Principles of Public Law

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EQUALITY

26.1 Introduction

Liberal democracies do not consist of identical individuals. It is a random collection of men and women ranging from convicts, millionaires, evangelical Christians, fundamentalist Muslims, to hereditary peers or refugees. Each one of these is recognised by others as belonging to a group or groups in society and this recognition determines their status. Hence the importance of the principle that all men and women, whatever group they belong to, should enjoy equal application of the law. This is easy enough to state, but far harder to implement. It is not enough to ensure that the law places no obstacles in the way of different groups of people on their way to the ballot box. This is the purely 'formal' notion of equality, espoused by libertarians like John Stuart Mill, who suggested that equality for women could be secured by ensuring their access to education, the franchise and employment. According to the libertarian view, after that was achieved, nothing more needed to be done; women should achieve their goals by talent alone. This model of equality imposes no obligation on society to adopt positive measures to ensure that sectors of the population whose status is irredeemably different are afforded true equality of opportunity. Nor does it impinge on the freedoms of others to live as they desire.

Clearly, this purely *formal* model of equality is insufficient to ensure effective equality in society. Women, for example, may still suffer the legacy of discrimination from centuries past. In order to eradicate such long established practices, *substantive* equality requires that the marketplace should adapt to women employees, not vice versa. (For an outline of this view, see Gardner, J, 'Liberals and unlawful discrimination' (1989) OJLS 1.) For the same reason, ensuring that everybody has equal access to the ballot box does not achieve true equality unless each individual feels there is some point in exercising his or her right to vote. Therefore, the State must guarantee to individuals or groups of individuals that their views and conduct will not be ranked at a lower level than those of other members of society. Without this guarantee, people will not see any link between their vote and the decisions and actions of the party in power. People have to be treated in such a way that they can and want to exercise that right to vote. A minority group routinely discriminated against by the majority and relegated to the lowest echelons of society in terms of employment, services, housing and so on will care little about the objectives of the democratic process since the views of its members are disregarded at a day to day level. So measures to ensure equality have to

start somewhere further down the scale that leads to the ballot box. This is to ensure that we can achieve what Ronald Dworkin calls a 'communal' democracy:

> This means not only that everyone must be allowed to participate in politics as an equal, through the vote and through freedom of speech and protest, but that political decisions must treat everyone with equal concern and respect [*Freedom's Law*, 1997, Oxford: OUP, p 365].

Meaningful equality thus requires certain measures to be taken by the State to coerce private bodies not to act in such a way as to reduce the status of groups of individuals in society by discriminating against them. How to reconcile this with the principle of a free society in which private individuals should be allowed to get on with their lawful activities without interference from the State is one of the most pressing problems of a modern liberal democracy. The freedom of private parties to contract with others – mainly in the field of employment, but also in the provision of goods and services – must be curtailed in order to secure the equality rights of others. But how is the balance to be struck? The trouble is that, once our rulers start justifying the imposition of laws on people in the name of justice, or equality, or some higher value, they are necessarily subordinating what we think is right to what they deem to be right and good for us. As Isaiah Berlin observes,

> This is the argument used by every dictator, inquisitor, and bully who seeks some moral, or even aesthetic, justification for his conduct ['Two concepts of liberty', in *Four Essays on Liberty*, 1975, Oxford: OUP, p 151].

If real equality is incompatible with individual liberty, how much rein should we give our rulers to decide what is best for us? The legislature that decides one day, quite sensibly, that employers should not recruit a man if an equally well qualified female applicant has put in for the post, may, the next day, declare that practising Christian Scientists are under-represented in the education system and pass a law to scrutinise the employment procedures of all schools for discrimination against Christian Scientists. This may seem far fetched, but it could be justified on the same principle that authorises interference by the State with the contracting powers of private bodies in the areas of sex, race and disability discrimination. The only way to reconcile coercive anti-discrimination laws with the principle of liberty is by acknowledging, again in the words of Isaiah Berlin, that:

> ... respect for the principles of justice, or shame at gross inequality of treatment, is as basic in men as the desire for liberty. That we cannot have anything is a necessary, not a contingent, truth [p 151].

Even if we accept that liberty must be curtailed to a certain extent to secure equality, the question remains as to who should decide when and what equality interests will prevail. It has been argued in Chapters 19–25 that most

rights and freedoms, if threatened, may be relied upon in the courts to challenge State action. But to what extent can we claim that a general democratic principle of equality entitles us to equality of laws and executive actions and that this is enforceable through the courts? This question arose recently in a Privy Council case concerning the scope of the right to equality in the constitution of Mauritius. The applicants claimed that the changes made to school examination regulations discriminated against pupils who did not speak oriental languages. Although the constitution prohibits discrimination in the enjoyment of rights on a number of limited grounds, there is no positive right to education or access to a particular school to be found in the constitution. The applicants nevertheless argued that there was a general substantive right to equality that went beyond the rights specified. The Privy Council did not doubt the principle that equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently. But Lord Hoffmann observed that:

> ... the very banality of the principle must suggest a doubt as to whether to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason for treating them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle – that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how the principle is to be applied [*Matadeen v Pointu (*1998)].

These judicial observations are borne out by the fact that the political instinct since the 1960s has been to legislate on these issues first and then to leave the interpretation to the judges, rather than relying on the common law to determine in what circumstances unequally placed persons should be treated unequally in order to achieve equality of opportunity. Nevertheless, as the cases discussed below demonstrate, judges are generally prepared to disagree openly with the lines drawn by the legislature, even in the sensitive areas of equality and discrimination.

So, inequality of treatment is sometimes necessary because the most insidious forms of discrimination appear in the guise of neutral requirements for all comers, which can only be fulfilled by a select few. Educational and linguistic requirements may disclose a form of indirect discrimination if not objectively necessary for the task in hand; see below, 26.3.2. To combat this, it is necessary for the State to ensure that people in similar circumstances should

be treated similarly and that any differences in treatment should be objectively justified.

Before tackling the scope of anti-discrimination rights, it is perhaps worth asking why we think it important to achieve the substantive equality which they are designed to secure. True democracy, it has been said, rests on this equality, but are there any other values that can be identified on the way? McCrudden has pinpointed a few objectives about which there is some consensus in this area (McCrudden, C, 'Introduction', in *Anti-Discrimination Law*, 1991, Dartmouth: International Library of Essays in Law and Legal Theory). It is said, probably correctly, that routine discrimination against certain groups in society sometimes erupts in protest and other public order problems that are best avoided by preventative legislation. Disruptive protests – such as those carried out by the suffragettes at the turn of the century – may be averted by appropriate measures prohibiting discrimination. The utilitarian argument is that permitting discrimination is economically inefficient since it gives an unfair competitive advantage to those players on the market who are prepared to be unfair. Allowing prejudicial and discriminatory practices to pass unchecked may have the consequence that less qualified candidates are given an uncompetitive advantage, thereby distorting the field. Anti-discrimination laws also open the market to more people and therefore allows for more efficient use of the talents and skills available in society. In addition, the recognition of plurality in society contributes to its richness and diversity. Instead of learning only about the Bible, for example, children should be educated about Buddha, Mohammed and Ganesh; in this way, they will not only be better equipped to make their own choices but the tapestry of education will acquire a few more strands (see Poulter, S, 'Minority rights' in McCrudden, C and Chambers, G (ed), *Individual Rights and the Law in Britain*, 1994, Oxford: Clarendon, pp 457–62; and Poulter, S (1987) 36 ICLQ 589, pp 614–15).

Finally, it has been argued that 'equality' should be regarded as a constitutional principle, like 'access to justice' and 'freedom of expression'. These constitutional rights recognised by the common law were used by judges to determine judicial review applications before the ECHR became part of national law. The substantive ground of challenge in judicial review proceedings, 'unreasonableness', is sufficiently open textured to yield a right to equality as one of its protected norms (see Jowell, J, 'Is equality a constitutional principle?' (1994) 47 CLP 1). However, not many cases have succeeded on this basis, because of the difficulties of establishing that the respondent's justification for differential treatment crosses the high threshold of irrationality required in judicial review proceedings. When four service personnel were discharged from service under the Ministry of Defence's policy of excluding homosexuals from the army, they argued that the interference with their rights to equality was unreasonable (see above, 15.5.1). While the court acknowledged that, where their rights to equality were at

stake, any measure infringing on those rights should be subject to the strictest scrutiny, it accepted, in the end, the Ministry's justification for the policy of differential treatment (*R v Ministry of Defence ex p Smith* (1996)).

26.2 The scope of anti-discrimination laws

The common law provides a limited protection against discrimination. For example, there is an ancient rule of the common law that public inns and taverns (and by analogy, all providers of public services) are under an obligation to serve all comers without discrimination: *Constantine v Imperial Hotels* (1944). More recently, in *Nagle v Fielden* (1966), the applicant complained that she had been denied a trainer's licence by the Jockey Club because she was a woman. Lord Denning MR granted the declaration sought, that the refusal of the licence was an unreasonable restraint of trade and the Club had interfered with her 'right to work'. In effect, this judgment deployed a common law interest (albeit of somewhat dubious origin) to protect a fundamental right to equality (see, further, Oliver, D, 'Common values in public and private law' [1997] PL 630).

The main protections against discrimination, however, are to be found in the statutes that prohibit discrimination on the grounds of race, sex and disability. Since the Human Rights Act 1998, Art 14 of the ECHR has brought a much wider range of prohibited grounds into discrimination law. Article 14 provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or any other opinion, national or social origin, association with a national minority, property, birth or other status.

This right differs significantly from other anti-discrimination laws in that it is parasitic – it is of no use to someone wishing to complain of discrimination who cannot point to a breach of another freestanding Convention right. And Art 14 is, of course, only actionable against the State and public authorities as defined by the Human Rights Act 1998 (s 6 and see above, 19.9 and 19.10.4). The interpretative obligation on the courts under this Act (s 3) may provide a route for Art 14 application in private cases, but the complainant would have to have a case under a substantive Article as well.

26.2.1 The scope of Art 14

As we have seen, there are many grounds of discrimination set out in Art 14 of the ECHR and the list is open ended ('other status'). But the case law of the European Commission and Court has established that some grounds are more prohibited than others. The 'suspect' grounds are limited to sex, race and legitimacy of children. In these cases, the European Court of Human Rights

will scrutinise very strictly any justifications advanced on the part of the signatory State. In other words, in these cases the State's margin of appreciation, or its ability to stray from the requirements of the ECHR, is narrower here than in other areas of discrimination. The European Court of Human Rights has been particularly robust in its approach to sex discrimination, holding that

> ... the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention [*Schuler-Zgraggen v Switzerland* (1993)].

Article 14 must be pleaded in relation to some other substantive right in the ECHR. It is not necessary to establish a violation of another Article; if the claim comes within the ambit of another protected right, then it is possible for the applicant to succeed on discrimination alone, even if the primary violation has not been established, or the signatory State's action has been found to come within one of the permissible exceptions to that right (*Belgian Linguistic* case (1979)). A good example of this is *Abdulaziz and Others v UK* (1985). The UK's policy of not letting in husbands of lawfully settled immigrants was considered to come within the permitted exceptions to the right to privacy under Art 8, so they failed on that point. Article 8 does not require signatory States to grant the right of family members to enter and reside. But the fact that the applicants could allege a difference in treatment without a legitimate justification under Art 14 carried their claim through.

Equally, even if the right does not itself arise directly out of one of the ECHR provisions, once a State has introduced additional rights, it cannot implement them in a discriminatory manner. The right to have a system of appeal courts, for example, is not implicit in the fair trial provisions of Art 6 – once a Member State has put such an appellate system into place, it cannot operate it in a discriminatory fashion, since Art 14 prohibits discrimination in allowing access to courts throughout the whole judicial system.

Even if the European Court of Human Rights finds a violation of a substantive right, it is still theoretically possible to obtain a ruling that Art 14 has been infringed as well. In *Marckx v Belgium* (1985), the court concluded that the unfavourable treatment of illegitimate children under Belgian inheritance laws violated their right to a family life under Art 8 and breached the requirement under Art 14 that Convention rights should be secured without discrimination. But, in most cases, the court will content itself with a finding that a substantive right has been breached. In another case involving Art 8, the applicant challenged laws criminalising homosexual behaviour in Northern Ireland (*Dudgeon v UK* (1982)). The court, having found a violation of Art 8, left it at that, without going on to consider the applicant's claim that the imposition of these laws in Northern Ireland and not in the rest of the UK was a breach of Art 14.

The court has been reluctant to be drawn into disputes about discriminatory allocation of State resources where direct inequality is not in point. In *Botta v Italy* (1998), it rejected a claim that the lack of disabled facilities at a seaside resort violated the applicant's right to equal enjoyment of his right to a private life under Art 8, together with Art 14. The court held that such 'social' rights as the participation by disabled people in recreational and leisure facilities could not come within the scope of Convention rights such as Art 8 and, therefore, Art 14 did not apply.

26.2.2 Anti-discrimination legislation

Before incorporating Art 14, the UK legislature took action to prohibit discrimination in three main areas: race, sex and disability. The Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995 each define direct discrimination as unfavourable treatment of a person on grounds of race, sex and physical capacity. Indirect discrimination is the application to that person of a requirement that cannot be justified other than by reference to the person's race, sex and physical capacity, and is to the detriment of that person because they cannot comply with it. These Acts protect anyone, not just a victim of discrimination, who claims that they have been penalised for complaining about discriminatory practices. Discrimination on grounds of someone else's race is prohibited. Employers for example who prevent their staff from serving black customers will be committing an offence under the Act (*Zarcynska v Levy* (1979)). Despite these broad prohibitions, it will be seen below that it is possible for discrimination on all these grounds to be justified in certain circumstances (see below, 26.3).

Legislation has also been passed to prohibit discrimination on grounds of religion or political belief in Northern Ireland, since it is in this region that this form of discrimination causes the most violent civil strife. Here, it is a statutory tort to discriminate against someone because of their or their family's religious affiliations and compensation is available for anyone who can establish that such discrimination has taken place (s 76 of the Northern Ireland Act 1998). The Fair Employment (Northern Ireland) Acts 1976 and 1989 prohibit such discrimination in the workplace.

Race

The main statutory prohibition on racial discrimination is to be found in the Race Relations Act 1976 (RRA). 'Race' as defined by this act means colour, nationality or ethnic or national origins. Discrimination on these grounds is unlawful in employment, education and in the provision of goods, services, and facilities to the public. The Act also applies to advertising which has the effect of excluding members of particular racial groups. However, the Act does not cover the activities of those bodies whose function is not to provide a service but to control people – so, for example, the conduct of immigration authorities or the police cannot be challenged under the Act. Special provision is made in the Act for discriminatory practices by private institutions, such as clubs, since it would be possible for a club to escape legislative control of its

discriminatory practices by arguing that it is not providing a service to the 'public'. All clubs are, therefore, covered by the Act, provided they have 25 or more members. Unlike the Sex Discrimination Act 1975, race discrimination law in this country has only been indirectly influenced by Community law in this field. For this reason, public authorities carrying out official duties are still immune from the provisions of the RRA, unlike practices by public bodies that discriminate on grounds of sex. On the other hand, the strict scrutiny of the justifiability of discriminatory measures, applied by the European Court of Justice in C-170/84 *Bilka-Kaufhaus v Weber* (1986), is applied under the RRA as much as the SDA.

The provisions of the RRA are enforced by the Commission for Racial Equality which conducts formal investigations into an activity which it believes to be discriminatory. At the conclusion of this process, a non-discrimination notice requiring the party concerned to cease their discriminatory practices may be issued. The Commission may also assist individuals who wish to apply for compensation for breach of their rights under the RRA before an industrial tribunal, if their complaint concerns employment, or through the ordinary courts if they have been discriminated against in other areas covered by the Act. Damages may be awarded for injury to feelings, and there is no limit on the amount of compensation which may be awarded.

Sex

The Sex Discrimination Act 1975 (SDA) covers discrimination on grounds of sex and marital status in the fields of employment, education, the provision of goods and services to the public, the disposal and management of premises and advertising. The SDA also protects employees who bring complaints or evidence under the Act from being victimised. The Act only covers non-contractual discriminatory practices; matters relating to pay are governed by the Equal Pay Act 1970. The scope of this legislation was, therefore, somewhat limited and it was only when the European Community's laws in this area became part of national law that discrimination on grounds of sex took centre ground in national courts. So, for example, the immunity enjoyed by public officials under the SDA was greatly restricted when the Court of Justice ruled that the issue of a certificate that prevented the bringing of a discrimination claim in respect of employment by the Royal Ulster Constabulary, on the basis of national security, amounted to a failure to provide an effective remedy for breach of Community law (see above, 18.2) (*Johnston v Chief Constable of the RUC* (1986)). As a result of this judgment, the Sex Discrimination (Amendment) Order was adopted in 1988 to remove the exclusion on grounds of national security for discriminatory practices in employment and education. It is important to remember, however, that in challenges to other forms of discrimination, this Order is not applicable, so important evidence may be withheld on grounds of national security. This legislative gap led to the decision by the European Court of Human Rights in *Tinnelly and McElduff v UK* (1998). Here, a firm, most of whose members were Catholics, had been

unable to proceed in its claim that it had been discriminated against on religious grounds by a major contractor because crucial evidence was excluded on national security grounds. The Court ruled that it had been denied its right to a fair trial under Art 6 of the ECHR.

The development of European Community law on sex discrimination is discussed in detail later (see below, 26.4). As far as the SDA is concerned, the Equal Opportunities Commission is responsible for monitoring compliance with its provisions, although, unlike the Commission for Racial Equality, it relies on litigation rather than investigation to get its message across. This takes the form of assistance to individuals in taking discrimination claims before the courts as well as judicial review. The Equal Opportunities Commission scored a notable success in the role of public interest litigator in 1994, when it successfully challenged provisions in domestic law which discriminated against part time workers (who are usually women) in respect of qualification for redundancy payments. The House of Lords granted their application for a declaration that this was in breach of European Community law (*R v Secretary of State for Employment ex p Equal Opportunities Commission* (1995)). The most important advance made in this case was the recognition by the courts of the Equal Opportunities Commission's standing to bring judicial proceedings in their own right.

Disability

The only form of statutory prohibition is set out in the Disability Discrimination Act 1995 (DDA). Like the RRA and the SDA, the DDA prohibits discrimination against disabled people in the context of employment, education, provision of goods and services and in the provision of property. The Act applies to all UK employers who have 20 or more employees. It does not apply to a number of occupations, including the armed forces, the police, fire fighters, prison officers and people working on boats or aircraft. There are complex definitions within the Act as to who should come within the scope of its protection. After all, 'disability', in its literal sense, can extend from paraplegia to a very minor disability such as short-sightedness. The DDA sets a minimum standard for disability – the person concerned must have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities, but includes within its scope conditions which may not be very significant at the time but may be progressive, such as HIV, multiple sclerosis or muscular dystrophy. The DDA also covers people who have had a disability in the past, even if they have since recovered.

As with the RRA and the SDA, a criterion of 'less favourable treatment' applies for direct discrimination. This means that a person will be able to establish direct discrimination under the Act if he or she can prove that more favourable treatment would have been meted out but for the fact that the victim of discrimination had been disabled. The Act will also be infringed if an

employer or a provider of services, etc, fails to comply with a duty of 'reasonable adjustment' (s 6), for example, by installing ramps, Braille keyboards, or making the necessary alterations to working hours and procedures. In relation to service provision, a shop owner may be in breach of the DDA if he fails to allow access to a blind person's guide dog, even though a general prohibition on animals on his premises is lawful. Like the RRA and the SDA, the DDA makes it unlawful to victimise anyone, whether disabled or not, who complains that the provisions of the DDA are being breached. The Act also imposes restrictions on recruitment for vacancies, so that employers may not include requirements in job advertisements or interview questioning which would unjustifiably exclude people with disabilities. A requirement for a driving licence which would discourage a candidate with cerebral palsy or epilepsy for applying, for example, will breach the Act if driving is not essential to the job.

Like the other anti-discrimination laws, there is to be a regulatory body, the Disability Discrimination Commission, established by the Disability Discrimination Act 1999. It will have powers to conduct formal investigations, issue non-discrimination notices and assist individuals in litigation concerning disability matters.

26.2.3 Justified discrimination

Because of the particularly intrusive nature of anti-discrimination legislation, which affects the behaviour of public and private actors alike, the courts are ready to accept circumstances where technically discriminatory behaviour should be permitted.

Objective grounds

Discriminatory measures may be justified on objective grounds and if there are no alternative ways of avoiding discrimination. In the work place, it is open to employers to seek to justify recruitment qualifications as long as they are required by the reasonable needs of the employer. A requirement of English fluency, for example, may indirectly discriminate against certain ethnic groups; it will be justifiable if the employer is an English language teaching school, but not, perhaps, if the employer is a motor repair business. In the *Equal Opportunities Commission* case (discussed above, 26.2.1), the Secretary of State's arguments that discriminatory provisions in employment law could be justified on the basis of preserving part time employment did not hold in the absence of objective evidence to that effect. In the context of disability discrimination, as with the RRA and the SDA, an employer may only permit himself less favourable treatment towards a disabled person if there is a relevant and substantial reason and this objection cannot be overcome by making adjustments, for example, by supplying additional training or by the allocation of some duties to another employee. Service providers may be justified in refusing to make 'reasonable adjustments' if they

are prevented from so doing for health and safety reasons, or where providing a service to a disabled person would ruin or jeopardise the service for others.

Positive discrimination

The assumption that individuals have a right not to be treated as members of a particular group cuts both ways. It applies to favourable treatment as well as negative treatment. The RRA and the SDA are symmetrical in operation, in other words, practices which favour disadvantaged groups over others will be as unlawful as ordinary or negative discrimination. Substantive equality requires, in some circumstances, formal measures to be put in place to afford certain sectors of the population true equality of opportunity (see the introductory section to this chapter). For this reason, the 'symmetrical' operation of anti-discrimination legislation in this country is subject to some limited exceptions. In offering vocational training to a particular group in areas of employment where that group has been under-represented in the past, the institute may specify race or sex. The DDA requires that measures be adopted to open up opportunities for disabled people, so this, to a certain extent, is an Act authorising positive discrimination as a whole.

The effect of Art 14 on positive discrimination is more debatable. It is a classic 'negative' obligation, in other words, it imposes no positive duties on States to run affirmative action programmes, for example, or to provide resources for the improvement of opportunity for traditionally disadvantaged groups. Conversely, a State may take measures for positive discrimination without violating Art 14, provided there is an objective justification for increasing disproportionately low representation of a particular group in some area.

However, this Article does require signatory States to 'secure' the enjoyment of rights and freedoms without discrimination. The precise meaning of that obligation has not been settled by the European Court of Human Rights and the import remains obscure, particularly since the ECHR does not require incorporation of any of its substantive provisions into the national law of signatory States. Under the Human Rights Act 1998, this obligation may be interpreted in the UK courts so as to impose an obligation on the government to prevent private discrimination on the grounds set out in the ECHR. While the discriminating organisation (club, private school, private medical clinic) may escape a claim under Art 14 because it is not a public authority (see above, 19.10.4), it may be possible for the government itself to be challenged for not having 'secured' the equal enjoyment of Convention rights, in other words, for not legislating to prohibit such discriminatory practices by private actors. In disputes between private parties, it will also be possible to argue that the court, as 'public authority' under the Human Rights Act, is itself obliged to develop the interpretation of statute or common law in accordance with the principle of equality enshrined in the Convention.

26.3 Equality in European Community law

Much European Community law is concerned with the creation of a single market through the elimination of barriers to trade between Member States. This entails the prohibition of measures that discriminate on the basis of nationality. From the outset, the EC Treaty also required equal pay for equal work by men and women and, subsequently, Community law has sought to prohibit other forms of sex discrimination. In recent judgements and opinions, the Court of Justice and Advocates General have appeared sympathetic to the broader aims of equality, extending the scope of the equality provisions in the EC Treaty and subordinate law to areas beyond the specific grounds of sex and nationality. The cases considered below were decided before the Amsterdam revisions to the EC Treaty and Treaty on the European Union (see above, 7.2), which considerably widened the scope for anti-discrimination measures. Article 13 of the EC Treaty gives the Council express power to 'take appropriate action to combat discrimination based on sex, racial and ethnic origin, religion or belief, disability, age or sexual orientation'. This provision is, however, unlikely to be held to create any directly effective rights enforceable in national courts (see above, 7.9.2) nor does it actually prohibit discrimination in these listed fields. It simply enlarges the Community's legislative competence in these areas. On the other hand, it is potentially a very useful basis for the enlargement of equality rights in the Community sphere. Since Community legislation is aimed at the harmonisation of the laws of Member States to achieve the aims of the single market, a number of different areas can now be brought within the sphere of Community competence, providing a legal basis for measures promoting equality. Under the new Art 13, for example, Community institutions could pass laws prohibiting discrimination on the listed grounds in the areas of environmental standards, construction, transportation, communication and a number of other very important fields of economic activity.

26.3.1 Sex discrimination in European Community law

Prohibitions against sex discrimination in Community law apply in the context of employment and provision of social security. Article 141 of the EC Treaty states that 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'. This Treaty provision is directly effective (see above, 7.9.2) and may be relied on in national courts against both public authorities and private firms (Case C-43/75 *Defrenne v Sabena (No 2)* (1976)). Article 141 is supported by a raft of directives (in particular, the Equal Treatment Directive 76/207 and the Equal Pay Directive 75/117) and judgments of the Court of Justice on the liability of Member States for breach of these provisions. Other directives have been passed which require equal treatment in matters of social security (Directive 79/7), pension schemes (Directive 86/378), equal treatment for self-employed persons (Directive 86/613) and conditions of work relating to

pregnancy and maternity leave (Directive 92/85). Directives are required to be transposed into national law by Member States (see above, 7.6.2); if a Member State has failed to do this, a person may be able to rely on a directly effective provision in a directive to bring proceedings in a national court or tribunal – but only against public authorities, not against private firms or other individuals (Case C-152/84 *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (1986)).

This has been of huge significance to women employees; in the UK, Community law has been invoked more frequently than in any other Member State, in particular, testing the legality of retirement provisions, which, in this country, are linked to the statutory pensionable age (60 for women, 65 for men). In *Marshall*, M, a public health sector employee, challenged the compulsory retirement policy which obliged her to retire five years before her male colleagues. The Court of Justice found that her case was not within the exceptions laid out by the Social Security Directive, which excluded from the equal treatment principle the determination of pensionable age for the purposes of granting retirement pensions, but ruled instead that her pensionable age was being determined for 'other purposes' and, therefore, fell foul of Community law. The Sex Discrimination Act 1986 has now rendered discriminatory retirement ages illegal, and men and women both have to reach the age of 65 before they qualify for pensions.

26.3.2 Justified discrimination: objective grounds in European Community law

The European Court of Justice has distinguished between direct discrimination (when men and women are treated differently by virtue of their sex) and indirect discrimination (sexually neutral rules adversely affect a significant proportion of one sex more than another). Indirect discrimination may, as in domestic law, be objectively justified (Case C-170/84 *Bilka-Kaufhaus GmbH v Weber von Harz* (1986)). Discrimination on grounds of sex is also permissible under the Equal Treatment Directive, but only on the very narrowly construed grounds that the sex of the worker is a determining factor, in other words, that a person of one sex could not in any possible sense carry out the work designed for someone of the other sex; differential treatment may also be justified if it concerns the protection of pregnant women, which excludes, for example, special provision for maternity leave for women from the scope of the Directive. Dismissal on grounds of pregnancy constitutes direct discrimination under the Directive (Case C-177/88 *Dekker v VJV Centrum* (1990)) and it cannot be justified by comparing the state of pregnancy with an illness or disability (Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* (1995)). Dismissal on grounds of absence due to pregnancy related illness does not offend the provisions of the Directive, however, since a man could also be dismissed for overlong absence due to illness (Case C-179/88 *Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening for Danfoss* (1990)).

26.3.3 Positive discrimination in European Community law

The Equal Treatment Directive does not prohibit measures designed to remove existing inequalities which affect women's opportunities, even though they might amount to discrimination in favour of women. These measures, however, must not overstep the mark – in Case C-450/93 *Kalanke v Freie Hansestadt Bremen* (1996), the Court of Justice held that national rules requiring the appointment of female candidates over equally qualified male candidates were in breach of the directive. On the other hand, if the Member State is careful to include in its positive discrimination programmes provisions which allow men to get the post if particular characteristics tilt the balance back in their favour, then they will not fall foul of the directive (Case C-409/95 *Marschall v Nordrhein-Westfalen* (1997)). However, these cases were decided before the Amsterdam revisions to the EC Treaty took effect. Article 141 was amended to include the following provision:

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

26.3.4 Discrimination on grounds of nationality in European Community law

Article 12 (formerly Art 6) of the EC Treaty provides that:

> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

This is a central element in Community law which is based on the rationale that the internal market will not function correctly until all borders, financial, physical and psychological, between Member States are removed. Discrimination on grounds of nationality can only form the basis of a complaint under the EC Treaty and directives if the complainant is an EC national; no protection is afforded to third country members within the European Union. The protection against this form of discrimination is carried forward by the EC Treaty's provisions on free movement of workers, establishment and services (Art 39, 43 and 49). These Treaty provisions and relevant directives all have direct effect (see above, 7.9.2) and, therefore, provide an important protection at a domestic level against discrimination. However, it is important to remember that, originally, these rights could only apply in the context of workers. Discrimination on grounds of nationality was outside the scope of Community law if it had nothing to do with economic activity. The claimant, in order to attract the protection of the Court of Justice

against discriminatory practices, had either be a worker or a member of a worker's family. However, the Court of Justice has extended the principle of non-discrimination to cover a broader category of EC nationals, such as the recipients of services (see below, Chapter 27).

26.3.5 Equality as a general principle of European Community law

The EC Treaty expressly prohibits discrimination between producers and consumers in achieving its objectives under the Common Agricultural Policy (Art 34). Equality is also a *general principle* behind the Court of Justice's review of the legality of Community measures and there have been a number of successful appeals to this principle in disputes between producers. Aids or subsidies may be granted to one group of producers at the expense of another, or levies imposed on an agricultural sector which those affected may feel has a disproportionate impact on them. In Cases C-103 and 145/77 *Royal Scholten-Honig Holdings Ltd v Intervention Board for Agricultural Produce* (1978), glucose producers challenged the imposition of levies on their production that were used to finance subsidies for sugar producers. This, they argued, was in breach of the general principle of equality between producers in competition with one another. The court upheld their complaint and annulled the regulations imposing the levy.

As stated above, the general principle of equality as developed and applied by the Court of Justice is only relevant in cases involving areas of Community competence. In the wake of the BSE scare and the consequent European Union ban on beef products being exported from the UK, the Ministry of Agriculture, Fisheries and Farming (MAFF) set up a 'beef stocks transfer scheme' to provide financial aid to beef exporters with their own slaughtering activities. Those exporters who did not run their own facilities challenged MAFF's scheme in judicial review proceedings, saying that they were being discriminated against in breach of the equality principle in Community law. In *R v Ministry of Agriculture, Fisheries and Food ex p First City Trading* (1997), the High Court ruled that, since this case concerned matters internal to the UK only, general principles of Community law could not apply.

26.4 Discrimination on the basis of sexual orientation

There are, as yet, no clear precedents for prohibiting discrimination on grounds of sexual orientation. Of all the systems of law, the case law of the European Court of Human Rights has gone furthest in this respect. As early as 1982, that court ruled, in *Dudgeon v UK* (1982), that sexual orientation should be immune from interference by the State, and the European Commission of Human Rights has declared admissible a complaint that the higher age of consent for male homosexuals in England than that applicable to heterosexuals constitutes a violation of Art 14 of the ECHR in conjunction with Art 8. In the Commission's view, this amounted to discrimination on the

basis of sex, because only homosexual *males* under the age of 18 were prohibited from engaging in sexual conduct according to their orientation (*Sutherland v UK* (1996)). There are also cases pending before the Commission questioning the basis for dismissing gays and lesbians from the armed forces (*Lustig Prean v UK* (1996)).

The Human Rights Act 1998 requires courts in the UK to interpret legislation so far as possible to comply with the ECHR and relevant case law from the European Court of Human Rights (see above, 19.10.1). Before the ECHR became part of national law, the Court of Appeal considered whether a homosexual partner of a deceased tenant could take over the tenancy under the Rent Act 1977 which limited such succession to persons who had lived with the original tenant 'as wife or husband' or that they were a member of his 'family' (*Fitzpatrick v Sterling Housing Association Ltd* (1998)). The majority of the court dismissed the application, holding that the term 'family' was to be construed in its popular contemporary sense, taking into account prevailing social attitudes. Family, in this light, meant an entity which bound together 'persons of the opposite sex cohabiting as man and wife'. In a strongly worded dissent, Ward LJ held that the exclusion of same sex couples from the protection of the Rent Act proclaimed the message that society judges their relationship to be 'less worthy of respect, concern and consideration than the relationship between members of the opposite sex'. He noted that a number of European countries had started permitting same sex couples to enter into agreements regulating their property and inheritance rights just as unmarried heterosexual couples can do, and that the US Supreme Court had recently held that the view of a family should include 'two adult lifetime partners whose relationship is long term and characterised by an emotional and financial commitment and interdependence' . In the context of the UK Rent Act, which is designed to protect tenants and their families from sudden eviction, the concept of the family should move with the times:

> The trend is to shift the focus, or the emphasis, from structure and components to function and appearance – what a family is rather than what it does, or, putting it another way, a family is what a family does [*per* Ward LJ].

While this was a minority judgment, the emphasis given to the applicant's 'constitutional right to equal treatment under the law' suggests that the claims of minorities will not be discounted so readily in future cases marking out the scope of concepts such as the 'family'. More recently, in an employment case, the Court of Appeal upheld an argument that discrimination against a male homosexual could provide grounds for a claim under the Sex Discrimination Act 1976 (*Smith v Gardner Merchant Ltd* (1998)). However, such a claim could only be made out if the complainant could show that a gay woman would have been treated differently. In this sense, no new ground was broken by this judgment, since discrimination on the basis of homosexuality alone would not be illegal under the Act if a homosexual woman in a similar position would be equally prejudiced.

26.4.1 Homosexuals

In Case C-249/96 *Grant v South-West Trains Ltd* (1998), the applicant claimed that the refusal by her employer to grant travel concessions to her female partner, on the basis that the concessions were not available to partners of the same sex , constituted discrimination based on sex, contrary to the provisions of Community law on equal pay for men and women. The Court of Justice held however that this claim of sex discrimination had not been made out since South-West Trains also refused travel concessions to partners of gay men. Given the lack of consensus amongst Member States in this area, the Court did not feel in a position to extend the protection of Community law to this type of discrimination. It therefore remains for the Community to pass legislation under Art 13 of the amended EC Treaty (see above, 26.4) to give the court sufficient legal basis for outlawing discrimination on the grounds of sexual orientation.

26.4.2 Transsexuals

Individuals who wish to obtain recognition for their change of gender raise difficult issues in EC law since such recognition often involves positive obligations on Member States in an area where there is little international consensus. Nevertheless, in Case C-13/94 *P v S and Cornwall County Council* (1996), the Court of Justice ruled that the protection offered by the Equal Treatment Directive 76/207 covered discrimination against an individual wishing to undergo gender re-assignment. Rejecting the argument of the UK that the employer would have dismissed P if P had been a woman and had undergone an operation to become a man, the Court indicated that the principle of equal treatment would no longer be based on the comparison between a female and a male employee:

> ... where a person is dismissed on the ground that he or she intends to undergo or has undergone gender re-assignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender re-assignment.

In response to this judgment, UK law was changed by the Sex Discrimination (Gender Re-assignment) Regulations 1999 (SI 1999/1102) which make direct discrimination against transsexuals contrary to the SDA 1975 in some circumstances.

26.5 Assessment

The scope of anti-discrimination is a fast developing area of human rights law. However, there remain some inadequacies. Individual citizens may still be discriminated against on grounds of age or health (if that does not amount to disability). The scope of Art 14 is limited to the rights set out in the ECHR and

Community laws on discrimination are restricted to matters within Community competence. The provision for extended grounds for anti-discrimination measures in the Community field in the EC Treaty raises the possibility that issues not presently covered by Community law – such as disability – might in future be encompassed by the Court of Justice within its general principles of equality and non-discrimination. However, no amount of directives and regulations under the amended EC Treaty on a number of grounds of discrimination will prove of much assistance to people whose cases raise no Community law element. The protection of EC Treaty rights, such as the right to free movement, only applies to people operating within the open labour market. Therefore, as things stand at present, disabled people, for example, who are employed within specially targeted training or vocational schemes, are denied the status of 'worker' under Community law and cannot enforce the rights associated with that status because national schemes adopted to help disabled people back into work do not constitute an 'effective and genuine economic activity' (Case C-344/87 *Bettray v Staatsecretaris van Justitie* (1989)). This approach has been confirmed recently by the Court in Case C-199/95 *Kremzow v Austria* (1997), where it said that, 'where national legislation is concerned with a situation which ... does not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling, give the interpretative guidance necessary for the national court to determine whether the national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the ECHR'.

EQUALITY

Equality is a cornerstone of democracy. To establish real equality it is necessary, not only to ensure equal participation at election time, but to guarantee to each individual that his or her views or conduct will be given equal status to those of other members of society.

Equality of treatment means that people in similar circumstances should be treated similarly and any differences should be objectively justified. Equality also demands that different cases should be treated differently.

Prohibition of discrimination

Statutes have been passed to restrict discriminatory practices in the context of race, sex and, lately, disability. Discrimination on grounds of religion is prohibited in Northern Ireland.

Race relations

The Race Relations Act 1976 prohibits discrimination on grounds of colour, nationality or ethnic or national origins. It applies to employment, provision of goods and services to the public, and certain types of private clubs. The Commission for Racial Equality is the statutory watchdog.

Sex equality

The Sex Discrimination Act 1975 prohibits unequal treatment between men and women in the context of employment and provision of goods and services to the public. The Equal Opportunities Commission is the statutory watchdog.

Physical capacity

The Disability Discrimination Act 1995 prohibits discrimination on grounds of disability in the context of employment, provision of goods and services and in the provision of property.

Equality under the ECHR

Article 14 requires that the rights and freedoms in the ECHR must be available without discrimination on a number of grounds. The Strasbourg Court will scrutinise most closely those laws and practices of signatory States that discriminate on grounds of sex, race and legitimacy of children. Article 14 is a procedural right only and must be pleaded in tandem with another substantive ECHR right.

Justified discrimination

An employer or service provider may get away with a discriminatory practice if he or she is able to prove objective grounds for it.

Positive discrimination, or affirmative action programmes, are discriminatory on their face and may fall foul of any of the above statutes unless the practice comes within one of the limited grounds authorised by the legislation.

Remedies

Individuals may sue under these Acts in industrial tribunals for employment cases and in the ordinary courts for all other forms of discrimination; damages are at large, which means they can claim compensation for injury to feelings as well as financial loss.

Equality in European Community law

Community law prohibits discrimination on grounds of sex and nationality. Originally, these prohibitions related to 'economic actors' only, to ensure a level playing field for goods and services in the internal market, but the Luxembourg Court has extended the equality requirements to other areas, where, for example, people who are benefiting from tourism services in other Member States are discriminated against. The Amsterdam Treaty now provides a basis for legislation against discrimination in any area of Community competence on a wide range of grounds, including disability and sexual orientation

Sex discrimination

Community law in this area only applies in the context of employment. Women are entitled to equal treatment and equal pay to men; this includes benefits as well as remuneration. Transsexuals may not be discriminated against on the basis of a gender re-assignment operation; on the other hand,

employees in same sex partnership relationships may not rely on Community law for equal provision of benefits.

Justified discrimination

It is possible to justify discriminatory practices, but only on the very narrowly defined grounds set out in Community law and only if sex of the worker is a determining factor. The Luxembourg Court will scrutinise very closely any affirmative action measure; if it is unnecessarily unfavourable towards male workers, it may be in breach of Community discrimination law.

Equality as a general principle of law

EC law prohibits discrimination between producers and consumers; in addition, the Court of Justice, as part of its 'general principles of law', will rule out any legislative measure that favours one group of producers against another.

Nationality

Community law prohibits discrimination on grounds of nationality. Only EC nationals crossing over inter-State boundaries may rely this prohibition; it does not extend to cover the rights of nationals within Member States, nor can it be relied upon by non-EC nationals.

Sexual orientation

This ground has not yet become a firm basis for action under any national or international prohibition of discrimination. Strasbourg jurisprudence prohibits the criminalisation of homosexual activities, but Community law and the Sex Discrimination Act 1975 may only be invoked by homosexuals if a gay person of the opposite sex would not have been similarly treated. Discrimination on grounds of homosexuality *per se* is, therefore, not yet illegal.