

# Disability, dignity and the cri de coeur.

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*This paper contrasts the rhetorical concern, expressed by the European Court of Human Rights and domestic UK courts, for the rights of disabled people to be enabled to live lives 'with dignity' – with the judgments of such courts, which it suggests signally fail to provide such protection. The analysis uses as its paradigm case that of the UK's Supreme Court in R (McDonald) v Royal Borough of Kensington and Chelsea which it contrasts with a judgment of the Scottish Outer House, of the Court of Session in Napier v Scottish Minister. The paper argues that there is no fundamental jurisprudential reason why the privileged status accorded by courts to the rights of prisoners to minimum 'dignity' standards should not also be accorded to disabled people. In so doing, it challenges the notion that there is an inherent trade off between the loss of liberty and the right to minimum standards of care: that such an argument fails in relation to disabled people, for whom institutionalisation has historically been the default position and for whom 'liberty' is, in the context of the social model of disability, a far from unambiguous concept.*

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It is a truth universally acknowledged that a senior judge in possession of a hard 'disability' case is want to expound at length on 'dignity'. The process is no doubt cathartic, but it generally results in a Delphic judgment that leaves us none the wiser on the practical: as to what constitutes 'indignity'. There are precious few case reports concerning disabled people that provide a benchmark, where judges actually finger a concrete situation and identify it as indignity. In Strasbourg jurisprudential terms one might be tempted to trade a 100 *Pretty*'s<sup>1</sup> for one *Peers*.<sup>2</sup> In *Pretty* 'dignity' gets 15

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<sup>1</sup> *Pretty v UK* (2002) 35 EHRR 1.

mentions, but results in no violation; in *Peers* it gets but two, and yet a violation is found.

In the context of disability and the European Court of Human Rights, many commentators might challenge this assertion and point to the ringing declaration in *Price v United Kingdom*<sup>3</sup> where Judge Greve memorably identified a Convention obligation on states to 'ameliorate and compensate for the disabilities faced by disabled persons: 'compensatory measures' that were, in her opinion 'part of the disabled person's bodily integrity'. *Price* however concerned a prisoner – who happened also to be a disabled person – and it is this dichotomy that this article explores:<sup>4</sup> somehow such declarations roll out so much more easily when the disabled person is detained. Is there really a qualitative difference between a state's international human rights obligations to detained disabled people than to those who it has not 'deprived of their liberty'?

This paper challenges the accepted wisdom that a self-evident difference exists and suggests instead that the absence of judicial *cri de coeur* concerning the rights of non-detained disabled people stems in part from a certain aspect-blindness<sup>5</sup> by a portion of the judiciary – who appear to comprehend dignity on an objective intellectual plane but are unable to express (or perhaps 'experience') subjectively the meaning of what it is to suffer indignity. In effect, that 'dignity' becomes something defined by a process and perforce 'indignity' in terms of a flawed process – and not as an issue of substance. Conceptions of dignity, such judges would claim, are (like all legal principles) matters for the head and not the heart – and certainly not to be identified by reference to non-rational emotional benchmarks – such as ideas of revulsion or the mores of a civilised society.

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<sup>2</sup> *Peers v. Greece* (2001) 33 E.H.R.R. 51 where the Court held that the prison conditions in which the applicant was detained amounted to degrading treatment within the meaning of Article 3 of the Convention – not least because he 'had to use the toilet in the presence of another inmate'

<sup>3</sup> (2002) 34 E.H.R.R. 53.

<sup>4</sup> Other analogous dichotomies warrant similar exploration – for example the difference in the approach taken by courts to the social care needs of destitute asylum seekers and of disabled people – see for example, *MSS v Belgium & Greece*, Application no 30696/09, judgment of 21 January 2011 and *R (Adam and others) v Secretary of State for the Home Department*. [2005] UKHL 66; [2005] 3 WLR 1014; (2006) 9 CCLR 30.

<sup>5</sup> Wittgenstein likens what he calls 'aspect-blindness' to lacking a musical ear – ie hearing but not experiencing; and suggests that in a legal sense it is the difference between 'how someone meant a word' and how they 'experienced the meaning of a word' - see L. Wittgenstein *Philosophical Investigations* 2<sup>nd</sup> edition translated by G. E. M. Anscombe. Oxford: Blackwell (1958) p214.

The paper uses as its paradigm case, that of the United Kingdom's Supreme Court in *R (McDonald) v Royal Borough of Kensington and Chelsea*<sup>6</sup> since this judgement (which concerned a non-detained disabled person) has been contrasted by several commentators<sup>7</sup> with a judgment of the Scottish Outer House, of the Court of Session in *Napier v Scottish Minister*<sup>8</sup> (which concerned a non-disabled detained person). In both cases the applicants were continent and their need was to access a toilet. In *McDonald* she needed help to get to her commode and in *Napier* he objected to using a chamber pot and claimed a right to a private flush toilet. Whereas *Napier's* claim succeeded as a clear violation of article 3, *McDonald's* claim under article 8 was rejected with something akin to legal contempt.

This paper argues that the courts have grave difficulties in identifying atypical human rights abuses experienced by disabled people – atypical in the sense that they are different to the 'typical' abuses identified in relation to non-disabled people: in much the same way that the courts found it particularly challenging to identify abuses experienced by Roma.

### *R (McDonald) v Royal Borough of Kensington and Chelsea*

*McDonald* is a triumph of black letter law. The applicant was 67 and a former principal ballerina with the Scottish Ballet. In 1999 (when aged 56) she suffered a stroke and subsequently a broken hip which left her with reduced mobility. She was assessed by the council as needing assistance at night to access her commode. Once a community care need of this nature has been 'assessed' as eligible, then domestic law obliges the local authority to meet that need: it is what is known as a 'non-resource dependent' duty.<sup>9</sup> Assessed community care needs of this kind must be met, regardless of the cost of meeting them.

Although the council provided this support it decided in 2008 (a decision that coincided with the economic recession) that it could save money by putting her in incontinence pads and on 'special sheeting' at night and sorting her out the next day: effectively withdrawing exiting support and requiring her (as Baroness Campbell of Surbiton

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<sup>6</sup> [2011] UKSC 33.

<sup>7</sup> See for example the comments of Baroness Campbell of Surbiton, Hansard HL Deb, 5 May 2011, c606.

<sup>8</sup> [2002] UKHRR 308.

<sup>9</sup> Clements, L and Thompson, P *Community Care and the Law* 5<sup>th</sup> edition (2011) London: Legal Action Group § 3.174.

expressed it<sup>10</sup>) ‘to lie in [her] own urine and faeces’. There was however, a domestic law problem with the council’s approach. Elaine McDonald’s need was not for incontinence pads (because she was not incontinent): her need was quite different, namely to access her commode.<sup>11</sup> To address this problem (albeit that nothing had changed) the council undertook a desktop reassessment and re-defined her need as a need to ‘be kept safe from falling and injuring herself’.

The majority of the Supreme Court, in dismissing the claim in trenchant language, thought nothing wrong with this process and doubted that the facts engaged article 8 at all. The dissenting speech of Baroness Hale is a *cri de coeur* – that people should be ‘assessed against the standards of civilised society’ and that on this basis (regardless of cost) the UK does not ‘oblige people who can control their bodily functions to behave as if they cannot do so, unless they themselves find this the more convenient course. We are, I still believe, a civilised society.’ As could be predicted such dissent was bound to attract disdain from the majority, although the scorn with which it was communicated is startling – referring to her judgment as ‘nothing short of remarkable’; as ‘regrettable’; as one with which Lord Walker ‘totally disagree[d]’ and ‘deplore[d]’.

In rejecting the argument that there might be the a wisp of a human right in issue, the court cited three European Court of Human Rights disability related judgments, the most celebrated of which being *Sentges v. Netherlands*.<sup>12</sup> Drawing solace from these, Lord Brown observed ‘[r]eally one only has to consider the basic facts of those three cases to recognise the hopelessness of the article 8 argument in the present case.’ In *Sentges* the court (when referring to the margin of appreciation in such cases) observed that ‘the national authorities are in a better position to carry out this assessment than an international court’. We see here, therefore, the mature expression of the ‘pass the parcel’ deference game: the Strasbourg Court defers to national courts who then use that deference as justification for rejecting similar claims.

### *Napier v Scottish Minister*

*Napier* is a thoughtful, carefully constructed judgment, interspersed with references to external benchmarks such as reports of the Chief Inspector of Prisons for Scotland and the Committee for the Prevention of Torture; as well as to the European Prison Rules;<sup>13</sup>

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<sup>10</sup> Hansard HL Deb, 5 May 2011, c606.

<sup>11</sup> See legal analysis in Gordon, R. *Counting the Votes: A Brief Look at the McDonald Case* 2009 CCLR.

<sup>12</sup> *Sentges v. Netherlands* (2003) 7 CCLR 400, 405: Admissibility Application No 27677/02; 8 July 2003.

<sup>13</sup> Recommendation No.R(87)3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987.

the United Nations Standard Minimum Rules for the Treatment of Prisoners;<sup>14</sup> and Strasbourg case law (not least *Peers v. Greece*). Although such comparators did not suggest that the circumstances of the applicant's incarceration were at the severe end of the indignity scale, the conclusions that he had been subjected to a violation of article 3 are incontrovertible.

In 2001 Robert Napier, who faced charges including robbery, abduction and attempted murder was remanded in custody to Barlinnie Prison, where he had served previous prison sentences. He alleged that the totality of his prison conditions amounted to degrading treatment. This included having to share a cell with one other prisoner, the size and layout of the cell, the prison regime, his food, his underlying ill-health (atopic eczema) and the attitude of staff. None of these factors (imperfect as they were) in themselves were considered to be of a severity to found a violation.

The pivotal finding, however, concerned the practice of slopping out. Barlinnie is an old prison and at that time not all of the cells were fitted with flush toilets. As the court noted the two principal components to slopping out were '(1) the use of a bottle to urinate and a chamber pot to defecate in the cell and (2) the practice of groups of prisoners emptying both'. In fact the applicant did not use the chamber pot on any occasion and his cell mate did so on only twice. Nevertheless the court considered in detail his feelings about the idea of having to use the chamber pot in his cell: that it made him feel 'like you don't exist because you are forced to use that toilet ... you shouldn't need to do that and I was not prepared to do that myself ... it just makes you feel low all the time' (§ 76). On this basis Lord Bonomy concluded that he was 'entirely satisfied that the petitioner was exposed to conditions of detention which, taken together, were such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation' (§ 78).

### **The prisoner's dialectic**

The duty to treat prisoners with humanity and with respect for their inherent dignity is a fundamental obligation of all states and a specific provision of the International Covenant on Civil and Political Rights (article 10). Prisoners are of course especially vulnerable, as the state has total control over almost every aspect of their lives; they are deprived of the ability to decide where they live, or with whom they live and have little

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<sup>14</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders on 30 August 1955.

choice about their health and social care arrangements. Prisoners are also hidden from the public gaze and dependant on the good services of state agents. It is for these reasons that a variety of inspectorates / committees exist (domestic and international) to safeguard their well-being – and do so (as noted above) by a reference to a number of international benchmark standards.

Given the totality of state control, the European Court of Human Rights<sup>15</sup>, to its credit, has placed substantial obligations on member states to ensure that minimum standards are upheld. Because of the ‘vulnerability’ of detainees with ‘physical or mental conditions’<sup>16</sup> the Court has subjected to particular scrutiny their material conditions, to establish whether they are ‘compatible with Article 3. In *Slyusarev v Russia*,<sup>17</sup> for example, it found a violation of article 3 in relation to the non-provision of glasses to a short-sighted prisoner.

The above analysis suggests that if Elaine McDonald had been a detained person, the court (at the very least) would have subjected her conditions to significantly greater scrutiny. The question is then, whether this difference in scrutiny (let alone outcome) is attributable to an objective qualitative difference between the state’s obligations in such cases – or is there in a dialectical sense, a contradiction that is in human rights jurisprudential terms irreconcilable? Should the substance of a state’s obligations to a disabled person hinge on whether that person is or is not in a public place of detention?

On several levels such a distinction is open to challenge – two of which call for particular analysis. Firstly, given that there is no bright line distinguishing a deprivation of liberty and a restriction on liberty – can there be any philosophical reason why the former alone, should attract concrete procedural and substantive obligations. The second ground concerns Carr’s<sup>18</sup> observation that in such contexts, the private / public separation of state responsibility is unsatisfactory, not least because it assumes a clear dividing line which does not exist: ‘instead there is a spectrum of care provision which has emerged in response to policies of de-institutionalisation combined with the retraction and refocusing of welfare’.

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<sup>15</sup> The right has also been recognised by the ‘positive obligation averse’ US Supreme Court, albeit in a restricted form: *Estelle v Gamble* 429 U.S. 97 (1976).

<sup>16</sup> *Dybeku v. Albania* [2009] M.H.L.R. 1; Application No. 41153/06, 18 December 2007 § 40.

<sup>17</sup> Application No. 60333/00, 20 April 2010.

<sup>18</sup> Carr, H *Alternative Futures v NCSC: A Feminist Critique* Conference Paper to the European Network of Housing Research Rotterdam 2007 at [www.enhr2007rotterdam.nl/documents/W18\\_paper\\_Carr.pdf](http://www.enhr2007rotterdam.nl/documents/W18_paper_Carr.pdf) (accessed 14th September 2011).

## Liberty as a cliff edge right

Identifying a deprivation of liberty for the purposes of Article 5 of the Convention is not always straightforward, given the oft repeated assertion that the distinction between a deprivation of and a restriction upon liberty is merely one of degree or intensity and not one of nature or substance:<sup>19</sup> where however the process concerns a disabled person, it can require psychic powers of intuition.

In *HM v Switzerland*<sup>20</sup> Judge Loucaides listed some of the more challenging aspects of the notion of 'deprivation'. A person can be deprived of their liberty, even though they live in an unlocked setting and are permitted to leave that setting unaccompanied during the day and over the weekend.<sup>21</sup> Likewise a person can be so deprived, even though they agreed to the particular regime<sup>22</sup> and even though the regime serves their best interests.<sup>23</sup> In *HL v United Kingdom*<sup>24</sup> it was held that a person may be deprived of his liberty even though he was unaware that he was not free to leave.

Conversely, the Strasbourg and UK courts have at times gone to inordinate (and occasionally incomprehensible) lengths to find that no deprivation has occurred. For example, deprivation has been held not to arise where: a person was locked in a room for prolonged periods (because it was done by devoted parents solely concerned about his welfare, happiness and best interests);<sup>25</sup> a person was held against her wishes by the police for seven hours (because the police were 'acting in good faith');<sup>26</sup> an elderly person was placed in a foster home against her wishes by the police pursuant to an order explicitly providing for a deprivation of liberty.<sup>27</sup>

It is difficult to avoid the impression that in certain cases the Strasbourg and domestic UK courts strain to avoid finding a 'deprivation' because of a perception that these are not the 'type of case' that the Convention was designed to address: that in such cases the judicial heart is struggling with the judicial head. Influential in this *sense vs. reason* conflict will be the judge's analysis of the consequences of his or her decision: ie the

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<sup>19</sup> see *Guzzardi v Italy*, (1980) 3 EHRR 333, § 92, *HM v. Switzerland*, (2002) 38 EHRR 314 § 42, *HL v United Kingdom*, (2005) 40 E.H.R.R. 32 § 89, and *Storck v Germany*, (2006) 43 E.H.R.R. 6 § 42

<sup>20</sup> (2002) 38 EHRR 314.

<sup>21</sup> see *Ashingdane v. the United Kingdom* (1985) 7 E.H.R.R. 528 § 43.

<sup>22</sup> *De Wilde, Ooms and Versyp v. Belgium* (1979-80) 1 E.H.R.R. 373.

<sup>23</sup> *Ibid.*

<sup>24</sup> *HL v United Kingdom*, (2005) 40 E.H.R.R. 32.

<sup>25</sup> *A Local Authority v A (A Child)* [2010] EWHC 978 (Fam) para 115.

<sup>26</sup> *Austin and another v Commissioner of Police of the Metropolis* [2009] UKHL 5; [2009] 3 All ER 455.

<sup>27</sup> *HM v. Switzerland*, (2002) 38 EHRR 314 per Judge Loucaides.

consequent obligations that would then be imposed on states if detention is found. The evidence suggests that a key premise for this analysis is often flawed, namely that the consequences will be materially different if no deprivation is found. The misconception being that on some fragment of context, a person's human rights evaporate – in effect, that article 5 is a cliff edge right. Once secured, the 'detainee' gains all manner of rights (not only procedural, but also health and social care supports: flush toilets and glasses). However, if they be fractionally the wrong side of detained, then they fall: the court as sympathetic spectator, powerless to intervene.

The misconception is that in the generic human rights context, there is no cliff edge. The Convention provides a spectrum of safeguards that become more intense and heightened the greater the individual's 'vulnerability'; the greater the gravity of the potential consequences; and the greater the constraints he or she experiences. The protection is graduated and exists: even in the absence of a detention; even in the absence of evidence that the person is distressed; and even in the absence of bad faith on the part of the restraining authority.

The protections exist because of the state's safeguarding obligation assumed in Article 1 and delineated by the individual Articles. They include, for example: the duty to take measures to provide effective protection for vulnerable persons;<sup>28</sup> the duty to ensure that such persons are afforded a fair hearing in relation to any interferences with their civil and political rights;<sup>29</sup> the duty to provide inspectorates and to take other measures to protect against unnecessary interferences with their private life;<sup>30</sup> the duty to combat hate crime based on disability.<sup>31</sup>

The failure of judges to look over the edge of article 5 deprivations and see the article 8 protections that form a continuum – is evidenced by many cases. *Parker et al*<sup>32</sup> have highlighted the 'restricted vision' of the Strasbourg Court in relation to the bridging article 8 rights: that in situations which fall short of a deprivation of liberty, even minor

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<sup>28</sup> Vulnerable, either because of innate factors such as their age, impairments of illness (see for example *Z and Others v. the UK*, (2002) 34 E.H.R.R. 3, § 73, and *Osman v. the UK*, (2000) 29 E.H.R.R. 245, § 116) or because of external factors (see for example *Öneryıldız v. Turkey* (2005) 41 E.H.R.R. 20; *Budayeva v. Russia* (2008) Application No, 15339/02, 20 March 2008; and *Kalender v Turkey*, Application no 4314/02, 15 December 2009.

<sup>29</sup> *Shtukaturov, v Russia* (2008) 11 C.C.L. Rep. 440; Application No. 44009/05, 27 March 2008 §§ 68 and 69.

<sup>30</sup> *Storck v. Germany*, (2006) 43 E.H.R.R. 6 § 150.

<sup>31</sup> See *Dorđević v Croatia* (pending) Applic no. 41526/10 and by analogy *Timishev v Russia* (2005) Applications nos. 55762/00 and 55974/00 § 56 13<sup>th</sup> December 2005.

<sup>32</sup> C Parker and L. Clements (2008) *The UN Convention on the Rights of persons with Disabilities: a New Right to Independent Living?* in *European Human Rights Law Review* Issue 4 2008 pp508 – 523.



restrictions require justification under Article 8(2). Unfortunately, to date the Strasbourg Court has shown a disinclination to consider this dimension: in *Storck v. Germany*<sup>33</sup> for example (on the basis that in substance it repeated the Article 5 complaint) and in *HM v Switzerland*<sup>34</sup> (on the basis that no separate Article 8 complaint had been made).

Jurisprudentially, the need for a seamless spectrum of protections that span situations where disabled people are actually deprived of their liberty and situations where their Convention rights are constrained derives (as noted) from the obligations in Article 1. Functionally, however these protections are required, not only because of the difficulty in establishing a bright line as to when a restriction becomes a detention<sup>35</sup> but also because of the problematical notion of deprivations and restrictions in the context of the experiences of disabled people. Arguably such a discourse is inappropriate for a group for whom state incarceration has been the norm – rather than the exception: for whom, until relatively recently, the default position has been the workhouse, the mental handicap hospital; the special school; the day centre; the group home.

### *Institutionalisation and the private / public divide*

The history of the institutionalisation of disabled people and the current rhetoric of independent living adds a key dimension to the analysis. The various de-institutionalisation programmes in many European member states should at best be viewed as ‘compensatory measures’ for past wrongs to disabled people. Not infrequently however, they are cost cutting measures (accompanied by severe reconfigurations of social security supports).<sup>36</sup> As the cost of institutional care has risen<sup>37</sup> due to demands for higher standards (resulting, ironically, from the findings of human rights monitoring bodies, inspectorates and the courts) states have sought to resettle disabled people into ‘community settings’. In many situations these resettlements have changed little of substance, creating new forms of ‘community

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<sup>33</sup> *Storck v. Germany* (2006) 43 E.H.R.R. 6.

<sup>34</sup> Application no. 39187/98: (2002) 38 EHRR 314.

<sup>35</sup> And in some cases when a person lacks the requisite mental capacity to make the necessary decisions see *HM v Switzerland* (2002) 38 EHRR 314.

<sup>36</sup> European Commission *Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care* (2008) Directorate-General for Employment, Social Affairs and Equal Opportunities (2008) p16

<sup>37</sup> Freyhoff, G. Parker, C. Coué, M. and Greig, N. (eds) Included in *Society Results and Recommendations of the European Research Initiative on Community-Based Residential Alternatives for Disabled People* p.37; and see generally, Mansell, J. Knapp, M, Beadle-Brown, J. and Beecham, J. *Deinstitutionalisation and community living – outcomes and costs: report of a European Study* (2007) Canterbury: Tizard Centre, University of Kent

detention'; guardianship; community treatment orders; smaller institutions; a form of passive institutionalisation; 'a region of simple responsibility where any manifestation of madness will be linked to punishment'.<sup>38</sup>

The social model of disability conceptualises this community confinement through its recognition that most of the most oppressive and limiting factors that disabled people experience are socially created.<sup>39</sup> The cover to Michael Oliver's seminal 1990 book *The Politics of Disablement*<sup>40</sup> is apt in the current context. Its picture is of a person in a wheelchair at the bottom of a flight of steps. At the top is a sign saying 'Polling Station'. The barrier to the disabled person accessing his Convention rights betrays an able bodied view of the world: a world designed for and by non-disabled people. The barriers are not all so simple and so physical; not infrequently they are social, administrative, educational, attitudinal or indeed, emotional. Most pernicious of all, they include the way that disabled people are thought of by the dominant non-disabled group. A way of thought that has been conditioned by the fact that disabled people have been institutionalised and excluded from a wider social interaction until comparatively recently; an idea that disabled children need to be educated separately; that ideally that they should not be born or not resuscitated; that unlike able bodied people (for whom access to a flush toilet is an essential 'dignity' requirement) disabled people are different and untroubled by pads and special sheeting.

Cases such as *McDonald* leave the impression of judicial aspect-blindness to such stereotyping and to the fact that for disabled people 'liberty' is, unsurprisingly, perceived in a very different way to that of their non-disabled peers – not as an able bodied utopian construct, but as a highly complex, relative and invariably compromised idea.

The UN Convention on the Rights of Persons with Disabilities (CRPD) adopts in large measure the social model critique<sup>41</sup> and seeks to deconstruct disabled people's imprisoning environments. Article 19, for example, provides for the right of disabled people to live independently in the community and in furtherance of this right to a range of support services. All Council of Europe states have now signed the CRPD

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<sup>38</sup> Foucault, M. *Madness and Civilisation*. (2005) Oxford: Routledge Classics.

<sup>39</sup> See Broach, S. Clements, L and Read, J *Disabled Children: A Legal Handbook* (2010) London: legal ActionGroup § 1.6.

<sup>40</sup> 1990, London: Macmillan.

<sup>41</sup> The Preamble para (e) identifies disability as resulting 'from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

(with the exception of Switzerland<sup>42</sup>) and a sizeable majority have ratified it (including the European Union<sup>43</sup>) and in consequence, the Strasbourg Court has accepted that a concrete consensus exists in Europe as to the Treaty's norms.<sup>44</sup> Parker *et al*<sup>45</sup> argue that the main impact of this recognition should be to invigorate (through the medium of the 'interpretive obligation') the latent independent living and non-discrimination rights of disabled people in the Convention.

Given European acceptance as to the validity of the social model critique, the challenge is to formulate effective human rights law remedies. In relation to the Michael Oliver image for example, is the appropriate response to remove the physical barrier or to allow the wheelchair user to vote by post: ie a substantive or a 'separate but equal' approach? On the basis of *McDonald* and the *Farcas*<sup>46</sup> judgment (discussed below) it would appear that instinctively UK courts and Strasbourg favour the latter.

Underpinning the insistence on such a separation it is arguable that there lies the notion that it is not unreasonable for there to be a trade off: that in return for non-incarceration, disabled people must accept fewer rights (for example, fewer protections from indignity). In exchange for community living, other human rights (such as subjective 'dignity') must be waived – or if not waived, that these rights (which in the context of detention are deemed to have a strong civil and political rights component) transmogrify into aspirational socio-economic rights.<sup>47</sup>

Much of the above analysis concerning the need for a reconceptualisation of the treatment of disabled people echoes aspects of the feminist critique: of the oppression, the discrimination and the barriers women experience in a male engineered society.

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<sup>42</sup> Which did not however preclude the European Court of Human Rights from relying on the CRPD in *Glor v. Switzerland*, Application no. 13444/04, 30 April 2009.

<sup>43</sup> Note also the Charter of Fundamental Rights of the European Union, Article 26 'the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.

<sup>44</sup> *Glor v. Switzerland* (ibid) and see also *Kiyutin v. Russia*, Application no. 2700/10, 10 March 2011; *Jasinskis v. Latvia*, Application no. 45744/08, 21 December 2010; *Alajos Kiss v. Hungary*, Application no. 38832/06, 20 May 2010; *Seal v. United Kingdom*, Application no. 50330/07, 7 December 2010; *Trpeski v. Macedonia*, Application no. 19290/04, 22 October 2009.

<sup>45</sup> C Parker and L. Clements (2008) *The UN Convention on the Rights of persons with Disabilities: a New Right to Independent Living?* in *European Human Rights Law Review* Issue 4 2008 pp508 – 523.

<sup>46</sup> *Farcas v. Romania* (2010) Application No. 32596/04.

<sup>47</sup> In *Zehnalová & Zehnal v Czech Republic* (2002) Application no 38621/97. the court described its role as being to 'determine the limits to the applicability of Article 8 and the boundary between the rights set forth in the Convention and the social rights guaranteed by the European Social Charter'.

Carr also makes the important and frequently overlooked point<sup>48</sup> that the feminist discourse is not a separate struggle: that ‘welfare law is principally (and ideologically) concerned with the lives and issues of poor women’ – that women (such as Elaine McDonald) are far more likely than men to be in need of welfare support and formalised care: that ‘aging and caring are gendered in ways that are more nuanced and compelling than the simple fact that women live longer than men’.

### **Of benchmarks, polycentricism and Sorites**

The social model of disability ‘talks to’ a multiplicity of environmental, administrative and attitudinal handicaps – that in their totality disable. Such compound influences are an anathema to black letter lawyers who crave the ‘discrete incident’ or as Wexler described it ‘the law school model of personal legal problems’ where the law’s role is to ‘[return] the client to the smooth and orderly world in television advertisements’.<sup>49</sup> Judge Pettiti in *Buckley v United Kingdom*<sup>50</sup> referred to the unease of judges in such cases: cases which involved ‘the superimposition and accumulation of administrative rules (each of which would be acceptable taken singly)’ and of the court’s inability to find violations even in the face of evidence that their cumulative impact was clearly devastating. In such situations judges may be all too willing to ‘talk the talk’, but without a substantial crutch in the form of external benchmarks may feel incapable of ‘walking the walk’.

Even where there is only a single factor at play, incrementalism poses similar difficulties and likewise sees judges searching for the safe ground of an independent standard in order to avoid having to use their own judgment as to when the permissible amber becomes the impermissible red. Goldstein has referred to this as the paradox of the Colour Patch Sorites:<sup>51</sup> essentially the inability of rational analysis alone to decide where along the continuum amber becomes red. Indeed in philosophical terms, since the difference between adjoining slices along the gradation are imperceptible (ie

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<sup>48</sup> Citing Chunn, D and Gavigan, S *Welfare law, welfare fraud and moral regulation of the never deserving poor* in *Social and Legal Studies* (2004) 13(2) 219 – 243 p220.

<sup>49</sup> Wexler S (1970) *Practising Law for Poor People*; *The Yale Law Journal*. Vol. 79: 1049, 1970.

<sup>50</sup> *Buckley v United Kingdom* 23 E.H.R.R. 101 (1996).

<sup>51</sup> Goldstein, L. *How to boil a live frog*. *Analysis* Volume 60, Issue 266, pages 170–178, April 2000

perceived as identical) red must be amber: degrading treatment must be mere discomfort.<sup>52</sup>

The exemplar series of cases that illustrates the paralysing cocktail of incrementalism and multilayered impacts commences with *Botta v. Italy* (1998).<sup>53</sup> In this case a physically disabled applicant complained of a violation of his rights under Articles 8 and 14 (amongst others) because physical barriers stopped him gaining access to his chosen holiday beach. Although the Court was prepared to envisage that restrictions of this nature could interfere with the article 8 right – particularly in relation to his ‘relations with other human beings’ – it was, unsurprisingly, of the view that (given he was ‘at a place distant from his normal place of residence’) the complaint was so broad and indeterminate that no violation was evident.<sup>54</sup> In *Zehnalová & Zehnal v Czech Republic*,<sup>55</sup> the barriers were in the town where the disabled applicant lived, and were not to a beach but to over 150 public buildings – including most municipal council offices, the District Court, and the police station. Notwithstanding that these facts placed the complaint considerably further down the amber to red Sorites continuum it was rejected as incompatible *ratione materiae*: in part due to doubt that the applicant needed to access the buildings ‘on a daily basis’. *Farcas v. Romania*<sup>56</sup> lies yet further down the continuum. Here the disabled applicant was unable to access the court buildings and his lawyer’s office – which introduced article 6 as an additional dimension. The court however found that there were other feasible steps that he could have taken to access justice – by post or with the help of his relatives. Although clearly this is a difficult issue, it is striking that the Strasbourg Court found no scope to affirm (even rhetorically) the rights of people with disabilities to live as equal citizens with equal rights to participate in court proceedings. The judgment parallels the Roma related jurisprudence of the 1990’s in which the court boxed itself into a situation where it was effectively incapable of finding a violation of article 14 on grounds of race. This

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<sup>52</sup> In the context of claims by applicants concerning health care – the challenge can be demonstrated thus: in *Nitecki v. Poland* (Application No. 65653/01 21 March 2002) at what point down the continuum would the court have found a violation – if the state contribution towards ill-people’s medication expenses had been 69% rather than 70% and so on; or in *Passannante v Italy* (Application no. 32647/96, 1 July 1998; (1998) 26 EHRR CD 153) if the wait for a hospital appointment had been 1 day less than 5 months and so on.

<sup>53</sup> (1998) 26 E.H.R.R. 241 – and see also *Glor v. Switzerland*, Application no. 13444/04, 30 April 2009.

<sup>54</sup> It is however noteworthy that in relation to non-disabled people the court is prepared to find authorities responsible for barriers: in *Kalender v Turkey* (Application no 4314/02, 15 December 2009) for example a violation was found where a railway station had no subway and several blocked passages, which meant that passengers had to cross the track.

<sup>55</sup> (2002) Application no. 38621/97.

<sup>56</sup> (2010) Application no. 32596/04.

absurdity was challenged (and shortly thereafter neutralised<sup>57</sup>) by a withering *cri de coeur* from Judge Bonello, in which he parodied Strasbourg's approach to reality: '[I]eafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia'. *Farcas*, in similar fashion, illustrates the court's inability to find that the barriers disabled people experience can ever violate a Convention right. The judgment renders this line hypothetical and illusory. If a disabled person can gain access through a non-disabled proxy – then there is no violation: a classic exposition of the separate but equal.

The dearth of national and international standards' relating to the treatment of disabled people<sup>58</sup> does not excuse judges (particularly domestic judges) from using their own judgment about what is acceptable. The problem of course is that avoidance of this course is drilled into them in almost every aspect of their training and practice. The resulting vacuum results in decisions such as *McDonald*: judgments where the courts sit on their hands waiting for external tipping points – Parliamentary action; emerging consensuses; international benchmarks. Such an approach might have been acceptable prior to the incorporation of fundamental rights into the domestic legal framework – but it is no longer: judges cannot stay mute for lack of the ideal tool: poets stifled through lack of a sharp pencil.

The classic example of this anxious deference is of course<sup>59</sup> *Somerset's case* where Lord Justice Mansfield strained at every legal stratagem in order to avoid having to declare slavery unlawful<sup>60</sup> 'more fearful of the damage he might inflict than of the justice he might mete out'.<sup>61</sup>

The Sorites paradox is also a species of the slippery slope – for which judicial misgiving about their lack of 'judgment' is but one example. Olivier de Shutter<sup>62</sup> attributes this reluctance, not to any inherent inapplicability of Article 8 to such cases but to a

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<sup>57</sup> *Nachova v. Bulgaria* (2006) 42 E.H.R.R. 43.

<sup>58</sup> The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) for example, are largely aspirational.

<sup>59</sup> *R. v. Knowles, ex parte Somerset*, (1772) Lofft 1, 98 E.R. 499, 20 S.T. 1

<sup>60</sup> see Oldham, *J English Common Law in the Age of Mansfield* (2004) University of North Carolina Press, p321-323

<sup>61</sup> Schama, *S. Rough Crossings* (2005) BBC Books, London p59.

<sup>62</sup> De Schutter O. Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights in Disability Rights in Europe: From Theory to Practice Lawson L & Goolding C (eds): (2005) Hart Publishing, Oxford § 3.3.

'timidity' that stems in part from a fear of the ripple effect (in terms of the resource implications) of their decisions. Academics are fond of referring to this as polycentricism.<sup>63</sup> In his view the courts feel ill-equipped to arbitrate on such budgetary choices and are concerned about their lack of democratic legitimacy. Both of course are very real and valid factors. There are however very real and valid arguments against the indiscriminate deployment of polycentric caution. King<sup>64</sup> for example, has highlighted the court's inconsistent approach in this field – particularly in relation to rich and poor applicants: that '[w]hile deference and justiciability are the watchwords in the social welfare context, with polycentricity providing a key conceptual justification, different values and outcomes are found at play in tax law'.

The fear of destabilising the established order is a problematical notion, where the *status quo* is based on the oppression of a disempowered group – be they slaves, women, racial minorities, prisoner's or disabled people: and where their struggle is directed at a re-engineering of such structures. Politically such change is always contested – particularly on economic grounds and it is for this very reason that human rights courts came into existence.

In relation to domestic 'disability' cases such as *McDonald*, the 'resource' discourse has acquired many of the hallmarks of the Brocken spectre,<sup>65</sup> with the courts refusing to engage in any rational analysis as to the substance of this apparition.<sup>66</sup> The same courts, that have been so impressive in upholding individual rights in the face of states raising the spectre of 'terrorism', become utterly limp at the mere mention by the executive of 'resource' constraints: supinely willing to accept such assertions at face value. In *McDonald* for example, the opening paragraph of the judgment details the alleged cost saving of making her incontinent (ie by putting her in incontinence pads). The cost (£22,000 pa) is the same as the cost of providing her care in a care home.<sup>67</sup> Incontinence (albeit that in this case, it is forced incontinence) is the second greatest cause for older people being institutionalised in the UK and brings with it 'innumerable and well documented problems – not merely risks of infection and compromised skin viability but also issues of profound depression deriving from a sense of despair and shame'.<sup>68</sup> The courts cannot have it both ways: on the one hand asserting their inability to get

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<sup>63</sup> See Fuller, L *The forms and limits of adjudication* (1972) 92 Harvard Law Review 353, and (for example) Allison, J.W.F. *Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication* (1994) 53 C.L.J. 367.

<sup>64</sup> King, J A. *The pervasiveness of polycentricity* Public Law [2008] 101 – 124 at 121.

<sup>65</sup> The fear of one's shadow – see C.G.Jung and A Jaffé. *Memories, Dreams, Reflections*. Glasgow, Collins (1977) p 107.

<sup>66</sup> *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898, CA.

<sup>67</sup> In which it would be considered abusive to place a continent person in incontinence pads

<sup>68</sup> Clements, L (2011) *Elder Law* volume 1 Jordans pp47-52 at p50.

involved in questions that concern the allocation of scarce resources – and on the other, citing expenditure figures (such as the £22,000 in McDonald or the €10,900 in *Sentges*<sup>69</sup>) as if these figures somehow communicated some self evident truth.

In this context, it should not be overlooked that the costs of implementing the *Napier* judgment have been very substantial: the refurbishment programme, the compensation awards to other prisoners (and prison officers<sup>70</sup>) and the litigation costs<sup>71</sup> appear to have exceeded £50 million,<sup>72</sup> which for a relatively small economy is a not inconsiderable sum.

## Conclusions

Claims by disabled people for community living supports, raise novel and difficult legal questions. It is – for all the reasons detailed in this paper – understandable that the courts will be tentative in the approach to such issues. What is of concern about the *McDonald* judgment is that parts of the judiciary do not consider that such distressing circumstances engage fundamental human rights at all: just as their colleagues saw no Convention question engaged in Diane Pretty's<sup>73</sup> circumstances or those of the applicants in *Glass v UK* and *HL v UK*.<sup>74</sup>

Robert Napier and Elaine McDonald were both dependent upon the state – one through misdemeanour and the other through age. Just as with detainees, the duty to treat disabled people with humanity and with respect for their inherent dignity is a fundamental obligation of all European states and a specific provision within the UN Convention on the Rights of Persons with Disabilities (Article 3, amongst others). Some disabled people are of course especially vulnerable, as even if not 'detained' the state may exercise control over almost every aspect of their lives; many lack the ability to

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<sup>69</sup> *Sentges v. Netherlands* (2003) 7 CCLR 400, 405: Admissibility Application No 27677/02; 8 July 2003.

<sup>70</sup> Macaskill, M (2005) *Now prison officers to sue over slopping out* Sunday Times 14<sup>th</sup> August 2005

<sup>71</sup> Satellite litigation has included, for example *Somerville v. Scottish Ministers* [2007] UKHL 44 and *Docherty and others v Scottish Ministers and others* First Division, Inner House, Court Of Session [2011] CSIH 58.

<sup>72</sup> See for example, English, S *Scottish prison chiefs reveal soaring cost of slopping out* Times, 3<sup>rd</sup> August 2005; J Robertson, J and Whitaker, A. *Slopping-out: taxpayer faces hundreds of new lawsuits* The Scotsman 3<sup>rd</sup> September 2011; Dinwoodie, R *Millions put aside for prison slop-out claims* Herald of Scotland 3<sup>rd</sup> September 2011.

<sup>73</sup> [2001] 3 WLR 1598 : [2002] 1 All ER 1.

<sup>74</sup> *Glass v United Kingdom* (2004) 39 E.H.R.R. 15 and *HL v United Kingdom* (2005) 40 E.H.R.R. 32 respectively.



decide where they live and many have little or no choice about their health, social care and accommodation arrangements. Many, due to the barriers they face and the ghettoisation of support services, are hidden from the public gaze and dependant on the good services of state agents. It is for these reasons that a variety of state inspectorates exist to safeguard their well-being. In this regard they are little different from detainees: indeed historically detention was the default position for very many of them. Without basic support many disabled people (like Elaine McDonald) will return to that state – or perhaps book themselves onto a Swiss Air flight and into the Dignitas clinic.

A number of critics of the *McDonald judgment* have attempted to explain it in terms of a failure of process – essentially that with greater forensic attention to the detail of the statutory framework, the Supreme Court should have found a violation.<sup>75</sup> Whilst there may be much force in their analyses, it is arguable that rationality alone cannot determine such cases, even if all the possible black letter legal arguments had been deployed. Due process – even heightened or anxious scrutiny of the *Daly* version remains due process, even where proportionality is allowed full play, since this mechanism has become very much a process driven review underpinned by explicit deference to the executive in some manifestation of other (eg *Wednesbury* / the margin of appreciation).

For lawyers schooled in due process review, there is a belief that if heightened, it can address substance – but this lacks credibility. How is a lawyer to know when a case requires heightened scrutiny – ie when it is of substance - and what if the process followed is utterly rational? It is no longer tenable to say (in such situations) that at that point, the decision is for the politicians, since European states have all incorporated into their domestic laws, provisions entrenching fundamental human rights: rights of substance, not of process. The simple due process conception of the rule of law is no longer tenable: Joseph Raz's famous critique<sup>76</sup> no longer holds sway.

Judgments must, when the usual 'due process' tools fail, include that most judicially ridiculed of instruments – the *cri de coeur*: the simple statement that – no matter how

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<sup>75</sup> See for example Gordon, R. *Counting the Votes: A Brief Look at the McDonald Case* 2009 CCL Rep and L Clements (2011) *Social care law developments A sideways look at personalisation & tightening eligibility criteria* Elder Law Journal (Jordans) v.1 pp 47-52.

<sup>76</sup> A 'non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies': Raz, J. *The Rule of Law and its Virtue* Law Quarterly Review (1977) 195.

rational the process; no matter how pressing the need; no matter how politically charged the context – ‘this cannot be’: the ‘revulsion’ option. We do see these on occasions – but it is a brave and unusual judge who resorts to such – for to do so, generally attracts derision and scorn: for they involve the breaking of club rules and are seen as an inability to master the complexities of the Glass Bead Game<sup>77</sup> – that is our legal system.

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<sup>77</sup> ‘The only way to learn the rules of this Game of games is to take the usual prescribed course, which requires many years; and none of the initiates could ever possibly have any interest in making these rules easier to learn’: Hesse, H. *The Glass Bead Game*. Harmondsworth: Penguin Books 1972 p18.