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European Commission Conference  
Equal Rights in an Enlarged Union

Walking the Talk.

Prague, 5-6 July, 2004.

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“...we can perhaps remember –even if only for a time – that those who live with us are our brothers and sisters; that they share with us the same short moment of life; that they seek – as we do – nothing but the chance to live their lives in purpose and happiness, winning what satisfaction and fulfilment they can”.

## **1. Introduction.**

I did not write these lines – but wish I had. They were not even written by a European. In fact they were written by Senator Edward Kennedy in 1968 to eulogise his slain brother - Robert Kennedy. Though written against the backdrop of a personal tragedy, they nonetheless contain the seeds of hope. For they pronounce a certain moral vision of the political community – one that happens to nicely express the essential moral and political mission of our European Union. For the very legitimacy and political potency of our Union rests on our collective commitment to respect diversity. Human diversity constitutes the very bedrock of our unity, a celebration of what it means to be European and not, as too often in the past, an occasion for exclusion and discrimination – whether overt or covert.

We are gathered here in Prague because of that political vision and because of the potentially central role that the two Anti-Discrimination Directives can play in helping to make it a reality. It is incumbent on us to maximise that potential and – through it – to ensure that the values that these Directives are given real meaning in the lives of so many of our citizens. The impact should be personal. The Directives should lead to tangible improvements in the lives of millions. But the impact should also be political in the sense that the steady triumph of their underlying values should help to make respect for diversity a natural and spontaneous reflex and not merely something to be done in order to avoid entanglement with the law.

It is fitting to hold this conference in Prague at this moment in time. Franz Kafka wrote chillingly of the absence of legality – or of the existence of a warped notion of legality in your country. His writing serves to remind us that legality has been as much an engine of oppression in the past as it can be the source of justice. It is important to recall that our

Union is built on the rule of law – not a spurious rule of law that is disconnected with justice – but one that is intimately tied to democracy and human rights. That is why we pin so much faith in the possibility of achieving justice through law and that is why these Directives are so important.

I want to reflect on the European project if only momentarily and because it gives context to these Directives. Although crafted by lawyers they do not belong to the technicians and theoreticians of the law – they belong to the People and to their longing for a more open and inclusive Europe. It is important to share this moral vision - or to work towards a common ethical vantage point - for it alone provides the clarity needed to chart a path through some of the more obscure interpretive choices that will confront us soon.

I also want to isolate and identify some of the key concepts which depending, on their interpretation, will largely determine the effectiveness of the Directives. Most of these concepts cut across all grounds. Some of them are peculiar to some grounds. Regardless of whether they are generic or *sui generis*, they need to be unpacked rationally and then understood instrumentally in order to achieve what underlying goals of the Directives.

In doing so, I will share with you our experiences in the Disability Expert Network. In our Network we travelled our own path to come to terms with the values and key concepts of the Framework Directive. Hopefully, our long road of reflection has ripened into understanding – an understanding of what, ideally the Directive, requires and how a country's performance should be judged. As such it is a microcosm of a process of that we all need to go through. We will never reach a final destination. But the journey will be meaningful if we share the same common destination. Thankfully, we will be able to go through it together in the expanded and integrated Expert Network. But of course, such Networks need to exist as much (if not more) in the life of the mind as well as within technocratic arrangements.

## **2. Moral Vision – Using Anti-Discrimination Law to Leverage Diversity**

Let me carefully unpack the linkage between non-discrimination and diversity.

### **(a) Diversity as an End.**

I think we can all share the view that diversity is both valuable in itself and also serves other instrumental ends. However, the case for diversity is not always self-evident and needs to be constantly reinforced with arguments that do not simply assume its legitimacy.

History, especially European history, teaches us many lessons in this regard. In a famous exchange in the late nineteenth century John Stuart Mill debated Lord Acton on the value of diversity within society. Mill took the view that homogeneity was crucial for the viability of a sustainable political order. Acton took exactly the opposite view. History has borne Acton out. Both were right, however, to insist that the question of how we handle the ‘other’ goes to the heart of our moral and political vision of the political community.

Perhaps the best way to appreciate the moral attractiveness and political and economic benefits of diversity is to reflect on its absence. The sad reality is that, through time, our societies have not responded well to difference – and almost regardless of the difference in question. It is as if the terms of entry, belonging and participating depended on conformity with some dominant trait or ideal.

### **(b) The Value(s) of Diversity.**

#### Practical Value – Allowing Identity to Evolve.

Homogeneity is ultimately counter-productive. For it through interaction with difference that identity develops and flourishes. So the more homogenous a society is the less capable it is of evolving through time to meet fresh challenges.

### Ethical Base – Ethics and Not Ethnicity as the Glue of Democracy..

From a purely ethical perspective, it is surely more laudable to build a political community on a common bedrock of ethics that all can subscribe to regardless of their other differences instead of building a political community on the basis of ethnic similarity.

### Economic Rationale: Diversity as a Productive Factor.

From an economic perspective diversity is a productive factor. We all intuit a strong connection in part because of the almost uniformly high motivation of those who can now enter the workplace who may have not been able to do so in the past. I applaud the Commission's recent study on the benefits of diversity within the workplace. Much more needs to be done here to make the 'business case' for diversity.

### Political Rationale – Diversity as a Civilising Factor.

And diversity is also a civilising factor. We value – or should value – human beings not merely because of their 'use value' within the economy but simply because they are human beings. A lower 'use value' should never equate with a lower value as a human being. Markets ultimately serve people. The social dimension to the market cushions people against markets when markets work against them. Also, and again from a political perspective, a rich infusion of difference helps refresh the polity which might otherwise degenerate towards decay.

Nothing helps the political marketplace so much as competition within the marketplace.

### **Core Tension: Group Affiliation – Individual Dignity.**

Our legal order is committed to a view of the person as morally free. We view individuals as capable of choosing their own good. We abhor ascribing responsibility – much less blame – in circumstances where they bear no personal responsibility. People are penalised for what they do (murder) and not for who they are (black, Irish, Jewish). Our legal orders create space for the morally free person by checking public power and by facilitating free and private interaction in civil society and in the market economy. The image at play is that of the 'unencumbered self'.

Yet the reality is that the stuff of the human personality is moulded by group affiliation and community. We are discriminated against because of, or on the ground of, age or disability - characteristics that make sense when shared collectively among others. The ground is collective – the effect is personal. So where then lies the focus on non-discrimination law – the group or the person.

Often we are proud of this affiliation. It gives shape and meaning to our personal destinies. Often we want our affiliation valorised by law and policy. We want to combat prejudice in society about the group – about individuals who share core traits of the group. For example, in the UN and in the context of the drafting of the treaty on disability rights, some NGOs argue that there should be a right to be disabled and be proud of it.

It is sometimes unclear whether the group is itself is being valorised (1) because it is a group or (2) because it is shorthand for valorising individuals who happen to share core traits of the group identity. Sometimes, diversity policies focus on the group – on what is needed to give continued support and vitality to group life – as distinct from the individuals that make it up. Sometimes the focus of the law is on protecting people precisely *because* they share the characteristics of the group.

But perhaps the stronger impulse or priority within liberal legal theory is to ensure that individuals, *despite sharing characteristics with the group*, are nevertheless protected against its smothering embrace. That is why the tension between tolerating group mores against the general ethic of society tends often to come down in favour of protecting individual rights even where to do so might erode group identity.

Importantly, our legal orders are jealous of the personal element in group affiliation. That is to say, they are reductionist toward group affiliation. The problem with automatically attributing all the characteristics of the group – or of a trait – to a person is that it swamps the personal element. Such automatic attribution seems to be an

inescapable part of the human condition. But it discounts the extent to which there may be variations within the group or trait. Most importantly, it leads to a form of social determinism – one that is blind to the individual realities behind the affiliation or trait. And liberal legality is the sworn enemy of social determinism in as much as it forecloses human possibilities for fulfilment. So although the group affiliation may be constitutive of who we are as persons, it does not eviscerate our individual humanity. Perhaps this gives us a clue to the moral purpose of the Directives.

**Appropriate Legal Responses: (1) Respecting Difference, (2) Accommodating Difference, (3) Promoting Difference through Anti-Discrimination Law?**

How should a democratic society interested in the flourishing of its citizens and the diversity of its various group affiliations respond to human difference?

Let me distinguish between a deontological approach and a comparative approach.

First, one might have a developed theory about how to respond appropriately to particular differences. That is to say, one might have a developed theory about the place of that difference in society and the just claims of those who are members of the affiliation. There is a substantive underlay to this vision of justice. Call it a deontological approach.

Secondly, one might adopt the view that those who share the difference in question must at least be treated equally with others who are similarly situated; call it a comparative approach. This approach does not necessarily pivot on a substantive theory of the just claims of the group when considered in isolation from other groups. It assesses the justice of their treatment *relative* to the treatment of other groups. So its underlying theory of justice is relative rather than substantive.

Obviously the second of these approaches is the one that predominates. And yet it is hard to imagine a purely comparative theory of justice in complete isolation from substance. Substance creeps back into the equation by considering, for example, whether individuals are indeed ‘similarly situated’. If individuals are not in fact held to be similarly situated

then some positive account must be taken of the difference. This view of non-discrimination has been endorsed by the European Court of Human Rights (Thleminos) and by the European Committee on Social Rights (Collective Complaint 13).

That is why difference should not merely be respected in the sense that it should not be the occasion for treating some persons less favourably than others, but the difference in question should be accommodated. The non-discrimination ideal – properly parsed – is quite capable of stretching to this agenda of accommodating difference and the Framework Directive remains one of the pre-eminent tools in the world for achieving this.

However, promoting difference is another matter. It could be said that society has a responsibility to foster group affiliation since it is a precondition for individual identity – or at least provides the backdrop to the formation of individual identity. And indeed, to a certain extent society does foster group at least in the context of religion by exempting religious bodies from some aspects of the laws. Yet this is the exception rather than the rule.

Positive action measures – whether responding to past injustices or compensating for a legacy of disadvantage or whether intended to valorise group identity – tend to find authoritative support outside the non-discrimination ideal and from more general public policy goals including the goal of advancing diversity in society. Yet I believe it is precisely because non-discrimination is a tool for the achievement of diversity that it can sit well with such positive action measures. That is why many non-discrimination provisions in Constitutions and in legislation create explicit ‘savers’ for positive action measures. However, and this is a big caveat, this does not alter the fundamental commitment of our legal orders to the human element. There may well come a point where certain positive action measures so eviscerate the human dimension that they can no longer be accommodated within liberal legal theory and might be found to violate the non-discrimination norm. It is debatable, for example, whether some positive action

measures in the context of disability so debase the human personality as to be incompatible with the non-discrimination ideal.

### **The Key Role of Non-Discrimination Law & Policy.**

To recap, adverse treatment because one happens to share membership of an affiliation – i.e., sharing core traits that brings one within a specified ‘ground’ – is prohibited for various overlapping reasons. Sometimes it is because the ground or group itself is worth valorising and that membership of it should not be used against persons (race, ethnic origin). Sometimes it is because the ground is proxy in the minds’ eye of the public for certain traits, which even if accurate, should never be used against individuals (age). And sometimes it is because the automatic attribution of the core traits of a ground or affiliation impermissibly eliminates the individual element – or merit – that should shine out despite membership of the ground in question (disability).

Take age. This is a human trait acquired naturally through the efflux of time. There is some truth to the common perception that age impacts on capacity. That is, there is a natural rate of decline of personal ‘use value’. Leave aside the question whether ‘use value’ should determine legal status. The implicit lesson of history was ‘accept your exclusion – you’re getting old’. However, this truth – or partial truth – has always masked the large degree of individual variations. Indeed, it is no longer as true as it once might have been because of more healthy lifestyles and advances in prophylactic medicine. In other words, biological fact gave rise to an odious form of social determinism which must now be reversed to valorise the diversity of ages in our societies.

Take disability. Here the reduction of ‘use value’ is implicit in the very word dis-ability. So the exclusion is even more ‘natural’. Integration is automatically on the defensive as cost-ineffective since it is presumed that persons with disabilities are less productive. Here the doctrine of ‘separate but equal’ - long and rightly rejected in the area of race – still finds an anchorage point. Not only is the exclusion natural and one must accept it but one must also be thankful for State support and largesse. Social determinism again

grossly exaggerates the reduced - or allegedly reduced - capacity of persons with disabilities. To a large extent the non-discrimination norm helps to reverse the presumptions accreted through the centuries about persons with disabilities. Furthermore, to respect the difference of disability will entail accommodating the difference in order to make space for the presence of the individual so that they can function to the optimum of their true capacity. Hence the significance of the concept of 'reasonable accommodation' as a way of moving beyond respect difference to accommodating it.

Take sexual orientation. Why does sexual orientation attract discriminatory behaviour. Note, age and disability tend to mask an underlying reality of personal capacity. So the key task there is to create space for more rational; appreciation of individual worth. Sexual orientation is not a mask for anything else. It is what it is. And yet it is reacted to negatively for a variety of complex reasons including irrational fear. No wonder that many persons of a difference sexual orientation fear going public. And so the key task of non-discrimination law is to protect sexual orientation for what it is (and not for what it should be as with age and disability).

Take race – the emblematic ground of discrimination. Differences of race challenge one impulse to construct out polities along lines of homogeneity. Such differences are visible. They imply – but not invariably – differences in culture and religion and political belief. They challenge the ethic of toleration and diversity. The motivation to prohibition discrimination on the ground of race is twofold; it is to honour and valorise the difference of race and race as such and it is to protect individuals because of negative reactions against race or because of irrational presumptions about those who belong to certain racial categories. The first goes to the reality that our polities are now built on common public ethics to which all may subscribe rather than on ethnicity which by definition excludes.

Take religion and belief.

Proxy for different national allegiances.

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