

**THE HUMAN RIGHTS OF PERSONS WITH DISABILITIES: EXTENDING FREEDOM
TO ALL
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**The Disability Rights Commission: a positive approach to equality and human
rights**

Nick O'Brien, Legal Director

One of the pleasing things about tonight's event is its recognition of the journey taken by disabled people, a journey from welfare to rights, from a medical model of disability (that sees impairment as the problem) to a social model (which highlights instead the failure of the social, economic and cultural environment to accommodate impairment) and perhaps now from that social model to something like Amartya Sen's and Martha Nussbaum's capability model, which sees the aim of liberal politics as that of providing support for human need so that all human beings, including disabled people, can choose to function. But what sort of rights should we aspire to in this context? Are the anti-discrimination norms favoured by the domestic Disability Discrimination Act 1995 (the DDA) sufficient? Or is the very different-looking human rights approach (whether that of the European Convention on Human Rights now incorporated into the domestic Human Rights Act, or of the revised European Social Charter which at Article 15 provides for the 'independence, social integration and participation in the life of the community' of disabled people, or again the Draft UN Convention with its principled insistence on independent living and participation) a necessary complement to anti-discrimination law and in fact a better bet for achieving anything like substantive equality for disabled people?

More specifically, and from the perspective of the Disability Rights Commission (the statutory body established by government in April 2000 to promote and enforce disability rights, especially as enshrined in the DDA, and, incidentally, the statutory body which has been expressly refused powers by successive Secretaries of State to bring stand-alone human rights cases on disability issues) I want to talk about three things: first, I want to draw upon the DRC's own litigation experience (and its observation of litigation in this area more generally) to suggest that in the context of disability rights a human rights framework does indeed complement and enlarge a narrower approach based just on conventional anti-discrimination law; secondly, I want to suggest that this complementarity has something to do with what might be described as the uniquely 'positive accent' in which disability rights law is enunciated, its distinctive requirement that employers and others do not just, in some crudely symmetrical and neatly rationalistic way, treat disabled people the same as everyone else but that they take positive steps ('make reasonable adjustments' to use the jargon) to achieve substantive

equality for disabled employees, students and pupils, customers and clients; and finally, I want to suggest that it is precisely this 'positive accent' that gives us a clue to the sort of pivotal role that disability rights might have in the future development of anti-discrimination law more generally and within the practice of the planned Commission for Equality and Human Rights. This analysis suggests that, far from being the poor relation, disability is well placed to shape the future practice and discourse of anti-discrimination and human rights law.

The DRC's experience

So let's start with the DRC. The very existence of the DRC is a reflection of a profound shift, a shift that has seen the disadvantage experienced by disabled people become not so much a source of pity as of indignation, a matter of justice and rights rather than of charity and welfare, of participation and empowerment rather than of benefits and patronage. A tangible sign of that shift is the DDA, of which the DRC is in a sense the 'guardian'. Although a major symbolic breakthrough, based largely on the Americans with Disabilities Act 1990, the DDA was greeted with some scepticism by parts of the disability movement: first, its 'medical model' definition of disability (in other words its preoccupation with what is wrong with disabled people rather than with what is wrong with the social set-up) opened the door to protracted litigation about who precisely is protected by the law (does it cover people with dyslexia, those with bad backs, those who are depressed for six-month spells but never quite for a whole twelve months in a row, and so on?); secondly, the balancing act between the needs of disabled people and the demands of business made for a relatively low 'justification' threshold and certainly for a useful negotiating tool when it came to settling cases before trial; and, even more importantly, the scope and reach of the DDA was heavily circumscribed by 'block-booking' exceptions from coverage, the most relevant in this context being the effective exclusion of all public functions (something only to be remedied in December this year). The result is that whilst the DDA has been a useful tool in certain employment and consumer disputes, it has left largely untouched whole swathes of public sector service-delivery, such as health, transport, social care and even education (covered by the DDA since just 2002), in other words, precisely those areas where protection is most needed if disabled people are to flourish socially, economically and culturally, and where anyway it would take something more positive than mere 'non-discrimination' (with its comparative dimension) to make a real difference.

In its early days, the DRC (and disabled people more generally) as a result found itself involved in cases that turned on just these issues: was the individual really disabled at all, and if so 'prove it'; surely health and safety factors justify such and such an employment practice; can a tea shop in Harrogate really be expected to make room for a wheelchair; can non-disabled golfers in Surrey sleep soundly in their beds when they know the next day they will be pitted against a disabled golfer in a buggy instead of

carrying his own clubs like them. Important though these issues were, the question inevitably arose: was this what it had all been about, all the campaigning, the lobbying and 'sit-ins'? Did this relatively compressed employment and consumer agenda really do justice to the complexity of disabled people's lives and to the real scale of the historical disadvantage encountered?

And so, enter human rights as one possible source of deliverance. By intervening in a series of human rights cases (not DDA cases at all but very often cases central to the independent living agenda) and by appealing to human rights principles (especially those developed under Articles 3 and 8 ECHR), the DRC has been able to reach beyond the DDA and its limitations. When two young disabled women wanted to challenge the decision of East Sussex County Council to take them into residential care because its health and safety practice entailed a 'no-lifting' policy in the home, it was human rights principles and not the DDA that came to the rescue; when Leslie Burke wanted to challenge the GMC's guidance to doctors on the withdrawal of artificial nutrition and hydration it was to human rights principles that he instinctively turned for ammunition; and when a disabled child developed asthma and was effectively denied the necessary ventilation on 'quality of life' grounds, it was human rights principles which informed her parents' determination to demand what was needed from another hospital and which enabled them to reach agreement with the first hospital about what had gone wrong.

In the East Sussex case, the judge, Mr Justice Munby, placed the argument firmly within the jurisprudence developed by the European Court of Human Rights when he remarked,

'True it is that the phrase [human dignity] is not used in the Convention but it is surely immanent in Article 8, indeed in almost every one of the Convention's provisions. The recognition and protection of human dignity is one of the core values – in truth, the core value – of our society and, indeed of all societies which are part of the European family of nations and which have embraced the principles of the Convention...The other important concept embraced in the "physical and psychological integrity" protected by Article 8 is the right of the disabled to participate in the life of the community...This is matched by the positive obligation of the State to take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not "so circumscribed and so isolated as to be deprived of the possibility of developing his personality".'

The 'positive accent' of disability rights law

What these human rights cases had in common was the desire to get public authorities to accept that they have positive obligations towards disabled people. This was not just a matter of human rights as a series of 'keep out' notices to Church and State, a

manifestation of a narrow 'civil liberties agenda'. Instead, this was something more positive, entailing a sense of positive value and the need for certain positive interventions that would be necessary if the disabled people in question were to have any meaningful freedom of choice, any meaningful prospects of social inclusion and participation. The fact that they were not always completely successful in their arguments is not the point: human rights principles (more than black-letter human rights law, still less black-letter anti-discrimination law) provide a language and framework within which the arguments could be articulated and given their due weight.

And, as it happens, such an approach sits well with, and builds upon, the most productive and distinctive parts of the DDA, its 'reasonable adjustment' provisions. It is those provisions that recognize, albeit imperfectly, that for disabled people equality is not about formally equal treatment at all, not about some neatly symmetrical notion of equality of opportunity, but in fact about something more ambitious, about difference of treatment to achieve something a little more like substantive equality. Baroness Hale made the point well when in the recent House of Lords DDA case of *Archibald v Fife Council* she said that unlike the Sex Discrimination Act and the Race Relations Act the DDA does not see treating everyone the same as the answer but instead accepts, realistically, that different treatment is actually the path to real equality; and the same 'positive' approach emerges too in the new Disability Equality Duty which will come into force on public authorities from December this year and provides that they must take account of disabled people's situations even where that involves treating disabled people more favourably than others.

In fact, it is recognized that both the SDA and RRA also need the inclusion of more positive provisions if they are to have real impact. The Race Relations Amendment Act 2000 already, in response to the Stephen Lawrence inquiry, introduces a positive duty on the public sector, and the Equality Act, passed just a couple of weeks ago, paves the way for a similar duty on gender. Elsewhere, in Canada for example, the 'reasonable adjustment' duty has been applied to all the prohibited grounds of discrimination, with the human rights concept of 'dignity' being used as a 'moderator' that avoids a comparative approach and instead tests against a common substantive benchmark.

Disability, equality and human rights

So where does this leave the future of equality and human rights law? This coalition of positive human rights obligations and what I have called the positive accent of the DDA (its reasonable adjustment provisions and the new public sector duty) is not just of parochial interest. The government's decision to review discrimination law and to create a new Commission for Equality and Human Rights raises fundamental questions about the purpose and effectiveness of anti-discrimination law, about the relationship between human rights and equality, and about the sort of equality that might carry positive value

and not just pleasingly neat and formal symmetry. Last week we heard that the Commission on Women and Work had confirmed what everyone knew, namely that after twenty-five years of the SDA the pay gap is still huge. Yet what the Commission failed to conclude (albeit controversially) was that the problem lies primarily with individual discriminatory acts on the part of employers, with breaches of the well-established and much-litigated law in this area. What I have suggested here is that the DRC's experience invites the conclusion that the achievement of substantive equality for disabled people will entail the continued interpretation of anti-discrimination law within a human rights framework, informed and enlarged by human rights principles and perhaps even occasionally by human rights law; that the lessons do not stop with disabled people but provide pointers for all seriously disadvantaged social groups to the sort of strategies that might help; and that such a positive approach does not lead in the direction of some sort of politically correct tyranny but instead to the only version of liberalism worth having, a liberalism that is not about negative freedom, about freedom from discrimination and irrationality but about something more ambitious, about dignity and equal worth, about the positive freedom to flourish and participate. To realize the human rights of disabled people in that case simply is one way of furthering equality and that positive liberty for everyone, whether disabled or not. And that, in my view, is an opportunity not to be squandered lightly.