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W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

Proof and Evidence of Discrimination

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Proof and Evidence of Discrimination

What is to be proved

The definitions of discrimination in the Race Relations Act identify the matters which need to be proved. Judicial tradition in Britain favours literal construction, though sometimes with an eye to legislative purpose[1]. In the USA a more purposive tradition prevails, which enabled the Supreme Court to interpret statutory language apparently defining direct discrimination as apt to embrace indirect discrimination as well[2]

So for the Race Relations Act we have to look at proof and evidence separately for direct and indirect discrimination. This dichotomy endangers our understanding of discrimination, which may not easily fit under either heading[3]

Direct discrimination

Two things must be proved:

> that the victim has been treated less favourably than another person has been or would be treated;

and that such treatment was on racial grounds

Indirect discrimination

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[1] Note the way in which the House of Lords justified their narrow construction of s.41 of the Act in their very recent decision in Hampson v. Department of Education and Science (June 1990)

[2] Griggs v. Duke Power Co., 401 U.S. 424

[3] See Charles Lawrence , The Id , the Ego and Racial Discrimination, 39 Stanford L.Rev.317 [January 1987]

Four things must be proved by the claimant:

that he or she has been subjected to a requirement or condition;

that the requirement or condition has been applied equally to persons not of the same racial group;

that the proportion of persons of the same racial group who can comply with the requirement or condition is considerably smaller than the proportion not of that racial group;

that the claimant has suffered a detriment

The respondent, may escape liability (the above having been proved) by showing the requirement or condition to be justifiable irrespective of racial grounds.

The burden of proof

The burden of proof rests on the claimant as is usual in civil poroceedings but there has been some recognition that in a discrimination case the evidence is likely to be in the control of the respondent.

(a) **direct discrimination**

It is now well established that the claimant having produced evidence of having received less favourable treatment (in one of the circumstances covered by the Act) the onus shifts to the respondent to produce evidence either that there was not less favourable treatment, or evidence that such treatment was not on racial grounds.[4]

However, the Vice-Chancellor, Sir Nicholas Browne-Wilkinson, has suggested that it is unhelpful to see the matter in terms of a

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[4] e.g.Oxford v. Department of Health and Social Security [1977] I.R.L.R.225

shifting burden of proof and that it is preferable to see the burden as always remaining on the claimant[5]. Practitioners will disagree. Burden of proof is a useful concept which identifies clearly what must be proved by each party.

In practice, the burden on the respondent needs to be more than an evidential burden if there is to be a real inducement to avoid discrimination. For it is too easy to find a plausible subjective ground, especially in recruitment or promotion cases, for choosing one candidate rather than another. The respondent should be required to <u>prove</u> a non-racial ground.

It appears to be sufficient to establish an objective causal link between the respondent and the discriminatory act, so intention to discriminate on racial grounds need not be proved.Nor apparently need there be an intention to treat the claimant less favourably than others[6]

(b) **indirect discrimination**

For those matters which have to be proved by the claimant the standard of proof is on the balance of probabilities,and generally the courts have interpreted the law broadly in favour of claimants.[7] The existence of a requirement or condition must be established; a mere preference is not enough, which is a defect pointed out by the CRE. From the victim's point of view, it may be immaterial -the impact may be the same.[8] The nature of

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[5] In Khanna v. Ministry of Defence, [1981] I.R.L.R. 653.However, he made it clear that 'if the primary facts indicate that there has been discrimination of some kind the employer is called upon to give an explanation (in the absence of which) an inference of unlawful discrimination from the primary facts will mean that the complaint succeeds.'

[6] R v. Birmingham City Council ex p. EOC [1988] 3 W.L.R.837, and see now James v. Eastleigh Borough Council, 14 June 1990 (HL); also Ross, 'Reason, Ground, Intention, Motive, and Purpose' 53 MLR 391 (May 1990)

[7] e.g.Price v. Civil Service Commission [1977] 1 W.L.R. 1417

[8] Perera v. Civil Service Comission (No. 2) [1983] I.C.R.428

the evidence necessary and admissible to prove adverse impact will be considered below. 'Detriment' no longer causes difficulty.

The test of 'justifiability' was for a long period interpreted broadly in favour of respondents, who were allowed to escape liability by showing that a requirement or condition was subjectively reasonable from the respondent's own perspective[9]. However, under pressure from the European Court of Justice, the respondent must now show that requirements or conditions will 'correspond to a real need on the part of the undertaking, are apapropriate with a view to achieving the objectives pursued, and are necessary to that end.'[10] This is closer to the US test laid down originally in Griggs v. Duke Power Co.[11]

Proving discrimination

The courts (and to some extent the draftsmen of the Race Relations Act) recognised that it is exceptionally difficult for the claimant to prove discrimination because (in most cases) all the relevant information is in the hands of the employer or other discriminator.

The 'questionnaire' procedure may go a little way towards overcoming this problem. The respondent who fails to answer reasonable questions risks an adverse finding of discrimination. In practice questions are usually answered and where there has been concealment or evasion tribunals have been increasingly been willing to draw adverse inferences.

The shifting of the evidential burden, mentioned in the previous paragraph,also redresses the balance to some extent.

Most significantly,the courts have endorsed the need for

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[9] Ojutiku & Oburoni v. Manpower Services Commission [1982] I.C.R. 661

[10] Bilka- Kaufhaus GmbH v. Weber von Harz [1986] I.R.L.R. 317

[11] [1971] U.S. 424

claimants to obtain wide discovery of documents and information in the possession of the opposing party. This includes confidential reports and documents, perhaps identifying other job applicants and their qualifications, whenever disclosure is necessary for fairly disposing of the proceedings.[12] Disclosure will also be ordered of statistical evidence (or evidence from which statistics can be prepared) which might establish a pattern of disparate treatment which might give rise to an inference of discrimination.[13] The recognition that discrimination against an individual claimant can be inferred from statistical evidence and that the claimant must be given access to such evidence is a development of major importance. It should form the basis for proceedings to restrain systemic direct as well as indirect discrimination.[14] 'If a practice is being operated against a group then, in the absence of a satisfactory explanation in a particular case, it is reasonable to infer that the complainant , as a member of the group, has himself been treated less favourably on grounds of race'[15]

However, a recent decision holds that a Respondent cannot be required to obtain information which he does not in fact possess.[16] This has the absurd result that employers may seek to protect themselves against liability by not carrying out equal opportunity policies (and, indeed, by not complying with the CRE's Code of Practice).

Conclusion

The elimination of the subjective element from direct discrimination (see cases cited in Footnote 6) raises questions

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[12] Science Research Counsel v. Nasse and Leyland Cars Ltd v. Vyas [1979] ICR 921

[13] West Midlands Passenger Transport Executive v. Singh [1988] 2 All ER 873

[14] Stephen L. Willborn, Proof of Discrimination in the United Kingdom and United States, [1986] Civil Justice Quarterly 321

[15] Balcombe L.J. in West Midlands Passenger Transport Executive v. Singh - see footnote 13

[16] Carrington v. Helix Lighting Limited [1990] I.R.L.R. 6

about the distinction between direct and indirect discrimination. If unequal treatment is to be inferred from statistical disparity and intention is immaterial what does the respondent have to show to disprove discrimination? And should a respondent be able to justify a practice from which systemic direct discrimination is inferred? The present law allows no general exemption based on overriding social value in such a case.

We are now in a paradoxical situation in which theoretically the difficulties of proving discrimination have been considerably relaxed, yet the success rate in tribunals and courts is low[17], and the impact of the law as a whole seems slight.This needs to be addressed.

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[17] In 1989, the number of cases disposed of as a result of industrial tribunal and county court proceedings declined slightly to 164 (the 1988 figure was 172). Of these,33 were succesful at trial, 49 were unsuccesful,and 82 were settled. £67,628 in total was awarded in compensation or damages and £108,036 recovered in settlements.(Annual Report of the CRE for 1989 p.110)

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DISCRIMINATION AND LAW

The Idea of Equality and Affirmative Action In the Bill of Rights Context for Southern Africa

Paseko Ncholo
(University College London)

Thursday 5 July 1990

The Idea of Equality and Affirmative Action In the Bill Of Rights Context for Southern Africa

Paseko Ncholo
(University College London)

The essence of the study is to examine the ideas of equality, equal opportunity and the right not to be discriminated against with the view of reconciling them with the notion of affirmative action. This is achieved by examining some of the key provisions in the constitutions of countries in Southern Africa.

Swaziland, Lesotho and Botswana

These countries were formerly known as the High Commissioner's territories during the colonial days. This was due to the fact of their administration by the High Commissioner of the British government. The laws that have been in force and continue to be in force evolved from their close relationship with South Africa.

Upon independence in the mid-sixties, these countries adopted constitutions based on the Westminster constitutional model. The Lesotho Independence Order No.1171 of 1966 provided for its independence with a justiciable Bill of Rights. This instrument protected the freedom of speech, freedom of movement, liberty of the person, the right to a fair trial and the freedom from discrimination.

Cowen[1] who was then Lesotho's constitutional advisor, says Lesotho had intentions of including the socio-economic rights in its independence constitution, but was advised against. The reason being that the realisation of such rights demands positive action on the part of government, which may be impossible to attain. The other issue is that in providing for effective non-discrimination, the constitution fore-closed all possibilities of invoking some programmes of affirmative action. Even so there was almost no permanent and large settler community that was more affluent as to warrant some form of redistribution of wealth.

In 1970, there was a coup d'etat when the government, after loosing the elections refused to step down. Since then, the country has been governed without a democratic constitution.[2]

Botswana adopted a similar constitution with a Bill of Rights which granted the protection of the traditional rights. There is no evidence of any deliberations in the direction of providing for substantive equality in areas of resources and opportunities. This may be due to the absence of the settler community that was monopolising all the resources and opportunities.

Thus, provisions like equality in both countries were directed towards "equality in law" and no further. The Swaziland Independence Order No 1377 provided for a similar constitutional order to all the other colonies, but that constitution was repealed in 1968. The present Proclamation of 16th April 1973 and the Establishment of Parliament of Swaziland Order 1976 make no provision for a Bill of rights.

In all the three countries there have been no policies geared towards affirmative action, even for women. Instead, women continue to be treated as minors,[3] which gives them limited rights and consideration in matters of employment, education etc.

Zimbabwe

Zimbabwe upon independence had a much bigger settler community which was mainly more affluent and in control of the resources of the country. Due to the nature of their negotiated settlement of their conflict, matters relating to affirmative action were not included in their Bill of Rights. Instead Section 16 of the Constitution provided for a comprehensive Article on the protection of property and equal treatment before the law. It also outlawed all forms of discrimination.

However, the only form of affirmative action undertaken so far, did not have a legal basis. The President was given power by the Constitution to issue directives to correct previous racial imbalances in the civil service and other uniformed services. In discharging this function he issued the Directive on Black Advancement.

Namibia

The Republic of Namibia adopted by a Constituent Assembly in Windhoek on the 9th February 1990 an independence Constitution with a justiciable Bill of Rights. The country had been a mandated territory to South Africa for many years such that it had a white settler community with almost the same pattern as that which obtains in South Africa. The white minority had a monopoly over most of the resources of the country in line with the policies of apartheid.

The new Constitution in Article 10 provides for equality and freedom from discrimination. It states that "all persons shall be equal before the law" and that no persons may be discriminated against on grounds of sex, race, colour etc. Article 23 provides for affirmative action for victims of apartheid as an exception to Article 10 on equality then Article 23(3) provides for special regard for women who have suffered from traditional discrimination.

In Article 24(3), the Constitution provides for non-derogation from Article 10 on equality and non-discrimination. This poses an apparent conflict in its provisions. It is not possible for one to uphold the other without bridging other provisions. As to how these provisions are actually to be interpreted by the courts remains to be seen. However, it is important to note that at least Namibia has taken a positive step to remedy the gross inequalities of past discrimination.
For South Africa, the lessons are enormous and almost relevant to the unfolding democracy.

South Africa

This country, with the largest white settlement in Africa has had Constitutional democracy for many years. Throughout this period, the country's wealth and resources have been under the control of one dominant yet minority race. The majority of the people have been excluded from the enjoyment of such resources as education, employment etc. In the process of the ensuing conflict, the present government[4] and the African National Congress (ANC)[5] on the one hand, have issued guidelines indicating a need for affirmative action in an effort to build a non-racial democracy. The government in its Law Commission's report, refers to affirmative action for the minority groups which are not clearly specified. The ANC refers to affirmative action and does not state as to who will be the beneficiaries.

Any form of affirmative action based on the American experience is likely to fail because it does not take into account the intricacies of the Southern African situation. The Bill of Rights must provide for equality of law and fact. This will help create the grounds upon which differential treatment could be justified. Such treatment should also derive from express provisions for affirmative action. This will help the government to concentrate on remedying the situation than litigating about its constitutionality. The courts in this regard will judge programmes as to whether they are prejudicial or not, as to whether they are reasonable or unreasonable or within the object to be attained. In this fashion affirmative action will provide law governed and well regulated programmes for balancing the conflicting claims of society. Affirmative action should be seen as a right the under-privileged are entitled to. It is not, as in America, a method by which those who are incapable of influencing the political process are given an avenue. It should not have a limit in the time but should be a continuous constitutional principle that enjoys the same status as the right of free speech, movement, equality and so forth. Lastly concepts like equality or affirmative action are concepts that are not cut and dry formulae that are imported from elsewhere, but instead, these are concepts that are continuously built upon in the cause of struggle. In principle such concepts must be goal-directed and are to be realised in action rather than articulated in discourse.

Thus in the South African context, it is necessary for the people to create for themselves a Bill of Rights that will provide answers to their ills and act as a guarantee to their gains. It is not surprising therefore, that in South Africa unlike the United States, affirmative action is being spoken of in relation to the majority of the people instead of a minority.

Equality becomes more effective in that affirmative action opens up opportunities which would otherwise not be open to persons of the disadvantaged classes were it not that they were provided with some adventitious aid so as to rise to a competitive level with others.

NOTES

1. Cowen D.V., "The Foundations of Freedom", Cape Town 1961.

2. Palmer V.V. and Poulter S.M., "The Legal System of Lesotho", Morija (Lesotho) 1972. See also Poulter S.M. "Legal Dualism in Lesotho 1979.

3. Bennett T.W., "Application of Customary Law in Southern Africa".

4. The South African Law Commission Report, Paper No 25 Occasional Paper on Individual & Group Rights.

5. African National Congress, "Constitutional Guidelines" Lusaka, Zambia 1988.

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DISCRIMINATION AND LAW

The Civil Rights Model of Anti-Discrimination Law: An Allegorical Critique

Professor Derek Bell
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Tuesday 3 July 1990

W.G. Hart Legal Workshop
Institute of Advanced Legal Studies
University of London
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The Civil Rights Model of Anti-Discrimination Law: An Allegorical Critique

Derrick Bell*

SUMMARY

Most civil rights statutes are well-intended but half-hearted efforts to alleviate fairly blatant discrimination based on inter alia, race, sex, and religion, practiced by those in power against those who are relatively powerless. While there is always a segment of the majority group in power who favor such anti-discrimination laws because they deem them an appropriate response to obvious bigotry, such support is, standing alone, usually insufficient to bring about passage. In order to overcome the many barriers to enactment, the majority must ascertain (although they need not acknowledge) some substantial political or economic benefit to themselves if the civil rights measure becomes law. Indeed, when these benefits fade or are no longer important, support for either the legislation or the law if enacted, diminishes to the point of its disappearance.

Enactment and enforcement of civil rights statutes is difficult because the practices they are intended to control or eliminate do not stem from simple-minded "meanness." The presence of an easily identifiable "minority" group provides a basis for coherence and stability across a majority whose members may differ widely in economic status and political ideology. In times of crisis, disparate, majority views can often be compromised through agreements that sacrifice the rights and interests of minorities who are usually not represented at the bargaining table. Indeed, the willingness of relatively disadvantaged members to the majority group to agree to policies that adversely affect their economic and political interests suggests their belief in something like a property right in their status as members of the majority. This status is confirmed when those who hold real power permit them to exclude or discriminate against members of the minority group.

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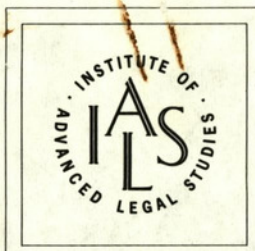
For these and a host of other reasons, civil rights statutes that seek to punish discriminatory behavior, will be difficult to enact into law and their enforcement will likely diminish over time. Proponents of these laws, even if they acknowledge the shortcomings summarized here, view the measures as necessary defenses against blatant discrimination. They serve an educational function by putting the government on the right side of the discrimination divide, and provide a basis in law for challenging and correcting at least the most damaging discriminatory conduct.

In discussing the wisdom of continued reliance on traditional civil rights laws, it may be helpful to compare them with a measure that more directly ties discriminatory conduct to economic factors. Thus, if those who -- for whatever reasons -- wished to discriminate on the basis of race, could obtain a license to do so in return for a commitment to place a percentage of the profits of their discriminatory policies in a publicly administered fund from which members of the victim class could draw to fund businesses, purchase property, and pay to obtain educational skills, would the effectiveness of so unorthodox a measure harm or help minorities seeking equal opportunity?

The suggestion is, of course, outrageous, but it may mirror in very direct ways how civil rights progress -- when it happens -- actually occurs.



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