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From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK

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This paper reviews the development and nature of one of the two components of the UK's equality regime – equality law. The origins of equality law lie in the postwar consensus on non-discrimination. The paper reviews the limitations of non-discrimination or negative equality duties. It documents the expansion of equality law at the turn of the twentieth/twenty-first century, when seven UK Acts and two European Directives introduced additional negative equality duties, provided for a new enforcement authority and introduced positive equality duties in respect of some social statuses. Many of these duties were introduced as part of devolution arrangements. UK equality law leads the field in European terms. The nature of positive equality duties and New Labour's approach to equality in general are also critiqued.

Introduction

Equality law is in a state of ferment in the UK. (O'Connell, 2006: 3)

Liberal welfare states and the 'Anglo social model' of the UK and Ireland are well known for their high production and tolerance of substantive inequality (Pearce and Paxton, 2005), despite British people regarding themselves as highly committed to fairness and justice (Taylor-Gooby, 2001, 2005). A new equality architecture will be created in the UK in 2007 when the new Equality and Human Rights Commission for Britain (CEHR) brings together the former Equal Opportunities, Disability and Race Relations Commissions. CEHR will thus take forward and develop the UK's 'single equality approach'. 'Single equality' refers to law and/or institutions which treat inequality and discrimination as having a generic core which crosses the divisions between social statuses and the boundaries between minority social groups. UK 'equality law' is regarded as being at the forefront of European developments and Northern Ireland's provisions are regarded as being in advance of those elsewhere in the UK (McLaughlin, 2003). McLaughlin (2003) proposed that a country's equality law together with the total redistributive or equalising impact of its social welfare system constitute its 'equality regime'. The equality regimes in force in the various UK countries differ from each other in terms of both elements of the regime. This paper traces, albeit briefly, the development of equality law in the UK. The first part of the paper reviews the nature and limitations of negative equality law, the second part the nature of positive equality duties. The remainder of the paper outlines the equality duties in force in each of the UK countries and comments on their implementation.

Discrimination and negative equality duties

All European welfare states rely on a combination of two very different concepts of equality. The first is that of non-discrimination; the second is that of 'positive liberty' (see also McLaughlin and Baker, this issue). The principle of non-discrimination was a fundamental part of the post-war political consensus on how to prevent the fascism, genocide and so on, which had been perpetrated in and by Hitler's Germany, from recurring in the future. Accordingly human rights' provisions after the war stipulated that all other rights should be enjoyed by all without discrimination on the grounds of gender 'race' or 'other social status.' Human rights and the welfare state share a common point of origin in the four freedoms of the war-time *Atlantic Charter*. Feldman (2002) identifies four subsequent waves or 'generations' of equality law ending with positive equality duties.

The prohibition on discrimination whether on the part of governments or other citizens is justified in liberal political theory on the grounds that individuals should not have their autonomy and fundamental rights constrained or distorted by the arbitrary imposition of the irrationalities and prejudices which may be contained in the will of others. In the immediate post-war period, the idea of discrimination that imbued human rights thinking was the one we would today call *direct discrimination*; that is, forms of interpersonal behaviour which are intended to cause, through less-favourable treatment, adverse outcomes for an individual due to their possession of social trait(s) against which there is prejudice on the part of the discriminator. McLaughlin *et al.* (2006) provide a review of types of discrimination in the context of a debate on whether institutional discrimination could or should be made unlawful. Discriminatory behaviour, if permitted, would damage the individual's liberty unfairly; in addition the irrationalities of discrimination may accumulate into economic inefficiencies and market distortions. Consequently, it is in the interests of everyone, not only those who may be discriminated against, for discriminatory behaviours to be prohibited. The mixture of morality and pragmatic instrumentalism underlying the prohibition on discrimination is typical of political liberalism.

The prohibition on discrimination is sometimes referred to as anti-discrimination or non-discrimination law. Non-discrimination provisions are categorised as negative equality duties because the intention is to prevent a certain behaviour – to create an absence rather than a presence. Negative equality duties prohibit certain behaviours, but they do so only by offering redress to those adversely affected if and after the behaviours have occurred.

Thus, in an important sense, negative equality duties are inherently tolerant of discrimination; indeed they rely on discrimination occurring so that it may be eradicated through the gradual disincentive effects of complaints cases and penalties. Clearly, this will mean that eliminating the problematic behaviour will be a slow process. Two further limitations of negative duties are set out below. These are the spectre of the comparator and the need to freeze fluid social processes for the purposes of the attribution of blame.

At the heart of the concept of discrimination lies the spectre of the comparator – someone without the social trait(s) of concern who it is claimed would receive more favourable treatment in identical circumstances. Who is this spectre? This can only be someone whose social traits are regarded as the 'natural us'. The non-recognition of masculinity, heterosexuality and whiteness as social traits means that the ways these

traits are naturalised forms of privilege are not recognised (Cassin, 2006). The problem of inequality is diverted away from the privilege and behaviours of the majority 'us' towards the troublesome minorities 'them'. Naïve and false universalism is thus inherent in and has always limited the transformative capacity of negative equality duties.

A further limitation of negative duties arises from the way it is necessary, for the purposes of legal practice and particularly the attribution of blame for wrong-doing, for the law to treat events and individuals as artificially 'frozen in space and time'. The need to 'freeze frame' means that the fluidity and contingent nature of social identity and processes of identification (see McLaughlin, this issue) must be ignored; individuals must choose whether it was their gender/ethnicity etc. which was relevant in the events complained of. Multiple identity cases have been notoriously difficult to pursue within the UK legal system and multiple identity itself has become a distinct disadvantage in terms of winning discrimination cases (Doyle, 2006; O'Brien, 2006).

Naïve universalism is used here to refer to the organisation of processes, institutions and practices around a hypothetical universal person. This person has the social characteristics assumed to be 'normal', 'average' or 'typical' in the population and culture concerned. For example, in the UK and Ireland, the universal is presumed to be a male, able-bodied, heterosexual white, English-speaking person. Recognition that assumptions about capacities and abilities to perform duties have often been based on the attributes of this universal person, to the disadvantage of those who differed, led to the introduction of the concept of indirect discrimination.

The concept and definition of indirect discrimination is potentially hugely radical, but most of its power and potential has been neutralised by conservative judicial interpretations of its provisions (Doyle, 2006). Equivalent provisions in Canada are known as employment equity (Faraday, Denike and Stephenson, 2006).

In Europe, legal definitions of indirect discrimination assume, at least to some extent, that unequal outcomes, if persistently patterned along the lines of social traits, are *prima facie* evidence that the processes leading to those outcomes contain some kind of less-favourable treatment of people with those traits. Most definitions of indirect discrimination assume that the disadvantageous treatment is largely unintentional and a consequence of naïve universalism. Specifically, it is hypothesised that a lack of fit between the attributes of members of minority social groups and the universal leave minority group members disadvantaged relative to others. Unless the bias or favour towards the attributes of the universal can be justified on rational and economic grounds, it is held to be wrong. Positive action measures to improve the fit between minority group members and the universal may be permitted.

Despite their limitations, negative equality duties are a necessary but insufficient basis for the achievement of other equalities. Proof of the importance of negative equality and its enforcement can be found in the history of Northern Ireland. The history of equality and inequality in Northern Ireland is especially complex (Magill and Rose, 1996; Hill *et al.*, 2005 provide summaries). Suffice it here to note that the pervasive lack of enforcement of the negative equality duties, which existed in respect of religion and political opinion after 1922, created widespread support for the politically motivated civil violence, which occurred between 1969 and 1994, and continue at a lower level at the time of writing.

Northern Irish equality law led the European field during the 1970s, introducing such radical provisions as a presumption of discrimination in complaints cases, extensive

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systems of compulsory monitoring of employers, contract compliance, calculation and definition of proportionality, and affirmative action. These provisions contained in a number of statutes are now collectively termed the 'fair employment' model. Fair employment developments were fitfully introduced over the period 1972–98, often as a consequence of pressure from the Irish American 'community' and/or the Irish government, both of which were impatient with the slow progress being made by the UK government in equalising the conditions of the two 'ethno-national' populations within the North (Magill and Rose, 1996). By the turn of the century, the 'fair employment' model had achieved significant success in terms of reducing substantive inequalities along the lines of religion and political opinion (Osborne and Shuttleworth, 2003; O'Leary and Zin Li, 2006). The 1998 Northern Ireland Act contained the basic framework of the UK's first positive equality duty. The duty's origin was twofold: firstly, a factor specific to Northern Ireland, dissatisfaction with the ineffectiveness of the nonstatutory equality proofing provisions of PAFT (Policy Appraisal and Fair Treatment guidelines) and, secondly, an international factor, the influence of the participationist approach within human rights law.

Equality and New Labour

Since 1997 New Labour has presented itself as the party of equality. The principles of welfare reform, enunciated by David Blunkett of behalf of the government (see Dornan, 2005), assume that equality of opportunity already exists in a meaningful sense.

New Labour has recognised that opportunity is more fictitious than real for people living in some places, but in general New Labour assumes that equality of opportunity exists and that it is the responsibility of individuals to build on and take up the opportunities available to them. This is an approach which ignores the intersubjectivity of equality of opportunity, denies the structural causes of inequality and peddles 'modern myths' of fair competition and a classless society. Labour's commitment to end child poverty and its record of investment in public services have enhanced positive liberty, but the unwillingness to endorse a strong normative framework in favour of and defining social justice weakens the government's claims to be serious about equality, as Ellison and Ellison (2006) argue. The denial that discrimination on the grounds of gender continues (for example, by the Prosser Committee on equal pay), together with the weak definition of institutional discrimination put forward by the McPherson Inquiry mean that New Labour relies too heavily on an individualised human capital approach 'education, education, education' for its equality strategy to be effective. As Ellison and Ellison (2006) and McLaughlin and Monteith (2006) also argue, New Labour's commitment to targeted rather than universalistic policies constrains its ability to deliver on equality and social justice. New Labour has been more receptive to the approach adopted by cosmopolitan advocates of re-democratisation and to the strategy that equality is best achieved through the participation of those affected by inequality in political and policymaking processes than to arguments that more opportunities need to be provided and/or that inequalities of treatment continue to limit some group's opportunities. The spacialisation of issues of inequality which New Labour has engaged in is a particular problem discussed by Alcock (2005) and McLaughlin and Monteith (2006). The passage of seven acts adding to equality law and the creation of a new enforcement body, however, certainly make it look as if this is a government doing a lot about equality.

The Equality Act (2006) introduced protection from discrimination on the grounds of age. A single equality bill for Northern Ireland has been drafted and awaits implementation. Northern Ireland has acted as a pilot or trial zone for both the new positive equality duties and the single equality approach. Following the adoption of equality as a major goal of the EU in article 13 of the 1996 Maastricht Treaty, the European Commission through the framework Equality Race Directives (2000) introduced additional negative equality duties covering additional social statuses – ethnicity, religion or belief, disability, age and sexual orientation. The commission required member states to extend their domestic equality law so as to implement the directive by 2007. The result in the UK was the Disability Act 2005 and the Equality Act 2006. The commission also encouraged member states to enforce existing equality provisions more rigorously. The year 2007 has been designated 'The Year of Equal Opportunities for All' and the period 2007–2010 will see an action program of the same name. The European Commission and New Labour share an understanding of social inclusion as being largely about inclusion in the labour market. The redemocratisation and participation agenda referred to above however have contributed to some broadening of the concept of equality of opportunity and have extended the reach of equality law to the world of public and private goods, facilities and services and policymaking as well as the labour market. These developments are all reflected in the 'positive equality duties', and their constitutionalisation through the various UK devolution acts.

Positive equality duties

The term 'positive equality duty' can be attributed to Sandra Feldman (2001, 2002). Feldman pointed out that a new wave or generation of equality law was developing, in which the duties required anticipatory actions on the part of the duty bearers. In contrast to negative duties, positive equality duties seek to prevent and pre-empt inequality, by requiring and encouraging certain potentially preventative behaviours and practices. Positive duties aim to address and pre-empt all forms of discrimination, including institutional discrimination, by mainstreaming equality considerations and the viewpoints of those affected by inequality into organisational decision-making processes. The term positive thus refers to the way these duties encourage or require duty bearers to act in certain ways; it should not be taken to imply that the duties have the capacity or intention to increase positive liberty.

Positive equality duties generally have three characteristic components – they involve consultative policy-making processes, the equality mainstreaming ethos and anticipatory impact assessment of the probable effects of policy decisions. Chaney and Rees (2004) argue that the mainstreaming approach underpinning these duties rests on four principles: treating the individual as a whole person, democracy, equity and justice. They note that the successful practice of mainstreaming requires a number of factors to be in place: appropriate institutional arrangements, awareness raising, appropriate training and expertise, reporting mechanisms, commitment from the top, incentives to build 'ownership' and the necessary resources. McLaughlin and Faris (2004) point out that in terms of substantive equality, positive equality duties and the mainstreaming methodology are parasitical, being dependent on the existing capacities and functions of the social institutions concerned; these may or may not be equality enhancing/inequality reducing.

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Equality provisions in England

There is no generalised positive equality duty in force in England; positive duties do exist in relation to the functions of municipal government and policing. The positive equality duties which apply in England are specified in: the Race Relations Act (2000), Section 404 of the Greater London Authority and local government act and the Disability Act (2005) (O'Cinneide, 2004).

The positive equality duty in the Race Relations Act (2000) was a response to the McPherson Inquiry's findings regarding institutional discrimination within the police service. Although the inquiry report leant at times towards bad apple types of denial of racism and discrimination, the overall conclusion was that widespread racism did exist and to the extent that could be described as institutional discrimination. The non-discrimination principle in relation to the performance of public functions was a significant product of the MacPherson Inquiry reaffirming Scarman's view in *Amin* that this has long been the unfulfilled intention of the UK legislature.

Equality and devolution in Scotland

The equality duty/provision included in the Scotland Act (2000) requires all the Parliament's legislation to be in accordance with Human Rights' principles. Schedule 5 of the Act defines six 'grounds against which proposed legislation should be assessed and equality 'proofed'. The Scottish Parliament needed little encouragement from Westminster to develop and apply a strong equality and social justice agenda. Given the historical contribution Scottish political and moral philosophers have made to theories of justice, it would be surprising if a concern with social justice was not a stronger core element in Scottish than English political culture. The Scottish Parliament has an Equal Opportunities Committee that equality 'proofs' all legislation and sets priorities for the work of the government's Equality Unit. Equality is seen as very much part of a broader social inclusion agenda, rather than being restricted to equality of opportunity. The Equality Unit administers an equality strategy and has oversight of equality matters across departments. The budget for equality was £3m in 2002/03 and £11m in 2006/07.

In terms of equality outcomes, equality considerations were prominent in the decisions to depart from the English practice in relation to free personal care for the elderly and disabled, foundation hospitals and to tuition fees in further and higher education (see also Parry, 2003). The Scottish Parliament's schedule 5 powers were applied in the 2000/04 period to the Local Government Act, the Housing Act, the Adults with Incapacity Act and the Health and Community Care Acts. The Scottish Parliament also established a Children's Commissioner. A Scottish Commission for Equality and Human Rights has been proposed. There is currently a Scottish Human Rights Commission.

In terms of equality outcomes, the history of higher per capita expenditure on public services in Scotland than in England and Wales has been a positive force for several decades, and has helped to minimise the effects of poor public health and economic underdevelopment. Scottish culture and history, however, have been marked by a degree of religious sectarianism and a non-secular majoritarianism such that inequality on the grounds of sexual orientation is a particular issue to be addressed: 'shameless indecency' and homosexuality were criminalized until relatively recently (1981).

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Equality and devolution in Wales

Section 120 of the Government of Wales Act (1998) states that the Assembly shall make 'appropriate arrangements with a view to ensuring that its functions are exercised with due regard to the principle that there should be equality for all people.' Section 48 provides that: 'The Assembly shall make appropriate arrangements with a view to securing that its business is conducted with due regard to the principle that there should be equality opportunity for all people.'

The Welsh Assembly has made an active commitment to equality mainstreaming, in order to discharge its section 48 and 120 duties. The Assembly has an Equality of Opportunity Committee, which conducts an annual Equality Audit and has had very high profile public support from the First Minister. The Welsh language is, to some degree, an additional equality issue in Wales. The Welsh Language Act (1993) put Welsh and English on an equal basis in public life in Wales: it placed a duty on the public sector to treat Welsh and English on an equal basis when providing services to the public in Wales. It gives individuals an absolute right to speak Welsh in court, and it established the Welsh Language Board to promote and facilitate the use of Welsh.

The Assembly's first term programme of government established social justice and equality as high priorities, especially in the context of building stronger communities.

> To deliver responsive services, we need to place citizens and communities centre-stage. I use the term citizens in its most inclusive sense as embracing everybody. The people of Wales are much more than customers of public services. (Rhodri Morgan, 23 September 2003).

As in Scotland, Welsh political culture favours a more social and relational understanding of equality compared with the narrower English concept of equality of opportunity.

> Approaches which prioritise choice over equality of outcome, rest in the end upon a market approach to public services, in which individual economic actors pursue their own best interests with little regard for wider considerations. (Rhodri Morgan, 10 May 2004).

In terms of outcomes, policy differences between England and Wales relevant to issues of equality, have included the introduction of free breakfasts in primary schools, free swimming for older people, free prescriptions for all and free and half price bus travel for the elderly, teenagers and the disabled. In addition domiciliary services for disabled people are not charged for. The second term of the Assembly has included a review of mainstreaming and further reviews of the pilot project and special initiatives which had been carried out in the first term. Special initiatives had included a domestic violence strategy, a childcare strategy and appointment of an Older Person's Commissioner. The Welsh Equality and Human Rights Commission established an Equality 'Reference Group' to link the public and civil society sectors. In the Assembly's second term it is intended to strengthen and publicise section 120, introduce complaints procedures and build a stronger equality infrastructure in the public sector.

Equality and devolution in Northern Ireland

The equality provisions in The Northern Ireland Act (1998) should be read in conjunction with the text of the 1997 'Good Friday Agreement'. The duties are contained primarily in section 75 and Schedules 9, 10 and 11 of the Act. Smyth and McLaughlin (2006) suggest that the importance of the equality and human rights or social justice strand of the Act and Agreement have been little understood by UK and Unionist policy makers and politicians. The Northern Ireland equality statutory duty requires all designated public bodies to have due regard to the need to promote equality of opportunity along nine dimensions of potential inequality:

- between those of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without.

The second equality duty under Section 75 (2) of the Act (1998), is that 'a public authority shall in carrying out its functions in Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group'; a 'good relations' objective is also contained in Article 67 of *The Race Relations* (Northern Ireland) *Order 1997*, whereby a District Council is under a duty "to make appropriate arrangements with a view to securing that its various functions are carried out with due regard to the need to eliminate racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups". Schedule 9 establishes that equality schemes will be the tool used to establish 'appropriate arrangements' for the promotion of equality of opportunity under section 75(1).

The section 75 duties placed on a statutory footing the practices previously expected of public authorities under PAFT guidelines. These nonstatutory guidelines had not been complied with to any significant extent (see Osborne *et al.*, 1996). Expectations of, and hopes for, the new statutory equality duty were high on the part of civil society organisations, perhaps unrealistically so (McLaughlin and Faris 2004).

The political focus of the 'fair employment' debate on labour market issues and economic inequality between men was an agenda that was significantly progressed through the fair employment model. Restricted access to justice in relation to goods, facilities and services (GFS) and the nature of external political pressure meant that before 1999 insufficient attention had been paid to equality in spheres other than the labour market; the positive equality duty in the 1998 Act is part of filling that gap.

There is evidence that social attitudinal change has accompanied the development of the North's equality provisions. Thus equality and non-discrimination are now values held by significantly higher proportions of the population than previously (ECNI, 2006). No-one, however, would contend that sectarianism and anti-republicanism do not still produce experiences of discrimination – direct, indirect and institutional – nor have the communal and individual legacies of decades of inequality of opportunity and their implications for the intersubjectivity of equality been fully addressed.

The main lesson to be learnt from the implementation of the statutory equality duty in Northern Ireland is that the duties are excessively process orientated and need to be complemented by other strategies if substantive inequalities are to be addressed. The

excessive process orientation is reflected in 'tickbox' and other practices reflecting a 'thin' rather than a 'thick' form of organisational compliance with the duty.

Proliferation and distraction

Positive equality duties are no panacea in terms of the achievement of equality and the eradication of inequality.

The limited capacity of positive duties to deliver substantive equality has been a key concern of commentators (McLaughlin and Faris, 2004; O'Cinnaide, 2005, 2006; McLaughlin, 2006). The orientation of the duties towards processes of decision making rather than to the content of the decisions is problematic; the participation of 'those most affected' may be limited to superficial consultation rather than their having the opportunity for real influence on decision-making; a 'thin' approach to compliance with the duties – adhering to the letter rather than the spirit of the duty – may be taken by policy-makers. These problems may combine with the inherent weakness of the duties themselves to mean that the duties are more of a distraction from inequality than a pathway to equality.

The duties are inherently weak because they generally only require public bodies to be able to show that equality considerations were raised at some point in the decision-making process, rather than being required to show that these considerations affected the decisions made; in addition the duties rely on only one concept of equality – equality of opportunity. Feldman (2000), relying on the South African experience, argues for the parallel introduction of socio-economic human rights. Smyth and McLaughlin argue likewise (2006), following the architects of the Northern Ireland Act and the Good Friday Agreement. The ill-thought-out proliferation of differently worded positive duties across the UK and the competition between the equality duties and other policy process requirements (Cabinet Office 1999) all threaten the effectiveness of the duties. The impact assessment methodology is utilised not only in positive equality duties, but also in other policy-making processes. Consequently, five or six distinct impact assessments may now be required in respect of a single policy. The capacities and skills required by mainstreaming and participatory policy-making generally are also known to be weak and poorly developed in the UK public sector (Cabinet Office, 1999; Taylor, 2006).

Concluding remarks

The key issues for the next decade of equality law include:

- Are the organisations of civil society being consulted to death?
- Is the consultation involved in positive duties incorporation of dissenting voices and tokenism or meaningful participation in decision-making?
- How can compliance with positive duties be judged and what level of compliance is acceptable?
- Can positive duties make a significant contribution to the achievement of greater substantive equality?
- Should positive equality duties be supplemented by the parallel development of socio-economic rights and/or other methods of economic redistribution?
- Is mainstreaming a cloak hiding the limited capacities of public bodies and services to promote equality and reduce inequality?

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