

## Access to justice

## Human rights poverty and social exclusion

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Little public or political attention has been directed to the impact that the Human Rights Act 1998 has had on the lives of vulnerable people and socially excluded sections of society<sup>1</sup>.

Research undertaken at Cardiff Law School and elsewhere in relation to this question strongly suggests that the Act has proved to be irrelevant for such people. A brief synopsis of the Cardiff research is provided at the end of this paper.

The promotion of the human rights of socially excluded people should not be viewed solely as a worthy and charitable activity. Action to promote the social and legal 'equity' of excluded people is of fundamental importance to the wellbeing of democratic institutions and the economy. As the most recent World Development report notes<sup>2</sup>:

Ensuring equality before the law and securing both personal and property rights for a broad section of the community give individuals the incentive and the opportunity to take part in economic and political life.

## Discussion

Possible reasons for the failure of the Act in this context.

Abusers and the middle classes

Rights based legislation does not in itself advance the interests of all sections of society: indeed without other positive action by the state such legislation not infrequently makes matters worse. Abusers have rights too – and they (and the

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<sup>1</sup> For a general overview see L Clements (2005) *Winners and Losers: Social Exclusion and the impact of the Human Rights Act* in L Clements & P Thomas (2005) Human Rights Act: A Success Story? Journal of Law and Society (Special edition) Spring 2005.

<sup>2</sup> World Bank (2005) *World Development Report: Equity and Development* (September 2005): Washington DC, World Bank, p156.

middle classes) are almost invariably better at asserting these rights than their victims.

## The issue of access

The advice deserts identified by the Valleys research; the isolated communities identified by the BIHR and Cardiff Law School research. However the suggestion that better resourced lawyers would resolve the problem is questionable – given the complex cultural (and practical) reasons why socially excluded people do not seek assistance for their problems; do not conceptualise their deprivation in terms of legal remedies<sup>3</sup>.

A 2003 Audit Commission investigation into the implementation of the Human Rights Act 1998<sup>4</sup> noted this factor. Referring to older people, children and to people with disabilities' it found that 'these groups of people were less likely to complain even where they had suffered unfair and/or degrading treatment at the hands of service providers'.

## Conflicting government programmes

Most obviously these would include the restrictions (financial and otherwise) on civil legal and its practical availability as well as the substantial increase in civil court fees. However the Cardiff Law School research suggested that the shadows cast by the Government's auditing /target setting agenda (at that time it was 'best value') 'materially suppressed local authority efforts to implement the Act'.

The failure of the Social Exclusion Unit to regard access to justice as a measure of 'social exclusion' is surprising. In contrast to the frequent references to health, education and social services, its publications are silent on the question of impaired access to the civil justice. As noted above, the World Bank has suggested that equitable legal systems are of fundamental importance in addressing social exclusion arguing, that<sup>5</sup>:

Those whose rights are not protected have little incentive to invest, perpetuating poverty and reproducing inequality. Conversely, good institutions that protect and enforce personal and property rights for all citizens have led to higher sustained economic growth and long-term prosperity.

## Public authority definition

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<sup>3</sup> See P. Pleasance, (2004) *Causes of Action: Civil Law and Social Justice*: London, Stationery Office.

<sup>4</sup> Audit Commission (2003) *Human rights: improving public service delivery*: Audit Commission, p5.

<sup>5</sup> World Bank (2005) *World Development Report: Equity and Development* (September 2005): Washington DC, World Bank, p22..

Many vulnerable and socially excluded people are no longer in direct contact with public bodies. This means that any concerted programme to improve the Human Rights Act awareness of public officers would not necessarily impact on these communities and individuals.

By way of example, those described in the BIHR report were institutionalised or reliant upon social care packages and of this group the vast majority now receive their services from independent organisations (albeit arranged by local authorities or the NHS). Likewise many impoverished communities – such as the Welsh valleys – are dominated by development corporations and private finance initiative projects that are possibly not ‘public authorities’ within the current meaning of the term for section 6 purposes<sup>6</sup>. Gypsies too are increasingly being accommodated on sites, leased by public authorities to ‘private providers’<sup>7</sup>. If the human rights of such excluded sections of society are to be protected, it will be necessary for these ‘quasi-state’ players to be covered by the Act (or at least to act as if they were covered by it)

### **Potential action to combat inequalities in access to justice**

The research findings suggest that reliance upon lawyers alone is unlikely to balance the ‘rights deficit’ experienced by vulnerable and socially excluded communities<sup>8</sup>.

The research suggests that the fostering of a human rights ‘culture’ (or at least ‘awareness’) within the institutions that come into contact with these groups is probably of greater importance.

It is likely (as has been argued elsewhere<sup>9</sup>) that the setting of human rights auditing requirements or targets on public authorities would be, at best, ineffective and at worst damaging. As has been observed, ‘the fact that *virtual*

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<sup>6</sup> Joint Committee on Human Rights (2004) Seventh Report *The Meaning of Public Authority under the Human Rights Act* HL 39/HC 382 Stationery Office, London.

<sup>7</sup> See for example para 144 et seq of the Report of the Council of Europe’s Commissioner for Human Rights, on his visit to The United Kingdom 4<sup>th</sup> – 12<sup>th</sup> November 2004 Strasbourg, 8 June 2005 CommDH(2005)6 accessible at [www.coe.int/T/E/Commissioner\\_H.R/Communication\\_Unit/CommDH\(2005\)6\\_E.doc](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/CommDH(2005)6_E.doc)

<sup>8</sup> See also S Halliday *The Influence of Judicial Review on Bureaucratic Decision-Making* (2000) Public Law 110–22, 117, where it is argued that ‘even if the structural conditions in which the administration of law in government took place were conducive to the flourishing of legal conscientiousness, judicial review may still be a largely ineffective means of regulating the administrative process.’

<sup>9</sup> See for instance O’Neill, O (2002) *A Question of Trust: The BBC Reith Lectures*. Cambridge, Cambridge University Press and Harris, J. (2003) *The Social Work Business*. London: Routledge – Harris describes (p 94) how those being audited, ‘adapt their behaviour to the audit process, distorting reality so that it conforms to an auditable reality’.

human rights safeguards have been put in place may make an organisation less responsive in reality'<sup>10</sup>.

Initiatives that could make a positive contribution include:

- Concerted training and education of all public service employees concerning their obligation to promote Human Rights. This would include a component of training by outside agencies (eg in due course by the Commission for Equality and Human Rights). Action of this type could effect the cultural change that has so far proved to be elusive. The programme could mirror that resulting from the Stephen Lawrence Inquiry<sup>11</sup> – which arguably has had a significant impact on police awareness of the value of cultural diversity.
- Revised terms of reference for the social exclusion unit – to include inequalities in access to justice as a measure of social exclusion;
- Action to widen the definition of a public authority for the purposes of the Human Rights Act 1998
- Radical action by the Legal Services Commission to promote legal and advocacy support for excluded communities and vulnerable people.
- An expanded role for alternative forms of 'legal' representation and resolution strategies. This could include greater emphasis on advocacy/ Mackenzie Friends and a wider remit for the Ombudsmen.
- Awareness promotion of rights and duties amongst school students in order to promote a knowledge base amongst the youth of the nation

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<sup>10</sup> L. Clements & J. Read (2003) *Disabled People and European Human Rights*; Bristol: Policy Press, p94.

<sup>11</sup> The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny 1999 Cm 4262-I – Recommendation 48 *et seq* on 'Racism Awareness and Valuing Cultural Diversity'

## Cardiff Law School research findings

### The Valleys research: deprived communities & the Human Rights Act 1998

A 2004 research study that focussed on the Human Rights Act awareness of solicitors practising in one of the former Welsh mining valleys (Cynon valley). This area was chosen as it is considered 'deprived' and its inhabitants 'socially excluded' by almost every measure of these characteristics.

The research revealed widespread solicitor ignorance of the Act and of its potential for improving the lives of clients.

Given the very small financial margins upon which most of the solicitors operate the researchers considered it 'unsurprising that solicitors have little time to consider and work within the new and challenging parameters of the Human Rights Act 1998'.

The report predicted that the situation was likely to deteriorate with 'the creation of "advice deserts" amongst communities with the greatest needs'.

### Gypsies: deprived communities & the Human Rights Act 1998

A 2002 study<sup>12</sup> investigated the extent of local authority preparations for the implementation of the 1998 Act. It sought to contrast the general responses (for all council activities) with those relating to a specific subject area – their responsibilities in relation to Gypsies and other Travelling people.

This section of the population was chosen as it too is considered 'deprived' and 'socially excluded'. In the opinion of the Government's Social Exclusion Unit 'Gypsies and Travellers constitute the single largest category of people (numerically) deemed to be 'at very high risk of social exclusion'<sup>13</sup>.

The conclusion drawn from the research (and other studies<sup>14</sup>) was that in relation to this socially excluded group 'not being proactive' was the most attractive local

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<sup>12</sup> Economic and Social Research Council funded research – reference R000239238; see L. Clements & R Morris (2004) '*The Millennium blip: local authority responses to the Human Rights Act 1998*' in Halliday S & Schmidt, P. (eds) in *Human Rights Brought Home: Socio-Legal Studies of Human Rights in the National Context*. Oxford: Hart Publishing

<sup>13</sup> *Breaking the Cycle: Taking stock of progress and priorities for the future. A report by the Social Exclusion Unit* Sept 2004, Office of the Deputy Prime Minister, London: para 1.61.

<sup>14</sup> See for example the 2002 District Audit Report *The human rights act: a bulletin for public bodies*; London, [District Audit p3.] which stated that 'within local government, an obstacle to adopting a corporate approach for [a human rights review of] policies has been a lack of member interest and engagement. This has resulted in a lack of support for front-line staff and inertia as far as taking the human rights agenda forward was concerned'.

authority option; that there were ‘few votes to be gained by elected members actively promoting policies’ on behalf of such causes.

The researchers explored the possibility that the Human Rights Act failure of authorities in relation to Gypsies was an exception – that deep seated prejudice against this group presented particular problems. However other studies have made similar findings. A British Institute of Human Rights (BIHR) investigation<sup>15</sup>, for instance, considered the Act’s impact on ‘people that are, or can at certain times in their lives, be considered vulnerable: children, disabled people, older people and refugees and asylum seekers’<sup>16</sup>. It found that the Act had ‘simply not had an impact in the sectors that this project considered’, that:

little serious attempt by any organisation – whether in government or in the voluntary sector – to use the Human Rights Act to create a human rights culture that could in turn lead to systemic change in the provision of services by public authorities<sup>17</sup>.

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<sup>15</sup> Watson, J (2002) *Something for Everyone: The impact of the Human Rights Act and the need for a Human Rights Commission*: London, British Institute of Human Rights.

<sup>16</sup> *Ibid* at p5.

<sup>17</sup> *Ibid* at p8.