Member States are not prohibited from espousing the second model – and, indeed, they should be incentivized to do so. As to the third model of equality, certain obstacles remain. These obstacles relate both to the uncertainties concerning the

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[5] For the views of the ECRI, see the Third report on Hungary, 5 December 2003, CRI (2004) 25, para.93 and Third report on the Czech Republic, 5 December 2003, CRI (2004) 22, para.86; see also ECRI General Policy Recommendation No.1 on combating racism, xenophobia, anti-Semitism and intolerance, 4 October 1996, CRI (96) 43 rev For the views of the Advisory Committee of the Framework Convention (ACFC), see the Opinion on Slovakia, 22 September 2000, ACFC/OP/I(2000)001, para.21; Opinion on Croatia, 6 April 2001, ACFC/OP/I(2002)003, para.29; Opinion on the Czech republic, 6 April 2001, ACFC/OP/I(2002)002, para.28.

protection of the right to respect for private life *vis-à-vis* the processing of personal data, and to the current understanding of the principle of equal treatment under European Community law. These obstacles coalesce to make it difficult, if not impossible, for the Member States to move towards an understanding of the principle of equal treatment as affirmative equality. The following sections will attempt to demonstrate this by examining three questions. In section 2, I examine the significance of the prohibition of indirect discrimination and the role, in this regard, of the rules on the allocation of the burden of proof in discrimination cases. In section 3, I comment on the rules relating to personal data protection, and their relationship to the different understandings of equality outlined above. In section 4, I discuss the status of positive action in European Community law. By focusing on these questions, I hope to give more flesh to the differences between the three models of equality which could only be briefly outlined in this introductory section. I also hope to convince the reader that European Law could achieve even more than it has to this date. However, in order to move further along the road of equality, a better understanding of the situation of European Law on the map of equality is required. This article should be seen as a contribution in this direction: although at times critical of the current state of European anti-discrimination law, its critical component in my view is less important than, and remains subordinate to, its constructive ambition.

Before examining these three questions, the answers to which may serve to relate any set of legal rules implementing the principle of equal treatment to one of the equality models outlined above, it may be useful to clarify what I am referring to under the notion of "European anti-discrimination law". Between the entry in force of the Treaty of Rome establishing the European Economic Community on January 1st, 1958, and the entry into force of the Treaty of Amsterdam on May 1st, 1999, the only provisions of the Treaty of Rome explicitly prohibiting discrimination were Article 119 EEC (now Article 141 EC, after revision) and Article 48 EEC (now Article 39 EC, after revision). Both provisions were seen, not primarily as seeking to protect the fundamental right to equality, but rather as contributing to the common market. This is obvious with respect to Article 48 EEC, which prohibited discrimination based on nationality between the nationals of the Member States as part of the right to free movement of workers within the Community.[6] But as is well known, the insertion of Article 119 in the original Treaty of Rome also was based on economic justifications[7]: when it decided that it should be recognized a direct effect, the European Court of Justice noted that one of the objectives of this provision was "to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers

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[6] This provision stated that the free movement of workers within the Community "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment".

[7] See in particular C. Barnard, "The Economic Objectives of Article 119", in Hervey and O'Keeffe (eds.), *Sex Equality Law in the European Union* (1996), pp.101-141.

as regards pay".[8] The more recent developments of European anti-discrimination law, instead, adopt the perspective of fundamental rights,[9] although of course the dual concerns of contributing to social cohesion and of raising the level of employment also contribute to explain why combating discrimination was made a priority at European level since the late 1990s.[10] With the Treaty of Amsterdam, Article 13 EC (initially Article 6A) was inserted into the Treaty of Rome, empowering the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[11] Within months following the entry into force of this new legal basis, the Commission presented the Council with the proposals[12] which – in a context dominated by a sense of urgency after the Freedom Party of Austria was included in the Austrian governmental coalition in October 1999 – led to the adoption, on 29 June 2000, of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereafter referred to as the "Racial Equality Directive"),[13] and on 27 November 2000, of Council Directive 2000/78/EC establishing a general framework for equal treatment in

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[8] Case 43/75, *Defrenne* v *Sabena (No.2)*, cited above, para.9. The Court added that the provision also "forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as emphasised by the Preamble to the Treaty . . ." (para.10).

[9] On this shift, see More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?" in Craig and de Búrca (eds.), *The Evolution of EU Law* (1999), pp.517-543.

[10] See, *e.g.* the 9th Recital of the Preamble to Council Directive 2000/43/EC (*infra*, n.13 and corresponding text), which states: "Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity". A similar justification may be found in the 11th Recital of the Preamble to Council Directive 2000/78/EC. Both Preambles refer also to the Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999, which stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability

[11] On the adoption of this provision in the Treaty of Amsterdam and its potential, see Flynn, "The Implications of Article 13 EC – After Amsterdam Will Some Forms of Discrimination be More Equal Than Others?" (1999) 36 *Common Market L. Rev* 1127; Bell, "Anti-Discrimination Law after Amsterdam", in Shaw (ed.), *Social Law and Policy in an Evolving European Union* (2000), pp.157-170. The Treaty of Nice, which entered into force on February 1st, 2003, added a paragraph to art.13 EC, stating that "when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in para.1, it shall act in accordance with the procedure referred to in art.251 [co-decision, requiring only a qualified majority within the Council]".

[12] COM(99) 564 to 566.

[13] OJ L 180 of 19.7.2000, p.22.

employment and occupation ("Employment Equality Directive").[14] The Racial Equality Directive imposes on the Member States to prohibit direct and indirect discrimination on grounds of race or ethnic origin, including harassment and the instruction to discriminate, in a large range of situations, comprising not only access to employed and self-employed activities but also areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services. The Employment or "Framework" Equality Directive, is broader with respect to the range of prohibited grounds, yet narrower in its scope of application *ratione materiae*: it prohibits all forms of direct or indirect discrimination (including, with regard to persons with disabilities, a refusal to provide reasonable accommodation) on the grounds of religion or belief, disability, age or sexual orientation in employment and occupation. The adoption of these legal instruments was complemented by a Decision 2000/750/EC establishing a Community action programme to combat discrimination (2001-2006).[15]

Soon thereafter, Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[16] was amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.[17] Adopted at a time when Article 119 EEC only stipulated the principle of equal pay between men and women for the same work, the original Directive was based on a legal basis which relates to the establishment or functioning of the common market;[18] Directive 2002/73/EC is adopted on the basis of Article 141(3) EC, which now provides that the Council may adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation generally. More recently, acting this time on the basis of Article 13 EC (as Article 141 EC only relates to equal treatment between men and women in employment and occupation), the Council adopted Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services on 13 December 2004.[19] These Directives closely mirror the Racial Equality Directive and the Employment Equality Directive, from which they borrow their concepts and tools.[20] This is the case, in particular, with regard to the definitions of direct and indirect discrimination, to a number of procedural provisions relating, *inter alia*, to the protection from reprisals or to the role of associations or organisations which have an interest

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[14] OJ L 303 of 2.12.2000, p.16.
[15] OJ L 303 of 2.12.2000, p.23.
[16] OJ L 39 of 14.2.1976, p.40.
[17] OJ L 269 of 5.10.2002, p.15.
[18] Art.100 EEC (now art.94 EC) allows for the adoption by a unanimous Council of directives for the approximation of the laws, regulations or administrative provisions of the Member States which directly affect the establishment or functioning of the common market.
[19] OJ L 373 of 21.12.2004, p.37.
[20] This is not to say that the Racial Equality and Employment Equality Directives have always been innovating. On the contrary, many of the provisions of those directives are directly borrowed from the case-law developed by the European Court of Justice in gender equality cases.

in the enforcement of the provisions of the directives, or to the authorisation of positive action.

It is this set of treaty provisions and legislative instruments, and the case-law which has interpreted them, which I shall be referring to under the notion of "European anti-discrimination law". Of course, the contribution of European Community Law to implementing the principle of equal treatment may not be reduced to this *acquis*. In particular, the principle of equality has been included by the European Court of Justice among the general principles of law, which it seeks to ensure the respect of in the field of application of Union law.[21] Indeed, in situations to which any of the above-mentioned directives would be applicable, but which also concern a measure adopted by a Member State which falls under the scope of application of Union law (for example because that measure seeks to implement a directive, or brings an exception to a fundamental freedom recognized under European Community law), it may be preferable to rely on the general principle of equality as a fundamental right, rather than on the applicable directive, because directives only may be directly invoked against public authorities and not "horizontally", against private individuals.[22] In the context of this article, however, we need not concern ourselves with the general principle of equality as developed in the case-law of the European Court of Justice. This article seeks to locate the choices made by the European legislator in the broader framework of anti-discrimination law. It is not its intention to offer a complete picture of the contribution of European Union law to combating discrimination.

2. The Dual Purpose of Prohibiting Indirect Discrimination

Indirect discrimination consists in the application of regulations, criterions or practices, which although apparently neutral, will produce an effect similar to the use of a prohibited ground of distinction: for instance, by paying lower hourly wages to part-time workers than what full-time workers would receive for the same work, in a situation where the part-time workforce is overwhelmingly female, the result achieved is similar to that of a pay policy which would pay women less than men, in violation of Article 141(1) EC. The prohibition of indirect discrimination is therefore the inevitable

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[21] Case C-144/04, *Mangold* v *Helm*, nyr (judgment of 22 November 2005 delivered upon a request for a preliminary ruling under art.234 EC from the Arbeitsgericht München (Germany)), at paras.74-75 (noting that "Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation (. . .) the source of the actual principle underlying the prohibition of those forms of discrimination being found (. . .) in various international instruments and in the constitutional traditions common to the Member States"). See also, among many others, Case C-442/00, *Caballero* [2002] ECR I-11915, paras.30 to 32; Case C-13/94, *P.* v *S. and Cornwall City Council* [1996] ECR I-2143, paras.18 and 19 (describing Directive 76/207/EEC as an expression of the principle of equality as a fundamental principle of law and recalling that the right not to be discriminated against on grounds of sex is a fundamental human right protected by the Court); Joined Cases 201/85 and 202/85, *Klensch* [1986] ECR 3477, paras.9 to 10; Case 149/77, *Defrenne* v *Sabena* (No.3) [1978] ECR 1365, paras.26-27.

[22] See the Opinion of Advocate General Tizzano delivered in the case of *Mangold*, *supra* n.21, at para.84.

complement to the prohibition of direct discrimination which, otherwise, would be easily circumvented. However, behind this simple definition, two quite different conceptions of the function of indirect discrimination coexist.[23] Under a first conception, which explains best the origins of the concept, the prohibition of indirect discrimination serves to unmask instances of intentional discrimination which seek to achieve indirectly what may not be done directly. Under another conception, it is completely detached from any kind of intention to discriminate, and is best seen as a tool to permanently revise institutionalized habits and procedures, in order to make them more hospitable to difference. While the first objective (unmasking instances of wilful discrimination which hide behind the use of apparently neutral measures) may be served either through the use of statistics in order to demonstrate the impact of those measures or through the concept of "apparently neutral, but suspect, measures", the second objective (adapting the structures to accommodate difference) necessarily requires the use of statistical tool, as the concept of indirect discrimination is extended to cover instances of disparate impact discrimination.

2.1. Indirect discrimination as disparate impact discrimination

The case of *Jenkins*[24] was the first in which the European Court of Justice included a prohibition of indirect discrimination in its case law. The referring court, the United Kingdom Employment Appeal Tribunal, sought to know whether a difference in the level of pay for work carried out part-time and the same work carried out full-time may amount to discrimination of a kind prohibited by Article 119 EEC when the category of part-time workers is exclusively or predominantly comprised of women. In its judgment of 31 March 1981, the European Court of Justice answered that this situation was not discriminatory "in so far as the difference in pay between part-time and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex",[25] for example where, by such pay policy, "the employer is endeavouring, on economic grounds, to encourage full-time work irrespective of the sex of the worker".[26] It added however that it should be considered a form of discrimination "where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex".[27] The notion of indirect discrimination, here, still is conceived as a means to prohibit intentional discrimination, where a pay policy is devised in order to achieve indirectly what may not be done overtly, by the use of sex as a criterion for calculating wages: the national courts should decide in each individual case "whether, regard being had to the facts of the case, its history *and the employer's intention*, a pay policy [where the hourly rate of pay differs according to whether the work is part-

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[23] For a more detailed discussion, De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi* (2000) 93-144.

[24] Case 96/80, *J.P. Jenkins* v *Kingsgate (Clothing Productions) Ltd*. [1981] ECR 911 (judgment of 31 March 1981).

[25] Para.11.

[26] Para.12.

[27] Para.13.

time or full-time] although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker".[28]

In *Bilka-Kaufhaus*, decided five years later, the approach already has shifted.[29] The European Court of Justice considers in that case that under Article 119 EEC, an employer may justify the adoption of a pay policy excluding part-time workers from its occupational pension scheme, irrespective of their sex, on the ground that it seeks to employ as few part-time workers as possible, "where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end".[30] The importance of *Bilka-Kaufhaus* resides in the explicit admission by the Court that, once it is shown that the pay policy has a disparate impact on women (which are over-represented within the part-time workers),[31] the burden of proof lies on the employer to demonstrate that the policy has economic justifications which satisfy the requirements of appropriateness and necessity. It is not for the part-time female employee to demonstrate that the exclusion of part-time workers from the occupational pension scheme is the means chosen by the employer to discriminate against women; it is for the employer to demonstrate the economic necessity of such exclusion, once a disparate impact on women is identified.

The adoption on 15 December 1997 of Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex[32] may be seen as the natural outcome of this line of cases.[33] The Directive is based on the finding

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[28] Para.14 (emphasis added). The European Court of Justice concludes that "a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women" (para.15). The language used clearly indicates that the notion of indirect discrimination is merely invoked here to prohibit the employer from circumventing the prohibition of direct discrimination against women or men in remuneration.

[29] Case 170/84, *Bilka - Kaufhaus GmbH* v *Karin Weber von Hartz*, [1986] ECR 1607 (judgment of 13 May 1986).

[30] Para.37.

[31] According to the data provided to the European Court of Justice by the referring court, 10% of the full-time workforce (benefiting thus from the occupational pensions scheme) was female; altogether, the undertaking comprised 72% of men and 28% of women; 90% of the men were employed on a full-time basis (10% on a part-time basis); 61,5% of the women were working full-time (38,5% part-time).

[32] OJ L 14 of 20.1.1998, p.6.

[33] See, among many others, Case 171/88, *Rinner-Kühn* [1989] ECR 2743 (para.12) (judgment of 13 July 1989); Case C-33/89, *Kowalska* [1990] ECR I-2591 (para.16) (judgment of 27 June 1990); Case C-184/89, *H. Nimz* [1991] ECR I-297 (para.12) (judgment of 7 February 1991); Case C-127/92, *Enderby* [1993] ECR I-5535 (para.17) (judgment of 27 October 1993); Case C-444/93, *Megner and Scheffel* v *Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741 (para.24); Case C-343/92, *De Weerd (née Roks) and Others* [1994] ECR I-571

that, although the European Court of Justice has held that the rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought, not all the Member States have adapted their rules on the burden of proof in discrimination cases accordingly.[34] The Directive defines indirect discrimination as a situation where "an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex".[35] It provides that, "when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".[36]

This approach to the concept of indirect discrimination, understood as the discrimination which results from the disparate impact of certain apparently neutral provisions, presents one advantage and one difficulty. Its advantage is in the breadth of its potential reach. Indirect discrimination, under this approach, may be identified even in measures whose content, as such, is not in any way suspect. Wherever a particular measure produces a disparate impact on the members of certain protected categories, it will have to be justified, even where that measure, apart from this statistically proven impact, would not appear to be potentially discriminatory. This advantage is clear especially in situations where the challenged practices is opaque or informal, thus making it difficult to anticipate its impact. In *Danfoss* for instance, as the undertaking had a pay policy which was characterized by a total lack of transparency, the Court of Justice considered that "it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men".[37] A similar reasoning could be made where an employer bases a recruitment process on the use of criterions or procedures which either are opaque (for instance, psychotechnical tests or job interviews), or more generally, whose potentially discriminatory impacts may only be identified by the use of statistics (for instance, where preference is given to candidates residing in a particular geographical area, where certain ethnic minorities are located primarily in other neighbourhoods and are thus disproportionately affected by the use of such a criterion).

The disadvantage of this method however, is that it requires the reliance on a specific methodology, based on the collection and analysis of statistical data,

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(para.33); Case C-100/95, *Kording* [1997] ECR I-5289 (para.18) (judgment of 2 October 1997).

34 See the Preamble, Recitals 18-20.

35 Article 2(2) of Directive 97/80.

36 Article 4(1) of Directive 97/80.

37 Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark* v *Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199 (judgment of 17 October 1989), para.16.

which may be particularly burdensome or even unavailable to victims of discrimination. Disparate impact analysis requires a comparison between the representation of different categories of persons (say, women and men, or different ethnic groups) within a "departure group" and their representation in the "arrival group", after an apparently neutral measure has been applied: the existence of a discrimination shall be presumed where the impact of that measure appears "disproportionate", that is, where the representation of one category (say, women, or persons of a certain ethnic origin) is significantly lower in the "group of arrival" than in the "departure group". However, apart from the question of what constitutes a disproportionate impact for the purposes of this analysis, the implementation of such a methodology requires that we define with precision the boundaries of the "departure group" on the basis of which the impact of the provision, criterion or practice may be calculated. In the context of employment for instance, the delimitation of the "departure group" raises questions such as that of which minimum level of qualifications may be required in order to delineate the "pool" of candidates to a job between whom the selection is to be made[38] – unless the job offered requires no qualifications or only minimal qualifications, or may be acquired by the training which the employer will provide[39] – or what role we allow the "preferences" expressed by potential applicants to play – although we know, of course, that such "preferences" are always suspect of being tainted by the existence of institutional discrimination or, indeed, by the very fact of under-

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[38] Thus for instance, it would not be justified to presume that a recruitment process is indirectly discriminatory where, although only 10% of workers are of a certain ethnic origin in a region where 25% of the active population is of that ethnic group, only 5% of those having completed their secondary education are members of that group. If we consider that having completed high school is an essential requirement for being employed in the undertaking concerned (more plausibly: within a particular occupation in that undertaking), the recruitment process is in fact favourable to persons of that ethnic group, although they still are underrepresented in that undertaking in comparison to their representation in the overall active population of the area. See, *e.g.* for situations where the definition of the relevant "pool" has been discussed within the case-law of the United States Supreme Court, in the context of Title VII of the Civil Rights Act 1964: *Johnson* v *Transportation Agency, Santa Clara County, Calif., et al.*, 107 S. Ct. 1442, 1452 (1987) ("When a job requires special training [. . .] the comparison should be with those in the labour force *who possess the relevant qualifications*"); *Mayor of Philadelphia* v *Educational Equality League*, 415 U.S. 605, 620 (1974) (noting that the Court is not dealing with a situation where "it can be assumed that all citizens are *fungible* for purposes of determining whether members of a particular class have been unlawfully excluded"); *Hazelwood School District* v *United States*, 433 U.S. 299 (1977) (in order to address the allegation that a procedure for the recruitment of schoolteachers is indirectly discriminatory on the basis of race, the percentage of blacks schoolteachers recruited in a particular county should be compared with "the percentage of *qualified black teachers in are labour force*"); *City of Richmond* v *J.A. Croson Co.*, 488 U.S. 469 (1989) ("where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be *the number of minorities qualified to undertake the particular task*").

[39] See, *e.g. Teamsters* v *United States*, 431 U.S. 324 (1977); *United Steelworkers of America* v *Weber*, 443 U.S. 193 (1979) (stating that it should be put an end to the affirmative action programme set up within the undertaking for access to training "as soon as the percentage of black skilled craftworkers in the [. . .] plant approximates *the percentage of blacks in the local labour force*").

representation of certain groups within certain sectors or at certain levels of the professional ladder.[40] Moreover, the assessment of the impact of such measure requires that we define the representation of the different categories within both the "departure group" and the "arrival group" where, in many cases, such data may be inexistent or where there may even be legal obstacles to the collection of such data.[41]

2.2. Indirect discrimination and the inherently suspect measure

Article 2(2)(b) of the Racial Equality and Employment Equality Directives state that indirect discrimination "shall be taken to occur where an apparently neutral provision, criterion or practice would put persons [to whom the protected grounds apply] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". Both directives also provide for the shifting of the burden of proof in discrimination cases: "when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".[42] The facts from which it may be inferred that there has been a direct or indirect discrimination are to be left to the appreciation of national judicial or other competent bodies, in accordance with rules of national law or practice. The Preambles to the Directives add that these national rules "may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence".[43]

These directives therefore rely on a concept of indirect discrimination which differs from the concept emerging from the case-law of the European Court of Justice in equal treatment between men and women cases and codified in Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.[44] Rather than seeking to take into account that certain measures,

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[40] Thus, the low level of representation of ethnic minorities in certain positions may discourage them from seeking to attain the educational level which would give them access to those positions, as emphasized in the "human capital formation" concept of Gary Becker (G. Becker, "Investment to Human Capital: A Theoretical Analysis", *Journ. Pol. Econ.*, vol. LXX (No. 5, part 2), October 1962, pp.9-49; Becker, *The Human Capital: A Theoretical Approach and Empirical Analysis With Special Reference to Education* (1st ed. 1964)). Similarly, the existence of racism or sexism in certain professional environments may discourage women or minorities from seeking to enter into those milieus: see, *e.g.* Anker, "Ségrégation professionnelle hommes-femmes: les théories en présence", *Rev int. du travail*, vol.136, No.3, 1997, p.343, at p.345.

[41] I return to this question in section 3.

[42] Art.8(1) of the Racial Equality Directive; art.10(1) of the Employment Equality Directive.

[43] 15th Recital of the Preamble.

[44] Although the definition of indirect discrimination provided in the Racial Equality and Employment Equality Directives has now been replicated in Directive 76/207/EEC as amended in 2002 (see art.2(2) of Directive 76/207/EEC, as amended by art.1(2) of Directive 2002/73/EC of 23 September 2002) and in

despite being apparently neutral, may have a disparate impact on certain protected categories – which, if such impact is proven by statistical means, will require that they be justified as appropriate and necessary for the achievement of certain legitimate aims – the Racial Equality and Employment Equality Directives are based on the idea that certain apparently neutral measures in fact may be seen as inherently suspect, because although not explicitly differentiating on the basis of a suspect ground, they may be seen as imposing a particular disadvantage on certain protected categories.

This betrays the original intent of the Commission as expressed in the anti-discrimination package it presented on 25 November 1999.[45] When, in these initial proposals, the Commission put forward a definition of indirect discrimination inspired by the case-law of the European Court of Justice in the area of free movement of workers, it intended this competing definition to facilitate the task of the victim in proving discrimination, without limiting the potential reach of the prohibition. According to this alternative definition: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely a person or persons to whom [a suspect ground] applies, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary". As clearly illustrated by the very judgment of the European Court of Justice referred to by the Commission, under this alternative definition of indirect discrimination, the victim is not obliged to collect statistical data, which will often be unavailable or will be considered valid only if the representative sample is important enough.[46] However, the Commission intended that the

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Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (see art.2(b) of Directive 2004/113/EC), Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (*supra*, n.32) remains in force; therefore, notwithstanding the new definition of indirect discrimination in Directive 76/207/EEC, disparate impact discrimination still is prohibited when based on sex.

45 *Supra*, n.12.

46 See Case C-237/94, *O'Flynn* v *Adjudication Officer* [1996] ECR 2417 (judgment of 23 May 1996). Mr O'Flynn, an Irish national residing in the United Kingdom whose son had deceased, had been refused a funeral payment under the United Kingdom Social Fund (Maternity and Funeral Expenses) Regulations 1987, because of a territorial provision in those Regulations stipulating that a funeral payment were to be made only if "the funeral takes place within the United Kingdom". The Court concluded that this condition was in breach of art.7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p.475), under which a worker from one Member State is to enjoy in the territory of the other Member States the same social and tax advantages as national workers. It recalled its case-law according to which "conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (see Case 41/84, *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, para.24; Case 33/88, *Allué and Another* v *Università degli Studi di Venezia* [1989] ECR 1591, para.12; and Le Manoir, para.11) or the great majority of those affected are migrant workers (see, Case C-279/89, *Commission* v *United Kingdom* [1992] ECR I-5785, para.42, and Case C-272/92, *Spotti* v *Freistaat Bayern* [1993]

victim should retain the option to prove discrimination by statistical means, even if this is not required to shift the burden of proof on the shoulders of the defendant. The proposal of the Commission for a Council Directive establishing a general framework for equal treatment in employment and occupation explains that:

> "In the field of sex discrimination, the European Court of Justice has required statistical evidence to prove indirect discrimination. However, adequate statistics are not always available. For example, there may be too few persons in a firm who are affected by the provision in question or where the provision, criterion or practice has just been introduced, statistics may not yet be available. (. . .) According to [the definition of indirect discrimination proposed by the Commission[47]], an apparently neutral provision, criterion or practice will be regarded as indirectly discriminatory if it is intrinsically liable to adversely affect a person or persons on the grounds referred in Article 1. *The 'liability test' may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned*."[48]

It is clear from the last sentence that the Commission intended to allow for victims of discrimination to present statistical data in order to establish a presumption of discrimination, shifting the burden of proof to the defendant. Instead, as a result of the discussions within the Council, the Member States now have the choice whether or not to allow victims to rely on statistics in

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ECR I-5185, para.18), where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (see *Commission* v *Luxembourg*, para.10, and Case C-349/87, *Paraschi* v *Landesversicherungsanstalt Wuerttemberg* [1991] ECR I-4501, para.23) or where there is a risk that they may operate to the particular detriment of migrant workers (see Case C-175/88, *Biehl* v *Administration des Contributions* [1990] ECR I-1779, para.14, and Case C-204/90, *Bachmann* v *Belgium* [1992] ECR I-249, para.9)" (para.18), unless "those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law (see, to that effect, *Bachmann*, para.27; *Commission* v *Luxembourg*, para.12; and Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* v *Università degli Studi di Venezia* [1993] ECR I-4309, para.15)" (para.19). In sum, said the Court: "unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory *if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage*. It is not necessary in this respect to find that the provision in question *does in practice affect a substantially higher proportion of migrant workers*. It is sufficient that it is liable to have such an effect (. . .)" (paras.20-21 (emphasis added)).

47 In its initial version, the definition read: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely a person or persons to whom any of the grounds [referred to in the directive] applies, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary".

48 COM(1999) 565 final, 25.11.1999, at p.8 (emphasis added).

order to establish a presumption of discrimination.[49] As a result, in a number of Member States where this option will not be open to victims, it will not be possible to impose on the author of an apparently neutral measure to justify that this measure is both appropriate and necessary for a legitimate objective, even in a situation where a disparate impact of that measure on a certain protected category may occur, unless the victim may convince the competent authority that the challenged measure would put the members of that category "at a particular disadvantage compared with other persons".

This significantly narrows the reach of the principle of equal treatment. By way of illustration, consider the well-known case of *Griggs* v *Duke Power Co.*, which the United States Supreme Court decided in 1971 and which is generally seen as the first "disparate impact" decision adopted under the Employment Title (Title VII) of the Civil Rights Act 1964.[50] This class action, filed on behalf of the African-American employees of the Duke Power Company, challenged the defendant's "inside" transfer policy, which required employees who wanted to work in all but the company's lowest paying Labour Department to register a minimum score on two separate aptitude tests in addition to having a high school education. The Court considered that this policy was in violation of the applicable provision of the Civil Rights Act.[51] There was evidence that, under this policy, far more Whites would accede to the other departments than African-Americans: in North Carolina, 1960 census statistics showed that, while 34% of white males had completed high school, only 12% of African-American males had done so; and with respect to standardized tests, the Employment Equal Opportunities Commission (EEOC) had found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks.[52] This prompted the Court to ask whether the requirements were justified by "business necessity" – for, as recalled by the Court, the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited". Insofar as "neither the high school completion

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[49] See *supra*, text corresponding to n.43.

[50] *Griggs* v *Duke Power Co.*, 410 U.S. 424 (1971). On the significance of this case, see D.A. Strauss, "Discriminatory Intent and the Taming of Brown", 56 *Univ Chicago L. Rev* 935 (1989); or Th. Eisenberg, "Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication", 52 *N.Y.U. L. Rev* 36 (1977).

[51] At the material time, Sec. 703 of the Civil Rights Act 1964 provided that "(a) It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex, or national origin. . . (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, colour, religion, sex or national origin. . . ." (78 Stat. 255, 42 U.S.C. 2000e-2).

[52] See the references in n.6 of the *Griggs* majority opinion.

requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used", the Court concluded that the policy was discriminatory:

> "The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."

The point to be emphasized here is that, without data indicating the percentage of African-Americans and Whites respectively having completed high school in North Carolina, and indicating the disproportionate impact of so-called "aptitude tests" on African-American applicants, these practices would not have been considered suspect and presumptively discriminatory. In fact, without breaking down the workforce of the Duke Power Company into ethnic groups, those requirements would most probably have gone unnoticed: even though upon closer examination they may have been found to impose disproportionate requirements on applicants, they would not appear, on their face at least, to impose a particular disadvantage on the African-American workers.

The lesson from *Griggs* is clear. By dropping the requirement that the Member States allow alleged victims of discriminations to shift the burden of proof on the defendant when statistics indicate that an apparently neutral provision, criterion or practice has produced a disparate impact on certain protected categories, it is the specific form of indirect discrimination outlawed in *Griggs* – disparate impact discrimination – that the European legislator has made difficult, or even impossible in practice, to challenge. Indeed, part of the difficulty with the requirement that the apparently neutral measure be shown to impose a "particular disadvantage" on the protected category, is that such a definition of indirect discrimination remains implicitly indebted to an understanding of discrimination which sees it as necessarily intentional. When it was decided in 1971, *Griggs* opened a parenthesis in the case-law of the United States federal courts during which the prohibition of discrimination was completely detached from the intent to discriminate: the simple fact of disparate impact, even if resulting from measures adopted in good faith, will suffice to require a justification from the author of the measure having that impact.[53]

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[53] A few years after *Griggs*, the United States Supreme Court decided that, under the Equal Protection Clause of the 14th Amendment to the Constitution, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose" (*Washington* v *Davis*, 426 U.S. 229 (1976)). See also, to the same effect, *Village of Arlington Heights* v *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Personnel Administrator of Massachussetts* v *Feeney*, 442 U.S. 256 (1979); *Hunter* v *Underwood*, 471 U.S. 222 (1985). Under Title VII of the Civil Rights Act 1964, *Griggs* v *Duke Power Co.* was decisively overturned by *Wards Cove Packing Co.* v *Antonio*, 490 U.S.

Apart from narrowing the scope of the principle of equal treatment, the requirement imposed on the alleged victim of an indirect discrimination resulting from the application of an apparently neutral measure to demonstrate that such application may put the members of a protected category "at a particular disadvantage compared with other persons" may give rise to specific difficulties. First, where the addressees of a provision or those to whom a criterion is being applied or who are affected by a practice could have avoided being put at a particular disadvantage compared to other persons by adopting a certain behaviour (for instance, by acquiring a particular qualification required by the employer, by sacrificing a specific dimension of one's ethnicity or by renouncing one aspect of one's freedom to express a religious belief), the question arises whether they may they still complain about a measure which creates this disadvantage. It is clear that, where the change in behaviour would imply abandoning one of the traits by which an ethnic or religious minority defines itself, it would be unacceptable to reject a discrimination claim on the ground that, by not "adapting" to the challenged requirement, the victim would have waived his or her right to complain.[54] Certain borderline cases may emerge, however, where a specific practice is not central to one's ethnicity or religion.

642, 109 S.Ct. 2115 (1989). Under *Wards Cove Packing Co.*, it is not enough for the applicant to identify "a racial imbalance in the workforce"; he or she must "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities". Moreover, the decision stated that the practice challenged because of its disparate impact should not necessarily be proven by the respondent to be "essential" or "indispensable" to the employer's business: "The touchstone of the inquiry", says the Court, "is a reasoned review of the employer's justification for his use of the challenged practice". The federal Congress reacted by adopting the Civil Rights Act 1991 (Pub. L. No. 102-66, 105 Stat. 1071), restricting the reach of the *Wards Cove Packing Co.* doctrine. As amended, the relevant provision of the Civil Rights Act now states that "(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if— (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, colour, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration (. . .) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice. (B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice. (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity" (42 U.S.C. s.2000e–2, (k) - Burden of proof in disparate impact cases). On the intentions behind the Civil Rights Act 1991, see Perritt, *Civil Rights Act of 1991: Special Report*, New York, John Wiley and Sons, 1992.

[54] See, *e.g. CRE* v *Dutton* (1989) 1 All ER 306, 315 (where, in a case inn concerning an inn-owner accused of committing discrimination against gypsies under the Race Relations Act 1976, as he had posted a bill denying entrance to travellers, the

Second, the application of the "particular disadvantage" standard retained under the current definition of indirect discrimination under the Racial Equality and the Employment Equality Directives requires both that all or the vast majority of the members of a group present certain common characteristics, and that these are sufficiently well known. Only through such knowledge will it be possible to screen the apparently neutral provisions, criterions or practices, and thereby to identify measures which could be presented as suspect. Conversely, the greater our ignorance about the average situation of the members of one protected category, the more difficult the task will be of identifying certain measures as "suspect". For instance, it requires a certain understanding of the situation of persons with disabilities to see that a measure setting a maximum age may be imposing a particular disadvantage on those persons (as they generally arrive later on the labour market), or that a requirement that the candidate to a job have a driving license could have this effect.[55] Similarly, the particular disadvantage resulting for the members of an ethnic minority from the use in a recruitment process of a criterion based on the place of residence requires that we possess information about the geographical segregation of different ethnic groups in a given region; the particular disadvantage on ethnic minorities resulting from recruitment by networks, in particular within the family acquaintances of the employees,[56] also presupposes that we have an idea about the ethnic composition of the existing workforce, which such recruitment processes will tend to perpetuate or reinforce. With respect to certain protected categories, the "particular disadvantage" standard will simply prove useless, as the members of the protected category simply present no other characteristic in common than what makes them members of that category: thus, there exists no "apparently neutral" criterion (with the exception perhaps of a preference in favour of married persons or persons with a family in the traditional sense) which will work to systematically exclude persons with a homosexual sexual orientation; an employer wishing to exclude homosexuals from the workforce will therefore rely on informal means of

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Court of Appeal noted: "gipsies can and do cease to be nomadic, but that will be of little use to a particular nomadic gipsy when he chances on the [respondent inn] and wishes to go in for a drink. At that stage he is, in practice, unable to comply"); or *Mandla* v *Dowell Lee* (1983) 1 All ER 1062, 1069 ("It is obvious that Sikhs, like anyone else, 'can' refrain from wearing a turban, if 'can' is construed literally. But if the broad cultural/historic meaning of ethnic is the appropriate meaning of the word in the 1976 Act, then a literal reading of the word 'can' could deprive Sikhs and members of other groups defined by reference to their ethnic origins of much of the protection which Parliament evidently intended the 1976 [Race Relations] Act to afford to them. They 'can' comply with almost any requirement or condition if they are willing to give up their distinctive customs and cultural rules [. . .] The word 'can' [. . .] must [. . .] have been intended by Parliament to be read not as meaning 'can physically', so as to indicate a theoretical possibility, but as meaning 'can in practice' or 'can consistently with the customs and cultural conditions of the racial group'").

[55] See Waddington, *Disability, Employment and the European Community* (1995) 56.

[56] On this form of recruitment, see Bataille, *Le racisme au travail* (1997) 122-123; Eymard-Duvernay and Marchal, *Façons de recruter. Le jugement des compétences sur le marché du travail* (1997), at 26 and 37; Granovetter, *Getting a Job. A Study of Contracts and Careers* (1974) 46.

selection, particularly job interviews, the discriminatory impact of which it will be impossible to challenge in the absence of statistical data.

A third difficulty is that the approach the Racial Equality and Employment Equality Directives adopt towards the notion of indirect discrimination simply is not realistic, at least in the context of employment. In the great majority of cases, the evaluation of the candidates competing for a job or for a promotion shall be based on both informal processes (in particular, job interviews) and relatively vague criteria, such as "personality", conformity to the "culture" of the institution, or the "presentation" of the candidate. The evaluation is thus negotiated, rather than planified.[57] In the face of such informal criteria, it is not particularly helpful for the victim of a discrimination to be authorized to demonstrate that certain provisions, criteria or practices are imposing a "particular disadvantage" to the category to which he or she belongs. Precisely because of the informality of such criteria, these criteria may not be considered as suspect *a priori*. What matters is not what they look like, but how they are applied in practice: only an *a posteriori* evaluation of the impact of such criteria being applied, based on a statistical analysis, may succeed in unveiling their discriminatory character, whether the discrimination is conscious or unconscious.

2.3. Conclusion

When it proposed the instruments which would become the Racial Equality Directive and the Employment Equality Directive, the Commission had intended the victims to be able to rely on statistical data in order to establish a presumption of discrimination, although it considered that the victims should not be obliged to provide the competent authority with such data where it was sufficiently clear that the challenged measure was liable to affect adversely a person or persons to whom any of the protected grounds applied.[58] The Council decided instead to leave it to the Member States to decide whether or not they should provide for the possibility for the victim of discrimination to rely on statistics to establish a presumption of indirect discrimination. This implies that, except in the clearest cases where the apparently neutral measure almost may be seen as having been calculated to produce the discriminatory effect which could not be achieved by openly discriminatory measures, the victim will find it difficult or even impossible to shift the burden of proof on the author of the measure, even where this measure has a clearly disparate impact on certain protected groups. This runs counter to what, under most jurisdictions, justified the introduction of the concept of indirect discrimination in the first place. As noted by a comparative study commissioned by the European Commission on the collection of data to measure the extent and impact of discrimination[59]:

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[57] For a theoretical discussion of this opposition, see Eymard-Duvernay and Marchal, *Façons de recruter*, supra n. 56 at 24-26. For empirical evidence, see, inter alia, D. Bartram, P. Lindley, L. Marschall, J. Foster, "The Recruitment and Selection of Young People by Small Businesses", *Journ. of Occupational and Organisational Psychology*, vol. 68 (1995) 339.

[58] See *supra*, n.47 and the corresponding text.

[59] *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the*

> "The indirect discrimination concept and the related action schemes, are intrinsically linked to statistics by their logic and objectives. The definition of indirect discrimination is based on quantitative concepts: significant effects and comparisons between groups. The cognitive tools used to capture indirect discrimination, which is the reasoning on which legal and political developments are based, are statistical. The group concept is the focus: treatment is no longer personalised, it is collective and only relates to individuals in terms of their real or assumed affiliation to a protected group. This shift from the individual to a group is strictly analogous to the operations carried out by statistics: impersonal aggregates that highlight a collective situation. As a consequence, all of the main elements of an intervention scheme require statistics: data recording and collection, the inclusion of personal characteristics into comparative tables, the production of indicators demonstrating differentials and the assessment of their extent and variations, the development of quantified objectives for rectifying procedures and promoting equality, and the assessment of the effects of the programmes, etc."

It cannot be excuded that, despite the unambiguous terms of the Racial Equality and Employment Equality Directives – which both explicitly exclude to impose on the Member States an obligation to provide for the possibility to establish a presumption of discrimination by statistical means – the European Court of Justice will be led to consider that such an obligation must be imposed as a condition for the effectiveness of the protection from discrimination. These directives, it will be recalled, are considered as merely implementing a more general principle, that of equal treatment.[60] This not only justifies a broad reading of their requirements. It also may justify imposing on the Member States acting under European Community law – as they do when they implement the directives – obligations which go further than those explicit in the directives, where required by the principle of equal treatment. And, as recognized by the European Committee of Social Rights under the European Social Charter, allowing proof by statistics of instances of discrimination is required in order for the prohibition of indirect discrimination to be truly effective.[61] Indeed, in the *Enderby* case, it is by

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Netherlands (Medis Project (Measurement of Discriminations), co-ord. P. Simon (INED – Economie & Humanisme), August 2004, p.82.

[60] See the judgment of 22 November 2005 delivered in Case C-144/04, *Mangold* v *Helm*, nyr.

[61] See European Committee of Social Rights, *European Roma Rights Centre (ERRC)* v *Greece*, collective complaint No. 15/2003, decision on the merits of 8 December 2004, at paras.21-28. The Committee notes in particular that, "in connection with its wish to assess the allegation of the discrimination against Roma made by the complainant organisation, the Government stated until recently that it was unable to provide any estimate whatsoever of the size of the groups concerned. To justify its position, it refers to legal and more specifically constitutional obstacles. The Committee considers that when the collection and storage of personal data is prevented for such reasons, but it is also generally acknowledged that a particular group is or could be discriminated against, the authorities have the responsibility for finding alternative means of assessing the extent of the problem and progress

taking into account the fact that the plaintiff had submitted statistical evidence making it possible to establish a *prima facie* case of discrimination that the Court considered, "Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory".[62] The Court has not feared in the past to restrict the procedural autonomy of the Member States, where it considered that the national rules relating to the presentation of evidence before the national jurisdictions were not sufficiently protective of the rights attributed by Community law.[63] Now may be the time to develop this jurisprudence once step further.

3. The Models of Equality and Personal Data Protection[64]

The rules relating to the protection of personal data are sometimes seen to create specific obstacles both to the use by a potential victim of discrimination of statistics in order to shift the burden of proof on the respondent – in the Member States which have provided for this possibility in their implementation of the Racial Equality and Employment Equality Directives – and to the adoption of policies in favour of diversity by certain actors, in particular employers. A report presented in October 2003 to the European Commission (Directorate-General for Employment, Industrial Relations and Social Affairs) on the business case for diversity policies within the undertaking[65] notes that one specific obstacle to the adoption and implementation of workforce diversity policies are the restrictions on the processing of sensitive data in the EU, which may make it impossible to

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towards resolving it that are not subject to such constitutional restrictions" (at para.27). For the reaction of the Committee of Ministers of the Council of Europe, see Resolution Res ChS (2005)11, Collective complaint No. 15/2003 by the European Roma Rights Centre (ERRC) against Greece, adopted by the Committee of Ministers on 8 June 2005 at the 929th meeting of the Ministers' Deputies.

62 Case C-127/92, *Enderby*, [1993] ECR I-5535, para.18 (judgment of 27 October 1993).

63 See, *e.g.* Case 199/82, *Administrazione delle Finanze delle Stato* v *Societa San Giorgio* [1983] ECR 3595 (judgment of 9 November 1983); Case 22/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para.20 (judgment of 15 May 1986).

64 See further on the questions discussed in this section two publications of the EU Network of Independent Experts on Fundamental Rights: *Report on the situation of Fundamental Rights in the Union in 2003* (January 2004), at 97-100; and *Thematic Comment No.3: The Protection of Minorities in the Union* (March 2005), section 2 ("Monitoring the situation of minorities"). The documents of the Network may be consulted on: http://www.europa.eu.int/comm/justice _home/cfr_cdf/index_en.htm.

65 *The Costs and Benefits of Diversity. A Study on Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises*, report drawn up by the Centre for Strategy and Evaluation Service (CSES) on behalf of the European Commission. The report is based on a survey of 200 companies in 4 EU countries, on literature reviews, on 8 case studies in 6 Member States, and on a number of interviews with a range of actors. See http://europa.eu.int/comm/ employment_social/fundamental_rights/prog/studies_en.htm.

measure the evolution of the workforce, according to sexual orientation, race or ethnic origin, or religion. Without returning to that difficulty, a more recent report identifies "workforce profiling" as a good practice of companies in monitoring progress towards diversity.[66] A study[67] commissioned under the Community action programme to combat discrimination (2001-2006) concluded from a comparative study on the EU-15 Member States, similarly, that data collection ought to be improved in order to gain a better understanding of discrimination in the EU Member States: "Data is needed to guide decision-makers, to facilitate awareness-raising activities, to enable the work of international human rights monitoring bodies, to facilitate legal action and to facilitate research on discrimination. Indeed, more than 90% of the experts surveyed were convinced that data collection on discrimination helps to improve the situation of individuals and groups vulnerable to discrimination." Among its recommendations, the report proposed that "States should develop their social and economic statistics in such a manner that they would be more useful in disclosing data on the (potentially) disadvantaged economic and social position of members of groups vulnerable to discrimination. Data related to employment, housing, education and income should be broken down by the grounds of discrimination, *e.g.* national origin, disability, gender and age", and that "Larger companies, public and private, should keep track of their workforce so as to be able to assess their recruitment, promotion and firing policies and practices". However, the survey prepared for that study also illustrated the high level of uncertainty about whether or not the existing rules on data protection represented an obstacle to the collection of data relating to discrimination, for the purposes recalled above.[68]

The authors of the 2004 *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands* noted the paradox underlying the debate in Europe on the implementation of anti-discrimination strategies:

> "Although there is a lack of statistical indicators to assess the extent of discrimination in the Member States, the belief is widely shared that discrimination is widespread and that there is a need to mobilise all social institutions and stakeholders to reduce this discrimination. Nevertheless, the collection of statistics relating to ethnic or racial origin, religion, disability

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[66] This is defined thus: "Workforce profiling including ethnicity, nationalities, religions, languages spoken, gender and age mix to enable identification of particular areas of under-representation, as well as to enable comparisons against local area demographics: *The Business Case for Diversity. Good Practices in the Workplace*, September 2005, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (Unit D3), at 26.

[67] Reuter *et al*., *Study on data collection to measure the extent and impact of discrimination in Europe*, Final report of 7 December 2004.

[68] 31% of the respondents to the survey were of the view that the data protection legislation does limit data collection. 36% disagreed. 33% did not know. There were no major differences in views provided by NGOs and Government representatives to this issue. See the report by Reuter *et al*., *supra* n.67, pp.158-160.

> or sexual orientation has been the subject of strong resistance. The experience of the countries under study in this report demonstrates that the lack of sufficient statistics to illustrate and evaluate discrimination is not compatible with establishing an operational scheme whose main characteristic is the intensive use of statistical data. It appears necessary – and possible – to transcend the European paradox opposing the fight against discrimination and the production of 'sensitive' statistics."[69]

It is therefore particularly important to clearly identify the limits imposed by data protection legislation on the use of statistical tools in order to monitor discrimination both in public policies and in private settings, including in particular within the workforce of private undertakings. This is required both for reasons of legal certainty, as the reluctance of both public and private actors to perform such monitoring may be attributed, in a number of cases, to misconceptions about the requirements of the rules relating to data protection, and in order to identify whether there may be a need to arbitrate a conflict between those requirements and effective anti-discrimination strategies. It is the purpose of this section to identify whether such conflict indeed exists, and if so, what may be done to alleviate it.

The general framework is as follows. The processing of personal data within the EU Member States must comply with the guarantees stipulated by Article 8 of the European Convention on Human Rights[70] and by the Council of Europe Convention (No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data.[71] Under this latter instrument, personal data undergoing automatic processing shall be "obtained and processed fairly and lawfully", "stored for specified and legitimate purposes" and processed by means "adequate, relevant and not excessive in relation to the purposes for which they are stored".[72] According to Convention No. 108 of the Council of Europe, personal data cannot be used in a way incompatible with the purposes for which they are collected.[73] States have to take the appropriate security measures for the protection of personal data stored in automated data files against unauthorised access, alteration or

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[69] *Supra*, n.59, at 87.

[70] The European Court of Human Rights has interpreted this provision as protecting the individual from the processing of data, whether relating to his or her private or public activities, which may be traced back to an identified or identifiable individual (Eur Ct HR (GC), *Rotaru* v *Romania* (Appl. No. 28341/95) judgment of 4 May 2000, at § 43 (noting in particular that "public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities")). However, the Court has rejected an extensive understanding of this case-law which would have created an obstacle to the use of any information, even recent, concerning a specified individual, in order to adopt certain decisions affecting that individual: see the partial inadmissibility decision of 6 March 2003 in *Zdanoka c. Lettonie* (Appl. No. 58278/00).

[71] This Convention has been opened for signature on 28 January 1981.

[72] Art.5 (a), (b) and (c).

[73] Art.5(b).

dissemination.[74] Under this same Convention, data relating to ethnic origin or the religion of an individual may not be automatically processed, unless domestic law provides for appropriate safeguards.[75] Within the European Union, Directive 95/46/CE of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereafter referred to as the "Personal Data Directive")[76] extends the protection offered by the 1981 Convention No. 108, in particular insofar as it applies also to the processing of personal data by non automatic means. Moreover, Article 3 (1) of the Council of Europe Framework Convention on National Minorities provides that every person shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and that no disadvantage shall result from this choice.[77] Under this provision, State authorities thus cannot impose the quality of belonging to a minority on individuals.[78] Finally, the principles of Recommendation No. 97(18) of the Committee of Ministers of the Council of Europe concerning the protection of personal data collected and processed for statistical purposes[79] and Recommendation No. (91) 10 of the Committee of Ministers on the communication to third parties of personal data held by public bodies must be taken into account.

This section explains why, contrary perhaps to a relatively widespread perception, the rules relating to the processing of personal data, including the heightened protection of sensitive data relating to the ethnic origin, the religious beliefs or the state of health (and the disability) of the individual, should not be seen as an obstacle to an adequate monitoring of the impact on certain groups protected from discrimination of public policies, legislation or private practices. On the contrary, they constitute a necessary and welcome safeguard against any risk of abuse in the process of such monitoring, a pre-condition for which therefore is that these rules protecting personal data are strictly adhered to. Although a number of States seem to consider that this form of monitoring is in conflict with the protection of personal data, especially as guaranteed under their national legislation implementing Directive 95/46/EC on the protection of individuals with regard to the

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[74] See art.7. Appropriate security measures shall be taken as well for the protection of these personal data against accidental or unauthorised destruction or accidental loss.

[75] Art.6. The Advisory Committee of the Framework Convention also emphasized the need to protect the confidentiality of the data relating to the membership of national (ethnic, religious, linguistic or cultural) minorities (Opinion on Italy, 14 September 2001, ACFC/OP/I(2002)007, para.20).

[76] OJ L 28 of 23.11.1995, p.31.

[77] Therefore, an obligation to reply to a question relating to the affiliation with a minority would not be compatible with art.3(1) of the Framework Convention on National Minorities: see Opinion of the Advisory Committee of the Framework Convention on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, para.19; Opinion on Poland, 27 November 2003, ACFC/INF/OP/I(2004)005, para.24.

[78] This right implies as well that each person shall have the liberty to request to stop being treated as belonging to a minority (see Opinion on Cyprus, 6 April 2001, ACFC/OP/I(2002)004, para.18).

[79] Adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies.

processing of personal data and on the free movement of such data, there is no such contradiction in fact. To understand why, it is useful to distinguish general monitoring through statistical means, from affirmative policies implying the processing of personal data.

3.1. Monitoring the potentially discriminatory impact through statistical means

According to Article 2(a) of the Personal Data Directive, personal data are:

> "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."

Therefore, once personal data are made anonymous in order to be used in statistics, the information contained in such statistics should not be considered as personal data. This should be taken into consideration when comparing the different forms under which the impact on certain specified categories of persons of certain policies, legislations or practices may be monitored. Such a monitoring may consist in collecting information from the individuals concerned, in order to use this information for statistical purposes after these data are anonymized. It may also be based on the processing of information not obtained directly from the individuals concerned for that purpose but processed and communicated for statistical purposes, a process which is referred to as "secondary collection of personal data". Finally, it may be based on other reliable techniques, such as those traditionally used in social science empirical research, including the use of representative samples or personal interviews conducted by independent researchers, under the principle of anonymity. In fact, this latter technique may produce results more reliable than those obtained through the collection of data by the use of individual questionnaires initially linked to identified or identifiable individuals, because of the risks of underreporting or over-reporting implied in the use of such questionnaires to be completed by the individuals concerned.

Recital 29 of the Preamble and Article 6(1)(b) of the Personal Data Directive make it clear that, insofar as the initial collection of personal data took place for specified, explicit and legitimate purposes, the further processing of personal data for historical, statistical or scientific purposes should not generally be considered incompatible with the purposes for which the data have previously been collected provided that Member States furnish suitable safeguards, which must in particular rule out the use of the data in support of measures or decisions regarding any particular individual. Insofar as sensitive data are concerned, relating in particular to the race or ethnic origin, the religion or the disability of the data subject, the Directive authorizes the Member States, when justified by grounds of important public interest, to derogate from the prohibition on processing sensitive categories of data where important reasons of public interest so justify, for instance for the

preparation of government statistics.[80] However, where the monitoring involves the use of personal data, the principles enumerated in the Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes,[81] should be complied with. In particular, this Recommendation prescribes that personal data collected and processed for statistical purposes shall be made anonymous as soon as they are no longer necessary in an identifiable form (Principle 3.3), *i.e*. immediately after the end of the data collection or of any checking or matching operations which follow the collection, except if identification data remain necessary for statistical purposes and the identification data are separated and conserved separately from other personal data, unless it is manifestly unreasonable or impracticable to do so (Principle 8.1 and Principle 10.1), or if the very nature of statistical processing necessitates the starting of other processing operations before the data have been made anonymous and as long as all the appropriate technical and organisational measures have been taken to ensure the confidentiality of personal data, including measures against unauthorised access, alteration, communication or any other form of unauthorised processing (Principle 8.1. and Principle 15). It also prescribes that, where personal data are collected and processed for statistical purposes, they shall serve only those purposes, and shall therefore not be used to take a decision or measure in respect of the data subject, nor to supplement or correct files containing personal data which are processed for non-statistical purposes (paragraph 4.1); and that, in order for the processing of personal data for statistical purposes to remain proportionate, only those personal data shall be collected and processed which are necessary for the statistical purposes to be achieved, which implies in particular that identification data shall only be collected and processed if this is necessary (paragraph 4.7). Specific principles governing the information of the persons concerned apply, moreover, in the context of either the primary or the secondary collection of personal data for statistical purposes (Principles 5.1 to 5.5).

Recommendation No. R (97) 18 provides that when, for statistical purposes linked to monitoring, personal data are collected from the person concerned, he/she must be informed of the compulsory or optional nature of the response and the legal basis, if any, of the collection (Principle 5.1), and any penalties for a refusal to reply may only be imposed by law (Principle 6.4). However, where the data collected from the person concerned relate directly or indirectly to the membership of the person of a minority, replying to such a question should always be optional. This follows both from Article 3 of the Framework Convention on the Protection of National Minorities, referred to above, which provides that every person belonging to a national minority shall have the right freely to choose to be treated as such. Moreover, Principle 6.2 of Recommendation No. R (97) 18 provides that:

> "Where the consent of the data subject is required for the collection or processing of sensitive data, it shall be explicit, free and informed. The legitimate objective of the survey may

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[80] Recital 34 of the Preamble and art.8(4) of the Personal Data Directive.
[81] Cited *supra*, n.79.

> not be considered to outweigh the requirement of obtaining such consent unless an important public interest justifies the exception.
>
> Where the monitoring involves the use of data which have not been collected directly from the individual whom these data relate to (secondary collection of personal data), this individual should in principle be informed of the use of these data when the data are recorded or at the latest when the data are first disclosed to a third party, for instance where an employer communicates certain statistical data on the ethnic break-up of his workforce to the public authorities, unless providing the individuals concerned with such information would involve disproportionate efforts, for instance because of the large number of persons concerned or because the further processing is purely for statistical purposes."[82]

The importance of these safeguards could hardly be overstated. They should prevent the misuse of personal data in the context of their processing, after anonymization, for statistical purposes in order to monitor the potentially discriminatory impact of legislations, policies or practices. None of these safeguards, however, impose insuperable obstacles to such processing. There is no conflict between personal data protection and the monitoring of discrimination through statistical means, insofar as the objective of such monitoring is to gain a better understanding of the over- or under-representation of certain groups in particular sectors or at certain levels, and to measure progress, in order to identify the need to act and to select the most effective course of action.

In principle, neither should there be such a conflict where the preparation of such statistics is required in order to make it possible for individuals claiming that they are victims of discrimination to bring forward certain statistical data which, if these data make a sufficiently convincing case that such discrimination has indeed occurred, will shift the burden of proof on the respondent. This calls for an important proviso, however. In the Member States which allow the victim of discrimination to bring forward statistics in order to establish a presumption of discrimination, the employer may have to shield him- or herself against legal action for alleged discrimination on the basis of certain statistical data on the composition of the workforce or the disproportionate impact of any system that he has put in place. This may require the continuous monitoring of the consequences of the decisions adopted by the employer in terms of their repercussions on the different categories of workers or prospective workers. Indeed, both experience in countries where the concept of disparate impact discrimination is used and academic commentary[83] show that allowing for the use of statistics by

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[82] This follows from Recitals 39 and 40 of the Preamble of the Personal Data Directive, and from its Article 11. This is also compatible with Principles 5.2. and 5.3. of Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes.

[83] See Goodman, "Affirmative Action", *Phil. & Public Affairs*, vol. 5, No. 2, Winter 1976, reprinted in M. Cohen, Th. Nagel and Th. Scanlon (eds.), *Equality and Preferential Treatment* (Princeton, Princeton Univ. Press, 1977) 192 at 198;

alleged victims of discrimination leads naturally to the potential respondents in disparate impact discrimination cases "operating by the numbers" in order to avoid liability for this specific form of discrimination: where it is not possible to justify the necessity of the full set of criteria, both formal and informal, which are relied upon in order to make a selection, the actor generally will have no other choice but to ensure, "artificially" as it were, that those selection processes lead to an adequate (roughly proportionate) representation of all categories protected under an anti-discrimination legislation.

This would not appear to be conflicting with personal data protection legislation, however. Under the 1995 Personal Data Directive, the processing of sensitive data by an employer may be allowed for the purpose of complying with the obligations imposed on him by labour law, insofar as such law provides adequate safeguards.[84] Thus, in the Member States which allow the victim of discrimination to bring forward statistics in order to establish a presumption of discrimination, and where the employer therefore may have to monitor the impact of his decisions on the workforce, the employer may be justified in processing "sensitive" data such as membership of a racial or ethnic group, religion, or health (disability) for that purpose. Outside the field of employment (particularly in education, social protection, social advantages and the supply of goods and services, to which the Racial Equality Directive applies), the Personal Data Directive also allows the processing of sensitive data where it is "necessary for the establishment, exercise or defence of legal claims".[85]

In examining the question of affirmative action taken by certain actors in order to protect themselves from potential legal liability for disparate impact discrimination, we have already anticipated on the developments of the next paragraph. It is to this question that we now turn.

3.2. Granting special rights in the context of affirmative action policies

In certain cases, the processing of personal data, relating for instance to the ethnic or religious affiliation of an individual or to his or her disability, will be required not only for statistical purposes, in order to ensure that the situation of minorities under generally applicable laws or policies is adequately monitored, but also in order to grant to the individual members of minorities certain advantages or to offer them specific treatment. This, indeed, will be required under affirmative action programmes, which constitute a sub-part of positive action programmes in general.[86] The

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Meyer, "Finding a 'Manifest Imbalance': The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII", 87 *Mich. L. Rev* 1986 (1989).

84 Art.8, s.2, b), of Directive 95/46/EC, quoted *infra* in s.2.2, stipulates that national law should offer specific safeguards, in other words, that it should strictly regulate the method used by an employer and the use made of those data, in particular the way in which those data are collected (only self-identification of the worker with certain categories makes this classification acceptable), the protection of the data (persons having access to those data and conditions of access), and the exercise by the person concerned of rights of access and rectification.

85 See art.8, s. 2, e) of Directive 95/46/EC, quoted *infra* in s.2.2.

86 See *infra*, s.4.

relevant rules relating to the protection of personal data must be fully complied with in the framework of such a policy. In particular, the processing of "sensitive" data on racial origin, religious or other beliefs, health (disability) or sex life is subject to particularly strict conditions, in order to reflect the risk of discrimination involved in the use of such data.

The Personal Data Directive provides that the EU Member States shall in principle prohibit the processing of sensitive data. These are defined as "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life" (Article 8 paragraph 1).[87] Directive 95/46/EC only allows the processing of sensitive data in five situations, among which two are relevant in this context:

> "(a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition [imposed on the processing of sensitive data] may not be lifted by the data subject's giving his consent; or (. . .)
>
> (e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims."

Insofar as, per definition, the processing of sensitive personal data in order to grant a preferential treatment will be advantageous to the data subject, it will typically be possible to obtain the consent of that person to the processing of such data. In fact, at least with respect to the members of ethnic or religious minorities whose membership in those groups is defined by their ethnic origin or their religion, which are two "sensitive" traits, there exists a complementarity between that derogation to the principle according to which sensitive data may not be processed on the one hand, and the rule stipulated in Article 3(1) of the Framework Convention on the Protection of National Minorities which, as the reader may recall, provides that every person shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and that no disadvantage shall result from this choice. As a result of these rules, where a potential beneficiary of an affirmative action programme agrees to identify him- or herself as having a particular ethnicity or religious faith, that individual will be granted the preferential treatment afforded under the programme; if the potential beneficiary refuses to thus identify to one ethnic or religious group, he or she will simply be considered to be exercising the right not to be treated as belonging to an ethnic or religious minority.

This raises, of course, the question of the validity of the consent. In the context of the 1995 Personal Data Directive, the notion of "consent" is defined as the "freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to

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[87] See also art.6 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, referred to *supra*, n.71 (which says that sensitive data "may not be processed automatically unless domestic law provides appropriate safeguards").

him being processed".[88] Two questions arise, however, even where the consent is free, informed, and specific, as required by this definition. First, Article 3(1) of the Framework Convention on the Protection of National Minorities states that no disadvantage shall result from the choice of the individual not to be treated as a member of a minority. Would not benefiting from an affirmative action policy not constitute precisely such a disadvantage? Second, in the specific context of the employment relationship, reliance on the consent of the worker either in order to legitimate the processing of personal data generally,[89] or in the context of the derogation to the processing of sensitive personal data, is generally considered highly suspicious, because of the power imbalance between the processor (the employer) and the data subject (the worker). Indeed, this was one of the important questions raised in the course of the consultations with the social partners which the European Commission conducted, in accordance with Article 138(2) EC, about a possible directive specifically addressed at the protection of personal data in employment.

These arguments against the reliance on the consent of the data subject who may benefit from an affirmative action policy do not seem to be decisive, however. The alternatives to this solution would consist either in not requesting consent from the individual concerned for the processing of personal data in the context of an affirmative action programme, or in renouncing the idea of such a programme altogether. But these alternatives are both unsatisfactory, and neither appears more favourable to the potential beneficiary of affirmative action. Indeed, the first solution (to dispense with the consent of the data subject) would be in clear violation of Article 3(1) of the Framework Convention for the Protection of National Minorities, where ethnic or religious minorities are concerned, as well as with the interpretation given by the Committee on the Elimination of Racial Discrimination to Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination;[90] and the second solution would run counter to the consistent view of the Advisory Committee of the Framework Convention that affirmative action programmes seeking to contribute to the effective integration of minorities are in principle desirable.[91] As to the fragility of consent in the context of the employment relationship, it is a concern which has been expressed – most notably, by the Working Party created under Article 29 of the Personal Data Directive[92] – in the specific situation of the recruitment process, where, as a matter of course, a refusal by the candidate to a job to provide the employer with the information requested may lead the

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88 Art.2, h, of the Personal Data Directive.

89 Art.7, a, of the Personal Data Directive provides that if it is unambiguous, the consent of the data subject to the processing of personal data may legitimate this processing.

90 The Committee on the Elimination of Racial Discrimination adopted General Recommendation VIII at its thirty-eighth session in 1990, in which it concluded that the identification of individuals as being members of a particular racial or ethnic group or groups "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned" (UN doc. A/45/18).

91 See *infra*, s.4.3.b, and text corresponding to n.133.

92 Opinion No. 8/2001 on the processing of personal data in the employment context, WP 48, 5062/01, 13 September 2001.

employer to deny the position to the individual concerned.[93] However, where the consent of the worker is requested in order to implement an affirmative action programme, it may not be presumed that it is coerced or particularly suspect:[94] typically, the employer will seek this information from the employee in order to comply with the legal obligations imposed on the employer, and it will be in the interest of both that the employee identifies him- or herself with a particular group benefiting from the policy.[95]

3.3. Conclusion

It has been the argument of this section of the article that under European Community law, personal data protection does not constitute an obstacle to moving towards a more affirmative model of equality, or one which, at a minimum, allows victims to establish a presumption of discrimination by bringing forward statistical data, thus allowing for the concept of disparate impact discrimination to emerge beyond the context of equal treatment between men and women. A distinct question is whether the requirements of the Personal Data Directive should not be clarified in this respect. In its Thematic Comment No. 3 concerning the rights of minorities in the Union, the EU Network of Independent Experts on Fundamental Rights suggested that an opinion by the Working Party established under Article 29 of the Personal Data Directive would be welcome, in order to clarify the requirements of the directive and to avoid any misrepresentations which would discourage the Member States from moving towards more effective models of equality, or from invoking personal data protection legislation as a pretext for not improving the monitoring of the situation of certain groups under their jurisdiction.[96] The different national sensitivities which exist in this area are of course to be fully respected. At the same time however, diverging interpretations of the Personal Data Directive should be avoided, not only for obvious reasons of legal certainty, but also because any differences in approach between Member States on this issue may pose a threat to the prime objective of the Directive when it was adopted, which was

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[93] See p.32 of Opinion No. 8/2001, *supra* n.92.

[94] It may be significant in this regard that, while it expresses its doubts about the validity of the consent given by the employee to the processing of personal data, considering the fundamental inequality between the parties to the employment contract, the European Commission notes, in its preparatory document to the *Second consultation phase with the social partners on the protection of personal data of workers*, that personal data concerning racial and ethnic origin or religious convictions may be processed in accordance with the law, in circumstances where the law allows for a differential treatment on any of these grounds, in particular where genuine occupational requirements or positive action measures are concerned (at p.14).

[95] For a more elaborate discussion of this question, see O. De Schutter, " La protection du travailleur *vis-à-vis* des nouvelles technologies dans l'emploi ", *Revue trimestrielle des droits de l'homme*, 2003, No. 54, pp.627-664.

[96] EU Network of Independent Experts on Fundamental Rights, *Thematic Comment No.3: The Rights of Minorities in the European Union*, March 2005, at p.18, available at http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm.

to guarantee the free movement of data between Member States, particularly in order to facilitate cross-border economic activity.[97]

4. The affirmative dimension of the principle of equal treatment: positive action

4.1. The many faces of positive action

Positive action comes in many forms. From the legal point of view, a fundamental distinction should be made between forms of positive action which do not create a risk of discrimination against the members of the group which the action does not benefit, and the forms which do entail such a risk (referred to here as "affirmative action"). Where, for example, an employer publicizes job advertisements in a paper read primarily by the members of a specific ethnic community, or includes on the job advertisement that minorities or women are encouraged to apply, or indicates that the undertaking has a nursery in order to attract applications from women, such measures – although they do demonstrate a willingness to go beyond a non-discrimination policy in order to achieve a better balance within the workforce – are not forms of "preferential treatment" which may be construed as a derogation from the requirement of formal equality.[98] On the other hand, the practice of "quotas" or set-asides, whether rigid (the reservation of a specified percentage of places to the members of under-represented groups) or flexible (preferential treatment of a candidate belonging to the under-represented category where the competing candidates are equally qualified), or conceived as part of diversity plans setting certain targets to be achieved and providing for the monitoring of the progress made

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[97] See Communication of the Commission on the implementation of Directive 95/46/CE, COM(2003) 265 final, 15.5.2003. The Commission recalls its view in the evaluation of the Personal Data Directive that Internal Market legislation should "provide a level playing field for economic operators in different Member States; help to simplify the regulatory environment in the interests of both good governance and competitiveness; and tend to encourage rather than hinder cross-border activity within the EU". The realization of this objective would be threatened, in particular, if differences in approach between national laws have the effect of impeding the implementation of a staff policy encouraging diversity in companies that operate in several States.

[98] They correspond to what, in a Report prepared within the Sub-Commission for the Promotion and Protection of Human Rights, M. Bossuyt describes as "affirmative mobilization" ("when, through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a social good, such as a job or a place in an educational institution ") or "affirmative fairness" ("when a meticulous examination takes place in order to make sure that members of target groups have been treated fairly in the attribution of social goods, such as entering an educational institution, receiving a job or promotion"). Such measures, while "dedicated to overcoming the social problems of a target group, (…) do not themselves entail discrimination against people who are not members of that group. Rather, they place the costs of affirmative action on the whole society" ("The concept and practice of affirmative action", Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with resolution 1998/5 of the Sub-Commission for the Promotion and Protection of Human Rights, UN doc. E/CN.4/Sub.2/2002/21, 17 June 2002, para.72-74).

in this direction,[99] may be seen as constituting such a derogation. This will be the case at least where the principle of equal treatment is formulated symmetrically – on the basis of a defined characteristic, such as race or ethnic origin, or sex, rather than in favour of one specified category, such as ethnic minorities or women – so that the specific advantages recognized to the members of one group defined according to this characteristic will be seen by the members of the other group as disadvantaging them.

Insofar as an affirmative action policy is scrutinized for its compatibility *vel non* with the requirements of the principle of equal treatment, two questions will matter. First, it will be necessary to inquire into the aims pursued by such a policy, in order to decide whether these aims are legitimate and may justify the restriction to the right of each individual to be treated "equally", *i.e.* on the basis of his or her individual situation, rather than as a member of the group to which he or she belongs. Three distinct rationales may be invoked in this regard.[100] A first rationale is backward-looking. Affirmative action is presented, here, as compensatory: because the group to which A belongs has, in the past, been excluded or denied certain benefits, in comparison to the group to which B belongs, it will be justified to grant a preferential treatment to A, in order to overcome the legacy of this past discrimination. A second rationale focuses not on the past, but on the present. It sees affirmative action as a tool necessary to establish "equality in fact", rather than mere "formal equality", because the latter (equality before the law, i.e., non-discrimination) would remain blind to certain realities – conscious or unconscious prejudice or stereotypes – which, unless taken into account, will work to the disadvantage of the members of a defined category. The trait of the individual, which characterizes that individual as the member of a group, is thus taken as a proxy for a disadvantage which it is the objective of the affirmative action policy to remedy. A third rationale may be said to be "forward-looking". It sees affirmative action as a tool to promote diversity or proportionate representation, in sectors or at levels where it matters that all the sub-groups of the community are fairly represented.

Once that rationale justifying affirmative action as a restriction to the principle of (formal) equal treatment is identified, the second question will be which level of scrutiny should be applied. Whether affirmative action policies are subjected to a strict scrutiny, requiring that they be demonstrated to be both appropriate and strictly proportionate, *i.e.* necessary, for the achievement of the aims pursued, or to a looser form of scrutiny, will depend largely on the understanding of affirmative action either as a means to achieve equal treatment (complementing the requirement of formal equality as non-discrimination) or as a mere derogation to that principle. It may also depend on the more or less suspect character of the trait on which the affirmative action policy – for instance, race or ethnic origin will usually be considered highly suspect, while sex may be considered less suspect.

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[99] For a discussion built around such a typology, see D. Schiek, "Sex Equality Law After Kalanke and Marschall", 4 *Eur. L. Journal* 148 (1998).

[100] For a more systematic approach, see C. McCrudden, "Rethinking positive action", *Industrial Law Journal*, 1986, vol.15, pp.219-243; or "The concept and practice of affirmative action", *supra* n.98.

4.2. The case-law of the European Court of Justice

The case-law of the European Court of Justice on the question of affirmative action in the only context where it has arisen to date before the court – where such affirmative action was instituted in favour of women[101] and was denounced as discriminatory towards men – is not fully consistent. It nevertheless may be examined on the basis of the typology above. In order to understand the position of the Court, the legal framework in which it operates should first be recalled. When it was initially adopted, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,[102] after defining the principle of equal treatment as the absence of any discrimination on grounds of sex, whether direct or indirect, provided in Article 2(4) that the Directive "shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities". These formulations refer symmetrically to both women and men, thus protecting the members of both groups from sex-based discrimination, while seeming to exempt affirmative action measures benefiting either men or women. Moreover, on 13 December 1984, the Council adopted Recommendation 84/635/EEC on the promotion of positive action for women, which emphasized that "existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures".[103] The Recommendation thus encouraged the Member States:

> "to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, (…) in order: (a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women; (b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources."

When it was confronted to affirmative action policies adopted by the Member States, the European Court of Justice nevertheless considered that "as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly".[104] In *Kalanke*, its first judgment on this

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[101] See however *infra*, n.117 and the corresponding text.
[102] OJ 1976 L 39, p.40.
[103] OJ 1984 L 331, p.34.
[104] Case C-450/93, *Kalanke* v *Freie Hansestadt Bremen* [1995] ECR I-3051.

issue, which it delivered on 17 October 1995, the Court arrived at the conclusion that the provision of the 1990 Bremen Law on Equal Treatment for Men and Women in the Public Service which provided that women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented, went beyond what was authorized by Article 2(4) of Directive 76/207/EEC. "National rules which guarantee women absolute and unconditional priority for appointment or promotion", said the Court, "go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive", and furthermore "in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, (...) [the Bremen Law] substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity".[105]

On 2 October 1997, the Heads of State and Governments of the European Union signed the Treaty of Amsterdam, which entered into force on May 1st, 1999. Article 119 EEC (now Article 141 EC) was substantially modified on that occasion. It now provided in paragraph 4 that:

> "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."[106]

Although the Treaty of Amsterdam was not in force yet when the Court decided its second affirmative action case, it may have influenced the outcome, because of the strong signal sent to the Court that the Member States intended to maintain and develop affirmative action and did not consider that this should be seen as conflicting with the requirements of equal treatment. In *Marschall*, which it decided on 11 November 1997, the Court distinguished *Kalanke*, on the basis that the challenged provision contained a "savings clause" (*Öffnungsklausel*), to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour.[107] Indeed, the 1981 Law on Civil Servants of the Land of Nordrhein-Westfalen, as last amended in 1995, provided that "Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, *unless reasons specific to an individual [male] candidate tilt the balance in his favour*". Although this element appears to be decisive in the reasoning of

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[105] Paras.23-24 of the judgment.

[106] The language in art.141(4) EC is symmetrical, applying identically to both women and men. However, Declaration No. 28 on art.141(4) (formerly art.119(4)) of the Treaty establishing the European Community, annexed to the Treaty of Amsterdam, states: "When adopting measures referred to in art.141(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life".

[107] Para.24.

the Court,[108] the judgment also illustrates the willingness of the Court to adopt a less formalistic stance towards the situation of women in the labor market and the virtues of equality of opportunities. It recognized that "even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances".[109]

The judgment in the case of *Badeck and others*, delivered by the Court of Justice on 28 March 2000,[110] confirmed the lessons drawn from the combination of the *Kalanke* and *Marschall* judgments. Faced with a series of provisions of the law of the Land of Hesse relating to the equality of men and women and the elimination of discrimination against women in public service, the Court of Justice began by reiterating the validity of the criterion set in the *Marschall* judgment: priority given to women in promotion where they are underrepresented in public service is compatible with Article 2, paragraphs 1 and 4, of Directive 76/207/EEC, insofar as it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates[111] on the basis of "secondary" non-discriminatory criteria. However, the Court added several specifications to this criterion, three of which are of particular relevance to our purpose. Firstly, even if, in principle, "automatic" – or "absolute and unconditional" – preferential treatment exceeds the limits of the exception to the individual right to equal treatment laid down in Article 2 (4) of Directive 76/207/EEC, such an automatism may be justified when such preference is based on a quantitative criterion constituted by an "actual fact", for example, "by reference to the number of persons who have received appropriate training".[112] Secondly, when "places in training with a view to obtaining qualifications with the

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[108] While confirming that art.2(4) of the Directive is to be construed strictly as it constitutes a limited exception to the individual right to equal treatment laid down in art.2(1), the Court concludes that the rule at stake does not exceed the limits of the exception, insofar as "in each individual case, [the savings clause] provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates" (para.33).

[109] Case C-409/95, *Marschall* v *Land Nordrhein-Westfalen* [1997] ECR I-6363.

[110] Case C-158/97, *Badeck and others* [2000] ECR I-1875.

[111] These two criteria are, strictly speaking, neither alternative nor cumulative. As their origin in the rules at issue in the *Marschall* case shows, they are in fact two ways of formulating one and the same criterion.

[112] Para.42.

prospect of subsequent access to trained occupations in the public service"[113] are at stake, rather than actual employment positions, the imposition of an absolute preference aimed at achieving a balanced representation may be admissible, insofar as (1) "despite appropriate measures for drawing the attention of women to the training places available"[114] there may not be enough applications from women, and (2) since the State does not have a monopoly for training places where a balanced representation of men and women is sought, "no male candidate is definitively excluded from training", as places are also available in the private sector.[115] Thirdly, insofar as it aims to promote "equal opportunity for men and women" without guaranteeing a result, a set of rules which ensures that women with the necessary qualifications will be called to interview for jobs in public service sectors where they are underrepresented does not constitute a prohibited discrimination, but instead should be considered a measure of affirmative action allowed by Article 2(4) of Directive 76/207/EEC.[116]

After *Kalanke*, *Marschall*, and *Badeck*, which set the stage for all the later case-law, the European Court of Justice delivered four more judgments, including two more answers to requests for preliminary rulings from German courts, on the admissibility of affirmative action policies in favour of women or, in one case,[117] men. The EFTA Court also delivered one judgment on this issue. This is not the place to review this case-law in detail. The following table summarizes the issues the European Courts were presented with in these cases as well as the answers they provided:

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[113] Para.52.
[114] Paras.51 and 55.
[115] Para.53.
[116] Para.56 to 63.
[117] See Case C-79/99, *Schnorbus* [2000] ECR I-10997. The case is also atypical in another respect, and some would contest its classification among "affirmative action" cases. The Court decided in this case that a measure giving priority to persons who have completed compulsory military or civilian service, although constituting an instance of indirect discrimination in favour of men (who alone are subject by law to such an obligation), cannot be regarded as contrary to the principle of equal treatment for men and women, as "the provision at issue, which takes account of the delay experienced in the progress of their education by applicants who have been required to do military or civilian service, is objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay" (para.44), and as moreover "the advantage conferred on the persons concerned, whose enjoyment of priority may operate to the detriment of other applicants only for a maximum of 12 months, does not seem disproportionate, since the delay they have suffered on account of the activities referred to is at least equal to that period" (para. 46). Although invoked in the proceedings by the parties, art.2(4) of Directive 76/207/EEC was not explicitly relied upon by the Court itself. This may be explained by the fact that, contrary to what is envisaged by that provision, the contested provision of the Legal Training Regulations of the Land of Hesse did not provide for a form of affirmative action in favour of men, but rather exempted from a waiting period for access to legal training if the number of applications for admission to practical legal training exceeded the number of available training places those for whom this would result in an "undue hardship", including those who were required to perform military or civilian service.

Case	**Substance of the national provision at stake**	**Conclusions of the European Court of Justice / EFTA Court**
Kalanke 17 October 1995 C-450/93	Equally qualified women are automatically given priority in appointments in sectors where they are under-represented (1990 Bremen Law on Equal Treatment for Men and Women in the Public Service)	An absolute and unconditional priority for appointment or promotion goes beyond promoting equal opportunities and oversteps the limits of the exception in Article 2(4) of Directive 76/207/EEC. A rule seeking to achieve equal representation of men and women in all grades and levels within a department substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.
Marschall 11 Nov 1997 C-409/95	Where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, priority is to be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour (Law on Civil Servants of the Land Nordrhein-Westfalen (1981, rev 1995))	A national rule in terms of which female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour towards women and thus reduce actual instances of inequality which may exist in the real world; such a rule is not disproportionate if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate,

		provided those criteria do not discriminate against female candidates.
Badeck 28 March 2000 C-158/97	"Flexible result quota" (*flexible Ergebnisquote*) system under which the binding targets are defined in accordance with the specificities of the sectors/ departments concerned and which does not necessarily determine from the outset - automatically – that the outcome of each selection procedure must, in a stalemate situation where the candidates have equal qualifications, necessarily favour the woman candidate (Law of the Land of Hesse on equal rights for women and men and the removal of discrimination against women in the public administration (21 December 1993), valid for 13 years).	Article 2(1) and (4) of the Directive does not preclude a national rule which, in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates
	National rule which prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline.	Justified insofar as such a system does not fix an absolute ceiling but fixes one by reference to the number of persons who have received appropriate training, which amounts to using an actual fact as a quantitative criterion for giving preference to women
	National rule for the public service which, in trained occupations in which women are under-represented and for which the State does not have a	The provision forms part of a restricted concept of equality of opportunity: it is not places in employment which are reserved for women but places in training with a view to

	monopoly of training, allocates at least half the training places to women, unless if, despite appropriate measures for drawing the attention of women to the training places available, there are not enough applications from women, in which case it is possible for more than half of those places to be taken by men.	obtaining qualifications with the prospect of subsequent access to trained occupations in the public service; since the quota applies only to training places for which the State does not have a monopoly, and therefore concerns training for which places are also available in the private sector, no male candidate is definitively excluded from training.
	National rule which guarantees, where male and female candidates have equal qualifications, that women who are qualified are called to interview, in sectors in which they are under-represented.	The provision at issue in the main proceedings does not imply an attempt to achieve a final result - appointment or promotion - but affords women who are qualified additional opportunities to facilitate their entry into working life and their career.
Abrahamsson 6 July 2000 C-407/98	A candidate belonging to an under-represented sex and possessing sufficient qualifications for the post may be chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen, provided that the difference in their respective qualifications is not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments (Jämställdhetslagen (1991:433) (Swedish Law on equality) and Högskoleförordningen (1993:100) (Swedish Regulation on universities))	The scope and effect of the condition according to which the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments cannot be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and that this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Moreover, candidatures are not subjected to an objective assessment taking account of the specific personal situations of all the candidates. It follows that such a method of selection is not such as to be permitted by Article 2(4) of the Directive.

*Schnorbus*7 Dec 2000 C-79/99	Where a decision concerning the admission of applicants to practical legal training is required because the number of applicants exceeds the number of training places, an applicant who has completed service which is obligatory only for men (military or substitute service pursuant to Article 12a of the Grundgesetz) is to be immediately admitted to the training and does not have to satisfy any further requirements in that regard, whereas the admission of other applicants (female and male) may be deferred by up to 12 months.	By giving priority to applicants who have completed compulsory military or civilian service, the provisions at issue themselves are evidence of indirect discrimination since, under the relevant national legislation, women are not required to do military or civilian service and therefore cannot benefit from the priority accorded to those who have completed service; however, the provision at issue, which takes account of the delay experienced in the progress of their education by applicants who have been required to do military or civilian service, is objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay, therefore it cannot be regarded as contrary to the principle of equal treatment for men and women: the advantage conferred on the persons concerned, whose enjoyment of priority may operate to the detriment of other applicants only for a maximum of 12 months, is not disproportionate, since the delay they have suffered on account of the activities referred to is at least equal to that period.
Lommers, 19 March 2002, C-476/99	Scheme set up by a Minister to tackle extensive under-representation of women within his Ministry under which a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be deter-	Article 2(1) and (4) of the Directive does not preclude a scheme set up by a Ministry to tackle extensive under-representation of women within it under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male officials may

	mined by the employer.	have access to them only in cases of emergency, to be determined by the employer, in so far as the said exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials.
EFTA Court, 24 January 2003, E-1/02, *EFTA Surveillance Authority* v *Norway*	Permanent and temporary academic positions ear-marked for women either by direction of the Norwegian Government or by the University of Oslo	The Norwegian legislation in question must be regarded as going beyond the scope of Article 2(4) of the Directive, insofar as it permits earmarking of certain positions for persons of the underrepresented gender. The last sentence of Article 30(3) of the University Act as applied by the University of Oslo gives absolute and unconditional priority to female candidates. There is no provision for flexibility, and the outcome is determined automatically in favour of a female candidate.
Briheche, 30 September 2004, C-319/03	Legislation reserving to "widows who have not remarried" the benefit of the exemption from the age limit (45 years) for obtaining access to public-sector employment, excluding widowers from the same advantage	Such a provision automatically and unconditionally gives priority to the candidatures of certain categories of women, including widows who have not remarried who are obliged to work, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding widowers who have not remarried who are in the same situation, which cannot be allowed under Article 2(4) of the Directive 76/207/EEC

Although the assessment which the Court of Justice has given of the various national rules that were submitted to it in the cases listed above may seem hard to reconcile with each other, the general significance of the Court's

approach seems fairly clear. This approach appears to be based on the idea that affirmative action in favour of women aimed at achieving equal "opportunity" for men and women, cannot go beyond this objective and pursue equal "results". The latter objective would be contrary to the principle of equal treatment whereby each person has the right not to be disadvantaged on grounds of his or her sex. According to the interpretation given by the Court, this limit is exceeded when affirmative action gives preference to women in the acquisition of a *result* (access to employment, obtaining a promotion) which has an *absolute* character, that is to say, which does not allow the rejected male candidate to bring forward the arguments that are likely to tilt the balance in his favour. Absolute preference in this sense would be considered discriminatory, since it establishes a non-rebuttable presumption in favour of women in cases where the candidates from both sexes are equally qualified, unless it is based on an "actual fact" such as the proportion of men and women among the persons with such a qualification. On the other hand, the preferential treatment that is accorded to women in terms of access to certain *opportunities* (vocational training, calls to job interviews) will be considered with less severity: even when absolute, such preferential treatment is aimed at achieving equal opportunity for men and women, and on this account should be considered as covered by the exception provided for in Article 2 (4) of Directive 76/207/EEC. Upon closer examination however, the distinction between equality of opportunities and equality of results to which the Court attaches so much importance – and for which there is some textual support in Article 2(4) of Directive 76/207/EEC – is not particularly helpful. It may even be a source of confusion, as it is used interchangeably either to distinguish measures which seek to provide chances to women from measures which seek to guarantee an outcome,[118] or to distinguish measures which improve the access of women to training positions which prepare for the competition on the employment market from measures which favour women in the allocation of jobs proper.[119]

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[118] This is how the distinction was understood in *Kalanke*. In *Badeck*, both Advocate General A. Saggio, in para.41 of his opinion, and the Court considered that a national rule which guarantees, where male and female candidates have equal qualifications, that women who are qualified are called to interview, in sectors in which they are under-represented, "does not imply an attempt to achieve a final result – appointment or promotion – but affords women who are qualified additional opportunities to facilitate their entry into working life and their career" (para.60 of the judgment).

[119] In *Badeck*, the Court agreed that a national rule for the public service which, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, was acceptable under art.2(4) of Directive 76/207/EEC. It noted in that respect that the challenged provision "forms part of a restricted concept of equality of opportunity. It is not places in employment which are reserved for women but places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service" (para.52). The EFTA Court thus considers that the European Court of Justice has "drawn a distinction between training for employment and actual places in employment. With regard to training positions, it has relied on a restricted concept of equality of opportunity allowing the reservation of positions for women, with a view to obtaining qualifications necessary for subsequent access

Another – and in my view more fruitful – way to approach the case-law of the Court of Justice in the affirmative action cases it has been presented with, is by locating it within the framework outlined above.[120] If we consider, first, the three possible justifications for the adoption of affirmative action measures (backward-looking or compensatory for past discrimination; as a tool to remove actual inequalities in fact; or forward-looking and aiming at proportionate representation or diversity), it appears clearly that only the second rationale has been considered to date legitimate by the Court: the Court reads Article 2(4) of Directive 76/207/EEC as "specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce *actual instances of inequality which may exist in the reality of social life*".[121] The Court considers, thus, that only actual inequalities in opportunity may render legitimate the use of affirmative action measures, as a restriction to the individual right to equal treatment. This may have seemed initially to the Court to be dictated by the language of Article 2(4) of Directive 76/207/EEC, which refers to "removing *existing inequalities* which affect women's opportunities".[122] However, despite the more encouraging formulation of Article 141(4) EC as inserted in the Treaty of Rome by the Treaty of Amsterdam,[123] the Court seems now to hold to this argument even without firm textual support.[124]

The Court also considers that any affirmative action measure seeking to eliminate or reduce actual instances of inequality should be strictly proportionate to that end. This is the source of its suspicion towards rules guaranteeing preferential treatment to women which are absolute and unconditional, *i.e.* which do not provide for the possibility to objectively assess all competing candidates in order to take into account their specific personal situations. This is also why, for instance, the Court did not object in

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to trained occupations in the public service" (para.50). However, as the EFTA Court also rightly notes, this qualification by the European Court of Justice of a measure as relating to equality of opportunity does not exempt this measure from being examined for its compliance with the requirement of proportionality: "even for training positions, the law requires a system that is not totally inflexible" (para.50).

120 *Supra*, s.4.1.

121 *Kalanke*, para.18 (citing Case 312/86 *Commission* v *France* [1988] ECR 6315, paragraph 15); *Marschall*, para.26; *Badeck*, para.19. The emphasis is added.

122 Emphasis added.

123 Article 141(4) EC refers to "measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". This would seem to allow for measures seeking to remedy the impacts of past discrimination towards women (which, for instance, may explain the lack of representation of women in certain sectors), by achieving a distribution "representing a (. . .) level of equality of representation that women would have had in the absence of societal discrimination" (Kenner, *EU Employment Law* (2003) 451), as well as measures which seek to anticipate the risk that women will be treated less favourably in the absence of affirmative action, even where such risk is not proven to have materialized yet.

124 See *Abrahamsson*, paras.54-55 (where the Court appears to consider that a measure found disproportionate under arts.2(1) and (4) of Directive 76/207/EEC also would fail to be justified under art.141(4) EC).

Badeck to a national rule for the public service which, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, on the basis that "the quota applies only to training places for which the State does not have a monopoly, and therefore concerns training for which places are also available in the private sector, [so that] no male candidate is definitively excluded from training".[125] Many other examples could be given. What matters is that the requirement of proportionality imposed by the Court is in fact interpreted to ensure that the affirmative action measures developed by the Member States do not sacrifice individual justice (the right of each individual to be treated on the basis of his or her personal situation) in the name of group justice (the automatic and absolute preference given to the members of one group, *e.g.* women, simply because of that membership).

4.3. The future of affirmative action jurisprudence

How, then, may this case-law develop, when transposed to the new grounds of prohibited discrimination listed under Article 13 EC, and when applied to affirmative action measures developed in fields other than employment? Each of the Directives adopted on the basis of Article 13 EC provides, "With a view to ensuring full equality in professional life [or, more generally, in practice], the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds [such as racial or ethnic origin]".[126] When it proposed the insertion of these clauses in the directives, the Commission seemed to assume that the case-law of the European Court of Justice as it had begun to develop with *Kalanke* and *Marschall* would simply apply, *mutatis mutandis*, to the new grounds of prohibited discrimination.[127] However, apart from the obvious differences which exist between the criterion of sex, on the one hand, and those of race or ethnic origin, religion or belief, age, sexual orientation or disability on the other hand – as well as, indeed, among these different "new" grounds of prohibited discrimination themselves – both with respect to the visibility or invisibility of these different criteria and the objectivity with which they may be ascertained, the gap is considerable between the questions which the Court has confronted hitherto and the challenges which lie ahead.

(a) Beyond the promotion of equal treatment between women and men

Note, first, that while it has proven to be relatively open to the judgment of legislatures of the Member States according to which affirmative action measures in favour of women were required to move beyond merely formal equality, the European Court of Justice has never considered that the Member States may be *required* to adopt such measures in order to implement the principle of equal treatment. In the case presented to the EFTA Court, the Kingdom of Norway sought to justify a rule reserving a

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[125] *Badeck*, para.53.

[126] Art.7(1) of the Employment Equality Directive; art.5 of the Racial Equality Directive.

[127] See COM(1999) 565 final, of 25.11.1999, at p.11: "as positive action measures are a derogation from the principle of equality, they should be interpreted strictly, in the light of the current case-law on sex discrimination".

number of academic posts exclusively for women by the requirements of the 1979 International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This argument was dismissed by the EFTA Court, on the ground that neither the CEDAW, nor other international instruments dealing with affirmative action measures in various circumstances, impose on States parties an obligation to adopt such measures: with respect to affirmative action, these instruments are "permissive rather than mandatory".[128]

Things may not be so simple, however, once we extend the question beyond affirmative action in favour of women. Under the International Covenant on Civil and Political Rights, the UN Human Rights Committee noted that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."[129] Article 2(2) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,[130] which is another instrument which all the EU Member States have ratified, provides that:

> "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

This provision, it will be noted, is more precise than its equivalent in the CEDAW (Article 3), which the EFTA Court probably had in view, together with Article 4(1), when it delivered its judgment in Case E-1/02. Both the ICERD and the CEDAW also contain clauses allowing for the adoption of affirmative action measures, provided these measures do not entail as a consequence the maintenance of unequal or separate rights or standards, and

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[128] Case E-1/02, *EFTA Surveillance Authority* v *Kingdom of Norway* (judgment of 24 January 2003), para.58.

[129] Human Rights Committee, General Comment No.18: Non-discrimination (1989), in Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev7, 12 May 2004, at p.146, para.10.

[130] The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. It entered into force 4 January 1969.

that such measures shall be discontinued after the objectives of equality of opportunity and treatment have been achieved.[131] However, the wording of Article 2(2) ICERD suggests that the adoption of affirmative action measures may in certain cases be compulsory, rather than simply optional, in circumstances where a particular racial or ethnic group is subjected to a form of structural discrimination.[132] Similar positive obligations to adopt measures in the face of entrenched inequalities may be derived from the Council of Europe Framework Convention on the Protection of National Minorities. Under Article 4 of the Framework Convention, States parties are to adopt "adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority", taking due account in this respect of "the specific conditions of the persons belonging to national minorities"; such measures are specifically designated as not being discriminatory in character. The Advisory Committee of the Framework Convention encourages the introduction of positive measures in favour of members of minorities, which are particularly disadvantaged.[133] With respect to persons with disabilities, the UN Committee on Economic, Social and Cultural Rights has considered, in its General Comment No. 5 on persons with disabilities, that the obligation imposed on the States parties to progressively realize the rights of the International Covenant on Economic, Social and Cultural Rights to the maximum of their available resources extends "in the case of such a vulnerable and disadvantaged group" to the obligation "to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required".[134] Therefore, it may

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131 Art.4(1) CEDAW; art.1(4) ICERD.

132 Where it states that the States parties to the ICERD should "take special measures to promote the employment of Roma in the public administration and institutions, as well as in private companies", and "adopt and implement, whenever possible, at the central or local level, special measures in favour of Roma in public employment such as public contracting and other activities undertaken or funded by the Government (. . .)", the Committee on the Elimination of Racial Discrimination may be implicitly referring to the obligations of the States parties under art.2(2) ICERD. See Committee on the Elimination of Racial Discrimination, General Recommendation 27, Discrimination against Roma, (Fifty-seventh session, 2000), U.N. Doc. A/55/18, annex V at 154 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev6 at 216 (2003), at paras.27-28. See also O. De Schutter and A. Verstichel, "The Role of the Union in Integrating the Roma: Present and Possible Future", European Diversity and Autonomy Papers (EDAP) 2/2005, 37 available at www.eurac.edu/edap.

133 See, *e.g*. Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, para.28; Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, para.27; Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para.38.

134 UN Committee on Economic, Social and Cultural Rights, General Comment n.5: Persons with disabilities, adopted at its 11th session (1994) (UN doc. E/1995/22), para.9.

be easier for the Member States to justify certain affirmative action measures benefiting racial or ethnic minorities, or religious minorities, than it has been to justify similar measures adopted in order to promote the professional integration of women.[135]

(b) Beyond the promotion of equal treatment in the sphere of employment

This first remark relates to the transposition of a case-law developed with respect to affirmative action measures benefiting women, to similar measures benefiting other groups which have been traditionally subject to discrimination and to the members of which the Racial Equality Directive and the Employment Equality Directive have extended the principle of equal treatment. A second challenge concerns the transposition of a case-law developed in the field of employment to other domains, covered by Article 3 of the Racial Equality Directive[136] or, more recently, by Article 3 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.[137] By moving in this direction, we move from one sphere of justice, to use the terminology of Walzer,[138] to other spheres. This should profoundly affect our understanding of the legitimacy of affirmative

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[135] Although it is easy to make the case that affirmative action is not *per se* contrary to international law, the question whether affirmative action may be mandatory in certain circumstances remains debated. Comp. "The concept and practice of affirmative action", Final report submitted by Mr. Marc Bossuyt, *supra* n.98, at para.53 (noting that "neither of the Covenants [ICCPR and ICESCR] has explicitly recognized any obligatory nature of affirmative action"), with M. Craven, *The International Covenant on Economic, Social and Cultural Rights, a perspective on its development*, Oxford, Clarendon Press, 1995, p.126 (emphasizing the obligation of States to focus their efforts on the most vulnerable and disadvantaged groups in society, which may include preferential treatment in favour of the members of these disadvantaged groups). In the conclusions of his report, M. Bossuyt notes however that "a persistent policy in the past of systematic discrimination of certain groups of the population may justify - *and in some cases may even require* - special measures intended to overcome the sequels of a condition of inferiority which still affects members belonging to such groups" (at para.101 (emphasis added)).

[136] *Supra*, nn. 13-15 and the corresponding text.

[137] Art.4(5) of this Directive provides that it "shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". The dissimilarity in wording illustrates that the authors of the directive are aware of the difficulties of transposing, *mutatis mutandis*, the existing case-law of the European Court of Justice as developed in the field of employment to the access to and supply of goods and services. The Preamble of the Directive (16th Recital) nevertheless states that "Differences in treatment may be accepted only if they are justified by a legitimate aim. (. . .). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities". The examples referred to however do not include affirmative action policies in the access to or provision of goods and services.

[138] M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, New York, Basic Books, 1983.

action, and thus, of its legal admissibility. By situating ourselves in one sphere, we are led to rely, more or less spontaneously, on a particular criterion of allocation which is imposed by the very nature of the good to be distributed. In the sphere of employment for instance, jobs will be distributed according to professional qualifications through the means of recruitment procedures, whereas protection from dismissal will be defined according to seniority,[139] and intra-firm promotions will generally be decided on the basis of a combination of these two criteria. Similarly, just like the academic grade will be granted according to the achievements of the candidate and the allocation of certain minimum social benefits will be granted according to the needs of the individual, the grant of a study scholarship will be decided upon through a combination of these two variables. As to the allocation of a subsidized home, it may depend on the needs of the family which has introduced the request, but also on the date on which the request has been filed – priority may be given to the requests which have been filed first, so that the families having waited for the longest period will be rewarded before the more recent requests are satisfied – and perhaps on the need to preserve a certain social or ethnic mix in the distribution of social housing and thus to avoid phenomena of segregation or ghettoization. Such examples could of course be multiplied.

These phenomena of "local justice" illustrate the extent to which an acceptable justification for the allocation of scarce goods will depend on the sphere in which we are situated.[140] The relevance of this notion to the debate on affirmative action should be obvious. First, it illustrates that the use of affirmative action may be acceptable in a particular sphere, but may nevertheless be excluded in another sphere to ensure the allocation of another scarce social good: thus, the need to preserve a representation of all the cultural groups of a society in the audio-visual programs may justify certain restrictions to the principle of non-discrimination,[141] although a similar requirement would not be acceptable, for instance, in the context of recruitment processes in employment; and an affirmative action programme acceptable at the recruitment stage could be less acceptable in determining

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[139] S. Romm, "Layoffs: Principles and Practices", in J. Elster (ed.), *Local Justice in America*, New York: Russell Sage Foundation, 1995, pp.153-226, at p.155.

[140] See L. Boltanski et L. Thévenot, *De la justification. Les économies de la grandeur*, Paris, Gallimard, 1991. See already, by the same authors: *Les économies de la grandeur*, Paris, Centre d'études sur l'emploi, Presses universitaires de France, 1987.

[141] In a case where a national legislation was challenged on the basis of the rules of the Treaty of Rome on the free movement of capital and the free provision of services, the European Court of Justice agreed that the need to safeguard, in the audiovisual sector, the freedom of expression of the different components, notably social, cultural, religious or philosophical, of society, should be considered a legitimate objective: see Case 353/89, *Commission* v *the Netherlands*, ECR [1991] 4089, para.30; and Case 288/89, *Stichting Collectieve Antennevoorziening Gouda and others* v *Commissariaat voor de Media*, ECR [1991] 4007, para.23. However, the obligation imposed on the national organisations of radio broadcasting to ensure that the different social, cultural, religious or philosophical components of Dutch society are represented in their programmes through a national undertaking, the Bedrijf, was considered disproportionate to the objective pursued.

the order of layoffs, in collective layoff procedures.[142] It is therefore extremely difficult to establish admissibility criteria of affirmative action that can claim general validity, that is, criteria that are not strictly linked not only to a particular "sphere" such as employment or education, but also to certain specific contexts such as, for instance, the size of a company, or the kind of market – local, national or global – where it sells its products. The identification of general criteria would be all the more difficult if, as the case of the allocation of scholarships or social housing illustrates, social goods would have to be distributed frequently according to a combination of criteria, rather than according to one single metric.

Although the possible assessment of affirmative action thus strictly depends on the nature of social goods of which the distribution is at stake, it would be wrong to consider that the environment in which we find ourselves predetermines the nature of the justification criteria of the distributions that take place there. Which kind of "local justice" predominates in a particular field depends on social expectations; these may change, and such change, far from being predominantly spontaneous, is in many cases the result of the artificial reshaping of social institutions, in which legal regulation itself has an important role to play. Is it necessarily true, for instance, that a company has no other objective than to make profit, and is it therefore normally inadmissible, except when relying on particularly solid justifications, to demand that a company departs from the principle of employment merely on the basis of the expected productivity of the candidates who present themselves? Should we not, on the contrary, consider that the company must contribute, like all the other social players, whether economic or not, to the integration of certain traditionally excluded sections of the population in the employment market – in exactly the same way as we should ascribe to an allocation system for social housing the objective of meeting the "needs" that arise according to their degree of urgency, but also of contributing to the social or ethnic mixity of neighbourhoods? We see here the danger that lies in a purely instrumental approach to the question of affirmative action that merely asks itself whether the end pursued by such a policy (integration of the beneficiary group) can justify a departure from the allocation principle that should normally govern such an area, in accordance with the rule of non-discrimination. The question arises whether this allocation principle is as imperative as it appears to be, or whether, by treating it with such deference, we are not guilty of a kind of institutional fetishism which constitutes an unnecessary obstacle to a reflection on affirmative action.

This may be illustrated by the role which the notions of "merit" or "qualifications" have hitherto played in the case-law of the European Court of Justice. These notions operate to form the baseline of the Court's reasoning in affirmative action cases: procedures or criteria which reward "qualifications" relevant for the job are in principle valid, any measures

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[142] See, *e.g*. *Wygant* v *Jackson Bd of Educ.*, 476 U.S. 267 (1986). Thus according to R. B. Ginsburg and D. J. Merritt, "The concern that affirmative action plans do not trench heavily on settled expectations has been salient in U.S. affirmative action jurisprudence. Thus preferences permissible for hiring have been rejected when laying off workers is the issue; for layoffs, strict seniority systems prevail" (R.B. Ginsburg & D.J. Merritt, "Affirmative Action: An International Human Rights Dialogue", 21 *Cardozo L. Rev* 253 (1999), at 265).

which seek to derogate from this baseline in order to achieve social justice (specifically, to improve the representation of women) are only allowable if they comply with the principle of proportionality. Thus, while it claims to combat certain *effects* resulting from the reliance on the mechanisms through which the market allocates its rewards to the individuals, affirmative action seems to acknowledge, without radically challenging it, the neutrality of these mechanisms. The technique of affirmative action allocates the roles. It is the role of market mechanisms to identify the "merits" and "skills"; in short, to locate the "most qualified". The instrument of law is then given the task of derogating from the outcome of these identifications, in order to accord "preferential" treatment to certain disadvantaged groups on account of the characteristics presented by its members.[143] Affirmative action thus, far from subverting the dominant logic – the idea that the market will reward the most "qualified" – may in fact reinforce it. As a result, the members of disadvantaged groups may find the negative stereotypes that exist with respect to them being further strengthened from the moment the law intervenes to compensate for the fact that they do not have – or are considered not to have – the qualities that would enable them to manage without its help.

A more subversive approach then may consist in going a step further, which is to challenge not only the consequences of the use of affirmative action, but also the very concept of "merit" – a concept which, convinced as we are of the natural character of the market mechanisms, we have such a strong tendency to turn into a fetish. The *Badeck* case precisely offers an illustration of the results which such an approach may lead to. The law of the Land of Hesse that was submitted to the Court of Justice in this case comprised a provision (paragraph 10) which stipulated: "When qualifications are assessed, qualifications and experience which have been acquired by looking after children or persons requiring care in the domestic sector (family work) are to be taken into account, in so far as they are of importance for the suitability, performance and capability of applicants. That also applies where family work has been performed alongside employment". The Court noted that such criteria, "although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women", but that they are "manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life".[144] It did not question their legitimacy.[145] In similar fashion, when it was confronted with the set-aside in favor of

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[143] In the *Abrahamsson* judgment, which concerned the Swedish rule favouring the recruitment of women to university teaching posts, the Court of Justice of the European Communities clearly reasserted the principle: "As a rule, a procedure for the selection of candidates for a post involves assessment of their qualifications by reference to the requirements of the vacant post or of the duties to be performed" (Case C-407/98, *Abrahamsson and others*, para.46). It is significant that this assertion is made in a context where the Community court was asked to rule on the legitimacy of a recourse to positive action: its reasoning must be based on the initial position of a supposedly neutral concept of "merit", to the requirements of which affirmative action makes an exception.

[144] Para.32.

[145] The Court in fact did not have to adopt a position on the acceptability of these criteria, which the parties to the main proceedings did not challenge.

women in Norwegian academia, the EFTA Court remarked that ". . . the criteria for assessing the qualifications of candidates are essential. In such an assessment, there appears to be scope for considering those factors that, on empirical experience, tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Furthermore, giving weight to the possibility that in numerous academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women, which concern lies at the core of the Directive".[146]

This reflexive re-appropriation of the concepts of "merit" or "qualification" has far-reaching consequences. Instead of the content of these concepts being imposed on us from outside, like when they are presented as dictated by the "laws of the market", they are here normatively defined as the outcome of a democratic deliberation process. This is a positive development. It calls upon us not to fetishize the way in which the market distributes its rewards. These allocation rules which result from the mechanisms of the market are inherited from a not all that distant past when discrimination was not disapproved of as it is today. They reflect a multiplicity of individual preferences which cannot be assumed to be free from prejudice. Moreover, by critically reflecting upon the concept of merit, we create the possibility of taking into account certain qualities which these persons may have, although they generally do not benefit from institutional recognition. Where affirmative action generally seeks to compensate certain individuals solely on account of their belonging to a traditionally disadvantaged category, leaving unchallenged the background norms relating to "merit", we now call into question the natural character of the "laws" of the market themselves and of their "blind" operation, as well as their pretence to neutrality – and therefore, also of their claim to provide the reference against which any change is to be viewed precisely as a derogation.

And yet, there is at the same time a risk inherent in such attempts to reshape the content of the notions of "merit" or "qualification" which form the baseline of the affirmative action jurisprudence. The successive revisions of these concepts should not make us lose sight of the importance of creating the background conditions that will allow each individual, no matter what social group he or she belongs to, to meet the requirements that are uniformly imposed on all persons. If not, the very ambition of defining scales of abilities that are common to all will be abandoned, and any existing inequalities of opportunities at the start will be accepted, provided that in the end these inequalities can be compensated for and the consequences of the unequal distribution of endowments between different social groups, thereby, mitigated.[147]

We see, then, that there is a balance to be struck here between two concerns, which we should take as being complementary rather than contradictory. On

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[146] Para.57.

[147] See in this sense R. H. Fallon, "To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination", *Boston Univ L. Rev*, vol. 60, 1980, p.815, here p.876.

the one hand, we need to make our understanding of anti-discrimination law more reflexive, to revise our spontaneous interpretations of the concepts of "merit", "competence" or "qualification" based on the different meanings which those interpretations may contain. On the other hand, we need to make every effort to ensure that each person, no matter what category he or she belongs to, is equipped with the tools that will enable him/her to meet the requirements that these concepts designate. By losing sight of the latter objective, we will run the risk of substituting a constant renegotiation of the criteria of competence for a structural policy aimed at promoting equality of opportunity. The danger would be that the members of the groups for whose benefit this renegotiation takes place will no longer be tempted to invest in acquiring certain skills, and that eventually we will find ourselves moving yet further away from, instead of coming closer to, the utopian view of a society where social cohesion is sufficiently strong and reliance on market mechanisms will not lead to structural inequalities. Neither affirmative action, nor a revision of the concept of "qualifications" in order to de-fetichize the understanding of this concept which we tend to see as naturally dictated by the requirements of the marketplace, are adequate substitute for policies aiming at the removal of the conditions which create inequalities in opportunities in the first place – policies which, for example in the fields of childrearing and education, seek to facilitate the conciliation of working and family life, or which seek to modify the dominant stereotypes about the ability of women to compete on the marketplace.

For the future of affirmative action, beyond the use of this tool in order to accelerate the professional integration of women – the context in which the case-law of the European Court of Justice has hitherto been developing – the lessons are the following. Whether or not the Court will continue to adhere to this case-law, allowing affirmative action only in situations where "actual inequalities" are shown to exist which have to be removed or compensated for and subjecting affirmative action measures to the test of proportionality, one alternative to affirmative action which may have to be explored further consists in the redefinition of the criteria which usually are relied upon in order to allocate social goods, depending on the nature of these goods. Just like "qualifications" may be redefined to take into account the experience which may have been acquired by looking after children or persons requiring care in the domestic sector or the specific "female life experience", they may be rethought in order to take into account the specific value, both in private business and in the public sector, of including more minorities, in order to be more responsive to the needs of the clients or of the public.[148] Similarly, in

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[148] Indeed, even specifically taking into account the race or ethnic origin, the religion or belief, disability, age or sexual orientation of the individual concerned may be acceptable and should not necessarily be construed as a prohibited form of direct discrimination. Both the Racial Equality Directive (art.4 and Recital 18 of the Preamble) and the Employment Equality Directive (art.4 (1) and Recital 23 of the Preamble) provide that a difference of treatment which is based on a suspect characteristic shall not constitute discrimination where, "by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". Although these terms are deliberately restrictive to avoid any abuse, the Commission does consider that "The term 'genuine

the other areas covered by the Racial Equality Directive such as education, social protection, or social advantages, or in the access to and supply of goods and services which are covered also by Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women, we may need to question the criteria we usually resort to for the allocation of these goods, in order to ensure that the disadvantages of members of minority groups are better tackled. More could be invested in education, for example, in the neighbourhoods where the immigrant population is concentrated; specific programmes could be developed to facilitate access to health services to nomadic populations, so that not only the health needs and the level of revenues are taken into account in the distribution of health services, but also the lack of access to such services which certain groups may experience; in general, we should proactively ask whether the usual criteria we use for the allocation of such goods are sufficiently sensitive to the needs of certain disadvantaged categories, even before asking whether forms of affirmative action should be developed in favour of these groups. At the same time, any attempt either to redefine these criteria in order to take into account these needs, or indeed any policy aimed at targeting specific categories defined by "suspect" characteristics for the distribution of certain benefits, should not become a disincentive for the adoption of more structural remedies which, once they will be put in place, will progressively bring about a situation where such special measures will be seen as redundant and unnecessary.

5. Conclusion

The recent Communication of the Commission "Non-discrimination and equal opportunities to all – A Framework Strategy",[149] which results from the consultation process launched by the publication of the Green Paper on Equality and non-discrimination in an enlarged EU on 28 May 2004,[150] states that:

> "the implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups. There is a need to go beyond anti-discrimination policies designed to prevent unequal treatment of individuals. The EU should reinforce its efforts to promote equal opportunities for all, in order to tackle the

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occupational qualification' should be construed narrowly to cover only those occupational requirements which are strictly necessary for the performance of the activities concerned. In the case of differences of treatment based on racial and ethnic origin, such cases will be highly exceptional. Examples of such differences might, for example, be found where a person of a particular racial or ethnic origin is required for reasons of authenticity in a dramatic performance or where the holder of a particular job provides persons of a particular ethnic group with personal services promoting their welfare and those services can most effectively be provided by a person of that ethnic group" (COM(1999) 566 final, of 25.11.1999, at p. 8).

149 COM(2005)224 final, 1.6.2005.

150 COM(2004) 379 final, 28.5.2004. The reactions to the Green paper are available at:http://europa.eu.int/comm/employment_social/fundamental_rights/policy/anevval/green_en.htm.

> structural barriers faced by migrants, ethnic minorities, the disabled, older and younger workers and other vulnerable groups."

The time has come to rethink the anti-discrimination model on which the current Community legislative framework is based. A first step would be to consider whether disparate impact discrimination should not be outlawed in the Member States. This implies going beyond the current definition of indirect discrimination as included in the Racial Equality and Employment Equality Directives. Victims of discrimination should be allowed to establish a presumption of discrimination by bringing forward statistics, thus obliging the author of a measure creating a disparate impact on certain protected groups either to justify that measure as both appropriate and necessary to the fulfilment of a legitimate end, or to modify it (above, section 2). Contrary to what is sometimes assumed, the processing of data in order to monitor the situation of racial, ethnic or religious minorities, of persons with disabilities, of persons with different sexual orientations, or of age groups, is not prohibited under the existing legal framework relating to the protection of private life in the processing of personal data (section 3.1). A second step would consist in moving towards a model of affirmative equality, in which anti-discrimination law seeks to ensure not only a fairness of process, but also a fair distribution in the outcomes, by including obligations to adopt measures improving the situation of the most disadvantaged groups of society. Under this model of equality, affirmative action policies have a crucial role to play, as a tool to combat structural forms of discrimination which cannot be adequately responded to by the prohibition of individual instances of discrimination (section 4). Here again, this may be reconciled with the existing legislation protecting private life *vis-à-vis* the processing of personal data, provided certain safeguards are complied with (section 3.2).

In its Communication proposing its Framework Strategy on non-discrimination, the Commission notes that "Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities".[151] But this is not because, as suggested by the Communication, "it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups". There is a role for legislation in combating structural discrimination.[152] Of course, social and economic policies are also required to fulfil this aim. But this should not exonerate us from improving the legislative framework to accommodate the needs of those who are underrepresented, and whose exclusion cannot be attributed solely to identifiable regulations, procedures or practices. Now is the time to act.

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[151] COM(2005)224 final, at para.3.3.

[152] Christopher McCrudden, "Institutional Discrimination", 2(3) *Oxford Journal of Legal Studies* (1982), 303-367.

FUMBLING TOWARDS COHERENCE: THE SLOW EVOLUTION OF EQUALITY AND ANTI-DISCRIMINATION LAW IN BRITAIN

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Introduction

McCrudden has suggested that it is difficult to describe the scope of equality and anti-discrimination principles applicable in English public law, as:

> "there is no one legal meaning of equality or discrimination applicable in the different circumstances. . . there is no consistency in the circumstances in which weaker or stronger conceptions of equality and discrimination currently apply . . . equality in English public law is . . . essentially pluralistic in its sources, in its origins, in its meanings, in its application, and in its functions."[1]

This analysis is entirely accurate, except that the use of the term "pluralistic" is a little generous: "fragmented", "disjointed" or "piecemeal" could also serve. This same uncertainty exists in Scotland and Wales, albeit that the devolved administrations appear to share a commitment to substantive equality approaches that is not necessarily reflected throughout England (see the discussion on mainstreaming below).[2]

Due to this lack of consensus as to underlying principles, the development of equality and anti-discrimination law in Britain has taken place in fits and starts.[3] When change occurs, it often tends to be reactive in nature.[4] Legislation and new policies are usually introduced in response to events, or to fill a sufficiently embarrassing gap in the legislation, or to comply with the requirements of EC law. This disjointed approach has persisted since the introduction of the earliest forms of anti-discrimination legislation in the

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[1] C. McCrudden, "Equality and Non-Discrimination", Chap.11 in D. Feldman, *English Public Law* (2004), para.11.02, at p.582.

[2] The enactment of equality and anti-discrimination legislation remains a function reserved to Westminster, but considerable room does exist for both devolved administrations to develop equal opportunities approaches in how they exercise their devolved functions and powers. As discussed below, the Welsh Assembly is under a positive duty to promote equality of opportunity, as is the Greater London Authority (GLA), which is perhaps the body at the forefront of the development of new equality strategies. See GLA, *Into the Mainstream: Equalities Within the Greater London Authority* (2003) for a comprehensive summary of the GLA's equalities initiatives.

[3] The evolution of equality and anti-discrimination law in Northern Ireland has followed a very different trajectory.

[4] Perhaps the major exception to this general trend was the introduction of comprehensive sex and race discrimination legislation in the mid 1970s, predating similar steps in some other European countries by several decades. See A. Lester, "Discrimination: What Can Lawyers Learn From History" [1994] *Public Law* 224.

1960s, and has produced a complex hybrid of equality principles embedded in a patchwork quilt of anti-discrimination legislation and case-law.[5] The "variable geometry" of EU and UK anti-discrimination legislation means that different levels of protection exist across the different grounds of prohibited discrimination. Multiple or intersectional forms of discrimination do not fit comfortably into this framework.[6]

Since 1995, anti-discrimination protection has been extended to the "new" grounds of disability, sexual orientation, religion and (imminently) age, while the scope of existing protection in the areas of race and gender has been extended. This has been paralleled by considerable shifts in judicial approaches to equality issues, with some development of common law equality principles and a move towards the purposive interpretation of anti-discrimination legislation. These developments have been accompanied by the introduction of positive equality duties, attempts to introduce mainstreaming initiatives, the coming into force of the Human Rights Act and the establishment of a single Commission for Equality and Human Rights.

This transformation of British equality law has not been immune from its recurring defects, exemplified in particular by the piecemeal, stumbling and reactive manner in which these reforms have been introduced. Nevertheless, it can be argued that the cumulative effect of these changes has been to establish the bare bones of a coherent framework of equality and anti-discrimination law. However, the conceptual uncertainties noted by McCrudden remain. Fundamental questions as to how this evolving legal framework should be further developed remain unresolved.

Part One of this article will examine the underlying conceptual uncertainties that continue to afflict British equality law and policy. Part Two will assess the scope and effectiveness of the recent extension of anti-discrimination legislation in Britain, while Part Three will outline how equality and anti-discrimination norms are becoming "constitutionalised" in British public law. Part Four will then look at attempts to require public and private authorities to take proactive action to eliminate patterns of inequality, and how conceptual uncertainties persist as to the appropriate scope and direction to be given to "transformative" equality measures. British equality law is fumbling towards greater coherence, consistency and clarity, but real obstacles to achieving full coherence persist.

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[5] A similar complex hybrid of equality norms and levels of protection exists in EC law, which contributes in its turn to the complexity of British law: see A. Morris, "Constitutionalising Equality in the European Union: Tolerance and Hierarchies" (2005) 8(1) *International Journal of Discrimination and the Law* 33-52; M. Bell, "The Right to Equality and Non-Discrimination", in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (2003), 91-110; M. Bell, *Anti-discrimination Law and the European Union* (2002); M. Bell and L. Waddington, "Reflecting on Inequalities in European Equality Law" (2003) 28 *European Law Review* 349-369.

[6] See S. Hannett, "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" [2003] 23(1) *OJLS* 65-86.

Part One: Attempting to Achieve Conceptual Coherence in Equality and Anti-Discrimination Law

Much academic literature has been generated in an attempt to formulate a clear conceptual basis for equality and anti-discrimination law. This desire to achieve some sort of conceptual coherence stems from the notoriously fuzzy nature of the concept of "equality" itself, and the often conflicting alternative accounts of what constitutes fidelity to this slippery and elusive value.[7] McCrudden has suggested that current European and British legal approaches attempt to balance and combine at least five different concepts of equality.[8] Fredman suggests that equality law and policy are based upon an often confused combination of different models of equality – "formal equality", that is, equality viewed as sameness of treatment of those in similar situations, "equality of opportunity", that is equality viewed as creating the necessary conditions to ensure a fair and equal starting point for all, and "equality of outcome", that aims to eliminate disadvantages faced by particular social groups. While recognising that elements of all three approaches are deeply embedded in contemporary law and policy, she advocates a greater focus on "equality of outcome" and "substantive equality" approaches, which would make the removal of obstacles faced by disadvantaged groups to full participation in society the main guiding principle of equality law.[9]

Other commentators have argued for a radical move away from any attempt to rely upon the concept of equality to serve as a firm normative base for equality and anti-discrimination law. Westen famously described equality as an empty concept, devoid of any real substance.[10] Raz has also been sceptical of the value of equality as a meaningful normative concept: while the language of equality may have value from a rhetorical point of view, justifications for anti-discrimination norms must be found elsewhere.[11] Matt Cavanagh has recently suggested that a defence of equality of opportunity as a moral good cannot be sustained,[12] while Tim Macklem has argued that equality of opportunity is not a coherent principle in its own right, but simply a "placeholder for other principles, the most familiar of which today is non-discrimination".[13]

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[7] See N. Bamforth, "Conceptions of Anti-discrimination Law" (2004) 24(4) *OJLS* 693.

[8] McCrudden identifies these principles as equality as "rationality", equality as protecting "prized public goods", equality as preventing "status harms" arising from discrimination on the basis of particular grounds, equality as "proactive promotion of equality of opportunity between particular groups", and equality as ensuring the "participation" of excluded groups. See both McCrudden, "Equality and Non-Discrimination", paras.11.04-11.07, pp.582-583, and by the same author, "Theorising European Law", in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (2003) 1.

[9] See Fredman, *Discrimination Law* (2001), pp.21-22. See also S. Fredman, *The Future of Equality in Britain* (2003).

[10] P. Westen, "The Empty Idea of Equality" (1985) 95 *Harv L. R.* 537

[11] J. Raz, *The Morality of Freedom* (1986), Ch. 9.

[12] M. Cavanagh, *Against Equality of Opportunity* (2002)

[13] T. Macklem, "Equality and Opportunity: Reconciling the Irreconcilable" (2005) 68(6) *MLR* 1016-1033, 1033. Similar arguments that anti-discrimination norms in

In arguing for a jettisoning of reliance upon equality as a guiding principle, many of these critiques have suggested that equality and anti-discrimination legal norms should instead be regarded as designed to remove obstacles to the enjoyment of basic human entitlements, to combat attempts to deny human dignity, or to express contempt towards particular groups.[14] Conceptualising the normative basis for anti-discrimination norms in this way has its attractions. It can explain why particular types of discrimination directed against particular social groups are singled-out for particularly intense forms of legal regulation and attract particular moral abhorrence. It also cuts through much of the confusion generated by the linking of equality and anti-discrimination law to fuzzy and contested concepts of equality. Eliminating disadvantage that constitutes a denial of dignity or basic entitlements can readily be shown to be more important than ensuring exact sameness of treatment for all. Therefore, this approach justifies placing less emphasis upon ensuring sameness of treatment, which Fredman suggests exercises a distorting effect upon the development and application of much of current British equality law and policy.[15] The view that equality and anti-discrimination legal norms are firmly rooted in a concern for the preservation of human dignity has been adopted with particular enthusiasm by the Canadian Supreme Court.[16]

However, as Moreau has noted, equality and anti-discrimination legal norms address a complex variety of different types of harm or demeaning treatment.[17] Attempts to define a single underlying targeted wrong, such as attacks upon human "dignity", the expression of "contempt", group "stereotyping", the denial of autonomy or other basic human entitlements, and so on, tend to be either under-inclusive or excessively vague.[18] Equality

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particular can and should be disentangled from the conceptual swamp of attempts to define equality of opportunity have been made by Eliza Holmes: see E. Holmes, "Anti-Discrimination Rights Without Equality" (2005) 68(2) *MLR* 175-194.

[14] See N. Bamforth, "Conceptions of Anti-Discrimination Law", 713-715. Gardner has suggested that anti-discrimination law can be justified *inter alia* as designed to remove unjustified impediments to personal autonomy, and can serve as a redistributionist tool: see J. Gardner, "Liberals and Unlawful Discrimination" (1989) 9 *OJLS* 1. Many feminist theorists call for the breaking down of oppressive social practices which deny meaningful life opportunities to women, and are at best sceptical about any appeals to the language of "equality". See C. MacKinnon, "Sex Equality: On Difference and Domination", in *Toward a Feminist Theory of the State* (1989), 215. See also D. Réaume, "Comparing Theories of Sex Discrimination: The Role of Comparison" (2005) 25(3) *OJLS* 547-564, who suggests that feminists have been compelled to use the language of equality in the absence of other recognised forms of legal or political rhetoric to challenge gender-based forms of oppression and the denial of fundamental dignity. See also by the same author, "Discrimination and Dignity" (2004) *Louisiana L. Rev* 1.

[15] See Fredman, *Discrimination Law* (2001).

[16] See *Laws* v *Canada (Minister for Employment and Immigration)* [1999] 1 S.C.R. 497

[17] S. Moreau, "The Wrongs of Unequal Treatment" (2004) 54(3) *University of Toronto L. J.* 291-326.

[18] *Ibid.,* 296-318. For example, Cavanagh's acceptance that discrimination is unjustified when it expresses "unwarranted contempt" can be given a very narrow ambit, or could extend to cover a very wide range of actions and social structures, depending upon what is deemed to constitute an expression of unwarranted

and anti-discrimination legal norms are designed to combat a complex set of different "wrongs", which take various forms across the different controlled grounds of discrimination and in different social contexts. The selection of which forms of discriminatory "wrongs" should be subject to legal regulation stems from social and political decisions that certain types of discrimination involve a denial of dignity by assuming the lesser worth of individual or group concerned, or subject particular groups to serious obstacles and extra burdens from which other groups are generally exempt. In other words, in calibrating which actions deserve regulation through equality and anti-discrimination law, there is usually some reference back to ideals of equality of respect and equal worth, even if these concepts are relatively inchoate.[19] Normative appeals to concepts of equality are not so easy to disentangle from the conceptual framework of equality law.

This is particularly obvious when consideration is given to the role of the state. Denials of dignity or basic entitlements will often be generated by the state making distinctions between different social groups, or permitting the existence of such distinctions. This can take the form of variation in the legal rights that different groups are accorded, or in the extent to which the interests and needs of different groups are protected in legislation and public policy. It can also rise in the way that particular social groups are allowed to oppress other groups. If the state is responsible for such treatment, or does not attempt to prevent its continuance, then this can be conceptualised as a failure by the state to respect the dignity of all, to provide basic entitlements, or even to act rationally.[20] However, in deciding whether a case exists for regulation via equality and anti-discrimination legal norms, and whether a social group has in fact been treated differently than another group, there is usually a need to recourse to the inchoate and uncertain set of concepts usually encapsulated within the term "equality of respect and concern", if only as instrumental tools of assessment.[21]

It is also essential to note that the basic perception that human dignity is offended by discriminatory treatment stems from a normative attachment to an ideal of the equality of status of human beings. Historically, many categories of humans were viewed as being of lesser status: for example, in certain cultures, it might be considered a legal and moral wrong to deny basic entitlements to slaves, but it was entirely permissible to treat them as

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contempt. The same is true for attempts to root anti-discrimination norms in ideas of the infringement of human dignity, or denials of individual autonomy. See Cavanagh, *Against Equality of Opportunity* (2002).

[19] Raz has suggested that greater equality as between different social groups is often a by-product of equality and anti-discrimination legal norms, not their underlying rationale: however, achieving this "by-product" is often a key element in defining which forms of intrusion upon human dignity are classed as illegitimate discrimination. Raz, *The Morality of Freedom*, at 228. Returning to the example of Cavanagh's concept of "unwarranted contempt" cited in the footnote above, defining what constitutes "unwarranted contempt" will inevitably involve a comparison of treatment between different groups.

[20] See the argument in J. Stanton-Ife, "Should Equality Be a Constitutional Principle?" (2000) 11 (2) *King's College LJ* 133-52.

[21] See the discussion in R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000), Chs. 2 & 4.

less than fully human.[22] In contemporary conditions, there is a strong and growing attachment to the idea that human dignity is denied by such concepts of unequal status. Equality and anti-discrimination law may be structured around the prevention of certain types of denial of dignity: but its ultimate *raison d'être* is as a tool to help achieve some form of social transformation, as part of the unfolding logic of a commitment to an ideal of equality of status.[23]

Equality and anti-discrimination norms can therefore be seen as complex construct of different elements: they are designed to prevent certain types of denial of human dignity rather than to guarantee "equality of opportunity" *per se*, but their use is also directly or indirectly intended to alter social structures to secure greater equality of respect or status for disadvantaged groups. They are also often "packaged" within a wider range of measures directed towards the elimination or amelioration of group disadvantage: anti-discrimination legislation is regularly accompanied by alterations in police practice, housing and family policies, and other forms of provision of public services.

Hugh Collins has drawn attention to this close link between anti-discrimination legislation and the use of other social policy tools. He suggests that equality law is best viewed as part of an overall strategy of combating forms of social exclusion faced by particular disadvantaged groups. He therefore argues that British equality law and policy can be regarded as built around a central structuring principle of "social inclusion".[24] The strength of this analysis is that it provides a coherent explanation for why anti-discrimination law prohibits certain types of harm inflicted upon specific "excluded" social groups. It also situates this legislation within a wider range of government initiatives and policy approaches that are closely concerned with addressing social exclusion. It captures current British government thinking on equality policies very well, in particular the new policy approaches being developed to address issues of "community cohesion".[25]

However, the possible disadvantage of this "social inclusion" analysis as a conceptual framework is that it may not adequately capture the potential transformative effect of equality law. Equality and anti-discrimination legal norms are capable of not alone removing obstacles to social inclusion by particular groups, but also of transforming existing social norms that are discriminatory in nature and effect. This transformative dimension is perhaps more often an aspiration than a reality. However, it remains a

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[22] See the disturbing account of how female slaves could be ceremoniously denied an afterlife to benefit Viking lords, by means of a particular human sacrifice ritual involving rape, in T. Taylor, *The Buried Soul: How Humans Invented Death* (2002). The slave in this ritual was conceptualised as an entirely disposable commodity, with no status as an "equal" even in the most formal and rhetoric sense of this term.

[23] I am grateful to Riz Mokal for helping me to clarify my thoughts on this point.

[24] H. Collins, "Discrimination, Equality and Social Inclusion", (2003) 66(1) *MLR* 16-43.

[25] See in particular Home Office, *Improving Opportunity, Strengthening Society* (2005)

potential outcome, and a key element of what equality norms aspire to achieve.

The language of "social inclusion", with its connotations of inclusion within a fixed norm, may not adequately capture this transformative, even utopian, aspiration of equality law.[26] Superficially successful inclusion within unjust or discriminatory social structures is possible, even though it may require previously excluded groups to suffer hidden costs and to conform to dominant norms. The integration of women in the workplace can be seen as a triumph of "social inclusion": however, the persistent failure of corporate culture to accommodate carer responsibilities, the burdens of pregnancy and alternative working methods continues to clash with the transformative ambitions of equality norms.[27] In contrast, the advantage of Fredman's substantive equality approach is that it places the transformation of social structures front and centre in its account of what a coherent equality approach should aim to achieve. This account of equality norms is perhaps closer to their inherent aspirations and underpinning logic than the language of "social inclusion", even if it does not always reflect their often limited impact in practice.

However, even if the existence of this transformative dimension is accepted, substantial disagreements still exist as to which jurisprudential or philosophical theories best encapsulate and describe these aspirations. In particular, dispute exists as to the extent to which these transformative ambitions should be stretched. How far should legal regulation be utilised to alter existing practices, concepts of merit, and the freedom of action of individuals and corporations? Considerable disagreement also exists as to what extent should group differences be institutionalised within law and policy, and in particular to what extent should religious sensitivities, different beliefs, and differences between different ethnic groups be reflected in legislation, policy and state practice. In other words, two areas of stark and often passionate disagreement exist: how much "social engineering" should be conducted via equality and anti-discrimination law, and how much "group differentiation" should be institutionalised? These areas of disagreement are ultimately rooted in wider conceptual disputes as to the relationship between equality, liberty, autonomy and other values, as well as to the appropriate role of the state *vis-à-vis* different forms of group identity.

Nevertheless, in mainstream British legal and political debate, it can now be argued that considerable agreement exists as to what a coherent framework of equality and anti-discrimination law should look like.[28] There is widespread acceptance that equality and anti-discrimination law should

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[26] Collins's main ambition in his thoughtful analysis appears to be to describe the existing theoretical basis for much of contemporary equality law and policy, without necessarily engaging in a normative analysis of the merits and legitimacy of "social inclusion" as an underlying principle, or how "transformative" this approach could prove to be.

[27] For the latest statistical evidence of this, see T. Hogarth and P. Elias, *Pregnancy Discrimination at Work: Modelling the Costs*, Equal Opportunities Commisison Working Paper Series No. 39 (2005)

[28] This is evidenced by the relatively uncontroversial nature of recent legislative and judicial developments discussed later in this article.

prohibit the illegitimate use of certain types of classification; apply not just horizontally between private entities but also to vertical relationships between disadvantaged groups and the state; and be capable of having some transformative effect, by making possible challenges to social norms that unfairly exclude or disadvantage particular social groups. There is also an underlying acceptance that any coherent framework of equality and anti-discrimination law should also reflect the Fullerian virtues of rationality, consistency and clarity.[29]

However, uncertainty persists about which conceptual account best describes and justifies the existence of this legal framework. Serious disagreement also exists as to the appropriate limits to its transformative ambitions and scope of application. Therefore, in line with Sunstein's description of an "under-theorised concept", it can be argued that substantial agreement exists on the essential contours of an effective equality law framework. This makes it possible to establish this basic framework by legislative and judicial reform, and for it to be operable within the British legal system. However, ultimate consensus on its foundational theories and ultimate guiding principles does not exist.[30]

Recent developments in British equality law reflect this combination of agreement about mid-level operating principles, and strong disagreement about foundational and guiding principles. New legislation has extended the scope of equality and anti-discrimination legal norms. It has cured some obvious inconsistencies and defects. There is a gradual move towards the establishment of a consistent and comprehensive basic floor of legal protection against the major forms of discriminatory behaviour. There is also an acceptance of the role of the state in perpetuating discriminatory patterns. Equality law is increasingly capable of being applied not just horizontal relationships, but also to vertical relationships between governance structures and the governed. As Bamforth has argued, it is necessary to adopt an "integrated constitutional conception" of equality law, and this is slowly emerging in Britain.[31] There has even been a greater recognition of the transformative aspirations inherent in concepts of equality, and a willingness to introduce some legal mechanisms that attempt to transform policies and practices that may have discriminatory effect.

However, serious conceptual debates persist. Their lack of resolution continues to block the evolution of a fully coherent equality law. In the absence of a comprehensive guiding vision, uniformity of approach and incremental tinkering often replaces clarity of principle, and incoherence persists. This pattern is replicated across the various elements of British equality law. In particular, this pattern can be seen in the evolution of anti-discrimination legislation.

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[29] See L. Fuller, *The Morality of the Law* (1964)

[30] C. Sunstein, "Incompletely Theorized Agreements" (1995) 108 *Harv L. Rev* 1733, 1739-40. Sunstein divides such agreements into several different categories: equality and anti-discrimination law in Britain fits into his second category.

[31] See N. Bamforth, "Conceptions of Anti-Discrimination Law", 701.

Part Two: The Slow Shuffle Towards Legislative Reform

Following the initial introduction of race relations legislation in the 1960s, and the enactment of the Equal Pay Act 1970, comprehensive race and sex discrimination legislation was introduced in Britain in the mid 1970s. The scope of this legislation was gradually clarified by judicial interpretation and the occasional minor legislative intervention, often driven in the context of gender by EC legislation.[32] This has resulted in the establishment of a relatively comprehensive framework of legislative protection against direct and indirect forms of race and sex discrimination in employment, occupation, education, and access to goods and services.[33] This legislation is now often seen as a part of the legal rights of UK citizens and has had considerable symbolic, educative and deterrent impact.[34] However, the scope of protection offered by this legislation was limited: other grounds of unfair treatment remained outside its scope. Unsuccessful attempts were made to extend the race and sex discrimination legislation to cover discrimination on the grounds of sexual orientation, religious belief and age.[35]

However, recent years have seen a considerable expansion of the scope of anti-discrimination legislation. This has been largely driven by the EU Framework Equality Directive 2000, which required the UK to introduce *inter alia* legislation prohibiting discrimination in employment and occupation on the grounds of religious belief and sexual orientation by the end of 2003, and to do the same for discrimination on the grounds of age by the end of 2006.[36] The Employment Equality (Sexual Orientation) and Employment Equality (Religion or Belief) Regulations 2003 have been

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[32] See *e.g.* the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, S.I. 2660, implementing the Burden of Proof Directive 97/80. For an unusual example of legislative reform introduced without the intervention of EC legislation, see the Race Relations (Remedies) Act 1994, which removed the upper cap on damages for race discrimination.

[33] Without the propulsion provided by the ECJ and the EC Equal Treatment and Equal Pay Directives, it is questionable whether the current levels of protection would have been attained. The jurisprudence of the European Court of Justice (ECJ) has played a very significant influence upon the interpretation of the Sex Discrimination and Equal Pay Acts, and indirectly upon the application of the race relations legislation. See A. Lester, "Discrimination: What Lawyers Can Learn From History" (1994) *Public Law* 224-237, 229-235.

[34] See B. Hepple, M. Coussey, and T. Choudhury, *Equality: A New Framework*, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Oxford: Hart, 2000), para.1.33 (hereafter the "Hepple Report").

[35] For an attempt to extend the protection of sex discrimination legislation to discrimination on the grounds of sexual orientation, see *McDonald* v *Advocate General for Scotland* [2003] UKHL 34. For similarly unsuccessful attempts to extend the race relations legislation to cover discrimination based upon religious belief, see *J.H. Walker* v *Hussain* [1996] IRLR 11 (EAT), *Crown Suppliers (PSA)* v *Dawkins* [1993] IRLR 284. For an unsuccessful attempt to use the sex discrimination legislation to challenge retirement ages, see *Rutherford* v *SS TI* [2004] EWCA Civ. 1186, CA. In Northern Ireland, on the other hand, discrimination on the grounds of religious belief and political opinion has been prohibited since 1976.

[36] EU Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, O.J. Series L 303/16.

introduced to implement this obligation.[37] The draft Age Regulations have been published for consultation and are expected to become law in their final form by October 2006.[38] These regulations adopt the same basic format and approach as the existing race and sex discrimination legislation, as required by the Directive.[39] However, their scope is confined to that of the Directive, i.e. employment and occupation. Discrimination on these grounds in access to goods and services, no matter how malignant or overt, is not covered.[40]

This limited scope was justified by the UK government on the basis that extending the new legislation further than the scope of the Directive would generate complex and difficult issues.[41] This caution is a persistent element of UK government responses to pressure to extend anti-discrimination legislation, and is a less than golden thread that has run through the equality policies of both Conservative and Labour governments since the 1980s.[42] This timidity stems partially from a desire not to be seen to "overburden" private employers and service providers, and a reluctance to offend certain sectors of public opinion by legislating on matters of some controversy. It is also compounded by neo-liberal preferences for private solutions and government non-intervention, and is largely responsible for the piecemeal, reactive and *ad hoc* nature of anti-discrimination law in Britain.[43] Legislation is introduced in response to the requirements of EU law or where sufficient political pressure builds up for change in a specific area, rather than as part of a coherent scheme based upon the recognition of the structural and rooted nature of many inequalities.[44] These tendencies reflect a strong reluctance to recognise and give effect to the transformative dimension of equality norms, and a hesitancy to curtail individual and corporate autonomy: anti-discrimination legislation has been essentially seen as a tool of last resort to reduce the occurrence of certain types of serious harms, rather than

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[37] See M. Bell, "A Patchwork of Protection: The New Anti-Discrimination Law Framework" (2004) 67(3) *MLR* 465-477, especially 467-475; L.Vickers, "Freedom of Religion and the Workplace: The Draft Employment Equality (Religion or Belief) Regulations 2003' (2003) 32 *ILJ* 23, 27.

[38] For the draft age regulations, see UK Department of Trade and Industry, *Coming of Age* (2005).

[39] A. Lester, "New European Equality Measures", (2000) *Public Law* 642

[40] The changes made to the race relations legislation by the Race Relations Act 1976 (Amendment) Regulations 2003 were also confined to the minimum steps necessary to satisfy the requirements of the Race Equality Directive. This ensured that a new series of complex distinctions and varying levels of protection have been introduced into the formerly homogenous race relations legislation: see M. Bell, "A Patchwork of Protection", at pp.466-7.

[41] See the discussion in Department of Trade and Industry (DTI), *Towards Equality and Diversity* (2001).

[42] The same set of explanations was also forthcoming for the preference of the UK government for combating age discrimination via a voluntary Code of Practice (subsequently acknowledged to be ineffective), rather than through enforceable age discrimination legislation. See Department of Works and Pensions, *Evaluation of Practice on Age Diversity in Employment* (2001).

[43] Mark Bell has described the state of British anti-discrimination law as a "patchwork of protection": M. Bell, "A Patchwork of Protection", 465.

[44] In the author's experience, attempting to teach British anti-discrimination law inevitably leaves students aghast at its incoherence and complexity.

a fundamental building block of a society founded on concepts of dignity and equal status.

The Pressure for Convergence

However, the complex and inconsistent structure of British anti-discrimination legislation is proving to be unsustainable. The existence of complex and confusing distinctions between different equality grounds generates claims by activist groups for protection against discrimination to be "levelled up" across the grounds. Multiple or overlapping forms of discrimination can become very difficult to handle.[45] Varying levels of protection encourage complex litigation. Conceptually, many of the distinctions between grounds are extremely difficult to justify, and this produces strong pressure for convergence of protection across the equality grounds.

The UK government is extending protection in Britain against religious discrimination to goods and services, education and other forms of service provision in the Equality Act 2006. While it initially relied yet again upon the principle of "unripe time" to postpone consideration of taking equivalent steps for age and sexual orientation,[46] pressure for convergence has provoked a change of heart, and similar protection is now to be extended to sexual orientation. It may only be a matter of time before protection against age discrimination is similarly extended: experience from the Republic of Ireland has shown that this is possible.[47]

The same gradual process of levelling-up has occurred in the context of disability discrimination. The Disability Discrimination Act (DDA) 1995 fell short of the race and sex discrimination legislation in several important respects. In particular, its definition of disability was problematic, its provisions were often unwieldy and lacked clarity, and it did not apply to education and other areas covered by the race and sex discrimination legislation. It also failed to provide for the establishment of a Disability Rights Commission (DRC) to play a similar promotion and enforcement role to the Commission for Racial Equality (CRE) and Equal Opportunities Commission (EOC).[48]

The inevitable demands for a convergence of protection resulted in the introduction of legislation establishing the DRC in 1999 and extending

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[45] As the extent of protection available to a claimant may vary considerably depending upon which grounds are identified as the "source" of the treatment in question, pressure exists upon courts and tribunals to compartmentalise a complaint within one particular ground, rather than taking an approach that recognises how different forms of discrimination may overlap and reinforce each other. See S. Hannett, "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination", 65-86.

[46] See F. Cornford, *Microcosmographia Academica: Being a Guide for the Young Politician* (1908), Ch. VII, for the classic exposition of this valuable political doctrine.

[47] For the Irish legislation, see C. O'Cinneide, "Age Discrimination and Irish Equality Law', in E. O'Dell (ed.) *Older People in Modern Ireland: Essays on Law and Policy* (2006).

[48] C. Gooding, "The Disability Discrimination Act 1995: An Overview", in J. Cooper, *Law, Rights and Disability* (2000) 139-163, 139.

protection against disability discrimination to educational institutions in 2000.[49] The legislation has subsequently also seen further modification, to ensure compliance with the disability requirements of the Framework Equality Directives, and to close some of other gaps left by the 1995 legislation.[50] Problems remain, but the pressure for convergence has generated considerable changes since 1995.

Therefore the patchwork structure of existing anti-discrimination legislation generates pressure in favour of "levelling-up" of protection across the different equality grounds. The aspirations towards fairness, consistency and adequate protection that are inherent in anti-discrimination norms rest uneasily with the inconsistency and lack of clarity of the current legislative provisions. This is not to say that there should necessarily be complete equivalence of protection across the different grounds: there may be very good grounds for having differing provisions, especially when it comes to issues linked to religious belief. However, any distinctions in the scope of protection across the grounds should be justified by reference to tangible moral and social considerations, rather than being the product of legislative inertia. There is a need for comprehensive equality legislation to level up levels of protection across the different equality grounds where appropriate, and to ensure greater clarity and consistency.[51] A Discrimination Law Review team has been established to consider the reform and codification of anti-discrimination legislation.[52] The momentum towards greater legislative coherence is well on course: it remains to be seen whether the lingering conceptual uncertainty about the ultimate status and importance of anti-discrimination law will derail or delay the train.[53]

However, real issues remain to be resolved before a unified and comprehensive anti-discrimination legislative framework can be put into place. Firstly, drafting a comprehensive anti-discrimination code will not be easy. Some questions are technical: should age discrimination legislation be applied to the provision of insurance services, and if so, what exceptions should be permitted? What is the most appropriate definition of disability?

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[49] The Disability Rights Commission Act 1999; Special Educational Needs and Disability Act 2001.

[50] The Disability Discrimination Act 2005 has extended the definition of disabled status to include HIV status, certain forms of cancer and previously excluded forms of mental illness. It also now extends to the performance by public authorities of their public functions (see later). For the impact of the Directive and the Disability Regulations 2003, see K. Wells, "The Impact of the Framework Equality Directive on UK Disability Discrimination Law" [2003] 32(4) *ILJ* 253-273, 256-257.

[51] Lord Lester introduced a private members' bill into the House of Lords in 2003 that provided for the introduction of unified and coherent anti-discrimination legislation. For the text of this bill, see http://www.odysseustrust.org/equality.html

[52] See www.dti.govuk/weu

[53] Moves in Northern Ireland to introduce a single equality bill will inevitably add momentum to developments in the UK. An Equalities Review has been established to examine the causes for inequality in Britain under the chairmanship of Trevor Phillips, which will report to the Prime Minister in summer 2006. It will be curious to see if this Review will uncover anything that is not already well-established in the literature on the causes of group disadvantage in Britain.

Should employers be liable for harassment suffered by their employees as a result of the actions of third parties?[54]

Another set of issues arise as to how far should reform of the basic framework of British anti-discrimination legislation go. For example, there is a strong case for an overhaul of the existing system of remedies in discrimination cases, and in particular for greater scope to be given to courts and tribunals to award exemplary damages and to grant wider forms of injunctive relief.[55] Serious consideration could also be given to removing the requirement to demonstrate that a complainant was treated less favourably than a comparator, which is a common requirement across most of British anti-discrimination law, and focusing instead on establishing whether the complainant has been subject to a disadvantage linked to one of the equality grounds. The comparator requirement is a lingering legacy of the distorting effect of "equality as sameness" rhetoric. It generates complex and messy difficulties of proof, and often operates to blunt the impact of anti-discrimination law without having any real basis in firm principle.[56]

However, deciding whether to enhance available remedies and to reform the comparator requirement requires a decision on the extent to which the legislation should be pushed to give more effect to its transformative aspirations. It also requires decisions as to what countervailing weight should to be given to apparently competing considerations, such as neo-liberal concerns for the autonomy of private market actors. A lack of consensus exists as to how far the "social engineering" aspirations of equality law should or can be pushed: this means that shaking off the inertia and caution that has prevailed in this area for years may prove difficult.

Other reform issues raise other fundamental questions of principle: extending the legislation in this way is not simply a matter of converging upon common standards, and removing insupportable inconsistencies. Real tensions exist between the claims of different groups as to what will constitute "equality of treatment" for them. For example, the claims of religious groups to be able

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[54] The decision in *Burton and Rhule* v *DeVere Hotels* [1997] ICR 1 had established that employers could be liable for third-party harassment, but in *Pearce* v *Mayfield Secondary School Governing Body* [2003] UKHL 44, the House of Lords overruled *Burton* on the basis that the legislation required that the employer had to subject the employee to less favourable treatment than another employee for liability to arise.

[55] See S. Fredman, *Discrimination Law*, 170-73. For an example of the use of a wider range of injunctive relief by the Canadian courts, see J. H. Beck, J. G. Reitz, and N. Weiner, "Addressing Systematic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change" (2002) 28 (3) *Canadian Public Policy* 373-394.

[56] See Fredman, *ibid.*, p.57. This would reduce some of the complexities generated by the requirement to point to a comparator, and replace this test with the more workable and arguably more just approach that would ask whether the complainant had suffered disadvantage on a prohibited ground. This is already the approach adopted under the DDA: see *Clark* v *Novacold* [1999] 2 All ER 977 (CA), and S. Fredman, "Disability Equality: A Challenge the Existing Anti-Discrimination Paradigm?", in A. Lawson and C. Gooding, *Disability Rights in Europe* (2005) 199-218. Evidence of treatment of comparators would still be used for evidential purposes.

to maintain the "religious ethos" of educational and other establishments may come into conflict with the expectations of lesbian, gay and transsexual groups, or secular groups, or women. This has already generated litigation in the employment context,[57] and is likely to do so again when protection against religious discrimination is extended by the Equality Bill to the provision of goods and services, including education.[58]

These are issues to which the current "under-theorised" understanding about how British equality norms should be framed cannot readily supply answers. British anti-discrimination legislation is slowly gaining more coherence, clarity and consistency. However, the reform of the legislation is also throwing up wider issues. The transformative aspirations of equality norms are coming up against conflicting considerations, issues about what inclusion means for different groups, and questions about what form of society should be the end goal of any transformative process.[59] There may be a danger that in the absence of conceptual clarity and real debate, achieving a uniformity of approach across the different grounds may substitute for the establishment of a truly coherent framework based on justifiable and well-reasoned moral, social and legal considerations.

The Commission for Equality and Human Rights

Similar conceptual issues arise with respect to the impending establishment of a common, cross-ground enforcement framework in the form of the Commission for Equality and Human Rights. The Commission's remit will extend across all the equality grounds and beyond to wider rights issues, including the promotion of good relations between different communities and "groups" in British society.[60] The existing British equality commissions

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[57] See art.4(2) of the Framework Equality Directive, Regulation 7(3) of the Employment Equality (Religion or Belief) Regulations 2003, Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003, and the discussion of the appropriate scope to be given to this "religious ethos" exception as incorporated into UK law by the implementing regulations in *R (Amicus)* v *Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).

[58] The prohibition of harassment on the grounds of religious belief in the provision of education has already generated a set of complex exemptions in the Equality Act 2006, and generates worrying concerns about free speech protection. See *Hansard* (H.L.), October 19 2005, cols. 819-832. See also the current controversy over the introduction of incitement to religious hatred legislation.

[59] An interesting question is whether anti-discrimination legislation should be extended to other grounds not currently covered in UK or EC law, such as socio-economic status or carer responsibilities. For a comparative analysis of the varying scope of anti-discrimination law across the globe, see S. Kilcommins *et al*, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* (2004). There is a danger that the extension of anti-discrimination could weaken the integrity of the existing legislation, by overreaching and establishing unenforceable norms. However, serious consideration could at a minimum be given to prohibiting discrimination on the grounds of carer responsibilities, and perhaps on other grounds as well.

[60] The broad concept of human rights is supposed to serve as an overarching and unifying conceptual framework that will give coherence to the Commission's work. Department of Trade and Industry, *Fairness for All: A New Commission for Equality and Human Rights* (2004) Cm 6185, paras.1.10-1.11.

will be gradually merged within the new Commission. This is controversial. Serious reservations have been expressed that the specific needs of the different equality grounds would be submerged and overlooked in the new structure. However, the government considered that a single Commission would be more successful in promoting equality of opportunity than would a set of several autonomous and separate commissions.[61]

There is a legitimate degree of concern that a single Commission may be more vulnerable to governmental pressure, bureaucratic inertia and/or to an overemphasis upon a "one size fits all" approach.[62] How well the Commission will perform its role will partially depend upon its leadership, its working practices, and how it chooses to use its statutory powers. However, a single Commission may be in a better position to push for widespread social change, and to emphasise the interconnectedness of anti-discrimination entitlements and other human rights, than would a multiplicity of different bodies.[63] What a single Commission may not be able to do is to give a political and representative voice to the different communities in Britain that currently look to the existing equality commissions to articulate their views. Trevor Phillips, the chair of the Commission for Racial Equality, has called for the establishment of a new Commission for Citizenship and Integration to work alongside the new Commission, partially perhaps due to concerns that the new Commission would be unable to address many of the policy issues that particularly concern black and other ethnic minority communities.[64] This dispute reflects an interesting difference of opinion as to the appropriate role of equality and human rights commissions: should its primary focus be on combating discrimination, denial of rights and social

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[61] *Fairness For All* suggested that a single commission should be more capable of dealing effectively with issues of multiple and overlapping forms of discrimination, making more effective use of resources and expertise, and encouraging best practice in its cross-ground equality work. *Ibid.*, paras.1.14-1.17. In any case, there was a need to ensure that the new sexual orientation, age and religious belief regulations were enforced, and establishing three new commissions was simply not a viable option. Controversy has persisted as to the appropriate internal structure of the Commission, and whether specific sub-committees are needed to ensure an adequate focus upon the needs of the different equality grounds.

[62] See the arguments made by the 1990 Trust, *Our Rights, Our Future* (2004)

[63] C. O'Cinneide, *A Single Equality Body: Lessons from Aboard* (2002), at pp.7-9. During the consultation process that predated its establishment, many activist groups argued that without comprehensive and unified equality legislation, a single Commission would be unable to operate in a coherent and effective manner. This was a tactically useful political argument, to push for more coherent legislation. However, it was not necessarily true: the experience of other jurisdictions has shown that single commissions can operate effectively even in the absence of unified equality legislation. See C. O'Cinneide, *A Single Equality Body: Lessons from Aboard*, p.9-10. Uniformity of legislation is not a precondition for an effective single Commission, and uniformity of approach could be a dangerous and unrealisable ambition.

[64] See *CRE Chair Calls for New Commission and New Rules for Integration*, CRE press release, 30 November 2005. Some of this concern stemmed from the recommendation in a consultant's report to locate the bulk of the Commission's staff in Manchester, and not in London with its considerable proportion of Britain's ethnic minority communities.

exclusion, or should it also be expected to play a major role in representing the needs of particular communities? This again reflects the recurring uncertainty underlying equality law and policy in Britain: can the enforcement and promotion of equal rights be separated from the articulation of group identities?

Other issues arise in respect of the powers of the new Commission. The Disability Rights Commission, Equal Opportunities Commission and the Commission for Racial Equality have attempted to combine promotional and enforcement work through the strategic use of their investigative and case support powers.[65] The legislation establishing the new commission is designed to enable the Commission to develop a similar strategic approach, and to strengthen and clarify the Commission's powers and functions.[66] The legislation also places the Commission under a "general duty" to use its powers and functions to work towards the development of a society where equality and rights principles have become rooted, which is defined as follows:

> "(a) people's ability to achieve their potential is not limited by prejudice or discrimination,
>
> (b) there is respect for and protection of each individual's human rights (including respect for the dignity and worth of each individual),
>
> (c) each person has an equal opportunity to participate in society, and
>
> (d) there is mutual respect between communities based on understanding and valuing of diversity and on shared respect for equality and human rights."[67]

This constitutes a fascinating attempt to give a legislative definition to the idea of a rights-based society. More pragmatically, its width also gives the Commission a wide field of action. Along with greater statutory clarity as to the scope of its enhanced powers, this should help reduce the risk of narrow judicial interpretation of its powers, duties and functions that has occasionally plagued the existing commissions.[68] However, the retention of limits on the investigatory powers of the new Commission will not permit it to carry out the intensive inspectorate role that the equality commissions

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[65] See J. Clarke and S. Speeden, *Then and Now: Change for the Better?* (2001); N. O'Brien, "The GB Disability Rights Commission and Strategic Law Enforcement: Transcending the Common Law Mind", in A. Lawson and C. Gooding, *Disability Rights in Europe* (2005), 249-263.

[66] The Equality Act 2006 gives new powers to the CEHR, including the power to enter into binding agreements with other bodies who will undertake to avoid discriminatory acts (this power is currently held by the DRC, but not by the other two existing commissions). The legislation also clarifies the scope of its investigatory powers, and it has been given a new power to enforce the general positive equality duties: see below.

[67] S.3 of the Equality Act 2006: more specific duties are imposed in respect of the Commission's equality functions in s.7 and its human rights functions in s.8.

[68] See C. McCrudden, "The Commission for Racial Equality: Formal Investigations in the Shadow of Judicial Review" in P. Craig and C. McCrudden, *Regulation and Public Law* (1987) 227-266.

were originally intended to play.[69] The fear of "social engineering" and potential backlash means that it has been denied a radical transformative role.

Part Three: Equality Norms as Constitutional Controls upon Public Authorities

Anti-Discrimination Controls on Public Authorities

Similar problems arise in respect of the gradual extension of British equality law to the vertical relationships between individuals, groups and the state. As discussed above, any coherent and effective structure of equality norms needs to address how the state maintains or permits the making of distinctions between different groups. However, British anti-discrimination law has historically not extended to instances where the exercise of state power has been at stake. This deficient coverage has constituted perhaps the single most gaping hole in British equality law.

One aspect of this gap was highlighted by the controversy that followed the death of Stephen Lawrence, and the subsequent findings of the Macpherson Report, which threw a spotlight upon the exemption of public authorities from anti-discrimination legislation when performing public functions. This exception was a typical example of an incoherent lacuna in British anti-discrimination legislation. It originated not from any particularly reasoned foundation in principle, but from a narrow interpretation of the Sex Discrimination Act by the House of Lords in *Amin* v *Entry Clearance Officer Bombay*.[70] The result of this was that the decisions of public authorities in many core areas of public sector activity, such as immigration control and policing policies, were exempt from any possibility of challenge on anti-discrimination grounds.[71]

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[69] See A. Lester, "Discrimination: What Lawyers Can Learn From History", 226-7. See also M. Munroe, "The *Prestige* Case: Putting the Lid on the Commission for Racial Equality" (1985) *Anglo-American Law Review* 187, G. Appleby and E. Ellis, "Formal Investigations: The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies" [1984] *Public Law* 236.

[70] [1983] 2 AC 518 (HL). Despite a strong dissent from Lord Scarman, the majority in *Amin* recognised a distinction between the provision by public authorities of goods and services analogous to those provided by private bodies, and the performance of public functions. As the legislation did not specifically apply to this latter type of activity, the Law Lords held that public authorities were not bound by anti-discrimination legislation when performing public functions. See C. O'Cinneide, "The Race Relations (Amendment) Act 2000" [2001] *Public Law* 221.

[71] It also generated complex and largely incoherent distinctions between matters which were exempt from the legislation, and matters that fell within its scope. Tax advice from a tax officer was treated as a type of service analogous to services delivered by private bodies, and so could be subject to the legislation, while the assessment and collection of the actual taxes were public functions and so could not: see *Savjani* v *Revenue Commissioners* [1981] QB 458. Obtaining assistance from a police officer was a service covered by the legislation, but not decisions to arrest or prosecute: see *Farah* v *Commissioner of Police of the Metropolis* [1998]

In the wake of the Macpherson Report, the Race Relations (Amendment) Act 2000 extended the legislative prohibition on direct and indirect race discrimination to public authorities performing public functions, with exemptions for judicial and prosecutorial decisions, the armed forces, the intelligence services and for certain immigration and asylum functions.[72] Subsequently, the Disability Discrimination Act 2005 extended the disability discrimination legislation to cover the performance of public functions. The Equality Act 2006 makes similar provision for the sex discrimination legislation, and the prohibition on discrimination on the grounds of religious belief and sexual orientation will also be extended to the performance of public functions by this legislation. Similar exemptions for all of these grounds are established as those introduced in the Race Relations (Amendment) Act.[73] These reforms represent a significant recognition that vertical citizen-state relationships need to be subject to similar controls as horizontal relationships.

This extension of the legislation greatly expands the scope of anti-discrimination controls upon public authorities, especially as they are now subject to the full rigour of the prohibition on direct discrimination. The impact of this can be seen in *R (European Roma Rights Centre)* v *Chief Immigration Officer, Prague Airport*, where the Law Lords held that the singling-out of Roma travellers to the UK for special pre-entry clearance scrutiny constituted direct race discrimination.[74] The Law Lords rejected the Court of Appeal approach in the same case, which deviated from the standard approach to determining direct discrimination claims, and applied the legislation in its full rigour to public authorities.[75]

QB 65. See also B. Hale, "The Quest for Equal Treatment" [2005] *Public Law* 571-585, 575; A. McColgan, *Discrimination Law* (2nd ed.) (2005) 271-280.

72 See C. O'Cinneide, ""The Race Relations (Amendment) Act 2000", [2001] *Public Law* 220. Note that the UK government was initially very reluctant to extend protection against indirect race discrimination to the performance of public functions, which subsequently became the central issue in *R (Elias)* v *Secretary of State for Defence* [2005] EWHC 1435 (Admin): see below. The exceptions for immigration and asylum functions, which permit discrimination on the basis of nationality, national origin and ethnic origin if authorised by the Secretary of State, remain controversial: see A. Dunnett, *The Immigration Exception in the Race Relations (Amendment) Act 2000* (Immigration Law Practitioners Association, 2001). See also C. O'Cinneide, "The Race Relations (Amendment) Act", [2001] *Public Law* 220, 227.

73 An exception to the extension of the sex discrimination legislation permits public authorities to provide services to one sex only, while the religious belief extension exempts some narrowly defined immigration decisions from the scope of the prohibition: the exemptions for judicial and prosecutorial decisions, the armed forces, and the intelligence services are common across the grounds.

74 [2004] UKHL 55.

75 [2003] EWCA Civ. 666. In the Court of Appeal, Simon Brown LJ (as he was then) and Mantell LJ had considered that the unequal treatment of Roma travellers was not based upon their ethnic origin, but rather upon the greater statistical tendency for Roma travellers to the UK to make asylum claims: as a result, they held that no race discrimination had occurred. This reasoning disregarded the fact that the difference of treatment was triggered by membership of that particular group, and

Similarly, in *R (Elias)* v *Secretary of State for Defence*,[76] Elias J. held that the exclusion of British civilians interned by the Japanese during World War Two from an *ex-gratia* compensation scheme, unless they had been born in the UK or had a parent or grandparent born there, constituted unjustifiable indirect discrimination on the grounds of national origin, contrary to the Race Relations Act. In applying the standard justification test, Elias J. accepted that it was a legitimate aim for the government to wish to direct benefits towards British citizens with a strong link with the country. However, he considered that the method chosen to give effect to this aim was disproportionate. Alternative criteria could have been used, such as requiring a period of residence or domicile in the UK before eligibility could arise, which would have focused less upon the "racial" or "bloodline" element of citizenship, and more on whether a tangible link existed with the UK.[77]

It remains to be seen what impact the extension of anti-discrimination legislation across the other grounds to include the performance of public functions will have, and in particular what forms of justification for indirect discrimination will be accepted by the courts. The decisions in *Roma Rights* and *Elias* illustrate its potential impact. However, anti-discrimination legislation does not apply to acts done under the authority of an Act of Parliament, nor can it override other statutory provisions. By itself, it is insufficient to protect against unfair discrimination in vertical relationships. There is a need for "constitutional" equality norms that will steer the interpretation of legislation in a way that maximises protection against discriminatory impact, and provide for the possibility of judicial review challenges to state action that results in unequal treatment.[78]

Equality as a Constitutional Norm

For most of the twentieth century, equality and non-discrimination principles have not been recognised as occupying a meaningful place in the set of common law values, beyond ritual obeisance in judicial pronouncements and academic rhetoric to Dicey's concept of the formal equality of all beneath the

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therefore fell squarely within the definition of direct discrimination adopted by the Law Lords in *James* v *Eastleigh Borough Council* [1990] 2 AC 751. Rabinder Singh QC has described the approach of the majority in the Court of Appeal as attempting to introduce a defence of justification into direct discrimination when the legislation is applied to public authorities: see R. Singh, "Equality: The Neglected Virtue" [2004] *EHRLR* 141-157, 152-154. In *R (Gillen)* v *Commissioner for the Metropolis* [2006] KHL 12, Lords Hope and Brown accepted that the singling-out of individuals for searches under anti-terrorism legislation on the basis of ethnicity alone would be unlawful under the Race Relations Act. This would appear to confirm the "strict" approach applied in *Prague Airport*.

[76] [2005] EWHC 1435 (Admin)

[77] This nuanced judgment is notable for the recognition by Elias J. of how concepts of ethnic origin, national origin and citizenship are intertwined.

[78] The term "constitutional" norm is used here to describe underlying legal principles that shape the application of public law controls and the interpretation of legislation.

rule of law.[79] This meant that anti-discrimination legislation was often regarded as carving out exceptions to established common law principles such as freedom of contract and association, and should therefore be narrowly interpreted.[80] It also meant that when public authorities did take action to promote equality of opportunity, this was sometimes deemed to lack sufficient weight to out-balance other competing considerations.[81] In contrast, if public authorities introduced discriminatory measures, the lack of any form of equality principle in the common law meant that, in McCrudden's phrase, "no positive principle of opposition" existed to ground a challenge to these policies.[82]

However, Jowell in a seminal article in 1994 suggested that a series of judicial review decisions had recognised that certain forms of distinction could be considered unjust, unfair and contrary to common law values, and these decisions could be interpreted as disclosing the existence of a common law equality principle.[83] This principle had a "formal" dimension in requiring that individuals and groups in similar positions should be treated alike. However, it could also be interpreted as having a "substantive" dimension, as certain forms of differentiation as intrinsically suspect, and prevented the making of "distinctions which were not properly justified" or which "ultimately [force] the citizen to relinquish her or his sense of equal worth".[84] Jowell therefore argued for the recognition in the common law of a presumption that certain forms of unjust distinctions should not be permitted to be applied or maintained by public authorities.

Subsequent criticism suggested that that this "equality principle" was better understood as involving no more than an application of the well-established requirement that public authorities had to act rationally: again, the conceptual

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[79] See A. Lester and G. Bindman, *Race and the Law* (1972). See also the extensive critique in A. McColgan, "Discrimination Law and the Human Rights Act 1998" in T. Campbell, K.D. Ewing and A. Tomkins (eds), *Sceptical Approaches to Human Rights* (2001) 215-241, 218-224.

[80] See *Charter* v *Race Relations Board* [1973] AC 868; *Dockers' Labour Club* v *Race Relations Board* [1976] AC 285; *R* v *CRE, ex p. Hillingdon Borough Council* [1982] A.C. 779; *In re Prestige* [1984] I.C.R. 473; *Amin* remains the classic example: *Amin* v *Entry Clearance Officer Bombay* [1983] 2 AC 518 (HL). See also D. Oliver, *Common Values and the Public-Private Divide* (1999), at 208.

[81] See *Roberts* v *Hopwood* [1925] AC 578; *R.* v *Lewisham LBC Ex p. Shell UK* [1988] 1 All E.R. 938

[82] See McCrudden, "Equality and Non-Discrimination", para.11.18, p.587. See also *Ahmad* v *Inner London Education Authority* [1978] 1 All E.R. 574.

[83] J. Jowell, "Is Equality a Constitutional Principle" (1994) 7 *Current Legal Problems* 1. See in particular *Nagle* v *Feilden* [1966] 2 QB 633, where a common principle of access to work and a profession was applied so as to prevent the Jockey Club denying training licences to women. See also *Oppenheimer* v *Cattermole (Inspector of Taxes)* [1976] AC 249; however, contrast *Blathwayt* v *Cawley (Baron)* [1976] A.C. 397, *Re Lysaght (Deceased)* [1966] Ch. 191, and the scepticism expressed by Hoffmann L.J. (as he was then) in *R* v *Jockey Club, ex p. Aga Khan* [1993] 1 WLR 916 about the decision in *Nagle*

[84] Jowell, *ibid*, p.7, 18. See also T. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 *LQR* 221, 244. Jowell also suggested that the substantive element of this principle could justify a departure from sameness of treatment, where a difference of treatment was "justified in the particular case (to achieve substantive equality)". See Jowell, p.14.

quicksand that lurks beneath equality legal norms loomed.[85] Nevertheless, Jowell's analysis and terminology has been adopted by the courts. The Privy Council in *Matadeen* v *Pointu* recognised that this principle of equality in Lord Hoffmann's words was "one of the building blocks of democracy and necessarily permeates any democratic constitution. . . treating like cases alike and unlike cases differently is a general axiom of rational behaviour."[86]

This has opened the door to a new approach to the application of common law norms and legislative provisions.[87] Legislation which is not directly concerned with the prohibition of discrimination has been interpreted so as to prevent disadvantage arising as a consequence of a suspect classification, most significantly in *Fitzpatrick* v *Sterling Housing Association*.[88] In *R* v *Secretary of State for Defence ex p. Smith*, the Court of Appeal held that administrative practices which make use of discriminatory classifications have to be shown to satisfy a heightened standard of scrutiny.[89]

However, the extent of this shift remains uncertain. The scope and ambit of this equality principle remains less than clear: for example, the extent to which private law will be affected remains an open question.[90] The requirement to show that the use of suspect forms of classification satisfies the "heightened scrutiny" test may not in practice constitute a very stringent

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[85] See J. Stanton-Ife, "Should Equality Be a Constitutional Principle?" (2000) 11 (2) *King's College LJ* 133-152. McColgan has argued that in actuality, the cases relied upon by Jowell disclose no meaningful principle of equality, and "any judicial commitment to non-discrimination appears to have been honoured significantly in the breach": see McColgan, "Discrimination Law and the Human Rights Act 1998", 224.

[86] [1999] 1 AC 98, 109C, citing Rault J. in *Police* v Rose [1976] MR 79, 81 in support. See also de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 1995) (5th ed.), paras.13-036 to 13-045, pp.576-582.

[87] In *R* v *R* [1992] 1 AC 599, the House of Lords overturned the common law rule that a husband could not be prosecuted for raping his wife. For another example of this new approach, the tort of misfeance in public office has been recognised as capable of encompassing discriminatory acts: see *Thomas* v *Secretary of State for the Home Department*, QBD, 31 July 2000, *per* Buckley LJ. See also McCrudden, "Equality and Non-Discrimination", p.643.

[88] [2001] 1 AC 27. See also *Lambert* v *Lambert* [2002] EWCA Civ. 1685.

[89] [1996] QB 517, 554. See also *R* v *Secretary of State for the Home Department, ex p. Daly* [2001] UKHL 26, para.27, *per* Lord Bingham.

[90] Lord Hoffmann in *Hall* v *Simons* [2000] 3 WLR 543 described the equal treatment of those in similar categories as a "fundamental principle" of the common law (560 E-F). See also *Oppenheimer* v Cattermole [1976] AC 249, especially 277-278; D. Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999), 64. However, as yet, it is not clear to what extent equality and anti-discrimination values will be applied in common law decision-making when private parties are concerned, and in particular to what extent equality norms can be considered as part of "public policy". For an interesting discussion of this issue in the North American context, see A. Reichman, "Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination" (2001) 14(1) *Canadian Journal of Law and Jurisprudence* 79-132. See also L. Leger, "The Culture of the Common Law in the 21st Century: Tort Law's Response to the Needs of a Pluralist Society" in K. Cooper Stephenson and E. Gibson, *Tort Theory* (1993), 162.

degree of scrutiny.[91] Even the very existence of this general equality principle seems to be uncertain. In *Association of British Civilian Internees (Far Eastern Region)* v *Secretary of State for Defence*, the Court of Appeal cast doubt on whether the Privy Council had in fact recognised the existence of a common law equality principle in *Matadeen*, suggesting that Lord Hoffmann's discussion in the earlier case was best interpreted as analysing how to apply the standard *Wednesbury* irrationality approach in the context of alleged unjustified discrimination.[92]

However, in *Gurung* v *Ministry of Defence*, McCombe J. regarded the exclusion of Gurkha soldiers from the scheme of compensation payments awarded to former P.O.Ws of the Japanese as based on *de facto* racial distinctions.[93] Their exclusion was therefore held to be irrational and contrary to the common law principle of equality, which was recognised without hesitation as an integral common law norm. McCombe J. rejected the Government's attempt to rely upon a formal distinction between units of the British and Indian Armies as a purely formalistic *de jure* attempt at "fossilising rationality in its 1951 form", which "disguised" the true racial nature of the distinction.[94]

Gurung represents the most rigorous and far-reaching application of the *Matadeen* equality principle yet, and demonstrates that it can have real "bite". However, uncertainty remains as to the scope and content of this principle. Lord Hoffmann in *Matadeen* identified the problem:

> "the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not?"[95]

Lord Hoffmann therefore suggested that this underlying conceptual uncertainty meant that in many cases it was suitable for the decision as to when and how this principle should be applied to be left to the legislature. [96]

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[91] See McCrudden, "Equality and Non-Discrimination", p.611-615

[92] [2003] EWCA Civ. 473, especially paras.85-86. Following this interpretation, the Court of Appeal applied the normal *Wednesbury* irrationality test to deny the claimants relief.

[93] [2002] EWHC 2463 Admin.

[94] Notably, McCombe J. used the example of the decision in *Short* v *Poole Corporation* [1926] Ch 66, where the Court of Appeal upheld the termination of a woman teacher's employment contract by a local authority after being satisfied that her husband could maintain her, as an example of the "danger of decision-makers today adopting a 'rationality' based upon the criteria of yesterday". As McCrudden notes, this shows that what he describes as the "grounds of unacceptability" may change over time: see McCrudden, "Equality and Non-Discrimination", para.11.149, p.648.

[95] [1999] 1 AC 98, 109.

[96] See also the comments of Lord Hope in *Relaxion Group* v *Rhys-Harper plc* [2003] UKHL 33, para.78: "although discrimination on whatever grounds is widely regarded as morally unacceptable, the common law was unable to provide a sound basis for removing it. . . Experience has taught us that this is a matter which can

The lack of clarity and consensus on the proper application of equality principles does mean that a resolution of many of the issues involved has to come from the legislature, as the appropriate forum for resolving such questions. However, this need not result in total judicial paralysis in the face of equality claims. As argued above, even in the absence of complete conceptual consensus, a sufficient degree of agreement now exists that a coherent framework of equality law should form part of the legal and social fabric of Britain. Decisions such as *Gurung*, where administrative action relied upon discriminatory classifications without any real tangible justification, can be said to violate contemporary standards of due respect for equality norms. It may be difficult to define with precision the source of these standards, or exactly what behaviour they do require. However, Jowell's suggestion that it is consistent with the logic of the common law to apply a presumption against the use of discriminatory criteria is clear, coherent and in line with contemporary understanding of equality norms. It therefore can serve as an operable and useful legal concept, notwithstanding the existence of some underlying conceptual issues.[97]

Therefore, the courts should be prepared to apply this common law principle, within the limits of their constitutional role.[98] The use of common law values by the judiciary plays an important role in steering the application of legal norms, whether these norms are legislative in nature or generated through the common law. Without the recognition and application of common law equality principles, then what Lester and Bindman described as the "ethical aimlessness" of the common law may ensure that protection against discrimination will be severely limited.[99] It may even result in the triumph by default of the traditional common law emphasis upon individual and corporate autonomy, in those circumstances where legislation does not provide a clear answer.

It is also essential that the importance of this equality principle be recognised in interpreting anti-discrimination legislation, and where appropriate that a purposive interpretation be given. Anti-discrimination legislation is supposed to be the appropriate tool to prevent the use of the illegitimate distinctions. However, narrow judicial interpretation of anti-discrimination legislation, combined with its often crabbed and impenetrable drafting,[100] has often tended to reduce its impact. However, with the shift towards judicial

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only be dealt with by legislation, and that it requires careful regulation by Parliament. . . The fact is that the principle of equal treatment is easy to state but difficult to apply in practice".

97 It can once again be seen as a classic instance of Sunstein's concept of an "under-theorised" legal principle that nevertheless attracts sufficient agreement and has sufficient legal clarity to be fully operable within a legal system: see the discussion in Part One. A similar development in the case-law of the ECJ has seen equality recognised as a general principle of EC law: see Case 319/03 *Briheche* v *Ministre de l'Intérieur* [2005] 1 C.M.L.R. 4, and the opinion of Advocate-General Stix-Hackl in Case C-186/01, *Dory* v *Germany* [2003] ECR I-2508.

98 The question of what is the appropriate constitutional role of judges in developing common law values is of course a fiercely contested issue, which lies outside the scope of this paper.

99 A. Lester and G. Bindman, *Race and the Law* (1972). See also A. Lester, "English Judges as Law-makers" [1993] *PL* 269.

100 See A. Lester, "Discrimination: What Can Lawyers Learn From History", 227.

recognition of a common law principle of equality, the courts have begun to embrace a more purposive approach to the legislation. McCrudden traces the beginnings of this shift back to the early 1980s, in cases such as *Home Office* v *CRE*[101] and *Mandla* v *Lee*.[102] However, the English and Scottish courts have continued to oscillate between narrow and more purposive approaches to the legislation up to the present day.

Nevertheless, recent decisions by the Law Lords have adopted a firm preference for a purposive approach to anti-discrimination legislation, which recognises the underlying logic of the legislation and how it should favour interpretations that enhance protection against discrimination. In *Relaxion Group* v *Rhys-Harper plc*, the Law Lords applied this purposive approach in finding that the SDA, RRA and DDA could apply to the post-employment relationship.[103] In *Archibald* v *Fife County Council*, the Lords took a similar approach in finding that the obligation to make reasonable accommodation in the DDA could require employers to waive standard procedures for selecting individuals to fill posts in order to accommodate a disabled person.[104] The traditional emphasis placed in common law adjudication upon the narrow construction of anti-discrimination provisions, the maintenance of employer "merit" requirements, and the rejection of forms of special treatment for disadvantaged persons are all absent from *Archibald*. A similar purposive stance can be seen in the expansive approach adopted in interpreting the DDA definition of disability by Morison LJ in *Goodwin* v *The Patent Office*.[105]

This gradual shift offers the potential for a more principled and coherent approach to how anti-discrimination legislation is judicially interpreted. It also reduces the potential for the generation of more *Amin*-style formalist distinctions, which tend to be unsustainable and ultimately require more legislative tinkering and judicial creativity. However, it remains to be seen whether this new purposive approach will prove to be applied consistently by the courts. This shift may also not have fully percolated through to the employment tribunals, where crabbed and formalist interpretations of the legislation persist.[106]

In general, given the inherent conceptual vagueness underpinning British equality norms, it is difficult to see how a common law equality principle can be pushed much further than applying a reasonably strong presumption against unequal treatment on the grounds of suspect criteria in judicial review. Similarly, a purposive interpretative approach can only extend to favouring a reading of the legislation that advances protection against unfair discrimination where real statutory ambiguity exists. How both approaches

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101 [1982] QB 385

102 [1083] AC 548, HL. See McCrudden, "Equality and Non-Discrimination", pp.604-5.

103 [2003] UKHL 33

104 [2004] UKHL 32

105 [1999] ICR 302; for another example in the disability context, see *Collins* v *Royal National Theatre Board* [2004] EWCA Civ. 144.

106 See the *cri de coeur* by Juliette Nash in Discrimination Law Association, *Briefings 377-390*, Vol. 26, October 2005, 390: "after thirty years of European influence upon English courts, it is clear that expecting the EAT to give anything resembling a purposive interpretation to legislation is most unwise".

are applied will also be affected by the underlying conceptual uncertainty of equality norms. This will inevitably generate a degree of fluctuating case-law and alternative approaches. Pending greater agreement on salient conceptual issues, it is useful that these approaches have evolved, but their impact will inevitably vary.

The Human Rights Act

In any case, any development of the common law principle will not permit challenges to legislation that has a discriminatory impact.[107] Similarly, the cultivation of purposive approaches to interpreting anti-discrimination legislation can only go so far: no scope for manoeuvre exists when this approach comes up against the limits of the statutory language.[108] Ensuring adequate protection against denial of equal status in vertical relationships requires some mechanism for scrutinising legislation for compatibility with equality norms. As Lady Hale has suggested, "insisting the laws themselves do not discriminate" is a necessary part of any legal solution to the problems caused by prejudice and group stereotyping.[109] The Human Rights Act (HRA), by making such scrutiny possible, is therefore another step along the path of establishing a coherent and effective equality and anti-discrimination framework. In addition, the Convention rights provide a firmer basis for challenging discriminatory acts by public authorities: the proportionality standard of review to be applied under the European Convention on Human Rights (ECHR) is more rigorous and difficult to satisfy than the common law "reasonableness" standard.[110]

However, while the HRA may constitute another step towards coherence, at present it can only offer a stunted form of protection against discrimination, and its transformative impact is limited.[111] Even before the enactment of the HRA, the European Court of Human Rights had found a series of UK

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[107] There have been recent judicial suggestions that legislation may not be given effect by the courts if it violates fundamental common law norms: see Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63 *Cambridge LJ* 317-330, and the *obiter* opinions of Lord Steyn and Lord Hope in *Jackson* v *Attorney General* [2005] UKHL 56. This shift in the traditional constitutional position, described by Lord Steyn as a "different hypothesis of constitutionalism", rests on uncertain grounds: if it takes root, however, the equality principle may very well be deemed to constitute one of these fundamental values, and a breach of core anti-discrimination norms could trigger a refusal to apply the relevant legislation. It is significant that Lord Steyn cited the South African decision of *Harris* v *Minister of the Interior* 1952 (2) 428 (AD) to illustrate his argument: this case saw the South African Appeal Division block the introduction of apartheid measures.

[108] For an example, see *McDonald* v *Advocate General for Scotland* [2003] UKHL 34

[109] See B. Hale "The Quest for Equal Treatment" [2005] *PL* 571-585.

[110] See the judgment of the European Court of Human Rights in *Smith and Grady* v *UK* (2000) 29 EHRR 493. In *R* v *Secretary of State for the Home Department, ex p. Montana* [2000] EWHC Admin 421 (23rd November, 2000), the High Court considered that the common law principle of equality did not add much to the scope of art.14, and would only be considered where art.14 not applicable.

[111] S. Livingstone, "Article 14 and the Prevention of Discrimination in the European Convention on Human Rights" (1997) 1 *EHRLR* 25.

legislative and administrative acts that impacted upon particular disadvantaged groups incompatible with the Convention: the Article 8 guarantee of personal privacy had proved a particularly effective avenue of challenge.[112] However, there was no great anticipation that the HRA would have a major impact in the field of equality and anti-discrimination.[113] This was due to the well-known fact that unlike other national or international human rights instruments, the ECHR contains at present no free-standing right to equality: Article 14 of the Convention only guarantees equality of treatment in the enjoyment of other Convention rights. The Strasbourg court has held that a breach of Article 14 can be established even where there is no finding of a breach of another Convention right.[114] However, Article 14 can only be applied where the facts in question falls within the "ambit" of one or more of the other rights of the Convention, that is, when they fall within the range of issues which relate to the enjoyment of the other Convention rights.[115]

Protocol 12 to the Convention is intended to supplement Article 14 with a free-standing guarantee of equality similar to that contained in the Equal Protection Clause of the US Constitution, s.15 of the Canadian Charter of Fundamental Rights and Freedoms, and s.9 of the South African Constitution.[116] If ratified by the UK, this would open up the possibility of the British courts and the European Court of Human Rights having the ability to hear challenges on equality and non-discrimination grounds across the full range of the British legal system.[117] However, the UK government has expressed concern about the uncertain impact of Protocol 12 and how it might be applied by the Strasbourg court, and has not as yet either signed or ratified the Protocol.[118] Pending any future shift in policy, Article 14 with its circumscribed scope and inherent limitations is the only individual equality right incorporated in UK law. For now, it remains the only game in town.

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[112] *Dudgeon* v *UK* (1981) 4 EHRR 149; *Smith and Grady* v *UK* (2000) 29 EHRR 493; see also the decision by the European Commission for Human Rights in *East African Asians* (1981) 3 EHRR 76 that the use of racial or ethnic distinctions could constitute "inhuman and degrading treatment" and therefore violate art.3.

[113] See *e.g.* J. Wadham and H. Mountfield, *Blackstone's Guide to The Human Rights Act 1998* (1999), 113: "the incorporation of Article 14 into United Kingdom law is, in itself, unlikely to add much to existing anti-discrimination law."

[114] *Belgian Linguistic Case* (1979-80) 1 EHRR 252. See L. Wildhaber, "Protection Against Discrimination under the European Convention on Human Rights: A Second-class Guarantee?" (2002) 2 *Baltic Yearbook of International Law* 71.

[115] *Abdulaziz, Cabales and Balkandali* v *The United Kingdom* (1985) 7 EHRR 471, para.71.

[116] For an excellent summary of the Canadian equality jurisprudence, see M. C. Hurley, "Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions", prepared for the Law and Government Division, Parliamentary Research Branch, Canadian Parliament, August 1995, revised February 2004, available at http://www.parl.gc.ca/information/library/PRB pubs/bp402-e.htm (last accessed 15 November 2005).

[117] See U. Khan, "Protocol 12 to the European Convention on Human Rights: A Step Forward or a Step Too Far?" (2001) *Public Law* 457.

[118] For criticism of the UK's reluctance to sign and ratify Protocol 12, see N. Grief, "Non-Discrimination under the European Convention on Human Rights: A Critique of the United Kingdom Government's Refusal to Sign and Ratify Protocol 12" (2002) *E.L.Rev* 3.

However, Article 14 has not quite lived down to expectations. It has generated a considerable volume of litigation, and taken with other articles of the Convention it has generated some very significant shifts in English and Scottish law. In particular, cases such as *Ghaidan* v *Mendoza*,[119] *Westminster City Council* v *Morris*[120] and *A* v *Secretary of State for the Home Department*[121] have seen discriminatory distinctions which were deeply embedded in legislation found to be incompatible with the Convention. The picture however is not all positive. While results have been mixed, it is clear that the courts are still struggling with Article 14, and the case-law that has emerged thus far has again been less than coherent.

Partially, this lack of coherence is the product of the skimpy Strasbourg case-law on Article 14. The European Court of Human Rights has historically tended to shy away from the complexities of Article 14, preferring instead to base its decisions on other articles of the Convention.[122] The basics of the Court's approach to Article 14 have been in place since the *Belgian Linguistics* decision.[123] However, until recently, the Strasbourg case-law on Article 14 was thin on the ground. The British courts have had to fill in the gaps themselves, but their response has been cautious and perhaps excessively timid: this again perhaps is a reflection of the "under-theorised" nature of equality norms.

While a comprehensive analysis of the Article 14 must await another paper, some of the salient features of the case-law will be highlighted to demonstrate this. In the Court of Appeal decision of *Wandsworth LBC* v *Michalak*,[124] Brooke L.J. set out a framework for approaching Article 14 issues, framed in terms of a four stage test:

1) Do the facts fall within the ambit of one or more of the Convention rights?

2) Was there a difference in treatment in respect of that right between the complainant on the one hand and others put forward for comparison (the "chosen comparators") on the other?

3) Were the chosen comparators in an analogous situation to the complainant's situation?

4) If so, did the difference in treatment have an objective and reasonable justification. . . ?[125]

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[119] [2004] UKHL 30.
[120] [2005] EWCA Civ. 1184.
[121] [2004] UKHL 56.
[122] See, *e.g.* the decision in *Lusting-Prean* v *UK* (2000) 29 EHRR 548, where the case was decided on the art.8 arguments, with the Court finding that the art.14 arguments did not require analysis: see para.108.
[123] (1979-80) 1 EHRR 252. See also *Rasmussen* v *Denmark* (1984), para.38.
[124] [2003] 1 WLR 617, 625, para.20.
[125] Lord Steyn in *R (S)* v *Chief Constable of South Yorkshire* and *R (Marper)* v *Chief Constable of South Yorkshire* inserted an extra question between stages two and three: was the difference in treatment based on one or more of the proscribed grounds under art.14? See [2004] UKHL 39, para.42.

The *Michalak* test was applied in subsequent Article 14 cases. However, in *R* v *Secretary of State for the Home Department*, *ex p. Carson*, the House of Lords departed from the *Michalak* test, and adopted a less rigid approach.[126] This recognised that the question of whether persons could genuinely be said to be in similar positions could be linked to the question of whether the difference of treatment was justified.[127] The Law Lords went on to state that the use of certain grounds of differentiation, such as race and gender would have to satisfy a very high threshold of justification. The use of other grounds, such as age (the ground at issue in *R* v *Secretary of State for Work and Pensions*, *ex parte* Reynolds, a case joined with *Carson*), would face a lower level of scrutiny.[128]

The recognition in *Carson* that "suspect" forms of classification should face very stiff scrutiny is welcome, and reflects the approach taken by the Law Lords in *Ghaidan* v *Mendoza* with regards to distinctions on the basis of sexual orientation.[129] However, some problems remain. As Baker has argued, the courts in applying Article 14 have tended to let considerations that should go to whether a measure is objectively justified "contaminate" the earlier stage of the test that focuses upon whether persons treated differently are in similar positions, and in contrast are slow to apply the objective justification in its full rigour. This approach can let unchallenged assumptions about the characteristics of individuals and groups seep into the Article 14 analysis.[130] There has also been a tendency in the case-law to focus on the *legislative purpose* for the measure in question, as opposed to its actual *effects*: concentrating just upon the legitimacy of the formal classification used can gloss over its actual impact.[131]

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126 [2005] UKHL 37.

127 Brooke L.J. in *Michalak* had himself described the test as "only a framework", recognised that the different stages of the test could overlap, and emphasised that "there may sometimes. . . be a need for caution about treating the four questions as a series of hurdles, to be surmounted in turn".

128 In *Carson* itself, a difference of treatment in pension provision, based upon the fact that the applicant was residing outside of the UK, was held to require only a very low level of justification. The Lords considered that wide leeway should be given to public authorities when it came to the use of geographical and other "non-suspect" criteria, especially where social provision is involved. See also *R (Hooper)* v *Secretary of State for Works and Pensions* [2005] 1 WLR 1681, where considerable leeway was given to the government in adjusting pension arrangements, even where sex discrimination was involved. See also *Secretary of State for Work and Pensions* v *M* [2006] UKHL 11 for similar reasoning.

129 See Lord Nicholls's comments in *Ghaidan*, [2004] 2 AC 557, especially at para.9. See also the Court of Appeal decision in *Secretary of State for Work & Pensions* v *M* [2004] EWCA Civ. 1343.

130 See A. Baker, "Article 14: A Protector, Not a Prosecutor", in H. Fenwick, G. Phillipson and R. Masterman, Judicial Reasoning and the Human Rights Act 1998 (2006). See also A. McColgan and H. Hill, "The New Equality Bill", paper prepared for the JUSTICE conference, London, October 2005, p.13.

131 See A. McColgan and H. Hill, "The New Equality Bill", paper prepared for the JUSTICE conference, London, October 2005, p.13. The Court of Appeal decision in *R (A)* v *Secretary of State for the Home Department* [2004] QB 335 illustrates this point well: the Court accepted that the formal distinction between nationals and non-nationals was sufficient to justify the difference in treatment, instead of analysing, as the Law Lords did subsequently, whether the effect of the measure

In contrast, the Strasbourg court in its case-law has shown an increasing readiness to concentrate upon the objective justification stage, and to examine the effects of measures, rather than just the formal classifications used.[132] Similarly, the Strasbourg court has been much more ready to accept that an issue falls within the ambit of a Convention right than have the British courts.[133] The HRA case-law has adopted a very restrictive approach to defining the scope of the ambit of Convention rights.[134] Again, however, recent Strasbourg case-law has adopted a much more generous approach to defining the ambit of Convention rights. In *Sidabras and Dziautas* v *Lithuania*, the ECHR considered that the imposition of restrictions upon individuals taking up employment in the private sector could come within the ambit of Article 8, and therefore Article 14 could be triggered.[135] In the admissibility decision of *Stec* v *UK*, the Grand Chamber of the European Court of Human Rights held that non-contributory benefits did come within ambit of Article 1, Protocol 1, contradicting earlier British case-law.[136] This looser application of the ambit test may actually be eroding the gap that Protocol 12 was intended to fill, and the extent of the gap now in the wake of *Sidabras* and *Stec* remains unclear. The British courts are also very restrictive in defining the scope of "other status" grounds under Article 14: again this seems very difficult to reconcile with the Strasbourg jurisprudence.[137]

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in singling-out a particular group for discriminatory treatment was justified. See R. Singh, "Equality: The Neglected Virtue" [2004] *EHRLR* 141-157.

132 See *Thlimmenos* v *Greece* (2000) 29 EHRR 162.

133 Partially, this reluctance on the part of the UK courts is due to the vagueness of the ECHR case-law on this point. For example, see the vague attempt to define the ambit of a right in *Petrovic* v *Austria* (1998) 4 BHRC 232, para.28: "the subject matter of the disadvantage. . . constitutes one of the modalities of the exercise of a right guaranteed", or the measures complained of are "linked to the exercise of a right guaranteed".

134 In *Association of British Civilian Internees (Far Eastern Region)* v *Secretary of State for Defence* [2003] EWCA Civ.473, the right to property in art.1 of Protocol 1 was given a narrow ambit, a stance that continued to be reflected in subsequent case-law, especially where non-contributory welfare entitlements were concerned. See Lord Hoffmann's views in *Carson*, para.12, and the agonising of the High Court and Court of Appeal at earlier stages of *Carson* and *Reynolds* as to whether either case came within the ambit of art.1, protocol 1. For other examples of restrictive ambit decisions, see also *R (Douglas)* v *North Tynesside MBC* [2003] EWCA Civ.1847, *Whaley* v *Lord Advocate* [2004] SLT 425, *Adams* v *Scottish Ministers* [2003] SLT 366.

135 Mantouvalou has suggested that this decision shows that the Strasbourg court "feels more competent to tackle discrimination". See V. Mantouvalou, "Work and Private Life: *Sidabras and Dziautas* v *Lithuania*" (2005) 30(4) *ELR* 573, 581-82.

136 Application nos. 65731/01 and 65900/01, judgment of 5th September 2005.

137 See the view of Lord Steyn that "other status" grounds should only include forms of distinction that closely resemble or which are closely analogous to the express grounds in art.14 such as race and sex, expressed in *R (S)* v *Chief Constable of South Yorkshire* and *R (Marper)* v *Chief Constable of South Yorkshire* [2004] UKHL 39, para.48. In *Countryside Alliance* v *Attorney-General* [2005] EWHC 1677 Admin., it was held that the singling-out of fox-hunting for prohibition was not discrimination based upon a status that would come within art.14. This appears difficult to reconcile with the more expansive current Strasbourg approach to defining what distinctions can come with "other status": see

The evolution of the Strasbourg case-law is therefore deviating from the approach adopted by the British courts, by giving freer rein to the transformative potential of Article 14 and being more willing to apply the justification test.[138] Once again, the expansion of equality and anti-discrimination norms has progressed in fits and starts, and has required extra propulsion from a more expansionist approach adopted by a European court. However, recent decisions, including *A* and *Westminster City Council* v *Morris*, have seen the British courts more willing to apply close scrutiny at the reasonable justification stage to the substantial effects of the measure in question, and to query formal legislative rationales for differences in treatment. In *Morris*, Sedley L.J. in his rigorous leading judgment adopted an expansive approach to defining the ambit of Article 8, and focussed upon the impact of the measure in question rather than its formal rationale.[139] In *Francis*, the Court of Appeal held that "administrative convenience cannot in itself be a sufficient reason for discrimination", again refusing to accept the use of formal classifications that generate discriminatory impact without clear justification.[140]

Again, a gradual fumbling towards a coherent, principled and consistent approach is discernable, which recognises the transformative dimension of rights adjudication. Complexities and uncertainties remain. The extent to which Article 14 will impact upon forms of indirect discrimination remains unclear, as is its potential interpretation in challenges to forms of positive action, the extent of the positive obligations which it imposes, and what horizontal effect may be given to it via the HRA. Other uncertainties also arise with respect to other Convention rights and their potential application in equality and anti-discrimination contexts. For example, the ECHR in *Connors* v *UK* recognised that states may be obliged to make special provision for the travelling community to comply with their positive

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Chassagnou and Others v *France* (2000) 29 EHRR 615. See also the very questionable decision by J. Newman in *Hopkins* v *Secretary of State for Defence* [2004] EWHC 299 (Admin) that discrimination on the grounds of length of time of cohabiting status was not discrimination on "status" grounds under art.14. See however the more open approach by the Court of Appeal in *Francis* v *Secretary of Sate for Work and Pensions* [2005] EWCA Civ. 1303 to what constitutes "personal status".

138 However, see the extremely cautious and poorly reasoned decision in *OH* v *Czech Republic* [2006] ECHR 113 for an indication that the Strasbourg Court also suffers at times from timidity in this area.

139 Rather than becoming embroiled in close analysis of the exact ground of distinction that the legislation in question made use of, Sedley LJ considered that "the attempt to isolate. . . a single ground operative ground of distinction may be a search for a mare's nest", and that it was "more consonant with the purpose of Article 14. . . to address the complex [of factors] itself". See *Morris*, paras.50-52. He went on to find that the identification of the precise ground for the difference in treatment was not critical, as the lack of firm justification for the legislative provision meant that its discriminatory effect could not be excused, irrespective of the precise differential factor at issue. See paras.35-36. See also the judgment of the Court of Appeal in *Secretary of State for Work and Pensions* v *M* [2004] EWCA Civ. 1343, in particular Sedley L.J.'s comments at para.59.

140 *Francis* v *Secretary of State for Work and Pensions* [2005] EWCA Civ. 1303.

obligations to uphold Convention rights:[141] the Court of Appeal in *First Secretary of State* v *Chichester District Council* took a similar approach,[142] but the Court of Appeal in *Price* v *Leeds* has expressed concern that this trajectory the ECHR case-law is incompatible with earlier approaches by the House of Lords.[143] The decision of the Law Lords in *Leeds* v *Price* [2006] UKHL 10 has left some of these issues unresolved. A very interesting question arises as to when the courts may be prepared to find that discrimination constitutes "inhuman and degrading treatment" under Article 3. In *R (Gezer)* v *Secretary of State for the Home Department*, the Court of Appeal was unwilling to find a breach by the state of its positive obligation to refrain from exposing individuals to degrading treatment contrary to Article 3, where an asylum-seeker had suffered from severe racial abuse when moved to a Glasgow housing estate as part of the asylum-seeker dispersal programme.[144]

The potential impact of the Act therefore remains uncertain, and it is still bedding-down. There should be no false expectations about the extent of change the Act will bring about.[145] Rights review rarely advances too far ahead of prevailing social norms and expectations.[146] However, by opening up new possibilities of challenging discriminatory barriers, the Act imposes pressure upon public authorities to justify the maintenance of these barriers. Exposure to this demand for justification can expose the lack a rational basis or real justification, even when case-law might incline towards complacency.[147] The existence of the possibility of rights review also forces public bodies (including Parliament) to factor in the possibility of rights

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[141] [2004] ECHR 223 (27 May 2004). For an analysis of the scope of positive obligations under the ECHR in general, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[142] [2004] EWCA Civ. 1248. See also *Clarke* v *Secretary of State for the Environment* [2001] EWHC Admin 800.

[143] [2005] EWCA Civ. 289.

[144] [2004] EWCA Civ. 1730. The European Court of Human Rights has recognised that singling out of particular groups on the basis of their racial or ethnic origin can constitute degrading treatment in violation of art.3: see *Moldovan* v *Romania* (Application Nos. 41138/98 and 64320/01, unreported, 12 July 2005, *East African Asians* v *UK* (1973) 3 EHRR 76.

[145] See A. McColgan, "Discrimination Law and the Human Rights Act 1998" in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *Sceptical Approaches to Human Rights* (2001) 215-241; by the same author, "Women and the Human Rights Act" (2000) 51(3) *Northern Ireland Law Quarterly* 417; also *Women Under The Law: The False Promise of Human Rights* (1999).

[146] See R. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279; see also M. Tushnet, *Taking the Constitution Away from the Courts* (1999) 153.

[147] Many arguments that suggest that rights instruments such as the Human Rights Act are largely incapable of generating meaningful social change are based upon assumptions about the inherent conservatism of the English and Scottish judiciary *en bloc*, or the limits of adversarial litigation: see, *e.g.* K. Ewing, "The Futility of the Human Rights Act" (2004) *Public Law* 829-852. Such accounts however often neglect the positive impact of the shifting legal dynamics that can be triggered by the coming into effect of a rights instrument such as the Human Rights Act.

review into their thinking, generating a form of "rights orientation" that can yield positive results.[148] It also opens up new terrain for legal activism, if campaigners employ the language and tools of rights review with an awareness of their limitations and the possibility of backfire.[149]

As with the common law approaches discussed above, the application of the HRA will inevitably fluctuate to a degree, in light of the uncertainty as to the underpinning equality principles. Nevertheless, the HRA is a crucial building block in the establishment of a framework of equality law that can apply to vertical relationships, along with the extension of anti-discrimination legislation to the performance of public functions and the development of the common law equality principle. Taken together with the slow shuffle towards comprehensive anti-discrimination legislation, something approximating a coherent framework of equality and anti-discrimination law is gradually emerging in Britain.

Part Four: Positive Action and the Limits of Anti-Discrimination Legislation

However, the extent to which this new framework can deliver on the transformative and inclusive ambitions of equality norms remains uncertain. Even a genuinely transformative instrument such as the HRA is limited in its field of application and in what it can achieve. Combined with a coherent anti-discrimination legislative framework and the development of common law equality norms, it may prevent the expression or manifestation of particular forms of prejudice by public authorities. However, it will often be of limited effect in altering underlying structural norms of subordination, as will anti-discrimination legislation in general.[150]

The problem is that institutional forms of exclusion that cannot be readily classified as "discriminatory" tend to slip beneath the radar of equality and anti-discrimination laws.[151] The findings of the Macpherson Report

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[148] For this concept of "rights orientation", see C. O'Cinneide, "Democracy and Rights: New Directions in the Human Rights Era" [2004] 57 *Current Legal Problems* 175-211.

[149] See J. Conaghan and S. Millns, "Gender, Sexuality and Human Rights" (2005) 13 *Feminist Legal Studies* 1-14; S. Millns, "Gender Auditing the Human Rights Act 1998" (2005) 8(1) *International Journal of Discrimination and the Law* 75-90; S. Palmer, "Feminism and the Promise of Human Rights: Possibilities and Paradoxes" in S. James and S. Palmer (eds.), *Visible Women* (2002), 92; L. Schwartzman, "Liberal Rights Theory and Social Inequality: A Feminist Critique" (1999) 14 (2) *Hypatia* 26-47

[150] See S. Fredman, *Discrimination Law* (Oxford, OUP, 2001), 163-168; C. McCrudden, "Anti-Discrimination Goals and the Legal Process" in N. Glazer and K. Young (eds.) *Ethnic Pluralism and Public Policy* (1983); B. Hepple, "Judging Legal Rights", 33 *Current Legal Problems* (1983) 71. See also G. Bownes, *Snakes and Ladders: Advice and Support for Discrimination Cases in Wales* (Cardiff; EOC, 2003). The effect of equality legislation may often be to confine the expression of prejudice within certain tolerated spheres or within 'coded' language, rather than to shift social attitudes.

[151] Such practices are often made to appear positively acceptable, as they are outside the legally established definition of discrimination. See N. Lacey, "From Individual to Group", in B. Hepple and E. Szyszczak, *Discrimination: The Limits of the Law* (1992), pp.102-3.

demonstrated that even the comparatively well-developed race relations legislative framework was having little impact upon the persistence of forms of "institutional racism" in the Metropolitan Police.[152] No obligation exists for employers or service providers to take anticipatory action to alter practices and policies that may disadvantage particular groups, with the exception of the reasonable accommodation obligations imposed by the Disability Discrimination Act. This means that structural inequalities and oppressive power relations often remain unchallenged and unaltered.

This could be seen as demonstrating the inevitable limits of what legal norms can achieve by way of social transformation: if structural forms of exclusion are to be broken down, then other forms of policy initiatives will have to be adopted. However, attempts have been made to extend the "classical" framework of equality and anti-discrimination law in an attempt to overcome these limits. In the United States, Owen Fiss, Jack Balkin and others have argued for a shift from an emphasis upon "anti-classification" approaches (*i.e.* using anti-discrimination law to prohibit any use of discriminatory criteria), to an "anti-subordination" approach, which would place the need to eliminate the "subordinate" status of disadvantaged groups at the centre of equality law.[153] Fredman has similarly called for the adoption of "fourth generation" positive action approaches, which would make the removal of obstacles to full and equal participation by disadvantaged groups in society one of the central guiding principles of equality law.[154] In essence, the argument is being made that the transformative aspirations of equality norms need to be directed towards the elimination of forms of group disadvantage. The "social inclusion" approach described by Collins also would involve the adoption of a similar approach.

Mainstreaming and Positive Duties in the Public Sector

A focus upon social inclusion can be clearly seen in the government's community cohesion strategies and its emphasis upon "outreach" to neglected social groups in education, health and welfare policies.[155] Mainstreaming has been used in Britain since the early 1990s to encourage the implementation of transformative equality strategies in the public

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[152] Macpherson *et al*., *The Stephen Lawrence Inquiry* (1999).

[153] See O. Fiss, "Groups and the Equal Protection Clause", in M. Cohen, T. Nagel and T. Scanlon (eds.) *Equality and Preferential Treatment* (1977), 85; see also J. Balkin and R. Siegel, "The American Civil Rights Tradition: Anticlassification or Antisubordination?" 58 *U. Miami L. Rev* 9 (2004).

[154] See Fredman, *Discrimination Law*, pp.14-22, 128-129. See also S Fredman, "Equality: A New Generation?" (2001) 30 *ILJ* 163; B. Hepple and C. Barnard, "Substantive Equality" (2000) 59 *CLJ* 566.

[155] Interestingly, the argument that government should not as a matter of principle concern itself with this form of social engineering is now rarely made, even by the Conservative Party: in Britain at least, when it comes to issues of state intervention to combat social exclusion, Nozick and Hayek have become cautionary voices counselling against over-enthusiastic state regulation, rather than prophets of an absolutist creed of non-intervention. However, see the comments by Baroness O'Cathain, H.L. Deb., Vol. 674, col. 779, 9 November 2005, citing the Bishop of Winchester.

sector.[156] However, the effectiveness of mainstreaming mechanisms has proved mixed: positive developments in Scotland and Wales have not always been paralleled in England.[157] A major problem with mainstreaming policies is that they are "soft law" initiatives: as mainstreaming initiatives are not legally enforceable duties, implementation of effective mainstreaming is usually dependant upon political good-will, organisational capacity, sustained leadership and expert advice.[158] In the absence of this, initiatives tend to be at the best procedure-orientated, and at the worst lapse completely, a problem exacerbated by the lack of clarity as to what equality principles should ultimately be applied. [159]

These defects have resulted in a series of attempts to beef up monitoring procedures for ensuring compliance with mainstreaming guidelines. At EU level, the provision of structural funds is linked to evidence of gender mainstreaming, while the Scottish Parliament and Welsh Assembly have introduced parliamentary scrutiny of how mainstreaming is being implemented in practice. Similar measures have been lacking in England and at Westminster level.[160] Nott has argued that the lack of any clear role for the new CEHR in promoting effective mainstreaming represents a serious wasted opportunity.[161] Despite its considerable promise, mainstreaming has only really taken root in Wales and Scotland, where fertile political soil exists for it to put down roots: in the perhaps more hostile political climate of England, results have been less good.[162]

This has prompted the introduction of a series of legally binding positive duties upon public authorities since 1998. Following the introduction in that year of the section 75 positive equality duty in Northern Ireland, less intense versions of this duty were imposed upon the Welsh Assembly and Greater London Assembly.[163] In the wake of the Macpherson Report, and following

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156 See M. Pollack and E. Hafner-Burton, "Mainstreaming Gender in the European Union" (2000) 7 *Journal of European Public Policy* 3, 432-457; T. Rees, *Mainstreaming Equality in the European Union* (1998); S. Nott, "Mainstreaming Equal Opportunities: Succeeding Where All Else Has Failed?" in A. Morris and T. O'Donnell (eds.) *Feminist Perspectives on Employment Law* (1999) 203.

157 See S. Nott, "Securing Mainstreaming in a Hostile Political Environment" [2005] 8(1) *International Journal of Discrimination and the Law* 121.

158 See the conclusions reached in a recent National Audit Office report: National Audit Office, *Delivering Public Services to a Diverse Society* (2004). See also G. Mills, "Combating Institutional Racism in the Public Sector" (2002) 31 *ILJ* 96-98. Maria Stratigaki has argued that at the level of the EU institutions, the adoption of mainstreaming measures is often used to neutralise or defer the adoption of other forms of positive action measures. See M. Stratigaki, "Gender Mainstreaming Vs Positive Action" (DATE) 12(2) *European Journal of Women's Studies* 165–186.

159 J. Rubery *et al*, "The Ups and Downs of European Gender Equality Policy", (2004) 35 *Industrial Relations Journal* 603. See also F. Mackay and K. Bilton, *Learning From Experience: Lessons in Mainstreaming Equal Opportunities* (2003).

160 See S. Nott, *ibid.*

161 See S. Nott, "Securing Mainstreaming in a Hostile Political Environment".

162 *ibid.*

163 These duties are much more vague in content than the Northern Irish duty, and lack any real enforcement mechanism aside from judicial review: however, as they have again fallen on fertile political soil, these duties have had some impact,

political pressure from the CRE and ethnic minority organisations, a much stronger positive race equality duty was imposed on listed public authorities in the Race Relations (Amendment) Act 2000. This considerably extended the largely ineffective duty originally imposed upon local authorities by s. 71 of the Race Relations Act 1976.[164] A disability duty has been imposed upon public authorities in general (defined in a similar manner as in the Human Rights Act) in the Disability Discrimination Act 2005, while a positive duty for the gender ground is to be introduced in the Equality Bill 2005.[165] The Scottish Parliament, having a power under Schedule 5 of the Scotland Act 1998 to encourage equal opportunities, has imposed duties on several types of devolved authorities.[166]

Positive duties impose a statutory duty on public authorities to give "due regard" to eliminating unlawful discrimination, and to promoting equality of opportunity in the performance of their functions. To supplement these general duties, additional specific duties are also imposed by statutory instruments introduced by the relevant Secretary of State.[167] At present, these specific duties can be enforced by the relevant equality commissions, who are given special investigatory and enforcement powers to issue compliance notices. The CEHR is to be given extended powers to investigate and enforce compliance with both the general and the specific duties.[168] The introduction of positive duties is therefore an ambitious attempt to make equality issues a core concern for public authorities, and through this to encourage the transformation of existing practices.[169]

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in particular the Welsh duty: see P. Chaney and R. Fevre, *An Absolute Duty: Equal Opportunities and the National Assembly for Wales* (2002).

164 See C. McCrudden, "Equality and Non-Discrimination", paras.11.189-11.191, pp.663-4.

165 See C. O'Cinneide, "Positive Duties and Gender Equality" [2005] 8(1) *International Journal of Discrimination and the Law* 91-119; by the same author, "A New Generation of Equality Legislation? Positive Duties and Disability Rights", in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe* (2005) 219-247.

166 See C. O'Cinneide, *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality* (2003), Part V.

167 These specific duties impose obligations upon public authorities to formulate and publicise their methods of complying with the duty, and to collect the necessary data by means of consultation and monitoring to enable them to assess the "equality impact" of their policies and practices.

168 Audit bodies, such as the Audit Commission, the public sector inspectorates and other regulatory agencies, are also expected to monitor how both the general and specific duties are being implemented, and judicial review can also be used to enforce compliance.

169 Some of the tools of "new public management", such as auditing mechanisms, monitoring requirements, and a steering duty, are combined together with neo-republican and democratic-participative aspirations within the positive duty mechanism. See O'Cinneide, "Positive Duties and Gender Equality". The potential impact of these duties has lead to calls for their scope to be extended beyond the equality context to the full range of human rights. See G. McKeever and F. Ni Aoláin, "Thinking Globally, Acting Locally: Enforcing Socio-Economic Rights in Northern Ireland" [2004] *EHRLR* 158. For a more sceptical perspective, see C. McCrudden, "Mainstreaming Human Rights", in C. Harvey (ed.) *Human Rights in the Community: Rights as Agents for Change* (2005).

The duties are however limited in certain important respects. The duties are supposed to "steer" how other duties and functions are performed: equality concerns are to be given their due proportionate weight in decision-making.[170] However, this by itself gives little guidance as to how important promoting equality of opportunity should be, or when equality considerations can be overridden by other policy considerations, or what constitutes promoting equality of opportunity in the first place.[171] There is also a danger that public authorities may relapse into formal equality approaches, or level-down the delivery of public services in response to an identification of adverse impact.[172] Once again, the lack of underlying agreement on what equality principles should govern public policy generates an inevitable lack of clarity: positive duties may encourage an analysis of what steps should be taken to promote equality, but do not specify what vision of equality should be applied, leaving the door open to public authorities to apply the vision they choose to prioritise.

Adherence to the duties could also just take the form of "process compliance", where authorities treat the duty as merely involving complying with a set of bureaucratic "tick-box" requirements. Verloo has suggested that mainstreaming has to "resonate" with the existing assumptions, rhetoric and practices within which public authorities work.[173] This could equally also apply to positive duties. There is therefore a danger that the duties may become no more than a technocratic tool in policymaking, which can be readily co-opted to maintain existing practices.[174] Their transformative potential may thus prove to be nominal. Nott has also suggested that the duties can be interpreted as only requiring an initial consideration of what policies are directly relevant to equality concerns, and an assessment of the impact of *those policies alone*. In contrast, a full mainstreaming approach would require equality considerations to be built into *all policies*.[175]

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[170] Fredman, *Discrimination Law*, 180.

[171] In an important judgment in *R (Elias)* v *Secretary of State for Defence* [2005] IRLR 788, Elias J. held that a failure to consider whether a particular policy raised issues relating to racial equality, or to assess whether any adverse impact was possible, or to consider what steps might be necessary to eliminate any negative impact, would breach the duty. This gives some "teeth" to the duty, but does not clarify how an authority is to balance competing considerations.

[172] See O'Cinneide, "Positive Duties and Gender Equality", 104.

[173] M. Verloo, "Another Velvet Revolution? Gender Mainstreaming and the Politics of Implementation", *IWM Working Paper*, No.5/2001 (2001), 9-10; available at: http://www.iwm.at/publ-wp/wp-01-05.pdf (last accessed 5 October 2005).

[174] See also N. Lacey, "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" (1987) 14 *Journal of Law and Society* 411-21. Maria Stratigaki has argued that at the level of the EU institutions, the adoption of mainstreaming measures is often used to neutralise or defer the adoption of other forms of positive action measures. See M. Stratigaki, "Gender Mainstreaming Vs Positive Action", 12(2) *European Journal of Women's Studies* 165–186.

[175] See S. Nott, "Securing Mainstreaming in a Hostile Political Environment", pp.126-130. Nott cites the Department of Trade and Industry's race equality scheme as adopting this narrow filtering approach to the duty. She also highlights the weakness of the enforcement mechanisms for the duty: see also O'Cinneide, "Positive Duties and Gender Equality", pp.104-06. Elias J. in *Elias* appeared to accept that the duty to promote equality of opportunity only applied to policies that were directly related to equality and anti-discrimination concerns, confirming

The duties are therefore far from being an ideal mechanism for ensuring the adoption of anti-subordination approaches on the part of public authorities. However, their existence enables the equality commissions to investigate the failure of public authorities to take positive steps to eliminate discrimination and promote equality of opportunity.[176] In addition, the duties have considerable symbolic and educative potential. The duty mechanism recognises that unconscious, structural or institutional forms of discrimination exist, and that it is a core responsibility of public authorities to take steps to minimise these forms of inequalities.[177] They also can serve as useful "pressure points" to demand greater focus upon equality issues from public authorities: authorities can be called to account for how they have complied with the duty, and pressed to demonstrate progress.

The existence of the duty can also *enable* public authorities to take proactive measures designed to promote equality of opportunity. In the past, the *absence* of a specific duty to promote equality of opportunity has meant that public authorities have often lacked a clear statutory authority for implementing equality policies.[178] The introduction of positive duties now partially overcomes this problem. The duties will also have an impact upon how authorities perform *other* statutory duties: they can justify the placing of considerable weight on equality considerations in deciding how to perform other duties and functions.[179] The duties can thus both serve to *steer* and to

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Nott's fears. The intent and wording of the duties does not necessarily support this approach: however, in the absence of real clarity as to what the duties require, Elias J.'s *obiter* opinion illustrates the risk that the scope of the duties will be interpreted and applied narrowly.

176 The important decision of the Northern Ireland High Court in *The Matter of an Application by Peter Neill for Judicial Review* [2005] NIQB 66 confirmed that the Equality Commission for Northern Ireland (ECNI) had the power under its investigatory function conferred by the s.75 duty to find that the positive equality duty had not been sufficiently complied with by the Northern Ireland Office in considering the equality impact of its decision to extend the legislation permitting the issuing of ASBO orders to Northern Ireland. The powers of the British equality commissions and the CEHR in respect of the British duties are similar to that of the ECNI, so this decision should also confirm the ability of the British commissions to make similar findings.

177 The existence of a duty may also serve to compel authorities to adopt equality initiatives even where the perception exists that inequality is no longer a "real problem": for the dangers associated with this perception, see D. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change" (1991) 100 *Yale LJ* 1731.

178 See P. E. Morris, "Legal Regulation of Contract Compliance: An Anglo-American Comparison" (1991) 19 *Anglo-American Law Review* 87-144, especially at 93-103. The s.71 duty on local authorities to promote race equality, while limited in impact, did give local authorities some legal basis for funding race equality councils and some scope for the insertion of race equality clauses into procurement contracts: *ibid.,* 93-121. However, the extent and enabling impact of this remained very uncertain: see *Wheeler* v *Leicester City Council* [1985] 1 A.C. 1054 and *R* v *Lewisham L.B.C., ex parte Shell (U.K.) Ltd.* [1988] 1 All ER 938.

179 For an interesting example of the possible impact of the duty, see the Local Government Information Unit (LGiU) briefing, *Election Meetings: Use of School and Community Premises* (London: LGiU, 29th March 2004), and CRE, *Elections and the Duty to Promote Race Equality* (2004). However, note that the L. Gill

enable public authorities to adopt policies based upon concepts of substantive equality, even if they cannot dictate with any real precision the exact contents of these policies. Therefore, the duties may have genuine potential as transformative instruments, despite their uncertain scope and inherent limitations.[180]

However, the introduction of a comprehensive scheme of positive duties will not be enough in itself to establish an adequate equality and anti-discrimination framework for the British public sector. Positive duties can orient how public authorities exercise their powers and functions within the existing statutory framework, but cannot overcome or modify statutory restrictions on what public authorities can do, or resolve debates about core issues of principle. Finally, their effect is confined to the public sector: the shrinking sphere of public authority activity means that the impact of the duties is confined to this narrowing sphere.[181]

Transformation and the Private Sector

Taking measures to combat disadvantage could be required in the private sector. The Hepple Report recommended that positive duties be imposed upon employers to take measures to promote equality of opportunity in their employment practices.[182] The employment equity legislation in Northern Ireland imposes similar obligations upon private sector employers, and has had reasonable success.[183] Similar measures in Canada have also generated some useful results.[184] The imposition of such positive duties in the private

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has altered its guidance on the impact of the duty: see L. Gill, *Guidance Update use of Public Premises at Election Time* (2005).

180 The Northern Irish equality duty does extend across the full range of equality grounds. Certain complexities exist in framing such cross-ground duties, but these are not insurmountable with careful design, and therefore a set of cross-ground duties could also be introduced in Britain. See O'Cinneide, *Taking Equality of Opportunity Seriously*, Part V.

181 However, the duties apply to all functions of public authorities, including those that they choose to contract out: the responsibility for complying with the duty requirements remains with the authority, which means that the duties may have some impact even in areas marked by extensive contracting-out of service delivery and other functions. See O'Cinneide, *Taking Equal Opportunities Seriously*, Part V See also CRE, *Statutory Code of Practice on the Duty to Promote Race Equality* (2002).

182 The Report suggested that employers should be required to undertake a three-year periodic review of employment procedures, and, in the event of the discovery of significant under-representation of particular groups, obligated to take reasonable remedial action by means of an employment equity plan. See the Hepple Report, para.3.37. Employers with 10 or more employees would also be required to carry out a similar three-yearly periodic pay audit and take appropriate action via a pay equity scheme where discrepancies were identified. See paras.3.41-3.50.

183 See C. McCrudden, R. Ford, A. Heath, "Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment" (2004) 24 (3) *OJLS* 363-415.

184 See the Canadian Employment Equity Act 1986, revised and extended in late 1995, and at provincial level, the Ontario Equal Pay Act 1987 and the Quebec Act Respecting Equal Access to Employment in Public Bodies 2000, c.45, s.1. Moderate gains have been identified from the implementation of these positive duties, which have been criticised as lacking adequate breath of application and a sufficiently rigorous set of enforcement mechanisms. See C. Agocs, "Canada's

sector could play a role in breaking down structural forms of discrimination, if adequate enforcement is introduced with due respect for the need to avoid excess bureaucracy.[185] Another possible reform could involve the introduction of a cross-ground set of "reasonable accommodation" requirements into British anti-discrimination law. Disability discrimination legislation imposes an obligation to take special measures to facilitate the needs of disabled persons in accessing services and in employment: this legislative obligation to take positive measures is capable of being transplanted to other equality grounds.[186] Contract compliance mechanisms, whereby public authorities require contractors to introduce rigorous equal opportunity policies, could also be very effective tools.[187]

However, the use of such incentives and requirements has not found favour with the UK government, outside of the Northern Irish context.[188] Pragmatic concerns about the excessive costs of business regulation have meant that no attempt has been made as yet to introduce private sector duties or general reasonable accommodation requirements in Britain. Indeed, the use of contract compliance policies by public authorities has been reined in and positively discouraged. Part 11 of the Local Government Act 1988 Act restricted or eliminated the ability of local authorities to use contract compliance measures outside of the race equality context.[189] Even the

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Employment Equity Legislation and Policy, 1986-2000: Unfulfilled Promises", in C. Agocs (ed.) *Workplace Equality: International Perspectives on Legislation, Policy and Practice* (2003), Ch. 4. See also A. McColgan, "Equal Pay: Lessons from Ontario's Pay Equity Unit", Working Paper No 5, Independent Review of the Enforcement of UK Anti-Discrimination Legislation, November 1999. For the application of similar approaches in Scandinavia, see K. Mile, "Mainstreaming Equality – Models for a Statutory Duty", in *Mainstreaming Equality: Models for a Statutory Duty – Conference Report* (Dublin: Equality Authority, 2003), available at www.equality.ie.

185 See C. O'Cinneide, *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality* (2003), Part 7.

186 Canadian anti-discrimination legislation, for example, extends the requirement to make "reasonable accommodation" across all the recognised equality grounds. For the Canadian approach, see *British Columbia (Public Service Employee Relations Comm.)* v *B.C.G.E.U.* (1999) 35 C.H.R.R. D/257 and *British Columbia (Superintendent of Motor Vehicles)* v *British Columbia (Council of Human Rights)* (1999), 36 C.H.R.R. D/129; *Central Okanagan School Dist. No. 23* v *Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.).

187 See C. McCrudden, "Using Public Procurement to Achieve Social Outcomes" (2004) 28(4) *Natural Resources Forum* 257-267.

188 Northern Ireland, as in may other areas of equality policy, is seen as an exceptional case.

189 See P.E. Morris, "Legal Regulation of Contract Compliance: An Anglo-American Comparison", 103-121; C. McCrudden, "Codes in a Cold Climate" (1988) 51 *MLR* 409. Despite the potentially greater scope for equality-based measures opened up by the *Helsinki Concordia Bus* decision (Case 513-99, [2002] ECR I-7213), and the recent legislative package clarifying the scope for social considerations available in public procurement (Directives 2004/17/EC and 2004/18/EC), EC legislation in this area has also consistently lacked real clarity as to when the introduction of such contract compliance requirements are compatible with EC law. See C. Tobler, "Encore: 'Women's Clauses' in Public Procurement under Community Law" [2000] 25(6) *European Law Review* 618-631; the *Hepple Report*, paras.3.71–3.73, pp.83-84.

marginal loosening of these controls with the introduction of the "Best Value" contracting regime in 2000 has not deterred the "chilling effect" such controls have exercised upon the use of contract compliance by public authorities.[190] The positive duties may be able to open some additional chinks in these regulatory constraints on the use of contract compliance. However, an effective framework for the use of contract compliance can only be put into place if the existing statutory restrictions are removed or comprehensively reformed: tinkering at the edges can only go so far.

It remains to be seen whether the Discrimination Law Review being conducted at present by the Women and Equality Unit will make any recommendation on this point, or on the introduction of other forms of positive requirements upon private employers. When it comes to this issue, liberal autonomy principles, neo-liberal free market approaches and real pragmatic concerns about bureaucratic load clash with the transformative ambitions of substantive equality theory: the underlying lack of social consensus as to what principles should prevail, and how far the transformative aspirations of equality norms should be pushed, hampers any easy resolution of this tension.

Preferential Treatment and the Limits on Positive Action

It is also worth noting that the current framework of equality and anti-discrimination law actually places obstacles in the way of the development of some anti-subordination approaches. The controls on the use of contract compliance mechanisms have already been discussed. In addition, many private and public sector organisations have in recent years adopted various forms of diversity management strategies. Such strategies aim to ensure a more "diverse" workforce, and are intended to mainstream good diversity practice into business decision-making and practices, and in particular into human resources policy.[191] They make use of a range of positive action strategies, which are designed to encourage more applicants for employment or promotion from under-represented groups.[192] However, as Barmes and Ashtiany have argued, many of these strategies exist in a legal grey zone.[193]

British anti-discrimination statutes tend to adopt a symmetrical and formal model of equality.[194] The "but for" test adopted by the House of Lords in *Eastleigh BC* v *James*[195] to determine if direct discrimination has taken place does not involve an analysis of whether disadvantage or a denial of dignity is

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190 See the comprehensive analysis in A. McColgan, *Discrimination Law* (2nd ed.) 386-407.

191 See R. Thomas, "From Affirmative Action to Affirming Diversity" (1990) 68 *Harvard Business Review* 107-117.

192 For a discussion of the strengths and problems of "diversity management" strategies, see L. Barmes with S. Ashtiany, "The Diversity Approach to Achieving Equality: Potential and Pitfalls" (2003) 32 *Industrial Law Journal* 274-96; J. Wrench, "Diversity Management Can Be Bad For You" (2005) 46(3) *Race and Class* 73-84.

193 *ibid.*

194 See Fredman, *Discrimination Law*, 130-135.

195 [1990] 2 AC 751.

underpinning the act of differentiation.[196] Preferential treatment will therefore fall foul of anti-discrimination controls, unless it comes within a statutory exception. However, very few exceptions have been permitted. The ones that do exist have been given narrow interpretations by courts and tribunals, and appear to be very circumscribed in scope.[197] In particular, the scope of the "training" and "encouragement" positive action exceptions in the existing legislation is not clear.

Article 7 of the Framework Equality Directive allows Member States to adopt measures to prevent or compensate for disadvantages linked to any of the grounds covered by the Directive.[198] However, in implementing these Directives, the government elected not to take advantage of this permitted scope for positive action.[199] The major exception is the Disability Discrimination Act, which does not adopt a symmetrical model of equality and permits preferential treatment for disabled persons.[200] However, with this and the other narrow exceptions, forms of preferential treatment that fall outside the scope of the statutory exceptions will constitute direct discrimination and therefore are illegal.[201]

Therefore, any diversity programmes that could be interpreted as benefiting a member of a disadvantaged group may run the risk of falling outside the scope of these exceptions, and therefore of being in violation of the legislation.[202] Barmes suggest that this uncertainty generates a "chilling

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196 See *ACAS* v *Taylor* EAT/788/97. Lizzie Barmes has argued that recent decisions may have begun to adopt a greater focus on the intent behind the use of suspect classifications, and therefore that there may be a move away from the strict application of the *James* "but for" test. However, as she notes, this trend is not clear, and may be confined to victimisation cases. See L. Barmes, "Promoting Diversity and the Definition of Direct Discrimination" (2003) 32(3) *ILJ* 200.

197 See *e.g. Hughes* v *Hackney LBC*, Employment Tribunal 6 Feb 1986, unreported; *Lambeth L.B.C.* v *Commission for Racial Equality* [1990] IRLR 231. See H. Slater, "Making a Positive Difference: A Legal Guide to Positive Action" (2002) 111 *Equal Opportunities Review*, November 2002, 12-17; A. McColgan, 148-157.

198 Art.5 of the Race Directive contains a similar provision.

199 See *Equality and Diversity: Coming Of Age* (2005), Part 4.2. The draft Age Regulations make provision for exceptions for training and encouragement of under-represented age groups, similar to the narrow exceptions contained in the SDA and RRA.

200 See S. Fredman, "Disability Equality: A Challenge the Existing Anti-Discrimination Paradigm?" in A. Lawson and C. Gooding, *Disability Rights in Europe* (2005) 199-218.

201 Age is an exception. A general defence of objective justification is available for any kind of direct age discrimination. This means that many forms of positive action may be justified without having to come within this narrow positive action exception in the draft regulations: see *Equality and Diversity: Coming Of Age* (2005), para.4.2.6.

202 See L. Barmes, "Promoting Diversity and the Definition of Direct Discrimination" (2003) 32 (3) *ILJ* 200. Similar problems apply in Ireland: see C. Costello, "Positive Action", in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (2003) 177-212, especially at 199-206.

effect" that can deter the use of such diversity strategies.[203] It is certainly true that any attempts to use any form of preferential treatment to compensate for disadvantage or to create a "critical mass" of employees or managers from under-represented groups will fall foul of the legislation. So do will the use by public authorities of even minor forms of preferential treatment designed to enhance equality of opportunity, notwithstanding the existence of the positive public sector duties.

Fiss, Fredman, Elizabeth Anderson and others have argued that combating the disadvantages faced by particular social groups may require special and even preferential treatment of these groups in appropriate circumstances.[204] They argue that the current restrictions are incoherent, as they deprive policymakers of a potentially valuable tool for addressing group disadvantage.[205] In contrast, opponents and sceptics suggest that it is more consistent with the general thrust of anti-discrimination legislation to restrict its use.[206] In general, successive UK governments have adopted this second viewpoint and set their face against the use of preferential treatment in Britain.[207]

The difficulty with this approach is that while in the abstract, it may be possible to distinguish preferential treatment from other types of positive action, this is increasingly proving difficult to do in practice, given the range of diversity strategies that are now commonplace. There is an uncertain borderline between preferential treatment and strong encouragement for

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[203] Barmes, *ibid*. The CRE has been obliged recently to offer more guidance for employers in this area: see R. Karim, "Take Care When Being Positive", *Connections*, Winter 2004.

[204] See O. Fiss, "Groups and the Equal Protection Clause"; see also J. Balkin and R. Siegel, "The American Civil Rights Tradition: Anticlassification or Antisubordination?", E. S. Anderson, "Integration, Affirmative Action and Strict Scrutiny" (2002) *NYUL Rev* 1195; S. Fredman, "Reversing Discrimination" (1997) 113 *LQR* 575; B. Parekh, "A Case for Positive Discrimination", in B. Hepple and E. Szyszczak (eds.) *Discrimination: The Limits of the Law* (1992); R. Dworkin, *A Matter of Principle* (1985); G. Ezorsky, *Racism and Justice: The Case for Affirmative Action* (1991).

[205] Trevor Phillips, chair of the CRE, has called for the suspension of restrictions on preferential treatment to ensure that more ethnic minority recruits join the police: see P. Butler and S. Salman, "Police 'Should Favour Black Recruits'", *The Guardian: Society*, March 17th 2004. There were media reports that the UK government was toying with this suggestion: see BBC News, "Police Plan to Boost Ethnic Ranks", available at http://news.bbc.co.uk/2/hi/uk_news/3634085.stm (accessed 15 November 2005). See also S. Fredman, "Reversing Discrimination" (1997) 113 *LQR* 575; B. Parekh, "A Case for Positive Discrimination", in B. Hepple and E. Szyszczak (eds.) *Discrimination: The Limits of the Law* (1992).

[206] See *e.g.* T. Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* (1996).

[207] In contrast, successive UK governments have been less concerned about the use of forms of preferential treatment in Northern Ireland, such as the introduction of the "Patten quota" for recruitment to the Police Service for Northern Ireland, and the leeway given to positive action to address group under-representation by the employment equity legislation. Again, Northern Ireland is seen as a "special case". See *A New Beginning: Policing in Northern Ireland*, The Report of the Independent Commission on Policing for Northern Ireland (1999).

disadvantaged groups, and the law at present is not providing clear or coherent boundary lines. There is also a clear lack of clear principle underlying the current set of exceptions, and an overall lack of clarity in the legislation. For example, the Sex Discrimination (Election Candidates) Act 2002 permits political parties to take positive action, including the use of preferential treatment, to reduce inequalities on the grounds of gender in candidate numbers.[208] The introduction of this exception has not been followed by other new exceptions. But why is preferential treatment permissible in selecting political candidates and not in other areas? The answer is not apparent. Greater clarity and coherence are required, and some loosening-up of the current restrictions on the use of preferential treatment (and thereby other forms of positive action) should again be on the agenda of the Discrimination Law Review. [209]

However, once again, the absence of clear agreement on core principles means that the transformative aspirations of substantive equality approaches come into conflict with other concepts, and this generates a lack of coherence. As discussed above, a strong argument can be made that a "best" understanding of equality norms suggest that they should be seen as focusing upon eliminating certain types of harm and transforming social structures in line with an overall aspiration towards equality of respect. An overemphasis on avoiding suspect classification at the expense of these two goals appears to be incompatible with this best understanding. However, British law remains slow to nail its colours to the anti-subordination mast.

Another set of issues remains unresolved. Anti-subordination approaches are primarily concerned with addressing group disadvantage and transforming social practices. However, they also go further than other equality norms, because they require positive action to be taken towards achieving a goal of equality of respect or status, rather than just requiring avoidance of particular forms of action. But how to measure the extent to which different groups are denied equality of respect, and how to define what this term means? Should public authorities aim to secure equality of outcome across different social groups, or seek to achieve alternative goals?[210] Is there a danger that other

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[208] See C. O'Cinneide and M. Russell, "Positive Action to Promote Women in Politics Some European Comparisons" (2003) *ICLQ* 587-614.

[209] Even if British law is clarified, the case-law of the European Court of Justice on positive action may still generate uncertainty. It is still not clear how much freedom the ECJ will permit to member states in using special measures to combat disadvantages across the different equality grounds. However, at present, EC law is more permissible and flexible than British law when it comes to positive action: see C. Costello, "Positive Action", in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (2003), 177-212; C. Tobler, "Positive Action under the Revised Second Equal Treatment Directive", in AFFA and EWLA (ed.) *L'égalité entre femmes et hommes et la vie profesionnelle; Le point sur les développements actuels en Europe* (2003) 59-92.

[210] For interesting analysis of the question of the legitimacy of utilising equality of outcome as the appropriate goal in such circumstances, see A. Phillips, "Defending Equality of Outcome" (2004) 12 (1) *Journal of Political Philosophy* 1. See also A. Phillips, *Which Equalities Matter?* (1999); E. Anderson, "What is the Point of Equality?" (1999) 109 *Ethics* 287-338; I. Marion Young, "Equality of Whom?" (2001) 9 *Journal of Political Philosophy* 1-18. However, is equality of outcome actually a fair test? Is it true that all groups should perform in an

forms of disadvantage such as socio-economic status will be overlooked in the focus upon race, gender, disability and the other grounds of disadvantage recognised in the anti-discrimination legislation? Does positive action serve to reinforce divisive group identities and perpetuate inter-group tensions? Does it encourage claims of victim status, engendering a cycle of assertions of group disadvantage that can become self-fulfilling prophecies? The makings of a coherent framework of equality and anti-discrimination law is in place in Britain, but how and whether to expand its scope to encompass anti-subordination approaches requires a real engagement with the currently under-theorised principle of "equality", and how far should the transformative dimension of equality norms be extended.

Conclusion

British equality and anti-discrimination law has undergone a considerable expansion in recent years. Anti-discrimination protection has been considerably extended, and may be extended further. Considerable shifts have occurred in judicial approaches to equality issues, the Human Rights Act has come into force, and a single Commission for Equality and Human Rights will be established. The foundations of a truly coherent framework are being put into place, even if British law is still fumbling, confusing and being slowly dragged by European influences towards its completion. If and when completed, this framework should provide consistent protection against unequal treatment in both horizontal and vertical relationships, and provide suitable avenues for legal challenges to be made against barriers to equal treatment and group inclusion. It will even give some effect to the transformative ambitions inherent in equality and anti-discrimination norms, in particular via the "constitutionalising" of equality as a fundamental common law norm and through the protection offered by the Human Rights Act.

However, the transformative potential of this new framework is finite and limited. To give it full effect, anti-subordination approaches may need to be adopted. However, the use of such approaches has not been constitutionalised or embedded in legislation, beyond the introduction of the public sector positive duties. Serious debates remain to be had about how far should the transformative dimension of equality norms be applied, and how other values like the neo-liberal attachment to freeing up market outcomes should be reconciled with these transformative aspirations. Other questions remain: how as what space should be given to assertions of religious identity, or what weight should be given to private autonomy as distinct from public engagement.

"Equality" remains an under-theorised concept in Britain: there is sufficient agreement to ensure the gradual development of a coherent framework of laws, but there is little agreement on fundamental principles, nor on how this framework should be stretched and applied in several cases. The comparatively well-developed equality and anti-discrimination legal regimes

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equivalent manner in an "equal" society, irrespective of different group cultural norms and expectations? This is contestable: and yet, the use of equality of outcomes as a tool of assessing progress in the implementation of the positive duties has become commonplace.

of Canada and South Africa have their roots in widespread political and social consensus as to the appropriate approaches to equality issues that should be adopted in law and policy. However, that degree of conceptual agreement is lacking in Britain, and therefore equality and anti-discrimination law is still fumbling towards coherence.

"STANDS SCOTLAND WHERE IT DID?": DEVOLUTION, HUMAN RIGHTS AND THE SCOTTISH CONSTITUTION SEVEN YEARS ON

Aidan O'Neill QC

***"Macduff**: Stands Scotland where it did ?*

***Ross**: Alas, poor country! Almost afraid to know itself."*

Macbeth Act IV Scene iii

Introduction

The Caledonian antisyzygy

Scotland is, according to an on-going publicity campaign promoted by the Scottish Ministers "the best (small) country in the world". According to the World Health Organisation, however, Scotland has the second highest homicide rate in Western Europe (only Finland's is higher). [1] The Scottish Executive's own statistics record an average and consistent homicide rate over the past twenty years or so of 22 violent deaths per million of population, [2] and press reports point out that an individual is two to three times more likely to be murdered in Scotland than in England and Wales. [3] A study from the University of California is expected to claim that Scotland's homicide rate is higher than that in the United States, in Israel, in Uzbekistan, in Chile and in Uruguay. Another recent United Nations Report has described Scotland as the most violent country in the developed world on the basis of the report's estimate of some 2,000 people each week being the subject of violent attack. [4] And research from the London School of Hygiene and Tropical Medicine indicates that Scotland now has one of the highest mortality rates in Western Europe for cirrhosis of the liver attributable to alcohol abuse. [5] Meanwhile the Scottish Ministers make plans to give Scotland a prison capacity of 8,000 which, if filled, would give Scotland the highest prison population rate in Western Europe. This mismatch between aspiration and experience – "it is the best of countries; it is the worst of countries" – exemplifies the Caledonian antisyzygy.

Antisyzygy means the yoking together of contradictory impulses or drives existing simultaneously, be it: love and hate; arrogance and abjection; radicalism and reaction; realism and fantasy. This idea of an internal (and eternal) conflict within the one entity has long been said to capture

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[1] See www.who.int/whosis.

[2] See http://www.scotland.go vuk/stats/bulletins/00377-01.asp for the Government official statistics showing homicide rates in Scotland from 1984 to 2004.

[3] See, for example, *The Guardian* 26 September 2005 "Scotland has the second highest murder rate in Europe" archived at http://www.guardian.co.uk/crime /article/0,2763,1578388,00.html.

[4] See http://www.timesonline.co.uk/article/0,,2-1786945,00.html.

[5] See, for example, *The Independent* 6 January 2006 "Binge drinking blamed for increase in liver cirrhosis across Britain" archived at http://news.independent. co.uk/uk/health_medical/article336782.ece.

something of the peculiarly Scottish character and situation and is, perhaps, archetypically to be seen in the novel *The Strange Case of Dr. Jekyll and Mr. Hyde*, a work of the Edinburgh lawyer, Robert Louis Stevenson. [6] But it is, I suggest, a useful (if somewhat literary) trope with which to begin to appreciate the impact and development of a human rights culture in Scotland and Scotland's relationship within the United Kingdom in recent years.

In so far as one can capture these things, it might be said that what has been most characteristic of Scotland's constitutional and legal history to date is that of being in a state of constant unresolved and irresoluble tension, of attachment and separateness, of rejection and belonging. The dynamic is one of seeking to accommodate the political and geographical reality of union with England – a country with ten times as many people – while striving to maintain a sense of Scotland as still being a distinct nation within a unitary State. Scotland, it must always be borne in mind, is a small country of some 5 million people – and dropping. There remains, then, a tension in the Scottish legal system between the assertion and preservation of its independent history within the civilian European Roman law tradition, and the sometimes resented pull toward the English common law. This tension makes for the odd mixture of judicial attitudes of conservatism and radicalism, of parochialism and crabbed insularity counterbalanced, at times, by a generous internationalism in approach.

The Devolutionary Settlement in Scotland

The gradual dismantling of the British Empire in the course of the 20th century and the pooling of the sovereignty of the United Kingdom with other member States of the European Union led to increasing political pressure within Scotland for an effective re-negotiation of the terms of the 1707 Parliamentary Union with England. The end result of that re-negotiation was the Scotland Act 1998 which established a new Scottish Parliament and an executive drawn from its ranks – the Scottish Ministers – who would, in effect, govern Scotland's internal affairs. The Scottish Ministers were also bound (under Section 58 SA) to respect and, if necessary, implement, all and any other international obligations of the United Kingdom. [7] But legislative and administrative power under this scheme was (provisionally) devolved and never (permanently) ceded to the new Parliament and Executive.

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[6] See: Gregory Smith *Scottish Literature: Character and Influence.* London: Macmillan, 1919 and Hugh MacDiarmid "The Caledonian Antisyzygy and the Gaelic Idea" (1931-32) in *Selected Essays of Hugh MacDiarmid* edited by D. Glen. (London: Jonathan Cape, 1969) at pp.56-74.

[7] See, too, para.7 of Sch.5 to the Scotland Act which provides as follows:
International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations, regulation of international trade and international development assistance and co-operation are reserved matters.
Sub-paragraph (1) does *not* reserve - observing and implementing international obligations, obligations under the Human Rights Convention and obligations under European Community law, assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.

The 1998 devolutionary settlement may be seen as an attempt to resolve historic Anglo-Celtic tensions within the United Kingdom, by giving formal recognition to the separateness of Scotland (as well as to the distinctiveness of Wales and Northern Ireland). But no provision is made for the constitutional recognition of England as a distinct entity within the Union. England is left to be governed by the institutions of the United Kingdom. This results in a new tension – the "West Lothian question" – because while the English are deprived of a say in the internal affairs of Scotland, Scots MPs (i) continue to vote in Westminster on purely English matters and (ii) to act as Secretaries of State over Whitehall departments dealing with purely English affairs. In theory of course, the UK Parliament's sovereignty remained untouched in the new constitutional framework. Westminster retains the right to legislate in all matters affecting Scotland, not simply in those areas it specifically reserved to itself in Schedule 5 to the Scotland Act. As has been observed, and as repeated re-imposition of direct rule in Northern Ireland even after the enactment of the Northern Ireland Act 1998 shows, power devolved is power retained.

The devolution statutes have created non-sovereign democratic institutions. These institution have strict legal limits on the extent of their powers, and provision is made for those limits to be enforced by the courts. This itself is the cause of new tension within the devolved polity. The Scottish Parliament may look and act like a Parliament, but in law it has no more status than any other statutory body exercising powers within its limited jurisdiction. This point was forcefully made by Lord Rodger of Earlsferry, when Lord President of the Court of Session, when he stated

> "[T]he [Scottish] Parliament [i]s a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law . . . .
>
> While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are <u>not</u> dealing with a Parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a 'self-denying ordinance' which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law."[8]

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[8] *Whaley and others* v *Lord Watson of Invergowrie and The Scottish Parliament* 2000 SC 125, OH; 2000 SC 340, IH *per* Lord Rodger at 348H, 350B-C.

And while Section 38(1) of the Crown Proceedings Act 1947 now defines "officer" in relation to the Crown as including "a Minister of the Crown or a member of the Scottish Executive", the courts have rejected the Scottish Ministers' claims to be entitled to the respect and immunities traditionally afforded "the Crown". As the First Division has noted:

> "[I]t is clear that the powers of the respondents [the Scottish Ministers], who were created by the statute, are circumscribed both by the limits of devolved competence and by reference to compatibility with Convention rights and community law. The validity of the acts of the respondents may be determined by a court of law as a devolution issue. *In this respect the respondents may be compared with the Scottish Parliament, which is not sovereign but is subject to the laws and hence to the courts* (*Whaley* v *Watson* 2000 S.C. 340, Lord President Rodger at page 350). In the present case we are concerned with the exercise by the respondents of their statutory functions under the Prisons (Scotland) Act 1989. While the exercise of such statutory functions on behalf of Her Majesty is devolved to the Scottish Ministers, *it is erroneous, in our view, to regard proceedings against them in respect of any of those functions as proceedings against the Crown itself*."[9]

Models for fundamental rights protection under the constitution

In *Matadeen* v *Pointu* Lord Hoffmann drew a contrast between the traditional UK constitutional approach, under which Parliament was regarded as sovereign in all matters, and countries in which fundamental rights were entrenched within a written constitution, noting:

> "A self-confident democracy may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly elected organs of its constitution. The United Kingdom has traditionally done so; perhaps not always to universal satisfaction, but certainly without forfeiting its title to be a democracy. A generous power of judicial review of legislative action is not therefore of the essence of a democracy. Different societies may reach different solutions.
>
> The United Kingdom theory of the sovereignty of Parliament is however an extreme case. The difficulty about it, as experience in many countries has shown, is that certain fundamental rights need to be protected against being overridden by the majority. No one has yet thought of a better form of protection than by entrenching them in a written constitution enforced by independent judges. Even the United Kingdom is to adopt a modified form of judicial review of statutes by its incorporation of the European Convention."[10]

The problem which the devolutionary settlement in Scotland has introduced – compounding the Caledonian antisyzygy – is that within the one unitary

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[9] *Beggs* v *Scottish Ministers*, 2005 SLT 305, IH at para.24.
[10] *Matadeen* v *Pointu* [1999] AC 98 *per* Lord Hoffmann at 109-110.

State of the United Kingdom we now have two wholly divergent constitutional models in relation to the protection of fundamental rights. One model under the Human Rights Act 1998 – which received Royal Assent on 9 November 1998 - is based on the idea of delicate constitutional dialogue and a dance of deference between judiciary and legislature but one where ultimately Parliament has the last word. The other model, under the Scotland Act - which received Royal Assent on 19 November 1998 – is one in which the courts are supreme and are required to strike down all and any "unconstitutional" acts of the devolved legislature and administration. The fact that these two UK statutes are working on the basis of quite distinct democratic models becomes clearer from an examination of the structures of the two acts and how they have been applied in practice.

The Human Rights Act and constitutional dialogue

The scheme of the Human Rights Act is one which may be said to be based along the lines of the model proposed by Sir Stephen (now Lord Justice) Sedley in which he speaks of:

> "a new and still emerging constitutional paradigm, no longer Dicey's supreme Parliament . . . but a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts, to each of which the Crown Ministers are answerable – politically to Parliament and legally to the courts."[11]

Section 3(1) HRA obliges public authorities, so far as it is possible to do so, to read legislation in a way which is compatible with Convention rights and to give effect to that legislation in a way which is compatible with those rights. [12] Where it is not possible to read or apply an Act of the Westminster Parliament in a manner which is compatible with Convention rights, Section 3(2)(b) HRA provides that the legislative provisions in question remain fully valid, operative and enforceable: in contrast to the situation where there is an incompatibility with Community law, national courts are not empowered even after incorporation of the Convention to "dis-apply" or suspend primary statutory provisions which contravene human rights.

Section 4 HRA sets up a mechanism for dialogue between the courts and the legislature in the event of an unavoidable conflict between the Convention rights and an Act of Parliament by giving the courts the power to make a declaration as to the incompatibility of this provision with the requirements of the European Convention. This conversation may at times be a spirited one.[13] But any such declaration of incompatibility by the courts has, by

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[11] Sir Stephen Sedley "Human Rights: a twenty-first century agenda" [1995] *Public Law* 386 at 389. See, too, the judgment of Sedley J. in *R* v *Parliamentary Commissioner for Standards, ex parte Al-Fayed* [1998] 1 WLR 669 at 670 where he describes the relationship between the courts and Parliament as "a mutuality of respect between two constitutional sovereignties".

[12] See *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557 *per* Lord Rodger of Earlsferry at para.107 p.595.

[13] See, for example, *A* v *Secretary of State for the Home Department* [2005] AC 68, *per* Lord Bingham of Cornhill at 110-1 para.42:
"I do not . . . accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course

virtue of Section 4(6)(a) HRA, no effect on the validity, continuing operation or enforceability of the offending legislative provision. Further, Section 4(6)(b) HRA provides that any declaration of incompatibility is not binding on the parties to the proceedings in which it is made. The obtaining of a declaration of incompatibility will therefore be a Pyrrhic victory for the party in whose favour it is granted unless Parliament decides to change the relevant legal provisions with retrospective effect so as to apply in his case. A final declaration of incompatibility – that is one against which no right of appeal exists or is being exercised – gives Ministers of the Crown the power to order under Section 10(1) HRA such amendment to, or repeal of, the primary or secondary legislation in question as they think is appropriate to remove the incompatibility. Any such remedial order will require the approval of Parliament under the affirmative resolution procedure, all as set out in Schedule 2 to the Act. The principle of ultimate Westminster Parliamentary sovereignty is said thereby to be maintained. As Lord Irvine of Lairg has stated:

> "This innovative technique will provide the right balance between the judiciary and [the Westminster] Parliament. [The Westminster] Parliament is the democratically elected representative of the people and must remain sovereign. The judiciary will be able to exercise to the full the power to scrutinise legislation rigorously against the fundamental freedoms guaranteed by the Convention but without becoming politicised. The ultimate decision to amend [primary Westminster] legislation to bring it into line with the Convention, however, will rest with [the Westminster] Parliament. The ultimate responsibility for compliance with the Convention must be [the Westminster] Parliament's alone."[14]

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true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. . . . The Human Rights Act 1998 gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it 'The courts are charged by Parliament with delineating the boundaries of a rights-based democracy' ('Judicial Deference: servility, civility or institutional capacity?' [2003] PL 592, 597)."

And *per* Lord Hoffmann at 132 para.97:

"[T]he power of detention [under s.23 of the Anti-terrorism, Crime and Security Act 2001] is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."

[14] Lord Irvine of Lairg "The Development of Human Rights in Britain under an incorporated Convention on Human Rights" [1998] *Public Law* 221-236 at 225.

But Section 21 HRA specifically includes Acts of the Scottish Parliament ("ASPs") within the definition of "subordinate legislation" which means that any ASP which is incompatible with any of the Convention rights is impliedly repealed under the HRA to the extent of its incompatibility. And no provision of primary Westminster legislation can be prayed in aid to prevent such implied repeal of Scottish legislation since the governing Westminster Statute is the Scotland Act 1998.

Convention rights and the limits on devolved power

The Scotland Act has been described as "a major constitutional measure which altered the government of the United Kingdom". [15] It contains quite different constitutional checks and balances from those which form the basis of the Human Rights Act. [16] The system under the Scotland Act is predicated on a wholly different constitutional model; one in which judges – rather than the legislature – have the last word.

Section 29(1) SA states that "an Act of the Scottish Parliament [ASP] is not law so far as any provision of the Act is outside the legislative competence of the [Scottish] Parliament". Not only is it put beyond the legislative competence of the Edinburgh Parliament or Executive to pass laws in areas reserved to the Westminster Parliament, but the Scotland Act also provides (in Section 29(2)(d) SA) that the Scottish Parliament has no power to pass any Act which contains a provision which is incompatible with any of the Convention rights specified in Schedule 1 to the Human Rights Acts 1998.

Statutory functions and functions derived from the royal prerogative may be conferred upon and exercised by the Scottish Ministers insofar as the exercise of these functions are compatible with the limits imposed on the legislative competence of the Scottish Parliament: see Section 53 SA. It follows from this that it falls outside the Scottish Ministers' devolved competence to confirm, approve or make any provision by subordinate legislation which would be incompatible with Convention rights: see Section 54 SA. Although Section 63 SA on its face allows for the transfer (by Order in Council) to the Scottish Ministers of further powers or functions which may exceed the legislative competence of the Scottish Parliament, this transfer cannot be used as a means to allow the Scottish Ministers to act incompatibly with Convention rights. This is confirmed by the provisions of Section 57(2) SA which states that "a member of the Scottish Executive has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights."

The protection of Convention rights under the constitutional settlement set out in the Scotland Act is, then, embedded within the concept of limits on the

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[15] *R* v *HM Advocate* 2003 SC (PC) 21 *per* Lord Rodger of Earlsferry at 60 para.16.

[16] See *Somerville and others* v *Scottish Ministers* [2005] CSOH 23 *per* Lady Smith at para.51: "[T]here is a clear constitutional framework within the Scotland Act to deal with the situation where a member of the public claims that a Scottish Minister has failed in his constitutional obligation to act in accordance with the Convention and it contains a self contained system of checks and balances which do not apply to claims under the Human Rights Act. It is impossible to resist the conclusion that Parliament intended the two types of claim to be treated differently."

powers or competence of the devolved authorities. Thus, the Convention compatible interpretative obligation for UK legislation in Section 3 HRA is paralleled by an interpretative obligation for Scottish legislation in Section 101 SA, relative to competence: Section 101(2) SA enjoins the courts when faced with devolved Scottish primary and subordinate legislation which *could* be read in such a way as to be outside competence to read the provision "as narrowly as possible as is required for it to be within competence, if such a reading is possible" and to give effect to it accordingly.

And the "implicit dialogue" provisions between court and legislature set out in Section 4 HRA in relation to Westminster legislation has its parallel in Section 102 SA as regards Scottish legislation: Section 102(2)(a) SA permits the court to remove or limit the retrospective effect of any finding that legislation – whether passed by the Scottish Parliament or the Scottish Ministers – is beyond their legislative competence and hence *ultra vires*; and Section 102(2)(b) SA allows the court to suspend the effect of its decision on lack of legislative *vires* for such period and on such conditions as might allow the defect identified by it to be corrected by the legislature.

Significantly there is no such power or discretion vested in the courts in relation to administrative (non-legislative) acts of the Scottish devolved institutions, just as there is no discretion given to the courts under Section 6 HRA to permit public authorities to act in a manner which is Convention incompatible – Section 6(2) HRA requires any such authorization to be found in the provisions of primary Westminster legislation. By contrast, the Scotland Act provisions have unequivocally placed the ultimate responsibility for ensuring compliance with the Convention in Scotland with the judges, rather than with the democratically elected Scottish Parliament or the publicly accountable Scottish Ministers.

In its decision in *R* v *HM Advocate* the Privy Council – acting under its devolution jurisdiction - made it clear that the Scotland Act has to be read as a constitutional document which provides, within its four corners, a complete system of rights, obligations and remedies as regards the devolved governance of Scotland. Thus, the Judicial Committee held that Section 100(1) SA rather than Section 7 HRA is the proper statutory basis for any claim against the Scottish devolved authorities in respect of a claimed breach of Convention rights; and Section 100(3) SA rather than Section 8 HRA is the basis for claims seeking "just satisfaction" damages for breach by the Scottish authorities of Convention rights.[17] If the coherence of the Scottish devolved constitutional settlement as set out in the Scotland Act is to be preserved, the provisions of the Scotland Act regarding the protection of Convention rights must take precedence over the parallel provisions of the Human Rights Act when considering questions of the Convention compatibility of Scottish legislation and Scottish Ministerial action.[18] Any

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[17] *R* v *HM Advocate* 2003 SC (PC) 21 *per* Lord Hope of Craighead at 39-40, 42 paras.29, 38; *per* Lord Rodger of Earlsferry at 61-62 paras.17-19.

[18] One may note in this regard Lord Hardie when, as Lord Advocate, promoting the Scotland Bill through the House of Lords (HL Hansard 2 November 1998, Column 79): "[It] is intended to bring the Scotland Bill *more into line with the Human Rights Bill in certain limited respects*. It is *not intended* that the Scotland

resulting difference between the position in Scotland and that which may exist in England under the Human Rights Act 1998 may be said to be a difference which has been prescribed by the UK Parliament in the express enactment of these provisions of the Scotland Act relating to Convention rights protection in the context of limits on competency of the devolved authorities.

No discretion as to remedy under the Scotland Act

Thus whereas under Section 8(1) HRA the courts are given a discretion as to what remedy, if any, to afford an individual whose Convention rights have been violated by a public authority,[19] there is no such discretion where the courts have found that the Scottish Ministers have acted in a manner which is incompatible with Convention rights. This is because the courts have held that the effect of Section 57(2) SA is to deprive the Scottish Ministers of all power to act incompatibly with Convention rights and therefore any purported act in contravention of a Convention right is *ultra vires*.[20] Accordingly under the scheme of the Scotland Act, it is simply not open to either the Scottish Parliament or the Scottish Ministers to decide to maintain Convention incompatible legislation in force, and they have no right to amend the legislation in such manner as they think fit. Instead any Convention incompatible legislation is to be struck down by the courts, whatever the wishes of the legislature or administration. The Westminster legislature has given the courts no choice as to what the consequences of any particular violation by the Scottish devolved administration or parliament of an individual's Convention rights by them should be. Such Convention incompatible action is void and, in principle, of no effect, not only in relation to the particular individual establishing violation of his or her rights, but *contra mundum*.

As has been observed, within the context of the devolved Scottish constitution the judiciary have therefore been handed rather different

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Bill should be brought so completely into line with the Human Rights Bill *that it destroys the common procedures for dealing with devolution issues no matter in which legal proceedings they arise and for determination ultimately by the Judicial Committee* [of the Privy Council]."

[19] *Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72 *per* Lord Rodger of Earlsferry at p.132 para.175: "These provisions [of section 8 HRA] indicate that the courts are meant to mould their remedies for unlawful acts to fit in with the requirements of the Convention. By contrast, there is nothing to suggest that Parliament ever intended that under the Human Rights Act 1998 the British courts should be obliged to grant a specific remedy for a particular kind of violation where that remedy was not specified by the Convention or where that remedy would not be just and appropriate in the circumstances."

[20] *Dyer* v *Watson*, 2002 SC (PC) 89 *per* Lord Millett at para.131:
"[T]he European Court [of Human Rights] . . . is not obliged to grant a remedy once a breach of a Convention right has been established; [n]or in England, where the court has a discretion to make such order as it 'considers to be just and appropriate'. But . . . in Scotland . . . Section 57(2) of the Scotland Act 1998 imposes a *vires* control by providing that the Lord Advocate has no power to act in a way which is incompatible with an accused's Convention rights. If the Lord Advocate threatens to exceed his powers, there is no discretion to withhold a remedy".

constitutional tools from those provided to the judges under the Human Rights Act. The Scotland Act's insistence on *vires* control of the Convention incompatible acts of the devolved authorities might be criticized insofar as it prevents the judges from "fashion[ing], more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system".[21] But, as Lord Rodger of Earlsferry has noted:

> "In enacting a constitutional settlement of immense social and political significance for the whole of the United Kingdom, Parliament has itself balanced the competing interests of the Government of the United Kingdom, of the Scottish Executive, of society and of the individuals affected. Having done so, *Parliament has decided that members of the Scottish Executive should have no power to do acts that are incompatible with any of the Convention rights. . . . If this is to use an axe rather than a scalpel, then Parliament has selected the tool*. Your Lordships' Board cannot re-open the exercise that Parliament undertook and re-balance the competing interests for itself. Rather, it must loyally give effect to the decision of Parliament on this sensitive matter, even if – or perhaps especially if – there are attractions in a different solution . . ."[22]

Scotland Act as lex specialis

As we have noted, the Convention rights' limits on the powers of the Scottish Parliament and Scottish Ministers exist independently from the provisions of the Human Rights Act.[23] Indeed, any person seeking to rely on his Convention rights against the Scottish Ministers or Scottish Parliament is not entitled to pick and choose between the remedies and procedures provided specifically in relation to the Scottish devolved authorities under Scotland Act and those applicable to public authorities in general under the Human Rights Act. Any Convention rights based challenges to the acts of the Scottish devolved administration or legislature have to be raised as

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[21] This is the description of the judge's role under the Canadian Charter of Rights and Freedoms by L'Heureux-Dubé J in *R* v *O'Connor* [1995] 4 SCR 411 at p.461 para.69 which is quoted with approval by Lord Steyn in *H.M. Advocate* v *R* 2003 SC (PC) 21 at 30 para.18 who then continues: "The moral authority of human rights in the eyes of the public must not be undermined by allowing them to run riot in our justice systems. In working out solutions under the Scotland Act 1998 and the Human Rights Act 1998 courts in Scotland and England should at all times seek to adopt proportionate remedies. In my view there is nothing in the open-textured language of s.57(2) SA, read in context, which rules out the application of such an approach in this case."

[22] *H.M. Advocate* v *R* 2003 SC (PC) 21 *per* Lord Rodger of Earlsferry at 73 para.50.

[23] See *Clancy* v *Caird*, 2000 SC 441, IH *per* Lord Penrose at 473, para.9 of his judgment: "Section 57(2) SA is concerned with a *further* specific limitation on the powers of the [Scottish] Executive expressed by reference to the Convention and Community law. *It is <u>not</u> a temporary or transitional provision. It will continue to apply after the Human Rights Act comes fully into force*."

"devolution issues" and brought under and in terms of the Scotland Act.[24] This has the following important procedural consequences among others:

(i) the Convention rights challenge to devolved action has to be intimated to the relevant law officer or officers for the jurisdiction of the UK in which the proceedings in question take place;[25]

(ii) the courts are enjoined to consider whether and to what extent any decision on Convention incompatibility of devolved legislation (but not administrative action) should be made retrospective;[26]

(iii) the court may also suspend its judgment to allow the identified Convention incompatibility in devolved legislation to be corrected;[27]

(iv) procedure is made for lower courts to make Article 234 EC style "preliminary references" on such Convention rights challenges to the superior courts;[28] and

(v) the final decision on these questions lies with the Judicial Committee of the Privy Council exercising its devolution jurisdiction whether on preliminary reference from a superior court (including the House of Lords),[29] on appeal from a superior court (including from the High Court of Justiciary in Edinburgh)[30] or on a direct reference to the Privy Council made by order of a law officer in proceedings in which he or she is a party.[31]

No time limits for Convention rights challenges under the Scotland Act

Section 7(5)(a) HRA imposes a long-stop one year time limit from the date of the act or omission complained of within which court proceedings under that Act alleging breach of Convention rights must be brought. This is, however, subject to any rule imposing a stricter time in relation to the procedure in question, which means that a claim under section 7(1)(a) HRA pursued by way of judicial review in England and Wales will be subject to the three month time limit normally applicable to judicial review applications in that jurisdiction.[32] By contrast the question of the time within which an action raising a Convention rights challenge as a devolution issue is left unspecified in the Scotland Act. But there are no time limits applicable to judicial review procedure in Scotland – this matter being left to the discretion

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[24] *H.M. Advocate* v *R* 2003 SC (PC) 21 *per* Lord Hope at 39D-40A, and *per* Lord Rodger of Earlsferry at 59D-F, 73C.

[25] See paras.5, 16 and 26 of Sch.6 to the Scotland Act 1998. In terms of the detailed Scottish procedural rules on intimation see Chap.25A of the Rules of the Court of Session 1994 and chap.40 of the Criminal Procedure Rules 1996.

[26] Scotland Act 1998 s.102(2)(a).

[27] Scotland Act 1998 s.102(2)(b).

[28] See paras.7-9, 18-21 and 28-29 of Sch.6 to the Scotland Act 1998.

[29] See paras.10-11, 22, 30, and 32 of Sch.6 to the Scotland Act 1998.

[30] See paras.12-13, 23, and 31 of Sch.6 to the Scotland Act 1998.

[31] See paras.33-35 of Schedule 6 to the Scotland Act 1998.

[32] Lester & Pannick, *Human Rights Law and Practice*, para.2.7.5, n.4. The rule is CPR 54.5(1).

of the court under the existing common law principles of *mora*[33] – and there is no Scottish authority in which a petition for judicial review has been refused on the ground of delay alone, in the absence of evidence of acquiescence by the pursuer or prejudicial reliance on this delay on the part of the defender.[34] This therefore leaves the acts of the Scottish administration and legislature potentially open to challenge for an indefinite period.[35]

Vires and the Scottish Administration

As we have noted, the effect of Sections 53 SA and 54 SA (as read in the light of Section 29(2)(d) SA) and of Section 57(2) SA is that "members of the Scottish Executive" (defined, in Section 44(1) SA, as the First Minister, the Law Officers and those other Scottish Ministers who are within the Cabinet) have *no power* to act in a manner incompatible with any of the Convention rights or with Community law. Consistently with this, paragraphs 1(c), 1(d) and 1(e) of Schedule 6 to the Scotland defines a "devolution issue" as including:

> "(c) a question whether a purported or proposed exercise of a function by *a member of the Scottish Executive* is, or would be, within devolved competence,
>
> (d) a question whether a purported or proposed exercise of a function by *a member of the Scottish Executive* is, or would be, incompatible with any of the Convention rights or with Community law,

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[33] See, *e.g. King* v *East Ayrshire Council*, 1998 SC 182, IH *per* Lord President (Rodger) at 196: "It is recognised that the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision for any longer than is necessary in fairness to the person affected by it." See, too, *Swan* v *Secretary of State for Scotland*, 1998 SC 479, IH.

[34] See, for example: *Singh* v *Secretary of State for Scotland* 2000 SLT 533, OH *per* Lord Nimmo Smith at 536 para.(8) and *Uprichard* v *Fife Council* 2000 SCLR 949 *per* Lord Bonomy at para.(16). In *R (Burkett)* v *Hammersmith LBC* [2002] 1 WLR 1593, Lord Hope of Craighead summarised the Scottish position thus at paras.63-64: "The principal protection against undue delay in applying for judicial review in Scotland is not to be found . . . in any statutory provision but in the common law concepts of delay, acquiescence and personal bar: see *Clyde & Edwards, Judicial Review*, para.13.20. The important point to note for present purposes is that there is no Scottish authority which supports the proposition that mere delay . . . will do. It has never been held that mere delay is sufficient to bar proceedings for judicial review in the absence of circumstances pointing to acquiescence or prejudice . . . none of the cases in Scotland provide support for a plea of unreasonable delay, separate and distinct from a plea of *mora*, taciturnity and acquiescence, in answer to an application for judicial review."

[35] See Lord Hope of Craighead House of Lords Hansard 17 Jun 1998: Column 1638: "*One has only to look at the devolution issues listed in paragraph 1 of Schedule 6 to see the scope which will exist for challenges to be made. No time limit is set for the making of those challenges.* As has been pointed out by several noble Lords, there is to be no revising chamber. So in theory at least - I stress the word theory - subject to the exercise of the powers given to the court in Section 93 to vary retrospective decisions, *legislation by the Scottish parliament could be set aside as not being within that parliament's competence long after it had been put into effect.*"

> (e) a question whether a failure to act by *a member of the Scottish Executive* is incompatible with any of the Convention rights or with Community law."

The question which then arises is whether or not the Scotland Act's definition of "devolution issue" (and consequently the Sections 53-54 SA and 57(2) SA *vires* limitation on Convention incompatible action) applies equally to Junior Scottish Ministers appointed by the First Ministers under Section 49 SA but who are not in the Scottish Cabinet, or to the Scottish Ministers' civil servants appointed under Section 51 SA, or to those defined under Section 126(7) SA as the holders of non-ministerial offices within the "Scottish Administration" (such as the Registrar of Births, Deaths and Marriages for Scotland[36] and Procurators Fiscal[37] who prosecute crimes under the direction of the Lord Advocate).

The answer to this question must be "yes" since any other conclusion would result in the constitutional anomaly that the powers of those employed or holding junior or non ministerial office within the Scottish administration would, in principle, exceed those of the Scottish Ministers who appointed them and to whom they are answerable. For example, if the actions of Scottish officials and junior ministers were not subject to the *vires* limitations imposed by Section 57(2) SA, then any Convention incompatible action by them would only be *prima facie* unlawful under Section 6(1) HRA (subject to the Section 6(2) HRA defence), and the courts would have a discretion under Section 8 HRA whether or not to grant a remedy for breach of Convention rights by the Scottish civil servant or junior minister, but would have no such discretion as regards the act of Scottish Ministers holding Cabinet rank. In any event, the general constitutional principle applicable to civil servants is the "*Carltona*[38] doctrine", which is that acts done by officials in the exercise of Ministerial functions are to be treated as the Minister's own acts regardless of whether these acts are done personally by the Minister himself or by a junior minister or by departmental officials. The *Carltona* doctrine does not involve any question of agency or delegation but rather the idea of the official as *alter ego* of the Minister: the official's decision is constitutionally seen to be the Minister's decision. [39]

Further, if the acts of non-ministerial office holders and members of staff of the Scottish Administration are to be regarded as distinct from the acts of the

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[36] S.126(8)(a) SA.

[37] See Reg.2 of the Scottish Administration (Offices) Order 1999 (SI 1999 No. 1127) which provides: "As from the [20 May 1999] date when section 44(1)(c) of the [Scotland] Act comes into force, the following offices are specified for the purposes of section 126(8)(b) of the Act (offices in the Scottish Administration which are not ministerial offices), namely the offices of procurator fiscal and procurator fiscal depute to which appointments may be made under sections 1(2) and 2 respectively of the Sheriff Courts and Legal Officers (Scotland) Act 1927."

[38] See *Carltona Ltd* v *Commissioners of Works* [1943] 2 All ER 560.

[39] See *Metropolitan Borough and Town Clerk of Lewisham* v *Roberts* [1949] 2 KB 608, 629 *per* Jenkins J; *R* v *Skinner* [1969] 2 QB 700, 707F-G, 709A-B *per* Widgery LJ; *In re Golden Chemical Products Ltd* [1976] 1 Ch 300, 307C-D *per* Brightman J; *Air 2000* v *Secretary of State for Transport (No. 2)* 1990 SLT 335; *R (National Association of Health Stores)* v *Department of Health* [2005] EWCA Civ 154, paras.23-24 *per* Sedley LJ, 71 *per* Keene LJ.

Scottish Ministers for the purposes of Section 57(2) SA and paragraph 1(d) of Schedule 6 SA, then the Judicial Committee of the Privy Council has wholly misunderstood the nature and extent of its devolution jurisdiction. Every case – bar one – which has come before the Privy Council to 2006 under the devolution statutes has concerned the actions of procurators fiscal and advocates deputes acting as public prosecutors in criminal trials in Scotland, rather than any personal acts of the Scottish Ministers.[40] In the exercise of its devolution jurisdiction, the Privy Council has become less a

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[40] The fourteen substantive criminal appeal decisions are, in chronological order: *Montgomery* v *H.M. Advocate*, 2001 SC (PC) 1 – decision of Lord Slynn, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Clyde, Lord Hope of Craighead, 19 October 2000 (Art.6 ECHR and pre-trial publicity); *Brown* v *Stott (Procurator Fiscal, Dunfermline)*, 2001 SC (PC) 43 - decision of Lord Bingham of Cornhill, Lord Clyde, Lord Hope of Craighead, Lord Kirkwood and Lord Steyn, 5 December 2000 (Article 6 ECHR and the privilege against self-incrimination); *McIntosh* v *HM Advocate*, 2001 SC (PC) 89 - decision of Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Clyde and Lord Hutton, 5 February 2001 (Article 6 ECHR, drug confiscation orders and the presumption of innocence); *McLean and another* v *Buchanan (Procurator Fiscal, Fort William) and another*, 2002 SC (PC) 1 - decision of Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Clyde, Lord Hobhouse of Woodborough and Lord Millett, 24 May 2001 (Art.6 ECHR, legal aid and the equality of arms between prosecutors and criminal defence lawyers). *Millar* v *Dickson*, 2002 SC (PC) 30 - decision of Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Clyde, Lord Scott of Foscote, 24 July 2001 (Article 6 ECHR and possible waiver of the right to an independent and impartial tribunal) *Dyer* v *Watson and Another and HM Advocate* v *K*, 2002 SC (PC) 89 - decision of Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Hutton, Lord Millett and Lord Rodger of Earlsferry, 29 January 2002 (Art.6 ECHR and the factors indicating unreasonable delay). *Mills* v *HM Advocate (No. 2)* 2003 SC (PC) 1 – decision of Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Lord Scott of Foscote, Lord Mackay of Clashfern, 22 July 2002 (Art.6 ECHR unreasonable delay between conviction and hearing of appeal and the remedy of a reduction in sentence). *R.* v *H.M Advocate*, 2003 SC (PC) 21 - decision of Lord Steyn, Lord Hope of Craighead, Lord Clyde, Lord Rodger, Lord Walker of Gestingthorpe, 28 November 2002 (Art.6 ECHR unreasonable delay in bringing charges and remedies under the Scotland Act); *Clark* v *Kelly*, 2003 SC (PC) 77 - decision of Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Hutton, and Lord Rodger of Earlsferry, 11 February 2003 (Article 6 ECHR and the independence and impartiality of the District Court). *Flynn and others* v *HM Advocate*, 2004 SC (PC) 1 – decision of Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Carswell, 18 March 2004 (Articles 5 and 6 ECHR tariffs for mandatory lifers). *Holland* v *HM Advocate*, 2005 SC (PC) 3, decision of Lord Bingham, Lord Hope of Craighead, Lord Clyde, Lord Rodger, Baroness Hale, Lord Carswell, 11 May 2005 (Art.6(1) fairness and procedure identification of accused by in the dock of the court). *Sinclair* v *HM Advocate*, 2005 SC (PC) 28, decision of Lord Bingham, Lord Hope of Craighead, Lord Clyde, Lord Rodger, Baroness Hale, Lord Carswell, 11 May 2005 (Art.6(1) fairness and disclosure to the defence of relevant information in the hands of the Crown). *Kearney* v *HM Advocate* [2006] UKPC D1, decision of Lord Bingham, Lord Hope, Lord Carswell and Lord Brown (whether temporary judges had the requisite independence from the executive to be Art 6(1) compliant). *Ruddy & Ors.* v *Griffiths* [2006] UKPC D2, decision of Lord Bingham, Lord Hope, Lord Rodger, Lord Carswell and Lord Brown (on acquiescence to a non-impartial tribunal).

general UK constitutional court and more a third tier court of criminal appeal from Scotland.[41] All of the eighteen cases before the Privy Council's devolution jurisdiction to the beginning of 2006 have come from Scotland, and only one of these cases has been a civil appeal; and even that one case concerned a challenge to the validity of continued detention – under and in terms of the first Act of the Scottish Parliament the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 – of persons detained in the State Hospital for reasons of public safety.[42]

Section 6(2) HRA and the Scottish administration

More radically yet, whereas under Section 6(2) HRA a public authority might claim that its Convention incompatible acts were not unlawful because they were constrained so to act by one or more provisions of Westminster primary legislation, or were simply giving effect to or enforcing provisions of some Convention incompatible Westminster derived legislation,[43] no such defence has been given to the Scottish Ministers. This means that no provision is made for the possibility of any "lawful" breach of Convention rights by the Scottish devolved authorities. Curiously, however, the Section 6(2) HRA defence is given to the devolved administrations and assemblies in both Wales[44] and Northern Ireland.[45] But because the Scottish Ministers and Parliament have no Section 6(2) HRA defence open to them, a declaration by a court made under Section 4 HRA to the effect that a provision of Westminster legislation is incompatible with the requirements of the Convention will have the effect of rendering *ultra vires* any act or omission of the Scottish Ministers or Parliament which relies upon the Westminster provision in question.

It is noteworthy that Section 57(2) SA refers to limitations on the powers of the Scottish Ministers under reference to both European Community law and Convention rights. One matter that remains to be resolved is what are the Scottish Ministers to do where Community law and Convention right

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[41] In addition to the twelve substantive criminal appeals, there have been three preliminary hearings before a three judge panel considering applications for special leave to appeal to the Judicial Committee cases after such leave had been refused by the High Court in Scotland: *Hoekstra and others* v *Her Majesty's Advocate (No. 5)* 2001 SC (PC) 37 – decision of the screening committee comprising Lord Slynn, Lord Hope and Lord Clyde, 26 October 2000; *Follen* v *H.M. Advocate*, 2001 SC (PC) 105 – decision of the screening committee comprising Lord Bingham, Lord Hope and Lord Clyde, 8 March 2001; and *Moir* v *H.M. Advocate*, 2005 SC (PC) 1 – decision of the screening committee comprising Lord Bingham, Lord Hope and Rodger, 17 November 2004.

[42] *A.* v *The Scottish Ministers*, 2002 SC (PC) 63 - decision of Lord Slynn of Hadley, Lord Hope of Craighead, Lord Clyde, Lord Hutton, Lord Scott of Foscote, 24 July 2001 (Art.5(1)(e) ECHR and the detention of persons of unsound mind).

[43] In *R* v *Kansal (No. 2)* [2002] 2 AC 69, HL Lord Hope observed (at para.88) that, in his view, the s.6(2)(b) HRA exception was *not* limited to non-discretionary acts and instead could be prayed in aid by a public authority which could point to a provision of, or made under, a primary Westminster statute which *authorised* the action in question.

[44] See s.107(4)(a) of the Government of Wales Act 1998.

[45] See ss.71(3)(a) and 71(4)(a) of the Northern Ireland Act 1998.

conflict.[46] But the decision not to afford the Scottish Ministers the possibility of a Section 6(2) HRA defence to any challenges made to the Convention compatibility of their actions is one with radical constitutional implications that have perhaps not yet been fully realised. For the decision means that – in relation to the assessment of the lawfulness of acts of the Scottish Ministers – Westminster statutes are placed in a position which is normatively subordinate to the requirements of the Convention. Because the Scottish Ministers have no Section 6(2) HRA defence, Convention rights have the same effect against the Scottish Ministers as do directly effective provisions of Community law – both render their acts *ultra vires*. Thus any Convention incompatible provision of a Westminster statute effectively falls to be "disapplied" as regards the Scottish Ministers, just as any Community law incompatible provision of a Westminster statute is to be disapplied as regards acts of emanations of the UK State.[47]

And it would appear that this failure to allow for *any* Convention incompatible activity on the part of the Scottish Parliament and Ministers was not a matter of simple oversight. When the Scotland Bill was before the House of Lords a provision was specifically amended in (and now forms Section 57(3) SA) to ensure that the Lord Advocate, when acting in his capacity as head of the system of criminal prosecution and investigation of deaths in Scotland, might be able to claim a Section 6(2) HRA defence.[48] In

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[46] See Aidan O'Neill "The constitutional supremacy of Community Law in the United Kingdom after the Human Rights Act" in de Sousa and Heusel (eds.) *Enforcing Community law from Francovich to Köbler: twelve years of the State liability principle* Volume 37 *Academy of European Law*, Trier, Germany (ERA, 2004) pp.87-116.

[47] See *R* v *Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] 1 AC 603.

[48] See House of Lords *Hansard* 28 October 1998 at Columns 2041-2042 *per* the then Lord Advocate, Lord Hardie: "Amendment No. 145F ensures that the Lord Advocate is able to rely on the protection afforded by Clause 6(2) of the Human Rights Bill when he is prosecuting an offence or acting in his capacity as head of the systems of criminal prosecution and investigation of deaths. Clause 6 of the Human Rights Bill provides that it is unlawful for a public authority which would include the Lord Advocate to act in a way that is incompatible with a convention right. Clause 6(2) provides that it is not unlawful if the act of the public authority was because it could not have acted differently as a result of primary legislation or the public authority was acting to give effect to provisions made under primary legislation. This is intended to protect a public authority where a Westminster Act required it to breach a convention right. *The amendment ensures that this protection is also afforded to the Lord Advocate where it is alleged that he has breached Clause 53(2) of the Scotland Bill [now Section 57(2) SA] which requires him to act compatibly with the convention rights. This ensures that the Lord Advocate could prosecute an offence contained in a UK Act even if it were in contravention of a convention right. Without the amendment the offence could be prosecuted by the Crown Prosecution Service in England but not by the Lord Advocate. The amendment also allows him to act in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland if he is acting as required by a provision of the UK Act. Without the amendment disapplying Clause 53(2) he could not act in this way* . . . What is being contemplated – I am not sure that I can think of a specific example – is United Kingdom legislation which creates an offence but which itself was contrary to the convention. . . . If an offence were created across the United Kingdom under a UK

the absence of specific Westminster derived authorisation the Lord Advocate would have, like the rest of the Scottish Ministers, no power to "move the court to grant any remedy which would be incompatible with the European Convention on Human Rights".[49] The fact that no similar amendment was made in respect of the other Scottish Ministers – or for the Lord Advocate when acting other than as head of Scotland's criminal prosecution service – suggests it was intended that the Convention based limits imposed on the powers of the Scottish devolved government would be subject to no exception. But since all those who hold office by virtue of their effective appointment by the Scottish Ministers within areas of devolved competence are governed by the *vires* controls of Section 57(2) SA – rather than by the lawfulness controls of Section 6 HRA – this means that a declaration of incompatibility made under Section 4 HRA has the effect of actually setting specific and particular limits on the power of those Scottish officials. A practical example may illustrate the issues that this constitutional arrangement may give rise to. In *Bellinger* v *Bellinger* the House of Lords made a Section 4 HRA declaration to the effect that Section 11(c) of the Matrimonial Causes Act 1973, which provided that in England and Wales "A marriage . . . shall be void on the following grounds only, that is to say ... that the parties are not respectively male and female . . ." was incompatible with the Convention rights articles 8 and 12 because it prevented the law's recognising the marriage entered into between a man and a transsexual female who on birth in 1946 had been correctly classified and registered at birth as male but had subsequently undergone gender reassignment surgery and treatment. For the purposes of domestic law, however, both parties to the marriage were regarded as being men and hence their marriage was not recognised. As Lord Hope noted:

> "When Parliament used the words 'male' and 'female' in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person's sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of child bearing. *I think that section 5(4)(e) of the Marriage (Scotland) Act 1977, which provides there is a legal impediment to a marriage in Scots law where the parties "are of the same sex", has to be read and understood in the same way.* I do not see how, on the ordinary methods of interpretation, the words "male" and "female" in section 11(c) of the 1973 Act can be interpreted as including female to male and male to female transsexuals.[. . .]
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> 69. *Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed*

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statute it would be appropriate that one of the considerations for the Lord Advocate would be whether he or she wished to prosecute in Scotland for that offence. Just as the Crown Prosecution Service in England could prosecute, it would be invidious if the Lord Advocate were precluded from prosecuting for the statutory offence under the United Kingdom Act simply because it contravened the convention right. At this stage, I am unable to think of specific examples."

[49] See *Lord Advocate* v *Scottish Media Newspapers Ltd* 2000 SLT 331 *per* the Lord President (Rodger) at 333B.

> *what the European Court of Human Rights has now held should be the position in Goodwin*. The court noted in para 100 of its judgment that article 9 of the Charter of Fundamental Rights of the European Union had departed 'no doubt deliberately' from the wording of article 12 of the Convention in removing the reference to 'men and women of marriageable age'. Article 9 of the Charter states simply that 'the right to marry' shall be guaranteed. The note to article 9 says that it neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. It appears that *the European Court saw that article as opening up the possibility of transsexuals marrying persons of the opposite sex to their post-operative acquired gender, as it rendered arguments about whether they were in fact of the opposite sex irrelevant*. By this route, which bypasses the physical problems which are inherent in the notion of a complete sex change, legal recognition can be given to the acquired gender of post-operative transsexuals. But *it is quite impossible to hold that section 11(c) of the 1973 Act treats the sex of the parties to a marriage ceremony as irrelevant, as it makes express provision to the contrary. In any event, problems of great complexity would be involved if recognition were to be given to same sex marriages. They must be left to Parliament. I do not think that your Lordships can solve the problem judicially by means of the interpretative obligation in section 3(1) of the 1998 Act*.
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> 70. So I too would dismiss the appeal. But *I too would make a declaration that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with Mrs Bellinger's right to respect for her private life under article 8 and with her right to marry under article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*."[50]

As Lord Hope notes, if Section 11(c)of the Matrimonial Causes Act 1973 is incompatible with the requirements of the Convention, so too is Section 5(4)(e) of the Marriage (Scotland) Act 1977 which, on its face, prevents same sex couples from marrying. But marriage is, of course, a devolved matter and the Registrar General of Birth, Deaths and Marriages in Scotland is defined, by Section 126(8) SA as holding a non-ministerial office within the Scottish Administration. It would therefore appear to be *ultra vires* the Registrar in Scotland to refuse to issue a marriage licence to a couple on the basis solely that they are of the same sex, since to do so would be to breach their Article 8 and 12 Convention rights. On this analysis, same-sex couples in Scotland need not have waited for the coming into force of the Civil Partnership Act 2004 before they could have legitimised their unions. They had the right to do so since July 1999 when power to regulate marriages was devolved to Scottish Ministers under the Scotland Act, and they retain the right even subsequent to the coming into force of the Civil Partnership Act to seek to a marriage licence. The fact that no such challenge has been made in

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[50] *Bellinger* v *Bellinger* [2003] 2 AC 467.

Scotland to date is if anything symptomatic of the lack of a properly developed public law culture in Scotland and the inability of pressure groups to take cases directly before the Scottish courts.[51]

Another example of the unexpectedly radical implications of the absolute duty placed on the Scottish Executive and Administration to act always in accordance with Convention rights arises from the decision of the Grand Chamber of the European Court of Human Rights in *Hirst* v *United Kingdom*[52] where it was held, by a majority of twelve votes to five held that the legislation in the UK which disenfranchises all individuals sentenced to a prison term after conviction for the duration of the period of their detention contravenes the requirements of the Article 3 Protocol 1 of the European Convention because it is disproportionate in its impact and effect and is not tailored to the circumstances of the conviction of individual prisoners. The opinion of Judge Caflisch, concurring with the majority, has stated that, in order to comply with the requirements of proportionality, any national law purporting to disenfranchise prisoners on conviction must have the following characteristics.

> "[It] cannot be a blanket law: it may not, simply, disenfranchise the author of every violation sanctioned by a prison term. It must, in other words, be restricted to major crimes, as rightly pointed out by the Venice Commission in its Code of Good Practice in Electoral Matters (judgment, section 32). It cannot simply be assumed that whoever serves a sentence has breached the social contract.
>
> The legislation in question must provide that disenfranchisement, as a complementary sanction, is a matter to be decided by the judge, not the executive. This element, too, will be found in the Code of Good Practice adopted by the Venice Commission.
>
> Finally – and this may be the essential point for the present case – in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner's release – the disenfranchisement must remain confined to the punitive part and may not be extended to the remainder of the sentence. In the instant case this would indeed seem to be confirmed by the fact that retribution is one of the reasons adduced by the United Kingdom legislator for enacting the legislation discussed here, and certainly a central one. This reason is no longer relevant, therefore, as soon as a person ceases to be detained for punitive purposes."

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[51] Compare with *Minister for Home Affairs* v *Fourie*, 1 December [2005] SACC and *Goodridge and Others* v *Department of Public Health* 18 November [2003] MSC where the south African constitutional court and the Massachusetts supreme court, respectively, held the exclusion of same sex couples from the legal regime of marriage unconstitutional because in violation of their fundamental right to equal treatment.

[52] App. No.74025/01 *Hirst* v *United Kingdom (No. 2)*, ECtHR (GC), 6 October 2005.

It is clear from the *Hirst* decision that Section 3 of the Representation of the People Act 1983 which provides that "a convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is *legally incapable of voting at any parliamentary or local government election*" is incompatible with the Convention right to "free elections" protected under both the Human Rights Act and the Scotland Act. It follows from this that the holding of general elections and any by-elections to the Scottish Parliament under that voting system would be incompatible with respect for the Convention rights of those who have been found to be improperly disenfranchised. Accordingly it is would appear that by virtue of Section 57(2) SA the Scottish Ministers and Administration have no power to participate in or do any official act – for example the provision or allocation of funds – in connection with any such elections to the Scottish Parliament until the franchise thereto has been altered so as to be Convention compatible.

Any such alteration in the franchise to the Scottish Parliament would appear to be the responsibility of the Westminster Parliament, however, by virtue of the provisions of Paragraph B3(b) in Part II of Schedule 5 to the Scotland Act which provides that "elections for membership of the House of Commons, the European Parliament, the [Scottish] Parliament, including the subject matter of . . . the Representation of the People Act 1983 and the Representation of the People Act 1985 . . . so far as those enactments apply, or may be applied in respect of such membership" are matters reserved to the Westminster Parliament and fall outwith the legislative competence of the Scottish Parliament and Executive. But in the meantime, the limitations on the powers of the Scottish Ministers as set out in the Scotland Act mean that the Scottish Ministers have no power to participate in or administer any legislative scheme – even one duly passed by the Westminster Parliament and approved by the Scottish Parliament by "Sewel motion"[53] – which is incompatible with the requirements of the Convention.[54]

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[53] The constitutional convention in the UK post-devolution is that the Westminster Parliament will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. A "Sewel motion" is a motion passed by the Scottish Parliament, in which it consents to the Parliament of the United Kingdom passing legislation on a topic which falls within the devolved legislative competence of the Scottish Parliament.

[54] Thus, for example, a challenge may be taken as to the lawfulness of any legislative provision which purports to allow the Scottish Ministers to act in any agency capacity in Convention incompatible elections. See the Scotland Act 1998 (Agency Arrangements) (Specification) Order 1999 (SI 1999 No. 1512) which by art.2(1) purports to specify the functions of a Minister of the Crown which may be exercised by the Scottish Ministers on his behalf under and in terms of s.93(1) SA. These functions include:
– Ss.18(5), 29(4A), 29(5), 29(6) and 29(7) of the Representation of the People Act 1983 (functions relating to funding arrangements for, and the conduct of, parliamentary elections).
– Ss.29(4A), 29(5), 29(6) and 29(7) of the Representation of the People Act 1983 as applied by regulation 3(1) of, and Sch.1 to, the European Parliamentary Elections Regulations 1999 (functions relating to funding arrangements for elections to the European Parliament).

Conclusion on the Scottish devolutionary settlement

Although the same substantive Convention rights (those set out in Schedule 1 to the Human Rights Act 1998) have been incorporated throughout the legal jurisdictions of the United Kingdom, those Convention rights have been given a completely different constitutional status in Scotland from the rest of the United Kingdom. Under the Scotland Act 1998, the rights guaranteed under the Convention have, in effect, the status of a higher law as against all and any legislation whether passed by the Westminster Parliament or passed by the Scottish Parliament as well as over any act or omission of a member of the Scottish Executive.[55] Scotland's new constitution under the Scotland Act mandates this new form of "democratic constitution" previously unknown within the context of the United Kingdom, one in which the judges are supreme in the sense that they have the power to strike down as invalid both:

(i) legislation which has been duly passed by the Scottish Parliament and

(ii) acts of the Scottish Ministers, even where these which might otherwise be warranted or authorized under primary Westminster legislation.

– Ss.29(4A), 29(5), 29(6) and 29(7) of the Representation of the People Act 1983 as applied by art.18 of the Scottish Parliament (Elections etc.). Order 1999 (functions relating to funding arrangements for elections to the Scottish Parliament).
– S.47(1) of the Representation of the People Act 1983 (function relating to determining terms and conditions for loans of equipment for local government elections).
– Regs.43(2) and 55(2) of the Representation of the People (Scotland) Regulations 1986 (functions of directing an adaptation of the electors lists and electoral register in force inconsequence of an alteration of parliamentary polling districts).
– Reg.51(2) of the Representation of the People (Scotland) Regulations.1986 (function of receiving copies of electoral register).
– Art.20(1) of the Scottish Parliament (Elections etc.) Order 1999 (function relating to determining terms and conditions for loans of equipment for Scottish parliamentary elections).
– Art.23(1) of the Scottish Parliament (Elections etc.) Order 1999 (function relating to the giving of directions to the discharge of registration duties).
– Arts.39(4), 40(3)(a), 40(5), 47(1), 47(6), 49(2) and 49(3)(b) of the Scottish Parliament (Elections etc.) Order 1999 (functions relating to the receipt of various returns and declarations in relation to election expenses).
– Art.55(2) and (3) of the Scottish Parliament (Elections etc.) Order 1999 (functions relating to the publication of notice of time and place of inspection of returns and declarations in relation to election expenses).
– Art.57(1) and (4) of the Scottish Parliament (Elections etc.) Order 1999 (functions relating to the making available for inspection various returns and declarations in relation to election expenses). Para.20(4) of Sch.4 to the Scottish Parliament (Elections etc.) Order 1999 (function in relation to the receipt of returns relating to postal ballot papers). Para.1(2) of Sch.7 to the Scottish Parliament (Elections etc.) Order 1999 (function in relation to the determination of questions about the use of rooms in school premises for election meetings).

[55] See Aidan O'Neill: "Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act" (2002) *Public Law* 724-742.

In French constitutional writing, the idea of the judiciary having such absolute power to review and strike down provisions of laws which have been duly passed by the legislature has been termed "*un gouvernment des juges*".[56] This is how the French would characterise the American constitutional position under which, since the seminal judgment in 1803 of the Supreme Court of the United States in *Marbury* v *Madison*,[57] the courts of that country have claimed the power to declare "a legislative act contrary to the constitution" as "not law". The US model involving the "Government of Judges" is one which has been imported into the devolved Scottish constitution. As the following survey of human rights decisions made by the courts in Scotland under the devolved constitution shows this is a development which has not been universally welcomed within the Scottish judiciary.

Human Rights Litigation in Post-Devolutionary Scotland

Given the statistics quoted at the outset of this article regarding the relevance of violent crime in Scotland and the high prisoner population, it should perhaps have come as no surprise that the bulk of human rights litigation to date following upon the devolution of power to the Scottish executive has been in the area of criminal justice, nor that the other main area in which courts have wrestled with Convention rights has been in civil claims brought by prisoners.

One explanation of this is a simple access to justice point. The vast bulk of individuals cannot afford to go to court and litigate against the government. Given the potential liability for the costs and expenses of the other side should one lose, one has either to be very rich – or so poor as to be eligible for legal aid – before one could even contemplate litigation. And litigation against government defenders is all the more fraught because, unlike ordinary litigants, the government recognises no general economic imperative to settle cases taken against it. The government's untrammeled access to tax-payers' pockets is such that it considers that it can afford to insist on litigating to the bitter end – regardless of cost – so that every avenue of appeal must be exhausted before it accepts defeat. This is a daunting prospect for all but the most determined litigants. And the most determined litigants are to be found amongst those who are seeking to avoid the loss of their liberty consequent upon their conviction and sentencing for a criminal offence and among those who, having lost their liberty on conviction, now have time enough on their hands to test the lawfulness of the actions of those by whom they are detained.

Further, the restrictive rules on standing (or "title and interest to sue") in Scotland as compared to the rules in England mean that there is no real scope for public interest litigation by pressure groups or non-government organizations.[58] And the Scottish courts have been traditionally unwilling to allow themselves to be used as debating *fora* for the resolution of purely

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[56] Davis "A Government of Judges: an historical review" (1987) 55 *American Journal of Comparative Law* 559.

[57] *Marbury* v *Madison* (5 US 368, 389, (1803) 1 Cranch 103 at 177.

[58] See Aidan O'Neill "Judging Democracy: the devolutionary settlement and the Scottish constitution" (2004) 8 *Edinburgh Law Review* 177-205.

academic disputes and have been hostile to the idea that they might be asked to pronounce "bare declarators" of law. Instead cases can only be brought in Scotland by individuals who can say that their rights are being breached and that they have a true on-going and live interest to have that matter resolved by the court.[59]

All of these factors have, by a process of elimination, left human rights issues against the Scottish Ministers to be litigated within the context of criminal prosecutions and, in the civil sphere, by convicted prisoners complaining of aspects of their detention. This has given a rather lop-sided feel to human rights in Scotland. From the decided cases, at least, human rights appears to be concerned only with asserting the rights of prisoners and criminals and the duty of courts to vindicate those rights and provide compensation for their violation. This has not been a development which has been universally welcomed, whether in the populace at large, the popular press, the politicians in charge of our affairs, or indeed among a number of the judges faced with these new claims before them. A feeling of injustice may also have been engendered by the fact that Convention rights challenge to the criminalisation of previously lawful activity (for example fox-hunting[60]) have failed whereas Convention rights cases brought by convicted prisoners have been successful. Prisoners are seen as undeserving and so their grievances should not be allowed to clutter up the courts and impede the speedy hearing and resolution of the legal claims of decent ordinary citizens. As Lord Hardie observed in *Davidson* v *Scottish Ministers (No. 1)*:

> "[T]he complainer and his legal advisers were seeking, *as part of a campaign involving other prisoners*, to obtain what was, in effect, an advisory opinion of the court. Had the reclaimer pursued his remedies under the Prison Rules, the present application might have proved quite unnecessary . . . *[C]ounsel for the reclaimer acknowledged that the reclaiming motion was intended to deal with abstract questions of principle. I strongly disapprove of the procedure adopted by the reclaimer and his legal advisers in this case*. It is a matter for future consideration whether the court should dismiss at the earliest opportunity any similar such petitions unless the petitioner has had recourse to and exhausted his remedies under the Prison Rules. If the court does not adopt such a stance there is a real risk that, by reason of the priority given to petitions for judicial review, judicial time and public funds will be utilised unfairly at the expense of other litigants."[61]

The underlying complaint appears to be that the litigation that was before the court – under which the prisoner challenged the compatibility of the conditions in which he was detained on remand in HMP Barlinnie with the

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[59] See *Adams* v *Advocate General*, 2003 SC 171, OH for a discussion of the requirements of title and interest in the context of a challenge to the Convention compatibility of the restrictions on fox hunting contained in the Protection of Wild Mammals (Scotland) Act 2002.

[60] See *Adams* v *Scottish Ministers*, 2004 SC 665, IH and *Friend* v *Lord Advocate* [2005] CSIH 69.

[61] *Davidson* v *Scottish Ministers (No.1)*, 2002 SC 205 *per* Lord Hardie at 216-217.

Article 3 ECHR prohibition on inhuman and degrading treatment and sought an order from the court removing him from these condition – was the continuation of politics by other means and was therefore illicit, as an improper use of court time and resources. The prisoner's application was accordingly summarily rejected. Ironically, however, the refusal on the part of this court to consider making such an order was itself subsequently overturned on the grounds that Lord Hardie as one of the bench hearing the application had failed to disclose his own prior political involvement as Lord Advocate on the very question of law – the competency of pronouncing coercive orders against the Scottish Ministers – then at issue before them.[62]

In *Napier* v *The Scottish Ministers*,[63] the prisoner litigant similarly complained that the cell in which he was detained on remand was Article 3 ECHR incompatible because: it was grossly inadequate in terms of living space, lighting and ventilation; the sanitary arrangements involved using a chamber pot in the presence of his cell-mate and subsequently "slopping out" the contents; and the extent to which he was confined in his cell was excessive with the periods of exercise and recreation outside the cell wholly inadequate. Unlike Mr. Davidson, he was successful in persuading the judge at first instance that he had made out a *prima facie* case which was strong enough for the judge to order his immediate transfer from his conditions of detention within HMP Barlinnie Prison to a conditions which complied with Article 3 ECHR The case subsequently went to a six week proof and – after consideration of expert evidence and Reports from the European Committee for the Prevention of Torture (CPT) – the Lord Ordinary, Lord Bonomy held that the combination of the "triple vices" of cellular and prison hall overcrowding, slopping out and impoverished regime in C Hall of Barlinnie Prison, Glasgow were such as to be capable of constituting in Scotland in 2001 a breach of Article 3. As he noted:

> "[T]o detain a person along with another prisoner in a cramped, stuffy and gloomy cell which is inadequate for the occupation of two people, to confine them there for at least 20 hours on average per day, to deny him overnight access to a toilet throughout the week and for extended periods at the weekend and thus to expose him to both elements of the slopping out process, to provide no structured activity other

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[62] *Davidson* v *Scottish Ministers (No.2)*, 2005 SC (HL) 7. This decision to find that Lord Hardie's participation in the case breached the necessary appearance of judicial impartiality was criticised by Louis Blom Cooper in "Bias on appeal" (2005) *Public Law* 225 at 228 in the following terms: "Whether or not the present law of bias is sustainable to test the impartiality of the trial judge, the executive and legislative roles performed by Lord Hardie when he was Lord Advocate cannot properly constitute a frame of mind (even assuming that Lord Hardie fully recalled his role in advising as a member of the Government on s.21 of the Crown Proceedings Act 1947 which apparently he did not) that would exercise in the courtroom bystander a proper feeling of bias. If one assumes (as one must) that an 'open mind' is not an empty mind and that Lord Hardie's politico-legal past included, even demonstrably, a relevance to the point of law raised by Mr. Davidson, an acknowledgement of the judicial role would preclude anything that called for disqualification or dismissal, at least not automatic."

[63] *Napier* v *The Scottish Ministers* [2002] UKHRR 308; [2001] 1 *Prison Law Reports* 347 *per* Lord Macfadyen at para.17.

> than daily walking exercise for one hour and one period of recreation lasting an hour and a half in a week, and to confine him to a 'dog box' for two hours or so each time he entered of left the prison was, in Scotland in 2001, capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe Article 3."[64]

The impact of these conditions, when taken together, were found by the judge to have diminished the petitioner's human dignity and to aroused in him feelings of anxiety, anguish, inferiority and humiliation. The Lord Ordinary also found that Article 8 ECHR was breached in the circumstances of the case. The detention of the petitioner in the conditions displaying the "triple vices" was held not to be "necessary in a democratic society". Interestingly, in reaching his decision on that point, Lord Bonomy took into account various statements made before the Scottish Parliament by members of the Executive, notably the then Minister of Justice, Jim Wallace MSP. From these statements, Lord Bonomy was able to judge that positive choices had been made by the Scottish Executive in the knowledge that there was an urgent need to address prison conditions. He noted in his judgment that in 1994 the conditions in HMP Barlinnie were criticised by the Committee for the Prevention of Torture. He also heard evidence that slopping out had generally been abolished in prisons in England and Wales by April 1996. The judge found from the Scottish Parliamentary material put before him by the petitioner's representatives that the Scottish Ministers could easily have installed integral sanitation in the cells in C Hall before 2001. Funds were available to them for this purpose but these had been allocated elsewhere. The Scottish Ministers were also found to have breached their common law duty to take reasonable care for the petitioner's health and safety in that the stress on the petitioner consequent upon the conditions of his detention was found to have contributed to the resurgence and exacerbation of his pre-existing eczema. In the circumstances an award of £2,000 plus interest was made to the petitioner to reflect the loss, injury and damages sustained by him in the course of the 42 days in which he was detained in the conditions in question.

The decision of Lord Bonomy was unsuccessfully appealed against by the Scottish Ministers to the Inner House, ultimately only on the question of the appropriate standard of proof to be applied by domestic courts in Article 3 ECHR cases. The First Division held that:

> "in civil proceedings in Scotland in which a finding is sought from the court that there has been an act or a failure to act by a public authority which is incompatible with the requirements of Article 3 of the European Convention on Human Rights, the appropriate standard of proof is the ordinary standard of proof applicable to civil cases in Scotland, namely, proof on a balance of probabilities."[65]

The Scottish Ministers declined to exercise their further right of appeal to the House of Lords.

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[64] *Napier* v *Scottish Ministers*, 2005 SC 229, OH at para.75.
[65] *Napier* v *Scottish Ministers*, 2005 SC 307, IH.

Lord Bonomy's judgment has since been publicly criticised by a retired Scottish judge (and former Solicitor General for Scotland) for its political nature and impact. Lord McCluskey wrote in a newspaper article as follows:

> "[T]he most remarkable feature of the *Napier* case was that the court accepted evidence that the Executive had deliberately decided to spend its limited financial resources on other things, in the light of their judgment as to what the public interest required. . . .
>
> The decision as how limited public (*i.e.* taxpayers') funds are to be spent within the criminal system is a matter for elected politicians not for judges. How can it be for judges to decide that spending money on improving toilet facilities for convicted criminals is more important than spending that money on tackling domestic violence or on trying to fight the menace of dangerous drugs?"[66]

Lord McCluskey had while still serving as a judge in Scotland previously expressed – in fairly robust terms – a certain scepticism as to the use to which the human rights legislation might be put; describing the incorporation of the Convention rights into domestic law as "a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers".[67] The tone and content of these remarks were subsequently found by the High Court of Justiciary to give rise to a legitimate apprehension that Lord McCluskey could not then be seen to apply questions arising out of that particular branch of the law with the necessary appearance of judicial impartiality.[68] It may be that the decision in *Napier* provided for him the confirmation of his earlier trenchantly expressed views on the unwisdom of incorporating the Convention.

This publicly expressed judicial hostility to human rights litigation for prisoners' rights appears to rest on the unspoken idea that justice is a limited commodity, or a zero-sum game such that for justice to be done to one means that an injustice is perpetrated against another. While there is no doubt that the claims of the victim to a form of restorative (and indeed individually retributive) justice are under-acknowledged within our present criminal and civil justice system it is not clear why that should constitute a basis for the demand that prisoners be excluded from any further participation in the justice system, or be denied the opportunity to air their grievances and seek vindication of their rights before the courts. It is clear that the individuals most directly aware of the activities of the particular prison administration are the imprisoned.

Another possible response to criticism of this kind of litigation might be to note that in improving the position of prisoners *vis à vis* the State one may improve the position of everyone, so that it is not just the undeserving who benefit from prisoners' rights litigation. Thus the abstract matter of principle that was before the Extra Division in *Davidson* (and to which Lord Hardie took exception) was the question as to whether or not it was ever open to the

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[66] Lord McCluskey "Opinion" in *The Scotsman* 3 August 2005.
[67] Lord McCluskey "Verdict" in *Scotland on Sunday* 6 February 2000.
[68] See *Hoekstra* v *H.M. Advocate (No. 2)* 2000 JC 391.

court to pronounce interdict or an order for specific performance against officers of the Crown (such as the Scottish Ministers) to compel them to comply with the law. Surely the establishing of such a principle can be seen to be potentially of use to all litigants faced with an abuse or excess of State power? In the event, when the decision of the Extra Division in *Davidson* was eventually appealed by the (former) prisoner petitioner to the House of Lords, the appeal was allowed unanimously, with Lord Hope observing as follows:

> "36. In *McDonald* v *Secretary of State for Scotland* 1994 SC 234, 238-239, Lord Justice Clerk Ross said:
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> 'It is thus clear that certain restrictions are imposed by section 21 [of the Crown Proceedings Act 1947] upon the granting of interdict in any civil proceedings against the Crown. The Act of 1947 in this respect changed the law of Scotland. Prior to the passing of the Act of 1947, the court in Scotland did on occasion pronounce interdict and interim interdict against the Crown (*Russell* v *Magistrates of Hamilton* (1897) 25 R 350; *Bell* v *Secretary of State for Scotland* 1933 SLT 519). . . . I accordingly agree with counsel [for the Secretary of State, the Lord Advocate, Lord Rodger of Earlsferry] that one effect of the Crown Proceedings Act 1947 has been to deprive litigants in Scotland of a right which they previously had, namely, a right to obtain interdict and interim interdict against the Crown.'
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> 37. Support for this view was undoubtedly to be found in the fine print of the Act. No one can pretend that it is easy to follow. It is obvious at a glance that the draftsman failed to examine the implications for the Scottish system to the same level of detail as is to be found in the provisions that are applicable in England. But *those who cared for the structure and orderly development of the law found it hard to believe that this was indeed what Parliament had intended. Why should litigants in Scotland have been deprived in 1947 of a remedy which they had previously enjoyed and was, for the first time, being made available to their counterparts in England?* Surely there would have been a protest about this result, if anyone had thought to explain that this was the intention while the Bill was being discussed in Parliament.
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> 38. That having been said, the decision in *McDonald* has been regarded as having settled the issue in Scotland for over a decade. *The appellant's attempt to open it up in the present proceedings, predictably, met with no success when the Extra Division heard the reclaiming motion against the Lord Ordinary's interlocutor*. We on the other hand have had the benefit of examining the issue in a tribunal which draws its membership from all parts of the United Kingdom. *There are occasions when those of your Lordships who come from Scotland feel justified in defending Scots law and the Scottish legal system against what are perceived to be alien influences. But this is not one of them. There is everything to be gained by the sharing of views among your Lordships which it has been*

> *possible to enjoy in this case. This has helped greatly, as we step back and try to take a broader view of section 21 of the 1947 Act*.
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> [. . .]
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> 54. I would summarise the conclusions which I have reached about the meaning of section 21 in its application to Scotland in this way. There are excluded from the expression 'any civil proceedings' in section 21(1) and section 21(2) proceedings by way of judicial review where relief is sought in respect of acts or omissions of the Crown or of an officer of the Crown acting as such. Proviso (a) to section 21(a) extends to any proceedings in which a remedy is sought against the Crown in private law proceedings, but not otherwise."[69]

And in *Beggs* v *Scottish Ministers*[70] the issue that was before the Inner House was whether or not individual civil servants can be called before the court to account for their contempt in failing to ensure that undertakings which had been given to the court on behalf of the Government were respected. Again, surely, the establishment of the principle that civil servants exercising State power may be held directly accountable to the court for their actions or omissions may be thought to be a matter of interest and significance not only to prisoners, but to everyone.

It is readily apparent, however, that there remains among at least a certain sector of the higher judiciary based in Scotland disquiet and unease about the constitutional position in which the Scottish devolutionary settlement has placed them. The fear appears to be that they are being required to enter into and make decisions on matters – such as the proper allocation of budgetary funds – in which they have little expertise and no democratic legitimacy. The problem is that is what the law requires them to do. A radical constitution is foisted on a conservative judiciary – the antisyzygy continues.

The Scottish Human Rights Commissioner

In March 2000, the Lord Advocate and the then Minister for Justice stated that the Scottish Ministers were considering the establishment of a human rights commission. Following a period of public consultation in 2003 the Scottish Executive announced their intention to put forward a Bill before the Scottish Parliament to establish the office of the Scottish Human Rights Commissioner (SCHR). Subsequent to the Scottish Executive announcing its proposals to create a human rights commission in Scotland, the UK Government announced its intention to create a Commission for Equality and Human Rights (CEHR) for England and Wales and Scotland. This UK proposal was set out in the Equality Bill which was introduced into the Westminster Parliament as a House of Lords Bill on 18 May 2005 and given royal assent as the Equality Act 2006. Some five months after the Equality Bill had been introduced into the Westminster Parliament, on 7 October

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[69] *Davidson* v *Scottish Ministers (No. 1)*, [2005] UKHL 74, 2006 SLT 110 (Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell, Lord Mance) *per* Lord Hope at paras.36-38, 54.

[70] *Beggs* v *Scottish Ministers*, 2005 SC 342, IH.

2005, the Scottish Commissioner for Human Rights Bill was introduced as an Executive Bill before the Scottish Parliament. The UK and Scottish Executives have apparently independently decided to create their own distinct Human Rights Commissions and Commissioners operating under distinct legislative frameworks.

But the whole question of the possible inter-relationship between the CEHR set up by Westminster and the SCHR to be established by the Scottish Ministers and Parliament seems to have been barely thought through. One of the complexities of the current Scottish constitutional arrangements is the fact that the Human Rights Act and the Scotland Act were drafted by wholly distinct Whitehall departments and little effort was made to co-ordinate the two Bills in their passage through the Westminster Parliament. This problem of complexity in constitutional structures for the protection of human rights in Scotland has now been compounded by the fact that there is little or no evidence of thought out co-ordination between the Westminster proposal for a British Commission for Equality and Human Rights and the Holyrood proposal for a Scottish Commissioner for Human Rights.

The very least it might be expected that each Commission(er) should have similar remits and investigative and coercive powers as well as similar powers to pursue and intervene in court actions. But that is not to be. The proposed Scottish Commissioner for Human Rights will have far less powers than the British Commission for Equality and Human Rights. Thus, while the CEHR is to be given statutory "title and interest" to raise actions and applications for judicial review before the courts in Scotland in any proceedings relevant to its functions (including human rights issues in reserved matters), the SCHR will be given no power either to raise actions in its own name before the courts in the public interest or to assist others who claim to be the victims of the violation of their rights in bringing human rights cases. The SCHR is given a limited power of intervention in civil cases before the Scottish courts but it will have no power to intervene in criminal cases. And the SCHR will have no power to investigate individual complaints of human rights abuses and any recommendations made in inquiries into the policies and practices of public authorities in Scotland will not be legally binding on any party. The CEHR's powers to conduct inquiries are broader than the Scottish Commissioner's in that the CEHR will be able to conduct enquiries into any matter relating to its human rights duties and its inquiries are not restricted to particular types of organisations. Further, in contrast to the CEHR which may give financial assistance to human rights NGOs, the SCHR will not have any grant-giving powers. As has been noted:

> "Given the fact that the [Scottish] Commissioner will not have the power to support individual cases, limited access to justice generally for individuals, and an NGO sector without the resources to fund cases, there is no guarantee that the strategically important cases in which the Commission might helpfully intervene will be litigated. This will severely restrict the ability of the Commissioner to operate at a proactive strategic level, and will sit in stark contrast to the position of the CEHR in England and Wales, and in Scotland on reserved issues. . . . The Northern Ireland model with an Equality Commission and a HRC with powers to give assistance to

> individuals, and to bring proceedings in its own name, as well as monitoring the law and conducting investigations, serves as a model to which the EOC considers that all nations of the United Kingdom, including Scotland, should aspire. While the creation of the post of Scottish Commissioner for Human Rights is a welcome move, the EOC considers that the role and remit do not go nearly far enough to ensure the creation of a human rights culture in Scotland."[71]

There is clearly an overlap both in terms of function, responsibilities and jurisdiction between the CEHR and the SCHR which is apparently to be addressed and alleviated by the conclusion of a Memorandum of Understanding between the two bodies on how they will co-operate on matters of mutual interest. It is apparently envisaged that whereas the CEHR will have a general overall remit for human rights matters in England and Wales, the CEHR's human rights role *in Scotland* will be restricted to reserved human rights issues and be a matter for Westminster: thus, such issues as data protection, elections, immigration and asylum, national security, competition, consumer protection, transport, social security, employment, discrimination and equal opportunities and broadcasting being all reserved issues might properly fall within the British Commission's Scottish remit. The SCHR's focus will, by contrast, be on *devolved* human rights issues which fall within the jurisdiction of Holyrood and will have regard not simply to the European Convention on Human Rights but *all* other international human rights instruments which the UK has ratified, although not specifically incorporated into domestic law.[72] It is envisaged in the Equality Act 2006 that the CEHR might take action in respect of devolved issues if the Scottish Commissioner gives consent to the CEHR to do so, but this apparent power of veto over the power of the CEHR in Scotland is not reflected in the terms of the Scottish draft legislation which sets up the SCHR.

The potential for confusion, duplication and for boundary disputes between the two bodies is clear. In addition the two new bodies will have to work with and co-ordinate their activities with the existing Scotland's Commissioner for Children and Young People, established by the Commissioner for Children and Young People (Scotland) Act 2003 and tasked with promoting and safeguarding the rights of children and young people." In the event, it is to be hoped that the creation of a multiplicity of

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[71] See Muriel Robison *Written Submission to the Justice I Committee of the Scottish Parliament on behalf of the Equal Opportunities Commission on the Scottish Commissioner for Human Rights Bill* 18 November 2005 (available online at http://www.scottish.parliament.uk/business/committees/justice1/inquiries/hrb/j105-hrb-evid-00.htm).

[72] Given that it is clear that under and in terms of s.58 SA and para.7(2)(a) in Part I of Sch.5 SA all of the UK's international obligations bind the Scottish Ministers as a matter of domestic law, then it may be argued that the Scottish constitution created under the Scotland Act is now a monist one for the purposes of international law, rather than the dualism which still characterises the UK constitution. Whether the international obligations which bind the Scottish Ministers as a matter of domestic law can be prayed in aid before the court by private litigants is more problematic however: see *Friend* v *Lord Advocate* [2005] CSIH 69.

distinct (and potentially competing) human rights Commissions and Commissioners holding a remit over human rights matters in Scotland will not be to the detriment of overall human rights protection within Scotland.

Conclusion

The devolutionary settlement in Scotland is an on-going constitutional experiment. The six years of its operation to date have revealed certain tensions, focusing most particularly around the question of the proper role of judges within a democratic polity. The United States has had two hundred years of experience with a constitution interpreted as mandating judicial supremacy, and there clearly remain tensions in its operation. The consequent juridicalisation of politics in that country has resulted in a perception of the politicisation of the judiciary, particularly in the members of the US Supreme Court[73] But the idea of judges as open political players runs wholly counter to the basic constitutional traditions of the United Kingdom where the preservation of the appearance of judicial impartiality is seen as being of fundamental importance.[74]

If the appearance of judicial impartiality is in danger of being compromised by the current constitutional position in which judges are placed under the devolutionary settlement, it may be that change is required in the Scottish constitution. Two options for change occur. First, that the Westminster legislature determine that "Convention rights" challenges against the Scottish Ministers should no longer be considered to raise devolution issues, and the Scottish Ministers then be treated on this matter as every other public authority in the United Kingdom, subject to the procedures of the Human Rights Act only. The result of such a change would be that the Privy Council would no longer have jurisdiction to hear criminal appeals from Scotland with the consequence that – in criminal matters at least – Scotland would be able to go its own way in Convention rights matters, untrammeled by UK wide considerations. This was the option recommended by Lord Bonomy in the context of his review into the practice and procedure of the High Court of Justiciary. He stated:

> "The only practical reason for ever categorising such issues as devolution issues was to ensure that recognition was given to the Convention rights during the period between the implementation of the Scotland Act and the implementation of the Human Rights Act, but even there it was a rather artificial way of introducing Convention rights to Scottish criminal procedure. That interim period is now over. *Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or on his behalf as prosecutor, are excluded from the definition of a devolution issue. The Scottish*

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[73] See, *e.g.* the decision in *Bush* v *Gore* 513 US 98 (2000) (00-949) where the US Supreme Court in a five-four split decision ruled on the validity of the Florida count in the 2000 US Presidential election thereby giving the election to George W. Bush notwithstanding his failure to achieve a majority of votes in his favour nationwide.

[74] See, for example, *In re Pinochet* (No. 2) [2000] AC 119.

> *Executive should urge the United Kingdom Parliament to make that amendment*.[75]

But such a constitutional change might itself set up new tensions within the Union however, since the High Court of Justiciary has, post-devolution, taken at times a fairly radical approach to the application of Convention rights considerations to criminal procedures. Thus in *Brown* v *Stott*[76] the Scottish criminal appeal court found that the prosecuting authorities could not lead and rely in court on evidence of an admission (regarding the identity of the driver of a car) which the accused was compelled to make to the police under Section 172(2)(a) of the Road Traffic Act 1988 as this was said to contravene her Convention right against self-incrimination. And in *HM Advocate* v *McIntosh*, the Scottish criminal appeal court found that the assumptions set out in Section 3(2) of the Proceeds of Crime (Scotland) Act 1995 relating to the recovery of the proceeds of drug trafficking were incompatible with the presumption of innocence set out in Article 6(2) ECHR.[77] Both of these decisions were overturned when the cases were taken to the Privy Council on Crown appeals. In coming to the decision in *Brown* v *Stott* Lord Steyn sitting as one of the Board of the Privy Council made the following general observations, implicitly critical of the approach taken by the Scottish court:

> "[A] single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights."[78]

Similarly, in reversing the decision of the Scottish criminal appeal court in *McIntosh* v *HM Advocate*, Lord Bingham stated his preference for the approach which had been taken by the Court of Appeal in England and Wales, as he observed:

> "The statutory scheme contained in the 1995 Act is one approved by a democratically elected Parliament and should not be at all readily rejected. I would for my part endorse the conclusion of the Court of Appeal (Criminal Division) in *R* v *Benjafield* [2001] 3 WLR 75, 103, para 87:
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> 'It is very much a matter of personal judgment as to whether a proper balance has been struck between the conflicting interests. Into the balance there must be placed the interests of the defendant as against the interests of the public, that those who have offended should not profit from their offending and should not use their criminal conduct to fund further offending. However, in our judgment, if the discretions which are given

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[75] *Improving Practice: the 2002 Review of the Practices and Procedure of the High Court of Justiciary by the Honourable Lord Bonomy* at para.17.14. The report is also available on-line at http://www.scotland.go vuk/library5/justice/rppj-00.asp.

[76] *Brown* v *Stott*, 2000 JC 328.

[77] *McIntosh* v *HM Advocate*, 2001 JC 78.

[78] *Brown* v *Stott*, 2001 SC (PC) 43 *per* Lord Steyn at 63.

> to the prosecution and the court are properly exercised, the solution which Parliament has adopted is a reasonable and proportionate response to a substantial public interest, and therefore justifiable.'"[79]

If the Scottish criminal courts were to maintain a different line on the protection, interpretation or remedies available for breach of Convention rights than the courts in the rest of the United Kingdom, then this might then open arguments (whether in applications to the European Court of Human Rights or before the domestic courts) that such difference in treatment may itself be a breach of Article 14 ECHR which provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . race . . . national or social origin, birth or other status."[80] The English have been found, after all, to constitute a distinct racial group from the Scots for the purposes of the Race Relations Act 1976,[81] and the distinctive ethnicity of the Welsh and Irish is not in dispute.

It should be noted that the possibility of such an Article 14 ECHR based discrimination claim already exists even under the existing constitutional arrangements. Currently a failure to bring a criminal prosecution against a person charged with a criminal offence within a reasonable time attracts quite different remedies in Scotland compared to the rest of the United Kingdom as a result of a divergence in approach between the Privy Council and the House of Lords. The Privy Council (in a divided 3:2 devolution jurisdiction decision) has held that such a failure in Scotland constitutes a breach of Article 6(1) ECHR and that the Lord Advocate therefore has no power to institute or maintain a criminal prosecution after a reasonable time has passed; the accused benefits from the delay by being able to avoid any trial.[82] But a nine judge House of Lords (in a divided 7:2) decision has sought to reject this approach for England and Wales[83] holding, instead, that

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[79] *McIntosh* v *HM Advocate*, 2001 SC (PC) 89 *per* Lord Bingham at 102 para.36.

[80] See, for example, *Dudgeon* v *United Kingdom* (1981) 4 EHRR 149 where a claim for breach of Article 14 ECHR in conjunction with Article 8 ECHR was based on the fact that while homosexual conduct had been decriminalised in Great Britain, it remained illegal in Northern Ireland. In the event, the Court did not find it necessary to deal with the Article 14 discrimination point, having found in favour of the substantive art.8 case – that the continued existence of the Northern Ireland legislation contravened individuals' right to respect for their private life.

[81] See *BBC Scotland* v *Souster*, 2001 SC 458; [2001] IRLR 150, IH.

[82] *H.M. Advocate* v *R* 2003 SC (PC) 21, decision of 28 November 2002, Lord Hope of Craighead, Lord Rodger of Earlsferry, and Lord Clyde forming the majority with Lord Steyn and Lord Walker dissenting.

[83] S.103 of the Scotland Act 1998, s.82 of the Northern Ireland Act 1998 and para.32 of Sch.8 to the Government of Wales Act 1999 all assert the binding nature of decisions of the Judicial Committee of the Privy Council in proceedings under these Acts in all other courts and legal proceedings, (apart from later cases brought before the Privy Council). The Government fully intended that this meant that decisions of the Privy Council exercising its devolution jurisdiction should be binding upon the Appellate Committee of the House of Lords. As Lord Sewel advised Parliament (House of Lords Hansard 8 October 1998 *per* Lord Sewell at Column 619):

Article 6(1) ECHR gives a right to be tried within a reasonable time but not a right *not* to be tried after an unreasonable time. Accordingly, it remains lawful for the Crown Prosecution Service in England and Wales to initiate criminal prosecutions after a reasonable time has passed, any unreasonable delay in the proceedings being recognized by the courts only in terms of possible compensation or reduction in sentence rather than as a bar to prosecution.[84] The consolidation of the devolution jurisdiction of the Privy Council with the appellate jurisdiction of the House of Lords into the new UK Supreme Court – as provided for by Section 40 of (and Schedule 9 to) the Constitutional Reform Act 2005 – may provide a forum in which this divergence in approach may be resolved and in future avoided. But unless and until that court is established, however, there remains something of a constitutional impasse which can only invite further litigation on these issues.

The second option for constitutional change might be to bring an end to the judicial supremacy on which the new Scottish constitution is based and to place the Scottish Parliament and Executive in the same legal position as the UK Parliament and Executive. On this model the judges could no longer simply strike down Scottish legislation but would have the power only to declare it to be Convention incompatible, leaving it to the Scottish legislature to decide whether, how and when to amend the legislation in question in the manner suggested by the judges. But the political implications of any such move might be regarded as too serious. If the Scottish Parliament and Executive were accorded the legal status of properly sovereign bodies, this might be seen as an unequivocal move away from the unionist agenda of retaining overall power under devolution, to a more unstable model of federalism and co-sovereignty within the Union. And this option might be seen to go too far down the slope to nationalism and raise the possibility of formal secession of Scotland from the Union.

The third option is simply to do nothing. The long-term implications of that may be just as radical on the United Kingdom constitution as a whole,

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"The Government believe that it is important that the decisions of the Judicial Committee of the Privy Council are binding in all legal proceedings other than proceedings before the JCPC itself. Amendment No. 292EA would mean that they were *not* binding upon this House, and *we do not accept that position.* Devolution issues will seldom be decided by this House. In normal circumstances, under Sch.6 of the Bill any devolution issue which arises in judicial proceedings in this House will be referred to the Judicial Committee unless this House considers it more appropriate that it should determine the issue itself. *We think it is appropriate that this House should not be able to depart from the earlier decisions made by the JCPC.* We believe that the JCPC is ideally placed to resolve disputes about *vires*. It has a vast experience of dealing with constitutional issues from the Commonwealth, making the provision that the JCPC's decisions of the highest status will ensure that clear decisions with a clear status are produced and that devolution issues are treated consistently. That is the advantage behind the line that we are advocating."

[84] *Attorney-General's Reference (No. 2 of 2001)* [2004] 2 AC 72, decision of 11 December 2003, Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffmann, Lord Hobhouse, Lord Millett, Lord Scott of Foscote forming the majority with Lord Hope of Craighead and Lord Rodger of Earlsferry dissenting.

however. Although, in theory, the Judicial Committee of the Privy Council may draw on a larger pool of potential judges than the House of Lords,[85] in practice the devolution cases of the Privy Council have largely been decided upon by the House of Lords judges.[86] When exercising this devolution jurisdiction, those judges have been acting under and in terms of the Scottish devolved constitution which, as we have seen, mandates a position of judicial supremacy over the legislature and, at least as regards the assessment of the lawfulness of the acts of the Scottish Ministers, places Westminster statutes at a normatively lower status than Convention rights. It is conceivable that this experience of acting under this Scottish constitutional model of *gouvernement des juges* may lead those judges to begin to question or push against the heretofore accepted tenets of the United Kingdom constitution which ascribe to judges – even in fundamental rights matters – a role subordinate to the UK Parliament. We may note in this regard, the following observations on the UK constitution made by Lord Hope (who has participated as a judge in every devolution case brought to date before the Privy Council):

> "Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley* v *The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the *English* principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified . . .
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> [I]t is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. . . ."

There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling

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[85] The Judicial Committee of the Privy Council exercising its devolution jurisdiction under s.103(2) of the Scotland Act may consist of Privy Councillors holding high judicial office in the United Kingdom (this means in effect all the current Inner House judges of the Court of Session) as well as the Lords of Appeal in Ordinary. By contrast the Appellate Committee of the House of Lords can only be constituted by Lords of Appeal in Ordinary or holders of high judicial office who also hold peerages (in Scotland among serving Court of Session judges, Lord Cullen of Whitekirk, Lord Mackay of Drumadoon and Lord Hardie of Blackford only).

[86] *Brown* v *Stott*, 2001 SC (PC) 43 is the only case to date in which one member of the Board – Lord Kirkwood – was a Privy Councillor who was not also a Lord of Appeal in Ordinary.

'law' and for applying it accordingly. It must never be forgotten that this rule, which is underpinned by what others have referred to as political reality, depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve."[87]

The experience of the Caledonian antisyzygy may, perhaps, be seen to act as a catalyst for future radical judicial change of the uncodified constitution of the United Kingdom as a whole. The constitutional dance continues, but it may be becoming less deferential: "the rules of the game are changing", to quote the Prime Minister,[88] but perhaps not in the way he had envisaged or hoped.

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[87] *Jackson* v *Attorney General* [2005] 3 WLR 733 *per* Lord Hope at pp.768, 769, 775 paras.104, 107, 126. See too similar effect the remarks by Lord Steyn at pp.767-768 para.102: "We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision made that clear: [1991] 1 AC 603. *The settlement contained in the Scotland Act 1998 also points to a divided sovereignty*. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish."

[88] See the Prime Minister's Press Conference for 5 August 2005, accessible on line at http://www.number-10.go vuk/output/Page8041.asp : ["W]e are today signalling a new approach to deportation orders. Let no-one be in any doubt, the rules of the game are changing. These issues will of course be tested in the courts, up to now the concern has been that orders for deportation will be struck down as contrary to Article 3 of the European Convention on Human Rights as interpreted by the European Court in the *Chahal* case in 1996, and indeed we have had such cases struck down. However, the circumstances of our national security have self evidently changed . . . [s]o it is important to test this anew now in view of the changed conditions in Britain. Should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights."

HUMAN RIGHTS IN POST-DEVOLUTION WALES: FOR WALES, SEE WALES?

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Introduction

The direction, and speed of direction, of developing a human rights agenda in the Welsh context has been governed very much by the nature of the devolution settlement in Wales, a weak scheme compared with those in Scotland and Northern Ireland, and one which lacks an underpinning logic and coherence. As will be discussed, the weaker powers of the Assembly have had the dual effect of providing less opportunity for infringing rights than exists in the other devolved jurisdictions but also less scope for creating a dynamic human rights agenda. Notwithstanding this, there has been some human rights activity, albeit activity which may appear very modest when compared to human rights developments in the other jurisdictions under consideration in this volume. However, to make any assessment of the significance of developments in Wales, it is necessary to measure them in and against the context in which they have taken place.

The General Context: Pre-Devolution Wales

Both the limited powers allocated to the National Assembly for Wales and the lack of preparedness of the general population in Wales for devolution are important factors to take account of in an examination of the development of human rights in post-devolution Wales. Without doubt, Wales was the least prepared of the three jurisdictions for devolution. Whereas Scotland had its Constitutional Convention, and Northern Ireland its Peace Process, which preceded the institution of devolved arrangements, in Wales there was little or no discussion of devolution prior to its establishment. Even immediately prior to the referendum on devolution in September 1997, the proposals in the White Paper were vague, and debate very limited. The general population in Wales, reliant on Anglo- or London-centric media, could not have been described as very aware or well-informed on the proposals for devolution, and certainly could not have claimed any ownership of the development of those proposals. Any such discussion came later.[1] Nor was a general debate on devolution encouraged by the dominant

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1 The National Assembly Advisory Group was established by the Secretary of State for Wales in December 1997 to assist him in the preparation of the guidance to be issued to the Standing Orders Commission on drafting the first set of Standing Orders for the Assembly. It carried out consultations during the first half of 1998 and reported in August 1998. Further discussion took place after the Assembly had been established: its own review of its procedures, the Assembly Review of Procedure, was described as "A Constitutional Convention by other means" by J.

political party in Wales, the Labour Party. Itself very divided on devolution for Wales, what emerged in the Government of Wales Act 1998 was the limit of what could be extracted from the anti-devolutionist element in the party. In his evidence to the Richard Commission,[2] pro-devolution Ron Davies, who had been Secretary of State for Wales in 1998, noted the compromise that had taken place.[3]

Civil society,[4] hugely important in the development of a true human rights culture, tended to be organised on an England and Wales basis, with the exception of groups focussed on Welsh language matters. Indeed, one commentator reflected that prior to devolution, divided on the basis of language, there were in Wales "two discrete civil societies living alongside each other but occupying different spaces."[5] Alternatively it was said, "Before the onset of the National Assembly it could be fairly said that there was a *civil society in Wales* rather than a *Welsh civil society."*[6] Within the context of an England and Wales legal jurisdiction, this made sense for many purposes but it was not conducive to the development of an agenda which was necessarily responsive to particular Welsh needs and priorities. Parallel with the situation of civil society in Wales prior to devolution, it has also been observed that the legal profession in Wales lacked a strong public law tradition, something likely to have an effect on the development of litigation on human rights.[7]

From the point of view of hoping for a dynamic development of a human rights agenda, none of this boded well. Accordingly, the development of a range of Welsh organisations, or the strengthening of the Welsh element

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Osmond in R. Hazell ed, *The State and the Nations – The First Year of Devolution in the United Kingdom*, chap.3.

[2] The Richard Commission was established in 2002 to examine the powers of the National Assembly for Wales and its electoral arrangements.

[3] In his evidence to the Richard Commission, he stated: "The 1998 Government of Wales Act was a compromise between enthusiastic devolutionists within the Labour Party and those who were less enthusiastic. The crucial battleground was within the Labour Party and the compromise which emerged was one around which the Party - both before and in government – was broadly able to unite." Evidence to the Richard Commission is available on the Commission's website: www.richardcommission.gov.uk.

[4] The Centre for Civil Society, London, defines civil society thus: "Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. . . Civil societies are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women's organisations, faith-based organisations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy groups." http://www.lse.ac.uk/collections /CCS.

[5] G.T. Davies and J. Osmond, "Culture and Identity", in J. Osmond and J.B. Jones ed., *Birth of Welsh Democracy – The First Term of the National Assembly for* Wales, 2003, p.245.

[6] J. Osmond, "Nation Building and the Assembly: The Emergence of a Welsh Civic Consciousness", in A. Trench ed., *Has Devolution Made a Difference? The State of the Nations 2004*, 2004, p.75.

[7] See, *e.g.* R. Rawlings, *Delineating Wales*, 2003, p.462 and p.477; R. Rawlings, "Taking Wales Seriously", in T. Campbell, K.D. Ewing and A. Tomkins ed., *Sceptical Essays on Human Rights*, 2001, p.180.

within England and Wales or United Kingdom bodies, with direct and indirect interests in human rights matters has in itself represented a significant achievement of devolution in Wales. In relation to the legal world, there has been the development of what is referred to as "Legal Wales,"[8] an expression which covers the development of legal institutions and professional bodies in Wales alongside the making of legislation by the Assembly and the "repatriation" of some elements of the administration of justice to Wales.[9] And, while the general public's imagination may not have been captured by the first six years of devolution in Wales, it is suggested that there has been a vast development in Welsh civil society. As observed elsewhere, an indicator of this sea-change is found in the number of all-Wales organisations which gave evidence to the Richard Commission on the powers of the Assembly, in contrast to the limited engagement with the Kilbrandon Commission in the 1970s where only the political parties and a small number of academics gave evidence.[10]

The Devolution Settlement in Wales

Of the three devolution settlements of 1998, the arrangements for Wales are by far the weakest. In comparison to both Scotland and Northern Ireland there are two important differences. In terms of the powers given to the National Assembly for Wales, no power to make primary legislation is conferred. Instead, the Assembly is given "functions" within a number of fields listed in the Government of Wales Act 1998.[11] In terms of legislative powers, the Assembly is restricted to making subordinate legislation under the authority of various specific Acts of Parliament. Even as regards the "fields" listed in the Government of Wales Act, not all the powers in each field are conferred. This brings us to the second major difference with Scotland and Northern Ireland: whereas under the Scotland Act and the Northern Ireland Act all powers are devolved other than those which are reserved, or reserved or excepted, in Wales only those powers which are specifically allocated to the Assembly are devolved. The initial allocation of powers to the Assembly in 1999 involved an Order in Council listing, on a statute by statute and provision by provision basis, the powers to be allocated to the Assembly.[12] Within any one of the several hundred Acts under which the Secretary of State for Wales exercised functions in relation to Wales prior to devolution, there may be some powers allocated to the Assembly, some not allocated at all, and some designated as exercisable by the Assembly jointly with the Secretary of State. Every new Act of the United Kingdom Parliament potentially alters the devolution settlement for Wales either by the deliberate allocation or withholding of new powers or the inadvertent withholding of new powers or consequential withdrawing of

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[8] The term was coined by the then Senior Presiding Judge on the Wales and Chester Circuit, Sir John Thomas, in the Lord Morris of Borth-y-Gest Annual Lecture in 2000 in University of Wales, Swansea: "Legal Wales: Its Modern Origins and its Role after Devolution: National Identity, the Welsh Language and Parochialism."

[9] See further, J. Williams, "Legal Wales", chap.19 in J. Osmond and J.B. Jones ed., *Birth of Welsh Democracy*, 2003.

[10] *ibid.* p.71.

[11] Government of Wales Act 1998, s.21 and Sch.2.

[12] National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672).

previously allocated powers. Those wishing to know the powers of the Assembly are faced with a moving target.[13]

These two distinguishing features of devolution for Wales have a significant impact on the human rights situation. The detailed, specific attribution of powers under hundreds of separate sections of Acts of Parliament does not lend itself easily to the development of coherent policy in the field of human rights or other substantive areas. This is all the more so when it is borne in mind that there is little obvious principle in the manner in which the line is drawn in the United Kingdom between what should be done by primary legislation and what may be done in secondary legislation. Moreover, any decision prior to 1997 as to powers to be exercised by a Secretary of State will have been made with little thought as to their significance for the subsequent devolution arrangements. The consequence is that Wales has been given limited powers in a manner which hinders the development of cross-cutting policies. Of course, while the Assembly is restricted to making subordinate legislation, this formal designation tells us very little in practice. Given the flexibility of the British constitution, "subordinate" legislation may cover measures which are trivial in the extreme to measures which contain provisions which could not described as secondary legislation in any system whose constitution embodied a more rigid notion of separation of powers. For example, in the area of education, some quite significant powers, including the power to remain outside some of the more market-driven changes to be applied to England, have been given to the Assembly. Even within the scheme set up by the Government of Wales Act, the powers of the Assembly could be more far-reaching if widely drafted framework legislation were adopted at Westminster. However, this approach has not, as yet, become established practice. Indeed, it is one of the United Kingdom Government's current proposals for developing the devolution settlement for Wales within the existing legislative regime.[14]

Given the weaker powers and their piecemeal allocation, there has been less opportunity for the Assembly to infringe basic rights, particularly in the field where the most efficient enforcement apparatus exists: that of traditional civil and political rights. However, the reverse is true too: there has also been less opportunity for the Assembly to promote a human rights agenda. It can go so far by encouraging outside bodies, but once a legislative basis is required the Assembly can go no further on its own even where there is complete consensus within the Assembly. Instead, it is dependent upon both the goodwill of the United Kingdom Government and the availability of a legislative slot in the crowded United Kingdom Parliamentary timetable in order to achieve its goal. As we will see, this lack of power to drive the agenda forward in many areas has resulted in a concentration on the areas in which more significant powers have been devolved, as for example in relation to children, and on matters where progress can be made to promote certain rights on the basis of consensus within and outside the Assembly, where the lack of coercive powers is less of an obstacle.

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[13] See, *e.g.* D. Lambert, "The Government of Wales Act – An Act for Laws to be Ministered in Wales in Like Form as it is in This Realm?" (1999) 30 *Cambrian Law Rev* 60.

[14] *Better Governance for Wales*, June 2005, Cm 6582.

However, the situation regarding powers which is described here is set to change. The Richard Commission, an independent Commission established by the Assembly to inquire into the "breadth and depth" of the Assembly's powers, was unanimous that the Assembly should be given primary law making powers.[15] However, the United Kingdom Government's White Paper of June 2005[16] showed little enthusiasm to take on board the totality of the Richard Commission recommendations. The Government's proposals are evidence, yet again, of the serious split in the United Kingdom Labour Party in relation to devolution for Wales and, once again, as was the case with the original devolution settlement in the Government of Wales Act, they smack of a compromise within that political party rather than a principled proposal to move on the devolution settlement in Wales. The White Paper proposed that immediately, and without the need for any amendment to the Government of Wales Act 1998, the Government will delegate the maximum discretion to the Assembly when primary legislation is being drafted.[17] The recently published Government of Wales Bill 2005[18] sets up a procedure whereby the Assembly may be given Henry VIII powers to modify legislation or to make new provisions on specified matters.[19] Orders in Council, made at the request of the Assembly and subject to the authorisation of Parliament,[20] will specify the matters within the Assembly's fields of competence on which the Assembly may make such "Assembly measures". The Assembly Measure utilising this allocation of power may then be made by being passed by the Assembly and approved by Her Majesty in Council.[21] In the longer term, the White Paper proposed that the Assembly could be given general powers to make primary legislation but this would not take place without approval by a referendum in Wales.[22] Provision is made for this in the new Bill[23] but the Government has indicated that it will not hold a referendum on primary powers before 2011 at the earliest.[24] Clearly, these proposed changes would have an impact on the situation regarding human rights in Wales. The greater the powers of the Assembly, the greater the scope both for infringing individuals' rights and for driving forward the promotion and the protection of human rights. The greater the powers of the Assembly, the more lively the human rights situation.

The Government of Wales Act and the Human Rights Act

The Government of Wales Act requires the Assembly to act consistently with European Community law and with the rights in the European Convention. To the extent that Community law embodies fundamental rights obligations, especially relevant when Community law is being implemented, the

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15 *Report of the Richard Commission*, March 2004. The report is available on the Commission's website, *supra* n.3.
16 s*upra* n.14.
17 *ibid.*, para.1.24
18 Introduced in the House of Commons on 8 December 2005 as Bill 100 of 2005-06.
19 Clauses 92 and 93 of the Bill as introduced on 8 December 2005.
20 Clause 94.
21 Clause 92.
22 *Supra* n.14, para.1.26.
23 Part 4 of the Bill.
24 Statement of Peter Hain, Secretary of State for Wales, to the House of Commons, HC Deb 15 June 2004, col. 264.

Assembly must obviously have regard to these rights requirements. However, the obligation which was likely to be the more significant was that arising under the European Convention on Human Rights.

Since the National Assembly for Wales is a public body within the meaning of the Human Rights Act 1998, it falls very clearly under the obligation not to act in a manner which is incompatible with the Convention rights. However, since the Assembly was established and exercising powers before the Human Rights Act entered into force in October 2000, it was necessary to make provision in the Government of Wales Act to apply the substance of the human rights obligations earlier in Wales.

Section 107(1) of the Government of Wales Act makes clear that the Assembly has no power "to make, confirm or approve any subordinate legislation" or "to do any other act" which is incompatible with any of the Convention rights. "Convention" and "Convention rights" in the Government of Wales Act have the same meaning as in the Human Rights Act. In addition, the Government of Wales Act makes it clear that the obligation in section 107(1) does not apply to an act which by virtue of section 6(2) of the Human Rights Act would not be unlawful under section 6(1) of that same Act. In other words, the Assembly will not be acting unlawfully if it makes subordinate legislation or otherwise acts in a way which is incompatible with a Convention right if it has been required to so act under an Act of Parliament. Since, for the moment, at least, the Assembly's powers are those allocated under specific Acts of Parliament, the major question will be whether the relevant primary legislation can be interpreted in a Convention-compliant way or whether it requires the Assembly to act in a manner incompatible with the Convention. The more closely drafted the primary legislation is, the less discretion the Assembly has and the greater the applicability of section 6(2) of the Human Rights Act in the case of any incompatibility with the Convention rights. However, should the practice develop of the United Kingdom Government promoting the drafting of broad framework legislation allocating significant discretion to the Assembly, the greater the scope for choice, and the greater the responsibility of the Assembly itself to ensure that the choices it makes comply with the Convention rights.

Beyond the Human Rights Act: Bilingualism and the Government of Wales Act

Apart from the provisions of the Government of Wales Act dealing with the Human Rights Act obligations, a number of other provisions are relevant to human rights in Wales even though they are not necessarily phrased in the language of individual rights. Particularly significant among such provisions are those on bilingualism and equality.

It was not surprising given the past battles over the Welsh language that provision was made in the Government of Wales Act in relation to the use of Welsh. The Assembly is required to conduct its business "to give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a

basis of equality."[25] Legislation enacted by the Assembly is to be drafted in both Welsh and English "unless in the particular circumstances it is inappropriate or not reasonably practicable for the draft to be in both languages."[26] And, legislation which is made in the two languages will have the Welsh and English texts treated as being of equal standing.[27] The Assembly is also given power to support the Welsh language.[28] As a result, Assembly business, in plenary and in committee, is conducted using both languages with simultaneous translation from Welsh into English and legislation is normally made in both languages. Although none of this is phrased in the language of individual or group rights, it is a very significant step in the protection of cultural rights of Welsh speakers and in the esteem enjoyed by the language and the language's speakers.

Earlier in the twentieth century, the use of the Welsh language in the courts in Wales was seen purely in the context of a due process right to a fair trial: the Welsh Courts Act 1942 failed to provide a general right to use Welsh in the courts. Instead, it provided that "the Welsh language may be used in any court in Wales by any party or witness who considers that he would otherwise be at a disadvantage by reason of his natural language of communication being Welsh".[29] It was not until the Welsh Language Act 1993 that the right to use the Welsh language in the courts, and with public bodies, was recognised as a cultural right rather than applying only in circumstances where a person would otherwise be disadvantaged. The Government of Wales Act, in establishing the Assembly to run on a bilingual basis, has raised the profile of the language further and will be seen by many as a major boost to the cultural rights of Welsh speakers.

Beyond the Human Rights Act: Equality in the Government of Wales Act

The other provisions of some significance for the promotion of rights in the Government of Wales Act relate to equality. In the conduct of its own business, the Assembly is required to have "due regard to the principle that there should be equality of opportunity for all people".[30] However, of greater significance is the requirement of section 120(1) which provides:

> "The Assembly shall make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people."

As with the provision on bilingualism, this too is a provision which is not framed in the language of individual or group rights. Indeed it has been described as a provision which is "not user-friendly for the individual litigant"[31] although it might be a relevant factor in a judicial review action in determining whether the Assembly took account of all relevant

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[25] Government of Wales Act, s.47.
[26] *ibid.*, s.66.
[27] *ibid.*, s.122(1).
[28] *ibid.*, s.32(c).
[29] Welsh Courts Act 1942, s.1.
[30] Government of Wales Act, s.48.
[31] R. Rawlings, *Delineating Wales*, 2003, p.475.

considerations in making subordinate legislation.[32] The inclusion of this provision in the legislation owes much to the efforts of a number of high-profile individuals working within equality bodies in Wales prior to and at the time of the establishment of the Assembly,[33] some of whom were subsequently elected to the Assembly.

In practice, the inclusion of this provision in the Government of Wales Act has had a significant impact on the Assembly's working and it has been an area of considerable focus in the development of Assembly policy. For example, the initial strategic plan for Wales, *BetterWales.com*, included as one of its three defining themes or values the promotion of equal opportunities – "the promotion of a culture in which diversity is valued and equality of opportunity is a reality".[34] The other core values are promoting sustainable development and promoting social inclusion. These three guiding values have been carried forward into the strategic plan which replaced *BetterWales.com*, the *Plan for Wales 2001*. Equality and social inclusion have thus been placed high on the list of the Assembly Government's stated priorities.

Standing Orders[35] require the establishment of a Committee on Equality of Opportunity to have regard to the need for the Assembly to avoid discrimination on grounds of race, disability or gender. In fact, the Committee has taken a wide interpretation of its remit and has extended its focus to include discrimination on other grounds including sexual orientation, age and religious beliefs.[36] It has also reported on the situation of gypsies and travellers in Wales and continues to follow up this area. Much of its work has been focused on the mainstreaming of equality issues in the Assembly's work. As explained in the Committee's report on mainstreaming equality issues,[37] the Assembly's approach in leading on equality issues has been to "put its own house in order" before promoting similar change in other public bodies. Its audit of pay was an example of this. The Assembly conducted an equality audit of the pay of its staff, identified a gender gap in pay and instituted a pay deal in order to deal with the gap.[38] Not everything has been a complete success immediately: for example, in its report on mainstreaming equality, the Equality of Opportunity Committee was critical of the Assembly's initial achievements in relation to implementing a race

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[32] *ibid.*, p.476.

[33] These included the late Val Feld, then Director of the Equal Opportunities Commission in Wales, founding director of Shelter Cymru and an Assembly Member in the first Assembly until her death in 2001; Helen Mary Jones, a former Senior Development Manager with the Equal Opportunities Commission in Wales, was a member of the National Assembly Advisory Group and has been an Assembly Member since the establishment of the Assembly; Jane Hutt, a former director of Chwarae Teg, an organisation seeking to support and expand the role of women in the Welsh economy, has been an Assembly Member and Minister since the establishment of the Assembly.

[34] These documents are available on the Assembly's website in the Themes and Strategies section: www.wales.gov.uk.

[35] Standing Order 14.

[36] See Equality of Opportunity Committee, *Report on Mainstreaming Equality in the work of the National Assembly*, July 2004.

[37] *ibid.*, para.6.11.

[38] *ibid.*

equality scheme under the Race Relations Amendment Act,[39] and the lack of an over-arching equality strategy was observed with regret in the same report.[40] However, the existence of the section 120 obligation allied with a fair amount of cross-party working[41] and consensus on equality matters, as well as the much stronger representation of women in the Assembly's membership,[42] and a dynamic approach by the Committee on Equality of Opportunity has led to a good deal of activity in this area.

A detailed study of the Assembly's work in relation to equality in its first two and a half years concluded that a distinctive equality agenda had started to emerge.[43] This has included the Assembly's work on equal pay within the Assembly itself and the promotion of equal pay in the public sector in Wales, the development of open recruitment in order to promote a more diverse workforce, training on equality awareness for all Assembly civil servants, and the participation of the statutory equality commissions in the work of the Assembly. To the extent to which it is permissible under EC procurement rules, the Assembly has developed the use of contractual terms to promote equality and has developed a voluntary code of practice to encourage suppliers to improve their practice.[44] The *Lifting Every Voice* report dealt specifically with the issue of institutional racism but was regarded as applying to how other aspects of inequality might be tackled.[45] Overall, the area of equality of opportunity is one of the key areas where the Assembly has developed policy very much on a Wales basis both in terms of the priorities and the working methods where partnership and consultation are very high on the agenda.

Beyond the Government of Wales Act: The impact of the United Nations Convention on the Rights of the Child

Interestingly, although the Assembly very clearly comes within the remit of the Human Rights Act, and although the Government of Wales Act makes compliance with the Convention rights a matter of *vires* for the Assembly, in practice the human rights treaty which has made the most high profile impact on policy development in the Assembly has been the United Nations Convention on the Rights of the Child, a treaty ratified by the United Kingdom but not made a part of domestic law. Indeed, the Committee on the Rights of the Child, the body which monitors state compliance with the Convention, has criticised the United Kingdom for its failure to ensure the

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[39] *ibid.*, para.6.14.
[40] *ibid.*, para.6.1.
[41] A point highlighted in P. Chaney and R. Fevre, *An Absolute Duty – Equal Opportunities and the National Assembly for Wales*, 2002, para.2.08.
[42] In the first Assembly, elected in 1999, 25 of the 60 members were women and 5 out of the 9 positions in the Assembly Cabinet were filled by women; currently there are 30 female members out of the total 60, and 4 women out of a total of 9 Assembly Cabinet Ministers.
[43] *Supra* n.41.
[44] Discussed in the Committee's Annual Reports.
[45] *Lifting Every Voice: A Report and Action Programme to address institutional racism at the National Assembly for Wales*, 2001.

coherent implementation and monitoring of the Convention in the United Kingdom.[46]

One of the most significant developments in Wales since devolution which is of relevance to rights was in the area of children's rights – the establishment of the Children's Commissioner for Wales. The setting up of this pioneering office, the first of its kind in the United Kingdom, is evidence of both the potential and the limitations of the devolution settlement in Wales. With the *Lost in Care* report on child abuse in North Wales[47] prominent in the minds of the newly elected Members of the first Assembly, there was complete political consensus on the need to enhance the protection of children. The establishment of a Children's Commissioner had the support of all the political parties in the Assembly. Yet, despite this high level of political consensus, the Assembly itself lacked the powers to move the project forwards, dependent on Westminster for primary legislation to do this. Although there was no United Kingdom Government opposition to the Assembly's desire to establish a Children's Commissioner, there was the need to wait for an appropriate slot in the crowded Westminster legislative timetable. In the event, the establishment of the Children's Commissioner was accommodated in the Bill which became the Care Standards Act 2000. This was a pragmatic move: while the remit of the Children's Commissioner was restricted to social services only, the office had been established earlier than it would have been had a dedicated slot been awaited at Westminster. An extension to the Commissioner's remit came the following year under the Children's Commissioner for Wales Act 2001. Now, the Commissioner deals with all areas within the Assembly's devolved responsibility.

There remains the matter of the non-devolved areas. From the perspective of the efficient protection of children's rights in Wales, the lack of competence on the part of the Commissioner in relation to non-devolved matters has been viewed as a serious practical disadvantage.[48] In the Children's Commissioner for Wales Bill as originally drafted, the Commissioner would have had no role whatsoever in relation to non-devolved matters, including for example children within the criminal justice system. However, in the House of Lords it was agreed that the Commissioner should be able to make representations in relation to non-devolved matters to the Assembly.[49] The Assembly may then exercise its right under section 33 of the Government of Wales Act "to consider, and make appropriate representations [to the United Kingdom Government] about any matter affecting Wales." However, the dispute over the competence of the Commissioner in relation to non-devolved matters rumbles on. In the course of the setting up of the English Children's

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[46] Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, 1995, para.8; Concluding Observations, 2002, para.4.

[47] *Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974.* Department of Health, HC 201 (2001).

[48] See, *e.g.* evidence of P. Clarke, Children's Commissioner for Wales to the Welsh Affairs Select Committee, Fifth Report of 2003-2004, *The Powers of the Children's Commissioner for Wales.*

[49] 3 April 2001, HL Deb vol.624, col.WA110.

Commissioner, despite representations by the Assembly Government[50] and the House of Commons Welsh Affairs Select Committee,[51] the opportunity was not taken up to extend the Welsh Commissioner's powers into the non-devolved fields. Instead, the English Commissioner will exercise his, weaker, powers in relation to individual children in Wales whose problems arise in relation to non-devolved matters.[52]

Early work in the first Assembly concerning children identified the Convention on the Rights of the Child as a source of "core values" which would inform the development of policy and practice in the Assembly.[53] Since the European Convention on Human Rights has sometimes been criticised for its "child-blindness", it is not surprising that the Assembly should have looked beyond its terms when it came to developing policy in relation to children, an area where its powers were such as to allow for some general policy development. When the Assembly was given the power to make regulations concerning the newly established Children's Commissioner for Wales, it included the requirement that the Commissioner should have regard to the Convention on the Rights of the Child,[54] a unique requirement in British law at the time and one resisted by the United Kingdom Government when it came to establishing the English Children's Commissioner.[55]

In January 2004, the Assembly in plenary session resolved to adopt the Convention on the Rights of the Child as its benchmark in relation to any policy affecting children.[56] The key principles of the Convention on the Rights of the Child have been translated into the seven core aims underlying Assembly policy in relation to children. These aims are that every child should enjoy: a "flying start" in life; comprehensive education and learning opportunities; the best possible health and freedom from abuse, victimisation and exploitation; access to play, leisure, sporting and cultural facilities; the right to be listened to and have their cultural identity and race recognised; a safe home and community; the right not to be disadvantaged by poverty. Each of these aims is explicitly linked to the relevant provisions of the Convention on the Rights of the Child.[57]

The obligation in Article 12 of the Convention on the Rights of the Child to have due regard to the views of children and young people has been embraced by the Assembly and from the very earliest days of the Assembly a very heavy emphasis was placed on encouraging the participation of children in the Assembly's work and in the development and delivery of public sector

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[50] Discussed in the Welsh Affairs Select Committee Report, *supra* n.49, paras.65-66.
[51] *ibid.*, paras.64-77.
[52] Children Act 2004, s.5.
[53] See, *e.g.* Welsh Assembly Government, *Extending Entitlement*, 2001; *Children and Young People: A Framework for Partnership*, 2002.
[54] Children's Commissioner for Wales Regs. 2001 (SI 2001/2787 (W.237)), Reg. 22.
[55] The Children Act 2004, s.2(11) in relation to the English Children's Commissioner includes only an interpretive provision which requires the English Commissioner to have regard to the UN Convention on the Rights of the Child when deciding what constitutes "the interests of children."
[56] *Official Record*, 14 Jan 2004.
[57] Welsh Assembly Government, *Children and Young People: Rights to Action*, 2004.

policies in Wales.[58] The Assembly funded the establishment of a youth parliament for Wales, now known as Funky Dragon, which has been a focal, but not exclusive, point of contact between the Assembly and children and young people. This high level of partnership working and consultation fits well within the style of government urged by the Government of Wales Act[59] and embraced by the Assembly and Assembly Government.

The obligations under the Convention on the Rights of the Child, not binding in British domestic law, would fall within the "international obligations" of the United Kingdom which are referred to in section 108 of the Government of Wales Act. Section 108 allows a Minister of the Crown to order the Assembly to refrain from a proposed action which the Minister considers to be incompatible with any international obligation, or to take action in order to give effect to an international obligation. Subordinate legislation considered by a Minister of the Crown to be incompatible with an international obligation may be revoked by the Minister. These powers constrain the Assembly to act in accordance with international obligations as interpreted by the United Kingdom Government. However, there is no positive power given to the Assembly to take action in order to comply with what it considers to be the requirements of these obligations. This is so even if, as is the case on some matters concerning the Convention on the Rights of the Child, the Assembly's view of the requirement is closer to that of the enforcement institution than is the United Kingdom Government's. So, for example, while the Assembly might agree with the Committee on the Rights of the Child[60] that smacking children should be prohibited,[61] it cannot act upon this unless it is given the power to do so by an Act of the United Kingdom Parliament.

The Institutional Framework: Guarding against Infringements of Human Rights in Wales

The National Assembly for Wales has not yet faced any successful legal challenge on human rights grounds. Indeed, challenges to the Assembly's subordinate legislation or its decisions have been few, and only one Assembly order has been successfully challenged and not on human rights grounds.[62] In a challenge to a decision of the planning inspector in *Wrexham Borough Council v National Assembly for Wales and others*,[63] the Court of Appeal agreed with the Assembly's view that a "gypsy" was someone who led a nomadic lifestyle. The Court of Appeal considered that there was nothing in the case law of the European Court of Human Rights which

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[58] See, *e.g.* the Assembly Government's first strategic plan, *BetterWales.com.*

[59] The Act includes requirements for consultation with the voluntary sector and the business community and for establishing partnership relations with local government.

[60] Concluding Observations (United Kingdom), 2002, paras.36-37.

[61] *Children and Young People: Rights to Action*, 2004: "The Assembly Government believes that the current legal defence of "reasonable chastisement" should be ended . . . We have made representations to the UK Government about this."

[62] *South Wales Sea Fisheries Committee* v *National Assembly for Wales* [2001] EWHC Admin 1162.

[63] [2003] EWCA Civ 835.

required a wider definition. Otherwise, human rights arguments have not figured.

The absence of challenges on human rights grounds may to some extent be attributed to the relative lack of powers on the part of the Assembly and its consequent lack of ability to breach human rights. It may also be due, to some extent, to a lack of a tradition in Wales of judicial review actions against government and to the absence of a strong public law tradition in Wales prior to devolution. In the days of the Welsh Office, there were only a small number of cases against the Secretary of State each year, usually concerning planning decisions. A great deluge of cases was not to be expected. Although the Assembly became subject to the requirements of the Human Rights Act at the same time as the devolved authorities in Scotland, it lacked any powers in the very area which generated the vast majority of the early cases in Scotland, the criminal justice system. The Assembly had more significant powers in relation to education, but the provision of the European Convention on Human Rights which deals directly with education, Article 2 of Protocol No. 1, leaves a fair amount of discretion to the Contracting Parties where resource allocation is concerned, something which has been bolstered in relation to the United Kingdom by the Government having entered a reservation to the extent of its obligations to respect the religious and philosophical convictions of parents in relation to their children's education.

Alongside these "negative" reasons for the absence of human rights challenges to the Assembly, account must also be taken of the systems within the Assembly to check against any possible human rights infringements in its use of its powers. Legislation will be examined during its drafting in the Assembly's legal department for compliance with human rights requirements and, depending on the system chosen for its enactment, it may or may not be considered by the relevant "subject committee".[64] Most legislation is not considered by the subject committees and it is difficult to assess how much attention would in any case be given to human rights considerations unless they were of a very significant kind.

However, the Legislation Committee has as part of its defined remit the consideration of whether any human rights issues arise. Its establishment required by the Government of Wales Act,[65] the remit of the Legislation Committee is to scrutinise Assembly legislation to examine whether it is within the powers of the Assembly.[66] Since compliance with the Convention rights is a matter of *vires*, this comes within the Committee's purview. Whereas its closest equivalent in Westminster, the Joint Committee on Statutory Instruments, reviews subordinate legislation on an *ex post facto* basis, the Legislation Committee's review is a required step on the path to the enactment of the measures in the Assembly. When it is borne in mind that the Assembly's powers are restricted to the making of subordinate legislation only, it is clear that the level of pre-enactment legal scrutiny is high. The Committee is required to report to the Assembly whether special attention needs to be drawn to any of the grounds listed in Standing Orders.

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[64] The committees whose remit mirrors those of the Assembly Ministers.
[65] S.58(1).
[66] Government of Wales Act 1998, s.58(4) and Standing Order 11.

This includes whether the measure is within the Assembly's powers. In fact, human rights problems, or indeed other problems of *vires*, have not figured largely in the Committee's reports. This is very likely due to the level of informal contact between the Committee's lawyers and those lawyers involved in drafting the legislation.[67] With such informal co-operation it is unsurprising that most problems should be sorted out prior to the Legislation Committee producing its report for the Assembly on the legislation. As a consequence, the reports of the Legislation Committee are short on substantive *ultra vires* points and only a few human rights issues have been mentioned in reports.

Of the human rights issues which have arisen, that which is of the most interest, largely because of how it was dealt with, was in relation to the Disabled Persons (Badges for Motor Vehicles)(Wales) Regulations 2000.[68] The Legal Adviser's report to the Committee raised concerns as to whether the draft Regulations were within the enabling powers and complied with the Human Rights Act.[69] The draft regulations provided for a right of appeal and the concern was whether the enabling power provided for such an appeal. Equivalent regulations had been made in England and Scotland which provided for an appeal. However, the Committee's Legal Adviser was concerned that the English and Scottish Regulations went beyond what the Act strictly allowed, a matter subsequently confirmed by the senior legal adviser to the United Kingdom Joint Committee on Statutory Instruments who acknowledged that it should have been identified that the enabling legislation did not allow the Regulations to create a right of appeal to the magistrates' court.[70] The Assembly Minister considered that the powers should be interpreted as they had been in England and Scotland and was reported as considering that the prospect of a legal challenge was remote. Members of the Legislation Committee considered that an appeal on the *vires* ground was possible if the Regulations included the right of appeal, whereas they were open to challenge on human rights grounds if they did not! In the event, the Committee divided and voted by 4 to 2 to accept the Legal Adviser's advice that the regulations as drafted were not within the Assembly's powers. Subsequently, the Minister agreed to remove the offending appeal to the magistrates' court and instead to provide for an appeal process via an independent hearing held under the umbrella of the Assembly.[71] The case illustrates the willingness of the majority of the Legislation Committee to take a line independent of the Assembly Government, but also the limits on the Assembly's scope for action. The specificity of the issues raised and their relative insignificance are further illustration of the impact of the limited powers of the Assembly on its potential for action, positively or negatively, in relation to human rights.

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[67] See the evidence of the Chair of the Legislation Committee to the Richard Commission.

[68] There was some discussion too of appeal rights in relation to the Changing of School Session Times (Wales) Regulations 2000 on 4 July 2000, and in relation to compliance with Article 6 ECHR by the Farm Enterprise Grant and Farm Improvement Grant (Wales) Regulations 2001 on 11 December 2001.

[69] Minutes of the Legislation Committee, 6 June 2000.

[70] Minutes of the Legislation Committee, 13 June 2000.

[71] Minutes of the Legislation Committee, 27 June 2000.

The Institutional Framework: Promoting Human Rights in Wales

When it comes to the promotion of rights, as opposed to scrutiny to prevent human right breaches taking place, the picture is perhaps not as positive. As already discussed, an emphasis on promotion is very visible in the children's policy area and in the area of equal opportunities. However, outside these areas there appears to be less by way of permanent machinery to promote human rights on a cross-cutting basis throughout all the Assembly's policy areas. There is, for example, no Human Rights Committee to mirror the Equality of Opportunity Committee whose existence is a requirement under the Standing Orders. It was suggested to the all-party Assembly Review of Procedure established in 2000 that there should be more focus on the protection and promotion of human rights.[72] One suggestion[73] was that the Equality of Opportunity Committee could take on the additional remit of a Human Rights Committee, thus providing a firm institutional focus for the Assembly on human rights questions in its policy and practice. The suggestion for extending the remit of an existing committee rather than for the establishment of a new committee was based on the small size of the Assembly and the difficulty of staffing an additional committee. The Report of the Assembly Review of Procedure observed that a formal mechanism was not in place for reviewing policies not effected by subordinate legislation, and therefore not reviewed by the Legislation Committee. However, the Committee on Equality of Opportunity has twice considered and twice rejected the suggestion.[74] While the Committee agreed that it was necessary to have an effective mechanism for scrutinising Assembly and Assembly Government compliance with human rights, it did not consider that it was the best forum for this. It referred to the potential for overload and stated that, given the cross-cutting nature of human rights, this was a matter for all the Assembly's committees and there was no need for a separate committee devoted to the subject. As the author of the suggestion for a human rights committee wryly observed, this argument seemed unconvincing given the cross-cutting remit of the Equality committee itself.[75] Whether the remit of human rights promotion should be placed with the Equality of Opportunity Committee or elsewhere, it is of some concern to read the Committee's view of what human rights involves. Its minutes record that "human rights was about ensuring that individuals complied with legislation". In contrast to the very positive and wide-ranging approach taken by the Committee in relation to equality matters, this view of human rights promotion appears very narrow.

Given the obvious success of the Committee on Equality of Opportunity in raising the profile of equality issues and "mainstreaming" them into various levels of Assembly policy and practice, the absence of a committee with a specific human rights remit is to be regretted. Regrettable as this may be at the moment, the gap in the machinery will be become far more serious if and

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[72] Evidence to the Assembly Review of Procedure by Cardiff Charter 88 and by Professor R. Rawlings.

[73] By Professor R. Rawlings.

[74] Equality of Opportunity Committee, Minutes of Meetings of 31 October 2001 and 26 June 2002. The matter was also discussed in the evidence of the Chair of the Equality of Opportunity Committee to the Richard Commission.

[75] R. Rawlings, *supra* n.7, p.484.

when the Assembly's legislative powers are enhanced. Armed with greater powers, it is essential that the general awareness of rights in the Assembly is raised and the potential for further developing a human rights culture in Wales realised.

Such an active promotion of human rights awareness is all the more necessary when general debate on human rights issues in the early years of devolution, outside the area of children's rights and equality matters, has had a relatively low profile in the Assembly, in plenary and in committee. Indeed, on occasion, the desire to promote a less aggressive and confrontational style of politics in the Assembly, itself an admirable aim, has led to too swift a dismissal of some basic human rights. In 2001, when the Education and Lifelong Learning Committee was conducting a policy review of higher education, evidence was given to the Committee which was considered by some of the Committee members to be offensive to non-Welsh-speakers and by others to be xenophobic.[76] Immediately, there was a move to strike it out of the record and a majority of the Committee subsequently voted to "deprecate" the language used in the evidence presented and to "disregard the subjective opinion" in the paper presented. A motion reaffirming the Committee's commitment to freedom of expression was defeated.[77]

An important issue of freedom of expression was not taken on board by some of the Committee members: the jurisprudence of the European Court of Human Rights has been very consistent in its insistence that Article 10 of the European Convention on Human Rights protects not only ideas which are acceptable and uncontroversial but also those which "offend, shock or disturb."[78] This is particularly so in relation to expression which takes place as part of the general political debate on matters of public importance. In the event, the Committee did not go so far as to strike the offending evidence from its record, but it is of concern that the freedom of expression, considered by the European Court of Human Rights as one of the foundations of a democratic society, was so lightly regarded by some members of the Committee. A motion subsequently passed by the Panel of Committee Chairs underlined this concern:

> "Any interference whatsoever in the process whereby papers are submitted by any contributors is an unacceptable and unwarranted infringement of the principles of freedom of thought and expression especially as defined by the Human Rights Act. Committee members must have the inalienable right to receive and deliberate on any opinion submitted to them and, if deemed appropriate, to comment on, accept or disagree with any such submission."[79]

A similar unwillingness to take on board the implications of human rights requirements had been visible earlier in relation to the requirement for Assembly Members to register their membership of the Freemasons in the

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[76] Education and Lifelong Learning Committee, Minutes of meetings of 17 and 23 May and 13 June 2001.
[77] Meeting of 13 June 2001.
[78] See, *e.g. Handyside* v *United Kingdom* (1979) 1 E.H.R.R. 737, para.49.
[79] Quoted in Rawlings, *supra* n.7, p.216.

Register of Interests; failure to register any interest listed in Standing Orders being a criminal matter under the Government of Wales Act.[80] The inclusion in Standing Orders of the requirement to register membership of the Freemasons was a response to the recommendation by the National Assembly Advisory Group which was taken up by the then Secretary of State for Wales in adopting the first set of Standing Orders for the Assembly. The Standing Orders Commission, the body established to draft the Standing Orders, had advised to the contrary, being concerned that singling out one particular organisation and requiring Members to register, with criminal liability for failing to do so, could fall foul of the requirements of the European Convention on Human Rights. A recommendation of the Assembly's Standards Committee to change this requirement failed to receive the necessary two-thirds majority in plenary to change the Standing Orders in 2002. Only in 2005[81] were the rules changed to provide that membership of *all* private clubs and societies with a closed membership should be recorded, but without criminal liability for a failure to do so.[82]

As regards external promotion bodies, the Assembly Government was unenthusiastic about pushing for the establishment of a separate Human Rights Commission for Wales when the Joint Committee on Human Rights was examining the matter in 2002.[83] In the context of the unitary legal jurisdiction of England and Wales, its lack of enthusiasm for a separate Welsh Commission may have been quite legitimate. What was unfortunate was the failure to discuss this in the Assembly and consider at an early stage the possible options for a Welsh presence on such a body when it was adopted.

On a healthier note, there is the very marked willingness of the Assembly to engage with NGOs and other groups on matters of human rights. As discussed earlier, the Health and Education Ministers regularly involve young people in consultation on Assembly Government policy. Children's rights organisations are currently working independently but in contact with the Assembly Government in their development of the "alternative" NGO report on Wales which will eventually become part of the United Kingdom NGO report to the Committee on the Rights of the Child in relation to the implementation of the Convention on the Rights of the Child in the United Kingdom. The Committee on Equality of Opportunity includes a number of "standing invitees" – the Disability Rights Commission, the Equal Opportunities Commission, the Commission for Racial Equality, the Welsh Language Board and Stonewall Cymru. Involvements such as these bring an additional source of expertise and enthusiasm to the working of the Assembly. In time it may be that the Assembly will have to adjudicate among competing claims to enjoy such privileged access as these organisations have been afforded and ensure that such access is afforded on a transparent basis; at present this does not appear to have become a problem.

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[80] S.72(6).
[81] *Official Record*, 20 April 2005.
[82] Standing Orders 4 and 16 were amended and a new Order, 38, added.
[83] Report of the Joint Committee on Human Rights, 3 March 2003, HL 67-I, HC 67-1.

Conclusion

The human rights developments and achievements in post-devolution Wales may appear small if compared crudely with human rights activity in the other jurisdictions under consideration in this volume. There has, for example, been very little activity in relation to the traditional civil and political rights included in the European Convention on Human Rights. Indeed, at times the desire for a new style of less confrontational politics has pulled in the opposite direction. However, developments must be viewed against the much lower starting baseline of Wales as possessing any legal identity of its own within the England and Wales unitary legal jurisdiction, and the limited development of civil society on a Wales, rather than an England and Wales, basis in 1999, along with the very limited devolution settlement. Only then do the developments in the area of human rights in post-devolution Wales emerge as important indicators of the development of a distinctive Welsh approach, one which emphasises a high degree of interaction with NGOs, voluntary sector and other groups, and which has prioritised areas such as equality, social inclusion and children's rights. It is only with such recent developments that one can see a movement away from the state of affairs described in the notorious and oft-quoted "For Wales, See England".[84] With the awarding of greater powers to the National Assembly on the political agenda at present, one may predict with some confidence that the rate of activity on the human rights front is likely to increase in the next decade.

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[84] Popularly attributed to the *Encyclopaedia Britannica*.

UNFAMILIAR INEQUALITIES

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Introduction

The conceptual underpinnings of Irish anti-discrimination measures and human rights law suffer from problems of breadth and depth and so are incapable of effecting radical changes to the social order. At best laws and policies framed around liberal principles seek to promote fairness in the competition for advantage, rather than tackling the social structures that continually generate unequal outcomes for minority groups. Moreover, these measures tend to shade out the affective aspects of people's lives, centring instead human activities and institutions associated with public sphere. Such a stance sits uncomfortably with the fact that many of the institutions of liberal societies are both dependent upon and have a direct impact on relationships of love and care. Being cared for is a fundamental prerequisite for human development; the emotional and material support people get from family and friends plays a vital role in sustaining their capacity to function as workers and citizens. It is therefore imperative that people are enabled to provide for, and benefit from care and love. At the same time, the organization of work and transportation has an obvious impact on the amount of time workers can spend with their families. And the way the state organizes residential facilities for disabled people, or denies accommodation to Travellers, has a huge impact on their personal relationships. Using a conception of equality termed "equality of condition", I examine the extent to which the Irish polity protects the intimate associations that sustain relations of love and care, focusing on the contribution of constitutional law. I argue that adoption of a relational approach to legal doctrine and method could promote a care-full conception of citizenship.

Theoretical Approaches to Equality

Looked at in a very general way, equality is a relationship, of some kind or other, between two or more people or groups of people, regarding some aspect of those people's lives. If equality were a simple idea, it would be obvious what this relationship is, who it is about and what aspect of their lives it concerns. Theorists have grappled with these questions for centuries and have arrived at various conceptions of equality, which colleagues at the Equality Studies Centre have loosely categorized as basic equality, liberal egalitarianism and equality of condition.[1]

A key assumption of the views we describe as liberal egalitarian is that there will always be major inequalities between people in their status, resources, work and power. The role of the idea of equality is to provide a fair basis for managing these inequalities, by strengthening the minimum to which everyone is entitled and by using equality of opportunity to regulate the competition for advantage. Variants of liberal egalitarianism supply the

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[1] J. Baker, K. Lynch, S. Cantillon and J. Walsh, *Equality: From Theory to Action* (2004).

theoretical underpinnings of the human rights guarantees and anti-discrimination laws that proliferate in liberal democracies. Defined over several decades of activism and international negotiation, the human rights agenda is primarily concerned with the setting of minimum standards and promoting key principles of non-discrimination. While constitutional bills of rights generally, explicitly at least, address so-called "first generation" civil and political rights,[2] within welfare states these protections tend to be supplemented by legislation and soft-law initiatives aimed at securing a floor of basic socio-economic entitlements and achieving equality of opportunity in certain settings. I consider below how this conceptual framework fails to capture adequately the inequalities operative in the sphere of the family.[3]

The radical idea of "equality of condition" we espouse sets out a much more ambitious aim: to eliminate major inequalities altogether, or at least massively to reduce the current scale of inequality.[4] The key to this much more ambitious agenda is to recognize that inequality is rooted in changing and changeable social structures, and particularly in structures of domination and oppression. These structures create, and continually reproduce, the inequalities that liberal egalitarians see as inevitable. But since social structures have changed in the past, it is at least conceivable that they could be deliberately changed in the future. Exactly how to name and analyse these structures and their interaction is a matter of continuing debate, but one way or another they clearly include capitalism (a predominantly market-based economy in which the means of production are privately owned and controlled), patriarchy (systems of gender relationships that privilege men over women), racism (social systems that divide people into "races" and privilege some "races" over others) and other systems of oppression such as ageism, disablism and heterosexism.

This emphasis on social structures in explaining inequality affects the way equality of condition should be understood and embedded within the legal system. For example, in contrast to the tendency of liberal egalitarians to focus on the rights and advantages of individuals, equality of condition also pays attention to the rights and advantages of groups. Whereas liberal egalitarians tend to concentrate on how things are distributed, equality of condition pays more attention to how people are related, particularly through power relations. Equality of condition also emphasizes the influence of contextual factors on people's ostensibly free choices and actions. I argue

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[2] See generally C. Fabre, *Social Rights under the Constitution: Government and the Decent Life* (2000).

[3] Indeed, Irish constitutional law in this domain combines formal equality principles with adherence to a set of communitarian, theocratic values.

[4] The idea of equality of condition draws on a wide range of sources, including J. Baker, *Arguing for Equality* (1987); J. H. Carens, *Equality, Moral Incentives, and the Market* (1981); G. A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (2000); N. Fraser, *Justice Interruptus* (1997); K. Nielsen, *Equality and Liberty* (1985); R. Norman, *Free and Equal* (1987); S. M. Okin, *Justice, Gender, and the Family* (1989); A. Phillips, *Which Equalities Matter?* (1999); J. H. Schaar, "Equality of Opportunity, and Beyond", in J. R. Pennock and J. Chapman, eds., *Nomos IX: Equality* (1967), at pp.228-49; and I. M. Young, *Justice and the Politics of Difference* (1990). There are of course many differences among these authors; our aim is to draw together their most important insights.

below that a relational concept of rights holds promise for proponents of radical egalitarianism.

In exploring the differences between liberal and radical models we distinguish five key dimensions of equality: (1) respect and recognition, (2) power, (3) resources, (4) working and learning and (5) love, care and solidarity.[5] These dimensions of equality represent some of the key factors that affect nearly everyone's well being or quality of life. Equality of condition calls not just for the toleration of differences, but for a "critical inter-culturalism" that encourages the members of different social groups to engage in a mutually supportive but critical dialogue from which everyone can learn, leading to equality of respect and recognition. In the dimension of power, it means the roughly equal enabling of each person to influence the decisions that affect their lives, both within the formal political system and throughout society. Aimed at ensuring that people have a broadly equivalent range of resource-dependent options, equality of condition not only means moving beyond poverty reduction goals to achieve greater equality of wealth and income, but also embraces non-financial goods, such as a right to accessible public services. It demands that the burdens and benefits of work should be much more equally shared and that the conditions under which people work should be much more equal in character. And it calls for ensuring that everyone has access to forms of learning that contribute to their self-development in the broadest sense.

Equality of condition also aims for social conditions under which people would have ample prospects for loving, caring and solidary relationships. Human beings typically have both a need and a capacity for intimacy with, and attachment, to others. All of us have urgent needs for care at various stages in our lives, as a consequence of infancy, illness, impairment or other vulnerabilities, while solidary bonds of friendship or kinship are frequently what bring meaning, warmth and joy to life. Being deprived of the capacity to develop such supportive affective relations, or of the experience of engaging in them when one has the capacity, is therefore a serious human deprivation for most people. Relations of love, care and solidarity are both a vital component of what enables people to lead successful lives and an expression of our fundamental interdependence.

We elaborate on this conceptual framework by discussing four central social systems as contexts of egalitarian change.[6] In line with the sociological tradition of Marx, Weber and Parsons, we distinguish the economic system from the cultural system and the political system. However, influenced by feminist theory, we also address the importance of the affective system - the system concerned with providing and sustaining relationships of love, care and solidarity.[7] Analysing a society in terms of social systems is a way of

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[5] See generally Baker *et al*, above n.1, chap.2.

[6] See Baker *et al*, above n.1, chap.4.

[7] The affective system was traditionally neglected across various fields of academic inquiry and only began to be addressed as feminist scholarship highlighted the importance of care and love work within the lives of women particularly. Some key contributions include, D. E. Bubeck, *Care, Gender, and Justice* (1995); B. Hobson ed., *Gender and Citizenship in Transition* (2000); M. C. Nussbaum, "Emotions and Women's Capabilities", in M. Nussbaum and J. Glover, eds., *Women, Culture and*

trying to get a sense of the central sets of relationships that structure people's lives and in particular account for the inequalities between social groups. The political, economic, cultural and affective systems are not independent, but on the contrary are deeply intertwined, both conceptually and empirically: Each system is partly constituted by the others and structural inequalities related to class, gender, disability, ethnicity, sexuality are persistent precisely because they are reinforced in all of the key social systems.

Identifying the affective system as a context of equality is meant to emphasise that the set of social relations that go into providing love, care and solidarity is itself a set of relations that involve inequalities, not just of love, care and solidarity, but also, for example, of respect and work burdens. Inequality in the affective domain takes two primary forms: when people have unequal access to meaningful loving and caring relationships, and when there is inequality in the distribution of the emotional and other work that produces and sustains such relationships. The types of people who are likely to be deprived of love and care (for example, children who are left without a primary carer and certain migrant populations) are generally very different from those who experience affective inequality due to undertaking a disproportionately high level of care work (women compared with men). Families are the key institutions in contemporary societies for providing love and care,[8] although these relationships are also sustained by networks of friendship and by public and commercial institutions. As Sevenhuijsen observes: "care takes place in all kinds of contexts, from child-rearing practices to intimate relations, to the social services, education and political deliberation."[9]

It is an important issue of equality, and therefore of justice, to ask who has access to, and who is denied, relations of love, care and solidarity, whether these relations are reciprocal or asymmetrical, and whether the ways societies operate help to satisfy or frustrate these human needs. Equality of condition envisages a society in which people are confident of having, if not equal, then at least ample prospects for loving, caring and solidary relationships. To achieve this goal, it is necessary to change structures and institutions that systematically impede people's opportunities to develop such relationships, including the organization of paid work, processes of gender stereotyping and the gendered division of labour,[10] attitudes and institutional arrangements concerning disability, and of course the burdens of poverty and deprivation.

Development: A Study of Human Capabilities (1995), pp.360-395; S. Sevenhuijsen,*Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (1998).

8 Including the families of choice that are especially important in the lives of those whose families of origin have been a site of oppression or constraint, see M. Friedman, "Feminism and Modern Friendship: Dislocating the Community" in C. Sunstein ed., *Feminism and Political Theory* (1990); J. Weeks *et al*, "Everyday Experiments: Narratives of Non-Heterosexual Relationships" in E.B. Silva and C. Smart eds., *The New Family?* (1999), at pp.83-99.

9 Sevenhuijsen, above n.7, at p.22.

10 As Fraser, above n.4, at p.61, argues: "The key to achieving gender equity in a postindustrial welfare state. . . is to make women's current life patterns the norm for everyone."

The legal system is an important site of critical inquiry and activation for progressive change since it is tasked with regulating all other social institutions and is located at the intersection of state and civil society. A central purpose of this article is to illustrate how the legal system, as a core element of the political system, interacts with the affective context. While law is the product of social relations, it simultaneously shapes various social practices including those pertaining to intimate associations on both a material and ideological plane.[11] As Brophy and Smart put it:

> "Law sets the parameters to what is considered 'normal', for example marriage, sexual relations, the way we care for our children. . . . We cannot 'opt out' of these legal parameters by adopting unconventional lifestyles or by avoiding heterosexuality. The law still has something to say about our domestic lives and intimate relations, and we cannot assert its irrelevance by ignoring it."[12]

Constitutional rights and the associated mechanism of judicial review lie at the centre of the "social contract" that mediates sets of relationships among individuals, groups and institutions within liberal democracies. Critical literature forcefully illustrates, however, that courts are not neutral mediators of various interests; legal doctrine and methodology tends instead to reinforce the position of dominant groups.[13] In a subsequent section I explore how the Irish courts have interpreted and enforced those "contractual terms" that directly concern relations of love and care. Using the position of children, sexual minorities and carers as exemplars, I demonstrate that the demarcation of private and public spheres envisaged by liberal political

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[11] See further A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (1993), p.3. For examples of constitutive approaches to the relationship between law and society see J. Brigham, "The Constitution of Interests: Institutionalism, CLS and New Approaches to Sociolegal Studies" (1998) 10 *Yale J. L. & Human.* 421; P. Ewick and S. Silbey, *The Common Place of Law: Stories From Everyday Life* (1998); R. W. Gordon "Critical Legal Histories" (1984) 36 *Stan. L. Rev* 57; A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (1993); M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994); J. Nice, "Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach" (2000) 85 *Cornell L. Rev* 1392.

[12] J. Brophy and C. Smart, *Women-in-Law: Explorations of Law, Family and Sexuality* (1985), p.1.

[13] See, *e.g.* K. T. Bartlett and R. Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (1991); P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", tr. R. Terdiman (1987) 38 *Hastings L. J.* 805; A. Bottomley and J. Conaghan eds., *Feminist Theory and Legal Strategy* (1993); R. Delgado and J. Stefancic eds., *Critical Race Theory: An Introduction* (2001); S. Edwards, *Sex and Gender in the Legal Process* (1996); D. Kairys ed., *The Politics of the Law: A Progressive Critique*, 3rd ed. (1998); N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998); C. A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); C. Smart, *Feminism and the Power of the Law* (1989); C. Stychin and D. Herman eds., *Sexuality in the Legal Arena* (2000); K. D. Weisberg (ed.) *Feminist Legal Theory: Foundations* (1993); P. J. Williams, *The Alchemy of Race and Rights* (1991).

theory is shot through with adherence to a set of theocratic values, so that the affective domain is "private" for some purposes and public for others. In each instance the courts' stance entrenches the affective inequalities experienced by minority groups and reinforces a gender order that perpetuates inequalities both as between women and men and among men. Before examining State regulation of the affective context I outline the contours of a relational conception of rights, suggesting that such an approach has the capacity to advance equality of condition within the legal field.

Rights as Relational

As Wilson notes, human rights have become "one of the most globalized political values of our times".[14] The proliferation of rights has proceeded along three dimensions: a widespread increase in the establishment of new legal rights; the assertion of ever more moral rights that are as yet not acknowledged in law;[15] and the increased use of rights-talk in political discourse.[16] These developments have coincided with scepticism amongst political philosophers as to the feasibility and indeed utility of anchoring human rights in universal moral foundations.[17] Left legal scholarship has also subjected rights theory and practice within liberal democracies to trenchant critique, the main strands of which are discussed below.[18] Nonetheless a widespread consensus exists to the effect that "rights matter".[19] Feminist and critical race scholars in particular have advanced both pragmatic and theoretical arguments to the effect that rights can be re-configured to advance substantive equality goals. For Williams and Crenshaw claims articulated in other terms are unlikely to be heard.[20] Further, rights talk has a deep cultural resonance for oppressed groups, a point borne out by the Irish disability

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[14] R. Wilson, "Human Rights, Culture and Context: An Introduction" in R. Wilson ed., *Human Rights, Culture and Context: Anthropological Perspectives* (1996), p.1.

[15] A current example being the Irish disability rights movement's attempts to ensure that the provision of various services is rendered rights-based in a legal sense. Indeed, this ongoing campaign forms part of a wider debate about the justiciability of social and economic rights generally. See for example, Irish Human Rights Commission, *Observations on the Disability Bill 2004* (2004).

[16] See C. Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (1999).

[17] Attempts to ground human rights in timeless and fixed human attributes such as "rationality" have been subject to robust critique by Richard Rorty for example cf. "Human Rights, Rationality, and Sentimentality" in S. Shute and S. Hurley eds., *On Human Rights: The Oxford Amnesty Lectures 1993* (1993), pp. 111-134; For an overview of these debates see S. Mendus, "Human Rights in Political Theory" in D. Beetham ed., *Politics and Human Rights* (1995), pp.10-24.

[18] Critiques of rights are not of course confined to those who identify with left politics, but I focus on these criticisms here.

[19] See further J. Waldron ed., *Theories of Rights* (1984); A. Sen, "Elements of a Theory of Human Rights" (2004) 32 *Phil. & Pub. Aff.* 315.

[20] P. J. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 *Harv C. R.-C.L. L. Rev* 401; K. Crenshaw, "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 *Harv L. Rev* 1331.

movement's continued assertion of rights before a recalcitrant government.[21] The central idea is that rights are not inherently limiting, rather the problem is that they operate with a "limited institutional, imaginative universe".[22]

A relational approach presents interesting opportunities for scholars and practitioners who believe that rights remain an important framework within which egalitarian political ideals can be progressed.[23] Under this approach legal rights are not singular objects possessed by individuals but social relationships that are reduced to a written text in order to be captured by law.[24] As Minow argues, because legal rights "arise in the context of relationships among people who are themselves interdependent and mutually defining…" they are best configured as "simply the articulation of legal consequences for particular patterns of human and institutional relationships."[25] Nedelsky also makes both a normative and empirical claim in asserting that all rights are relational: "In brief, what rights in fact do and have always done is construct relationships - of power, of responsibility, of trust, of obligation."[26] While the surface inquiry conducted by a court may present an understanding of rights as shielding the individual from the tyranny of the majority, a question of rights "trumping" the common good,[27] the actual structure of decisions reveals that they are vehicles for achieving various collective goals. In other words, our individual rights derive their meaning from and are reliant on the social position of others. Thus inevitably legal reasoning is already relational but tends to prioritise proprietary

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[21] See for example Disability Legislation Consultation Group, *Equal Citizens: Proposals for Core Elements of Disability Legislation* (2003).

[22] D. L. Rhode, "Feminist Critical Theories", in Bartlett and Kennedy eds., above n.13, at p.343. See also W. Brown, *States of Injury: Power and Freedom in Late Modernity* (1995), chap.5.

[23] This project is prompted to an extent by scholarship across a range of disciplines that seeks to reconcile the ethic of care with the ethic of justice. A significant strand of feminist work on the ethic of care was prompted by Carol Gilligan's research on moral psychology *cf. In a Different Voice* (1982). While Nel Noddings in *Caring: A Feminine Approach to Ethics and Moral Education* (1994), argues for the primacy of an ethic of care, Bubeck, above n.7, maintains that an ethic of care needs to be complemented by considerations of justice and puts forward two principles of justice in care. Kittay, above n.7 at p.103, suggests that "the good both to be cared for in a responsive dependency relation if and when one is unable to care for oneself, and to meet the dependency needs of others without incurring undue sacrifices oneself is a primary social good in the Rawlsian sense" which requires a separate principle of justice and calls for a connection-based conception of equality.

[24] Young, above n.4 at p.25; Jennifer Nedelsky, "The Practical Possibilities of Feminist Theory" (1993) 87 *Nw. U. L. Rev* 1286 at p.1289. See also R. Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms and Constitutionalism" (1998) 27 *JLS* 725.

[25] M. Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 *Yale L.J.* 1860 at 1884.

[26] J. Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 *Rev Const. Stud.* 1, at p.13.

[27] The characterisation of rights as "trumps" designed to protect the individual from the collective will advanced by legislatures is traceable to Ronald Dworkin's *Taking Rights Seriously* (1977).

relations rather than interpersonal affective ties.[28] The radical egalitarian task therefore, is twofold: to expose the unarticulated premises and invisible mechanisms through which relational principles enter the law and to ensure that those principles foster relationships, which will advance rather than impede substantive equality.[29] Later on I make some tentative suggestions as to how this project could be realised. I now turn to assess governmental responses to the affective context, tracing the main impetus of policies and legislative measures, before going on to consider relevant constitutional jurisprudence.

State Regulation of the Affective Context

Demographic change, primarily an ageing population and increased female participation in the labour market, has propelled issues of care on to the policy agendas of welfare states including that of Ireland. Throughout Europe the crisis over the work involved in caring has become a political issue although it is not named in these terms. It is defined as a problem of "work-life balance" that demands "family friendly" policies from employers and governments.[30] The silencing of the politics of care and love work stems in considerable part from the conception of the citizen that has informed contemporary politics; citizens have been defined as warriors, as workers but never carers.[31] Citizenship has been equated with one's public rather than personal obligations and commitments. At EU level, for example, most legal protections are for paid workers, those who contribute to the formal economy.[32] Yet no economy or society can function effectively without care work. It is not surprising, therefore, that the affective has become a mobilizing narrative for social movements in part because of the growing tensions between care work and capitalism, and especially between such work and paid employment; a conflict that is exacerbated in Ireland by inadequate public care infrastructure.[33] Given recent developments in other countries, debates about recognition of gay and lesbian partnerships have inevitably filtered into the Irish political arena.[34] Recent initiatives include

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[28] See Nedelsky, above n.26; D. Abraham, "Liberty without Equality: The Property-Rights Connection in a 'Negative Citizenship' Regime" (1996) 21 *Law and Social Inquiry* 1.

[29] I will argue below that the Canadian and South African Supreme Courts' jurisprudence on equality embraces a relational concept of rights on occasion.

[30] European Commission, *Confronting Demographic Change: A New Solidarity between the Generations* (2005); European Foundation for the Improvement of Living and Working Conditions, *Combining Family and Full-Time Work* (2005).

[31] S. Baer, "Citizenship in Europe and the Construction of Gender by Law" in K. Knop ed., *Gender and Human Rights* (2004), pp.83-112; R. Lister, "Dilemmas in Engendering Citizenship" in Hobson ed., above n.7, pp.33-83; S. Sevenhuijsen, above n.7.

[32] See Baker *et al*, above n. 1, chap.7.

[33] See Equality Authority, *Implementing Equality for Carers* (2005); J. Murphy-Lawless & P. Kennedy, *The Maternity Care Needs of Refugee and Asylum Seeking Women* (2002).

[34] The Equality Authority has played a central role in this regard see *Implementing Equality for Lesbians, Gays and Bisexuals* (2002); J. Mee & K. Ronayne, *Partnership Rights of Same Sex Couples* (2000). See also National Economic and Social Forum, *Equality Policies for Lesbian, Gay and Bisexual People:*

the introduction of a Private Members Bill on civil unions before the national Parliament and ongoing litigation challenging the treatment of a lesbian couple under the taxation code.[35] The imminent establishment of a governmental working group on partnership rights provides the clearest indication to date that legal change is on the horizon.[36] Yet a cautionary note needs to be sounded with respect to marriage and other types of relationship registration.[37] As discussed below, such contracts tend to reinforce the privatisation of responsibility for care and in particular can disadvantage partners who do not engage in paid employment.[38]

> "Under conditions of declining public support, broader definitions of family may simply mean more people are conscripted into care rather than better care giving or better relationships. Unless there are formal supports for unpaid care giving, both the caregivers and their relationships are increasingly likely to fall apart."[39]

Anchored in variants of liberal theory, state responses to inequalities arising in the affective context overlook the extent to which care is nested in a set of power relations and ensure the resilience of a public/private divide that locates primary responsibility for dependence within the family.[40] Rather than tackling directly the generative causes of inequality, the emphasis is on strengthening the social minimum while using equality of opportunity to achieve fairness in the competition for a more favourable place in unequal structures. Thus despite considerable institutional and legislative activity aimed at establishing an infrastructure for equality, putting in place rights-based legislation and developing specific policy initiatives, the gains, in equality terms, have been largely formal rather than substantive.[41]

Implementation Issues (2003); Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees* (2004).

35 See Irish Council for Civil Liberties, *Equality for all Families* (forthcoming, 2006).

36 *Irish Times*, December 21st 2005.

37 On the tension between the politics of "recognition" and "redistribution" generally see Fraser, above n.4, pp.11-39.

38 See K. Lahey, *The Impact of Relationship Recognition on Lesbian Women in Canada* (2001).

39 P. Armstrong and O. Kits, *One Hundred Years of Caregiving* (2001), at 33.

40 I argue below that anti-discrimination laws are a quintessential example of this model of the relation between "public" and "private". Although they "intervene" in the market, they do not question the ownership of the means of production and they confine themselves to paid work, excluding the unpaid labour undertaken, primarily by women, in the home.

41 The past decade has witnessed, for example, the establishment of the Equality Authority, the National Consultative Committee on Racism and Interculturalism, the National Disability Authority, the Office for Social Inclusion, the Children's Ombudsman and the Human Rights Commission. Benign legislative enactments include the Employment Equality Acts 1998-2004, the Equal Status Acts 2000-2004, the Carer's Leave Act 2001, the European Convention on Human Rights Act 2003 and the National Minimum Wage Act 2000. Significant policy measures introduced over the same period include the *National Children's Strategy* (2000) and the *National Action Plan Against Poverty and Social Inclusion* (2003-05).

Liberalism, as currently realised through state law and policy, assumes that the patterns of distribution and power relations at play in given contexts arise naturally and independently of State action; as a result, "intervention" in arenas such as the economy and family should occur only within prescribed limits.[42] Social welfare benefits and entitlements are drawn with reference to the "non-productive" status of those who give and receive care, and often institutionalised in a manner that allows bureaucracies to police the claimants' behaviour.[43] In combination with taxation measures, the net policy goal is to discourage "dependence" on the state and induce individuals to rely upon the market for an adequate income.[44] A report commissioned by the Equality Authority highlights the residual role played by the State in the provision of care while underlining the tension between market-driven policies and the provision of key social services: "Put crudely, current employment policy is oriented towards increasing participation rates for all groups, including carers, and current health policy is predicated on continued availability of informal carers to provide the vast bulk of care and support in the community."[45]

Empirical evidence underscores this stark relationship between the affective and the economic. The latest data reveals that in 2003 almost one-fifth of the population were at risk of poverty.[46] Indeed, despite a fifteen-year period of unprecedented economic growth Ireland has one of the highest levels of child poverty in the OECD.[47] While overall economic prosperity has contributed to an improved position on the 2005 *UN Human Development Index*, the same report highlights relatively low levels of social expenditure and an increasing gap between rich and poor.[48] Under-funding of public services when allied to State policies that promote paid employment as a route out of poverty, widens inequality of resources as between those who can take up such employment and those whose cannot by reason of age, disability or their occupation as carers. Studies issued by domestic and transnational bodies have consistently found that one's family status is a key determinant of economic security.[49] Spouses who work full-time in the home are treated as dependent under the social welfare system (as are unmarried opposite-sex

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[42] For a critique of the liberal defence of family privacy see Okin, above n.4.

[43] M. Diller, "The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government" (2000) 75 *N. Y. U. L. Rev* 1121; J. Habermas, *The Theory of Communicative Action. Vol. 2, Lifeworld and System: A Critique of Functionalist Reason* (1987), at pp.361-73; J. Handler, "Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History" (1991) 56 *Brooklyn L. Rev* 899; L. Williams, "Welfare Law and Legal Entitlements: The Social Roots of Poverty", in Kairys, above n. 13, at pp.569-590; V Zeziler, *The Social Meaning of Money* (1994).

[44] N. Fraser and L. Gordon, "A Genealogy of 'Dependency'" in Fraser, above n.4 at pp.121-149.

[45] K. Cullen, S. Delaney and P. Duff, *Caring Working and Public Policy* (2004), at p.19.

[46] Central Statistics Office, *EU Survey on Income and Living Conditions* (2005).

[47] UNICEF, *Child Poverty in Rich Countries* (2005).

[48] United Nations Development Programme, *Human Development Report 2005* (2005). See also V. Timonen, *Irish Social Expenditure in a Comparative International Context: Epilogue* (2005).

[49] See generally the Combat Poverty Agency's website :http://www.cpa.ie/; See also Central Statistics Office, above n.46.

cohabitees in some contexts), an ascription has particular repercussions for social insurance and access to pensions, exacerbating the established disproportionate poverty risk faced by older women.[50] Of the 150,000 full-time carers that save the state an estimated €1.5 billion per annum, just one in six is entitled to the means-tested Carer's Allowance.[51]

A "moral economy"[52] is operative that not only conceals the manner in which carers provide a massive subsidy to the state and society generally, but also instils a discourse of entitlement patterned according to one's group membership.[53] The interaction between affective and other inequalities is particularly visible in the lives of economic migrants and refugees, whose love and care needs are severely affected by failure to institute coherent family re-unification policies and also by the material conditions in which they are forced to live.[54] According to Loyal, a period of net inward migration has witnessed the re-emergence of a Victorian distinction between a deserving and undeserving poor in terms of a "putative difference between 'genuine' refugees (deserving), of whom there are too few, and 'bogus' refugees (undeserving), of whom there are too many."[55] The social position of Ireland's largest ethnic minority continues to be characterised by intolerable levels of inequality across all five dimensions.[56] Local authorities have been slow to create and improve accommodation for Travellers and unauthorized halting has been criminalized.[57] Enactment of legislation that

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[50] See, *e.g.* National Women's Council of Ireland. *Women and Poverty: Factsheet No. 2* (2003) which reports that: "More than 70 percent of women do not have occupational pensions (due to their leaving the workforce to undertake caring work); this has significant financial implications for older women". See also M. Murphy, *A Woman's Model for Social Welfare Reform* (2003).

[51] Carers Association of Ireland, *Pre-budget Submission to the Government of Ireland: Budget 2006* (2005).

[52] A. Sayer, "Equality and Moral Economy", Paper presented at the *Equality Studies Centre 10th Anniversary Conference*, University College Dublin, 15 December 2000.

[53] Despite the established connection between poverty and membership of the social groups alluded to in Irish anti-discrimination legislation "there is no evidence that these inequalities are specifically addressed within the poverty proofing process" according to the National Economic and Social Council, *Review of the Poverty Proofing Process* (2001), p.52. See further Combat Poverty Agency and Equality Authority, *Poverty and Inequality: Applying an Equality Dimension to Poverty Proofing* (2003).

[54] B. Fanning *et al*, *Beyond the Pale: Asylum-Seeking Children and Social Exclusion in Ireland* (2001); Free Legal Advice Centre, *Direct Discrimination?: An Analysis of the Scheme of Direct Provision in Ireland* (2003); Irish Human Rights Commission and NCCRI, *Safeguarding the Rights of Migrant Workers and their Families* (2004).

[55] S. Loyal, "Welcome to the Celtic Tiger: Racism, Immigration and the State" in S. Coulter and S. Coleman eds., *The End of Irish History?: Critical Reflections on the Celtic Tiger* (2003), at p.84.

[56] Pavee Point, *Assimilation Policies and Outcomes: Travellers' Experience* (2005); *Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community* (2005).

[57] Housing (Miscellaneous Provisions) Act 2002, s.24. See generally, Council of Europe, *Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Ireland*, (2003).

equates a person's home with an "object" which may be removed and ultimately disposed of by policing authorities seriously exacerbates the affective inequalities experienced by this group. Disabled people also experience high levels of poverty[58] and under the Disability Act 2005 continue to be construed as needy objects of policy as opposed to subjects of justiciable rights.[59]

The gender politics of care is underlined in a substantial body of feminist literature, due no doubt to the fact that women undertake a disproportionately high level of care and love work throughout the world.[60] Ireland is no exception; the proportion of women heading lone parent families was 91.7% in 2005 and less than 1% of persons whose principal activity was looking after home/family were men.[61] With respect to the provision of regular unpaid care to wider groups of people the gender breakdown is more even; 61.4% were female.[62]

Family and employment law modify the usual rules of property, contract and tort in order to take account of interdependence. Although statutes that provide for the re-distribution of property as between married family members afford some recognition to the value of care work at a horizontal level,[63] they also ensure that the costs of social reproduction are still largely privatised.[64] Legislation prohibiting discrimination on the grounds of gender and marital status within paid employment has been in place for the past three decades.[65] More recently the bases for claims and their sphere of application has expanded considerably yet the family sphere is effectively sealed off from the reach of equality law.

The Employment Equality Acts 1998-2004 and the Equal Status Acts 2000-2004 are the two main vehicles through which equality of opportunity is advanced within the Irish State. While the legislation has secured positive change for a considerable number of individuals, we need to be cognisant of its inherent limitations. Liberal equality of opportunity means that people should in some sense have an equal chance to compete for social advantages. This principle has two major interpretations. The first, "formal" equal opportunity classically gives rise to injunctions that all persons should be treated equally, thereby endorsing a "sameness" approach to equality.[66] A

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58 B. Gannon and B. Nolan, *Disability and Social Inclusion in Ireland* (2005).

59 See J. De Wispelaere. & J. Walsh (2005) "Rights or Policy?: Arguing for a Rights-based Approach to Disability Services", Unpublished Paper Presented to the Society for Applied European Thought Conference, *Inclusions and Exclusions in the New Europe*, Tatranská Lomnica: Slovakia, 3-8 July 2005.

60 M. Daly ed., *Care Work: The Quest for Security* (2001).

61 Central Statistics Office, *Women and Men in Ireland 2005* (2005).

62 *ibid.*

63 N. Yeates, "Gender, Familism and Housing: Matrimonial Property Rights in Ireland" (1999) 22 *Women's Studies International Forum* 607.

64 See for example S. Boyd, "Family, Law and Sexuality: Feminist Engagements" (1999) 8 *Social & Legal Studies* 369.

65 See generally M. Bolger and C. Kimber, *Sex Discrimination Law* (2001).

66 This approach is embodied in the prohibitions of direct discrimination found in the EEA and ESA. A claim can be taken on any one, or several of, nine specified grounds *viz*. age, disability, gender, family status, membership of the Travelling community, marital status, race, religion and sexual orientation.

stronger form of equal opportunity insists that people should not be advantaged or hampered by their social background and that their prospects in life should depend entirely on their own effort and abilities. In turn such an approach can give rise to laws and policies which mandate that in certain contexts people should be treated differently so that they arrive at an equal starting point in the competition for advantage.

Provisions aimed at accommodating "difference" currently take a variety of forms. Those pertaining to disabled people require adjustments in workplace practices and environments to enable them to participate in the labour market.[67] Similar measures operate to facilitate workers with family responsibilities but these are generally confined to statutory leave entitlements.[68] For carers the radical promise of indirect discrimination is undercut by the fact that its primary purpose is to diagnose discrimination rather than effecting equality of outcome.[69] The cumulative effect is that while an employee may take time off work for maternity, parental or care-taking purposes, employers are not required to *restructure* workplaces so that love and care labour can be undertaken without a resultant loss in status or opportunity in market terms. So-called "family friendly" work arrangements are instigated at the discretion of employers[70] and are therefore contingent on the bargaining power of employees and on wider labour market considerations.[71] Furthermore, the care activities of some groups are fully externalized through the operation of various exemptions. For example, an employer may refuse to confer rights on an employee's partner because they are not married, irrespective of the fact that such a policy amounts to indirect discrimination on the grounds of sexual orientation.[72] Exclusion of employees with same-sex partners from family based benefits not only constitutes a material deprivation but expresses unequal recognition and jeopardizes equality of love and care.

While, labour law makes some modest concessions to those who are "different", it ultimately reinforces a vision of the benchmark citizen as one who does not demand "special" treatment; he is not disabled, does not become pregnant or have domestic responsibilities.[73] At the same time, precisely because it has not dealt with the structures generating inequality,

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[67] EC Directive 2000/78, Art. 5; Employment Equality Acts 1998-2004, s.35. For a critical appraisal of reasonable accommodation and the supposed distinction between direct and indirect discrimination see, S. Day & G. Brodsky "The Duty to Accommodate: Who Will Benefit?" (1996) 75 *Can. Bar Rev* 433.

[68] Adoptive Leave Act 1995; Carer's Leave Act 2001; Maternity Protection Acts 1994-2004; Parental Leave Act 1998.

[69] S. Fredman, "Equality: A New Generation?" (2001) 30 *ILJ* 145.

[70] See *Walsh* v *Tesco* (ODEI-DEC-E2001-042); *Tesco* v *a Worker* (LC DEE014).

[71] See generally, H. Fisher, *Investing in People: Family Friendly Work Arrangements in Small and Medium-Sized Enterprises* (2000); P. Humphries et al, *Balancing Work and Family Life: The Role of Flexible Working Arrangements* (2000).

[72] See definition of 'family' and exemptions set out in ss.2 and 34 EEA respectively. M. Bell, "Sexual orientation in employment: An evolving role for the European Union", in Wintemute & Andenaes, *Legal Recognition of Same sex Partnerships – A Study of National, European and International law* (2001).

[73] For a fuller account of the limits of Irish anti-discrimination law see Baker *et al*, above n.1, chap.7.

anti-discrimination legislation entails continuous remedial activity. The result, as Fraser notes, is to "mark the most disadvantaged class as inherently deficient and insatiable, as always needing more and more".[74] Market-centred laws also permit new pockets of inequality to emerge. Labour undertaken in the home may result in a double shift for women in employment[75] or be delegated to a new primarily female underclass, whose own caring tasks are not part of the equal opportunities equation.[76] An "opportunity" in this context is the right to compete, not the right to choose among alternatives of similar worth.

In this section I have argued that as markets encroach on the redistributive function of the welfare state the claims of subordinate groups to various forms of social assistance meet considerable opposition. Resistance to narratives of love, care and solidarity comes not only from those who regard such issues as private, un-nameable, non-political matters, but also from those who fear that such narratives would distract from a necessary materialist analysis of economic and political relations.[77] What is all too often ignored is the materiality of love and care: the affective and the economic are deeply implicated with each other.

The following section considers the extent to which constitutional law has fostered or impeded the attainment of affective equality in relation to three social groups, children, carers and sexual minorities.

Constitutional Jurisprudence

An obvious starting point for consideration of the affective domain is jurisprudence concerning Articles 41-42, which are headed "The Family". Courts are working with raw material that is "heavily influenced by Roman Catholic teaching and Papal encyclicals",[78] endorses a gendered division of labour, imbues the *marital* family with inalienable and imprescriptible rights and seeks to protect it from "attack".[79] Despite widespread judicial consensus to the effect that the Constitution is a living document that ought to evolve in line with changes in Irish society,[80] successive judgments reiterate a narrow

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[74] Above n.4, p.25.

[75] See A. Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (1989). For an empirical picture of this gendered division of labour see European Foundation for the Improvement of Living and Working Conditions, *Gender, Jobs and Working Conditions in the European Union* (2002).

[76] See generally J. Tronto, "The Nanny Question in Feminism" (2002) 7 *Hypatia* 34.

[77] M. H. Marchand and A. S. Runyan, "Feminist Sightings of Global Restructuring: Conceptualizations and Reconceptualizations" in Marchand and Runyan eds., *Gender and Global Restructuring: Sightings, Sites and Resistances* (2000), pp.1-25; J. White and J. Tronto, "Political Practices of Care: Needs and Rights" (2004) 17 *Ratio Juris* 425.

[78] Government of Ireland, *Report of the Constitution Review Group* (1996), p.319.

[79] See discussion by A. Connelly, "Women and the Constitution of Ireland" in Galligan, Ward and Wilford eds., *Contesting Politics: Women in Ireland, North and South*, (1999), pp.18-37; and L. Flynn, "To be an Irish Man-Constructions of Masculinity in the Constitution", in T. Murphy and P. Twomey eds., *Ireland's Evolving Constitution 1937-1997: Collected Essays*, (1998), pp.135-45.

[80] See the comments of Keane CJ. to that effect in "Judges as Lawmakers: The Irish Experience", address delivered to the NUI Galway Law Society, October 1st 2003.

view of the form and function of intimate relationships. Heterosexual marriage is endorsed as the ultimate family unit and an assumption that responsibility for care of children and other dependent persons is a private and female concern runs through constitutional discourse. Arguments grounded in the equality guarantee, set out in Article 40.1, have made few inroads given the formal conception favoured by the courts.[81]

Another striking feature of relevant case law is the role of "social facts" in supporting dubious normative judgments about given minority groups. Whereas adjudicative facts concern the parties to a case, social or "legislative" facts relate to general policy considerations.[82] Evidence of such contextual matters takes multiple forms and finds its way into adjudicative processes through a variety of routes.[83] While the introduction of data produced outside law's interpretive community is regulated by rules of evidence and subject to the procedural requirements relating to a range of possible third party interventions, legal doctrine largely overlooks the manner in which judges draw on personal knowledge. Narrowly drawn rules on judicial bias comprise the main example in most jurisdictions. Boyle and MacCrimmon argue that "common sense understandings", generated by one's life experiences, permeate all levels of judicial fact-finding.[84] The case law canvassed below suggests that common sense assumptions (explicit or implicit) play a heightened role in decisions involving the affective context.

Judgments have continually reiterated that the family protected by the Constitution is exclusively that based on marriage. With respect to children whose parents are not married to each other the militaristic language employed in the constitutional text resounds throughout decisions that consider even the acknowledgment of children's succession rights as an "attack" on the traditional family form.[85] A series of cases concerning parent-child relations also accord considerable weight to the lesser status of extra-marital affective ties rather than employing the child's best interest as the paramount consideration.[86] For example, in *G. v An Bord Uchtála*[87] the

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In *McGee* v *Attorney General* [1974] I.R. 284 at 319 Walsh J. stated: ". . . no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

[81] Art.40.1 provides: "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function." The Article has never generated a finding of indirect discrimination. Its limitations are acknowledged by the Constitution Review Group, above n.78, pp.220-43.

[82] K. Davis, "Judicial Notice" (1955) 55 *Colum. Law Rev* 945. The Supreme Court of Canada has defined legislative facts as 'those that establish the purpose and background of legislation, including its social, economic and cultural context': *Danson* v *Ontario (A.G.)* [1990] 2 S.C.R. 1086 at 1099.

[83] C. Boyle and M. MacCrimmon, 'To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 *Windsor Y.B. Access Justice* 55.

[84] *ibid.*

[85] *O'B* v *S* [1984] IR 316. The concept of 'illegitimacy' was removed by passage of the Status of Children Act 1987, following the European Court of Human Rights decision in *Johnston* v *Ireland* (1986) 9 EHRR 203.

[86] See further, *The State (Nicolaou)* v *An Bord Uchtála* [1966] IR 567; *J.K.* v *VW.* [1990] 2 IR 437; *O'R. (W.)* v *H. (E.)* [1996] 2 IR 248.

[87] [1980] IR 32.

Supreme Court established that while an unmarried mother was automatically the guardian of her child, the relationship did not amount to a "family" within the terms of the Constitution and hence their rights are neither inalienable nor imprescriptible.[88] Attempts by unmarried cohabiting couples to regulate their financial position by employing cohabitation contracts have also been construed as undermining the institution of marriage.[89]

Before the courts claims for recognition of relationships that fall outside the parent-child or marital family nexus are reduced to pleas for toleration. In *Norris v Attorney General* [90] while the Supreme Court acknowledged that the criminalisation of consensual sex between men interfered with the plaintiff's right to privacy it found such interference was warranted in order to safeguard the common good. O'Higgins CJ held "on the ground of the Christian nature of our state and on the grounds that the deliberate practice of homosexuality is morally wrong, that it is damaging to health both of individuals and the public, and, finally, that it is potentially damaging to the institution of marriage, I can find no inconsistency with the Constitution in the laws which make such conduct criminal".[91] The perceived threat to marriage stems from the predatory homosexual male who has the apparent capacity to lure men from "marriages which might have been successfully and happily consummated".[92]

While the European Court of Human Rights adopts a more progressive stance, it also does so on terms that cling to a binary model of gender difference.[93] Even celebrated decisions such as that of *Karner v Austria*[94] fixate on the minority status of "homosexuals". Gay and lesbian people are posited as individuals with immutable characteristics that mark them out as "different" and as deserving of *toleration*. The background norm against which these "others" are measured – the heterosexual family unit – is not problematised.[95] Indeed the assumption is that governments can legitimately prioritise conventional family forms. As I argue below, such decisions exemplify the limits of the sameness/difference approach to equality, in that it adheres to an essentialist view of human beings and does not interrogate relations of domination and oppression.

> "Lesbians and gay men are granted legitimacy, not on the basis that there might be something problematic with gender roles

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88 *ibid*., at 55.

89 *Ennis* v *Butterly*, [1996] 1 IR 426. See Law Reform Commission, above n.34, paras.3.23-3.31.

90 [1984] IR 36 (Sup. Ct.).

91 *ibid*., at 63. For a critical appraisal of the decision see ICCL, *Equality Now for Lesbians and Gay Men* (1990); Flynn, above n.79; P. Hanafin, "Rewriting desire: the construction of sexual identity in literary and legal discourse in postcolonial Ireland" (1998) 7 *Social & Legal Studies* 389.

92 Above n.90, at 69.

93 See M. Grigolo, "The ECHR and Sexualities: Introducing the Universal Sexual Legal Subject" (2003) 14 *EJIL* 1023.

94 40016/98, [2003] ECHR 395, 24 July 2003.

95 Lise Gotell suggests that such decisions perform "a crucial role in reinforcing the naturalness of heterosexuality": "Queering Law: Not By Vriend" (2002) 17 *Can. J.L.& Soc'y* 89, at 91.

> and sexual hierarchies, but on the basis that they constitute a fixed group of 'others' who need and deserve protection. Human rights frameworks thus pull in 'new' identities thereby regulating them, and containing their challenge to dominant social relations."[96]

The absence of any positive affirmation of the affective ties between people is a marked feature of Irish constitutional discourse. A possible alternative locus for such claims, the constitutional guarantees of freedom of association and expression,[97] recognises the importance of interpersonal connections outside the marital contract but envisages these as taking place in the public sphere, the freedom of *intimate* association promoted by Karst is thereby closed off to those who do not conform with traditional norms.[98] Any prospect of re-imagining the family as a care-taking dyad rather than a heterosexual relation seems too remote to even contemplate.[99]

A common thread in judgments concerning extra-marital relationships is the omission to supply any empirical evidence demonstrating that equal treatment of the various groups concerned would undermine the institution of marriage.[100] The comments of a Canadian judge in a case concerning the location of social welfare benefits are instructive "it eludes me how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat?"[101]

The rhetorical commitment to State support for the paradigm family unit has not translated into concrete protections for the individuals who comprise it. Because the overarching concern is the promotion of an idealised family form and its protection from external forces, decisions gloss over the material conditions required to sustain care and love relations while also neglecting inequalities of power as between family members.

In 2003 the Supreme Court considered whether the constitutional protection afforded married families, specifically the ties between Irish citizen children and their third country national parents, was sufficiently weighty to overturn

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[96] C. F. Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 *Can. J.L. & Jur*. 49, at 58.

[97] Art.40.6.1° stipulates that 'the State guarantees liberty for the exercise' of rights to freedom of expression, assembly and association 'subject to public order and morality'.

[98] K. Karst, "The Freedom of Intimate Association" (1980) 89 *Yale L.J.* 624. See also Flynn's critique of the judgment in *McGee* v *A.G.* [1974] IR 284 which grounded the plaintiff's right to use contraception in her status as a *married* woman: L. Flynn, "Missing Mary McGee: The Narration of Women in Constitutional Adjudication" in G. Quinn *et al* eds., *Justice and Legal Theory in Ireland* (1995), pp.91-106.

[99] M. Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995).

[100] Indeed, as Justice Henchy's dissent in *Norris* pointed out, all of the empirical evidence presented at trial *via* expert testimony supported the decriminalization of consensual sex between men, above n.90.

[101] Iacobucci J. in *Egan* v *Canada*, [1995] 2 S.C.R. 513, at 616.

a deportation order directed at the adults.[102] Distinguishing a precedent that dated from 1990[103] the majority of the Court laid considerable emphasis on the changed wider environment and the behaviour of the applicants. Justice Hardiman for example contrasts hard-working "legitimate" migrants with the parents in question, the latter are suspect having claimed refugee status in Ireland after their claims were dismissed in the UK: the State was entitled to conclude that allowing such people to remain would undermine the "integrity of the asylum and immigration process".[104] At each juncture the fact matrix drawn upon is highly selective. As Justices Fennelly and McGuinness point out in their dissenting judgments the parents' legal status and wider migration patterns are immaterial to the constitutional rights of the children involved to the company and care of their parents. Further, in considering whether parents could exercise the child's acknowledged right to choose their place of residence a dubious distinction is drawn between such capacity and decisions as to medical treatment, which the Court had previously established vest in the family, even where exercised in a manner that is not in the child's best interest.[105]

The finding to the effect that promotion of the asylum process overrode the constitutional protection of family life, clearly resonated with a majority of the Irish electorate, who subsequently approved a referendum designed to confine citizenship to those with Irish parentage.[106] As such the amendment was a mechanism "for securing the property-like entitlement of citizenship and its accompanying benefits to 'natural-born' members – at the expense of excluding all non-right holders from claiming access to equivalent entitlements and benefits".[107]

The rights guaranteed by Articles 41 and 42 vest in each family member but also attach to the marital unit as a whole.[108] Where the interests of individuals within the unit are perceived as undermining the "constitution and authority" of the family, however, the latter tends to prevail. Treating children's welfare as the paramount consideration may not as a result be constitutionally

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[102] *Lobe* v *Minister for Justice, Equality & Law Reform* [2003] 1 IR 1; See further D. King, *Immigration and Citizenship in Ireland* (2004); U. Fraser, "Two-tier citizenship – the Lobe and Osayande case", Paper Presented at *Women's Movement: Migrant Women Transforming Ireland*, Trinity College Dublin, 20-1 March 2003.

[103] *Fajujonu* v *Minister for Justice* [1990] 2 IR 151.

[104] *ibid.*, at para.366.

[105] *North Western Health Board* v *HW and NW* [2001] 3 IR 622. See analysis in R. Byrne and W. Binchy, *Annual Review of Irish Law 2001* (2002), at 316-338, and that of R. Arthur, "*North Western Health Board* v *H.W. and C.W.* – Reformulating Irish Family Law" (2002) 2002:3 *I.L.T.* 39.

[106] See critical commentary by J. A. Harrington, "Citizenship and the Bio-Politics of Post-Nationalist Ireland" (2005) 32 *Journal of Law & Society* 424.

[107] A. Shachar, "Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws" *Jean Monnet Working Paper 2/03* (2003), p.5. See also J. Carens, "Aliens and Citizens: The Case for Open Borders" (1997) 49 *Review of Politics* 251.

[108] W. Duncan, "The Constitutional Protection of Parental Rights", in Government of Ireland, above n.78, at 612-626.

sound.[109] A recent statutory report notes, for example, that constitutional protection of the marital family unit in effect prevents the adoption of children whose best interests would be served by such an order.[110] The constitutional guarantee of equality before the law has been deployed to remove the remaining vestiges of formal status hierarchies as between married men and women,[111] but has not altered the substantive position of spouses, as becomes apparent in case law on the value of care work.

Under the social contract presented to the Irish electorate in 1937 "women were installed, as reproductive and domestic labourers, at the heart of the patriarchal and autarkic formation that was nationalist Ireland".[112] Article 41.2 of the Constitution provides:

> "1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

Irish constitutional law concerning care work falls under two heads; decisions that consider whether it is productive and so warrants re-distribution of private property and judgments pertaining to State support for such work. In *L* v *L*[113] the Supreme Court decided that Article 41.2 could not have the effect of vesting in "wives and mothers" a share in the ownership of the family home: To acknowledge the contribution of labour undertaken in the home in this manner would go beyond the bounds of judicial interpretation, amounting to a usurpation by the courts of the functions of the legislature. A subsequent Bill that purported to confer an automatic joint tenancy on spouses was unconstitutional because its provisions did not amount to "reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family".[114] The Court does not consider the gender implications of its finding nor does it discuss the history of State-induced dependence of married women on their husbands.[115]

In *Sinnott*[116] the parameters of the right to free primary education were drawn by the Supreme Court so as to exclude persons over eighteen years of age. In holding that primary education was age and not needs-related the Court effectively sanctions the continuation of an affective harm visited by State neglect of a fundamental right: over the course of some years a mother and her disabled son struggled unsuccessfully to have even the most basic of his

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109 A. Shatter, *Family Law*, 4th ed. (1997), p.94; See also the *Kilkenny Incest Investigation Report* (1993).

110 Department of Health and Children, *Adoption Legislation: 2003 Consultation and Proposals for Change* (2005), chap.7.

111 See generally O. Doyle, *Constitutional Equality Law* (2004), chap.7.

112 Harrington, above n.106, p.431.

113 [1992] 2 IR 77.

114 *Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305, at 326.

115 Through, *e.g.* the civil service marriage bar that remained in place until 1973. See further Yeates, above n.63.

116 *Sinnott* v *Minister for Education* [2001] 2 IR 545.

educational needs met. It further rejected the plaintiff's contention that her constitutional rights had also been violated. A majority of the Court, while acknowledging that Mrs. Sinnott had assumed an onerous care burden as a result of the State's inaction, found that no such cause of action was known to the law. Yet there were, as Justice Denham found in her minority judgment, at least two possible constitutional bases for the claim: the equality guarantee and the explicit protection of the family provided for under Articles 41 and 42, which acknowledges the role of women's labour in the home and commits the State to support such work. In addition the Court might have had recourse to the reservoir of unenumerated rights that stem from Article 40.3.[117] The latter have been fashioned on an *ad hoc* basis by the Courts since the 1960's and have given rise to new forms of claims against the State, overlapping to a degree with the Strasbourg Court's jurisprudence under Article 8 of the ECHR.[118] Moreover, a strong body of precedents reiterate that a breach of constitutional rights should be remedied notwithstanding the absence of an existing cause of action.[119]

It is submitted that the actual rationale rests not on a legal foundation as the judiciary asserted, but on a factual finding as to the nature of care work, specifically, a common sense assumption to the effect that such work is not commodifiable but is just a natural extension of love and affection.[120] As Robin West observes "an injury sustained by a disempowered group will lack a name, a history and in general a linguistic reality".[121]

Demarcation of care work as a female "duty" also surfaced in *Lowth v Minister for Social Welfare*.[122] Mr. Lowth sought equal treatment to a deserted wife in the form of State benefits. His claim failed on the basis that differences in treatment between the two groups concerned were justified because the legislation was pursuing a valid objective, that is, supporting the social function ascribed to women under the Constitution. It was of course open to the Court to hold that the purpose of the legislation was to provide financial support to persons who were at risk of poverty, rather than classifying the legislature's objective as one of supporting gendered social roles.

Judgments such as this and *Norris*[123], conceptualise the ill to be remedied by the equality guarantee as one of arbitrary differentiation based on inherent human characteristics. Article 40.1 is violated only if an impugned classification does not treat all those who are similarly situated with respect to the purpose of a law in the same manner. Three facets of this test are

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117 The foundational case is *Ryan* v *Attorney General* [1965] IR 294.

118 Many of the un-enumerated rights "discovered" to date implicate close personal relationships: the rights to marital privacy, individual privacy, to communicate, to bodily integrity and to know the identity of one's birth mother. See further J. Casey, *Constitutional Law in Ireland* (2000), p.395.

119 See judgment of Denham J., above n.116, at paras.159-66.

120 On the conflation of love and care labour by the U.S. courts see K. Silbaugh, "Turning Labor Into Love: Housework and the Law" (1996) 91 *Nw. U. L. R.ev* 1.

121 R. West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) 3 *Wisconsin Women's L.J.* 81, at 85.

122 [1999] 1 ILRM 5. See commentary by G. Hogan, "The Supreme Court and the Equality Clause" (1998) 4:3 *Bar Rev* 116.

123 Above n.90.

especially problematic. Its malleability means that the "reasonableness" of a distinction depends entirely on how one construes a measure's overarching function, as the *Lowth* decision amply demonstrates. Further, since discrimination is posited as irrational differentiation rather than subordination, the similarly situated test does not distinguish between using a classification to shore up privilege or challenge it.[124] A final flaw explains in part the judiciary's failure to tackle economic inequality. Absent express protection, socio-economic rights can achieve constitutional recognition in two principal ways; through an expansive reading of textual civil and political rights or via equality guarantees.[125] Neither of these paths has been followed. The latter is closed off because substantive inequalities do not give rise to actionable Article 40.1 claims, unless a formal distinction is drawn between groups.

In any event, the separation of powers doctrine presents a seemingly insurmountable obstacle to the imposition of the positive duties courts associate with socio-economic rights on the other branches of government.[126] The Supreme Court overturned a High Court order directing the State to adhere to its own time-scales for the building of special-care and high-support units for children at risk in *T.D. v Minister for Education and Others.*[127] The case supplies a stark example of self-imposed judicial restraint especially given that the right in issue was an enumerated one – the right to primary education. Many of judges accepted that *in principle* the plaintiffs' constitutional rights had been violated – in other words the Court appeared to accept that the right to education imposed positive duties on the State – but nonetheless refused to grant the remedy sought. Tushnet concludes that the decision reduces the right to primary education to a low status "declaratory right", which is no different in essence a non-justiciable right: "A purported right without an accompanying judicially enforceable obligation, is almost literally, toothless."[128]

In issuing something akin to a declaration of incompatibility the Irish courts seek to preserve a bright line between the legal domain and "political" distributive justice matters.[129] However, without an inter-branch dialogue mechanism for dealing with such putative rights violations[130], a state of

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[124] V. Vojdik, "Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions" (2002) 19 *Berkeley Women's L. J.* 68.

[125] See further Fabre, above n.2, and P. Hunt, *Reclaiming Social Rights* (1996).

[126] The bedrock decision is that of Costello J. in *O'Reilly* v *Limerick Corporation* [1989] ILRM 181. For a critical evaluation of the reasoning employed in such cases see G. Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2002); T. Murphy, "Economic Inequality and the Constitution", in Murphy and Twomey, above n.79, pp.163-181.

[127] [2001] 4 IR 259. See further C. O'Mahony, "Education, Remedies and the Separation of Powers" (2002) 24 *DULJ* 57.

[128] M. Tushnet, "Social Welfare Rights and the Forms of Judicial Review" (2004) 82 *Texas L. Rev* 1895, at 1901.

[129] A line which Whyte demonstrates is not that clear-cut, above n.126, chap.1.

[130] A limited exception to the general position arises under the terms of the European Convention on Human Rights Act 2003. Under s.5, a court can make a 'declaration of incompatibility' with the Convention's provisions, in respect of a law or public policy. The declaration is placed before the houses of the Oireachtas

inertia or stagnation in key areas of social policy results[131], as the fate of children in need of State care attests.[132] As I discuss below once "democracy" is no longer viewed as a narrow institutional role question, but as a normative concern, this rigid construction of the separation of powers doctrine demands revision. Intervention on behalf of groups who have no access to effective political representation, such as children, should raise different considerations from those applicable to members of relatively powerful groups.[133] Further, while economic inequalities cannot and should not be altered by judicial fiat, institutional competency difficulties can arguably be met at the level of remedies.

Towards a care-full conception of citizenship

Societies cannot *make* anyone love anyone else, and to this extent the right to have loving and caring relations is not directly enforceable.[134] But proponents of equality of condition contend that societies must work to establish the conditions in which these relationships can thrive. A key element in this task is to make sure that the work involved in providing love and care is properly recognized, supported and shared. The quality of people's interpersonal relations is also affected by the other dimensions of equality: equal respect, equal access to resources and equal power. Equality in these other dimensions is important in protecting people involved in relations of love and care from domination and exploitation.[135] While dependence is endemic to human relations regardless of gender,[136] Fineman points out that the "derivative dependency" experienced by caretakers is not a universal experience.[137] Likewise disability theorists have critiqued the manner in which people are rendered dependent and hence vulnerable to exploitation by disabling cultures and environments.[138]

> "By not noticing how pervasive and central care is to human life, those who are in positions of power and privilege can continue to ignore and to degrade the activities of care and those who give care. To call attention to care is to raise questions about the adequacy of care in our society. Such an

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(Irish parliament) within 21 days of the court hearing; there is no further guidance as to what should occur at that juncture.

131 J. Lobel, "The Political Tilt of the Separation of Powers", in Kairys, above n.13, pp.591-616.

132 *Irish Times*, 29 December 2003.

133 On the need for a context-sensitive approach to the separation of powers doctrine see M. Minow, *Making all the Difference: Inclusion, Exclusion, and American Law* (1990), pp.361-362.

134 For example, parents are legally required to care *for* their children, but they cannot be forced to care *about* them.

135 See further Bubeck and Kittay, above n.7.

136 N. Fraser and L. Gordon, "A Genealogy of 'Dependency'" in Fraser, above n.4, at pp.121-149.

137 M. Fineman, *The Autonomy Myth: A Theory of Dependency* (2003).

138 J. Morris, *Independent Lives?: Community Care and Disabled People* (1993) M. Oliver, *The Politics of Disablement* (1990); T. Shakespeare, "The Social Relations of Care", in G. Lewis, S. Gewirtz and J. Clarke eds., *Rethinking Social Policy* (2000), at pp.52-65.

> inquiry will lead to a profound rethinking of moral and political life."[139]

Care relations, including the emotional, material, social and political costs involved in sustaining them, are profoundly important matters that demand a radically improved public response. The remainder of this paper isolates some core features of a relational approach to rights. Probing its methodological implications, I argue that the envisaged contextual, care-full analysis of rights can only emerge through transformation of the social relations of knowledge production within the legal field.

Given its location at the intersection of State and civil society, the legal system's regulation of the affective domain has generated a considerable body of literature. Relational scholars, by foregrounding the interdependence of all human beings from the inner circles of care, what we might term "love relations", radiating outwards to various public spheres[140], challenge the implicit individualism of the legal subject. Naffine for example shows how the ostensibly autonomous, contracting individual is gendered: Men's dependencies and needs are met within the unacknowledged private sphere, thus woman sustains the "impossible paradox of the man of law".[141] By equating liberty with non-interference, the right to privacy including the decisional autonomy of the family as advanced in the judgments discussed above, cordons off aspects of this important sphere of life from public scrutiny. Separation is valorized above connection leading to the devaluation and invisibility of care work in judgments pertaining to both interpersonal relationships and the State-individual axis considered in socio-economic rights jurisprudence.[142]

In essence feminist writers in particular seek to reconstitute the provision of love and care as public goods.[143] We require an integrated conception of the work performed across all spheres, in recognition of the fact that unwaged labour currently subsidizes employment in the market and should no longer assume that nurturing work is "given as a gift to either the dependant or the society that benefits".[144] Rights retain their appeal as a means of ensuring that the self is not effaced by adherence to communitarian norms, which can lead to erasure of the female as subject within the family.[145]

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[139] J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (1993), p.111.

[140] See generally Nussbaum and Glover, above n.7.

[141] N. Naffine, *Law and the Sexes* (1990); See also F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harv L. Rev* 1497;

[142] See for example, Naffine above n.141; West above n.121; R. West, "Jurisprudence and Gender" (1988) 55 *U. Chi. L. Rev* 1; R. West, "Reconstructing Liberty" (1992) 59 *Tenn. L. Rev* 441; White and Tronto, above n.77.

[143] See further Fineman, above n.137; R. Lister, *Citizenship: Feminist Perspectives* (1997).

[144] M. Fineman, above n.99, p.9.

[145] See generally M. Minow and M. L. Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" (1996) 11 *Hypatia* 4. One reply to the charge that rights discourse generates conflict between individuals and so threatens co-operative social relations is that rights themselves do not fuel adversarial positions but are in place in the event

Taking the interdependence of self and others seriously, summons a care-full vision of citizenship that should inform constitutional doctrine concerning rights in general, not just those concerning intimate associations.[146] As Nedelsky puts it "our 'private rights' always have social consequences".[147] Once we accept that rights are relational we can no longer for example, regard the protection of private property rights as utterly divorced from the legal response to the claims of those living in poverty. Jurisprudence on socio-economic rights feeds into the construction of certain groups as needy objects of policy, whose claims should be advanced through the political process rather than before the courts.[148] Redistributive measures are often construed as unfair attempts at transferring the costs of social "problems" onto an innocent group.[149] That reasoning underpinned the decision in *Re Article 26 and the Employment Equality Bill 1996*,[150] where the Irish Supreme Court found that a reasonable accommodation provision constituted an unjust attack on the property rights of employers, specifically the right to carry on a business and earn a livelihood. Several ideological and practical problems flow from the designation of remedial measures as exceptional. The implication is that the difficulties encountered by various groups in participating in social life are traceable to their own problematic attributes rather than to unequal social structures bolstered by the operation of capitalist economies. The alternative to sharing or transferring costs is of course to leave things exactly as they are, that is, the costs of structural inequalities, both fiscal and personal continue to be borne solely by members of disadvantaged groups, a fact which was acknowledged by the Canadian Supreme Court in *Brooks v Canada Safeway*.[151]

Moreover, such judgments obscure the extent to which the fulfilment of negative duties is resource intensive:

> "Even conventional individual rights, like the right to free speech and private property, require governmental action. Private property cannot exist without a governmental apparatus, ready and able to secure people's holdings as such. So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs. Rights of property and contract, as well as rights of free speech and religious liberty, need significant taxpayer support."[152]

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that relations break down: J. Waldron, "When Justice Replaces Affection: The Need for Rights" in *Liberal Rights: Collected Papers 1981-1991* (1993).

146 See further Nedelsky, above n.26.

147 Above n.26, at 17.

148 See further Tronto and White, above n.77.

149 C. Harris, "Whiteness As Property" (1993) 106 *Harv L. Rev* 1710.

150 [1997] 2 IR 321. According to the *Ninth Progress Report of the All-Party Oireachtas Committee on the Constitution* (2004), at 28:
"It must be acknowledged … that the reasoning in this case stands out as the most pro-property rights decision of recent years. It is, perhaps, one of the few instances where a legislative measure was found to be unconstitutional on this ground where the arbitrary or unfair character of the impugned legislation was not self-evident."

151 [1989] 1 S.C.R. 1219

152 C. Sunstein, *Designing Democracy: What Constitutions Do* (2001), at 222-223.

Substantive equality guarantees are potentially a fruitful means of unpacking the relational nature of all constitutional rights. As mentioned above, formal equality analysis fixates on the individual claimant's supposed traits and neglects to highlight the oppressive practices of the powerful. The "reasonable classification" approach also clings to an understanding of difference as inherent and binary rather than viewing it as multiple and relational.[153] Critical theorists have forcefully argued that inequalities are not attributable to "differences" as such, but to the difference that difference makes. In other words differentiation is not the harm that ought to be addressed; subordination is.[154] Although there is some evidence of retrenchment the Canadian and South African Courts have applied relational, as opposed to comparative, equality analysis on occasion. Judgments of Justice Sachs have explored the social construction of sexual identities as well as their dynamic relation to dominant norms.[155] In advocating a revised stance towards Section 15 of the Canadian Charter, Justice L'Heureux Dubé comments:

> "We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences."[156]

The central idea here is that substantive inequalities are best tackled by focusing on the impugned act or omission, rather than on the defining the group to which a claimant belongs.[157] Such analysis prompts us to appreciate that particular rights are not properly understood until viewed as part of a larger context. In turn, the knowledge of context that we rely on should be generated by the groups at the receiving end of unequal treatment.

> "Human rights structure relationships not only by regulating patterns of behaviour but also by putting in place a method of claiming rights and creating a framework for a remedial dialogue between those who are disadvantaged or left out and those who are in positions of power and authority."[158]

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153 K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 139 *U. Chic. Legal Forum* 157; A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 *Stan. L. Rev* 581.

154 R. Colker, "Anti-Subordination Above All: Sex, Race, and Equal Protection" (1986) 61 *N. Y. U. L. Rev* 1003; MacKinnon, above n.13.

155 See P. De Vos, "Same-Sex Sexual Desire and the Re-Imagining of the South African Family" (2004) 20 *SAJHR* 179.

156 *Egan* v *Canada* [1995] 2 SCR 513, at 551-552.

157 Minow, above n.133, p.101.

158 J. Birenbaum and B. Porter, *Screening rights: The denial of the right to adjudication under the Canadian Human Rights Act and how to remedy it* (1999). Available from http://www.law.utoronto.ca/.

In other words, the manner in which rights are institutionalised is best understood as a "dialogue of democratic accountability".[159] Power inequalities mean, however, that the perspectives of some groups continually go unheard. In the following section I argue that rights interpretation needs to be informed by experiential knowledge of inequalities.

Democratising legal-decision-making

Judges frequently present what is a select viewpoint as one that is more comprehensive and epistemologically powerful than others.[160] As Martha Minow comments: "Court judgments endow some perspectives, rather than others, with power. Judicial power is least accountable when judges leave unstated - and treat as a given - the perspective they select."[161] Within traditional adjudicative processes reflexivity is not a requirement of the judicial task. The net effect of interpreting the world from the perspective of the "expert" is that the viewpoint of the outsider is privileged over that of the insider who has experienced the inequality. Privileging of the "expert" therefore produces perspectives on inequality and injustice that are not only politically and emotionally detached from the experiences that generated their articulation in the first place but dominate those experiences in legal discourse. Moreover, law's claim to enunciate "truths" in the form of detached and objective judgments mean that the partial, socially and historically contingent aspects of legal decision-making are continually masked. Adjudication is presented as a neutral exercise in rule application and law's coherence is supposedly assured through following principles elaborated in prior cases.[162]

Experiential knowledge – "knowing a person or thing through sustained acquaintance"[163]- provides a perspective on the world that does not have an explicit home in legal methodology. Yet people's experiences inevitably colour their affective responses to given situations. In turn affect is a "crucial component of judgment and reason".[164] Following Hannah Arendt, Nedelsky argues that, while there is no such thing as objective judgment, it is nevertheless possible, indeed important, to strive for good judgment.[165] To form a "good" judgment we must transcend our private idiosyncrasies, and we do this by testing our perspective against those of others. The more standpoints we consider, the better our own standpoint and hence our judgment will be. By virtue of their personal experience, those who carry the burden of inequality often have a better vantage point for understanding the

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[159] Nedelsky, above n.26, argues that a relational approach to rights posits constitutionalism as a 'dialogue of democratic accountability'. See also Minow and Shanley, above n.145.

[160] Bourdieu, above n.13; D. Kennedy, "Legal Education as a Training for Hierarchy" in Kairys, above n.13, pp.54-75; MacKinnon, above n.13; M. Minow, 'Feminist Reason: Getting It and Losing It' (1998) 38 *J. Leg. Ed.* 47.

[161] M. Minow, "Foreword: Justice Engendered" (1987) 101 *Harv L. Rev* 10, at 94.

[162] Bourdieu above n.13.

[163] J. Heron, "Philosophical Basis for a New Paradigm" in P. Reason and J. Rowan eds., *Human Inquiry: A Sourcebook of New Paradigm Research* (1981), at p.27.

[164] J. Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 *McGill L. J.* 91, at 106; See also discussion by Nussbaum, above n.7.

[165] J. Nedelsky, "Communities of Judgment and Human Rights" (2000) 1 *Theoretical Inquiries in Law* 1.

social world that creates inequality than those who enjoy its advantages. They can have a much deeper understanding of how particular laws, policies and procedures operate to promote inequalities than those who are advantaged by them.[166]

Third party interventions in public law proceedings are a valuable mechanism for giving a voice to people with day-to-day experiential knowledge of injustice. [167] Significantly, they differ qualitatively from the technical expert evidence usually drawn upon by courts and enable the presentation of issues in a form that emphasises their relational and affective dimensions.[168] Further, unlike expert evidence or individual client narratives, briefs can have an application wider than the facts of the case at hand. Social structures that contribute to the subordination of minority groups become most visible in the aggregate accounts of inequality furnished by representative organisations.

Under current conditions, written judicial opinions explain the court's findings solely as outcomes of a reasoned elaboration of legal materials.[169] As a step towards realising greater accountability, judges should be obliged to address the arguments put forward in these dossiers and explain how their decisions affect relationships between groups in addition to individual litigants.[170] In essence, this would require judgments to include an equality impact assessment and not just a decision on the particular case at hand.

It is submitted that critiques of legal method have to date paid insufficient attention to the question of legal remedies. In other words, the range of possible orders that flow from a decision inevitably shape the lead-in adjudicative processes, including the place accorded experiential knowledge of inequality. Irish constitutional litigation generally constructs what are essentially questions about relationships between various groups as narrow matters about the particular claimant's assertion of rights against another individual or entity. Inter-group relations, in typical adversarial mode, are analysed as inter-personal contests, in which a winner and loser must be identified.[171] In certain jurisdictions public interest law facilitates judicial review of institutional practices that affect given social groups rather than

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166 M. J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 *Harv C. R.-C.L. L. Rev* 323; R. Connell, *Schools and Social Justice* (1993), at pp.39-41; b. hooks, *Teaching the Transgress: Education as the Practice of Freedom* (1994).

167 P. Bryden, "Public Interest Intervention in the Courts" (1987) 66 *Can. Bar Rev* 490; S. Fredman, "Judging Democracy: The Role of the Judiciary under the Human Rights Act 1998' (2000) 53 *CLP* 99.

168 See, *e.g.* the briefs submitted by the Canadian women's rights organisation, LEAF, available at http:www.leaf.ca/.

169 See R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (1995), at pp.65-6; K. Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146.

170 Kearney and Merrill note that US courts do not even refer to amicus briefs in a large proportion of cases: "The Influence of Amicus Curiae Briefs on the Supreme Court" (2000) 148 *U.Pa.L.Rev* 743.

171 C. Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World" (1996) 38 *Wm.& Mary L.Rev* 5.

focussing solely on the rights of individuals.[172] However, many of these models simply augment the power of courts, in that they engage in ongoing supervision of how other social institutions operate, without securing an effective voice for subordinate people. The work of Dorf and Sabel on courts as sites of "democratic experimentalism", supplies a useful starting point for re-thinking public law remedies in a manner that addresses concerns as to appropriate institutional roles.[173]

Creative use of public law remedies could strengthen democratic legitimacy by avoiding either/or dispositions of cases.[174] Courts could, for example, issue judicial decrees requiring a structured participatory process for resolving a particular problem, with a clear role for the groups it affects and an appropriate statutory human rights or equality agency.[175] In other words, the judicial role need not necessarily be exclusively reactive. Dorf and Sabel suggest that courts are well placed to proactively direct collective problem-solving capacities: by setting out general performance standards and duties of coordination and cooperation that must be met by the relevant public body, while leaving the precise manner of this up to the institution concerned and affected parties. [176] The "best" decision may turn out to be one that does not entail the traditional first instance finding of unconstitutionally but one that generates more "experimentalist" remedies aimed at reforming practices of legislatures and bureaucracies. Any such role would involve abandoning the notion that the application of legal methods to social problems necessarily arrives at the "correct" result. As Klare remarks, lawyers "can best address problems concerning the democratic legitimacy of judicial power by honesty about and critical understanding of the plasticity of legal interpretation and of how interpretive practices are a medium for articulating social visions".[177]

However, the inclusion of subaltern perspectives within adjudicative processes and the placement of laws within their wider social context cannot of itself assure egalitarian outcomes.[178] The Supreme Court judgments in *Lobe*[179] and *Norris*[180] demonstrate how contextual factors can be used to

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[172] See for example, A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv Law Rev* 1281.

[173] M. Dorf & C. Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 *Colum. Law Rev* 267; M. Dorf, "Legal Indeterminacy and Institutional Design" (2003) 78 *N.Y.U.L.Rev* 875.

[174] C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *U.Pa.L.Rev* 1.

[175] Under s.8(h) of the Human Rights Commission Act 2000, the IHRC is already empowered to apply to act as *amicus* in cases concerned with the human rights of any person. Liberty to intervene is at the discretion of the courts and the power has been exercised twice to date. See further the Commission's website: http://www.ihrc.ie/. The Equality Authority is also due to act as *amicus* for the first time in a judicial review of the Housing (Miscellaneous Provisions) Act 2002: http://www.equality.ie/.

[176] Above n.173.

[177] Above n.169, at p.187.

[178] See Lacey, above n.13, chap.1.

[179] Above n.102.

[180] Above n.90.

rationalise dubious treatment of minority groups. For example, when faced with a choice between the social and medical model of disability, judges may well still opt for the latter.[181] An approach grounded in a relational understanding of rights mandates that adjudicators "look to the bottom",[182] echoing Ann Scales' call for the rejection of epistemological privilege:

> "When the law must chose between realities, the principle of equality requires that we look to see whose dignity is most at stake, whose point of view has historically been silenced and is in danger of being silenced again, and that, in the ordinary case, we chose that point of view as our interpretation."[183]

Unless constitutions specifically endorse transformative objectives, through for example interpretive clauses and substantive equality guarantees, the legal system may well end up preserving the status quo and containing change within confines set by an un-elected arm of the state. It remains to be seen whether such concerns will be taken on board by those currently charged with reviewing the operation of the Irish Constitution.[184]

Conclusion

"Equality" is open to many interpretations, as are such related concepts as rights and the public/private distinction. Critical legal scholars and social movements have shown that rights can be understood in wider and more progressive ways than those found in conventional legal analysis. But as Williams argues, these understandings will only emerge if courts and the legal profession are prevented from monopolizing the interpretive process.[185] What is at issue here is the case for an extended epistemology within the legal system so that a relational understanding of rights finds a home within adjudication. As will be gleaned from the case law canvassed above legal forms often frame social relations in narrow and confining ways and may inculcate particular understandings of problems or force claimants to adopt problematic identities.[186] However within any hegemonic order there are

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[181] See *Re Article 26 and the Employment Equality Bill 1996*, above n.150 .

[182] Matsuda, above n.26.

[183] A. Scales, "Feminist Legal Method: Not So Scary" (1992) 2 *UCLA Women's L.J.* 1, p.27.

[184] Currently we are more than mid-way through the second comprehensive examination of the Irish Constitution and its operation. The first phase involved the report of the Expert Group on the Constitution delivered in 1996, above n.78. For appraisals of the report see, A. Butler and R. O'Connell. "A Critical Analysis of Ireland's Constitutional Review Group Report" (1998) 33 *Irish Jurist* 237; S. Mullally, "Equality Guarantees in Irish Constitutional Law: The Myth of Constitutionalism and the Neutral State" in Murphy and Twomey, above n.79, pp.147-161; and Murphy, above n.126. An Oireachtas committee is now considering that report; the ten reviews have not highlighted the absence of any interpretive clauses in the text of the Constitution, which direct the judiciary to advance egalitarian values: http://www.constitution.ie/.

[185] Williams, above n.20, at 433.

[186] For a discussion of legal forms see B. Fine, *Democracy and the Rule of Law* (1984); R. Fletcher, "Legal Forms and Reproductive Norms" (2003) 12 *Social & Legal Studies* 217; S. Gavigan, "Legal Forms, Family Forms, Gendered Norms: What is a Spouse?" (1999) 14 *Can. J. L. & Soc'y* 127.

cracks and contradictions that can be exploited.[187] While courts should not supplant democratic decision-making processes, they could play an important role in advancing political debate, prompting rather than inhibiting the emergence of a care-full conception of citizenship.

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[187] D. Sugarman, "Law, Economy and the State in England, 1750-1914: Some Major Issues" in Sugarman ed., *Legality, Ideology and the State* (1983), pp.213-266.

THE LONG ROAD TO HUMAN RIGHTS COMPLIANCE

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Introduction: The Ancien Regime

Ten years ago the protection of human rights in the UK rested on the common law. A decade ago the guarantor of our freedoms was the "sovereignty of Parliament" whereby "Parliament has, under the English constitution, the right to make any law whatever and . . . no person or body . . . ha[s] a right to override or set aside the legislation of Parliament."[1]

How these two propositions could be fully reconciled was never adequately explained. But the result, according to ministers at the time, was an almost mystical enhancement of freedom.

> "This country's approach to rights and freedoms is more permissive than found elsewhere. The possession of rights and freedoms is assumed. It is not dependent on their enshrinement in statute or through some other constitutional devise."[2]

Or in the words of former Prime Minister Mrs Thatcher:

> "The Government considers that our present constitutional arrangements continue to serve us well and that the citizens in this country continue to enjoy the greatest degree of liberty that is compatible with the rights of others and the vital interests of the state."[3]

This is not to imply that the courts had no powers to check the actions and decisions of the executive. From the 1970s in particular, the courts gradually extended the degree to which, and the circumstances within which, they would hold public bodies to account. The Wednesbury approach to judicial review, developed in a case involving Sunday cinema performances and the Wednesbury Corporation, established that a decision could only be overturned on substantive, rather than procedural, grounds where it was "unreasonable".[4] The "burden of proof" on an individual to establish that ministers or officials had acted "beyond the range of responses open to a reasonable decision-maker" was very high.[5]

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* With much appreciation to Helen Wildbore for her excellent research and meticulous assistance.

1 A. V. Dicey, *Introduction to the Study of the Law of the Constitution (10th edition),* Macmillan, 1959, at 70.

2 Charles Wardle, Home Office Minister, 225 HC 1029, (27 May 1993).

3 *Letter* to Baroness Ewart-Biggs, 26 May 1989.

4 *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.

5 *R* v *Ministry of Defence ex. p. Smith* [1996] QB 517 at 554.

By the mid 1990s the courts had developed the so-called "flexible Wednesbury" principle, through which, it was maintained, fundamental rights, like life, should be subject to "the most anxious scrutiny".[6] This was most strongly articulated in the Court of Appeal in *Smith*, which challenged the automatic dismissal of gay men and lesbians from the military, where it was maintained that:

> "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable."[7]

However, although the Appeal Court judges expressed varying degrees of discontent with the reasons for the expulsions advanced by the Ministry of Defence, none were prepared to label the policy "irrational".[8] The case had to proceed to the European Court of Human Rights in Strasbourg before the policy was declared a breach of fundamental rights and overturned by the government.[9]

Lord Bingham summed up what is now the *ancien regime* of human rights enforcement in the UK:

> "It is, inevitably, common ground that the United Kingdom's obligation, binding in international law, to respect and ensure compliance with [the Convention] is not one that is enforceable by the domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. The fact that a decision-maker fails to take account-of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning the exercise of that discretion."[10]

As for reviewing primary legislation, prior to the Human Rights Act (HRA) this was effectively off limits. In case after case, the courts confirmed that the use of the European Convention on Human Rights (ECHR) as a guide to statutory interpretation was *only* applicable where there was an ambiguity in legislation. Even then, a breach of the Convention was said to have no greater significance than a breach of foreign law.[11] Research I conducted in 1996 suggested that the ECHR influenced the interpretation of legislation in only 11 of the 316 cases in which the Convention was cited in the English courts from 1975.[12]

The Stated Aims of the Human Rights Act

In 1998 the HRA was introduced by the new Labour Government in line with its 1997 manifesto commitment to incorporate the ECHR into UK law.

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6 *Bugdaycay* v *Secretary of State for the Home Department* [1987] AC 514, at 531.
7 *R* v *Ministry of Defence, ex. p. Smith* [1996] 1 All ER 257 at 263.
8 *ibid.*
9 *Smith and Grady* v *UK* (1999) 29 EHRR 493.
10 See n.7 at 266.
11 *Per* Lord Nolan, *R* v *Khan* [1996] 3 All ER 289 at 302.
12 Seven of these cases involved the interpretation of legislation passed specifically to comply with adverse decisions in Strasbourg. See Francesca Klug and Keir Starmer, "Incorporation through the Back Door?" [1997] *Public Law* 223.

This followed a long campaign for a Bill of Rights to address the deficiencies in human rights protection of relying on a combination of the common law and parliamentary sovereignty to protect fundamental rights.[13] The HRA came into force with the new millennium, in October 2000. This "ridiculous law"[14] or "cranks charter"[15] was greeted by howls of ridicule and warnings of dire consequences by much of the press and a number of political and legal commentators. Columnist Peter Oborne, was not alone in viewing the Act as evidence of the contempt the new Labour government was showing to:

> "the institutions that define our existence as a nation . . . The real effect of this month's incorporation of the European Convention on Human Rights into English law is the replacement of the Common Law, unchallenged since the Middle Ages, with a codified European model."[16]

The government, on the other hand, proclaimed the significance of the Act. Jack Straw, the then Home Secretary, claimed it provided "the first Bill of Rights this country has seen for three centuries".[17] Three broad reasons were given by the government for taking this momentous step.

First, to "bring rights home" so that individuals in the UK could "assert and enforce their rights under the ECHR through the ordinary UK courts and tribunals".[18] This would "enable individuals to use the UK courts to prevent and remedy the misuse of public power" which is "the primary purpose of incorporating the ECHR".[19]

Second, to address what was argued to be a "democratic deficit" in the British political system whereby executive accountability consisted mainly of periodic elections and limited scope for judicial review (see above). Along with other proposals for constitutional reform, the Human Rights Act was claimed to:

> "strengthen representative and democratic government…by enabling citizens to challenge more easily actions of the state if they fail to match the standards of the European Convention."[20]

Third, to build "a culture of rights and responsibilities in the UK. These aren't empty words or mere jargon. A rights and responsibilities culture *really* is our goal . . . we didn't incorporate the Convention principles and norms as playthings for lawyers. . . in time, the language of the Convention

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[13] This was primarily an elite-led campaign led largely by Charter 88 and other pro-constitutional reform NGOs, lawyers and political commentators, largely on the left of the political spectrum.
[14] *The People*, 22 October 2000.
[15] *Daily Mail*, 2 October 2000.
[16] *Sunday Express*, 15 October 2000.
[17] 306 HC 769 (16 February 1998).
[18] *Bringing Rights Home: Labour's plans to Incorporate the ECHR into UK Law,* Labour Party consultation document, 1996, p.11.
[19] *ibid*, p.8.
[20] See n.17 above.

will be the language in which many of the key debates are settled…And that's a real culture change."[21]

Prime Minister Tony Blair put it this way:

> "The Act…requires all of us in public service to respect human rights in everything we do."[22]

To assess the impact of the HRA on compliance with human rights norms in the broadest sense, each of these stated aims need to be evaluated in turn.

Bringing Rights Home: Compliance in the Courts

It was not long before the first effects of the HRA on the judicial process were apparent. Out of 431 cases in which the ECHR was cited by the higher courts in the first eighteen months of the Act's life (over a hundred more than in the previous two decades), it was estimated that the HRA affected the outcome, reasoning and procedure in 318.[23]

Yet predictions of clogged up courts and a new litigious culture did not materialise, at least not as a consequence of the HRA. Early research by the Lord Chancellor's Department (LCD) indicated that very few cases at any level were wholly reliant on the HRA.[24] Then, as now, the HRA is mainly cited as a defence in criminal trials or as an additional argument in judicial reviews or torts. By July 2001 Lord Steyn warned against:

> "unfounded predictions that the 1998 Act would cause chaos in our legal system. A healthy scepticism ought to be observed about practised predictions of an avalanche of dire consequences likely to flow from any new development . . ."[25]

Unexpected Decisions

Failing to head the warning of Professor David Feldman, former legal advisor to the Joint Committee on Human Rights (JCHR), that "Convention rights are unlikely to operate in a purely liberal and individualistic way", there were numerous early cases that confounded the expectations of both the opponents and proponents of the HRA.[26] The assumption, based on a "black letter" reading of the ECHR, that the Human Rights Act would usher in a

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[21] Jack Straw, "Building a Human Rights Culture", Address to Civil Service College Seminar, 19 December 1999.

[22] *Conventional Behaviour: questions about the HRA, an introduction for public authorities*, Home Office, 1999.

[23] An HRA claim was upheld in 94 cases and remedies of some kind awarded in 91. These figures are based on research by the Human Rights Act Research Project which I directed until 2003. See Francesca Klug and Claire O'Brien, "The First Two Years of the HRA," [2002] Public Law 649.

[24] See Craig Raine and Clive Walker, "The Impact on the Courts and the Administration of Justice of the Human Rights Act 1998" (October 2002) which found relatively limited impact of the HRA on the courts in terms of challenges and additional workload, although it had invoked a number of significant policy and practice changes and was felt to be engendering a stronger human rights culture within the courts.

[25] *R* v *Lambert* [2001] UKHL 37, at para.30.

[26] David Feldman, "The Human Rights Act 1998 and Constitutional Principles", 19(2) *Legal Studies* 165 (1999) at 173.

new era of libertarianism was first jolted by the drink-driving case of *Brown*.[27] This concerned the use of self-incriminating evidence by car owners and drivers under section 172 of the Road Traffic Act 1988. The court found that the Act was not a disproportionate response to the high incidence of death and injury on the roads and that submitting a driver's admission at trial did not undermine Article 6, the right to a fair hearing. The Privy Council recognised that, inherent in the Convention, is the need to establish the correct balance between the protection of individual rights and the interests of the community at large.

In *Clingham*, where the use of hearsay evidence in the granting of an ASBO was also challenged as a breach of Article 6, the court held that ASBO proceedings had the features of a civil rather than criminal hearing and that hearsay evidence was therefore admissible. Lord Hutton said:

> "[T]he striking of a fair balance between the demands of the general interest of the community and the requirements of the protection of defendants' rights requires the scales to come down in favour of the protection of the community."[28]

In *Marper* the retention and use by the police of DNA samples and fingerprint evidence after a suspect had been acquitted was found to be compatible with the ECHR.[29] The evidence, the court heard, was only kept for the limited purpose of the detection, investigation and prosecution of crime and would not be made public. When balanced against the enormous advantages conferred by the expansion of the database in the fight against serious crime, the House of Lords determined, the practice was not disproportionate in effect.

There have been numerous other cases, unsurprisingly, whose outcome has disappointed human rights advocates and activists, often involving procedural issues concerning the ambit of Article 6.[30] Perhaps the most surprising and disturbing of these was the Court of Appeal ruling that evidence obtained by torture abroad could be relied upon in domestic courts, provided that UK officials were not involved in obtaining it. This decision was subsequently overturned by the House of Lords, the majority of the Lords ruling that the Special Immigration Appeals Commission should not admit evidence if it concludes on the balance of probabilities that it was obtained by torture.[31]

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[27] *Brown* v *Procurator Fiscal and Advocate General for Scotland* [2001] 2 WLR 817. It was held that the jurisprudence of the European Court of Human Rights very clearly established that whilst the overall fairness of a criminal trial could not be compromised, the constituent rights contained in Art.6 of the Convention, whether explicit or implicit, were not themselves absolute.

[28] *Clingham* v *Kensington and Chelsea LBC; R (McCann)* v *Manchester Crown Court* [2002] UKHL 39 at para.113.

[29] Arts.8 and 14. *R (LS)* v *Chief Constable of South Yorkshire Police; R (Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39.

[30] *Matthews* v *Ministry of Defence* [2003] UKHL 4; *Begum v Tower Hamlets* [2003] UKHL 5; *D* v *East Berkshire Community Health NHS Trust* [2005] UKHL 23.

[31] The Lordships ruled that Article 15 of the Convention Against Torture, which prohibits the use of evidence established to have been obtained by torture in proceedings, cannot be understood to apply only where the state in whose

However, any meaningful evaluation of the degree to which the HRA has fulfilled the intention of 'bringing rights home' needs to look beyond the results of individual cases to the impact the HRA has had more generally on the *system* for protecting rights within the UK.

Judicial Review

Before incorporation, the European Court of Human Rights described the British system as one that:

> "effectively excluded any consideration by the domestic courts of the question of whether the interference with applicants' rights answered a pressing social need or was proportionate . . . "[32]

This polite but damning indictment of the *Wednesbury reasonableness* doctrine as an adequate protection of fundamental rights was effectively endorsed by the House of Lords in *Daly*,[33] which provided its verbal death throes, at least where Convention rights are at stake.[34] Lord Cooke predicted that:

> "the day will come when it will be more widely recognised that . . . Wednesbury . . . was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of reasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation."[35]

Lord Steyn, whilst cautioning against confusing his approach with a "merits review" in which the courts substitute their own judgement for that of the primary decision-maker, observed that "there is a material difference between the *Wednesbury* and proportionality grounds of review".[36] He suggested three concrete differences. First, the doctrine of proportionality may require the reviewing court to assess the balance that the decision maker had struck, not merely whether it is within the range of rational or reasonable decisions. Second, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Third, even the "heightened scrutiny" (or "flexible Wednesbury") test is not necessarily appropriate to the protection of human rights:

> "The intensity of the review . . . is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social

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jurisdiction the proceedings are held has inflicted or been complicit in the torture. *A* v *Secretary of State for the Home Department (no 2)* [2004] EWCA Civ 1123 and *A* v *Secretary of State for the Home Department* [2005] UKHL 71.

32 *Smith & Grady* v *UK*, see n.9 above.

33 *R (Daly)* v *Secretary of State for the Home Department* [2001] 2 WLR 1622.

34 The point here being that, under the Convention doctrine of proportionality, the measure adopted by the decision-maker must be that which is the *least* intrusive of the protected right, while still achieving the legitimate aim in question.

35 *ibid* at 1636-37.

36 *ibid* at 1634.

> need, and the question whether the interference was really proportionate to the legitimate aims pursued."[37]

Steyn's approach has been broadly followed in a string of successive cases. In *Wilkinson* the Court of Appeal authorised the attendance of doctors for cross examination to assess whether the administration of medical treatment without the consent of a detained mental health patient was proportionate.[38] In *Prolife Alliance* Lord Justice Laws held that a constitutional responsibility lay on the court's shoulders to decide for *itself* whether interference with a fundamental right was justified, the UK now being "long past the point" where a public authority's "bare demonstration of rationality or reasonableness" would be sufficient.[39] The strongest demonstration to date of the transformative effects of importing the doctrine of proportionality through the HRA was provided in the case of *A*. This involved the courts reviewing the *Anti-Terrorism Crime and Security Act 2001* for compatibility with the ECHR, something the courts were effectively constitutionally barred from doing prior to 2000. The House of Lords concluded that the power to indefinitely detain without trial foreign nationals in Part 4 of the Act was disproportionate; it discriminated on grounds of nationality or immigration status without achieving its stated aim of preventing terrorism.[40]

The Common Law and Horizontal Application

The development of the common law in line with the HRA has been a little more uneven. Naomi Campbell's privacy case against the *Mirror* group newspapers confirmed what the case law until then had already established; that the HRA did not create any new 'cause of action' between private parties (sometimes referred to as "horizontal application"). However the courts, as public authorities under section 6 of the Act, must interpret *all* law compatibly with Convention rights, including the common law as it applies between private individuals.[41]

This is clearly what was envisaged by Lord Irvine, the Lord Chancellor, when the HRA was introduced:

> ". . . it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention, not only in cases involving other public authorities, but also in developing the common law in deciding cases between individuals."[42]

The widespread prediction that the HRA thereby would in time fill the lacuna left by the systems failure to protect personal privacy has not yet materialised. This gap was described by Lord Bingham as "the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens".[43]

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[37] *ibid* at 1635-36.
[38] *R (on the application of Wilkinson)* v *Responsible Medical Officer Broadmoor Hospital* [2002] 1 WLR 4.
[39] *R (on the application of Prolife Alliance)* v *BBC* [2002] 2 All ER 756 at 33 and 36.
[40] *A* v *Secretary of State for the Home Department* [2004] UKHL 56.
[41] *Campbell* v *MGN Ltd* [2004] UKHL 22.
[42] 583 HL 783 (24 November 1997).
[43] *Kaye* v *Robertson* [1991] FSR 62.

Although it was recognised in *Douglas* that the HRA stopped short of full "horizontal" effect,[44] in that only public authorities are directly liable for Convention breaches under HRA section 7 and section 8, the courts were held to have a "positive obligation", in appropriate cases, to develop the common law to protect privacy rights.[45] Lord Justice Sedley even observed that "we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy".[46]

However when footballer Garry Flitcroft tried to gag publication of details of his alleged extramarital affairs, the Court of Appeal was categorical that privacy claims would be brought, not as new privacy actions, but through the tort of breach of confidence.[47] The court's section 6 duty would be met by "absorbing the rights which Articles 8 and 10 protect," into this action, giving it "new strength and breadth . . . so that it accommodates the requirements of those articles", which would "in the great majority of situations, if not all . . . provide the necessary protection."[48] This self-imposed limitation arguably falls short of 'bringing privacy rights home' but this interpretation is almost certainly liable to further development by the courts.

A further protection gap between the Strasbourg and English courts concerning horizontal application has opened up through the definition of 'public authority' under the HRA developed in the *Poplar Housing*[49] and *Leonard Cheshire Foundation*[50] cases. These suggested that certain governmental features had to apply before a body could be classified under the HRA[51] as a public authority "certain of whose functions are functions of a public nature" (sometimes referred to as 'hybrid bodies'). These features relate to the closeness of the body to the institutions of the state, for example whether it exercises statutory powers, rather than the functions the body performs and whether the state would be under a duty to provide them if the body in question did not.

In the more recent case of *Aston Cantlow,* Lord Hope developed a wider and more functional approach to defining "hybrid bodies" noting that the purpose of the HRA is to "bring rights home" and provide a domestic remedy where Strasbourg would find a breach of the Convention.[52] The broader requirements of Articles 1 and 13 of the Convention, which are not included in the Convention Rights incorporated into domestic law through the HRA, sometimes require the state to put in place a legal framework which prevents or responds to breaches of Convention rights even when the person or body

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44 *Douglas* v *Hello! Ltd* [2001] QB 967 see para.81.
45 *ibid* at 88-91.
46 *ibid* at 110.
47 *A and B, sub nom Garry Flitcroft* v *Mirror Group Newspapers Ltd* [2002] 2 All ER 545.
48 *ibid* at para.4 and 11. See also Francesca Klug and Claire O'Brien n.23 at 654-657.
49 *Poplar Housing and Regeneration Community Association* v *Donoghue* [2001] EWCA Civ 595.
50 *Callin, Heather and Ward* v *Leonard Cheshire Foundation* [2002] EWCA Civ 366.
51 S.6(3)(b)
52 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v *Wallban* [2004] 1 A.C. 546.

responsible is not a public authority or performing a "public function".[53] In making his observation, Lord Hope was echoing the intentions behind the drafting of HRA section 6 as clarified by Home Secretary, Jack Straw, when piloting the Human Rights Bill through Parliament:

> "The principle of bringing rights home suggested that liability in domestic proceedings should lie with bodies in respect of whose actions the UK Government were answerable in Strasbourg . . . We decided that the best approach would be reference to the concept of a public function . . . One of the things with which we had to wrestle was the fact that many bodies, especially over the past 20 years, have performed public functions which are private, partly as a result of privatisation and partly as a result of contracting out…The courts will consider the nature of a body and the activity in question."[54]

As the JCHR observed in its report, *The Meaning of Public Authority under the Human Rights Act*,[55] it is not yet clear that the functional approach of the House of Lords in *Aston Cantlow* is being applied by the lower courts. Organisations like Age Concern, Help the Aged and the Disability Rights Commission, concerned that many vulnerable people in private or charitable residential homes or day care are unprotected by the HRA, have been lobbying government to intervene in a relevant case or clarify the definition of public authority in the promised Single Equality Act.[56] The government has now committed itself to addressing this issue.[57]

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[53] These requirements are often grouped and referred to as "positive obligations" on the state. Examples where the domestic courts have generously endorsed the "positive obligations" doctrine include *Bernard* v *Enfield London Borough Council* [2003] H.R.L.R. 4 where the court held that Article 8 ECHR placed an obligation on the council to "take positive steps . . . to enable [a severely disabled woman and her family living in local authority housing]. . .to lead as normal a family life as possible" (para.33). In *R (A and B)* v *East Sussex County Council* [2003] E.W.H.C. 167 (Admin) the court applied the separate opinion of Judge Greve in *Price* v *UK* (2001) 34 E.H.R.R. 1285 and said "[i]n order to avoid discriminating against the disabled…one may need to treat the disabled differently precisely because their situation is significantly different from that of the able-bodied…the positive obligation on the State to take reasonable and appropriate measures to secure the rights of the disabled . . . calls for human empathy and humane concern as society seeks to try and ameliorate and compensate for the disabilities faced by persons in A and B's situation." (Para.93.).

[54] 314 HC 406-410 (17 June 1998). See also Francesca Klug, "The Human Rights Act 1998, *Pepper* v *Hart* and all that," [1999] *Public Law* 246 at 255-259.

[55] Seventh Report of 2003-04 Session (2004). See also Francesca Klug and Keir Starmer "Standing Back from the HRA: how effective is it five years on?" [2005] *Public Law* 716.

[56] The Women and Equality Unit in the DTI is carrying out a Discrimination Law Review with the aim of drafting a new Single Equality Act to integrate and streamline current anti-discrimination and equality legislation for which the Westminster Parliament has responsibility. The HRA is included in this review in so far as it interacts with the equality enactments.

[57] See, for example, Baroness Ashton: "the Government are committed to look for a case in which to address the issues . . . it is possible for us to look more closely

Statutory Interpretation and Declarations of Incompatibility

The new rule of statutory interpretation in section 3 of the HRA – that primary and subordinate legislation must "so far as it is possible to do so" be "read and given effect in a way which is compatible with the Convention rights" – is a significant departure from the past. Prior to the HRA, statutory review outside the context of EU law, was virtually non-existent. Where a compatible interpretation is not "possible", higher courts can make a "declaration of incompatibility" under section 4(2) HRA. In similar circumstances, subordinate legislation can be set aside, unless "primary legislation prevents removal of the incompatibility".[58]

According to Lord Irvine, the Lord Chancellor, section 3 was intended to go:

> "far beyond the [then] present rule. It will not be necessary to find an ambiguity. On the contrary, the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so."[59]

This was intended as a "strong form" of incorporation.[60]

Following a series of bold but controversial early decisions, it soon became apparent that the HRA's scheme has the capacity to alter law and practice to give substantive protection to individual rights.[61] The courts have applied section 3 to "read down" over-broad legislation,[62] re-interpret provisions to provide new safeguards,[63] or give a statutory provision a meaning it would not ordinarily bear.[64] It also became clear that the courts are most likely to apply section 3 forthrightly to re-interpret legislation where their own powers are at issue,[65] and are least likely to do so where questions of resource allocations or decisions outside their traditional expertise are at stake.[66]

Compared to the early days of HRA jurisprudence,[67] a reasonably consistent consensus has now emerged on the judicial interpretation of HRA section 3 and its interrelationship with section 4. On the one hand, although it is clear

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and carefully at whether we might do more to address the immediacy of the problem." HL Deb, 19 October 2005.

58 HRA s.3 (2)(c).

59 "Lord Irvine, The Development of Human Rights in Britain under an Incorporated Convention on Human Rights"#,[1998] Public Law 221 at 228.

60 Lord Chancellor, 582 HL 1230 (3 November 1997).

61 See, *e.g. R.(H)* v *Mental Health Review Tribunal* [2002] Q.B. 1 and the remedial order (Mental Health Act 1983 (Remedial) Order 2001, S.I. 2001 No. 3712) made following the court's declaration of incompatibility. Additionally, the Secretary of State for Health approved an *ex gratia* scheme for compensation of those who had been affected.

62 *R* v *A (No. 2)* [2001] 3 All ER 1.

63 *R* v *Offen* [2001] 1 WLR 253.

64 N.25 at 81.

65 *R* v *Offen*, n.63*; R.* v *A (No. 2)* n.62.

66 *Re W and B (Children) (Care Plan), Re W (Children) (Care Plan)*, above n.29; see also *R (Reynolds)* v *Secretary of State for Social Security* [2002] EWHC 426 (Admin); though *cf. R (H)* v *Mental Health Review Tribunal*, n.61.

67 See in particular Lord Steyn and Lord Hope in *R v A* [2002] 1 AC 45, paras. 44 and 108.

that "section 3 itself is not free from ambiguity",[68] there is now broad agreement that what Lord Steyn calls an "excessive concentration on the linguistic features of the [statute to be interpreted]", should be substituted in favour of a "purposive" approach concentrating on "the importance of the fundamental right involved".[69] As Lord Nicholls has pointed out, once it is accepted that section 3 was intended to supersede the pre-HRA legislative ambiguity principle of re-interpretation, Parliament cannot intend the courts to "depend critically upon the particular form of words adopted by the parliamentary draftsman" in the legislation in question without making the application of section 3 "something of a semantic lottery".[70]

On the other hand, Lord Steyn has rowed back from his earlier implication in *R* v *A*[71] that there is a presumption that Convention rights should override the provisions of other statutes unless there are *express* words to the contrary.[72] In *Anderson* he accepted that re-interpretation "is not available where the suggested interpretation . . . *is by implication necessarily contradicted by the statute*".[73]

The search to nail down the characteristics indicating such a "contradiction" has also borne fruit. Lord Rogers argued in *Ghaidan* that section 3 "does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying x is not to happen".[74] In Lord Nichol's terms "[t]he meaning imported by application of section 3 must be compatible with the *underlying thrust* of the legislation being construed".[75]

Applying this construction, the phrase in the 1977 Rent Act "as his or her wife or husband"[76] was re-interpreted to mean "*as if they were* his wife or husband" in *Ghaidan*.[77] This was viewed as in line with the *thrust* of the statute which had already been amended to include cohabiting, as well as married, couples but discriminated against gay and lesbian partners. However to read section 29 of the Crime (Sentences) Act 1997 in *Anderson* as precluding the Home Secretary from participating in setting the minimum period served by a mandatory life prisoner, was not deemed "possible" when the provision was drafted for that precise purpose. Such an application of section 3, according to Lord Bingham would "not be judicial interpretation but judicial vandalism. . .".[78]

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68 *Ghaidan* v *Ghodin-Mendoza* [2004] 2 AC 557, at 27. See also Aileen Kavanagh, "The elusive divide between interpretation and legislation under the Human Rights Act 1998", (2004) 24 *Oxford Journal of Legal Studies* 259.

69 *Ghadian, ibid.*, at 41.

70 *ibid.*, at 31.

71 N.62.

72 *Ibid.*, at 44. Lord Steyn argued that the boundary where impossibility arises under s. 3 lies when there is a "clear [limit] on Convention rights . . . stated in terms".

73 *R (Anderson)* v *Secretary of State for the Home Department* [2003] 1 AC 837, para.59 (my emphasis).

74 N.68, at 110.

75 *ibid.*, para.33 (my emphasis).

76 Para.2, Sch. 1 Rent Act 1977.

77 N.68 at 51.

78 N.73 at 30. This is not to suggest that the rationale for applying s.3 or s.4 in any individual case is beyond dispute. The same argument advanced in *Anderson*

The fact that a re-interpretation was not "possible" did not mean the courts could do nothing, however, as they would have under the *ancien regime.* Instead, they made a Declaration under HRA section 4 that section 29 of the 1997 Act was incompatible with ECHR Article 6. The government responded by repealing section 29 to remove the role of the Home Secretary in setting minimum terms of imprisonment.[79]

Declarations of Incompatibility (DoIs) have not been the paper tiger that many critics feared.[80] They been more frequent than predicted and in virtually all cases have led to changes in the law or in practice.[81] The higher courts have issued 17 DoIs in five years, of which 11 are still standing.[82] The

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could legitimately have been made against the application of s.3 in *R* v *A* (see n.62 above) whilst, using the logic advanced in *Ghaidan*, it is possible to make the case that s.3 should have been used to reinterpret s.11(c) of the Matrimonial Clauses Act 1973 in *Bellinger* v *Bellinger* [2003] 2 A.C. 467 to recognise the reassigned gender of Mrs Bellinger, and therefore the lawfulness of her marriage.

79 S.29 of the Crime (Sentences) Act 1997 was repealed by the Criminal Justice Act 2003, ss.303(b)(I), 332 and Sch. 37, Pt 8. Transitional and new sentencing provisions were contained in chap.7 and Sch.21 and 22 of the CJA 2003.

80 David Bonner *et al* describe "declarations of incompatibility "as "merely a formal, dramatic and public call for something to be done. . ." in "Judicial approaches to the Human Rights Act", (2003) 52(3) ICLQ 549 at 562. Tom Hickman stated that "s.4, unlike s.3, decouples rights from remedy" in "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998," [2005] *Public Law* 306 at 327.

81 Of the Declarations still standing, in five cases the legislation has been amended after the declaration was made (*R (H)* v *Mental Health Review Tribunal for the North East London Region and Secretary of State for Health* [2001] 3 WLR 512 in relation to Mental Health Act 1983, ss.72-73, *International Transport Roth GmbH* v *Secretary of State for the Home Department* [2002] 3 WLR 344 in relation to Immigration and Asylum Act 1999, Pt II, *R (D)* v *Secretary of State for Home Department* [2003] 1 WLR 1315 in relation to Mental Health Act 1983 s.74, *Blood and Tarbuck* v *Secretary of State for Health* (unreported) in relation to Human Fertilisation and Embryology Act 1990 s.28(6)(b) and *Bellinger* v *Bellinger* [2003] 2 AC 467 in relation to Matrimonial Causes Act 1973 s.11(c)). In two cases the legislation was repealed after the declaration was made (*McR's Application for Judicial Review* (2003) NIQB 58 (unreported) in relation to Offences Against the Person Act 1861 s.62 and *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837). In one case the legislation was repealed before the declaration was made (*R (Wilkinson)* v *Inland Revenue Commissioners* [2005] 1 WLR 1718 in relation to Income and Corporation Taxes Act 1988 s.262). In one case a commitment has been made to amend the legislation (*R (M)* v *Secretary of State for Health* [2003] ACD 389 in relation to Mental Health Act 1983 ss.26-29) and in another case the legislation expired and has not been renewed (*A and others* v *Secretary of State for the Home Department*, [2005] 2 WLR 87 in relation to Anti-Terrorism, Crime and Security Act 2001 s.23). In the final case the declaration has only recently been upheld (*R (Morris)* v *Westminster City Council and First Secretary of State* [2005] EWCA Civ 1184).

82 Six Declarations of Incompatibility have been overturned on appeal (*R (Alconbury Developments Ltd.)* v *Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, *Wilson* v *First County Trust Ltd. (No.2)* [2004] 1 AC 816, *Matthews v Ministry of Defence* [2003] 1 AC 1163, *R (Uttley)* v *Secretary of State for the Home Department* [2004] 1 WLR 2278, *R (Hooper)* v

most notable example was, of course, the House of Lords declaration in December 2004 that section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with ECHR Articles 5 and 14.[83] The government did not seek to renew the offending provision and the 10 remaining prisoners, who were subject to indefinite detention when Part 4 of the Act expired, were released, although they now remain subject to "control orders" or detention pending deportation.

Addressing the Democratic Deficit

The scheme of the HRA, relying on a strong interpretive clause combined with the power to issue Declarations of Incompatibility, attracted some scepticism at the outset. Lawyers and constitutional reformers who campaigned for a "constitutional Bill of Rights" argued that without the power to overturn primary legislation, on a par with the American and Canadian Supreme Courts, the executive would remain unaccountable.[84] Nothing less than a judicial strike down power would adequately address the inadequacies of our democratic system which had been one of the spurs for incorporation. In this vein, the think-tank, the Institute of Public Policy Research, maintained that:

> "The need for the entrenchment of rights for individuals . . . implies a constitutional document . . . to change from a single, fundamental principle, the supremacy of Parliament . . . to a fundamental law which is prior to, independent of and the source of authority for the system of government."[85]

The contrary view warned against addressing one democratic deficit by creating a new one. Increased accountability of the executive to the judiciary would be at the cost of democratic legitimacy and participation. Professors Keith Ewing and Conor Gearty argued that:

> "A Bill of Rights would run counter to democratic instincts. The reason for this is that it empowers the courts to strike down legislation passed by Parliament. The effect would thus be to transfer the ultimate power in the community to the judges . . . It is always to be kept in mind that a Bill of Rights has to be interpreted before it can be applied in any particular case."[86]

The scheme of the HRA was intended to address this latter criticism, whilst significantly increasing the accountability of the executive to the courts. The adopted approach has sometimes been called a "dialogue model" in that it engages all the major organs of the state in deliberations about fundamental human rights and their interpretation. It significantly enhances the power of the courts to determine that breaches have occurred, but leaves the final say

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Secretary of State for Work and Pensions [2005] 1 WLR 1681 and *R (MH)* v *Secretary of State for Health* [2005] UKHL 60).

[83] N.40.

[84] See also the article by Aidan O'Neill QC in this Special Issue for an analysis of the alternative model in Scotland.

[85] IPPR, *A Written Constitution for the UK*, 1993, p.7.

[86] Keith Ewing and Conor Gearty, *Democracy or a Bill of Rights*, Society of Labour Lawyers, 1991, p.4.

on legislation with Parliament, albeit a Parliament which is significantly dominated by the government of the day.

The "dialogue model" plays out in particular through the intersection of HRA section 3 and section 4 but there is also a requirement on ministers to state whether new legislation is compatible with ECHR rights under section 19. Although this was initially viewed as a "parrot provision" (every Bill being deemed by ministers to comply) it has grown to be a useful catalyst for nudging Whitehall into a more thorough rights review of new policies and legislation and provides a useful peg on which parliamentarians can hang scrutiny of new Bills.[87] The most significant effect of this section has been the additional spur it has given to the courts to seek to interpret legislation compatibly, even if this was not always a minister's intention in making a "statement of compatibility" on the face of a Bill.[88] An example of dialogue in action.

Jack Straw described the HRA model in the following terms:

> "Parliament and the judiciary must engage in a serious *dialogue* about the operation and development of the rights in the Bill . . . this dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens."[89]

This approach is sometimes enmeshed with a separate but parallel debate on judicial deference, or, as Lord Woolf, former Lord Chief Justice, has put it, the area of judgement "within which the judiciary defer on democratic grounds to the considered opinion of the elected body or person whose actual decision is said to be incompatible with the Convention".[90] This latter question is often addressed as if the HRA itself was not designed to resolve issues of judicial and executive boundaries. Rather than construct a complicated new doctrine of judicial deference to the legislature, it might be more productive to elicit these principles from the scheme of the HRA itself.[91] As Richard Clayton QC has argued, "the principle of 'democratic dialogue,' which is implicit in the structural features of the Act" renders "the need to defer to parliament or the executive . . . less compelling, once it is

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[87] Lord Lester QC has commented that "human rights scrutiny is now systematic, influencing the preparation of legislation in Whitehall and the legislative process itself" in "The Human Rights Act 1998: Five Years On," [2004] 3 *European Human Rights Law Review* 258 at 262. Examples include the Care Standards Act 2000, the Gender Recognition Act 2004 and the Mental Capacity Act 2005.

[88] See for example the rationale for Justice Collin's decision that s.55 of the Nationality, Immigration and Asylum Act 2002 violated ECHR Arts.3 and 6 in *R (Q)* v *Secretary of State for the Home Department* [2003] EWHC 195.

[89] 314 HC 1141 (24 June 1998). (My emphasis). It should be noted, however, that when the senior judiciary gave evidence to the JCHR they distanced themselves from the notion that they were involved in a dialogue with the other organs of the state on fundamental human rights. JCHR, *Minutes of Evidence*, HC 332-iii, 2001.

[90] Lord Woolf, "*European Court of Human Rights on the Occasion of the Opening of the Judicial Year,"* [2003] 3 *European Human Rights Law Review* 257 at 260. See also Lord Steyn, "Deference: a tangled story," [2005] *Public Law* 346.

[91] See Francesca Klug "Judicial deference under the Human Rights Act" [2003] *European Human Rights Law Review* 125.

acknowledged that the HRA envisages that the other branches of government will have a second bite of the cherry".[92]

As we have seen, despite the absence of a legal duty on government to respond to Declarations, in virtually every case the government has changed law or policy as a result. The decision as to what that law or policy should precisely be, however, remains one for Parliament or government. This applies even in relation to section 3 interpretations, in that it is open to Parliament to enact new legislation to modify such interpretations. There may even be occasions, as Jack Straw acknowledged in introducing the Human Rights Bill, where "the Judicial Committee of the House of Lords could make a declaration that, subsequently, Ministers propose and Parliament accepts, should not be accepted".[93] The example he gave was abortion law, but he might have added fox hunting bans**,** gun control or election expenditure limits, all of which have been the subject of human rights disputes here or in other jurisdictions**.**

If the "dialogue model" is to be an effective approach to protecting human rights, rather than a means of retaining unaccountable executive dominance, as supporters of a constitutional bill of rights feared, Parliament needs its own voice, distinguishable from government.[94] The government White Paper *Bringing Rights Home* was explicit on this:

> "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy."[95]

Lord Irvine elaborated on this further when he described the HRA as representing a "new and dynamic co-operative endeavour . . . between the Executive, the Judiciary and Parliament; one in which each works in its *respective constitutional sphere*".[96] The establishment of the Joint Committee on Human Rights (JCHR) in 2001 has undoubtedly enhanced the awareness of the HRA within Parliament. The Committee has been indefatigable, producing 88 full reports and 3 special ones in four years.[97] Subjects covered range from the case for a human rights commission to police reform. Some of its reports have clearly been influential,[98] in a few instances leading to small, but significant, changes in the final shape of

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[92] Richard Clayton, "Judicial Deference and 'Democratic Dialogue', the legitimacy of judicial intervention under the Human Rights Act 1998", [2004] *Public Law* 33.

[93] 317 HC 1301 (21 October 1998).

[94] See Danny Nicol, "The Human Rights Act and the Politicians," [2004] *Legal Studies* 451.

[95] *Bringing Rights Home: Labour's plans to Incorporate the ECHR into UK Law,* Labour Party consultation document, 1996.

[96] Inaugural Irvine Human Rights Centre Lecture, 1 November 2002, Durham Human Rights Centre, Durham University, published in [2003] *Public Law* 308.

[97] The Committee published its initial report on the Anti-Terrorism, Crime and Security Bill only two days after David Blunkett introduced the Bill on 12 November 2001.

[98] Amendments were tabled to several Bills as a consequence of JCHR reports including the *Criminal Justice and Police Bill 2001, Nationality, Immigration and Asylum Bill 2002, Courts Bill 2002#,Crime (International Co-operation) Bill 2002, Housing Bill 2003 and the Mental Capacity Bill 2003*.

legislation.[99] The JCHR has also succeeded in persuading the government to expand slightly the written information it provides with section 19 **"**statements of compatibility**"**.[100] That said, there has, of course been a steady stream of legislation and policy which the Committee deemed in breach of Convention rights and which it has been unable to affect.[101]

Building a Human Rights Culture of Compliance

What is only occasionally acknowledged, is that underlying the "dialogue approach" to human rights compliance is a particular vision of human rights. It is a different vision to that which informed the American Bill of Rights, drafted to "withdraw certain subjects from the vicissitudes of political controversy".[102] It is informed by a view of human rights that acknowledges that they are not always, or even usually, absolute but derive from political struggle and thrive on political argument. The purpose of the dialogue model is to keep the idea and dynamic of human rights alive, rather than to close down the debate about them and hive them off to a rarefied court.

Although difficult to evaluate and impossible to quantify, there is evidence that to this degree a culture of human rights awareness, if not compliance, is beginning to be fostered as a result of the HRA. Debates about detention without trial, the morality of deporting suspects to countries where they may be tortured, the ethics of assisted suicide, access to expensive medicines and the degree to which celebrities and politicians have a right to a private life, have arguably all been enlivened by the HRA. The existence of a statute that, for the first time in modern UK history, establishes a set of broad ethical values that inform all other law and policy, provides the potential for a common framework – a touchstone – within which these debates can occur.

A deeper understanding and awareness of human rights values also provides a route to developing the culture of respect for human rights that was presented as the third stated reason for introducing the HRA. The Act is unusual in having a specific clause aimed at public authorities, requiring them to comply with Convention rights.[103] The Disability Rights

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[99] The JCHR report on the Anti-Terrorism, Crime and Security Bill led the government to amend the Bill to introduce "reasonable grounds" of suspicion of involvement with "international terrorism" before an individual could be detained. See Fifth Report of Session 2001-02, para.8. Another example is the removal of clause 25 from the Draft Civil Contingencies Bill following criticism from the JCHR and others. Clause 25 provided that a regulation made under Part 2 of the Bill would "be treated as if it were an Act of Parliament" for the purposes of the HRA. See Fifteenth Report of Session 2002-03, para.3.26.

[100] The Standing Orders of both Houses were amended in November 2001 to require memorandum attached to each Bill by the promoter to include "a statement of opinion. . . as to the compatibility of the provisions of the bill with the Convention rights. . ."

[101] For example, the JCHR warned that Part 4 of the Anti-Terrorism, Crime and Security Act 2001 might be found to breach Arts. 5 and 14 of the ECHR (see Second Report of Session 2001-2002, para.38). The House of Lords agreed. See n.40.

[102] *West Virginia State Board of Education* v *Barnette* 319 US 624 at 638 (1943).

[103] HRA s.6(1): "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

Commission and organisations like Age Concern, Help the Aged and Values Into Action[104] have already used the values in the Act to advocate better services for their members and to engage in public debates about what constitutes dignified and just treatment for all.[105]

There is, as yet, no reliable research on public understanding or awareness of the HRA[106] but an Audit Commission review concluded that **"**the impact of the Act is in danger of stalling and the initial flurry of activity surrounding its introduction had waned**"**.[107] In the absence of any institutional support for championing the HRA outside of Northern Ireland,[108] these findings are perhaps unsurprising. The proposed Commission for Equality and Human Rights (CEHR), whose duties will include promoting **"**awareness, understanding and protection of human rights**"**[109] and encouraging **"**public authorities to comply**"** with HRA section 6, is scheduled to begin operating in the autumn of 2007.[110] Although the Commission will not be empowered to support individual human rights cases, unless they also engage anti-discrimination legislation, it will be able to judicially review public authorities for breaches of Convention rights and apply to the courts to

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104 VIA promotes the right of people with learning difficulties to be treated with the same respect due to all citizens.

105 See Tessa Harding, 'Rights at Risk: Older people and human rights', Help the Aged, 2005 and the forthcoming report by Frances Butler, 'Rights for Real: Older People, their Human Rights and the Commission for Equality and Human Rights', Age Concern, due to be published 2006.

106 The Department for Constitutional Affairs (DCA) is carrying out research on human rights with users and providers of public services to identify strategies for implementing the principles underlying the Human Rights Act.

107 Audit Commission, *Human Right: Improving public service delivery*, 2003, para. 2. The report states that whilst basic training of staff on the HRA is fairly widespread and growing, 58% of public bodies surveyed had no corporate human rights strategy.

108 The Northern Ireland Human Rights Commission was created by s.68 of the Northern Ireland Act 1998, in compliance with a commitment made by the British Government in the Belfast (Good Friday) Agreement of 10 April 1998. The Australian Central Territories, which in 2004 introduced a Human Rights Act largely modelled on the UK Human Rights Act, has already established a Human Rights and Discrimination Commissioner to monitor and promote it. The Scottish Commissioner for Human Rights Bill was published in October 2005 and will establish an independent Commissioner to promote awareness, understanding of and respect for human rights in Scotland.

109 Defined as "the Convention rights within the meaning given by s.1 of the Human Rights Act 1998, and other human rights", which includes all other international and regional human rights declarations and treaties. Equality Bill 2005, clause 9(2).

110 Equality Bill 2005, clauses 9(1)(c) and 9(1)(d) respectively. See also Francesca Klug and Claire O'Brien, "'Fairness for All?' An analysis of human rights powers in the White Paper on the proposed Commission for Equality and Human Rights," [2004] Public Law 712.

intervene in human rights cases.[111] It will also be able to conduct human rights inquiries, with full powers to subpoena witnesses and call for papers.[112]

The thrust of CEHR's human rights powers are aimed at championing the importance of human rights and creating a culture of compliance amongst public, and relevant private, bodies. The ground-breaking work of the British Institute of Human Rights in pioneering this approach, which will undoubtedly influence the CEHR, is described in a separate article.[113]

Conclusion

The HRA is still in its infancy. Its impact on the legal system has been considerable. Where once individuals relied on the unwritten common law, and obscure principles of rationality and lawfulness, to protect their unknown rights, they can now challenge any authorities carrying out public functions to uphold their written rights.[114] This change of approach is starting to seep into public discourse so that debates about moral and ethical dilemmas more often take their bearings from human rights values.

Appreciation of how these values can translate into public policy and inform decision making within public authorities is still in its infancy. With no Commission to lead on this approach, that is to be expected. The proposed CEHR should have the capacity to drive this vision forward. Yet the HRA remains vulnerable. The Conservative Opposition is committed to reviewing the Act with a view to its "reform, replacement or repeal".[115] The government which introduced it, loudly complains about judges using the HRA to block its programme,[116] and muses about directing the courts to interpret its provisions differently from the European Court of Human Rights.[117]

If the HRA is to endure like other Bills of Rights, it will need to become embedded in the popular consciousness as a useful tool and as a defining statement of values. But if, as Professor Conor Gearty has argued, the HRA "has the potential effectively to resolve many of the issues of political power

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111 Equality Bill 2005, clause 30. The DRC has successfully used intervention powers to extend the reach of human rights law in a number of HRA cases, *e.g. R (A and B)* v *East Sussex County Council*, see n.53 and *R (Burke)* v *General Medical Council* [2004] EWHC 1879 (Admin) and [2005] EWCA Civ 1003.

112 Equality Bill 2005, clause 16.

113 See the article in this Special Issue by Sarah Cooke former Director of the British Institute of Human Rights.

114 *E.g.* in the fight to get the drug Herceptin to treat breast cancer, it has been argued that primary care trusts' refusal to pay for the drug breaches human rights legislation and the right to life. The Health Secretary Patricia Hewitt said primary care trusts could not refuse to fund the life-saving drug solely on the grounds of cost. See *Telegraph* (4 October 2005).

115 "David Davies announces review", Conservative Party website, 23 August 2004.

116 In response to judicial interpretations of the Nationality Immigration and Asylum Act 2002 (n.88) David Blunkett, then Home Secretary said, "I'm fed up with having to deal with a situation where Parliament debates issues and the judges overturn them." *Times*, 20 February 2003.

117 In the context of the government's stated wish to deport suspected international terrorists to countries which routinely practice torture. "Interview with Charles Clarke, Home Secretary," *New Statesman Special Issue*, 26 September 2005.

and judicial legitimacy that . . . have dogged other jurisdictions with analogous bills of rights"[118] then the long road to human rights compliance is at least in sight.

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[118] "Reconciling parliamentary democracy and human rights" [2002] 118 LQR, 245.

SECURING HUMAN RIGHTS THROUGH PROMOTION AND TRAINING

Sarah Cooke, Former Director of the British Institute of Human Rights

The Need for Innovative Approaches

The Human Rights Act was heralded by the government as a tool that would not only give people redress in the domestic courts for the breaches of the European Convention on Human Rights, but would help change the relationship between the state and individual more widely, creating a "culture of rights". It became quickly apparent, however, that, without some concerted action, a culture based on respect for human rights was not going to emerge on its own by virtue of having a Human Rights Act on the statute book.

An early indicator of this was the predictable (prior to the Human Rights Act coming into force) and observable (once it had done so) fact that socially and economically excluded people were the least likely section of the population to achieve real benefit from the Act. This is despite the self-evident fact that it is precisely these people who are most likely to suffer an infringement of their human rights.[1]

This is not a phenomenon unique to the UK. A report looking at the question of enhancing access to human rights across the world identified the sense of disillusionment felt by those who have struggled to establish support for human rights – including by incorporation of human rights into domestic law – when poor or otherwise marginalised communities remain sidelined and powerless and in some cases appear to be even worse off than before. As the report identifies, this has led human rights activists and organisations to ask themselves what else needs to be done beyond law and legal reform, to ensure that rights and entitlements are available and accessible to all.[2]

In that spirit, The British Institute of Human Rights (BIHR), in 2002, commissioned a report, *Something for Everyone: The Impact of the Human Rights Act and the Need for a Human Rights Commission,*[3] to consider what steps might be necessary if a human rights culture is to take root in England and Wales.[4] In particular it looked at the impact of the Human Rights Act on the voluntary sector – often important gatekeepers in enabling people to challenge violations of their rights and seek better, human rights compliant, service provision. The evidence gathered provided a valuable insight, not

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[1] See Luke Clements "Winners and Losers" (2005) 32 *Journal of Law and Society* 34-50.

[2] International Council on Human Rights, *Enhancing Access to Rights*, 2004, p.1.

[3] Published by The British Institute of Human Rights on 10 December 2002, researched and written by Jenny Watson. Available at http://www.bihr.org/programmes4.html.

[4] The project did not consider Scotland where there was already a proposal from the Scottish Executive to establish a Human Rights Commission.

only into the voluntary sector, but also into the attitude of the public sector with respect to human rights.

The report made a number of findings including:-

- awareness of the Human Rights Act has not in general spread outside the legal field. The report remarked "without more attention paid to the promotion of the Human Rights Act and the principles which lie behind it in a way that makes it accessible to lay people the vicious circle of unresponsive public services which lead to legal challenges cannot be broken".[5]
- individual members of staff in public services have no understanding of their responsibilities under the Human Rights Act. The report stated: "The lack of any ongoing concerted promotional strategy for the Act means that staff who provide public services – particularly frontline staff – fail to understand what the Act is, the rights that it contains and the responsibilities that they have to uphold it."[6]
- there is little or no understanding of the Human Rights Act as a useful framework for public service providers within which problems can be solved and risk assessed, and within which the needs of individuals in the provision of services can be considered. The report stated: "This may be particularly useful for areas where the rights of one individual may need to be balanced against the rights of others, perhaps leading to restrictions on rights which can be justified using the Act's concept of proportionality. Such a framework could enable public service workers to make difficult decisions about allocation of resources, or protection of vulnerable children or adults, with more confidence."[7]
- there is no single authoritative source of advice and information that could help to shape the development of a human rights culture in the absence of a statutory body that could promote and protect human rights. The report went on to say: "Important principles captured in case law are not, at present, applied across a wider area of work. This prevents the development of good practice."[8]

These findings led to a single recommendation that the government should establish an independent body capable of effectively promoting and protecting human rights, and should seize the opportunity presented by the single equality body project to do this by creating a Commission for Equality and Human Rights. This, in fact, foreshadowed the emergence of such a proposed body, as detailed in the Equality Bill (and now Equality Act 2006).

These findings prompted BIHR to think about new ways of tackling the problems identified in its report, *Something for Everyone*.

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[5] *Something ForEveryone*, Executive Summary.
[6] *ibid.*
[7] *ibid.*
[8] *ibid.*

Piloting a new approach to human rights protection

Its response was to establish, in January 2003, a new stream of work dedicated to human rights promotion and awareness-raising in the voluntary and public sectors, under the banner Community Outreach Programme and since renamed Human Rights Promotion and Training Programme.

The objectives of the programme were:

- in the voluntary sector, to encourage voluntary and community groups to use the Human Rights Act and other international human rights standards as tools to negotiate and attain better standards of public service for their beneficiaries.
- in the public sector, to encourage public authorities to use the Human Rights Act as a framework for best practice and as a tool for better service delivery.

Underpinning the approach was the idea that human rights are an important means by which to improve society, to make it more humane and better able to cope with the differing needs of the people within it. Also to the fore in the development of this work stream was the idea that equality, dignity and respect are core values that underpin the human rights paradigm, and that these values should be the bridge by which people come to understand the relevance and connection of human rights to the lives of ordinary people in the UK.

Underscoring this model also was the belief that human rights litigation alone would not deliver improved service delivery for excluded people. As noted in *Something For Everyone,* "[Litigation] is not the only – and probably not the fastest – method of achieving change and, used alone, it creates a false perception of the Act." Three years on from that report, one could put it more strongly. Litigation could never bring about the sort of "social change" required if a human rights culture is to blossom. Litigation will always have its place in establishing certain principles. The challenge is how these principles take root across the whole landscape of public service delivery.

Voluntary sector work

The work comprises running full day human rights awareness-raising sessions with those voluntary and community organisations that work with vulnerable and excluded people. The sessions are free of charge and usually run in-house. One session may have attendees from one organisation or from a variety of different organisations.

The work originally focused on voluntary and community sector organisations working with four groups in particular[9] although each area was brought "on line" gradually over a period of time, to allow for networks and specialist knowledge to be developed in each area. Over time BIHR has been able to offer training across most of the full range of social exclusion and human rights.

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[9] Refugees and asylum seekers, disabled people, people with mental health problems and disadvantaged older people.

The work was set up as an England-wide project and, for managerial and resource reasons, rather unevenly distributed with 80% of the training taking place in London, the East and the South East and 20% throughout the rest of England.

There is no one general profile of an organisation that undertakes human rights awareness-raising. They range from small service user or carer led support, advocacy or advice groups, to sector specific umbrella organisations to large public service providing charities.

Public sector work

The work with the public sector was launched in earnest in early 2004 to run alongside and complement the work in the voluntary sector. There is a particular focus on those public authorities working with vulnerable people such as social services, housing and education departments of local authorities and NHS Trusts. Some work has also been conducted with central government.

The work is undertaken under contract with the public authority. It may consist of a one-off training day for a particular group of staff, but more usually, and desirably, a comprehensive range of training. BIHR encourages the adoption of a training strategy encompassing front-line staff, managers, equality officers and those in non-executive roles, such as councillors in local authorities. Different approaches are usually required for different groups, in particular for those in senior non-executive positions who may have limited time but play a crucial leadership role within an organisation.

BIHR encourages adoption of a rolling programme of training, usually as part of the training provision offered generally across the public authority. Additionally public authorities are encouraged to think about how induction of new staff will be managed so that human rights will be covered, how staff might have access to refresher or more specialist sessions in the future, how agency staff are trained, and how those managing contracted out services are being covered.

Periodically, through any contract period, BIHR will seek evaluation meetings with representatives of the public authority to allow for two-way feedback, which may then inform the future shape or focus of training. It also allows for BIHR to feedback suggestions, often ideas raised by staff within the public authority during training, of how processes or systems within the public authority might be improved to take account of human rights. Suggestions have included the creation of human rights champions in particular departments, the inclusion of a standing human rights agenda item in team and inter agency meetings, the development of a guide to better decision-making using the human rights framework and inclusion of human rights in checklists relating to decisions, for example, concerning child protection.

The methodology

The style of training is practical, focusing on the day-to-day situations encountered by the participants. Experience has shown that an overly legal and/or formal approach to the content and training method itself can be counterproductive. It tends to feed the idea that human rights is only for

lawyers and packages the content in such a way that it is out of the grasp (or perceived to be) of many.

The style of training is also interactive and participative, with emphasis on creating a forum for discussion of problems and good and bad practice which can then be used as the basis for illustrating the operation of human rights principles. This is also why case studies form the basis of much of the learning in a training session, as it gives participants a chance to put human rights principles into practice in situations which are familiar to them. Much of the emphasis is on tuning people into when human rights are engaged rather than turning out human rights experts.

The content of the training consists of an explanation of those human rights standards that are particularly relevant for that audience and how they interact with other domestic law and regulations. Participants usually have little knowledge about the former but a well developed knowledge of the latter. Specifically the integral relationship between human rights and the law relating to equality and anti-discrimination is covered in training.

The standards are explained by reference to subject specific examples which will be familiar to the audience. Case law is used where appropriate to illustrate important principles that have been established in a particular area but the training is not simply an account of case law. Emphasis is placed on giving participants the confidence to apply human rights principles, or at least identify a human rights issue themselves without having to know all the relevant case law. Typically participants are invited to consider, in small groups, a number of scenarios and work out which human rights might be relevant and why. A discussion in the plenary group then ensues, where the reasoning and approach of participants is looked at more closely and guidance is given about the correct approach.

Over the course of the training certain fundamental principles, which are key to understanding the operation of human rights are elucidated and illustrated. The objective is that these principles are firmly understood by the end of the training session as they are particularly important for the development of a proactive, best practice led approach:

- human rights are not all of the same nature, some are absolute, some limited and some qualified;
- the principle of proportionality; and
- the nature of positive obligations.

All the training is accompanied by detailed training materials, to support the participants' knowledge base acquired in the training session and for reference following the training.

Evaluation of the training was identified as being key from the start but BIHR's evaluation techniques continue to improve and develop over time.

An evaluation of the training takes place immediately after the training. Participants are asked to complete evaluation forms so that they can rate all aspects of the training. These evaluations are analysed on a six monthly basis to indicate trends, identify strengths and weaknesses and opportunities for future developments. The trainer also completes their own evaluation to capture reflections about training techniques, the content and structure of the

session, the prevalence of particular human rights issues in the organisations trained, systematic problems encountered as well as specific examples of good and bad practice.

All organisations are followed up within 6 – 12 months of the training to assess its impact on the work of the organisation. However, further thought and work is required to measure more accurately the long term impact of training in such a way as to inform the development of new methodologies and tools to bed down a human rights culture.

The resources

The work under BIHR's Community Outreach Programme was undertaken initially by one full time member of staff recruited specifically for that purpose. That post was funded for three years by the Community Fund (now The Big Lottery). As the work stream developed it quickly reached maximum capacity and further funding was received from Comic Relief allowing another post to be created in 2004. With the public sector work coming on stream in 2004 a third post was created in early 2005. Funds generated by the public sector work were re-invested in the programme to fund the third post and some of the running costs of the programme.

However, the programme has quickly reached full capacity with training sessions typically being fully booked six months or more ahead. The challenge of sustaining existing levels of funding as well as the need to attract new funding to support the strategic development of the work is an on-going challenge.

As the training style has been particularly important in the success for the programme, it is worth noting the need for particular qualities in those carrying out the training. Trainers not only need to have in depth knowledge of the Human Rights Act, other relevant human rights standards, the law relating to equality and the panoply of other relevant domestic law in particular areas, such as the Mental Health Act and the Children's Act, they also need to be effective trainers and communicators. Finding this combination of skills in one person can be challenging. There appears to be a lack of lawyers or people with legal knowledge who are also able, coherently, to take human rights outside its legal box.

Ways to public service improvement using a human rights approach

Human rights are a practical set of values which can underpin the design and delivery of better public services

Public authorities need to adopt a human rights approach to their work not only because it is the law,[10] but also it can be a catalyst in improving services. The application of human rights principles, not least those relating to dignity, autonomy and respect, can help to improve a service user's experience and quality of care and will inevitably lead to improved outcomes.

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[10] Human Rights Act 1998, s.6.

The Prime Minister has spoken about redesigning public services around individual need, abandoning the "one size fits all" approach.[11] The Human Rights Act framework can assist those who deliver public services to consider how best to meet the needs of vulnerable people and put the individual back at the heart of the service.

The Audit Commission, an independent body responsible for ensuring that public money is spent economically, efficiently and effectively, to achieve high-quality local and national services for the public, has underlined the importance of this approach. It has stated "The [Human Rights] Act was a clear statement of rights that need to be taken into account in the delivery of public services".[12] It has also expressed concern that public bodies have struggled to make the connection between human rights, equalities and service improvement. It found that, in 2003, 58% of public bodies surveyed had not adopted a strategy for human rights, and in health this figure was as high as 73%.[13]

If human rights are to inform better service delivery then they must influence the work of public authorities in a number of ways, alongside, and informed by, human rights training:

- The importance of adopting a corporate approach. There is a temptation for public bodies to respond to human rights in a piecemeal way, usually by responding to adverse case law. The human rights framework needs to be integrated into the corporate systems of public authorities. It does not need to be a separate strategy per se and there will be benefits of a level of integration with strategies dealing with equality, race relations and community cohesion.

- The need for human rights principles to be taken into account in the formation and review of policies and procedures. For example, blanket policies, such as a policy stating that the manual lifting of residents in care should never be allowed, should generally be avoided as they fail to put the individual at the centre of decision making.

- The need for human rights principles to inform decision making including decisions made by front-line staff who deliver services in practice, for example care staff in a residential care home.

Some organisations have very helpfully provided guidance to assist people in adopting a human rights approach when making policies or taking decisions including a number of checklist models.[14] The development of desk based learning tools and other guides to help with decision making is also underway.[15]

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[11] Speech by the Prime Minister about Public Service Reform, 25 January 2002. http://www.number-10.gov.uk/output/Page3008.asp.

[12] *Human Rights: Improving Public Service Delivery*, Audit Commission, October 2003, p.3.

[13] *ibid.*, p.7.

[14] The most comprehensive is to be found in *Human Rights Act Toolkit*, Jenny Watson and Mitchell Woolf, Legal Action Group, 2003.

[15] See also, *e.g.* the guide published in July 2005 for non executive board members of NHS Trusts on promoting equality and human rights in the NHS. Available at

There are examples of changes of practice, but more research is needed to gather quantitative and qualitative information about the impact of incorporating a human rights approach into the way public services are delivered. An evidence base needs to be amassed in order to evaluate "what works".

The Audit Commission provides twelve examples of changes made by public bodies to their policies and practices including:

- A borough council improving its procedures for appeals by appointing an independent chair.
- A number of councils' standard contracts and grant conditions have been amended to ensure that human rights issues are clearly delineated.
- A health trust conducting policy review of consent and resuscitation policies, violence and aggression policies, selection and recruitment and disciplinary policies, patient control and restraint policies. [16]

BIHR also comes across changes in policies and procedures some of which are similar to those uncovered by the Audit Commission, or was able to suggest changes in evaluation meetings with public authorities, some of which were mentioned above. BIHR was also made aware, through its evaluation process, of changes in practice at the front line of service delivery:

- A disabled man questioning the practice by which he was examined naked in front of different people a number of times, a situation which he found humiliating.
- Challenging the conditions of seclusion for mental health patients in a secure unit.
- The review of a decision in a residential care home that bed pans would not be provided between lunch and tea time.

A recent paper on improving public services using a human rights approach noted "Implementation beyond paper compliance to actual delivery is always the mountain that needs to be shifted and it is likely to require systematic planning and fundamental systemic reform led from the top. . ."[17] The improvement of public services by way of the adoption of a human rights framework for delivery will depend, not only on training, but also partly on the overall culture of the public body concerned, including how the staff themselves are treated. In well run and "healthy" public authorities the incorporation of a human rights approach should complement what the organisation is already doing. [18]

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http://www.dh.gov.uk/PolicyAndGuidance/EqualityAndHumanRights/fs/en (accessed November 05).

[16] *Human Rights: Improving Public Service Delivery*, Audit Commission, October 2003, p.14.

[17] Frances Butler, *Improving Public Services: Using a Human Rights Approach*, Institute for Public Policy Research, June 2005, p.42.

[18] *ibid.*

Open textured nature of human rights makes it well suited to underpinning difficult decisions faced by public authorities where a number of interests need to be taken into account

Many of the rights in the Human Rights Act are qualified rights and are concerned with ensuring that the rights of the individual are balanced against the rights of others and the interests of the community. Even those rights which are absolute in nature, like the right not to be subjected to torture, inhuman or degrading treatment, involve consideration of the particular circumstances in order to ascertain whether the right has been engaged at all.

Application of the human rights framework therefore usually means the application of a decision making process, within certain parameters, which is objective and has considered and balanced, using the concept of proportionality, the rights of all involved. This is inherently uncomfortable for some who desire certainty – these are people who in training will want to know "the answer" rather than understand and apply "the process". It is however precisely because this is the nature of the human rights paradigm that it is so suitable for providing a framework for best practice development across a broad spectrum of public services.

A human rights approach to decision making can help to achieve transparent, objective and well reasoned decisions

Because, as outlined above, application of the human rights framework is as much about how one applies the standards as the standards themselves, it allows for decisions to be made that are objective and transparent. This helps to show service users and others that the decision making process is objective and helps protect an organisation from allegations that it has not considered people's rights.

The role of the voluntary sector

The voluntary sector has an important role to play in driving up standards of public service delivery to vulnerable people. It has a crucial influencing and representative role in advancing the interests of others. Voluntary organisations can be effective in holding public authorities to account for their legal responsibilities and bad practice by using preventative mechanisms and advocacy which may or may not include legal action. This has been powerfully demonstrated by those voluntary sector organisations which BIHR has trained over the past three years.[19]

The role of inspectorates

There is a "sharp edge" to human rights promotion. Promotion of human rights standards has a direct link with *protection* of human rights when aimed at those who have the capacity to affect the enjoyment of human rights. That is why the inspectorates with responsibility for inspecting public services are increasingly aware that a service which is delivered within a human rights framework is more likely to be a quality service which is responsive to service user need.

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[19] Frances Butler, *Human Rights: Who Needs Them? Using Human Rights in the Voluntary Sector*, Institute for Public Policy Research, 2004.

In October 2005 the Audit Commission launched a new form of Comprehensive Performance Assessment for single tier and county councils.[20] One of the key lines of enquiry by which a local authority will be inspected is its *capacity* to deliver what it is trying to achieve. The "criteria for judgement" include whether the council has a strategic and integrated approach to diversity, human rights and user focus evident in its policy development, employment practices and service delivery and whether the council promotes these to its staff, partners and the wider community. Other inspectorates are gradually taking on board the importance of human rights in improved service delivery outcomes and therefore considering how this might inform the inspection process.[21]

Challenges for the future

The work of BIHR will be useful to the new Commission for Equality and Human Rights in having tested out some approaches to human rights promotion and the promotion of best practice in this area, two of the proposed human rights duties of the new body.

Through its work it is possible to identify where some of the significant challenges will lie in developing a strategy aimed at promoting human rights awareness and good practice. Notably, while recognising the importance of training, there is a huge challenge in making this "work to scale" given the large number of public authorities which need to engage with this agenda. When thinking about this, consideration will need to be given to the importance of cross-sector working, the need for engagement of frontline staff, managers and those with senior executive and non-executive roles and the need for messages to be practical, relevant and integrated with those on equality. Capacity within public authorities will need to be built and supported in order for the public bodies themselves to become the drivers in developing a human rights culture. Co-ordinated work with both the inspectorates of services and the voluntary sector will be an important component of any strategy given their ability to challenge bad practice and hold the providers of public service to account. Given the wide range of services that are contracted out by public authorities, the private and voluntary sector will also need to be engaged as providers of services themselves.

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[20] *CPA – The Harder Test*. This can be found at http://www.audit-commission.gov.uk/cpa/index.asp?page=index.asp&area=hpcpa.

[21] Frances Butler, *Improving Public Services: Using a Human Rights Approach*, Institute for Public Policy Research, June 2005, p.26.

HUMAN RIGHTS AND EQUALITY IN NORTHERN IRELAND

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Introduction

The aim of this article is to outline the position in Northern Ireland on human rights and equality following the Belfast Agreement 1998.[1] The article is based on the premise that the Agreement represents a "constitutional moment" in the history of Northern Ireland which has left a significant political and legal legacy and within which concepts of both human rights and equality are intended to play a key role.[2] The principles underpinning the Agreement are at the core of the "political constitution" of Northern Ireland, with the Northern Ireland Act 1998 as a "new constitution", and all secured by bilateral agreements between the British and Irish governments.[3]

The Agreement provided the impetus for a more intense focus on human rights protection and promotion. It brought human rights from the "margins to the mainstream".[4] The intention here is to explore selected developments in Northern Ireland to illustrate the nature of the governing framework. The article is in two stages: first, the framework for the promotion and protection of human rights in Northern Ireland is outlined; and second, some consideration is given to current debates on equality. The suggestion is that

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[1] *Agreement Reached in the Multi-Party Negotiations* (Cm 3883, 1998). The Belfast Agreement comprises both the Multi-Party Agreement and the British-Irish Agreement.

[2] For analysis of the Agreement see: Brendan O'Leary "The Nature of the Agreement" (1999) 22 *Fordham International Law Journal* 1628; Brendan O'Leary "The Nature of the British-Irish Agreement" (1999) 233 *New Left Review* 66; Brendan O'Leary "The Character of the 1998 Agreement: Results and Prospects" in Wilford (ed.) *Aspects of the Belfast Agreement* (2001) 49; John McGarry and Brendan O'Leary *The Northern Ireland Conflict: Consociational Engagements* (2004); Austen Morgan *The Belfast Agreement: a practical legal analysis* (2000); Kieran McEvoy and John Morison "Beyond the 'Constitutional Moment': Law, Transition and Peacemaking in Northern Ireland" (2003) 26 *Fordham International Law Journal* 961; Gordon Anthony "Public Law Litigation and the Belfast Agreement" (2002) 8 *European Public Law* 401. For the wider context see Brendan O'Leary and John McGarry *The Politics of Antagonism: Understanding Northern Ireland* (2nd ed., 1996); John McGarry 'Democracy' in Northern Ireland: experiments in self-rule from the Protestant Ascendancy to the Good Friday Agreement" (2002) 8 *Nations and Nationalism* 451.

[3] *Robinson* v *Secretary of State for Northern Ireland* [2002] UKHL 32.

[4] Paul Mageean and Martin O'Brien "From the Margins to the Mainstream: Human Rights and the Good Friday Agreement" (1999) 22 *Fordham International Law Journal* 1499; Brice Dickson "Protection of Human Rights – Lessons from Northern Ireland" [2000] *European Human Rights Law Review* 213; Colin Harvey and Stephen Livingstone "Human Rights and the Northern Ireland Peace Process" [1999] *European Human Rights Law Review* 162.

rights and equality should play a central part in the governing process. Although practice may diverge substantially from the agreed principles, these commitments retain considerable significance.

Promoting and Protecting Human Rights

Human Rights, the Belfast Agreement and the Northern Ireland Act 1998

First the Belfast Agreement 1998 and its provisions on human rights protection and promotion must be examined. The Agreement includes several references to human rights. As one would expect, its language is not fully replicated in the Northern Ireland Act 1998, but the legislation generally reflects the human rights commitments contained in the Agreement. The express purpose of the 1998 Act is to implement the Agreement.[5] The Northern Ireland Act 1998 has been described as a new constitution for Northern Ireland and it has been interpreted with this in mind.[6]

The Agreement contains a section entitled *Rights, Safeguards and Equality of Opportunity* but the language of rights is to be found in other sections. The Declaration of Support commits the participants to the "protection and vindication of the human rights of all".[7] It also contains recognition of continuing disagreement:

> "We acknowledge the substantial differences between our continuing, and equally legitimate, political aspirations. However, we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements."[8]

The right of self-determination is addressed in a formulation which is linked to concurrent consent in both parts of Ireland.[9] The status of Northern Ireland ultimately rests on the consent of a majority of its population and the current preference appears to be for continuing membership of the UK. The principle is now reflected in section 1 of the Northern Ireland Act 1998 as well as in the Irish constitution.[10] The notion of "double protection" captures the role of rights within this constitutional picture.[11] The theory is that whatever choice is made by the people of Northern Ireland the power of the government with jurisdiction there:

> "shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of

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[5] The Long Title of the Act provides: "An Act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883."
[6] *Robinson* above n.3.
[7] *Declaration of Support* para.2.
[8] Para.5.
[9] *Constitutional Issues* para.1(iii); British-Irish Agreement Article 1(ii).
[10] Constitution of Ireland Article 3(1).
[11] See McGarry and O'Leary above n.2.

> freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities."[12]

The Agreement recognises the significance of human rights whatever constitutional arrangements are in place and the responsibility of the state (British or Irish) to ensure their promotion and protection.

The notion of rights (but not only rights) as safeguards figures prominently in the Agreement. This is evident in the section on *Democratic Institutions in Northern Ireland*, or Strand One.[13] The idea underpinning this part of the Agreement is to create institutions in Northern Ireland which are inclusive and subject to safeguards to ensure the rights and interests of all sides of the community are upheld. Its consociational nature is evident in the Strand One arrangements which reflect a particular form of power-sharing government.[14] The safeguards are there to secure a democratic purpose intrinsically linked to power-sharing and based on concerns about the adverse consequences of majoritarian forms of democracy in "divided societies".[15] They exist to guarantee a form of representative democracy in which all sections of the community can participate.[16] Rights form one part of this list of safeguards, which include: the European Convention on Human Rights; any Bill of Rights adopted for Northern Ireland; and the work of the Human Rights and Equality Commissions.[17] Other safeguards relate to the proportionate allocation of Committee Chairs, Ministers and Committee Membership, special voting rules, human rights proofing, the Pledge of Office for Ministers as well as a Code of Conduct.[18] Taken together these constitute an impressive array of protections, with the aim of securing full participation. The Northern Ireland Assembly has been suspended since October 2002.[19]

The human rights dimension is reflected in the Northern Ireland Act 1998 in a number of ways. A provision of an Act of the Assembly is not law if it is incompatible with the relevant provisions of the European Convention.[20] A Minister, or Northern Ireland Department, has no power to make subordinate legislation or do any act which is incompatible with Convention rights.[21] Mechanisms are in place within the Assembly to scrutinise whether proposed legislation is within its legislative competence. For example, the Presiding

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[12] *Constitutional Issues* para.1(v); British-Irish Agreement Article 1 (v).
[13] *E.g.* para.5.
[14] See O'Leary n.2 above. On consociationalism see Arend Lijphart *Democracy in Plural Societies: A Comparative Exploration* (1977); Arend Lijphart *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (1999); Michael Kerr *Imposing Power-Sharing: Conflict and Coexistence in Northern Ireland and Lebanon* (2005); Brendan O'Leary "Debating Consociational Politics: Normative and Explanatory Arguments" in S.J.R. Noel (ed.) *From Power-Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (2005) 3.
[15] See Lijphart *ibid.*
[16] Para.5.
[17] *ibid.*
[18] See paras.5-29.
[19] Northern Ireland Act 2000 s.1; Northern Ireland Act (Suspension of Devolved Government) Order 2002 (SI 2002/2574).
[20] Northern Ireland Act 1998 s.6(2)(c).
[21] Northern Ireland Act 1998 s.24(1)(a).

Officer ensures that the provisions of proposed legislation are scrutinised prior to their introduction to the Assembly.[22] The Northern Ireland Human Rights Commission also has a role in offering advice on the compatibility of a Bill with human rights.[23] "Human rights" in the relevant provisions of the Northern Ireland Act 1998 are not confined to the Convention rights.[24] This allows the Commission to draw upon a range of human rights standards when providing advice to the Assembly. The relevant Minister is required to state that a new Bill is within the legislative competence of the Assembly.[25] The Attorney General for Northern Ireland has the power to refer the issue of competence to the Judicial Committee of the Privy Council for decision.[26] The Assembly Committees also have a significant role in the legislative process.[27] There is, however, no human rights committee, even though the Agreement indicated the need for human rights proofing. Reference to human rights was to be found in the Executive Committee's Programme for Government 2002-2005.[28] The Northern Ireland Assembly, when functioning, did address human rights matters. For example, The Northern Ireland Assembly debated the work of the Human Rights Commission on 25 September 2001.[29] The debate in the Assembly broadly reflected the views of the political parties on both the Commission and the Bill of Rights process. There was little explicit reference to enforcement of a Bill of Rights, however, some hard questions about the Bill of Rights process were raised. A concern about a "maximalist human rights culture" was expressed, reflecting unease among some politicians about the impact of expansive human rights protections on the democratic process.[30]

Strand Two of the Agreement deals with North-South matters – the all Ireland dimension. The absence of any mention of rights protection in Strand Two (North/South Ministerial Council) is compensated for in later sections of the Agreement, where reference is made to the rights of everyone living on the island of Ireland in the context of the work of the two Human Rights Commissions.

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22 Northern Ireland Act 1998 s.10.
23 Northern Ireland Act 1998 s.69(4).
24 Northern Ireland Act 1998 s.69(11)(b).
25 Northern Ireland Act 1998 s.9.
26 Northern Ireland Act 1998 s.11. See the Constitutional Reform Act 2005 for the role of the new Supreme Court.
27 Northern Ireland Act 1998 s.13.
28 *Programme for Government: Making a Difference 2002-2005* (2001), *e.g.* p.13: "One of our key challenges is to develop a society – a wider community – in which all citizens can fully and freely participate. In such a community, equality, human rights, mutual trust and respect must be core values and citizens must be able to realise their full potential and live free from poverty."
29 NI Assembly, Official Report, 25 September 2001. Dr. Esmond Bernie MLA moved the motion: "That this Assembly believes, in the context of the development of a Bill of Rights, that the Northern Ireland Human Rights Commission has failed to discharge its remit, as given to it by the Belfast Agreement, in its various contributions to the debate on developing human rights in Northern Ireland."
30 *ibid*.

Strand Three deals with British-Irish relations and the "totality of relationships among the peoples of these islands".[31] It includes the creation of a British-Irish Council and a British-Irish Intergovernmental Conference. There is limited reference to rights, but they are listed as matters to be addressed by the Intergovernmental Conference.[32] Provision for these new institutions can be found in the 1998 Act, in Irish law and in bilateral agreements between the British and Irish governments.[33]

Human rights are fully addressed in the section of the Agreement entitled *Rights, Safeguards and Equality of Opportunity*. Here the parties affirm rights to the following: free political thought; freedom and expression of religion; to pursue democratically national and political aspirations; to seek constitutional change by peaceful and legitimate means; to choose one's place of residence; to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; to freedom from sectarian harassment; and the right of women to full and equal political participation.[34] The rest of the section is concerned with the commitments of the British and Irish governments. The British government agreed to incorporate the European Convention on Human Rights.[35] The government also agreed to a new statutory equality duty which would "create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation".[36]

The Agreement refers to the establishment of a new Northern Ireland Human Rights Commission which would be invited to consult and advise on a Bill of Rights for Northern Ireland.[37] The Commission began its work on 1 March 1999 and the Bill of Rights process commenced one year later on 1 March 2000.

The attempt to embed human rights principles in Northern Ireland is not confined to the democratic and other institutions mentioned above. Human rights principles have, for example, framed the debates on policing and criminal justice. What is distinct about current developments in Northern Ireland is that they go beyond the piecemeal enunciation of principles. The intention appears to be to "mainstream" human rights norms in the governance of Northern Ireland. The idea being, as in the equality debates,

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[31] Para.1.

[32] *British-Irish Intergovernmental Conference* para.6.

[33] *Agreement establishing a British-Irish Intergovernmental Conference* (2000) UKTS no.54, (1999) Cm 4295; *Agreement establishing a British-Irish Council* (2000) UKTS no.55, (1999) Cm 4296. Both these British-Irish agreements entered into force on 2 December 1999.

[34] *Rights, Safeguards and Equality of Opportunity* para.1.

[35] *Rights, Safeguards and Equality of Opportunity* para.2. See the Human Rights Act 1998.

[36] *Rights, Safeguards and Equality of Opportunity* para.3. See s.75 Northern Ireland Act 1998.

[37] *Rights, Safeguards and Equality of Opportunity* paras.4-5.

that human rights also become a central and normal part of processes of policy formulation and implementation.[38]

The Irish government agreed to implement a number of human rights commitments through the Agreement, in particular to "take steps to further strengthen the protection of human rights in its jurisdiction".[39] Taking account of the work of the All-Party Oireachtas Committee on the Constitution, and the Report of the Constitution Review Group[40] the Irish government agreed to advance proposals to strengthen and underpin the constitutional protection of human rights.[41] The Agreement states that these proposals should draw upon the European Convention on Human Rights "and other international legal instruments in the field of human rights" and that the issue of incorporation of the Convention be further examined.[42] The overriding purpose is to ensure "at least an equivalent level of protection of human rights as will pertain in Northern Ireland".[43] This commitment to equivalence can be traced directly to the constitutional basis of the Agreement.[44] As noted, the basic idea is that whichever state exercises jurisdiction over Northern Ireland there should be no difference in the levels of human rights protection. The concept of equivalence has given rise to considerable debate on its precise implications in the Irish context. There are two points to note. First, the constitutional context of the UK and Ireland differs. Ireland has a "written constitution" with rights contained in it. Second, equivalence relates to the possibility of a choice about constitutional status, in other words, that the Unionist community in Northern Ireland would suffer no loss in terms of human rights guarantees in the event of Irish unity.

The Irish government also agreed that it would: establish a Human Rights Commission; ratify the Council of Europe Framework Convention on National Minorities as quickly as possible; implement enhanced employment equality legislation; introduce equal status legislation; and "continue to take further active steps to demonstrate its respect for the different traditions on the island of Ireland".[45] The Irish government has acted on a number of these, with the enactment of the Equal Status Act 2000 and the Employment

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[38] See Christopher McCrudden "Mainstreaming Human Rights" in Colin Harvey (ed.) *Human Rights in the Community: Rights as Agents for Change* (2005) chap.2.

[39] *Rights, Safeguards and Equality of Opportunity* para.9. See also the British-Irish Agreement Article 2: "The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement."

[40] See the All-Party Oireachtas Committee on the Constitution *Report of the Constitution Review Group* (1996). The Committee has published ten progress reports thus far.

[41] *Rights, Safeguards and Equality of Opportunity* para.9.

[42] *Rights, Safeguards and Equality of Opportunity* para.9.

[43] *Rights, Safeguards and Equality of Opportunity* para.9.

[44] See Colm O'Cinneide *Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (December 2005).

[45] *Rights, Safeguards and Equality of Opportunity* para.9.

Equality Act 1998.[46] The Irish Human Rights Commission was established by the Human Rights Commission Act 2000 and the Human Rights Commission (Amendment) Act 2001. The Irish government has also "incorporated" the European Convention on Human Rights into domestic law.[47]

The Agreement does not envisage the two Human Rights Commission working in isolation from each other. It proposed a Joint Committee of both Commissions which would operate as a "forum for consideration of human rights issues in the island of Ireland".[48] One of the matters for consideration is a charter which would reflect and endorse agreed measures for the protection "of the fundamental rights of everyone living in the island of Ireland".[49] The Joint Committee was established in November 2001, and work has been carried out on, among other things, the Charter of Rights with the publication of a pre-consultation document setting out possible options.[50]

This is an outline only of the more important aspects of the Agreement and the 1998 Act as they relate to human rights promotion and protection. As noted, the institutions of the Agreement and Northern Ireland Act 1998 were suspended by the Secretary of State for Northern Ireland on 14 October 2002 under the terms of the Northern Ireland Act 2000.[51] The Secretary of State and his team of "direct rule" Ministers run the relevant Northern Ireland Departments while the Northern Ireland Assembly is suspended. The commitment to human rights has been repeated in the official documentation from both governments thus far. For example, the Joint Declaration from April 2003 makes reference to human rights[52] and the Comprehensive Agreement proposed by both governments in December 2004 lists equality and human rights as at the "heart of the new dispensation in Northern Ireland".[53]

The Northern Ireland Human Rights Commission

There has, in recent times, been a steady increase in the number of national institutions for the protection of human rights.[54] For example, a new national

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[46] Ireland ratified the Framework Convention on National Minorities in 1999 and it has submitted two reports to the Framework Convention's Advisory Committee.

[47] European Convention on Human Rights Act 2003.

[48] *Rights, Safeguards and Equality of Opportunity* para.10.

[49] *Rights, Safeguards and Equality of Opportunity* para.10. See Brice Dickson "A Charter of Rights for the Island of Ireland", University College, Cork, 2 October 2004.

[50] Joint Committee *Pre-Consultation Paper on Charter of Rights for the Island of Ireland* (September 2004). The Joint Committee has also published: *A User's Guide to the International Convention on the Elimination of Racial Discrimination* (September 2003).

[51] See above n.19.

[52] *Joint Declaration by the British and Irish Governments* paras.25-33.

[53] *Proposals by the British and Irish Governments for a Comprehensive Agreement* (December 2004).

[54] See International Council on Human Rights Policy *Assessing the Effectiveness of National Human Rights Institutions* (2005).

human rights commission has been established in Afghanistan.[55] There will soon be a Commission for Equality and Human Rights in Britain[56] and there may be a Scottish Commissioner for Human Rights.[57]

The nature and functions of these bodies differ, but one objective is to provide an institutional home, and more secure basis, in national contexts for human rights protection and promotion.[58] The opportunities and risks are well known. National human rights commissions may be used by governments primarily for external purposes. It is useful within the international community for a state to point to the existence of an institution like this as an example of how it is taking human rights seriously.[59] Human Rights Commissions may not be sufficiently independent from government in practice and thus refrain from tackling difficult issues. The process of appointment of Commissioners to national institutions can cause concerns. However, Commissions have potential, particularly if they are able to act independently and rigorously seek to measure and improve "human rights performance" in the state.

The Northern Ireland Human Rights Commission is not the first such body. The Northern Ireland Constitution Act 1973 provided for the establishment of the Standing Advisory Commission on Human Rights (SACHR).[60] SACHR carried out some important and influential work[61] but suffered from a number of well-documented weaknesses, including a limited mandate.[62] The intention, as expressed in the Agreement, was to replace it with a body which would have, "an extended and enhanced role beyond that . . . exercised by [SACHR]".[63] The new Commission was intended to reflect the community balance in Northern Ireland and be independent of government.[64]

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[55] See http://www.aihrc.org.af. The Constitution of Iraq 2005 provides for the establishment of a Supreme Human Rights Commission. For further details see: http://www.nhri.net.

[56] Equality Act 2006.

[57] At the time of writing the Scottish Commissioner for Human Rights Bill is before the Scottish Parliament. However, in February 2006 the Justice 1 Committee of the Parliament refused to endorse the Bill. See the article by Aidan O'Neill for further details on developments in Scotland.

[58] See generally Bertrand Ramcharan (ed.) *The Protection Role of National Human Rights Institutions* (2005); Brice Dickson "The Contribution of Human Rights Commissions to the Protection of Human Rights" [2003] *Public Law* 272; Speech of Dr Maurice Manning, President of the Irish Human Rights Commission, Queen's University Belfast, 10th June 2005.

[59] See the references to the Indian Human Rights Commission in *Chahal* v *UK* (1996) 23 EHRR 413.

[60] Northern Ireland Constitution Act 1973 s.20.

[61] See, *e.g.* Standing Advisory Commission on Human Rights *Report on Fair Employment, Religious and Political Discrimination and Equality of Opportunity in Northern Ireland* (1987).

[62] SACHR was dissolved, see Northern Ireland Act 1998 s.72.

[63] *Rights, Safeguards and Equality of Opportunity* para.5.

[64] See generally Stephen Livingstone "The Northern Ireland Human Rights Commission" (1999) 22 *Fordham International Law Journal* 1465; Stephen Livingstone and Rachel Murray *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with Comparisons from South Africa* (January 2005).

The functions and powers of the Commission are set out in the 1998 Act and largely reflect the references contained in the Agreement.

> "A new Northern Ireland Human Rights Commission, with membership from Northern Ireland reflecting the community balance, will be established by Westminster legislation, independent of the Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals."[65]

Part VII of the Northern Ireland Act 1998 provides for the establishment of the Commission. As noted, the Commission began its work in March 1999 and consists of a full-time Chief Commissioner and nine part-time Commissioners.[66] In appointing Commissioners the Secretary of State is under a duty to ensure as far as practicable that they are representative of the community in Northern Ireland.[67] The Commission's statutory functions include: keeping under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights; the provision of advice to the Secretary of State and the Executive Committee of the Assembly on measures to be taken to protect human rights; and advice to the Assembly on whether a Bill is compatible with human rights.[68] The Commission may provide assistance to individuals who wish to bring proceedings.[69] In addition, the Commission has an education function in promoting understanding and awareness of the importance of human rights issues in Northern Ireland.[70] In fulfilling this function it may undertake research and other activities.[71] It has the power of investigation but it is currently a limited one.[72] The Commission also has a casework function and it has provided assistance to a number of individuals. As noted, "human rights" in the relevant sections of the 1998 Act are not confined to Convention rights, thus permitting the Commission to draw upon the full range of international standards.[73] The Commission has undertaken a review of its effectiveness and it made a number of recommendations to government

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65 *Rights, Safeguards and Equality of Opportunity* para.5.

66 The current Chief Commissioner is Professor Monica McWilliams (2005-). The previous Chief Commissioner was Professor Brice Dickson (1999-2005).

67 Northern Ireland Act 1998 s.68(3).

68 Northern Ireland Act 1998 s.69.

69 Northern Ireland Act 1998 s.70. See also *Re Northern Ireland Human Rights Commission* [2002] UKHL 25. For comment see Anne Smith "Access to Intervene: The Northern Ireland Human Rights Commission and the Northern Ireland Act 1998" [2003] *European Human Rights Law Review* 423.

70 Northern Ireland Act 1998 s.69(6)(b).

71 Northern Ireland Act 1998 s.69(6). Significant Commission publications include: *Human Rights and Victims of Violence* (June 2003); *The Hurt Inside: The imprisonment of women and girls in Northern Ireland* (revised ed., June 2005).

72 Northern Ireland Act s.69(8).

73 Northern Ireland Act s.69(11)(b).

in 2001.[74] The government responded to these recommendations in May 2002[75] and in December 2004 indicated that it was minded to give the Commission the powers it had sought in relation to access to places of detention and the power to compel evidence and witnesses.[76] In 2005, the government published a consultation document on the powers of the Commission, broadly reflecting the position outlined in December 2004.[77] The work of the Commission has also been examined by the Joint Committee on Human Rights[78] and its report contains a number of useful recommendations.[79]

The Commission has responsibility for what is termed the "Bill of Rights process".[80] The idea that Northern Ireland requires a Bill of Rights has been around for some time.[81] There appears to have been a broad political consensus that it was a worthwhile venture, although there are differences of view on the detail.[82] However, it is only with the adoption of the Agreement that the political aspiration has become a real possibility.[83] The primary focus of the participants, however, was on securing overall political agreement on the structures needed to bring an end to the conflict. This political agreement provides the legitimacy for the Bill of Rights exercise. The Agreement states:

> "The new Northern Ireland Human Rights Commission. . . will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These

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[74] Northern Ireland Human Rights Commission *Report to the Secretary of State Required by Section 69(2) of the Northern Ireland Act 1998* (February 2001). See also Northern Ireland Human Rights Commission *Briefing paper concerning the UK Government's Consultation Paper on the Review of the Powers of the Northern Ireland Human Rights Commission* (July 2002); Northern Ireland Human Rights Commission *The Commission's Powers – A Supplementary Report* (April 2004).

[75] Northern Ireland Office *The Northern Ireland Human Rights Commission's Review of Powers Recommendations: A Paper for Consultation* (May 2002).

[76] NIO Press Release "Competition for Chief Commissioner of the Northern Ireland Human Rights Commission" 17th December 2004.

[77] Northern Ireland Office *The Powers of the Northern Ireland Human Rights Commission* (November 2005).

[78] Joint Committee on Human Rights *Work of the Northern Ireland Human Rights Commission* (2002-2003) 14th Report, HL Paper 131, HC 142 (15th July 2003).

[79] *ibid*.

[80] For extensive analysis of the process and its context see "Special Double Issue on the Proposed Bill of Rights for Northern Ireland" [2001] 52 *Northern Ireland Legal Quarterly* 229-406.

[81] See Austen Morgan "What Bill of Rights?" [2001] 52 *Northern Ireland Legal Quarterly* 234.

[82] See CAJ *A Bill of Rights for Northern Ireland: Through the Years – the views of the political parties* (July 2003).

[83] *Rights, Safeguards and Equality of Opportunity* para.4. However, it is worth noting that the process can also be linked to the power of the Commission to advise the Secretary of State on "legislative and other measures which ought to be taken to protect human rights. . ." Northern Ireland Act 1998 s.69(3).

> additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be: the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors."[84]

The 1998 Act places a duty on the Secretary of State to request the advice referred to in the above paragraph.[85] The Secretary of State requested this advice in March 1999.[86] The consultation process was launched by the Commission on 1 March 2000 with events in Derry and Belfast. The Commission has stressed the inclusive nature of the process and its desire for innovation and creativity. There have been working groups, consultation documents, conferences, seminars and many other events.[87] The timescale has been subject to amendment and the Commission has not as yet submitted its final advice. It has worked on a draft Bill of Rights which it published in September 2001 with an updated and revised version published in April 2004.[88] In its proposed Strategic Plan for 2006-2009 one of the aims of the Commission is to build support for a Bill of Rights and work in partnership with others for its implementation.[89] The Commission has expressed its continuing support for the idea of a roundtable forum to take forward the Bill of Rights process. This forum would be composed of the political parties and representatives of civic society, with an international chair and an independent secretariat. The forum was expressly referred to in the Joint Declaration of April 2003 and the Comprehensive Agreement of December

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[84] *ibid*.

[85] Northern Ireland Act 1998 s.69(7).

[86] Brice Dickson "Introduction" [2001] 52 *Northern Ireland Legal Quarterly* 229, at 230.

[87] For details see http://www.nihrc.org.

[88] Northern Ireland Human Rights Commission *Making a Bill of Rights for Northern Ireland* (September 2001); Northern Ireland Human Rights Commission *Progressing a Bill of Rights for Northern Ireland* (April 2004); Northern Ireland Human Rights Commission *Summary of Submissions on a Bill of Rights* (July 2003). For comment on the Commission's proposals see Christopher McCrudden "Not the Way Forward: Some Comments on the Northern Ireland Human Rights Commission's Consultation Document on a Bill of Rights for Northern Ireland" (2001) 52 *Northern Ireland Legal Quarterly* 372. See also the work of the Human Rights Consortium (established in 2000 to ensure participation in the Bill of Rights process and to call for a strong and inclusive Bill of Rights) *Frequently Asked Questions about a Bill of Rights for Northern Ireland* (June 2005); *A Bill of Rights – what it means to us* (August 2004); *A Bill of Rights – What it means to me* (March 2005).

[89] Northern Ireland Human Rights Commission *Strategic Plan 2006-2009: Consultation Document* (November 2005).

2004 included further reference to it.[90] Both governments remain committed to the establishment of the roundtable.

Human Rights as part of the mainstream?

A major focus of debate since 1998 has been on "mainstreaming human rights".[91] This reflects the view that human rights should not be viewed as an add on, but as an intrinsic part of the policy formulation, development and implementation process; that human rights become a mainstream feature of political and legal life in Northern Ireland. The Human Rights Act 1998 was intended to embed a culture of respect for human rights, an aspiration that goes further than reliance on litigation alone.

There is a wide range of public bodies in Northern Ireland with an express interest in rights, for example: Equality Commission for Northern Ireland; Community Relations Council; Parades Commission; Sentence Review Commission; Northern Ireland Commissioner for Children and Young People; Criminal Justice Inspection (Northern Ireland); Judicial Appointments Commission; Interim Victims' Commissioner; and others. These bodies are expected to take, among other things, human rights seriously in their work. As noted, in the areas of policing and criminal justice there has been a sustained attempt to stress the centrality of human rights.[92] The work of the Policing Board and the Criminal Justice Inspectorate is of particular importance in this regard.[93]

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[90] See Annex A "Secretary of State further consults with parties and announces arrangements for an independently facilitated forum on a Bill of Rights for Northern Ireland including details of an independent facilitator". See also Joint Communiqué, British-Irish Intergovernmental Conference, London, 1 February 2006: "The Conference also discussed human rights issues and specifically the question of a roundtable forum on a Bill of Rights for Northern Ireland. The British Government will work with the political parties and civic society to determine how best to build cross-community consensus on the issue."

[91] Christopher McCrudden "Mainstreaming Human Rights" in Harvey (ed.) *Human Rights in the Community: Rights as Agents for Change* (2005) chap.2.

[92] Arising, for example, in the policing context from the recommendations of the "Patten Report" (*A New Beginning: Policing in Northern Ireland – The Report of the Independent Commission on Policing in Northern Ireland* – September 1999) and in the criminal justice context from the Criminal Justice Review (*Review of the Criminal Justice System in Northern Ireland* – March 2000). Both reports stressed the centrality of a rights-based approach. For analysis of the policing debate see Mary O'Rawe "Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic" (2003) 26 *Fordham International Law Journal* 1015; John McGarry and Brendan O'Leary *Policing Northern Ireland: Proposals for a new start* (1999); Mary O'Rawe and Linda Moore *Human Rights on Duty: Principles for better policing – International lessons for Northern Ireland* (1997).

[93] The Policing Board monitors the compliance of the Police Service of Northern Ireland with the Human Rights Act 1998, see Police (Northern Ireland) Act 2000 s.3(3)(b)(ii). See Northern Ireland Policing Board *Human Rights Annual Report 2005*. Keir Starmer QC was appointed as Human Rights Advisor to the Policing Board in February 2003 and Jane Gordon was appointed as assistant to the Board's Human Rights Advisor in July 2003. See also Northern Ireland Policing Board *Report on the Policing of the Ardoyne Parades 12th July 2005 and the Whiterock Parade 10th September 2005* (December 2005). For an example of a

The Human Rights Act in Northern Ireland

The Human Rights Act 1998 entered into force throughout the UK on 2 October 2000 and applies in Northern Ireland. As in the rest of the UK, it is of particular significance in considering the framework of human rights protection and promotion. It has been extensively cited and used in the Northern Irish courts.[94] There is now a large body of case law on the Act and the application of Convention rights. These cases range from those like *McCaughey and Grew*[95] dealing with Article 2 of the Convention, *Department for Social Development v Shaun MacGeagh*,[96] involving the Child Support Order and its regulations and the question of compatibility with Articles 6[97] and 14 as well as Protocol 1 Article 1, to cases like *In re Shay Donnelly*,[98] dealing with court proceedings for the possession of a house and compliance with Article 8.[99] Convention rights have been raised in cases such as *AR v Homefirst Community Trust*,[100] where the making of a care order was held to violate Article 8. This can be contrasted with *Re Misbehavin' Ltd*[101] where the Northern Ireland Court of Appeal held that Belfast City Council had failed in refusing to grant a licence to conduct a proper balancing exercise in relation to Article 10 and Protocol 1 Article 1 of the Convention.

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human rights-based challenge to the new arrangements for police recruitment see *Re Parsons* [2003] NICA 20. The Criminal Justice Inspectorate was established by the Justice (Northern Ireland) Act 2002 and following the recommendations of the Criminal Justice Review. The Inspectorate has developed a "common core" matrix within which equality and rights play a central part. Respect for human rights and equality is listed under "even-handedness" which is one of the five elements of the "common core" of the inspection process, Criminal Justice Inspectorate *Prospectus for a new Criminal Justice Inspectorate in Northern Ireland* (January 2004) at 15. See also Northern Ireland (Miscellaneous Provisions) Bill 2006 and Northern Ireland Office *Devolving Policing and Justice in Northern Ireland – A Discussion Paper* (2006).

94 See Brice Dickson "Northern Ireland" in Lord Lester of Herne Hill QC and David Pannick QC *Human Rights Law and Practice* (2nd ed., 2004) pp.527-587.

95 [2005] NICA 1. See also *Re Jordan* [2004] NICA 29. Both cases are on appeal to the House of Lords at the time of writing. Other cases of note on Article 2 include: *Re Committee on the Administration of Justice and another* [2005] NIQB 25; *Re Anderson* [2005] NIQB 61; *Re McBride* [2003] NICA 23; *Re Meehan* [2003] NICA 34.

96 [2005] NICA 28.

97 There are a considerable number of Article 6 cases, see *e.g.*: *R* v *McQuade* [2005] NICA 2; *Walsh* v *Director of the Assets Recovery Agency* [2005] NICA 6; *R* v *McKeown* [2004] NICA 41.

98 12 December 2003.

99 Other Article 8 cases of note include: *AR* v *Homefirst Community Trust* [2005] NICA 8; *McConway* v *Northern Ireland Prison Service* [2004] NICA 44; *Family Planning Association of Northern Ireland* v *Minister of State for Health, Social Services and Public Safety* [2004] NICA 39; *Re Stewart's Application* [2003] NI 149.

100 [2005] NICA 8.

101 [2005] NICA 35.

Northern Ireland and international human rights law

Northern Ireland is part of the UK. The UK is state party to a range of international human rights conventions and is responsible for ensuring compliance in Northern Ireland with relevant international standards. There is an international dimension to human rights protection in Northern Ireland and international mechanisms are often used. The European Convention on Human Rights, for example, was familiar to lawyers, NGOs and others in Northern Ireland long before the enactment of the Human Rights Act 1998.[102] Many cases have gone to the European Commission/Court of Human Rights challenging law and practice.[103] The Northern Ireland Human Rights Commission and human rights NGOs, such as the Committee on the Administration of Justice, have made practical use of the international mechanisms to argue for human rights reform. A useful example – many others could be cited – is the work of the Human Rights Commission and NGOs on the UK's report to the UN Committee against Torture.[104]

Equality in Northern Ireland

Mainstreaming Equality

Human rights and equality are foundational principles of the Belfast Agreement. The *Declaration of Support* provides:

> "We are committed to partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands."[105]

Equality is referred to in the statement of *Constitutional Issues*,[106] and there is, as noted, a section of the Agreement addressing *Rights, Safeguards and Equality of Opportunity*. The institutional structures of internal power-sharing, as well as the North-South and East-West dimensions, reflect a commitment to national equality, in addition to the references to social equality.[107] Several of the rights listed relate directly to equality. For example, "the right of women to full and equal political participation" and

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[102] See Dickson n.94 above pp.529-540.

[103] *E.g. Shannon* v *UK*, judgment of 4 October 2005; *Brannigan and McBride* v *UK* (1993) 17 EHRR 539; *Brogan* v *UK* (1988) 11 EHRR 117; *Dudgeon* v *UK* (1981) 4 EHRR 149; *Ireland* v *UK* (1978) 2 EHRR 25; *McCann* v *UK* (1995) 21 EHRR 97; *McShane* v *UK* (2002) 35 EHRR 23; *Finucane* v *UK* (2003) 37 EHRR 656; *Kelly* v *UK* (2002) 34 EHRR 553; *Jordan* v *UK*, judgment of 4 May 2001; *McKerr* v *UK*, judgment of 4 May 2001; *Shanaghan* v *UK*, judgment of 4 May 2001.

[104] See UN Committee against Torture *Conclusions and recommendations: UK* UN Doc. UNCAT/C/CR/33/3, 10 December 2004. The Committee recommended: "the State Party should consider designating the Northern Ireland Human Rights Commission as one of the monitoring bodies under the Optional Protocol. . ."

[105] Para.3.

[106] Para.1(v).

[107] See generally Christopher McCrudden "Mainstreaming Equality in the Governance of Northern Ireland" (1999) 22 *Fordham International Law Journal* 1696.

"the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity". [108]

As noted, the two governments agreed to support and implement measures on both human rights and equality. The British government committed itself to the following:

> "Subject to the outcome of the public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables."[109]

The conclusion of the Agreement coincided with extensive discussions on the institutional protection of equality in Northern Ireland and in the Agreement the British government set out its preference for a single Equality Commission to replace the existing bodies: "Such a unified Commission will advise on, validate and monitor the statutory obligation and will investigate complaints of default."[110] The Agreement also states:

> "It will be open to a new Northern Ireland Assembly to consider bringing together its responsibilities for these matters into a dedicated Department of Equality."[111]

The British government committed to making "rapid" progress with, for example:

> "measures on employment equality included in the recent White Paper ('Partnership for Equality') and covering the extension and strengthening of anti-discrimination legislation, a review of the national security aspects of the present fair employment legislation at the earliest possible time, a new more focused Targeting Social Need initiative and a range of measures aimed at combating unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need."[112]

There are other references to equality in the Agreement, but this captures the main elements.

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[108] *Rights, Safeguards and Equality of Opportunity* para.1.
[109] *Rights, Safeguards and Equality of Opportunity* para.3.
[110] *Rights, Safeguards and Equality of Opportunity* para.6.
[111] *Rights, Safeguards and Equality of Opportunity* para.7.
[112] *Rights, Safeguards and Equality of Opportunity* para.2(iii).

The Equality Commission for Northern Ireland was established by the Northern Ireland Act 1998 and it started work on 1 October 2000.[113] The functions of the existing bodies were transferred to the single Equality Commission for Northern Ireland.[114] The Commission inherited the existing legal framework and no Single Equality Act has yet been enacted.[115] As is well known there are distinctive features in equality law in Northern Ireland, for example, the mechanisms in place to address inequality between the two main communities.[116]

The introduction of an innovative statutory duty to promote equality of opportunity in relation to listed grounds has generated much comment.[117] This attempt to "mainstream" equality in Northern Ireland has provoked considerable debate about positive duties. Section 75 entered into force in January 2000 so there is now extensive practical experience on which to base assessments.[118] The Northern Ireland Act 1998 provides:

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[113] Northern Ireland Act 1998 Part VII.

[114] Northern Ireland Act 1998 s.74. The bodies were: Fair Employment Commission for Northern Ireland; Equal Opportunities Commission for Northern Ireland; Commission for Racial Equality for Northern Ireland; and the Northern Ireland Disability Council.

[115] Special Educational Needs and Disability (Northern Ireland) Order 2005; Disability Discrimination Act (Amendment) Regulations (Northern Ireland) 2004; Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003; Equality (Disability etc)(Northern Ireland) Order 2000; Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended); Race Relations (Northern Ireland) Order 1997 (as amended); Sex Discrimination (Northern Ireland) Order 1976 (as amended). See also Office of the First Minister and Deputy First Minister *A Single Equality Bill for Northern Ireland: A Discussion Paper on options for a Bill to harmonise, update and extend, where appropriate, anti-discrimination and equality legislation in Northern Ireland* (June 2004); Office of the First Minister and Deputy First Minister *Single Equality Bill: Responses to Consultation* (March 2005); Equality Commission for Northern Ireland *Response to OFMDFM Consultation Paper 'A Single Equality Bill for Northern Ireland'* (November 2004).

[116] Christopher McCrudden "Northern Ireland, the Belfast Agreement, and the British Constitution" in Jowell and Oliver (eds.) *The Changing Constitution* (5th ed. 2004) 195, at 229-230; Standing Advisory Commission on Human Rights *Fair Employment Law in Northern Ireland: debates and Issues* (1996).

[117] Northern Ireland Act 1998 s.75 and sch.9. For a comprehensive analysis see Christopher McCrudden above n.107. There is also a duty to "have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group" see Northern Ireland Act 1998 s.75(2) and also Office of the First Minister and Deputy First Minister *A Shared Future: Policy and Strategic Framework for Good Relations in Northern Ireland* (March 2005).

[118] The Joint Declaration of April 2003 provided for the establishment of a review of the operation of s.75 by the British government, with the Equality Commission and other interested parties. See Eithne McLaughlin and Neil Faris *The Section 75 Equality Duty – An Operational Review: A Report Prepared for the Northern Ireland Office as the First Stage of the Review* (November 2004). See also Annex B to the report: Christopher McCrudden *Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998.* In addition to this, there is a statutory five year review of equality schemes to be undertaken by those

> "75(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> (b) between men and women generally;
>
> (c) between persons with a disability and persons without; and
>
> (d) between persons with dependants and persons without."

A list system is adopted in relation to the definition of "public authority".[119] A complex enforcement mechanism has been put in place.[120] The Equality Commission must: keep the operation of section 75 under review; and offer advice to public authorities.[121] The Equality Commission has a central role in enforcement of the duties through its monitoring of the equality schemes submitted by public authorities, but the Secretary of State for Northern Ireland may also become involved. Before submitting its equality scheme a public authority must consult "in accordance with directions given by the Commission . . . representatives of persons likely to be affected by the scheme . . . and such other persons as may be specified in the directions".[122] The Equality Commission can approve the scheme or refer it to the Secretary of State.[123] The Secretary of State can approve the scheme, request that the public authority submit a revised scheme or make an equality scheme for the public authority.[124] The Equality Commission has the power to investigate a complaint received about the compliance of a public authority with an equality scheme.[125] Such investigations can lead to directions being issued by the Secretary of State in relation to non-compliance.[126] The Equality Commission, has so far, completed a considerable body of work in terms of both monitoring progress and providing guidance.[127] In the next phase it

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public bodies subject to s.75 (Northern Ireland Act 1998 schedule 9 para.8(3)) and the Equality Commission for Northern Ireland is conducting an effectiveness review. On the five year review see Equality Commission for Northern Ireland *Guidance on Five Year Review of Equality Schemes by Public Authorities* (November 2005).

119 Northern Ireland Act 1998 s.75(3).

120 Northern Ireland Act 1998 schedule 9; Equality Commission for Northern Ireland *Section 75 of the Northern Ireland Act 1998: Guide to the Statutory Duties* (revised February 2005); Equality Commission for Northern Ireland *Section 75 of the Northern Ireland Act 1998 – Practical Guidance on Equality Impact Assessment* (revised February 2005).

121 Northern Ireland Act 1998 schedule 9 para.1(a) and (b).

122 Northern Ireland Act 1998 schedule 9 para.5.

123 Northern Ireland Act 1998 schedule 9 para.6.

124 Northern Ireland Act 1998 schedule 9 para.7.

125 Northern Ireland Act 1998 schedule 9 paras.10-11.

126 Northern Ireland Act 1998 schedule 9 para.11(3)(b).

127 See above for details of guidance. Equality Commission for Northern Ireland *Report on the Implementation of the Section 75 Statutory Duties 1 April 2002-31 March 2003* (2004); *Full Report on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities 1 January 2000-31 March 2002* (2003); *Summary Report on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities 1 January 2000 – 31 March 2002* (2003).

appears that further thought will be given to how to make section 75 more effective in practice.

The mainstreaming approach does not negate established discrimination law guarantees. It seeks to build on existing protections in a proactive way that recognises the potential limits of established approaches. However, it is a mistake to assume that mainstreaming rules out more "coercive" methods, such as strategic litigation. A useful example is the case of *Re Peter Neill*.[128] The case involved the use of Anti-Social Behaviour Orders in Northern Ireland and specifically the argument that the relevant law had not been introduced in compliance with section 75 of the Northern Ireland Act 1998. An investigation by the Equality Commission, which followed a complaint to the Commission from the Children's Law Centre, revealed that the Northern Ireland Office (NIO) had failed to conduct an equality impact assessment. The Commission concluded that the NIO should conduct an impact assessment. Before the High Court the NIO collaterally challenged the lawfulness of the Equality Commission report. Justice Girvan rejected the argument that the Anti-Social Behaviour (Northern Ireland) Order 2004 could be rendered invalid because of a failure to comply with section 75, "section 75 does not contain any provision that a breach of that duty to have due regard to the need to promote equality of opportunity renders legislation invalid".[129] He went on to state:

> "Alleged breaches of schemes are to be the subject of investigation and reporting with political consequences. It appears that the legislature, no doubt by way of a political compromise, opted for that route to remedy breaches of schemes rather than by conferring rights to be asserted by action or other litigious means."[130]

Justice Girvan went on to address the issue of the Commission report and its legal status. In addressing this question he noted:

> "In approaching the provisions of section 75 and Schedule 9 one must bear in mind that these provisions are part of a statute intended to be a new constitution for Northern Ireland framed against the background of the history of Northern Ireland and the principles agreed in the so-called Good Friday Agreement. The Agreement was the product of multi-party negotiations and was intended to be a balanced and carefully nuanced constitutional arrangement. The equality provisions were a central part of the new arrangements. . ."[131]

He also stated that the, "powers and duties of the Commission must be interpreted in a way that does not emasculate the role of the Commission".[132] Justice Girvan had the benefit of a written intervention on behalf of the

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[128] [2005] NIQB 66. See the following useful briefing note: *Briefing Note by the Committee on the Administration of Justice on the Section 75 court challenge* (September 2005). See also *Re Northern Ireland Commissioner for Children and Young People* [2004] NIQB 40.

[129] Para.41.

[130] Para.42.

[131] Para.43.

[132] Para.44.

Committee on the Administration of Justice prepared by Robin Allen QC and Fiona Doherty which included a comprehensive examination of the scope and nature of section 75.[133] Justice Girvan argued that a "narrow legalistic analysis of the Commission report" was inappropriate and concluded that the Commission had acted lawfully.[134] As noted, the Commission report was questioned in these proceedings by way of a collateral challenge. Justice Girvan attached significance to this fact:

> "It seems unlikely that this dispute between the NIO and the Commission would have otherwise come before the court. Having regard to the whole structure of section 75 and Schedule 9 it is not the type of dispute that would generally be suitable for the litigious process."[135]

Justice Girvan dismissed the application. The decision was appealed to the Northern Ireland Court of Appeal.[136] Dismissing the appeal Lord Chief Justice Kerr stressed the need to focus on the context of this particular case. He noted that the failure of the NIO to comply with its Equality Scheme was the precise situation Schedule 9 was designed to address.

> "It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament . . . The juxtaposition of sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations . . . strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with section 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in section 76."[137]

On the issue of the availability of judicial review the Court of Appeal was not persuaded that:

> "the existence of the Schedule 9 procedure ousts the jurisdiction of the court in all instances of breach of section 75 . . . We incline to the opinion . . . that there may well be occasions where a judicial review challenge to a public authority's failure to observe section 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis."[138]

The debate over the effective implementation of section 75 is likely to continue given, in particular, impending reviews. Debates on equality are not confined to section 75. As noted, this simply builds on established equality measures applying in Northern Ireland but it has generated an

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133 Para.44 and para.49.
134 Paras.49-50.
135 Para.50.
136 *Re Peter Neill* [2006] NICA 5.
137 *ibid.,* para.28.
138 *ibid.,* para.30.

extensive debate on the role of positive duties in ensuring that the objectives of equality and anti-discrimination law are met.[139]

Conclusion

This article outlines the basic framework in Northern Ireland relating to human rights and equality. There is a particular focus on the Belfast Agreement 1998 and developments since then. Whatever the precise legal status of the Agreement, its core concepts remain central to the "political constitution" of Northern Ireland. Human rights and equality are fundamental principles of the Agreement. However, disagreement continues over the precise meaning and implications of this. Northern Ireland is undergoing a conflict transformation process, underpinned by constitutional and international legal and political commitments. Human rights and equality are, in principle at least, central to this "new dispensation".

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[139] *E.g.* the Northern Ireland Act 1998 s.76 makes it "unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion."