

## **Human Rights and Human Wrongs: A rights based approach to the punishment of sex offenders**

**Bernadette Rainey and Karen Harrison**

Abstract: The treatment and management of sex offenders is largely premised on the concepts of punishment and public protection. Driven by populist punitiveness and moral panic, policies designed to manage such offenders are largely incapacitative and retaliatory. Rather than looking at punishment from this aims perspective however, this article considers the influence of human rights on the concept of punishment. By looking at the management of sex offenders through the use of pharmacotherapy and the sex offender register it considers how concepts such as consent, dignity and equality are relevant to the punishment debate.

### **Introduction**

The sentencing, management and treatment of sex offenders are fraught with difficulties and as such are controversial on a world-wide scale. Driven by populist punitiveness<sup>1</sup> and moral panic<sup>2</sup>, policies designed to supervise such offenders are largely incapacitative and retaliatory in nature. While many would agree that the public need protecting from predatory offenders, governments are still obliged to try and attain the correct balance between the rights of the offender and the need to protect society from him/her. Important to this is the concept of human dignity, which emphasises the need to maintain dignity for all people, irrespective of what that individual may have done (including as in this case crimes of a sexual nature). Even though providing dignity and the concept of rights to such an individual is contentious, the state is nevertheless under an obligation to protect all within its jurisdiction from the violation of individual rights. Despite this, the right of an individual to this dignified existence is often overshadowed by the public's and through them the state's desire for 'safer communities'. This utilitarianism raises justifiable concerns for human rights advocates in several areas concerning the treatment and management of sex offenders; with this article looking

---

<sup>1</sup> Bottoms, A.E. (1995). *The Philosophy and Politics of Punishment and Sentencing*, in: C. Clarkson & R. Morgan (eds.), *The Politics of Sentencing Reform*. Oxford.

<sup>2</sup> Cohen, S. (2011) *Folk Devils and Moral Panics. The creation of the Mods and Rockers*. London: MacGibbon & Kee.

specifically at the use of the sex offender register. Furthermore, moving onto another concept, namely that of equality, this article also looks at the notion of ‘treating differently’ and examines whether current sex offender legislation in England and Wales meets such equality concerns. In short we are questioning whether in relation to sex offenders there is a culture of human rights or whether instead it is best described as one of human wrongs.

## **Human Rights**

Historically, risk was seen to be the domain of criminologists, and human rights an area for lawyers; with neither area overlapping or colliding (Murphy and Whitty 2007). Since the introduction of the new penology and its emphasis on risk (Kemshall 2008), however, it is no longer acceptable for such a demarcation to exist, with lawyers, in particular being unable to ignore the threat that risk has to the protection of individual rights. As Beck explains (2007) we are now living in a risk society, where the precautionary principle dominates and where legislation and policies designed to manage all offenders have risk and the protection of the public at the forefront. In such an environment, especially when talking about sex offenders and bearing in mind the measures often used in their containment and surveillance, a rights based approach can work to lessen the threat to liberty from policies based on a risk discourse. Focusing on rights for any offender however, let alone a sex offender, is not a popular dialogue. Sex offenders are often demonised and seen to be less worthy of protection, reflecting a delineation between the ‘deserving’ and the ‘undeserving’. Such a viewpoint, however, is rejected by human rights lawyers, with Baroness Hale confirming that, human rights apply to all “no matter how unpopular or unworthy she may be” (*R (Adam and Others) v Secretary of State for Home Department* (2005) UKHL 66). On this basis a rights based focus is needed when managing sex offenders in England and Wales. One way in which this can be achieved is by providing a legal framework based on the two concepts of dignity and equality (Zedner 2006).

### **The concept of dignity**

Human dignity is a central tenet of human rights law and flows from natural rights theory and Kant’s categorical imperative which states that no person should be used as a means to an end (McCrudden 2008). Modern thinkers such as Gerwith have taken this further basing human

rights protection on ideas of human agency (Gerwith 1978). It has been argued that the principle of dignity is the basis for ethical consideration of offender treatment and management. In a legal context, the idea of dignity has been described as one of the three adjudicating principles in the application of human rights law (Gearty 2004). The protection of dignity is explicit in international human rights instruments and various national constitutions and although there is no codified constitution in the UK, dignity has become more prominent in English law since the passing of the Human Rights Act in 1998 (Feldman 2000).

Despite acknowledgement of its existence, dignity is still a difficult legal concept to apply in decision making, largely due to its vague definition. It has been described as a malleable concept (Feldman 1999) and is thus open to cultural reinterpretation (Donnelly 2003). As noted by McCrudden (2008, 698) “human dignity...is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions.” That is not to say that the concept is illusory and unusable. Different conceptions may arise in different legal cultures but there remains a “minimum core” of meaning that is arguably universal (McCrudden 2008). McCrudden argues that this minimum core has three elements; the recognition of the intrinsic worth of every human being, that this intrinsic worth is recognised and respected by others and that the state should recognise and exist for the sake of individual worth (McCrudden 2008, 679). Feldman defines human dignity as “an expression of an attitude to life which we humans should value when we see it in others as an expression of something which gives particular point and poignancy to the human condition’ (Feldman 1999; 686). The role of law is to provide a list of rights which reflect at least the “minimum core” and that help preserve the opportunity for a dignified life (Feldman 2000).

However, Feldman argues that dignity can be defined as subjective or objective (Feldman, 2000). Subjective dignity focuses on the individual values of autonomy and self determination. However this may clash with objective dignity which focuses on the dignity of humanity as a whole. Hence the state can limit individual autonomy to protect the dignity of the human collective, such as the banning of “dwarf tossing” in France, where the court decided that even if the individual consented, the activity undermined the dignity of humanity as a whole (Feldman, 2000). The culturally relative meanings of dignity and the lack of legal

consensus as to how dignity should be used in adjudication (McCrudden, 2008) has not precluded its use to justify decision making. The European Convention on Human Rights (ECHR) does not include dignity explicitly but the European Court of Human Rights (ECtHR) has increasingly used the concept to justify its reasoning (for example see *Pretty v UK* (2002)). It is argued that the treatment and management of sex offenders should be premised on the human dignity of the offender, whilst recognising the need to protect the dignity of potential victims. The protection agenda should not automatically outweigh the intrinsic worth of the individual; there must be a strong justification for this. In the area of penal policy, this justification is usually premised on risk. However, the permissibility of limitations on rights is dependent on the right involved and the justifications used. Any breach of the right to ill treatment (article 3 ECHR) cannot be justified whereas the qualified rights such as the right to private and family life (article 8 ECHR) allow the state to limit rights as long as any limitation meets a legitimate aim, is in accordance with law and is proportionate. The safety of others is recognised as a legitimate aim of public policy when considering qualified rights. However, a question arises as to the legitimacy of claims of dangerousness and risk when law and policy limits rights.

It should also be noted that risk may be used not just to limit rights but can also be used to place an obligation on the state to protect individuals in the community from “dangerous” offenders. The state is under a positive obligation to protect the rights of all within the community, an obligation that has been recognised by the ECtHR. For example, under article 2 and article 3 on the right to life and not to be ill treated, the state has obligations to provide protection where there is a real and immediate *risk* of death or serious harm that the state knows or ought to know exists and the state can take reasonable steps to protect identifiable individuals (*Osman v UK* (2000) 29 E.H.R.R. 245). Similar obligations apply under article 8. The courts have not given a detailed analysis of risk in these cases, instead reaching conclusions on all the evidence (for example *Chahal v UK* (1996)). Therefore the concept of risk is clearly interrelated with dignity and the protection of rights.

***Risk: The protection of the community***

As discussed above, the literature of risk has not traditionally examined rights in detail. However, there has been a growing concern with “legal risk” in regulation studies and in areas such as insurance and tort law (Ewald 2000, Ericson 2007, Steele, 2004). As noted by

Murphy and Whitty (2007), the relationship between the two concepts is complex and intersecting. Similar to dignity, the concept of risk is open to interpretation across the political, social and legal spectrum as well as between policy makers, practitioners and legal enforcement (Kemshall 2008). The term risk is value laden (Douglas 1992). The concept of risk has increasingly been used as a descriptor for the post or late modern age; we are living in a risk society. (Beck 2007). This leads to demands for a risk averse society driven by the precautionary principle (Beck 2007). This “precautionary logic” (Hebbenton and Seddon 2009) to risk impacts on legal regulation. ‘Security is displacing freedom and equality from the highest position on the scale of values. The result is a tightening of laws, a seemingly rational totalitarianism of defence against threats’ (Beck 2007: 8-9). This has led to a shift from welfare to risk, from treating the offender as a moral agent who can be transformed (Garland 1985) to the management of risk classified by dangerousness (Feely and Simon 1992). This new risk penology has not only been driven by a focus on risk by policy makers but also by public opinion. Sex offenders are the new “folk devils” and moral panic has heightened the fear of paedophiles following high profile murders. (Kemshall and McIvor 2004). The cultural understanding of risk (Kemshall and McGuire 2003) has led to legislative and policy changes that focus on regulating the perceived dangerousness of sex offenders.

If risk has become the predominant rationale of penal policy then there has to be a framework to assess offender risk. Assessment tools have been developed in order to manage and differentiate risk. Different methods have been used such as clinical assessment tools which focus on the individual and actuarial methods of assessment focusing solely on the context and statistical data available (Grubin 2004). In actuarial risk assessment, there is little focus on individual characteristics. The failure to take individual characteristics into account has been criticised as being flawed (Grubin 2004) and may compromise the rights protection of the individual. Removing individual characteristics objectifies the offender and undermines his dignity. Recent risk assessment tools use dynamic methods of assessment, which combine actuarial assessment with the individual circumstances and characteristics of the offender. These third generation tools are arguably more effective and do consider the needs of the offender (Kemshall 2003). However there are still difficulties with assessing what is meant by a high-risk offender. (Kemshall 2003). The use of risk moves the penal system further from traditional notions of proportionate punishment and deterrence focused on past crime (Von Hirsch 1985), to prevention of acts that may occur in the future.

## **The Concept of Equality and the law**

It can be argued that equality is one of the basic values of a liberal, democratic society. However the concept of equality is philosophically and legally open to interpretation and is contested (McCrudden and Prechal 2009). Equality “appears to be an open-ended and indeterminate concept, capable of giving rise to multiple and often conflicting accounts of its ‘proper’ meaning.” (O’Cinneide 2008, 78). There is considerable debate surrounding the scope and societal guarantees that equality can provide and equality is often “fragmented into distinct and often rival concepts” (Fredman 2008, 176).

Equality is often divided into concepts of formal equality and substantive equality. Formal equality as endorsed by libertarians such as Hayek, (O’Cinneide 2008, 93) advocates the negative aspect of equality; the non-interference with personal autonomy that may lead to inequality. Other philosophers such as Rawls argue for some form of substantive equality, where steps are taken to enhance equality through opportunities with fair competition (Mason 2006). Others go further, arguing for policies that lead to equality of outcomes (O’Cinneide 2008, 94). Legal approaches to equality have reflected these conceptual differences.

The emergence of equality as a principle value in legal discourse has relatively modern foundations (Fredman 2011). The twentieth century witnessed a rapid expansion of legal rules aimed at tackling some of the inequalities within society. Anti-discrimination law developed at international and national level as a tool to tackle discrimination based on a personal characteristic. Following the mass discrimination and genocide of the second world war, the United Nations placed non-discrimination as a foundational principle in the Universal Declaration of Human Rights in 1948 as well as formulating several specific treaties to prevent discrimination based on specific characteristics (Rainey 2012). The codification of equality was further endorsed in other international instruments such as the European Convention of Human Rights (ECHR) and in domestic constitutions. In Europe, the European Union has been proactive in developing non-discrimination policies in employment which have now been expanded to goods and services. (McCrudden and Prechal 2009).

### ***Formal Equality in Law***

Most international and domestic law on equality deals with non –discrimination. This is the unjustified, less favourable treatment of a person because of a personal characteristic or because they belong to a group within society. Formal equality is reactive; the law acts to compensate a person after past discriminatory practice and guarantees equal treatment before the law (for example the fourteenth amendment to the US Constitution). This form of discrimination law is embodied in the idea of direct discrimination where it is clear a person has been treated unequally. However this cannot happen in a vacuum and there must be someone that the person can be compared to in order to demonstrate unequal treatment. In direct discrimination cases, the treatment is intended by the discriminator. Non-discrimination is not a value in itself but a “characteristic of a society based on the value of equality”. (Bell 2004) It is not an end in itself but a means for furthering the equality ideal by removing the most egregious forms of direct discrimination. Different forms of anti-discrimination law have been used as tools in an attempt to achieve equality. This can include the two forms of the Aristotelian concept of equality. Aristotle argued that like cases should be treated alike. This reflects a minimalist view of protection from discrimination under which every person is treated similarly under the law. However, Aristotle argued that the corollary to this concept is that in some cases, inequality can arise from an attempt to make unequal things equal (McCrudden and Prechal 2008, see also *Thlimmenos v Greece* (2001) 31 EHRR 411; the European Court of Human Rights (ECtHR) found that difference of treatment can result from the state’s failure to treat two different situations differently). Therefore, difference and diversity need to be recognised in order to achieve equal treatment.

### ***Substantive equality in law***

However, although non-discrimination law can redress individual discrimination and provide a remedy, it has been argued that a different approach is needed as this negative aspect of equality fails to remove the underlying barriers to equality that are pervasive in society. As noted above, equality advocates argue that in order to effect societal change and remove inequality it is necessary to have substantive equality provisions. The recognition of difference can not only remove individual direct discriminatory practice but can also lead to the recognition of indirect discrimination: where a legal rule, policy or practice can apply equally to all under the law (treating everyone the same), but can have an adverse impact on a particular group. In this scenario, intent to discriminate is irrelevant as it is the effect that is important. A good example of this was established in *Brown v Board of Education* 347 U.S.

483 (1954), where racial segregation in schools in states in the US was held to be indirectly discriminatory due to the impact of segregation on black children even though the state involved had provided education as required under the law and segregation was allowed under previous judicial interpretation of the equal treatment amendment in the US Constitution which endorsed the “separate but equal” doctrine.”(*Plessy v Ferguson* 163 U.S. 537 (1896) ). Indirect discrimination has been important in recognising the impact of law and policy on groups as well as individuals.

A focus on group protection has also led to the development of the idea of equality of opportunity. This term is also contested (Mason 2008), but put simply involves the attempt to create a “level playing field” based on fair competition. This may lead to “positive discrimination” policies, where a disadvantaged group is given preferential treatment in order to “level” the field and redress a history of discriminatory practice (Rainey 2012, Fredman 2011). The most substantive attempt to achieve equality is the desire for “equality of outcome”. These are the most controversial areas of legal intervention with differing claims concerning the use of law to “social engineer” society and the relationship between equality and liberty (O’Cinneide, 2008). A concept which is increasingly being used to achieve equality of outcome in the long term is the “mainstreaming” of equality into law and policy, meaning the state is placed under a duty to promote and progressively achieve equality.

### ***Mainstreaming and equality duties***

Since the mid 1980’s mainstreaming has emerged in various areas of law and policy. It was identified by women’s rights organisations as an effective way of going further than formal legal methods of tackling discrimination and instead actively promoting gender issues. This idea has since permeated into other areas of law and policy including the environment, regulation, human rights, development and equality. It has been defined differently for different concepts. With regard to equality, the Council of Europe (1998) defined it as:

*“the reorganisation, improvement, development and evaluation of policy processes, so that an equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making”*

Mainstreaming is an effort to move equality from the margins of policy formulation into a central decision making role in government. It is aimed at tackling problems with present day policy-making. However, it is anticipatory in that it identifies where issues and problems may arise in the future. It is also participatory in that it encourages a proactive approach by both policy makers and those directly affected by the decisions made in government. (Rainey and Jenkins 2007).

The mainstreaming of equality in the UK has led to the development of equality duties. These are legal duties based on public bodies to have due regard to equality and adverse impact on protected groups when formulating and implementing policies. S75 of the Northern Ireland Act 1998 introduced the legal duty in Northern Ireland and this was followed in the rest of the UK under non-discrimination legislation (Rainey and Jenkins 2007). Disparate legislation covering differing protected groups were combined in the Equality Act 2010 in the UK ( not including Northern Ireland), which now contains the general legal equality duty to have due regard to equality of the groups protected by the Act (see below). The duty does not guarantee equality of outcome in the short term but develops recognition of differential impacts and a duty to take steps to mitigate any impact. Research on the use of the equality duty in Northern Ireland has highlighted the importance of the political context for achieving the aims of mainstreaming (Fredman 2008) and other issues such as problems with consultation, a lack of substantive engagement with the process as well as issues with measuring impact given the contested meaning of equality. (Rainey and Jenkins 2008, McLaughlin and Faris 2004), However, there is recognition that there has been an improvement in participation between civil society and government. (Donaghy 2004). The duties also allow an individual to mount a legal challenge against the public bodies for a failure to fulfil the duty under the legislation. It can be argued that the equality duties in UK legislation encompass a duty on the state to recognise difference and under certain circumstances to modify or commit resources to mitigate differential impact; in other words, to treat certain groups differently.

### ***Equality, Rights and Risk***

Equality is a central tenet of human rights discourse as discrimination undermines human dignity and the rights guaranteed in international and domestic law. As noted above, international human rights instruments either have a non-discrimination clause or have been

formulated to deal specifically with certain groups (for example the UN Convention on the Elimination of all forms of Racial Discrimination 1966, UN Convention on the Elimination of All Forms of Discrimination Against Women, 1979, UN Convention on the right of the Child 1989, UN Convention on the Rights of Persons with Disabilities 2008).

The ECHR also contains a non discrimination clause in article 14<sup>i</sup>. However, this clause is limited as it cannot be raised as a standalone right. It can only be engaged if another right in the Convention is arguable before the Court (Ovey and White 2010, McColgan 2003). Protocol 12 to the ECHR has now allowed discrimination to be raised as a standalone right although it has rarely been used (Rainey 2012). The limitation on the use of article 14 is restrictive as it ties discrimination to civil and political rights which are the rights enshrined in the ECHR (Ovey and White 2010). These “first generation” rights are traditionally views as negative rights. They require non-interference of the state with personal autonomy and require little state intervention (Moeckli et al 2010). This is arguably a limitation on the application of substantive equality as it focuses on the protection of the individual from discrimination rather than the protection and promotion of equality for groups (Rainey 2012, Fredman 2008).

In contrast, substantive equality including indirect discrimination encompasses economic and social concerns and rights such as education, housing , employment etc. As noted above, positive duties such as the equality duty are designed to promote societal change in the long term and address structural discrimination. As noted by Fredman (2008, 175) this distinction between negative and positive aspects of rights and equality is increasingly being recognised as artificial and “without a positive duty to promote equality, patterns of discrimination and social exclusion will remain unchanged.” This reflects a growing recognition in human rights law generally that civil/political and economic/social rights are indivisible and interrelated (UN Vienna Declaration 1993). Group protection is increasingly being recognised as necessary to achieve effective protection of rights as well as substantive equality.

Similarly, the use of risk penology as justification for government policy on the treatment and management of sex offenders which may restrict offender rights. As will be discussed below, the focus on risk assessment has led to the development of tools of assessment to categorise sex offenders’ level of risk and suitability for treatment programmes. Different methods have

been developed such as clinical assessment tools which focus on the individual and actuarial methods of assessment focusing solely on the context and statistical data available (Grubin 2004, see CHAPTER 20: A CONVERGENT APPROACH TO SEX OFFENDER RISK ASSESSMENT). In actuarial risk assessment, there is little focus on individual characteristics. The failure to take individual characteristics into account has been criticised as being flawed (Grubin 2004). This may compromise individual rights by removing individual characteristics and objectifying the offender. Actuarial assessment may also have a negative impact on particular groups whose social and cultural circumstances are not taken into account or they are treated as a homogenous sub category, (Hudson and Bramhall 2005, Martel, Brassard and Mylene 2011). In terms of discrimination, one of the justifications for the development of these tools is that they use risk markers with no variance for gender or ethnicity and therefore are universally applicable (Martel, Brassard and Mylene 2011). Thus, scientific methods are neutral and it has been argued that they reduce discrimination by removing bias that may be found in clinical assessment tools (Cheliotis 2006). However, actuarial tools fail to recognise that different groups may need to be treated differently and so violate Aristotle's second precept of equality (see above).

Recent risk assessment tools use dynamic methods of assessment, which combine actuarial assessment with the individual circumstances and characteristics of the offender (see CHAPTER 20: CONVERGENT APPROACH TO SEX OFFENDER RISK ASSESSMENT.) These third generation tools are arguably more effective and do consider the needs of the offender (Kemshall 2003). However there are still difficulties with assessing what is meant by a high-risk offender. (Kemshall 2003). It has also been argued that dynamic assessment tools have been used to the detriment of ethnic groups (Martel, Brassard and Mylene 2011, see below). As noted by Douglas (1992), the concept of risk is "value laden," and like equality, is open to interpretation by both policy makers and practitioners (Kemshall 2008). Dynamic risk assessments may be open to the same criticism of earlier assessment tools where discretion given to decision makers and practitioners may allow bias into the process. It may be that assessment methods would benefit from the continual monitoring and standards that an equality duty in the public sector can provide.

### **Applying rights protection to dangerous sex offenders**

The taking of a rights based approach to the treatment and management of sex offenders involves the application of the concept of dignity to penal policy and community protection. Specific examples will be used to illustrate the application of a rights framework, the use of risk penology and the implications for community protection.

### ***Human Rights Challenges and the Sex offender register in England and Wales***

As Thomas (2010) notes the use of sex offender registration in the UK has been influenced by US federal law, premised on public protection and crime prevention. The requirements for the register were first legislated for by the Sex Offenders Act 1997 and later amended by the Sexual Offences (SOA) Act 2003. Thomas (2010) outlines the increasingly draconian additions to the register since 1997. The register requires registration for designated sexual offences: registration is indefinite for sentences of more than 30 months; for a period of six to 30 months registration is for ten years; for less than six months registration is for seven years; with a police caution meaning registration for two years (ss 81-82 SOA 2003). As well as being on the register, an offender must report to the police station within three days, be photographed, give fingerprints, give notification of travel abroad, annual verification visits and notification of changes, powers of forced entry by police into registered sex offenders' premises, and the use of polygraphs. (Thomas 2006). These measures will be further extended under the Sexual Offences Act 2003 (Notification Requirements) England and Wales Regulations 2012. The measures are motivated by public protection arguments (Thomas 2006; Kemshall 2008; 115).

However, sex offender rights are engaged under this regime. The main right engaged is the right to private and family life under article 8 of the ECHR<sup>ii</sup>. Article 8 is a qualified right; the state may justify interference if it is in accordance with law, meets a legitimate aim and is necessary in a democratic society<sup>iii</sup>. Article 8(1) does not define what private and family life means. Family life covers most familial relationships, whilst private life has been interpreted widely by the court to include 'a person's physical and psychological integrity' for which respect is due in order to 'ensure the development, without outside interference, of the personality of each individual in his relations with other human beings' (*Botta v Italy* (1998) 26 EHRR 241).

As a minor intrusion can constitute interference, many cases are decided under article 8(2). A measure has to be ‘in accordance with law’ meaning that there should be some legislative basis for the treatment. (*Malone v UK* 7 E.H.H.R 14). The state will then have to demonstrate a legitimate aim when implementing the measure. These include public safety, crime prevention and protection of others. The issue upon which most of the jurisprudence on Article 8 is decisive, is that of the necessity for such a measure in a democratic society. For a measure to be necessary it has to be proportionate; does it strike a ‘fair balance’ between the right of the individual and the needs of the community? (*Hatton v UK* (2003) ECHR 338). The decision maker will carry out a balancing exercise where the right of the individual is weighed against the public interest. In this balancing exercise, the clash of the differing forms of dignity discussed above is illustrated.

Article 8 places positive obligations on states to ensure respect of the right. Victims of sex offenders have potentially a claim for protection in order to fulfil their rights to protection under Article 8<sup>iv</sup>. Where a Court decides the balance should be struck may depend on the margin of appreciation it gives to the states. This is the amount of discretion the ECtHR will give to the states as best placed to decide on certain issues due to ‘their direct and continuous contact with the vital forces of their countries’ (*Handyside v UK* (1976) 1 EHRR 737).

The register itself is an administrative requirement as a result of a criminal sentence rather than a punitive measure and has been recognised as such by the ECtHR. In *Adamson v UK* (Application no. 42293/98), the applicant argued that it was a penalty separate from his conviction and so violated article 7, as a penalty heavier than the one applicable for his offence. The ECtHR rejected this argument, finding that the requirements at the time of the case were not onerous enough to constitute a penalty. However, the more draconian the requirements of the register, the more likely that it may be seen as a penalty. (Home Office/Scottish Executive 2001: 13). *Adamson v UK* did recognise that the register engaged article 8 in regard to its effects but the measure was not held to be disproportionate. However, the more onerous the interference the less likely that it will be found to be proportionate under article 8(2). There have been several challenges to the register which until recently were dismissed. However, recent UK case law has challenged the compatibility of the register regime with Convention rights.

A series of cases challenged the automatic nature of the register regime. Those placed on the register indefinitely had no right to seek a review of the decision. In *Re Gallagher* ([2003] NIQB 26), the applicant used article 8 to challenge the automatic nature of the register requirements which denied him the right to review of the indefinite registration. The judge underlined the need for the state to justify interferences with individual rights (para 24) but noted that “the gravity of sex offences and the serious harm...must weigh heavily in favour of a scheme designed to protect potential victims of such crime” (para 24); individuals “must be of secondary importance” (para 23). Dangerousness was placed above individual rights; “the court deferring to parliament and reflecting governmental and public attitudes” (Rainey 2010). Subsequent case law followed this reasoning (*Forbes v Secretary of State for Home Department* [2006] 1 WLR 3075, *H v The Queen* [2007] EWCA Crim 2622, *A v Scottish Ministers* [2007] CSOH 189). The latter two cases dealt with minors. The argument that as children their circumstances should have been open to greater scrutiny was rejected. However, in both cases the court did consider individual circumstances in finding that the seriousness of the offences in question meant the indefinite registration period was not disproportionate.

However, the Courts now seem prepared to show less deference to parliament. In *F and Thompson v Secretary of State for Justice* [2010] UKSC 17, the Supreme Court declared the indefinite nature of registration without review incompatible with Article 8. F was 11 years old when the offence was committed. The Court found that juveniles should have a right to review indefinite registration. A lack of review was disproportionate given that the general approach of the courts to juvenile sentencing was to consider the maturity of the offender. In Thompson’s case, the Court noted that indefinite registration may be necessary but where an offender believes he is no longer a risk, in principle he should be given the opportunity to establish this. As the statutory scheme made no provision for review, it was declared incompatible with article 8. The court noted that evidence was inconclusive with regard to the impact on recidivism of indefinite registration. It also noted the negative impact on rehabilitation that indefinite registration can have on those who are no longer a risk. (para 55, 51). The case may also reflect concerns that the legislation failed to consider juvenile characteristics. The courts have been aware of the necessity of considering maturity and age in sentencing. The Court noted the decision in *S and Marper v UK* (2008) Application No.30562/04, in which the ECtHR criticised the UK for a blanket penal policy that failed to

consider children. The decision in *F and Thompson* does not go as far as interfering with the actual requirements of the register but lays down a minimum safeguard of access to review. This reflects the emphasis on procedural rather than substantive protection given in IPP cases above but it also demonstrates that the judiciary is prepared to find that a scheme excluding any consideration of the individual may be incompatible with convention rights.

Despite government rhetoric condemning the decision, claiming it was “disappointed and appalled” and would put public protection first (Theresa May, Hansard 16 Feb 2011, Col 959), the government has responded to the Court ruling by amending the law and allowing a right to review indefinite registration. When in force,<sup>v</sup> the Sexual Offences Act 2003 (Remedial) Order 2012 will allow for a right to review indefinite registration. Unlike in Scotland, where amended legislation allows for an automatic right of appeal after 15 years (Sexual offences 2003 (Remedial) (Scotland) Order 2011), the amendments in England and Wales give a more limited right to review which reflects the government’s desire to take a minimalist approach and be “tougher” than the Scottish regime. (Theresa May, Hansard 16 Feb 2011, Col 955, 959, Liberty, 2011). The Order allows for a review of indefinite registration if requested by an adult offender after 15 years and an offender under 18 after 8 years. (s 91B 2003 Act). The review will be carried out by a chief police officer. If the police officer decides to keep the offender on the register, then it may be reviewed again in 8 years. This further review can be postponed by the police officer until 15 years after the initial review. The test for deciding if the offender is to remain on the register is the “risk of sexual harm” (s91B). This includes psychological as well as physical harm to the community. This definition has been criticised as being too vague (JCHR 2012). Coupled with this, the police officer may contact relevant bodies such as MAPPa for information on risk etc, but there is no obligation to do so. Therefore the efficacy of decision making on risk is questionable.

In the original draft of the Order, the decision of the police officer was final. This was criticised as failing to comply with the decision in *F and Thompson*, where the Supreme Court explicitly noted the need for an independent tribunal ( as underlined in *Bouchacourt v France* ((2009) Application no. 5335/06)). It is questionable that the police are an independent authority for the purposes of review and it was arguable that such a review process was not rights compliant (JCHR 2012, Liberty 2011, Howard League for Penal

Reform 2011). In response, the draft order now includes a right to appeal to a magistrate's court from the review decision of the police officer. This does provide a minimum level of compatibility with article 8. However, the test of "sexual harm" and the limited examination of risk undermines the review process. As noted by critics of the Order, sex offender registration uses considerable resources so it makes little sense for the government to maintain offenders on the register who are no longer a risk. (Liberty 2011). The statements by the government condemning the Supreme Court decision in terms of victims and public protection may suggest a political reason for the minimalist review allowed under the legislation.

### ***Human Rights Challenges and Disclosure***

Following "Megan's law" in the US, the UK government has resisted the public pressure to introduce a similar regime in the UK. (Thomas 2010; Kemshall 2008; 118). There is no general duty on the police to disclose the whereabouts of registered sex offenders though there has been a discretionary disclosure policy, which is circumscribed (Kemshall 2008; 119). However, disclosure is now legislated for in limited circumstances. S.327A Criminal Justice Act 2003 (as amended by s.140 of the Criminal Justice and Immigration Act 2008), allows a public authority to disclose to a relevant member of the public if a sex offender poses a risk of serious harm to a child and it is necessary to protect the child. The authority may impose conditions on the relevant person as to further disclosure. There is a presumption that disclosure should be made.

The case law on public disclosures has tended to uphold the right to disclose in particular circumstances but the courts have been clear that any disclosure engages article 8(1) and must be justified under article 8(2). For example, in *Re C* (unreported, 15 Feb 2002), the Court allowed a disclosure concerning the dangerousness of C. However, it weighed the need to protect others with the right to private life of C, the danger to C from vigilantes and dangers in controlling sensitive information (Power 2003, 84). One of the problems that may arise under the "presumption to disclose" may be the difficulty in restricting information to those considered in need of protection. Based on previous case law, any challenge to a disclosure would lead to careful scrutiny of the necessity of such disclosure. This may be due to the fear of vigilantism or the fear that offenders may be forced into hiding.

There may also be an awareness that the state is under a positive obligation to protect. As noted, the ruling in *Osman v UK* ((2000) 29 E.H.R.R. 245) found that the state can be held responsible for a death if it knew or ought to have known of a credible threat and did not take reasonable steps to protect. This applies both to offenders and to the potential victims. An offender could be put in danger if information is made public and measures were not in place to protect him, as noted in *Re C*. However, a potential victim may claim a credible threat against him/her if an offender is in the area. This may be more difficult to argue as the claimant would have to demonstrate he/she was a specific target for the offender and that the register requirements did not provide reasonable protection. In decisions based on *Osman* in other cases, the Courts have shown a reluctance to find against the police (*Van Colle v Chief Constable of Hertfordshire Police* [2008 UKHL 50]) but the potential for challenges still remains. There is also an argument that there may be a positive obligation under article 8 to provide information where members of the public are at risk. The ECtHR has held that where claimants' health was affected by a failure to disclose information, a state may be liable (*Guerra v Italy* [1998] 26 E.H.R.R. 357). However, as Power (2003, 88) notes, register disclosure involves competing rights (of the offender and the potential victim) whereas *Guerra* did not.

### **Special offender groups**

Given the legal framework that operates to both prevent discrimination and in some cases promote equality, the treatment and management of sex offenders should recognise common risk factors but also identify how different characteristics may impact on offending and rehabilitation. Research has increasingly highlighted the need to move away from treating sex offenders as a homogenous group of white, adult, male offenders (Duncan 2006). As case examples, several groups have been identified from the research. However, this is not an exhaustive list and it should be remembered that an offender may possess more than one characteristic that affects offending and treatment.

### ***Juvenile sex offenders***

In recent years, there has been increasing legal intervention to prevent discrimination based on age. In the EU and in the UK age is now a protected characteristic in equality legislation

(Equality Act 2010). It should also be noted that the UN Convention on the rights of the child (1989) is applicable to juvenile offenders. This includes article 2 protecting children from non discrimination, article 2 guaranteeing the best interests of the child and article 12 which states that the views of the child should be given due weight, given the child's age and maturity.

There has also been increasing research into the specific characteristics of juveniles in the criminal justice system. The term "juvenile" is used here, though some researchers prefer "sexually abusive youth" or adolescents to avoid labelling young people as sex offenders as this may be counter productive in attempting to treat these offenders (Metzner, Humphreys and Ryan 2009).

#### *Risk assessment*

The research suggests that the issues raised with other subgroups apply to juveniles. Applying predictions of recidivism based on risk factors attributable to adults may not be appropriate for juveniles and there is a lack of knowledge and research into sexually deviant behaviour in juveniles (Hendricks and Bijleveld 2008). Research suggests that the juvenile sub group is not homogenous and that a significant portion of offenders in this group have co-occurring development disabilities, suffer from family breakdown and have poor social skills (Schladale 2010), so underlining the need to consider specific criteria when assessing risk. It has been noted that as children, these offenders are continuing to develop cognitively and this needs to be recognised (Poortinga. E et al 2009). Research has identified possible juvenile specific risk factors that should be taken into account (Schladale, 2010, Poortinga et al 2009). As noted by Poortinga et al (2009), evidence based research focused on the characteristics of juveniles is needed to ensure the efficacy of treatment.

#### *Responsivity: delivery*

Given the specific issues relating to juveniles, it is necessary to response to variant risk factors with suitable and effective treatment and management. Research has highlighted the need for tailored programmes for juveniles. It has been suggested that successful treatment requires a "holistic, individualised approach based upon empirically driven practices for youth prevention" (Schladale, 2010, 182). Without this, the efficacy of treatment can be questioned. The need for a responsive treatment programme is mirrored in the criminal justice system and the management of juvenile sex offenders. There are issues that arise

concerning consent to treatment, age appropriate interviews for treatment and management, the use of polygraphy on juveniles and the use of drug therapy (Scott 2009). The UK Supreme Court has also noted that sex offender registration rules should consider the age of the offender and the right to review registration should be age appropriate (*F and Thompson v Secretary of State for Justice* [2010] UKSC 17, see CHAPTER 2: HUMAN RIGHTS AND SEXUAL OFFENDERS). It has been argued that registers are not appropriate for juvenile offenders and can have potentially harmful effects (Miner et al 2006.)

As above, clear guidelines for treatment and management of juvenile sex offenders would enhance successful treatment and may help reduce recidivism. IATSO has developed standards of care for juvenile treatment that could be a useful measurement tool to measure a public body's legal duty to take into account age in policy and decision making. The standards outline juvenile specific factors to be taken into account including consideration of the family context, sensitivity to development change in juveniles, heterogeneity of the juvenile offenders, treating with respect and dignity, sex offender notification should not be used against juveniles, and research should be based on specialised clinical experience, (Miner et al 2006.)

### **An equality duty: UK**

The above discussion outlined examples of subgroups within the general population of sex offenders. Research has demonstrated the specific needs of each group and the need for the treatment and management of sex offenders to be responsive to different groups. Practitioners have noted the ethical need for specific programmes. The guidelines put forward for different groups could be used to guide a legal duty on public bodies to have due regard to equality when devising policies and programmes within a prison or community setting.

Recent legislation in the UK has developed an equality duty to promote equality for the protected groups. In England, Wales and Scotland the Equality Act 2010 brought together the previously separate legislation on non-discrimination against different groups and now includes several protected characteristics: sex, race, disability, religion or belief, sexual orientation, age, gender reassignment, pregnancy and maternity. (Northern Ireland has a separate and more detailed equality duty under S75 Northern Ireland Act). The previous

legislation required equality schemes to be drawn up by public bodies. This has now been consolidated in to a general public duty.

S149 of the Equality Act sets out the public sector equality duty. It places on public bodies an obligation to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.(S149(1) (a) )
- Advance equality of opportunity between people who share a protected characteristic and those who do not. (S149(1) (b)
- Foster good relations between people who share a protected characteristic and those who do not. (S149(1) (c)

The section goes on to explain that having due regard for advancing equality involves removing or minimising disadvantages, taking steps to meet the needs of people from protected groups where these are *different* from the needs of others and encouraging people from protected groups to participate in public life (S149(3) ).

This general duty is supplemented by specific duties made under regulations for each jurisdiction. The regulations for England (The Equality Act 2010(Specific Duties) Regulations are arguably less onerous than in Wales, as in England public bodies are required to publish information on how the equality duty has been fulfilled but they are under no obligation to carry out equality impact assessments. In contrast, the Welsh and Scottish Regulations are more prescriptive and include the need for equality plans and assessments to be published (Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012). The Equality and Human Rights Commission (EHRC) is responsible for monitoring and enforcing compliance with the equality duty and issues guidance to public bodies (EHRC 2012).

### ***Possible impact on sexual offender treatment and management***

The public sector equality duty recognises difference and acknowledges the importance of this for the advancement of equality (EHRC 2012). Public bodies responsible for the treatment and management of sex offenders are under a duty to ensure policies and

programmes do not discriminate against one of the protected groups *and* recognise difference in order to further substantive equality. In doing so, a public body should establish monitoring and training schemes to address the differential needs of the protected groups and to mitigate adverse impact on these groups.

An example of the equality duty in practice is the recent review of indeterminate sentencing for sexual and violent offenders in England and Wales. An equality impact assessment was carried out by the Ministry of Justice on the proposals to amend the sentencing structure for sex offenders (Ministry of Justice 2011.) The assessment identified potential differential impact on age (those under 21 less likely to be released), disability (due to mental disorder), and gender (as men more likely to get an IPP than women), In mitigation, the assessment noted the plans to have better and more individualised rehabilitation programmes in prison to negate adverse impact including new pathways for IPP prisoners with a mental disorder. The assessment also noted that these new rehabilitation programmes would have a positive impact on equality; therefore meeting the obligation to advance equality and recognise difference. The assessment also noted the positive impact on potential victims of the proposed sentencing scheme. There would be monitoring in place to establish the impact of the sentencing scheme on the protected groups. However, the assessment stated the opinion of the Ministry that any negative impact would be proportionate in relation to the changes as overall, they will improve the protection of victims and potentially aid prisoners.

The equality impact assessment may have accepted that some negative impact may occur, but it can be argued that the benefit of the legal duty to have due regard to equality has forced the public body to engage with the differences between groups of offenders. The Assessment produced statistics on different groups and this kind of information gathering is important as it provides evidence of differential impact. It also is participatory as it is part of the consultation process of policy change. It is important for anticipating differential impact and what the consequences might be. As illustrated above, a failure to address the different needs of sub groups of offenders may led to recidivism. Examining assessment tools or penal policies before they are implemented may help to ensure appropriate measures are taken that can be successful in preventing further offending.

However, if there is a lack of engagement by public bodies and they do the minimum to fulfill their obligations, then the goal of the duty may be undermined. For example in Northern Ireland, the Department of Justice (NI) carried out equality assessment of the proposed changes to the sex offender notification scheme (Department of Justice 2011). Under S75 of the Northern Ireland Act 1998, all policies have to be screened to determine if an equality impact assessment is necessary. The screening form for the notification scheme gives little information as to why it was decided that an equality impact assessment was not necessary. Despite the criticisms of notification requirements on juveniles (see above), the screening paper simply states there is no impact, states no impact on disability despite more draconian limitations on sex offenders that may have an adverse impact on physically and mentally disabled offenders and when addressing men and women simply states the vast majority of sexual offenders are men without explaining the relevance of that statement. The form does note the potential positive impact on vulnerable groups of victims but little else. It also notes that the only adverse impact on any group would be where a member of that group committed a sexual crime. Overall, it could be argued that the scant information given as to why the decision was taken not to assess equality impact suggests a lack of engagement with the process and possibly a failure to recognise the importance of difference in the treatment and management of sex offenders which might potentially have a negative impact on potential victims.

### ***Legal challenge***

If a public body fails in its duty to have due regard to equality, there is the possibility of judicial redress. The goals of the public duty include cooperation and cultural change so recourse to the courts should only be needed where there is a lack of cooperation or where an individual feels a failure to comply needs to a remedy from the Courts. There have been several cases brought against the government under the equality duties (under previous legislation) on areas such as education and social services. There have also been challenges made to the prison service involving the treatment of prisoners. Some of these cases have been brought by the Equality and Human Rights Commission on behalf of an individual (s).

In *R(on the application of Equality and Human Rights Commission) v Secretary of State for Justice* [2010] EWHC 147, the court found that the National offender Management Service

(NOMS) and the UK Border Agency failed to fulfil their statutory duty under disability and race legislation to have due regard to the equality of these groups. The bodies had decided to remove foreign prisoners to different prisons without any evidence that the policy had been assessed for differential impact. The lack of evidence of an assessment of the impact of the policies was compounded by a response from the defendant body in correspondence with the applicants, asserting that as the policy does not discriminate then their obligations were limited. As noted by the judge, this did not inspire confidence that the duty was taken seriously.

Another example of a failure to fulfil the statutory duty can be found in *R (on the application of Gill) v Secretary of State for Justice* [2010] EWHC 364. The applicant was a violent offender with a learning disability who was unable to access the offender rehabilitation programmes he needed in order to demonstrate he no longer posed a risk and therefore served over double his sentence tariff. The reason he was unable to access these programmes was his low I.Q. It was decided that a person with his intellectual capability would not benefit from the programmes. Despite the fact that several versions of NOMS policies stated that offender programmes should be responsive to the individual needs of the offender, the applicant was excluded from the offender programmes deemed necessary by the Parole Board if he was to be released. The prison also failed to offer effective alternative help. The prison had a disabled prisoners' policy with a list of specialist organisations but these were not used. The judge also dismissed any argument of excessive cost in providing tailored programmes for ID prisoners (para 75).

The impact assessment schemes described are example of good and bad practice. The assessment of IPPs has provide data and detail that at least aids transparency and notes group specific characteristics, whereas the screening of changes to sex offender notification is limited and demonstrates little appreciation of difference. Where a public body does fail to engage or propagates a policy that clearly has negative impact, then the court can be used as a method of enforcement. The case law demonstrates that group specific considerations need to be taken into account when devising and applying penal policy which may impact on sub groups of sex offenders. The UK public sector duty demonstrates some potential benefits for recognising difference in sex offender policies which include: training, monitoring, impact data and group specific criteria to measure compliance with the duty.

### **Conclusion: Finding a balance?**

The increasingly transparent role of dignity and rights in law has developed alongside government penal policy based on risk. In recent years, it is apparent that the state has placed community protection above the individual rights of the offender. (Kemshall 2008; 110). There is also an increasing recognition in the literature of the complex relationship between rights and risk and the need to use both legal and non legal knowledge to determine the “balance” between rights and risk.

However, the idea of “balance” can be misleading when discussing rights protection. In some cases, a balancing act does take place between the rights of the individual and the needs of the community. This is most obvious when discussing Article 8, where there is a balancing of subjective and objective dignity (Feldman 1999). This allows limitations on an individual’s rights but the essence of the right itself should not be undermined. (Fenwick 2002; 31). The idea of balance is misplaced in relation to due process and ill-treatment. The basic procedural rights in the criminal justice system apply to all, irrespective of conduct in the same way as the right not to be tortured or degraded is universal. Does access to a review procedure mean the offender’s rights take precedence over the victim or potential victim? Having access to a review does not mean that sex offenders are more likely to be released or removed from a register. Indeed, it could be argued that the system will be enhanced by review and a continuing examination of risk with the prospect of rehabilitation. As Liberty (2011) notes, the system of indefinite registration without review meant control of sex offenders was ineffective and “continued registration by certain ex-offenders may actually undermine public safety by diverting police resources away from those who continue to pose a serious risk” (para 13).

Case law has provided limited protection for offender rights and legal reasoning suggests that determining risk should be subjective and contextual. The State has a duty to protect all within its jurisdiction and high risk sexual offenders may require treatment and management that may lead to some limitation on individual rights. However, public protection should not allow the objectifying of offenders within the system, undermining individual and collective dignity.

There is an increasing literature on sex offender treatment and management which identifies the lack of homogeneity in offenders. Organisations such as IATSO are developing guidelines for practitioners to ensure both ethical and appropriate treatment is used. There is also a recognition that research into sex offending should also highlight the need to identify diversity in offender groups and conduct research accordingly (see CHAPTER 6: ETHICAL ISSUES IN SEX OFFENDER RESEARCH). Alongside the need for ethical treatment, legal duties can play a role both in promoting greater equality amongst different offender groups and enforcing legal obligations on public bodies. It should also be noted that “protected” groups are not homogenous as groups. Duncan (2006) notes that research on groups such as juveniles are usually male juveniles and there is a lack of literature on offenders who are juvenile *and* female. McColgan (2005) notes the difficulties adjudicating on multiple discrimination although a single equality act such as the Equality Act 2010 helps to overcome these issues. Hannett (2003) identifies different forms of multiple discrimination: additive discrimination involving two or more personal characteristics and intersectional discrimination, where having two or more characteristics (such as Black lesbian women) lead to a particular form of discrimination. The latter category cannot be addressed properly through formal equality. The focus should be on difference *and* disadvantage; economic and social causes that need to be tackled through structural change in society. Offenders belonging to multiple groups should have the impact of these differing characteristics taken into account during risk assessment and treatment, with guidelines in place for the particular subgroups and a more nuanced approach to those with multiple characteristics.

The development of substantive equality has furthered the equality debate and moved it away from formal equality which secures equal protection before the law, treats all persons the same and guarantees non-interference with civil and political rights. Substantive equality attempts to tackle the structural and organisational inequality inherent in society by placing positive duties on states to take steps to achieve a more equal society. Thus, equality duties may encompass economic and social rights. This has been illustrated above, as treatment and management programmes increasingly recognise the specific needs of differing groups. Responses to offender risk and need must take into account a myriad of factors influenced by diverse backgrounds. It has also been noted that developing equality complaint schemes costs money (Duncan 2006) and may be more expensive than the homogeneous policies and tools

that can be used across the different groups. However, in making an argument for “mainstreaming” equality into public decision making and policies, it should be noted that the cost both in monetary terms and to society in the long term may be much greater if re-offending occurs due to the unsuitability of schemes (Duncan 2006).

Although equality duties and equality impact assessments have been criticised as being bureaucratic and failing to create meaningful change, it may be too early to tell in the UK what long term difference such policies have made. Tentative progress has arguably been made in Northern Ireland albeit with criticisms. What has been flagged as a possible early success is a greater participation in policy making through consultation with interested groups and civil society. Equality duties are a shift from the “command and control” measures of achieving equality through non-discrimination law to deliberative democratic methods (Rainey and Jenkins 2007, McCrudden). Similarly, the use of equality impact assessments when introducing penal policies or treatment and management tools may allow for greater participation of government, practitioners, community and offenders as to the most appropriate methods. This may not only reduce recidivism but it may also enhance awareness and properly informed debate on sex offender treatment, acting as a counter point to the media portrayal of sex offenders (Kemshall 2008).

However, as noted by Martel, Brassard and Mylene (2011), participation should not lead to a shift of responsibility for the treatment and management of sex offender from government to the community. Involving ethnic minority and other groups in an attempt to address specific criminogenic needs of offenders should not lead to a withdrawal of state intervention, especially if structural inequalities afflicting those communities are not addressed. In an age of austerity, the present government in the UK has championed a “big society” where communities take responsibility for public goods, whilst at the same time implementing cuts in welfare, social services, policing, prisons etc. (NEF 2010). The UK equality duties obligate government to at least consult and consider the protected groups before making policy decisions. The rationale of equality duties is one of participation, not abdication. However, equality advocates are concerned that the UK government is now trying to limit the equality duty under the 2010 Act (Employment Lawyers Association 2012). If this is indeed the case, it is arguable that it is a step backwards on the road to a more equal society. Equality duties are not a panacea for an unequal society. However, the chapter has illustrated that

practitioners in sex offender treatment and management are responding to the ethical challenge of recognising differential impact between groups of sex offenders. A legal public sector duty to assess and monitor this impact further underlines the Aristotelian maxim that equality also involves a duty to treat different things differently.

---

<sup>i</sup> Article 14 ECHR ““The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>ii</sup> ‘(1) everyone has the right to respect for his private and family life, his home and his correspondence’

<sup>iii</sup> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime for the protection of health or morals, or for the protection of rights and freedoms of others’.

<sup>iv</sup> where the state fails to prevent a violation of Article 8 either by its own agents or by non-state actors. See *X and Y v Netherlands* (1986) 8 EHRR 235

<sup>v</sup> Not yet in force as of 30<sup>th</sup> May 2012