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W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

# *Racial Discrimination and Law: Where Are We Now?*

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Tuesday 3 July 1990

**W.G.HART LEGAL WORKSHOP 3-5 JULY 1990**

# RACIAL DISCRIMINATION AND LAW: WHERE ARE WE NOW ?

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## Outline

### 1. Have 25 years of Race Relations legislation been a failure ?

The question is based on the false assumption that law is simply a technical device "capable of doing as much for ethnic relations as the microchip has done for communications" (Hepple,1987). The "common thread in all civil rights strategies is eventual failure" (Bell,1987,p.248). The ineffectiveness of the Race Relations Acts (RRA) to break the "cycle of disadvantage" is a theme of much research (Brown and Gay,1984; Smith,1976). But the RRA have driven underground those overt expressions of discrimination common in the mid-1960s (Hepple,1968); they have been an unequivocal declaration of public policy supporting those who do not wish to discriminate ( Race Relations Board 1966-67,para.65) and a basis for promoting significant changes in organisations,e.g. through Codes of Practice . They have also given individuals the opportunity to seek redress for the wrong of racial discrimination. The absence of wider effects is not unique to the RRA, but is a characteristic of most legislation which seeks to protect those without economic and social power through the mechanism of individual rights enforced by private litigation (Lustgarten,1986; Cotterrell,1984). This paper explores some of the reasons in the context of the RRA 1976.

### 2. Limits of rights-based law

(a) The "cycle of disadvantage" cannot be brought within the scope of law because legal concepts have to be capable of judicial interpretation and enforceable against identified persons; the legal process can operate only by individualising conflict between specific parties (Ehrlich, 1975 ed.).

(b) The law is directed only at one of the many causes of disadvantage, namely "discrimination".

> (i) "Direct" (RRA s.1(1)(a)): note the continuing confusion about "intention " "motive" "grounds" and "reason" -James v Eastleigh Borough Council [1989] IRLR 318,CA; R.v.Birmingham City Council, ex parte EOC

[1989] IRLR 173,HL; R v Westminster City Council, ex parte CRE [1984] IRLR 230,HC;[1985] IRLR 426,CA. The "causation" or "mixed motives" problem may soon be imported from the USA ( Price Waterhouse v Hopkins US Sup.Ct. noted (1989) 26 EOR 35); cf. Owen & Briggs v James [1982] IRLR 502,CA; and SACHR, 1987,paras.6.5 and 6.15.

(ii) "Indirect" (RRA s.1(1)(b; Fair Employment Act 1989,s.49(1)(FEA)(NI) ): based on a principle of procedural justice (McCrudden,1985, p.88) and narrowed down from its US parent (Griggs v Duke Power Co 401 US 424 (1971))(Hepple,1983,p.75); Perera v Civil Service Commission [1983] IRLR 166,CA; Mandla v Lee [1983] IRLR 209,HL; Briggs v North Eastern Education and Advisory Board [1990] IRLR 181, NI CA; Kidd v DRG (UK) Ltd [1985] IRLR 190,EAT; Ojutiku v Manpower Services Commission [1982] IRLR 418,CA; Hampson v Department of Education and Science [1989] IRLR 69,CA.

(c) A more positive statutory concept such as "equality of opportunity" or "fair opportunity" ( see SACHR ,1987,para.7.9; FEA 1989,ss.20,58) does not guarantee the redistribution of disadvantage any more than negative concepts of discrimination,particularly if the "merit " principle is invoked (SACHR,1987,para.7.13; White Paper, 1988,para.1.14; cf.Williams, 1962,pp.110,126).

**3. The symbolic and educative role of law**

The educative role has been recognised since the start (Race Relations Board 1966-67) and justifies a wide persuasive definition of equality of opportunity (above) . The Codes of Practice, formal investigation reports and "liberal" judicial decisions fulfil this purpose. The price for this social consensus has been a restrictive and racist immigration policy ( Commonwealth Immigration Acts 1962 and 1968, Immigration Act 1971 and British Nationality Act 1981 )."The price of progress was once again calculated to be concessions to the unappeasable" (Rose,1969,p.549.).

**4. Law and social integration**

The RRA have significant functions as mechanisms for social integration. In Parsonian terms , their implementation has involved the continuous "negotiation" of conflicting pressures for stability and change. Mayhew's classic study (1968) could be replicated with advantage in Britain: note how the CRE has operated between the "controlling forces" of job and housing markets and the "conditioning forces" of inadequate government funding,hostile judicial review (e.g. the Prestige case [1984] ICR 473,HL) and a culture of individualism in the 1980s (McCrudden,1987; cf. Sacks,1986). The combination of ambiguous legislative standards, legal casuistry and weak enforcement

allows the law to be all things to all people. This also makes it possible to identify the radical symbolic elements in the RRA (e.g. positive action ,indirect discrimination) and to link these with the structures of power in Britain so as to promote change.

**5. Law,power and process**

Whether one agrees with the pluralists, that the RRA represent a continuous series of compromises between conflicting social groups, or with the adherents of theories of power elites that the theRRA are used by the white establishment to maintain social control without eradicating discrimination (Bell,1987,pp.60,61), there is general agreement that the RRA are an expression of changing power relations. "What any particular group of people get is not just a matter of what they choose or want but what they can force or persuade other groups to let them have" (Abrams,1982,p.15) . One must start with the pressures and counter-pressures for the RRA ( Rose,1969,Part VI) and the curious linkages between sex discrimination legislation and the RRA (Meehan,1985): note the effect of "liberal" interpretations of sex discrimination (including EEC law) on race cases; the different proposals for reform from the CRE (1985) and the EOC (1988); and the justifications for separate agencies. Has a single code of anti-discrimination law distorted the strategic objectives of the movement for racial equality ? Note the changes in CRE strategy since 1983 with the rise of ethnic political movements. The current struggles over racial equality focus on two "symbols" of great importance: achieving more through the individual complaints process (especially by the strategic use of individual cases); and developing a co-ordinated strategy of targeting influential, large organisations (through formal investigations,contract compliance,positive action,promotion and advice) as "models" of change.

**References**

Abrams,P.1982.Historical Sociology. Shepton Mallet,Open Books.

Bell.D.,1987.And We are Not Saved: the Elusive Quest for Racial Justice. New York: Basic Books.

Brown,C. and Gay,P. 1986. Racial Discrimination: 17 Years after the Act. London: Policy Studies Institute.

Cotterrell,R. 1984. The Sociology of Law: an Introduction. London: Butterworths.

Ehrlich,E. 1975. Fundamental Principles of the Sociology of Law. transl. W.L.Moll. New York: Arno Press.

Hepple,B. 1968. Race ,Jobs and the Law in Britain. London:Allen Lane (2nd ed. Penguin: 1970).

Hepple,B. 1983. "Judging Equal Rights" Current Legal Problems 71.

Hepple,B. 1987. "The Race Relations Acts and the Process of Change" 14 New Community 32.

Lustgarten,L. 1986. "Racial Inequality and the Limits of Law" 49 Modern Law Review 68.

Mayhew,L.H. 1968. Law and Equal Opportunity: A Study of the Massachussetts Commission Against Discrimination . Cambridge,Mass: Harvard University Press.

McCrudden,C. 1985. "Changing Notions of Discrimination" in Equality and Discrimination : Essays in Freedom and Justice (eds. S.Guest and A.Milne). Stuttgart:Franz Steiner Verlag.

McCrudden,C. 1987. "The Commission for Racial Equality:Formal Investigations in the Shadow of Judicial Review" in Regulation and Public Law (eds. R.Baldwin and C.McCrudden).

Meehan,E. 1985. Women's Rights at Work: campaigns and policy in Britain and the United States. London.

Race Relations Board, Annual Report 1966-67. HMSO.

Rose,E.J.B. 1969. Colour and Citizenship: a Report on British Race Relations.London: OUP.

SACHR,[Standing Advisory Commission on Human Rights].1987. Religious and Political Discrimination and Equality of Opportunity in Northern Ireland: Report on Fair Employment. Cm.237. HMSO.

Sacks,V. 1986. "The Equal Opportunities Commission - Ten Years On" 49 Modern Law Review 560.

Smith,D.J. 1977. Racial Disadvantage in Britain. Harmondsworth:Penguin.

White Paper, 1988.Fair Employment in Northern Ireland Cm. 380. HMSO.

Williams,B.1962. "The Idea of Equality". in Philosphy,Politics and Society. (eds. P.Laslett and W.Runciman) 110.