Institute of Advanced Legal Studies
(University of London)
Charles Clore House
17 Russell Square
London WC1B 5DR
Telephone: 01-637 1731
Telex: 269 400 SH UL (ref. IALS)
Fax: 01-436 8824

W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

Disrimination Between Social Spheres

Dr John Gardner
(All Souls College, Oxford)

Wednesday 4 July 1990

DISCRIMINATION BETWEEN SOCIAL SPHERES

John Gardner, All Souls College, Oxford

1. The division of the world into social spheres is often said to be a characteristic of liberal political theory. For some, this fragmentation of social life into political, economic and personal realms frustrates liberalism's fulfilment of its liberating promise; for others, such fragmentation is essential to the fulfilment of that liberating promise. The question, it seems, is whether these supposed social spheres protect us from domination by a single way of life, or subject us to a rigid regime of approved ways of life. On this, see Roberto Unger, *The Critical Legal Studies Movement*, (Cambridge Mass. 1986), 5-57; Michael Walzer, 'Liberalism and the Art of Separation', *Political Theory* 12 (1984), 315; Samuel Bowles and Herbert Gintis, *Democracy and Capitalism*, (London 1986), 121-151.

2. A picture of a social life divided into spheres often seems to inform legal doctrine, and discrimination law contains many intimations of such a division. In s20 of the RRA 1976, we find that race discrimination in the provision of goods, facilities and services is only unlawful where the goods, facilities and services are provided 'to the public or a section of the public'. In two cases in 1973 and 1974 the House of Lords held that the aim of these words was to exclude the operation of the Act from certain activities 'of a purely private character', on the ground that some personal matters are not appropriately regulated by such legislation. The 1973-4 cases, however, suggest two competing philosophical rationales for this. On the one hand, it is suggested that 'personal' relationships are governed by a completely different set of moral norms from, say,

commercial relationships, so that race discrimination is morally acceptable in the former but repugnant in the latter. On the other hand, there are also suggestions that both kinds of relations are governed by the same set of moral norms, but that it may sometimes be self-defeating to use state coercion to secure compliance with these norms, since coercion will destroy or detract from the value of the relationship to which the victim of discrimination was denied access. I want to argue that liberalism is committed to the second of these approaches, but not to the first. The norms of personal autonomy permeate all types of relationship, whether personal, commercial or political. But this in itself entails that there may be reasons to refuse coercion in particular situations where the coercion will destroy more autonomy than it secures. So there are some matters which are 'private', but this is just to say that state coercion happens, on their particular facts, to be unjustified in relation to them. The use of the words 'public or a section of the public' to put some relationships outside the legislation entirely is therefore not a use of 'social spheres' to which liberals ought to be sympathetic. The cases are *Charter* v *Race Relations Board* [1973] 1 All ER 512 and *Dockers' Labour Club* v *Race Relations Board* [1974] 3 All ER 592. Useful background reading on personal autonomy would be Joseph Raz, 'Liberalism, Skepticism, and Democracy, (1989) 74 *Iowa Law Review* 761 at 779-786. On liberalism's commitment to anti-discrimination legislation, see my 'Liberals and Unlawful Discrimination', (1989) 9 *Oxford J Leg Stud* 1.

3. Another use of a 'social spheres' rhetoric is that which holds the employment relationship to be a market relationship, and then suggests that the market has its own norms, in which certain anti-discrimination norms do not fit. The problem often arises with equal pay cases, where

'market forces' are often given a life of their own, and allowed to run roughshod over the equal pay norms. A liberalism which values personal autonomy, and which justifies anti-discrimination norms by reference to the value of personal autonomy, ought to reject this position on much the same grounds as it rejects the wholesale insulation of so-called 'personal' relationships against anti-discrimination norms. Cases which try to insulate the market against anti-discrimination norms include *AFSCME* v *Washington* 770 F 2d 1401 (1985) and, less extravagantly, *Rainey* v *Greater Glasgow Health Board* [1987] IRLR 26.

4. The division of the personal from the market seems to crop up in discrimination cases in another way as well. A woman may claim indirect discrimination where an age-limit is set for applications for employment, an age-limit which she exceeds because of time spent looking after her children. Or a woman, working part-time in order to be at home with her children more, may claim indirect discrimination because an employer fails to give benefits to part time workers on the same terms as he gives benefits to full time workers. In asking whether women 'can comply' with an employer's requirements, the courts now ask whether they 'can comply' in practice. In the case of women who have devoted time to childcare, the courts answer in the negative. There are two ways to interpret this in terms of the discourse of social spheres. An uncharitable interpretation proposes that the courts are treating women with children differently from, say, consumers or other market sphere agents, just on the grounds that personal sphere agents are patronisingly assumed to be subject to an attenuated form of rationality. A charitable interpretation suggests that the courts are aiming to ensure that women's disempowered position in the personal sphere does not adversely affect their position in the market

sphere: the market sphere is being adjusted so that part-time and late-start career-tracks are available, without which women's disempoweerment would spill over. But the discourse of social spheres once again distorts the liberal agenda. The liberal justification for the state's use of coercion is merely that it thereby protects and secures personal autonomy for its citizens. Some citizens have their personal autonomy attenuated by institutional pressures, and many women take on the full responsibilities of child-rearing because of such pressures. They lack viable alternatives. Coercion in order to stop the institutional pressures themselves would often, however, detract from rather than enhancing the autonomy of women, in the sense that valuable aspects of particular relationships would often be sacrificed for the sake of closely regulating the kinds of institutional pressures which those relationships involve. An alternative strategy therefore presents itself, which is to restructure other institutions so that the relationshipos which they involve become available to women in spite of the institutional pressures they suffer in relation to childcare. It is pertinent to ask whether a woman can already comply in practice with an employers requirements just in order to discover whether making access to this particular option easier will in fact serve to enhance the applicant's personal autonomy. Cases to look at are: *Price* v *Civil Service Commission* [1978] 1 All ER 1228; *Clarke* v *Eley Kynoch* [1983] ICR 105.