

THE REGULATION OF WOMEN'S PAY: FROM INDIVIDUAL RIGHTS TO REFLEXIVE LAW?

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Abstract

Legislation mandating equality of pay between women and men was among the earliest forms of sex discrimination legislation to be adopted in Britain. However, the model embodied in the Equal Pay Act 1970 is increasingly being questioned: the law is, at one and the same time, highly complex and difficult to apply, while apparently contributing little to the further narrowing of the pay gap. As a result there is a growing debate about whether a shift in regulatory strategy is needed, away from direct legal enforcement to a more flexible approach, based around the concept of 'reflexive law'. This paper provides an assessment of whether reflexive approaches are likely to work in the equal pay area

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1. Introduction

Legislation mandating equality of pay between women and men was among the earliest forms of sex discrimination legislation to be adopted in Britain. The Equal Pay Act 1970 predated the more general prohibition on sex discrimination in employment by five years. It was introduced prior to the UK's membership of the European Community and at a point when the Community, although it had a Treaty provision governing pay equality between women and men, had no Directive on the subject, and prior to the judgments of the European Court of Justice which opened up the field of equality law in the course of the 1970s. If the model for the UK Act was more American than European, the federal Congress having passed an equal pay law in 1963 and the more extensive Civil Rights Act in 1965, the British measure was, in important respects, *sui generis*. It relied on a combination of individual claims and collective dispute resolution mechanisms to achieve its objectives, and was initially successful in combining legal remedies and pre-existing features of the industrial relations system to close the pay gap. In the 1980s and 1990s, when collective bargaining was being eclipsed, individual litigation increasingly took its place, encouraged by developments in EU law and backed by strategic support from the Equal Opportunities Commission (EOC) in key cases. This did not simply lead to the radical reshaping of equal pay law, but had far-reaching consequences for payment systems and for industrial relations more generally, not least in bringing into the open tensions between unions and their own members. In part because of these destabilizing effects, the model embodied in 1970 Act is increasingly being questioned: the law is, at one and the same time, highly complex and difficult to apply, while apparently contributing little to the further narrowing of the pay gap. As a result there is a growing debate about whether a shift in regulatory strategy is needed, away from direct legal enforcement to a more flexible approach, based around the concept of 'reflexive law'.

This chapter considers the nature of the shift which may now be taking place, against the backdrop of the evolution of equal pay law over the past four decades, and recent reviews of the legislation which have set out the case for change. Section 2 provides an overview of the different regulatory approaches adopted in the course of the legislation's development, culminating in the proposals set out in the 2007 Discrimination Law Review. Section 3 links the proposals in the 2007 Review to the wider debate on the role of 'reflexive regulation' in employment and company law and section 4 provides an assessment of whether reflexive approaches are likely to work in the equal pay area. Section 5 concludes.

2. The evolution of regulatory strategies in the field of equal pay

The Equal Pay Act 1970 gave an individual worker the right to bring a claim against her employer for equality of pay with a comparator of the opposite sex who was employed in the same ‘employment’ and ‘establishment’ as she was. The legal mechanism by which a successful claim took effect was the insertion into the applicant’s contract of an ‘equality clause’ which harmonized her terms and conditions of employment with those of her chosen comparator. The Act, although passed in 1970, did not come into force until 1975, during which time many payment structures, particularly at sector level, were amended voluntarily through collective bargaining. In addition, the compulsory arbitration procedure which was provided for by section 3 of the Act enabled unions to bring claims for the realignment of discriminatory pay structures to the Central Arbitration Committee (‘CAC’), which had the power to amend entire collective agreements and similar arrangements at sector or company level. Econometric analysis conducted in the mid-1970s suggested that the narrowing of the pay gap which occurred at this time – average hourly wages rose to around 70% of men’s by the end of the 1970s, compared to around 60% at the start – was the result of a combination of the legal mechanisms set out in the Act and implementation of the equality principle through centralized pay bargaining (Zabalza and Tzannatos, 1985).

Nevertheless, following several landmark decisions of the European Court of Justice (‘ECJ’) in the course of the 1970s and the passage of the Equal Pay Directive in 1975, UK law was seen to be out of line with the requirements of European Community law, and the Equal Pay Act was amended in 1983 to allow claims for equality in the case of work of ‘equal value’ in addition to the existing categories of ‘like work’ and ‘work rated as equivalent’ under a voluntary job evaluation scheme. The amendment was effected in a highly complex way and it took some considerable time for the litigation which followed to establish clear parameters for equal pay claims. Repeated references to the ECJ, given financial and logistic support by the EOC, led to significant extensions (or perhaps clarifications) of the law in relation to pension rights, the position of part-time and fixed-term workers, and the scope of employers’ defences (see Deakin and Morris, 2005: 576-579). Although this litigation-led approach was successful in reshaping the law, the process was often protracted (some cases took over a decade to resolve) and induced considerable uncertainty for collective agreements and pension schemes.

One reason for the prominence accorded to individual claims at this time was the diminishing role played by collective bargaining. The collective arbitration route set out in section 3 of the Act was effectively blocked off by the Court of Appeal's 1979 decision in the *Hy-Mac* case, which decided that the CAC's powers were confined to cases of direct discrimination (in effect, payment structures which were based directly on the criterion of gender) and did not extend to cases of indirect discrimination (payment structures which resulted in different outcomes by sex by virtue of occupational segregation). Although the ECJ later held (in 1982) that this decision had placed the UK in breach of EC law, amendments made to sex discrimination legislation in the mid-1980s, rather than restoring the pre *Hy-Mac* meaning of section 3, repealed that provision altogether, putting in its place a largely symbolic and practically ineffective measure for declaring void provisions of collective agreements or similar payment structures which contravened the prohibition on discrimination (see Deakin and Morris, 2005: 692-3). Thus, from the early 1980s onwards, individual litigation was the only effective route by which the equal pay principle could be implemented. Although legal victories were often the catalyst for collective agreements which led to large-scale realignments of payment structures, the decline in union power in this period undermined the potential role of collective bargaining in implementing the goals of legislation. Then, in the early 2000s, a series of court decisions allowed individual litigants to challenge deals struck by unions and employers and to claim compensation from unions themselves in cases where they were held to have failed to pay due regard to the equality principle in balancing competing claims of groups of workers (Dickens, 2007: 483)

At the same time, a substantial gender pay gap remained. Women's average hourly earnings had reached 75% of men's by 1988 and the figure rose to 79% by 1992 and 82% by 2000 (see Deakin and Morris, 2005: 583 and the sources cited there). In the early 2000s it was largely static, with a further narrowing being attributed not to equal pay law but to the introduction from 1999 of the national minimum wage (DCLG, 2007; 9). As a result, attention began to turn to alternative and more proactive modes of addressing pay discrimination. In part this took the form of a growing recognition that the Equal Pay Act's focus on the workplace addressed only one part of the problem, and a belief that assumptions about the gendered nature of the division of labour should be challenged through changes to the law governing maternity and paternity rights and by reforms to the tax-benefit system (see Fredman, 1997), an agenda which was then taken up in the area of 'work and families' legislation (Deakin and Morris, 2005: 696-713). In the field of equal pay law itself, 'proactive approaches' put forward included those placing positive duties on organisations to take action to overcome institutional discrimination inherent in their policies

and practices, rather than leaving it up to individuals to lay claims. It was argued that these methods would reduce reliance on confrontational litigation and shift the emphasis to one of changing organisational behaviour and attitudes (Hepple *et al.*, 2000; O’Cinneide, 2003).

One proactive method for addressing pay discrimination that began to be widely advocated at this time was that of mandatory equal pay reviews, as part of a wider reconsideration of the role of regulatory strategies in discrimination law (Hepple *et al.*, 2000). The underlying assumption was that pay discrimination is mostly systemic and unseen, and as such can only be identified through a systematic analysis of job roles, responsibilities and remuneration. Thus, the argument was made that employers should be obligated to examine their pay systems and identify and rectify any gender-based wage differentials they uncover. This approach was first adopted in Ontario under its 1987 Pay Equity Act (McColgan, 1997), and this lead was then been followed in a number of other jurisdictions, including Quebec, Sweden and, most recently, Finland.

In the United Kingdom, a significant step in the same direction was taken when the Equal Pay Task Force, which was set up by the EOC in 1999 to explore the pay gap 30 years after the introduction of the Equal Pay Act, recommended that employers should be required to conduct equal pay reviews on a regular basis. The Task Force took the view that ‘the vast majority of employers do not believe they have a gender pay gap and therefore do not believe an equal pay review is necessary’; legislation was needed to make reviews mandatory since ‘the overwhelming evidence to date is that [employers] will not [introduce them] voluntarily’ (Equal Pay Task Force, 2001: xi).

However, the official Government response since then has been to reject compulsion in favour of public policy support to encourage employers to undertake a pay review. Thus, two months after the release of the Equal Pay Task Force Report, the government commissioned Denise Kingsmill to undertake a very similar review into women’s pay and employment, but the terms of reference were limited to examining and reporting on *non-legislative* proposals for reducing the pay gap (Kingsmill, 2001). Given this, it is not surprising that Kingsmill recommended a voluntarist rather than mandatory approach to getting employers to undertake pay reviews. Significantly, part of the reasoning offered was that for the private sector, and in particular large companies with stock exchange listings, a combination of reputational effects and shareholder activism would put companies under pressures to reform their practices. Here, Kingsmill used the language of corporate social responsibility (CSR) to argue that private sector companies would recognise the business case

for reform. The main drivers would be the risk and cost of reputational damage from gender bias, including loss of shareholder confidence and the fragmentation of companies' consumer base; the high expense of equal pay litigation; and costs stemming from an inability to recruit and retain high calibre employees. A different approach was suggested for the public sector, where commercial pressures would not apply to the same degree: Kingsmill recommended compulsory employment and pay reviews for public sector organisations, with the findings of reviews to influence the public procurement process.

The issue of pay reviews was considered again only a few years later by the Women and Work Commission (2006). The Commission had a wide remit, which included a consideration of the issue of gender stereotyping and other broader causes of occupational segregation. In relation to pay reviews, the Commission's terms of reference did include consideration of the case for making pay reviews mandatory through legislation. The Commission recommended a voluntarist approach, however, for the reason that its members were unable to reach consensus on the need for compulsion. Thus, the report simply outlined the arguments for and against pay reviews without taking a position, and recommended a series of measures intended to raise awareness, promote best practice and build employer capacity to address equality issues. In common with the Kingsmill Report, the Commission recommended a mandatory approach in the public sector.

Following on from the recommendations of these successive reports various public policy supports were put in place in the 2000s to encourage firms to examine their pay systems, as well as to address the issue of gender equity in the workplace more generally. The Government launched the so-called *Castle Awards* to encourage and reward firms that displayed excellence in addressing equal pay, and it began working with a number of networks of 'fair pay champions' such as *Opportunity Now* to promote best practice. The EOC published various documents to encourage and assist firms conduct an equal pay review. One of these was the *Code of Practice on Equal Pay* (EOC, 2003) which set out best practice on compliance with legislation. It stressed that the best way for firms to avoid equal pay litigation was to conduct regular equal pay reviews in consultation with their employees. In 2003, the equal pay questionnaire came into effect, which allowed individual employees to request information from their employer if they thought they were not receiving equal pay. These combined steps were considered to have raised the profile of equal pay reviews in the private sector by the mid-2000s (Neathey *et al.*, 2005).

In the public sector, all civil service departments and agencies were required to draw up an equal pay action plan in 2003, and in 2006 the *Civil Service Reward Principles* were released, one of which targeted equal pay and the need to eliminate pay discrimination. Local authorities were required to conduct a pay review by 2007 under the 2004 National Joint Council pay agreement. In addition, the public-sector gender equality duty, which became law in April 2007, required public authorities to take active steps to promote gender equality and eliminate gender discrimination. This placed obligations on public bodies to further examine their pay and employment systems. At the same time, several high profile equal pay cases involving local authorities highlighted the penalties involved for unequal pay and further raised the profile of the equal pay issue.

The Discrimination Law Review of 2007 may well prove to be a turning point in the debate. At the time of writing the review was only a consultation document, but it set out a clear vision for the future of anti-discrimination law in the UK, with the Government's position on certain issues very clear. And in the area of equal pay reviews, the influence of both the Kingsmill Report and the Women and Work Commission was clear. Thus, no consultation was invited over this issue, with the Review arguing that the likely costs of enforced pay reviews would outweigh the benefits, and as such, would 'contravene better regulation principles'. Instead, it favoured an approach based on 'promoting the spread of good practice' as well as mechanisms to increase the 'reputational benefits' for firms that undertake them voluntarily (DCLG, 2007: para3.7-3.8).

However, the Review was not confined to equal pay or indeed to sex discrimination law, but covered legal issues arising from the full range of anti-discrimination provisions (sex, race, disability, age, gender reassignment, sexual orientation, and religion or belief), one of its objectives being to provide a framework for a new Single Equality Act. Its broad approach can be described as one based on 'reflexive regulation', as McCrudden (2007: 4) has suggested: various elements in the report, 'when taken together, amount... to the partial adoption of reflexive regulation which... is quite different in significant respects from those methods of anti-discrimination regulation that have gone before'. These elements ranged from a new emphasis on the business case for equality, to references to the diffusion of good practice in contradistinction to enforcement strategies based on strict legal compliance, and to the role of engagement with stakeholders. Specific proposals included amendments to the law to allow greater scope for positive action by employers in favour of workforce diversity, and the replacement of specific aspects of the duty of public sector bodies to promote equality with a more general test of proportionality.

3. The meaning of ‘reflexive regulation’

What, then, is reflexive regulation? It is perhaps easier to say what it is not. It is generally contrasted to, on the one hand, ‘command-and-control’ forms of regulation which are based on prescriptive and detailed controls and supported by penal or civil sanctions for non-compliance; and, on the other, deregulation of the kind which removes statutory controls altogether in favour of a return to individual freedom of contract or (which may amount to the same thing) market-based governance. The critique of the command-and-control approach maintains that there are limits to the effectiveness of legal regulation in the face of alternative sources of norms beyond the law. These alternatives range from relatively formal systems of self-regulation, such as collective bargaining or financial codes of conduct, to informal social norms and tacit conventions which may shape behaviour in particular contexts. The idea can be expressed more formally using the language of autopoiesis or systems theory, which posits a radical separation of the legal system from the social sub-systems which it is seeking to regulate (Teubner, 1992). Legal rules, it is suggested, rely on linguistic forms and institutional processes which are particular to the legal system itself and translate incompletely, at best, into the economic or organisational contexts in which legal rules are intended to be applied. The more detailed and prescriptive attempts at regulation are, the less successful they tend to be in achieving their desired goals, a phenomenon which feeds back into the legal system in the form of the ‘juridification’ of law, implying the over-specification of rules and excessive detail and complexity in the form of the law, particularly legislation.

More positively, the theory also emphasizes the possibilities of matching legal rules more effectively to the various tasks which regulation is called on to perform. ‘Reflexive law’ can, it is argued, be designed in such a way as to stimulate self-regulation of the kind which will fulfill policy objectives. Reflexive law is therefore associated, to some degree, with a shift from substantive to procedural norms. Legal interventions are often characterized as reflexive when they make use of default rules and other quasi-optional forms of regulation. These allow the parties to self-regulatory arrangements – for example, trade unions and employers in the context of collective bargaining – to vary the terms of statutory norms, which, as a result, cease to be completely mandatory. In this way the application of the law is tailored to local conditions. In such fields as working time, equal treatment of part-time and fixed-term workers and information and consultation of employees, legislation sets default rules which can be varied by agreement – so called ‘bargained statutory adjustments’ (Davies and Kilpatrick, 2004) – but only if certain conditions are met. In a sense, the law has been ‘proceduralised’ – a standard which was

previously substantive, in the sense (for example) of setting an absolute limit to working time, is now, in part at least, procedural. The law is no longer exclusively concerned with setting the contents of the relevant norm, but also with stipulating the procedure by which the norm can be modified.

Reflexive law also has a hybrid quality which is suggested by the way it combines sanctions of different types. The influential ‘pyramid of enforcement’ model developed by Ayres and Braithwaite (1992) and extended to discrimination law by Hepple *et al.* (2000) presupposes that hard sanctions, possibly penal ones, must be exercised if all else fails. The model assumes that the application of legal sanctions will hardly ever have to occur – these are the few cases occupying the apex of the ‘pyramid’ – but it is important that the possibility should exist in order to maintain the stability of the overall structure. Many apparent cases of financial self-regulation depend on the existence, as a matter of last resort, of hard sanctions of this kind.

A common thread uniting the different conceptions of reflexive law is the idea that the role of the law is to promote a learning process around the question of ‘what works best’ as a route to achieving social or economic policy goals. Thus the law recognises or validates a range of potential solutions, while at the same time using benchmarking procedures and other deliberative mechanisms to set up a series of tests for determining their relative success or failure. In order for such deliberative strategies to be effective, some have argued that attention has to be given to the issue of the ‘frame’: ‘the hypothesis of reflexive governance holds that the conditions under which a deliberative process may succeed can be identified, and once identified, must be affirmatively created, rather than taken for granted’ (De Schutter and Deakin, 2005: 3). In that sense, reflexive regulation is governance by design, rather than a process left entirely to the forces of spontaneous order.

At the same time there are limits to what can be achieved by design alone. For reflexive strategies to be effective, institutions and mechanisms must be in place, beyond the law, to receive and translate reflexive legal norms in a way which makes their implementation effective. In theoretical terms, this presupposes the existence of bridging institutions which assist the ‘structural coupling’ of the legal system with the organisational and market contexts in which the rules are intended to be applied. Such institutions may include, in the employment law context, collective bargaining or other possible forms of workplace-based deliberation such as employee consultation (Barnard *et al.*, 2003). Thus another critical issue is whether social institutions have the capacity to play the role ascribed to them by reflexive regulatory strategies. To

the extent that they do not, the law may have to undertake a capacity building role.

The debate over the role CSR provides an illustration of this point. In principle, CSR can be quite effectively integrated into a reflexive approach to regulation. CSR involves an appeal to companies to go ‘beyond compliance’ since by doing so they can better preserve their competitiveness and prepare themselves to deal with future shocks. The business case for CSR intersects with the regulatory argument for limiting the role of the law to that of providing a framework which will reward those organisations which can most effectively internalise their social costs. One of the regulatory techniques associated with this approach is the use of disclosure rules and reporting requirements to generate a flow of information about the way in which companies handle the issue of externalities. This issue has appeared on the policy agenda in the UK as a result of the protracted debate over the introduction of a statutory ‘operating and financial review’ (‘OFR’) which would require large companies to produce annual reports on how they were dealing with various aspects of their social and environmental performance. The somewhat diluted form of this provision which was eventually brought into force by the Companies Act 2006, the ‘business review’, is, despite the changes made after the government abandoned the OFR in 2005, a measure with the potential to stimulate processes of benchmarking and peer review, when coupled with the active participation of social actors in the evaluation process. Changes in pensions law have also been introduced with the aim of stimulating a greater interest in social and environmental issues on the part of institutional investors; legislation requiring pension funds to disclose their voting policy and to state the extent to which social, ethical and environmental investment matters are taken into consideration, came into force in the UK in 2001. The Association of British Insurers has taken the view that this requirement has had a ‘significant and wide-ranging impact on the investment community...[and has] added significantly to the growing Socially Responsible Investment (SRI) movement’ (ABI, 2001: 13). These measures can therefore be seen as ‘capacity building’ mechanisms in the sense identified by reflexive theory.

How successful is this strategy likely to be in the context of discrimination law, and equal pay in particular?

4. The prospects for the reflexive regulation of pay inequality: theory and evidence

As we have seen, a core aspect of the theory of reflexive law is the rejection of models based on spontaneous order. Reflexive approaches, far from advocating complete deregulation, contemplate a version of ‘market steering’ which presupposes a role for the legal ‘frame’. Two dimensions of this problem are critical: the appropriate role of sanctions, and the role of the law in capacity building. Here we firstly examine the empirical research, before discussing whether a voluntary approach to equal pay adequately addresses either of these dimensions.

The empirical research suggests that a voluntary approach has had limited impact in persuading private sector firms to conduct pay reviews. The EOC commissioned four surveys between 2002 and 2005 looking at the extent of equal pay reviews among organisations in 2002 (Adams *et al.*, 2006; Brett and Milsome, 2004; Neathey *et al.*, 2003; Schafer *et al.*, 2005). While there was some increase in the number of large (500+ employees) private sector firms that had conducted an equal pay review between 2003 (14%) and 2004 (33%), in the 2005 survey this figured was almost unchanged (34%). More than half of large private sector firms reported no past equal pay review activity, nor any intention to conduct one in the future, and only 5% had an equal pay review in progress. Once small and medium sized organisations were included the picture was even less positive. 82% of organisations in the 2005 survey had not conducted an equal pay review, did not have one in progress and did not intend to conduct one (Adams *et al.*, 2006). These survey results are supported by data in the 2004 Workplace Employment Relations Survey (WERS), which showed only 24% of firms were monitoring their recruitment and selection, only 10% were monitoring promotion, and only 7% were reviewing their relative pay rates for indirect gender discrimination (Kersley *et al.*, 2006).

There is therefore little reason to revise the view of the Equal Pay Task Force in 2001, to the effect that the majority of employers do not think that they have pay equity issues to resolve, a conclusion that the EOC has also reached in now advocating for equal pay reviews to be made mandatory.

From a theoretical perspective, the issue of the ‘frame’ is concerned with the role of legal rules in setting appropriate incentives for self-regulation. From this point of view, and in the light of the evidence concerning voluntary audits, making pay audits mandatory should be considered as a viable option here. This would not amount to committing employers to any particular outcome, but

it would require them to undertake a regular review process and to disclose the results. Enforced audits are therefore comparable to mandatory disclosure rules which in other contexts (such as corporate governance) are seen as playing a vital role in stimulating learning without dictating the final form of solutions arrived at by employers.

Evidence from Ontario illustrates that such learning can take place, but only when the right ‘frame’ is in place. Here, mandatory pay reviews have had only limited success due to a lack of monitoring, which has meant high levels of non-compliance (Baker and Fortin, 1999) and manipulation of the process by employers where unions are not involved (McColgan, 1997). The most successful reflexive governance seems to occur in organisations where strong unions exist and the process is jointly managed. The Canadian Pay Equity Task Force (2004) notes that both employers and unions in such firms report that they have gained a greater appreciation of the skills involved in many traditional female roles as a result of conducting job evaluations and that there have been self-worth benefits for the workers themselves in having the skills involved in their work identified and acknowledged. The report also notes that jointly conducted pay reviews have often led to better industrial relations, in contrast to the adversarialism that a complaints-based system engenders. In some cases, unions have reached agreements where they bargained away the statutory requirement to conduct a pay review (breaching the legislation) in exchange for more generous pay rises for female dominated jobs (McColgan, 1993).

This last point raises an important issue in the debate over self-regulation in the employment law field, and that is how to protect appropriate voluntary arrangements from external legal challenge. In the case of ‘bargained statutory adjustments’, as we have seen earlier, this involves giving priority to collective or workforce agreements over statutory standards as long as certain procedural safeguards are met. The 2007 Review considered adopting a similar scheme for equal pay, in the form of an ‘equal pay moratorium’. This would mean that ‘where an employer carries out an equal pay review and identifies gender inequalities in their pay systems, they would have a set period free from legal challenge, within which to rectify discriminatory pay policies and practices’ (DCLG, 2007: para. 3.23). But while acknowledging that this move would ‘have the advantage of helping employers to address the issue of equal pay’, the Review came down against it on the grounds that to dilute individual rights in this way might run counter to EU law, as well as leading to uncertainty about the position of individuals if the issue of pay inequality were not effectively reviewed during a moratorium (DCLG, 2007: para. 3.24).

In rejecting the case for equal pay moratoria, the Review gave little encouragement to collective solutions at workplace level. Research suggests that such solutions will not emerge ‘spontaneously’ if the right conditions are not put in place at the level of the legislative ‘frame’. Barnard *et al.* (2003) looked at the way in which employers were achieving flexibility in the application of the legislation implementing the Working Time Directive. They found that very little use was being made of the collective routes to working time flexibility – those based on collective or workforce agreements – given the ease with which employers could impose opt-outs on individual workers. The wide derogation allowed by the legislation for individual agreements meant that an opportunity had been lost to generate a process of collective learning, based on deliberation at workplace level. As a result, the legislation had had little impact in changing prevailing organisational practices: most employers continued to rely on a mixture of long working-hours to meet peaks in demand, while employees remained dependent on overtime earnings to supplement their pay.

In defence of the Review, the issue of how to reconcile individual claims with collective procedures is not straightforward. The history of equal pay legislation suggests that the two routes can be complementary; as noted above, litigation often provided the catalyst for collective agreements which brought about significant progress in removing institutionalised disadvantage in relation to pay and other employment conditions. More recently, however, clear tensions have surfaced. In *Allen v GMB* (2005) an employment tribunal ruled that the union had acted in a discriminatory fashion in concluding a collective agreement which purported to implement the equal pay principle, and awarded damages to the applicants. Although the ruling was reversed on appeal, the *Allen* litigation represents a direct challenge to collective approaches; there is now less room for collective agreements to balance the interests of different workforce groups, and any attempt to trade off the implementation of the equality principle against other union interests (such as the preservation of employment, a real concern in the public sector) would be fraught with difficulty from a legal perspective. Nor does the potential liability of unions end there. In one week alone in the summer of 2007, several thousand claims were issued against trade unions alleging negligence in the way equal pay cases had been handled (‘Who’s best at getting equal pay for women?’ *The Observer*, 12.8.07.)

These developments suggest that litigation-based routes towards enforcement show no signs of diminishing in importance in the UK system, and that having been complementary to self-regulatory approaches based on collective bargaining in the past, they now have the potential to undermine the capacity of

unions to act in the equal pay field. One of the preconditions for the success of a reflexive strategy, namely the presence of effective employee representation at workplace level, is looking less secure by the day.

Perhaps the continuing demise of collective bargaining matters less when alternative mechanisms, in the area of corporate governance, are taken into account. But to take this view would be, at best, naïve. The proactive role for the shareholder activism which Kingsmill emphasised has yet to be realised. In part this is because of the troubled legislative history of attempts to extend corporate reporting requirements on employment issues; the government's abrogation of the OFR in December 2005, followed by its partial rebirth in the form of the business review, has both diluted and delayed the implementation of new disclosure rules. But there is also empirical evidence that institutional supports for shareholder activism of the kind envisaged by Kingsmill are lacking (Deakin and Hobbs, 2007). Notwithstanding the growth of interest in SRI, it remains a niche segment of asset management. Pension funds, although legally required to disclose how far CSR affects their investment strategies, are also constrained by fiduciary law and by financial regulations in the degree to which they can direct fund managers to take employment issues into account when making voting or investment decisions. Uncertainty affecting the funding of many defined benefit pension funds, coupled with an increasing degree of stock market turbulence, have meant that many funds still pay little regard to CSR issues within the wider context of their obligation to maximise returns to scheme members.

5. Conclusion

This paper has considered the evolution of regulatory strategies in the area of equal pay between women and men since the inception of equal pay legislation in the 1970s. There is a case for saying that the legislation was most successful in the first years of its operation when an interventionist legal strategy was linked to the use of collective bargaining to put the equality principle into practice. Of course, this was also the point at which some of the more egregious examples of pay discrimination – including separate grades in job evaluation schemes and collective agreements for women and men- could be easily identified and rectified. However, the failure of the legislation to go on to deal with indirect sex discrimination, arising from occupational segregation, was due not to inherent difficulty of applying the law in this area, but more straightforwardly to the weakening and then removal of the collective arbitration mechanism which had been contained in section 3 of the Act. The individual claims route which came to the fore in the 1980s and 1990s produced some spectacular legal victories which led to fundamental changes in the

content and structure of equality law, but led to an ever more complex body of legislation which, in turn, contained the potential for seriously destabilizing existing payment structures. While this could, from one point of view, be justified as an inevitable feature of the application of the equality principle to established procedures, a more fundamental critique would point to the dangers inherent in growing employer resistance to the aims of the law and union disenchantment with the prevailing approach to its enforcement.

It against this background that the case for reflexive regulation has come to the fore as a way of making the operation of equal pay legislation more effective in practice. ‘Reflexive’ approaches involve a shift from litigation-based and other ‘hard law’ strategies to a range of self-regulatory mechanisms and proactive measures for embedding the equality principle in organisational practice. A discussion about the role of such mechanisms has been going on since the early 2000s in the context of pay audits. Discrimination Law Review of 2007 marked a potentially significant step in extending reflexive techniques, which have been widely used elsewhere in the labour law field, to equality law as a whole. However, the recommendations made by the Review in the area of equal pay reflected certain ambiguities which are inherent in the concept of reflexive law, and highlight certain of its limitations.

The ambiguity of reflexive law relates to a lack of clarity concerning the relationship between mandatory law and flexible enforcement mechanisms. It is inherent in theories of reflexive law, and in much of the practice over the past decade or so since the idea started to gain acceptance, that legal sanctions have to be deployable as a matter of last resort if legal changes are to have an impact on practice. This means, conversely, that self-regulatory solutions must be accorded some protection from the impact of more direct legal intervention once they pass certain thresholds of acceptability. This is the approach used in the context of ‘bargained statutory adjustments’ in the area of working time law and the default options which operate in relation to employee representation. But in the current context of equal pay law, these routes are not available, and the option of promoting equal pay reviews by securing them from legal challenge was ruled out in the Review itself. The limitations of reflexive law derive from the dependence of this technique on social institutions beyond the legal system which, in the manner of ‘bridging mechanisms’, can assist in the translation of legal norms into workplace and organisational practice. A reflexive strategy is unlikely to be effective in the context of equal pay law at a time when collective bargaining is being undermined by a number of factors including equal pay litigation itself, and when the institutional preconditions for alternative ‘bridging mechanisms’, such as shareholder activism, do not yet exist. For all that, it seems that discrimination law is currently taking a

reflexive turn. It remains to be seen whether this will make the law more effective and workable in practice.

References

- ABI (2001) *Investing in Social Responsibility: Risks and Opportunities* (London, Association of British Insurers).
- Adams, L., Carter, K. and Schäfer, S. (2006) *Equal Pay Reviews Survey 2005* (Manchester: Equal Opportunities Commission).
- Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: OUP).
- Barnard, C., Deakin, S. and Hobbs, R. (2003) 'Opting-out of the 48-week: employer necessity or individual choice? An empirical study of the operation of Article 18(1)(b) of the Working Time Directive in the UK' *Industrial Law Journal*, 32: 223-252.
- Brett, S. and Milsome, S. (2004) *Monitoring Progress on Equal Pay Reviews* (Manchester: Equal Opportunities Commission).
- Davies, P. and Kilpatrick, C. (2004) 'UK worker representation after single channel' *Industrial Law Journal*, 33: 121-151.
- DCLG (2007) *Discrimination Law Review. A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (London: Department for Communities and Local Government).
- De Schutter, O. and Deakin, S. (2005) 'Introduction: reflexive governance and the dilemmas of social regulation', in O. De Schutter and S. Deakin (eds.) *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, 1-17 (Brussels: Bruylant).
- Deakin, S. and Hobbs R. (2007) 'False dawn for CSR? Shifts in regulatory policy and the response of the corporate and financial sectors in Britain' *Corporate Governance: An International Review*, 15: 68-76.
- Deakin, S. and Morris, G. (2005) *Labour Law* 4th. ed. (Oxford: Hart Publishing).
- Dickens, L (2006) 'Equality and work-life balance: What's happening at the workplace' *Industrial Law Journal*, 35(4): 445-449.
- Dickens, L. (2007) 'The road is long: thirty years of equality legislation in Britain' *British Journal of Industrial Relations*, 45: 463-494.
- Equal Opportunities Commission (EOC) (2002) *Equal Pay Review Kit* (Manchester: Equal Opportunities Commission).
- Equal Opportunities Commission (EOC) (2003a) *Equal Pay, Fair Pay: A Small Business Guide to Effective Pay Practices* (Manchester: Equal Opportunities Commission).

- Equal Opportunities Commission (EOC) (2003b) *Code of Practice on Equal Pay* (Manchester: Equal Opportunities Commission).
- Equal Pay Task Force (2001) *Just Pay* (Manchester: Equal Opportunities Commission).
- Fredman, S. (1997) *Women and the Law* (Oxford: OUP).
- Hepple, B., Coussey, M. and Choudhury, T. (2000) *Equality: A New Framework- Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart).
- Kersley, B., Alpin, C., Forth, J., Bryson, A., Bewley, H., Dix, G. and Oxenbridge, S. (2006) *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (Abingdon: Routledge).
- Kingsmill, D. (2001) *Review of Women's Employment and Pay* (London: DTI).
- McColgan, A. (1997) *Just Wages for Women* (Oxford: Clarendon Press).
- McCrudden, C. (2007) 'What would improve the current system?' Paper presented to the Nabarro/UCL Conference, Where is Anti-Discrimination Law Going Wrong?, 14 June 2007; forthcoming, *Industrial Law Journal*.
- O'Conneide, C. (2003) *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality* (London: Equality and Diversity Forum).
- Neathey, F., Dench, S. and Thomson, L. (2003) *Monitoring Progress Towards Pay Equality* (Manchester: Equal Opportunities Commission).
- Neathey, F., Willison, R., Akroyd, K., Regan, J. and Hill, D. (2005) *Equal Pay Reviews in Practice* (Manchester: Equal Opportunities Commission).
- Schäfer, S., Winterbotham, M. and McAndrew, F. (2005) *Equal Pay Reviews Survey 2004* (Manchester: Equal Opportunities Commission).
- Teubner, G. (1992) *Law as an Autopoietic System* (Oxford: Blackwell).
- Women and Work Commission (2006) *Shaping a Fairer Future* (London: Women and Equality Unit).