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FROM INDIVIDUAL TO GROUP?

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Over the last few years a plentiful and challenging literature has developed in which feminist writers have constructed an illuminating critique of legal approaches to dismantling sexism and sex discrimination[1]. Much of this literature makes passing or more substantial reference to questions of racism, generally in the context of an acknowledgement of the specificity of the oppression of black women. However most of it[2] does not addres directly the question of what the critical tools and insights of feminist social theory might contribute to a more thoroughgoing analysis of laws designed to combat racism. This silence is born partly of a recognition and respect for the specificity and complexity of racism and its relationship to law; a (proper) inhibition from too easily regarding racism and sexism as simply analogous social institutions; and an understandable concentration on the question of women's oppression and its legal constitution, stretching beyond anti-discrimination legislation, which is the central focus of feminism.

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However, I think it is true to say that many of us who are concerned with this general field of inquiry are uncomfortable with the fact that, with some notable exceptions[3], there has been a relative lack in United Kingdom law journals of critical analysis specifically focussed on race discrimination law. This is not to say, of course, that the question of racism is not canvassed in legal literature. Particularly in the criminal justice area, the racist practices and attitudes of public institutions such as the prison system and the police are debated regularly in specialist and general press.[4] However, it would be fair to say that in terms of analysis and critique of the potential positive role of law in combatting racism, there has been less published debate than in the area of gender. Given the scandalous under-representation of Afro-Carribean and Asian people and those from practically all ethnic minority groups[5] on the staff of law schools (and indeed in the higher education system generally) this is perhaps (depressingly) predictable. Whilst the contributions of members of non-oppressed groups to the struggle to understand and opppose racism in the legal sphere is to be welcomed,[6] both the prominence of ideas about the relevance of direct experience and particularity of perspective in much modern social theory and straightforward arguments of social justice identify this under-representation as a major cause for concern and activity. Whilst working for significant improvements on this front, it is obviously important for us to familiarise ourselves with developments in other countries, such as the United States, where black people have found a significant voice in the legal academy and have begun to

subject legal practices to the scrutiny of what has come to be known as 'critical race theory'.[7] However, it also seems worthwhile to ask what contribution feminist ideas, which are beginning to have some impact on the law school agenda in this country, could make to a critical understanding of race discrimination law. This is the underlying project which informs this paper. I should like to note at this point my sense of discomfort both at the possibility of being seen to pre-empt or deny the distinctive perspectives of people from ethnic minority groups by generalising a white feminist perspective to their position, and, conversely, of being marginalised as one 'loony left' approach talking to another. Certainly, there will be aspects of the issues which I am discussing to which my position as a middle class white woman will have made me insensitive. My conviction that racism, like sexism, cannot and must not be regarded as exclusively the problem of its victims, and that the challenges posed by feminist and anti-racist analyses of law are challenges which must be met by all lawyers, prompts me to continue with the project nonetheless.

My argument will fall into two main sections. In the first place, I shall return to the questions I raised in an earlier article on sex discrimination law, so as to explore the relevance of feminist questions I raised there for race discrimination law. This will involve some discussion of the relationship between feminist and anti-racist approaches to law, and a more general account of the questions of social theory raised by feminism. Secondly, I shall move on from the

feminist critique of anti-discrimination law to ask one specific question about possible reform: how far could we improve the symbolic and instrumental value of anti-discrimination law by employing the notion of collective or group-based rights? What legal and political questions are raised by this kind of approach? Finally, I shall try to draw some general conclusions about the usefulness of and dangers inherent in anti-discrimination legislation and make some tentative suggestions about where we might go from here. I shall in particular address the question of how reformist lawyers ought to respond to feminist and anti-racist scepticism about the gains to be had from law and legal processes.

I FEMINIST PERSPECTIVES ON ANTI-DISCRIMINATION LAW

In an earlier article[8] I noted that there is now a wide consensus, among lawyers with very different political points of view, about certain intractable problems thrown up by the sex discrimination legislation. Problems of proof; the hopeless inadequacy of the available remedies; the unsatisfactory nature of the resource basis and structure of the enforcement agencies; the inexpert nature of the tribunals hearing discrimination cases; the lack of legal aid for tribunal cases; all these are widely acknowledged to hamper the potential effectiveness of the legislation.[9] All of these technical problems, and more, apply equally to the operation of the Race Relations Act[10], and have been analysed and criticised by the Commission for Racial Equality in its proposals for reform.[11] The general message delivered by

these and similar proposals is that, with some fairly substantial modification, but without any major change of direction or underlying principle, the anti-discrimination law could be made to work tolerably well. Several rather different kinds of problem are, however, suggested by a feminist critique, and these seem to call into question the very structure and basis of anti-discrimination law. I shall now sketch out some of these feminist questions, and consider their relevance for race discrimination law.

Assumptions

(a) The Underlying Notion of Equality of Opportunity

It is widely recognised that a legal commitment to formal equality is insufficient to guarantee the fair treatment of groups which have suffered a history of prejudice and iscrimination. This is reflected in the Sex Discrimination and Race Relations Acts' commitment to 'equality of opportunity', and their instantiation of the concept of indirect discrimination. However, this fundamentally liberal notion, the precise delineation of which is in any case by no means clear, poses problems for and puts limitations on the achievements to be made by anti-discrimination law. For example, indirect discrimination effectively uses an unequal outcome as a prima face test for inequality of opportunity. However, the ultimate willingness of the tribunal to interpret this as an instance of unjust, illegal inequality is modified by the underlying ideology of equality of opportunity, which invites the tribunal to be receptive to the idea that unequal results may be explained in terms of the free, autonomous choices of individuals. For example, if the sexual

segregation of the labour force, the concentration of women in low paid and part time work, and the under-representation of women in highly paid and high prestige jobs are seen as flowing from autonomous individual choices which flow in turn from women's and men's legitimately different lives, the tribunal will be more sympathetic to arguments of justification and less persuaded by the plaintiff's argument that the result represents a legally recognised injustice. In other words, the tribunal's response to the evidence may be affected by the very stereotypes which many of us hoped that the legislation would serve to attack. Exactly comparable problems arise here in respect of race: although the hold of 'naturalistic' or 'biologistic' ideas about the appropriate place, role and characteristics of people from ethnic minority groups is perhaps now less tenacious than is the case with sex, the influence of stereotypes about what, for example, Afro-Carribean or Asian people are like can be directly relevant in race discrimination cases. This is because they affect both the plausibility of certain kinds of arguments about justification and the tribunal's reading of whether or not the unequal outcome is something which should be regarded with suspicion, or rather as just the 'natural' outcome of people's choices. The powerful hold of racist stereotypes in areas such as police practice and the treatment of prisoners[12] can hardly be doubted to exist in most areas covered by the current Race Relations Act, and many more which are not.

The Implication of the Individual Complaint

Following on from these difficulties with the liberal ideology

of equality of opportunity, there are further limitations in the capacity of indirect discrimination to bite against structural sexism or racism which are inherent in the nature of the liberal legal form. Indirect discrimination seeks to address practices which have discriminatory effects, but it works by means of individual lawsuits which, it is hoped, will have wider knock-on effects. This has indeed happened in some instances, but the relative infrequency of successful cases is, as we have already noted, often deplored. One problem with the current legal approach is that a basic structural implication of any lawsuit is the idea that what is complained against is abnormal. This implication, once agan, affects the tribunal's reading of both law and fact, and it constitutes a psychological and hence material barrier to success in indirect discrimination cases for a very simple reason. This is that in many areas of social life, institutional sexism and racism are the norm: they cannot be regarded as abnormal. Descriptive and prescriptive conceptions of 'the norm' shade into one another, generating a reluctance to conceive the statistically normal as legally proscribed: descriptive normality confers legitimacy. Doubtless this speaks volumes on the general problem of laws which seek to legislate in advance of social practice and consensus. But it can hardly be doubted to pose a special problem for Afro-Carribean, Asian and female defendants who are addressing their complaints about heavily entrenched and rarely questioned social practices to a white male dominated legal forum. The statutory construction of (certain very limited kinds of) racism and sexism as abnormal has proved to be relatively

impotent in the face of the broader social construction of them as normal. This seems likely to mark a significant difference in the experience of male plaintiffs under the Sex Discrimination Acts and white plaintiffs under the Race Relations Act, whose complaints will often call into question practices (such as affirmative action) which are not so universally and unquestioningly endorsed. An interesting example of 'majority' plaintiff who did meet with little sympathy from the courts arose in the Peake [13] case, in which the practice complained of was assimilated with chivalry - precisely the kind of widely accepted sexist institution to criticisms of which the courts are likely to be resistant. Of course, the Peake decision is happily no longer with us, but its history is of continuing interest.

(3) **Problems of Comparison with the White Male Norm** Related to Problems of symmetry

A further problem in the operation of the Sex Discrimination Acts is a function of their definition of discrimination in comparative terms: both direct and indirect discrimination depend on a comparison of the plaintiff's treatment or position with what would have been the treatment of or what is the impact of the practice upon a person of the opposite sex. The major problem here is that the standard of treatment or the outcome which represents the point of comparison and hence the Act's conception of what is normal or legitimate is necessarily a norm set for (and generally by) men. This poses particular problems in areas such as pregnancy where particular treatment is legitimate yet where a discrimination claim is either ruled out in an exercise of blinkered logic[14]

or allowed on the basis of an inappropriate comparison between a pregnant woman and a disabled man[15]. It also illustrates rather clearly the blunt critical edges of the legislation, which cannot provide any platform for litigants to criticise the formulation of the 'normal' standard: they must content themselves with arguing for assimilation to it. Complaint about formal difference rather than substantive critique is the name of the game. Are similar problems posed for Afro-Carribean and Asian people by the comparative aspect of anti-discrimination law? Certainly assimilation to a white-defined standard is seen as an eminently unsatisfactory goal by most anti-racist writers, and the desire to raise more radical questions about social justice has infused not only critical social theory but also popular culture, as for example in the songs of Tracey Chapman. As in the case of gender, appeals to specific needs, interests, ways of life or sensibilities are inherently dangerous and double-edged in the context of a legal system informed by the formally egalitarian ideology of the rule of law, just as basic challenges to the conventional construction of standards and value are quite literally ruled out of court.[16]

Problems of Symmetry : See above.

As Cotterrell has noted,[17] at a formal level, anti-discrimination legislation operates by means of decategorisation rather than categorisation. In other words, it picks out certain features or categories only in order to prohibit their operating as reasons for certain kinds of decisions. This reflects the liberal notion that all have the

same right not to be discriminated against. It opens up the possibility of white male legal actions which exploit the vulnerability of any legal recognition of race or gender difference[18] however important these may be in addressing the disadvantage of women or certain ethnic groups. It can do so precisely because the legislation is framed in terms of difference rather than disadvantage: it constructs the problem to be tackled as race and sex discrimination, rather than as discrimination against and disadvantage of women and certain ethnic groups. Quite apart from the fact that this seriously misrepresents the social problems to which the legislation purported to respond, it means that any kind of protective or remedial measure addressing disadvantage is suspect. In particular, it rules out affirmative action, even of a moderate kind, as objectionable in principle. It thus represents a serious limitation on the legal and political possibilities for tackling women's and ethnic minority people's oppression and social disadvantage.

Assumption: that actions not contained in Acts are legitimate.

The Implicit Validation of Sexism and Racism in the 'Private' Sphere

Related to the comments I have made about the need for individual litigants to convince the tribunal that what happenned to them was 'abnormal', the converse, and equally damaging, implication of the legislation must be that less favourable treatment on grounds of sex or race or unjustified differential impact are legitimate where they fall outside the limited ambit of the Acts. As Fitzpatrick has suggested,[19] in the context of a society where racism is endemic, it is in

principle impossible to have 'innocent' law: any legislation which attempts a partial attack on race discrimination implies, at the very least, that only that racism covered by the legislation is of sufficient importance to merit political intervention and to raise serious questions of social justice. This implication becomes less damaging the more thoroughgoing the legislation is, and as arguments about the relative ineffectiveness of legal intervention become correspondingly stronger. Yet in a racist and sexist society, it is impossible completely to escape the implication of limited anti-discrimination legislation that discrimination not addressed by it fails to raise questions of injustice calling for political redress.

END

Empowering Disadvantaged Groups?

I hope that these brief comments will have been sufficient to demonstrate that the problems from a feminist perspective with respect to the operation of the Sex Discrimination Acts raise comparable and similarly intractable problems for race discrimination law. At every turn the critical hold offered by the legislation is severely limited, and becomes more so when applied by judges and others whose political perspective encourages them to a restrictive view of its role. At the point of deciding what constitutes less favourable treatment, sexist and racist stereotypes can creep in; in deciding what is justified, the view of anti-discrimination law as essentially concerned with dismantling restrictive practices and opening up a genuine market of equal opportunity presdisposes tribunals to be sympathetic to economic arguments

and discourages any clear appeal to the intrinsic value of a more egalitarian world. If we want to get at the real structures of racism and sexism, individual lawsuits on this kind of model are unlikely to be an effective vehicle.

FEMINIST SOCIAL THEORY AND CRITIQUES OF RACISM

We now need to explore how these specific criticisms of the anti-discrimination legislation relate to more general themes in critical social theory, and to consider how far these alternative critical analyses suggest ways of overcoming the problems inherent in the political framework of the present legislation. The points I have made are directly informed by the insights of feminist and critical legal theory. Several of the points turn on what has become known as the critique of liberal legalism - a cluster of ideas among which the ideal of the rule of law and the separation of the world into public and private spheres are two of the most important. The liberal legal world is one in which legal rules are applied and enforced in a politically neutral and formally equal way; the legal sphere is seen as relatively autonomous from the political sphere; all are equally subject to law and formally equal before it. There are stringent limits on the proper ambit of state intervention by means of law, which is seen positively as protecting individual rights and interests against political encroachment, and negatively as respecting a sphere of private life in which public regulation is inappropriate and indeed oppressive.[20] The place in which the line between public and private is seen as falling has shifted over time, as has the content of the rights perceived

eas the object of legal protection, but this basic framework has exercised an enduring hold over legal practice, imagination and ideology.

Several features of this framework have been the object of critique. Feminists have criticised the ahistorical, presocial view of human nature which underlies liberal rights theory and legal individualism, and have pointed out the ways in which the need to frame legal arguments in terms of individual claims systematically obstructs the project of revealing and dismantling structures and institutions which disadvantage women. These arguments have developed into a more general critique of the discourse of rights, which are seen as not only inherently individualistic, but also essentially competitive and hence anti-socialistic. They are also seen as being tied in with the notion of formal equality - hence the need to ascribe equal rights to all and the inevitable obscuring of real social problems and dsisadvantages. In a world in which white, male and middle class people both have more effective access to legal fora and meet a more sympathetic response when they get there, the ascription of formally equal rights will in effect entrench the competitively asserted rights of these privileged people. Far from dismantling the disadvantage of women, people from ethnic minorities and socio-economically underprivileged groups, it may even have the opposite effect. In pursuing this potentially radical critique of liberal law, feminists have also been understandably preoccupied with questions of strategy: to what extent should and must we try to exploit

legal forms despite our doubts about principle and practice, given that they are undeniably one of the socially salient forms of public argument and power? I shall return to these questions of strategy below.

Secondly, and related to this first point, feminist and other forms of critical legal theory aspire to deconstruct the asserted neutrality and objectivity of liberal legal forms, and to expose their substantive preconceptions and the ways in which they in fact favour systematically certain kinds of interest. An integral part of this deconstruction is the denial of the possibility of making a separation between questions of form and those of substance, and between substantive law and its enforcement. Feminism is therefore necessarily committed to a socio-legal and political analysis. One specific object of deconstruction, of particular interest in the anti-discrimination area, is that of the legal subject. Feminists claim that far from being a neutral, genderless, classless and raceless abstract individual, the legal subject (as unwittingly revealed in legal language) is in fact a white, middle class, man. Hence the views and assumptions built into legal forms, rules and principles, as well as the values and goods recognised by legal arrangements, express the experiences and viewpoints not of the abstract individual (itself an incoherent idea) but of the priviliged white male.

Furthermore, it has been argued that the nature of law as a closed system of reasoning, administered by a high-status profession and cast in exclusive and often obfuscating

language, necessarily disadvantages the less powerful in their attempts to use the legal system for reformist purposes. Those whose interests are already reflected in legal rules and arrangements have no difficulty in participating in the closed system of reasoning. In contrast, those whose interests and perspectives are marginalised or ignored will often find that arguments which they wish to introduce and see as relevant to a legal issue are regarded as irrelevant and inadmissible. A notorious example is that of the frequent experience of female witnesses in rape trials of being silenced and of having their account excluded from the legal process[21]. This can also be a function of the individualisation of legal disputes, and here anti-discrimination law is once again an important example. The individual litigant in a race or sex discrimination case may well find that evidence about her employer's practices and attitudes in different spheres or towards different people and on different occasions which have formed an important part of her recognition of her own treatment as discriminatory are not admissible in proving her individual complaint.

One possible strategy, of course, is for feminists and anti-racists to attempt to intervene in the legal forum, reworking legal concepts and definitions so as to reflect Afro-Carribean, Asian, female, and other perspectives. A notable example of such a strategy is law defining and making actionable sexual harassment - a concept which reconstructs, from a feminist perspective, behaviour conventionally regarded as acceptable and even favourable to women as unacceptable, oppressive and illegal. This kind of social and legal

reconstruction is one of the most important potential contributions of critical social theory, and in the anti-discrimination area it raises a number of possibilities for reform. One example might be the recognition of groups' rather than individuals' claims, combatting the notion of the legal subject as an abstract individual and putting the position and experience of an oppressed group explicitly on the legal agenda -a possibility which will be canvassed later in this paper.

Thirdly, feminists have demonstrated the ideological power yet the disingenousness and indeed analytic incoherence of the public/private distinction. On the one hand, the liberal argument is that there are certain areas of life (paradigmatically, the family, but also, and of relevance to anti-discrimination law, certain kinds of market relations) in which legal intervention and regulation is inappropriate or should be severely restricted. This argument is used by liberals as a justification for law's keeping out: the assertion of 'privacy' is then hived off from the preceding argument, presented as a matter of description, and the legal policy of non-intervention constructed as an absence or omission. Yet this stance of omission as politically innocent is disingenuous, for law in fact keeps out only where it is satisfied to leave in place the social arrangements and power relations which characterise the unregulated situation. Where law has the capacity to intervene, the decision not to do so is itself a political decision: omission, feminism argues, calls for justification as much as does intervention, for it

effectively legitimises the status quo.

On the other hand, the alleged distinction between public and private, although ideologically powerful, in fact collapses under just the kind of analytic scrutiny which liberal legalism prizes so highly. In the late twentieth century at least, even discounting the argument that omission is the political equivalent of intervention, it is quite simply impossible to find areas of social life which are legally constructed as entirely private. Even the family, to take a central example, is hedged around with legal regulation at practically every turn. This combination of the ideological power yet analytic weakness of the public/private distinction militates to its use in a way which is both intellectually vacuous in that it is question-begging, and at the same time politically powerful. A good example of this apparent contradiction is represented by arguments purporting to justify the limited scope of anti-discrimination law by simply asserting the existence of a private spheres not suitable for legal regulation without articulating just why such regulation is inappropriate. The feminist analysis sketched in this paragraph underpins the argument noted above that non-regulated areas can come to be seen as areas in which the legal system implicitly legitimises sexism and racism, given the social facts of their existence.

Fourthly, many feminists have called for a move away from analysis in terms of inequality <u>understood in the sense of difference from the position of or treatment normally accorded</u>

to men.[22] This is not to say that the powerful notion of equality is abandoned: rather, it is recast in terms of the dismantling of oppressive and exploitative power relations and of a thoroughgoing challenge to the very construction of norms and values which have conventional status and which are argued to reflect the partial judgments of men or other dominant groups. This is clearly of direct relevance to anti-discrimination law, for it addresses the problem already canvassed about the limitations inherent in the notion of comparison with and equalisation to a white male-defined norm in its introduction of a more radical egalitarianism. However, it also introduces one of the major problems for feminism or indeed any other critical social theory whose analysis depends heavily on the specificity of the oppression of a particular group. I want to dwell on this problem because it is of direct relevance to my further question about the potential gains to be had in terms of a move to legal recognition of group-based claims.

I shall try to illustrate the problem using feminism as my example. Feminism, put very crudely, attempts to understand women's subordination and to struggle against women's oppression. As such, it is implicit in the feminist project that some features of that subordination are common to all women in a particular society, at least at some level - although the forms and nature of women's oppression are recognised to be historically and culturally specific. As we have already seen, feminist critique draws heavily on notions such as 'women's' and indeed 'men's' point of view or

experience; this specificity of viewpoint is generally held to flow from the common experience of gender oppression or domination.[23] What makes this kind of feminist claim highly complex is, of course, the fact - increasingly recognised and pondered upon in feminist thought - that not all women's oppression, even in one society, is just the same. Since the subordination experienced by Afro-Carribean women, Asian women, working class women, lesbian women and women who are single mothers and so on is qualitatively different, the feminist claim must be that gender is always <u>one factor</u>, and a fundamentally important one, in constituting the social position and experience of all women and men; but it is overlaid with many other factors, most notably in our society, by race and by class. Exactly the same points can be made, of course, about the experience of racial or religious oppression: the experience of Afro-Carribean and Asian women and men is not the same, nor indeed is that of different ethnic groups, as is clearly illustrated by recent work on the prison system which shows stark contrasts in the stereotypical views held about different ethnic groups in prison.[24]

This recognition of the differentiated nature of social oppression[25] is leading critical social theorists steadily away from attractively simple, monolithic theories such as marxism, in which everything is reduced to one explanatory concept, towards a more complex and pluralistic approach. This is certainly to be welcomed, but it has to be acknowledged that so far it has raised more questions than it has answered. For it takes us into crucially important and

intractable issues such as the status of assertions about oppression generated by different individuals and groups and the role, if any, to be accorded to claims to 'truth' anud 'knowledge';[26] the relationship between the different points of view generated within particular people according to their experience of different forms and combinations of prejudice and subordination; the extent to which oppression has to be understood in cultural as well as (or as opposed to) material (economic) terms; and political questions about how to move towards a society in which these different perspectives and experiences can be heard and recognised in the attempt to begin to dismantle oppressive power relations and to reconstruct human relations along non-oppressive lines. These are fundamentally important questions of social and political theory which cannot be addressed in this paper. However, the fragmentation and diversity of the experience of oppression in society is of great significance for any group-based approach to reform of anti-discrimination law.

RACE, GENDER AND CRITICAL SOCIAL THEORY

I hope that enough has been said in the last section to show both that the methodological tools of a critical feminism are powerful in analysing a variety of social issues including those of race and ethnicity, and that this approach may be suggestive not only of critical points but also of positive future directions for anti-discrimination law. However, it must be re-emphasised that the argument is at the level of critical method, and does not imply any simplistic assumption about analogies between racial or gender oppression in this or

any other society. The project so far has been to extend a certain kind of critical analysis which in the United Kingdom has hitherto been applied to sex discrimination law to anti-discrimination law more generally. However, the analogies and points of contact between sexism and racism must occupy our attention, because they raise intensely difficult and crucially important problems of principle and practice.[27] For example, Asian women who have organised against domestic violence have often found particularly strong resistance from the police when asking them to intervene.[28] The police argue that this resistance is justified on the basis of the value of the extended Asian family and the need to allow that institution to settle its own disputes (hence avoiding awkward cultural conflicts). These women point out that this denial of support is not only sexist but also racist, in that it is based on stereotypes about the way in which Asian people live. There could hardly be a starker example of the denial of respect implicit in the marginalisation of an experience these women had struggled and sacrificed an enormous amount to express. It also represents the kind of doubly oppressive situation which is liable to arise from the fragmentation of human identity. These women were ignored by the white state power to which they appealed at the same time as being subject to censure in the community from which they came; in putting the issue in the public domain, they also inevitably risked the propagation of stereotypes of the authoritarian role of men in Asian families by media and police.

As social institutions, racism and sexism clearly exhibit

certain important differences. The centrality of naturalistic and biologistic arguments in constituting and maintaining them, at least in the United Kingdom, is arguably different; membership of particular racial groups is heavily correlated with social class and with poverty, as conventionally understood, in a way which is not so obviously true of gender; the experience of racial oppression is arguably more diverse than that of sexism given the variety of stereotypes about different racial groups. Furthermore, the need to understand oppression in cultural terms is more contested, and the meaning of 'cultural discrimination' less clear cut, in the case of women than in the case of ethnic minority groups. As Modood's paper in this volume illustrates, even in the case of racial discrimination there has been a reductive tendency towards a focus on discrimination as colour prejudice as opposed to the devaluation of a particular set of values and ways of life.

However, much also binds racism and sexism. Both are strongly associated with a variety of forms of political and social disadvantage - educational, economic, in the arena of criminal justice - and both rely to a significant extent on stereotyped views about what is normal to, appropriate for or to be expected of members of that group simply by virtue of that membership. Perhaps most importantly, both have been recognised as social institutions - parts of the structure and patterning of social relations - rather than merely cumulations of individual prejudices, actions and decisions. This move from the recognition of discrimination to the naming

of and struggle against sexism and racism is a crucial one, and opens up the possibility of and need for the common critical methodology outlined above. Finally, and more contingently, Afro-Carribean and Asian people and feminists who have come to this kind of consciousness of racism and sexism tend to share a deep scepticism about how far their situation is likely to be improved by resort to a white male-dominated legal process which relies on individual assertions of right. Can the legal process respond positively to this scepticism? Can legal forms be de-individualised and politicised so as to reflect and tackle racism and sexism understood in this way?

FROM INDIVIDUAL TO GROUP?

There are many ways in which the legal process might try to respond to the scepticism of Afro-Carribean and Asian people and women. In this paper, I shall canvass only one - the move from an exclusive reliance on individual enforcement in the discrimination area to include a focus on the rights, interests and claims of groups.[29] This kind of reconstruction seems to be well worth considering given the powerful criticisms of the limitations inherent in individual enforcement and the accompanying representation of the paradigm legal subject as an abstract individual which, it has been argued, is implicity white and male. Could a move to the recognition of group rights and/or collective remedies help to overcome the problems of legal individualism or to deconstruct the notion of the abstract legal subject in acknowledging as subjects entities recognised precisely because of their

substantive political position? I shall discuss this question on the assumption that such a reform would not replace but be combined with either the existing legislation, or a reformed statutory framework of individual enforcement which might move away from the liberal symmetry of the current legislation.

Group rights may be understood in a variety of different ways, several of which might be worth considering in reforming anti-discrimination law. For the purposes of this discussion, I shall distinguith between just two senses of group rights. The first I shall call 'cultural' or 'protective' rights. These may be adopted to protect and express respect for the particular and distinctive ways of life of peoples from specific ethnic, racial or religious groups.[30] An example would be the rights of a Sikh to wear the dress appropriate to his or her religious beliefs, or the right of a muslim worker to observe traditional religious holidays or hours of prayer. This kind of right - / the 'right to be different', as Albie Sachs has called it,[31] is already recognised to some extent in United Kingdom law, both indirectly via the Race Relations Act[32] and directly in legislation such as the Road Traffic Act 1988 s.16(2) (which exempts Sikh motor cyclists from the requirement to wear a crash helmet provided that they are wearing a turban). Such cultural rights are not so much group rights as rights pertaining to a person by reason of his or her membership of a particular group, although one can certainly imagine occasions on which it would be useful to allow the group itself to take legal steps through a representative or authoritative body to ensure that such rights were met. The development of these

kinds of legal rights as one means of ensuring tolerance of and promoting respect for cultural diversity is an important political issue which calls for serious and continued consideration.

In this paper, however, I want to assess the potential of a second conception of group rights, which I shall call 'remedial' rights. These 'remedial' rights focus on socio-economic disadvantage and the distribution of basic goods rather than on cultural discrimination and the value of cultural pluralism. These rights would apply to groups which were suffering disadvantage as a result either of present oppression or the present effects of past oppression, in areas of life in which this was the case.[11] The essence of the right would be that positive and effective steps be taken to combat and overcome that disadvantage within a reasonable period of time. This would mean that the holders of such rights would typically be members of minority ethnic and religious groups and women, rather than white men, and that the very instantiation of the rights would therefore express the perceived social problem to which they purport to respond. The enforcement of these group rights would need to be supported by adequately resourced public agencies which would offer counselling, legal advice and representation, and which would monitor the effectiveness of remedies over a substantial period of time. The assertion of group rights would be met with remedies not only of the traditional legal kind - i.e. damages or injunctions distributed among or with an impact upon assignable individuals who are members of the group - but

also a wide range of radically different remedies which would not necessarily be susceptible of such distribution. This feature would be crucial in breaking the conceptual link between loss and remedy which characterises the individual legal form.[34] Hence contract compliance, quota systems and other affirmative action programmes, urban development programmes, educational reforms and money to set up community projects of various kinds would be possible responses to the legal assertion of the violation of a group right. Should such rights be instantiated as legal rights, or must they rather be conceptualised as political rights? Would courts and tribunals as currently constituted be capable, politically or professionally, of administering legal actions asserting such claims? I would argue that it would be possible to legislate for such group rights in certain areas. For example, this might be done by allowing a group defined in terms of the Race Relations Act and Sex Discrimination Act categories (which it is to be hoped might be extended to include religion and homosexuality) whose representation in an area of employment fell below its numbers in the general pool by a certain margin, or a group whose share of valuable educational resources was disproportionately low, to bring a claim for appropriate remedial action. As such, the action would have much in common with the procedural notion of a class action, but would have the additional feature of de-individualising the legal subject and opening the way for more wide-ranging remedies which are not tied to specific legally recognised harms. The essence of the action would be seen not so much as an assertion of the existence of widespread

individual acts of discrimination against members of the group, but of an unjust disadvantage suffered by the group, the ultimate source of which would not be the subject of technical legal proof. This would overcome some of the main problems of legal proof and enforcement, and would be informed by an ideal of a substantive equality of outcome which goes well beyond the commitment of the present legislation. And although the structure of such actions would inevitably be complex, many of the technical problems which would arise have already been encountered and at least partially resolved in indirect discrimination cases under the 1975 and 1976 Acts.

What would be the main advantages of such an approach? First of all, such a notion of group rights would entail a form of class action which, as has been widely argued[35] and as is reflected in American experience, has a number of procedural advantages as compared with individual litigation. The encouragement, solidarity and consciousness produced by a class action; the wider relevance of individual pieces of evidence which can add enormously to the persuasiveness of the case; the possibility of touching on discrimination as a patterned structure rather than as individual pathology in the court room; progress in terms of widening access to legal redress and moving away from a situation in which rights are in practice the preserve of the relatively privileged few among the underprivileged group; the possibility of spreading the costs of litigation; all these constitute major advantages of the class action approach. Obviously, the possibility of class actions exists without resort to the notion of group

rights, but it is a natural concomitant of that notion and as such can fairly be regarded as one of its advantages.

Secondly, the recognition of collective rights would mean the direct and overt legal recognition of the specificity of the objects of racial and sexual discrimination. In other words, group rights would empower groups of people who experience a common socio-economic or educational disadvantage which is structured along racial, ethnic, gender or religious lines to assert themselves and the patterned nature of their disadvantage. Rather than stopping at giving all citizens the same right not to be discriminated against, which, as an exclusive stategy, as we have seen, obscures the nature of the real political problem, the collective approach would make those problems visible in the legal and political arena. It would represent a move beyond the obfuscating exclusive reliance on a symmetrical approach criticised earlier in this paper, and could mean that the legal sphere might become a more symbolically as well as a more instrumentally powerful forum in which to assert and voice the disadvantages and injustices suffered by certain oppressed groups in our society. This would help to overcome the problem raised by the symmetrical individual enforcement model's implication that discrimination is something unusual, pathological, abnormal, and would put institutional discrimination centre stage. It would represent a significant step away from the notion of the abstract, gender and race-neutral individual legal subject who is equal with all other subjects before the law, and towards a legal recognition that sexism and racism

mean that all subjects are not equal before the law, and that compensatory legal recognition and remedy is called for to combat the unfair disadvantage suffered by some legal subjects. It introduces into the courtroom the historical realities of racism and sexism, which could no longer be marginalised on the legal agenda by being divided up into individual pathological acts of discrimination of no general political significance. Litigation might become a forum in which an oppressed group actually advanced its cause and further developed its sense of solidarity and resistance to its race and gender-related disadvantage. Arguably, in other words, the notion of collective rights might help to politicise the legal process in a positive way.

Conversely, certain disadvantages and potential dangers are also inherent in the notion of collective rights. First of all, if we were to add a system of group rights to an otherwise unmodified structure of individual enforcement (and indeed to an essentially individualist liberal legal system), might the very starkness of the contrast itself serve further to marginalise racism and sexism as legal issues? Could the legal institutionalisation of a specific group paradoxically undermine the struggle against racism and sexism either by calling forth political hostility or by becoming a 'specialist' or marginal area of legal practice? The first problem is met by the fact that such a change would not occur without some measure of political will and hence a change in the political climate, but the inhospitability of the legal system even to the limited models of agency enforcement

introduced by current anti-discrimination legislation suggests that we should not merely dismiss the marginalisation point as a non-problem.

Secondly, important questions can be raised about whether the move from individual to group rights really overcomes feminist and other objections to the notion of legal rights, particularly if the structure of individual rights is left in place. In liberal political theory, the notion of collective rights has had the dubious honour of being both marginal and controversial, with purists tending to argue for the essentially individual nature of rights. Those liberals who are willing to countenance the notion of group rights tend to do so by analogy with individual rights, thus playing down their specificity.[36] This means that liberal notions of group rights tend to share many of the features of individual rights to which feminists, socialists and others object: their reliance on coercive enforcement and hence their oppositional and potentially divisive nature. If the liberal world of competitive assertions of conflicting rights by atomistic individuals is simply to be replaced or supplemented by a similar competition between self-interested groups, is this genuinely a political gain? Socialists like Tom Campbell[37] have argued persuasively for a conception of rights in terms of values and goods individuals or groups may legitimately have an interest in (which could include the non-oppressive political treatment of both themselves and others). He asserts that this model escapes the disadvantages of the liberal model of competitive and coercive individual rights.

As we have already seen, this kind of argument has not laid to rest feminist scepticism about the usefulness of rights discourse. But some of the most important of the relevant feminist and socialist arguments are addressed to a symmetrical liberal notion of rights, which the approach to disadvantage-based, remedial group rights which I have suggested would move beyond.

A third possible objection to the notion of group rights also flows from a scepticism about rights and their legal entrenchment. This is manifested in the arguments of Unger[38] among others, who asserts that the liberal legal project of fixing categories and boundaries in the concrete form of legal rules, and in particular in the form of entrenched constitutional rights, is dangerous and oppressive. In his view, the radical liberationist political project consists in precisely the opposite strategy - that of pulling down boundaries, questioning assumptions about how things have been organised traditionally, and making possible a wide variety of different kinds of social, personal and political arrangement. Unger's vision has itself been dubbed a kind of 'super-liberalism', but in the version described it suffers from a naively utopian character which arguably disqualifies it as a serious argument against practical reforms which seek to intervene in the actual legal world experienced by relatively powerless, disadvantaged groups. His argument is connected, I think, with a certain kind of scepticism about the legal process which supposes that people always have a choice about whether to use legal forms or not, whereas in the present

world, such a choice often doesn't exist. I shall return to this point in the concluding section of this paper. Meanwhile it also seems apposite to note that Unger's objection to the objectification and concretisation of particular categories and arrangements may not in any case bite against the kind of group rights which I am envisaging, which are contingent on the present existence of disadvantage and which would disappear with its dismantling.

Fourthly, a more serious problem for the notion of group rights seems to be the fact of fragmentation and diversity of individual and group identity noted in the last section. People in any social world are members of a number of different communities and groups, and suffer or enjoy a number of overlapping and interacting identities, advantages and disadvantages as a result. Those who are oppressed or advantaged for one purpose or in one sphere are not necessarily so in others. Hence we certainly cannot assume any kind of identity of interest among members of a group just because of one shared oppression, nor can we assume that, for example, racial oppression will have had the same kind of impact on the experiences, consciousness and life chances of all members of that group. A recognition of this kind of diversity, and a commitment to recognition of a plurality of oppression, experiences and interests, seems to bring with it a nightmarish vision of the potential explosion of overlapping groups defined along different lines all competing with each other (and implicity with parts of themselves) for the resources or changes necessary to dismantle their specific

disadvantages. This is to return to the liberal, competitive notion of rights from which we are trying to move away; but the practical and conceptual difficulties raised by the diversity of social oppression and the consequent fragmentation of group identity cannot be underestimated.

Conversely, we have to ask ourselves whether the legal constitution of <u>certain</u> groups identified in terms of specific forms of disadvantage as the bearers of special claims has its own dangers, given that they would be likely to be limited in number if only for practical reasons. For example, it could be said to resonate with the reductionist mistakes of monolithic social theory which were criticised above, by apparently reducing the complexities of social oppression to two or three discrete, irreducible and separate axes. Furthermore, it can be argued (as indeed it frequently has been in critical discussion of reverse discrimination programmes) that the identification of women or a racial group as the object of a speficic policy of this kind serves to consolidate the very suspect categories which it is necessary to dismantle, and to reinforce the notion that race and sex can be legitimate reasons for action. This argument, which evokes Unger's critique, however, is open to challenge. For it identifies the basis for reverse discrimination (or group rights) as the shared fact of race or gender rather than as the shared fact of race- or gender-related disadvantage. The concentration on the latter rather than the former is crucially important, not least because it escapes the inference of reliance upon a more full-blooded identity of

interest or indeed on any notion of the shared culture or values which may or may not characterise particular disadvantaged groups. Shared culture, values and ways of life can and often do form the basis for and can arise out of discrimination and oppression, but this is not necessarily the case. Whilst, as we have already seen, there is a strong case for having protective cultural rights to underpin respect for pluralism, not all attempts to dismantle oppression need to cast in legislation the specificities of any particular self-identified group or culture. To this extent I am in sympathy with the direction of Unger's argument outlined above. I also take very seriously the lessons of both Werner Menski's and Edward Phillips' papers in this volume[39], which deal with compensatory group rights in India and Malysia. Certainly any attempt in this country to move in the group-based direction would have to take account of the negative aspects of the Indian and Malaysian experience. However, very significant differences exist between each of those schemes and the more fluid approach which I have been considering, in which the legal structure would attempt to facilitate the self-identification of local disadvantaged groups within the broad categories of proscribed grounds of discrimination enacted in the Race Relations and Sex Discrimination Acts. However, if any further argument is needed to support the idea that these kinds of objections to a group-based approach should be considered seriously, one has only to look at the way in which the notion of a group and indeed of group rights has been used in political debate in apartheid countries such as South Africa to see that a reliance on the notion of

culturally identified groups can carry with it serious political dangers.

Arguments are likely to be raised about the impact of the kinds of remedies which I have suggested. These are arguments once again rehearsed in critiques of reverse discrimination, and they suggest that the individuals who benefit from such programmes are generally the relatively privileged among the disadvantaged groups, and that such strategies therefore both miss their real targets and tend unjustly to disadvantage relatively underprivileged members of advantaged groups for the benefit of relatively privileged members of disadvantaged groups.[40] This criticism is not wholly misplaced in its assertion that the effects of such programmes can fall in an unfortunately patterned way, but the basis for their criticism is misplaced. For it depends on the move from a group-based remedy to an individual-based objection. If we regard reverse discrimination as a genuinely group-based remedy, we are not called on to look in every case at questions of distribution between individuals, although distributive patterns over time will certainly be important. This argumentative move from group to individual is understandable because such objections are usually placed in the context of liberal discussion of reverse discrimination which attempt to defend it on the basis of individualistic theories of equal opportunity. Very sophisticated liberal arguments for reverse discrimination have been put forward[41], but they are ultimately vulnerable. This is because they have little to say about just why an egalitarian end-state as between particular groups is seen as

desirable, or why an unequal outcome is seen as problematic in the absence of clear proof that a particular individual has suffered from the unjust inequality of opportunity suffered by at least some members of her group. Hence the liberal reply to the conservative objection that only the relatively privileged benefit from reverse discrimination programmes is not entirely satisfactory. Once again, I would argue that a satisfactory account can only be given on the basis of a more radical and thoroughgoing commitment to equality of outcome and the elimination of social disadvantage.

GROUPS, LAWS AND POLITICS

I hope that I have now said enough to justify the tentative conclusion that it is worth the while of those of us committed to further political legal and action to combat racism and sexism to consider the symbolic and instrumental benefits to be gained by the constitution of collective remedial rights based on present social disadvantage. I have tried to show what kinds of questions critical social theory would raise about such group rights, and how these questions might be addressed. These questions are extremely complex and require much more detailed analysis and thought than I have been able to give them in this paper. However, I should like to draw out one or two underlying questions for further comment before ending this paper.

The kind of approach to group rights which I have gestured at sits right on the traditionally constructed boundary between law and politics. This boundary is in my view quite

artificial, but given the conventional understanding of the specificity of legal and political processes, it is important to acknowledge that the kinds of remedies I have envisaged for breaches of group rights might well be seen as calling for political action and decision-making rather than for legal (judicial) determination. A more overtly politically significant constitutional court might well, in my view, be able to tackle such decision-making, but I would only hold to this view on the assumption that there would be radical changes in the training, selection, tenure and accountability of judges - changes which seem far from the political agenda in this country at the moment. On the present construction of the boundary between law and politics, remedial decisions with the kinds of significant resource implications likely to be effective in tackling racial and sexual disadvantage could only come from governmental institutions. As things stand at the moment, therefore, I suspect that effective recognition of group-based remedial rights would have to be at a political rather than a legal level. One compromise would be that courts should make a finding that a group right had been violated - probably on the same kind of basis as findings of prima facie indirect discrimination - and then refer the issue to a governmental or quasi-governmental agency with effective enforcement powers for remedial action, perhaps with a system of reference back to the court within a certain period of time.

A further implication of my arguments about group rights is that they apply in principle more widely than to the social

institutions of racism and sexism. Just what is the implication of a commitment to disadvantage-based group rights is entirely socially contingent, but in a society such as ours it would certainly bite in principle against class oppression and socio-economic disadvantage in a variety of spheres including, significantly, education. In pointing out this kind of implication I am revealing just how radically egalitarian such an approach might be, were it to be pursued beyond the confines of the Sex Discrimination and Race Relations Acts' categories. Doubtless not everyone will accept the political attractions of egalitarian pluralism, and in this paper I have not been concerned to defend it in a thorough way. I have been concerned rather to point out how a commitment to it can overcome some of the limitations widely recognised to characterise the current equality of opportunity approach. Hence I would suggest that its attractions are implicitly recognised by many who would baulk at its radical implications, in that it underlies the move towards recognition of racism and sexism as structural and as expressive of institutionalised power relations rather than as entirely explicable as products of individual decision and action.

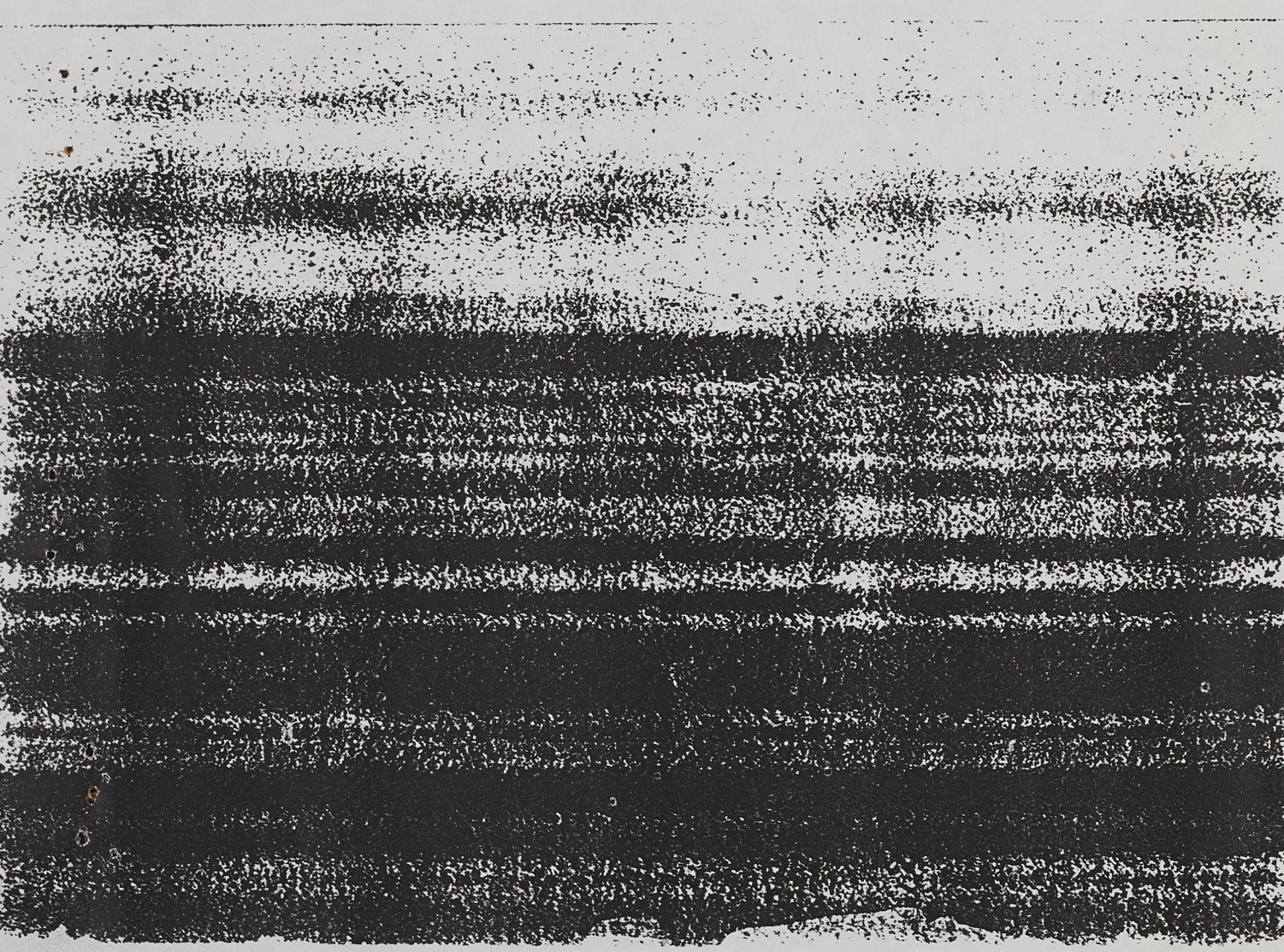
Finally, I should like to draw together some threads left loose in the paper around the issue of left-wing scepticism about using the legal process to advance radical change on behalf of Afro-Carribean and Asian people, women and others. Feminist discussions of this issue (on which there is a wide range of opinion) are sometimes reminiscent of marxist

arguments about the irreducibly oppressive nature of law, which become translated into something like a claim about its irreducible maleness. The marxist claim has always seemed to me to mark an unusual failure of imagination in marxist thought, and I feel the same about the feminist analogue. The claim that law under capitalism and law under patriarchy exhibit most of thoe oppressive features of those social systems seems to me both true and unsurprising. But we should beware both of reductionism and of a despairing and unrealistic surrender to the idea that the nature of law, unlike that other social institutions, cannot be gradually transformed through political struggle and action. This is not to say that much progress has yet been made in this direction - altohough even the fiercest left critics of the Race Relations and Sex Discrimination Acts would be loath to see them repealed.... But, given its social power, we simply cannot afford to abandon the legal process as a site for political action. And we must not do so for a further reason, already touched upon. This is because in the real world disadvantaged people do not always have a choice about whether or not to defend or advance their needs and interests by legal means. Sometimes they simply have to do so because legal action is initiated by other parties, and on other occasions they have to because no other avenue of redress is available or remains to be explored. We must try to alter law so as to make it more receptive to the arguments of the powerless, so as to stop it silencing their voices: we should not completely discount law as an arena for consciousness raising as well as material political advance.[42]

Group-based rights, then, just might be a step in the right direction, particularly if their recognition of disadvantage spilled over into wider legal recognition at the level of defence to civil and even criminal actions, for example. This would be radical change indeed, but if we are not prepared to think in this imaginative and speculative way about law, we abandon it to its current oppressive status and our sceptical stance simply becomes a self-fulfilling prophecy. I hope to have said enough in this paper to justify the conclusion that although the gains to be had from law are at the moment quite limited, we must not abandon the reformist project, just as we must not confine ourselves to a focus in anti-discrimination law. Changing law must remain one modest but important part of the radical political enterprise.

Nicola Lacey

1. See for example Katherine O'Donovan and Erika Szyszczak, Equality and Sex Discrimination Law, (Oxford, Blackwell, 1988); Catharine MacKinnon, Toward a Feminist Theory of the State, (Cambridge, Harvard University Press, 1989), Chapter 12; Carol Smart, Femininsm and the Power of Law, (London, Routledge, 1989).



2. Including my own contribution: see Lacey, 'Legislation against Sex Discrimination: Questions from a Feminist Perspective', (1987) 14 Journal of Law and Society 411.

3. See Peter Fitzpatrick, 'Racism and the Innocence of Law', (1987) 14 Journal of Law and Society 119; Laurence Lustgarten, Legal Control of Racial Discrimination, (London, Macmillan, 1980), and 'Racial Inequality and the Limits of Law', (1986) Modern Law Review 68.

4. See for example, Institute of Race Relations, Police Against Black People, 1979; Paul Gordon, 'Black People and the Criminal Law; Rhetoric and Reality', (1988) International Journal of the Sociology of Law 295.

5. The question of the proper language to be used in referring to ethnic minority groups is a difficult one, and most of the possibilities have some drawbacks. In response to the powerful arguments of Tariq Modood in his 'Black and Asian Identity', ((1988) XIV New Community 397), I shall refer in the British context to 'Afro-Carribean and Asian people' in preference to the more usual 'black people'. This has the benefit of marking the fact that racial prejudice is not merely colour prejudice, but is also based on culture (see Modood's 'Colour, Class and Culture' in this volume). The drawback with this usage is that it excludes other groups which are proptected by the Race Relations Act 1976. I shall therefore also occaionally refer to 'ethnic minority groups'. Of course, members of majority groups are also protected by the Act, but I hope that the view of the social functions of anti-discrimination legislation which emerges from this article justifies the focus on 'minorities'.

6. For an interesting discussion of this point, see Randall L. Kennedy, 'Racial Critiques of Legal Academia', (1989) 102 Harvard Law Review 1745.

7. See for example Derrick Bell, Race, Racism and American Law, 2nd edition, 1980; Charles R. Lawrence III, 'The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism', (1987) 39 Stanford Law Review 317; Patricia Williams, 'Spirit-Murdering the Messenger: The Discourse of Finger-Pointing as the Law's Response to Racism', (1987) 42 University of Miami Law Review 127.

8. Lacey, cited above, note 2.

9. See for example the articles by Bindman and Fitzpatrick in this volume.

10. See in this volume the articles by Coussey, Hepple and Mabilatsa.

11. Commission for Racial Equality, Time for a Change?, (1983); Review of the Race Relations Act 1976: Proposals for Change, (1985).

12. See for example Elaine Genders and Elaine Player, Race Relations in Prisons, (Oxford, Clarendon Press, 1989), Chapters 3-5; P. Gordon, cited above, note 4.

13. Peake v Automotive Products [1978] QB 233.

14. Turley v Allders Department Stores Ltd. [1980] ICR 66.

15. Hayes v Malleable Working Men's Club [1985] ICR 703; Webb v EMO Air Cargo UK [1990] IRLR 124.

16. One potential exception here in the gender area being the law on equal pay for work of equal value: see O'Donovan and Szyszczak, cited above, note 1, Chapter 5.

17. Roger Cotterrell, 'The Impact of Sex Discrimination Legislation', (1981) Public Law 469.

18. Judy Fudge, 'The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada', (1989) 17 International Journal of the Sociology of Law 445; Carol Smart, cited above, note 1, Chapter 7.

19. See P. Fitzpatrick, cited above, note 3.

20. For a different view of the significance of the public/private distinction, see John Gardner's 'Private Activities and Personal Autonomy' in this volume.

21. See for example G. Chambers and A. Millar, 'Proving Sexual Assault: Prosecuting the Offender or Persecuting the Victim?', in P. Carlen and A. Worrall (ed.), Gender, Crime and Justice, (Milton Keynes, Open University Press, 1987) p.58; Carol Smart, cited above, note 1, Chapter 2; Jennifer Temkin, Rape and the Legal Process, (London, Sweet and Maxwell, 1987) pp.1-8.

22. Christine A. Littleton, 'Reconstructing Sexual Equality', (1987) 75 California Law Review 1279; Catharine MacKinnon, cited above, note 1; O'Donovan and Szyszcak, cited above, note 1, Chapter 1; Carol Smart, cited above, note 1, Chapters 4 & 7.

23. However, some strands of feminist thought are sympathetic to (at least partially) naturalistic explanations, and even firmly socially constructionist accounts are often vulnerable to misinterpretation as biologistic by writers hostile to the feminist project.

24. See Genders and Player, cited above, note 12.

25. See R.W. Connell, Gender and Power, (Polity Press, 1987), Parts I & II.

26. For contrasting positions in this debate, see R. Kennedy, cited above, note 6, and P. Williams, cited above, note 7.

27. See Sandra Fredman, Deirdre Stanley and Erika Szyszczak's 'The Interaction of Race and Gender' in this volume.

28. An eloquent and incisive account of just such a situation was given by members of the Southall Black Women's Centre at a seminar held by the Oxford University Women's Studies Committee in its series on Race, Class and Gender held in autumn 1985.

29. This is not a novel suggestion. In his early work on the Race Relations legislation, Legal Control of Racial Discrimination (cited above, note 3), Lustgarten canvassed the idea of a 'collective remedial concept of discrimination' (pp.31-7). The disadvantage-based, remedial rights which I suggest should be considered have much in common with Lustgarten's ideas, and his discussion is illuminating in defending the practicality of the notion and illustrating its continuity with current approaches to anti-discrimination law in the U.S.A.. Interestingly, his original suggestion attracted little comment or response. This may have been because of its relatively brief treatment in the context of a longer work, but it is probably also attributable to most commentators' unquestioning acceptance of the individual model at the time at which Lustgarten was writing.

30. I should like to acknowledge a particular debt to Tariq Modood, whose comments at the Hart Workshop made me aware of the inadequacy of my original formulation. My continued focus on what I have called 'remedial' rights as opposed to 'cultural' rights flows from a recognition of the complexity of the issues raised by the latter, rather than from any sense that they are of less importance. Many of the most important issues concerning 'cultural' rights are dealt with in Sebastian Poulter's paper in this volume.

31. Albie Sachs, The Future Constitutional Position of White South Africans, (Institute of Commonwealth Studies, London, 1990) p.28.

32. Mandla v Dowell Lee [1983] 2 AC 548.

33. A link between the two senses of group-based rights is suggested by Charles Lawrence's argument that in interpreting anti-discrimination law (and hence in ascribing any 'remedial' rights), the decision-making tribunal might be directed to consider whether the 'cultural meaning' of the existing disadvantage was a racial or religious one ('The Id, the Ego and Equal Protection', cited above, note 7). Whilst I find Lawrence's arguments about the importance of unconscious racism totally persuasive, my feeling is that, even if it would work in the U.S.A., in the British context a 'cultural meaning' test would turn out to be highly restrictive. The lack of a recent history of overt and blanket legislative exclusion of ethnic minority groups from certain goods, along with the persistence of racist attitudes, would mean that tribunals and juries would be reluctant to ascribe a 'racial meaning' to de facto disparities. This judgment is reinforced by what we know of tribunals' interpretation of the

'justification' test in indirect discrimination cases such as Ojutiku v Manpower Services Commission [1982] IRLR 418.

34. On this point, see Alan Freeman, 'Legitimising Racial Discrimination through Antidiscrimination Law; A Critical Review of Supreme Court Doctrine', (1978) 62 Minnesota Law Review 1049.

35. See Jeanne Gregory, Sex, Race and the Law, (London, Sage, 1987), p.34-6, 156-8; A. Chayes, 'The role of the judge in public law litigation', (1976) 89 Harvard Law Review 1281; David Pannick, Sex Discrimination Law, (Oxford, Clarendon Press, 1986), pp.282-302.

36. See for example Joseph Raz, The Morality of Freedom, (Oxford, Clarendon Press, 1986), pp.198-203.

37. Tom Campbell, The Left and Rights, (London, Routledge and Kegan Paul, 1983).

38. Roberto Mangabeir Unger, The Critical Legal Studies Movement, (Harvard University Press, 1986); Social Theory: Its Situation and Tasks, (Cambridge University Press, 1987), Chapters 2-5.

39. See Menski, 'Post-Colonial Models for Compensatory Discrimination: the Indian Experience and its Lessons for Britain'; Phillips, 'Compensatory Discrimination in Malysia: A Cautionary Tale for the United Kingdom'.

40. Again, cf. the papers by Menski and Phillips.

41. See Ronald Dworkin, Taking Rights Seriously, (London, Duckworth, 1977), Chapter 9; see also the article by S. Pitt in this volume.

42. See Kimberlé Williams Crenshaw, 'Race, Reform and Retrenchment; Transformation and Legitimation in Anti-discrimination Law', (1988) 101 Harvard Law Review 1331, for a subtle and ambivalent assessment of the role of rights. Crenshaw recognises the potential of legal rights both in combatting the 'otherness' of Black people in America yet also, conversely, in risking legitimation and co-optation. In the legal arena, winning and losing are, as she puts it, 'part of the same experience'. I agree with her view that rights discourse is, however, sometimes the only available point of entry for struggle or reform, and that we need to use liberal legal ideology pragmatically, with our eyes open to its dangers.