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## Equality and empowerment for decent work

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## Equality and empowerment for decent work

Bob HEPPLÉ\*

Equality is at the heart of the notion of “decent work”, the ILO’s exciting new vision to promote “opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity” (ILO, 1999, p. 3). In this context — and with national and local action increasingly moving away from negative duties to avoid discrimination towards positive and inclusive duties to promote equality — this article argues that the best model of regulation is one which involves the empowerment or participation of the disadvantaged groups. To that end it begins by deconstructing the idea of equality and goes on to explore this idea in the context of other fundamental rights, explaining why positive duties to promote equality are needed. Finally, it examines some regulatory models for implementing duties to promote equality and how these can be used as vehicles of empowerment.

### The concept of equality

The subject of equality is topical across the globe. The ILO’s Discrimination (Employment and Occupation) Convention, 1958 (No.111), a remarkably far-sighted and comprehensive instrument, is one of the most widely ratified of all ILO Conventions, and one which continues to inspire national legislation and other measures. The ILO Declaration on Fundamental Principles and Rights at Work of 18 June 1998 declares that “the elimination of discrimination in respect of employment and occupation” is an obligation of all member States, whether or not they have ratified the relevant Conventions.<sup>1</sup>

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<sup>1</sup> The full text of the Declaration is published in the special issue of the *International Labour Review* entitled “Labour rights, human rights”, Vol. 137 (1998), No. 2, pp. 253-257.

In the European Union, a comprehensive anti-discrimination directive addressed to the Member States under Article 13 of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam, was adopted by the Council of Ministers in November 2000.<sup>2</sup> The European Union Charter of Fundamental Rights, which was adopted at Nice in December, has a separate chapter devoted to equality.<sup>3</sup> The Council of Europe, for its part, opened for signature on 4 November 2000 a new Protocol (No. 12) to the European Convention on Human Rights, which plugs a gap in that Convention. At present the Convention is breached only when there is discrimination in the enjoyment of a right it expressly protects. But because it makes no provision for the right to employment, for example, the Convention affords no protection in respect of discrimination in employment. The new Protocol provides a free-standing guarantee against discrimination, which is not dependent upon the breach of some other Convention right.

These instruments, and the provisions of national constitutions and legislation, provide a bewildering range of concepts of equality. It is, therefore, necessary to clarify how “equality” might be understood in the context of “decent work”. This is not for any semantic or ideological reason, but because in fashioning a decent work programme, it is essential to have regard for the underlying principles from which legal and social concepts of equality derive.

### *Equality as consistency or formal equality*

The concept of equality has two basic dimensions: equality as consistency — i.e. likes must be treated alike — and substantive or material equality.<sup>4</sup> The first of these is found in all anti-discrimination laws, and also in Article 1(1)(a) of ILO Convention No. 111.<sup>5</sup> It embodies a notion of procedural justice which does not guarantee any particular outcome. So there is no violation of this principle if an employer treats women and men equally badly, or sexually harasses women and men to the same extent. A claim to equal treatment in this sense can be satisfied by depriving both persons compared of a particular benefit (levelling down) as well as by conferring the benefit on them both (levelling up).

For example, in cases brought to the European Court of Justice under Article 141 EC (ex 119 of the EC Treaty), which follows ILO Convention

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<sup>2</sup> Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation. See *Official Journal of the European Communities* (Luxembourg), L 303, 2 December 2000, pp. 16-22.

<sup>3</sup> See *Official Journal of the European Communities* (Luxembourg), C 364, 18 December 2000, pp. 1-22.

<sup>4</sup> These ideas are elaborated in more detail in Hepple, Cousey and Choudhury (2000, pp. 27-35), Barnard and Hepple (2000), and Fredman (1999).

<sup>5</sup> This provision is worded as follows: “For the purpose of this Convention the term ‘discrimination’ includes ... any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

No. 100 in guaranteeing equal remuneration for women and men doing work of equal value, employers have been allowed to raise women's pensionable age to the same as that applying to men, rather than lowering men's pensionable age.<sup>6</sup> The choice of comparators can also be determinative of a claim to equal treatment. For example, a railway company in the United Kingdom had a policy of granting travel concessions to its employees' spouses or unmarried partners of the opposite sex. A female employee with a same-sex partner claimed that this was unlawful sex discrimination, but the European Court of Justice made a comparison with the way in which the same-sex partner of a male employee would have been treated, and concluded that there was no sex discrimination.<sup>7</sup> A comparison with an unmarried heterosexual would have shown a clear breach of the principle of equal treatment.

### Substantive equality

The limitations of the principle of formal or procedural equality have led to attempts to develop the concept of substantive or material equality. Here, three different, but overlapping, approaches can be identified. The first is equality of results.

#### Equality of results

Apparently consistent treatment infringes the goal of substantive equality if its results are unequal. Inequality of results itself can be understood in three senses. The first focuses on the impact of apparently equal treatment on the individual. The second is concerned with the impact on a group, e.g. women, ethnic groups, people with disabilities, etc. And the third demands an outcome which is equal, such as equal remuneration for women doing work of equal value to that of men, or equal representation of women and men in a given occupational grade.

The concept of indirect or adverse-impact discrimination is that an apparently neutral practice or criterion has an unjustifiable adverse impact upon the group to which an individual belongs. The best-known examples are selection criteria for recruitment, promotion or lay-offs with which it is significantly more difficult for members of a disadvantaged group to comply. This concept is thus results-oriented in the first sense — in that the treatment must be detrimental to an individual — but it also involves equality of results in the second sense. However, the concept of indirect discrimination is not redistributive in the third sense: if there is no exclusionary practice or criterion, or if no significant disparate impact can be shown, or yet if there is an objective business or administrative justification for the practice, then there is no violation. This concept is usually said to have its origins in case law of the 1960s under Title VII of the United States Civil Rights Act. In fact, its foundation was laid in 1958 in Article 1 of ILO Convention No. 111, which covers any “distinction, exclusion

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<sup>6</sup> Case C-408/92, *Smith and Others v. Avdel Systems Ltd.*, ECR 1994, p. I-4435.

<sup>7</sup> Case C-249/96, *Grant v. South West Trains*, ECR 1998, p. I-621.

or preference ... which has the effect of nullifying or impairing equality of opportunity or treatment”. But Article 1(2) of this Convention — like the later case law of the United States Supreme Court and the European Court of Justice — goes on to provide that: “Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination”.

An approach which is more results-oriented in a redistributive sense is to define equality in terms of “fair” (sometimes referred to as “full”) participation of groups in the workforce, and fair access of groups to education and training, and to other facilities and services. This aims to overcome the under-representation of disadvantaged groups in the workplace and to ensure their fair participation in the distribution of benefits. This may involve special measures to overcome disadvantage. These measures are generally described as “affirmative action”. Professor Faundez, in his useful ILO study, defines this as “treating a sub-class or a group of people differently in order to improve their chances of obtaining a particular good or to ensure that they obtain a proportion of certain goods” (Faundez, 1994, p. 3). Once again, it was the ILO’s far-seeing Convention No. 111 which in its Article 5, was one of the first instruments to recognize that “special measures or protection or assistance” for disadvantaged groups should not be deemed to be “discrimination”.

The term “affirmative action”, however, is unfortunately tarnished by negative experiences with its use in some countries. For this reason, the notion of “employment equity” was coined in Canada, as was “fair participation” or “fair access” in Northern Ireland. Canada’s Employment Equity Act 1995 uses “employment equity” to denote that equality “means more than treating persons in the same way but requires special measures and the accommodation of differences”. South Africa’s Employment Equity Act of 1998 treats affirmative action as the means of achieving employment equity. It provides that “affirmative action measures are measures designed to ensure that suitably qualified people from [disadvantaged] groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce”.

Affirmative action in this sense is used as a tool of social policy in many countries and is endorsed in international human rights conventions, such as the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965<sup>8</sup> and the International Convention on the Elimination of All Forms of Discrimination against Women, of 18 December

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<sup>8</sup> Art. 1.4 allows “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups” provided that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups, and are not continued after the objectives for which they were taken have been achieved.

1979.<sup>9</sup> Another example is the legislation in force in Northern Ireland since 1989, which aims to secure greater fairness in the distribution of jobs and opportunities and to reduce the relative segregation of the Catholic and Protestant communities in that part of the United Kingdom. A recent report on the impact of this legislation reveals that it has led to significant reductions in employment segregation, in the under-representation of the Catholic community overall and of Protestant and Catholic communities in specific areas, as well as reduction in the unemployment differential between the two communities (House of Commons, 1999, paras. 48 et seq.).

### Equality of opportunity

A second way of characterizing substantive equality is in terms of equality of opportunity. Convention No. 111 uses this concept. It brings to mind “the graphic metaphor of competitors in a race” and “asserts that true equality cannot be achieved if individuals begin the race from different starting points. An equal opportunities approach therefore aims to equalise the starting points” (Fredman, 1999, para. 3.12).

However, the use of this concept does not make it clear whether the promotion of equality of opportunity is a narrow procedural obligation, or a broader substantive one. The procedural view involves the removal of barriers or obstacles, such as word-of-mouth recruitment or non-job-related selection criteria. This opens up more opportunities but “does not guarantee that more women or [members of ethnic minorities] will in fact be in a position to take advantage of those opportunities” (Fredman, 1999, para. 3.13). A more substantive approach would require affirmative action to compensate for disadvantages.

### Equality of human dignity

A third approach to substantive equality is based on the broad values of the dignity, autonomy and worth of every individual. Such an approach is to be found in many national constitutions. In some there is emphasis on equality as the sharing of “common humanity”, or “equal worth”. One example is article 23 of the Belgian Constitution which provides that “everyone has the right to lead a life worthy of human dignity”. Another is Article 2 of the Greek Constitution which speaks of “respect and protection for the value of the human being” as the primary obligation of the State. In the field of labour law, this approach is reflected in the idea that “labour is not a commodity”. The work of the ILO has been based on this principle ever since the Organization’s very inception. Labour is “human flesh and blood”. It is not a commodity to be exchanged because a person’s working power cannot be separated from her or his existence as a human being.

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<sup>9</sup> Art. 4.1 allows “temporary special measures” aimed at achieving de facto equality between men and women, provided that these measures are discontinued when the objectives of equality of opportunity and treatment have been achieved.

A good illustration of the importance of human dignity as the starting point of an approach to equality is the judgment of 28 September 2000 of the South African Constitutional Court in the case of *Hoffmann v. South African Airways*. The practice of South African Airways (SAA) — like that of many other airlines — was not to offer employment as cabin attendant to any person whose blood test showed that he or she was HIV positive. SAA justified this on safety, medical and operational grounds. In particular, they argued that persons who are HIV positive may react negatively to yellow fever vaccinations, which cabin crew must have for world-wide duty; that people who are HIV positive are prone to contracting opportunistic diseases, with the consequent risk of infecting passengers; and that the life expectancy of HIV-positive people is too short to warrant the costs of training. Mr. Hoffmann, who was refused employment on these grounds, challenged the constitutionality of SAA's practice.<sup>10</sup> The Constitutional Court accepted medical evidence that asymptomatic HIV-positive persons can perform the work of a cabin attendant competently, and that any hazards to which an immunocompetent cabin attendant may be exposed can be managed by counselling, monitoring and vaccination. The risks to passengers were inconsequential. Even immunosuppressed persons are not prone to opportunistic infections and may be vaccinated against yellow fever as long as their count of "CD4+ lymphocytes" remains above a certain level.

On the basis of this evidence, the Constitutional Court held that Mr. Hoffmann's right to equality, guaranteed by section 9 of the South African Constitution, had been violated and it reinstated him in the job of cabin attendant. Discrimination on grounds of HIV status and the question of testing to determine suitability for employment are now governed by South Africa's Employment Equity Act of 1998, but the facts arose before that Act came into force and the issue was solely a constitutional one. Although section 9 of the Constitution mentions a number of grounds of unfair discrimination, these do not include HIV status. The most significant feature of the judgment in question was therefore its reliance on the human dignity argument: "at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against".<sup>11</sup>

The judgment, concurred in by the full Bench, went on to stress that South Africa's new democratic era is characterized by respect for human dignity for all human beings: "prejudice and stereotyping have no place" in this era.<sup>12</sup> The fact that *some people* who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does

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<sup>10</sup> SAA is an organ of the State, not a private employer.

<sup>11</sup> *Hoffmann v. South African Airways*, Case CCT/17/00, Judgment of 28 September 2000, para. 27.

<sup>12</sup> *ibid.*, para. 37.

not justify the exclusion of *all people* who are living with HIV. As a Judge of the Indian Supreme Court recently pointed out: “the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death” by denying them employment.<sup>13</sup>

It must be obvious from the foregoing analysis that the three approaches to substantive equality — equality of results, equality of opportunity and equality of human dignity — lie at the heart of the notion of decent work. This is not only because the ILO’s definition expressly refers to opportunities for women and men, and to conditions of “freedom, equity, security and human dignity”, but also because of the universality of the concept. The idea of ending untenable distinctions between different categories of workers has a long history in labour law. It is based on the notion that there must be comparable protection for all those who work. The first European constitution to recognize social rights, that of the Weimar Republic (1919) in its Article 158, required the State to create a “uniform labour law”, in particular by linking public and private law. This is reflected in several modern constitutions, such as the Italian Republic’s, whose Article 35(1) stipulates that the Republic “protects labour in all its forms and applications”.

What is truly innovative in the ILO’s concept of decent work, as Amartya Sen (2000) pointed out in his address to the 1999 International Labour Conference, is that it encompasses all kinds of productive work. Unlike classical labour law, it does not presuppose the existence of a contract of employment or an employment relationship. It is not limited to “dependent” or “subordinated” labour, on which labour legislation has traditionally been focused. Indeed, labour law has tended to legitimize inequalities between different categories of workers, between the employed and self-employed, and between those who work and those who are unemployed or cut off from work on grounds of age. The objective of decent work proclaims the basic equality of all those who work or seek work. The concept of substantive equality provides a framework for keeping in mind the needs of the unemployed as well as the employed and self-employed, the aged as well as the young, and those in the informal sector as well as those in the formal sector.

## Equality in the framework of fundamental rights

How does this idea of equality fit into the framework of the rights which are fundamental to a democratic society? The ILO’s 1998 Declaration on Fundamental Principles and Rights at Work focuses on freedom of association and the right to collective bargaining, the elimination of forced and compulsory labour, and the worst forms of child labour, as well as discrimination.

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<sup>13</sup> *MX of Bombay Indian Inhabitant v. M/s ZY and another*, AIR 1997 (Bombay) 406 at 431 (Tipnis J).

Action against discrimination aims to achieve equality for disadvantaged groups, such as women, ethnic minorities and people with disabilities. This may be characterized as horizontal equality between workers — a relatively modern concern dating to the Second World War and the ending of colonialism. The more traditional focus of labour law, and of the ILO, has been on what may be called vertical equality between the parties to the employment relationship. Hugo Sinzheimer, one of the founders of labour law in Germany, argued in 1910 that the “special function” of labour law — “the guardian of human beings in an age of unrestrained materialism” — was to ensure some substantive equality between employer and worker (Sinzheimer, 1910, p. 1237). This conception became part of the common law of nations as embodied in ILO Conventions on subjects such as forced or compulsory labour and child labour, and through support for collective organization and collective action in defence of the interests of workers. The principle behind such measures has been described by Paul van der Heijden as “inequality compensation”, the aim of which is to compensate by social measures for the economic inequality between employers and workers (van der Heijden, 1994, pp. 135-136). Equality is thus embedded in all elements of the ILO Declaration, making clear the connections between the fundamental rights it protects.

In considering horizontal equality, it is again necessary to distinguish the duty to “eliminate discrimination”, in a negative sense, from a broader positive duty to promote equality. Eliminating discrimination, in the sense of avoiding unfavourable actions against individuals, is a negative concept. It usually depends upon *responding* to a complaint or assertion of a right by an individual. That response may be defensive and adversarial, especially when legal proceedings are brought or threatened. Yet this may leave untouched the processes, attitudes and behaviours which, within organizations, lead to prejudice and stereotyping or to practices which unwittingly have the effect of putting women, ethnic minorities, disabled persons and other groups at a disadvantage. Where affirmative action is used, this is seen as a negative exception to the non-discrimination principle. It therefore tends to be sporadic, contested and limited.

By focusing on positive duties to promote equality one can encourage an inclusive, proactive approach. Organizations which have positive duties are compelled to devise coordinated strategies to improve diversity in the workforce or to pursue equality policies in the delivery of services to those who are socially excluded. Instead of passive and defensive responses to complaints of discrimination, organizations are made responsible for reaching stated goals and targets. This will usually involve reasonable adjustments or “special measures”. Thus, equality of opportunity increasingly depends not simply on avoiding negative discrimination, but on monitoring, planning, training and improving skills, developing wider social networks and encouraging adaptability. This does not, however, mean reverse discrimination, which can often be counter-productive.

ILO Convention No. 111 anticipated and encouraged the modern emphasis on positive duties. Its Article 2 requires member States “to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”. The term “equality” would have been preferable to “equality of opportunity” which, as explained above is both ambiguous and only one of the senses in which substantive equality should be understood. However, there can be no doubt that as long ago as 1958 the ILO envisaged positive promotion and not simply negative prohibition. Article 5 of the Convention provides that “special measures” or “special protection” for certain groups is not discrimination. This leaves ratifying States who wish to do so free to use affirmative action measures. For the reasons already advanced, positive measures will frequently be essential if discrimination is to be eliminated.

There is another reason why positive duties to promote equality and corresponding rights are now necessary: decent work was devised as a model for socially sustainable development. It means productive work which generates an adequate income with adequate social protection. In this respect, there is a growing convergence between the objectives of the ILO and those of the World Bank. Indeed, the *World Development Report 2000/2001* acknowledges the need for a broad social agenda and — of particular relevance here — concludes from the experiences of the 1990s that “inequality is back on the agenda” (World Bank, 2000, p. 33). The *Report* points out the importance of gender, ethnic and racial inequalities as a dimension — and a cause — of poverty. Social, economic and ethnic divisions are “often sources of weak or failed development. In the extreme, vicious cycles of social division and failed development erupt into internal conflict, as in Bosnia and Herzegovina and Sierra Leone, with devastating consequences for people” (World Bank, loc. cit.). The World Bank’s “general framework for action” for reducing poverty, like that of the ILO for decent work, obviously requires positive duties on states to grant rights of access to work, health, education, and social security.

An objection to such positive duties which is frequently heard is that social rights cannot be enforced. It is argued that a clear line exists between civil and political rights, on the one hand, and economic, social and cultural rights on the other (see Hepple, 1995). The former are limitations of governmental power — i.e. governments must respect the right not to be discriminated against, etc. — whilst the latter require governments to act, e.g. to provide minimum income, social security, provision of health services and education, etc. Civil rights can be made legally enforceable, while it is said that social and economic rights cannot. However, the creative decisions of the Indian Supreme Court and, more recently, the South African Constitutional Court show that the line between the two classes of rights can become blurred and that it is even possible to give legal effect to certain basic social rights.

An example is the recent South African case of *Mrs. Grootboom*, one of those many thousands of unfortunate people who live in shacks made of cardboard and hessian. The land on which Mrs. Grootboom and many other people lived was subject to flooding, so she and others moved up the hill onto some private land from which they were then rather brutally evicted under a court order. They brought the case to Court relying on section 26 of the new democratic South African Constitution which entitles everyone to the right of access to adequate housing. This right is not absolute because it is subject to the qualification that “the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”. The Constitutional Court decided on 4 October 2000 that the rights in section 26 oblige the State to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations. The South African Government and the local authorities concerned argued that they had a housing programme, and that houses were being built. However, the Court reached the conclusion that Mrs. Grootboom and the others were entitled to this basic protection. They did so on the basis of the rights in the Constitution which guaranteed human dignity, freedom and equality. In the words of Justice Yacoob: “if measures, though statistically successful fail to respond to the needs of those most desperate [like the homeless Mrs. Grootboom] they may not pass the test” of reasonableness.<sup>14</sup> This judgment has great significance for the enforcement of other social rights such as rights to work, to education, to health services and social security. It suggests that the state can be compelled to act “reasonably” in giving effect to fundamental social rights, within the constraints of available resources and the progressive realization of these rights. “Reasonableness”, or rationality, requires account to be taken of human dignity, where people are in intolerable or crisis situations.

As this discussion shows, the ILO Declaration and Convention No. 111 must be construed broadly, perhaps even be revised. “Eliminating discrimination” should not be understood simply as a negative duty. The notion should be refocused, so as to emphasize the responsibility of governments, organizations and individuals to generate change by positive actions.

## Empowerment

This leads finally to the question of the implementation of positive duties. This involves designing an optimal system of regulation to reduce inequality by promoting fair representation and eliminating exclusion and institutional barriers to full participation.<sup>15</sup>

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<sup>14</sup> *Government of the Republic of South Africa and Others v. Grootboom*, Case CCT 11/00, Judgment of 4 October 2000, para. 44.

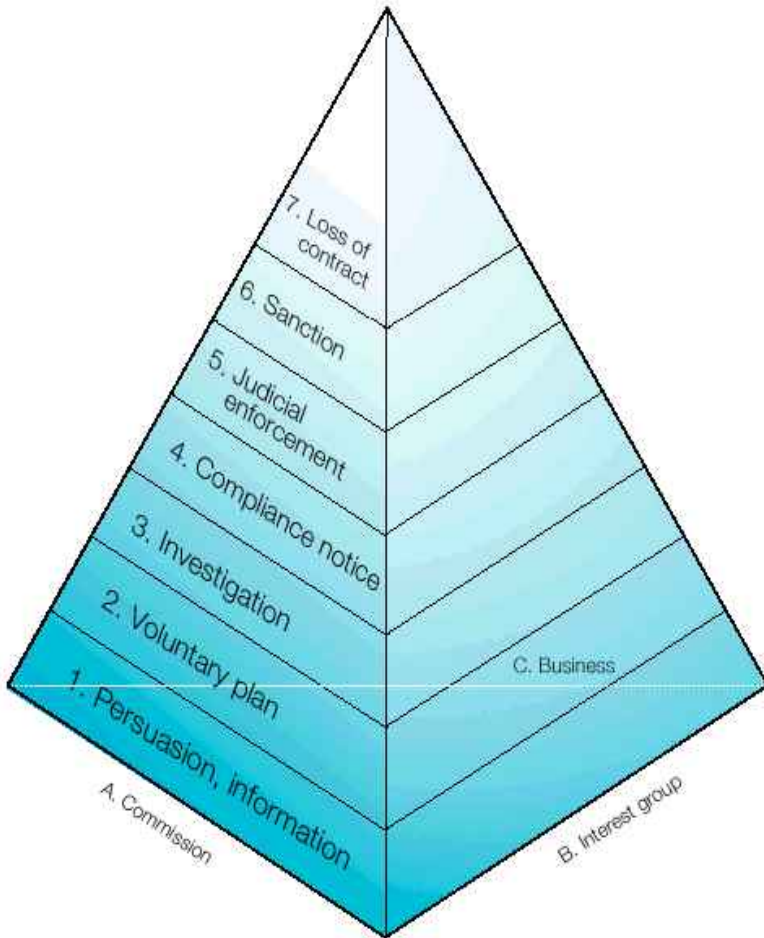
<sup>15</sup> This draws extensively on Hepple, Coussey and Choudhury (2000).

There are several designs. One of them concentrates on rights and liabilities allowing individuals to bring legal claims for violation of the right to non-discrimination — this is usually called the American model. Another is that of “command and control” by government or an independent public agency that sets the standards which organizations are required to meet, and enforces them through investigation and legal proceedings. A third model relies exclusively on voluntary self-regulation, with organizations meeting prescribed targets unilaterally without any threat of coercion. A fourth uses enforced self-regulation, applying legal sanctions against those who fail to comply voluntarily. And, finally, there are economic incentives — such as withholding public contracts or subsidies — which may also be used as a means of encouraging compliance.

At one extreme in the debates about the relative advantages and disadvantages of these models are those who want to throw in every kind of policy and legal instrument to tackle inequality — what has been called a “smørgåsbord” approach: “everything is on the table” (Gunningham and Sinclair, 1998, pp. 432-433). In this particular context, however, it rests on the mistaken assumptions that coercion is always necessary and that the resources for enforcement are unlimited. Experience shows that imposing too many bureaucratic requirements on organizations is not only costly, but also likely to engender resistance and adversarialism which make this approach politically unacceptable.

At the other extreme are those who advocate an entirely voluntary approach, encouraging governments and employers to follow best practice without enforceable duties. The trap into which these advocates of “doing good by doing little” fall is to pose one form of regulation (e.g. voluntarism) against another (enforced self-regulation). The point is that a voluntary approach may work in influencing the behaviour of some organizations — e.g. leading edge companies whose markets are among communities receptive to an equal opportunities policy — but fail with others which, for economic or social reasons, are resistant to change.

This has led to the theory of “responsive regulation”, now well developed in the environmental field, but not yet so well developed in the field of labour legislation. The idea is that regulation needs to be responsive to the different behaviours of the various organizations subject to regulation. In a recent Independent Review of the Enforcement of UK Anti-Discrimination Legislation which I co-directed, we developed a model of an enforcement pyramid (Hepple, Coussey and Choudhury, 2000, pp. 56-59). As shown in the diagram below, the base of this pyramid consists of what might be called the voluntary means, i.e. persuasion, information and so on. If this fails, the organization is encouraged to have a voluntary plan and when that fails, we move up to investigation by a public body. Eventually the investigation reveals non compliance, and the organization is ordered to comply by compliance notice, traditional enforcement sanctions, ultimately perhaps loss of contracts. In order to work, there must be gradual escalation and, at the top,



sufficiently strong sanctions to deter even the most persistent offender. The idea is that the most severe sanctions will rarely be used, but if they are not there the rest of the pyramid is inoperative.

A crucial element in the design of the enforcement pyramid is to identify the potential participants in the regulatory process. In the field of equality, enforcement has traditionally been viewed as a dialogue between the state (or, in some countries, an independent equality commission) and those who are being regulated (employers, service providers, etc.) But this leaves out the disadvantaged groups themselves. Modern regulatory theory offers two critical insights in this respect. The first is that private forms of social control are often more important in changing behaviour than state law enforcement. In other words, more can be achieved by harnessing the enlightened self-interest of employers and service providers than through command and control regulation. There is, of course, a strong “business” case on efficiency grounds for equality and diversity. The second insight —

which is the one stressed in this article — is that the quality of regulation depends crucially on empowerment. This, in turn, means bringing into the regulatory process the experience and views of those directly affected, i.e. groups such as employers' organizations and trade unions, community associations and public interest NGOs, etc., which act as watchdogs, educate and inform others, and help individuals to enforce their rights. These groups must be given and effectively enjoy rights to be informed, consulted and engaged in the enforcement process.

The enforcement pyramid involves a tripartite relationship between those who are regulated (business), those whose interests are affected (interest groups) and an independent commission acting as the guardian of the public interest. For example, a strategy of this kind has been introduced in Northern Ireland in respect of a duty on all public authorities to promote equality of opportunity. Section 75 of the Northern Ireland Act 1998 attempts to “mainstream” equality, that is to make equality issues central to the whole range of policy debates and implementation. The reactive and negative approach of anti-discrimination is thereby replaced by proactive, anticipatory and integrative methods. Public authorities must draw up equality schemes. These must set goals and targets, and progress has to be monitored. As a result, public authorities cannot ignore or sideline equality issues.

Central to this new positive duty in Northern Ireland is the empowerment of the local communities themselves. The door has been opened for the people who are affected to get involved in the decision-making process, through rights to information and consultation. A similar positive duty on public authorities has now been enacted in the rest of the United Kingdom in respect of racial equality, and the Government has announced an intention to do the same for gender equality and for disability.

## Concluding remarks

Does this model of empowerment in the enforcement of a positive duty to promote equality have any relevance to the global Decent Work Agenda? I suggest that it does. The World Bank has proposed as an essential feature of sustainable development the notion that state institutions must be made more accountable and responsive to poor people in political processes and in local decision making. If the barriers that result from distinctions based on gender, ethnicity, race, social status, disability and other disadvantages are to be removed, legal and political processes need to be reformed in this way.

After 42 years, ILO Convention No. 111 still provides a basis for positive policies to promote equality and for the participation of “other appropriate bodies” as well as employers' and workers' organizations in this process (Article 3). This Convention, and the accompanying Recommendation, could now usefully be revised to provide a clearer focus on equality and empowerment. The decent work programme provides an inspiring framework for fulfilling these objectives.

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