

**FEMALE COMBAT EXCLUSION IN THE UK ARMED FORCES – IS IT STILL  
LEGAL?**

**INTRODUCTION**

Women have served in the UK military for many years and today 73% of jobs are open to women in the Navy, 70% in the Army and 96% in the RAF. The Sex Discrimination Act 1975 (SDA75)<sup>1</sup>, now replaced by the Equality Act 2010<sup>2</sup>, excludes discriminatory acts from protection to ensure combat effectiveness. This must comply with relevant EU legislation<sup>3</sup> that does not contain a provision allowing an exclusion for combat effectiveness although the ECJ has held that the Member States may take decisions on the organisation of their armed forces to ensure their security<sup>4</sup>. However, this has to be exercised with the genuine aim of guaranteeing public security whilst being appropriate and necessary to achieve this aim<sup>5</sup> with a ban on women serving in the Royal Marines justified as it would be confined to a small force and applied to the principle of inter-operability. This combat effectiveness exclusion limits full integration of women in the military ensuring that women cannot serve in front line army units, the RAF Regiment, the Royal Marines and submarines<sup>6</sup>. In a new report in November 2010 exclusion of women from ground

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<sup>1</sup> SDA75 s 85(4)

<sup>2</sup> EA10 s 29(6) with Schedule 3, s 4(1) and s 39(1)&(2) with Schedule 9, s 4(1)

<sup>3</sup> Directive 2006/54

<sup>4</sup> Case C-273/97 Case C-273/97 Sirdar v The Army Board & The Secretary of State for Defence [1999] ECR I-7403 (ECJ) para 15, noted: P Koutrakos, 'Community Law and Equal Treatment in the Armed Forces' (2000) 25 ELR 433; and, J Langer, 'Case Comment' (2000) 37 CMLRev 1433

<sup>5</sup> Ibid para 28

<sup>6</sup> Ministry of Defence, 'Women in the Armed Forces', report by the Employment of Women in the Armed Forces Steering Group, May 2002, accessed at [http://www.mod.uk/NR/rdonlyres/A9925990-82C2-420F-AB04-7003768CEC02/0/womenaf\\_fullreport.pdf](http://www.mod.uk/NR/rdonlyres/A9925990-82C2-420F-AB04-7003768CEC02/0/womenaf_fullreport.pdf)

close-combat roles was retained<sup>7</sup> and wholly attributed to unit cohesion. In December 2011, it was announced that the submarine service would be fully opened to women by 2016.

This paper will consider the retention of the combat effectiveness exclusion and analyse its legality especially with reference to EU and UK law.

### **THE ORIGINAL POSITION**

Sex discrimination was initially regulated in the UK with the adoption of the Sex Discrimination Act 1975 (SDA75), in advance of the adoption of the European Union's Equal Treatment Directive<sup>8</sup> (ETD). The ETD prohibited sex discrimination in unequivocal terms in Article 2(1), be that direct or indirect discrimination, with exclusions set out in Articles 2(2) to 2(4). Article 2(2) allowed Member States to exclude occupational activities and the training leading to those activities from the scope of the Directive "for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor". Article 2(3) excluded "provisions concerning the protection of women, particularly as regards pregnancy and maternity", and Article 2(4) excluded provisions designed to "promote equal opportunity for men and women". The application of the principle of equal treatment prohibiting discrimination on grounds of sex was set out for three specific conditions: access to all jobs or posts, including selection criteria, whatever the sector or branch of activity (Article 3(1)); access to all types of vocational training and retraining (Article 4(1)); and, working conditions and the conditions governing dismissal (Article 5(1)). Article 6 required Member States to provide methods for individuals suffering from sex discrimination to obtain redress through processes that could culminate in the courts.

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<sup>7</sup> Ministry of Defence, 'Report on the Review of the Exclusion of Women from Ground Close-Combat Roles', November 2010, accessed at [http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report\\_review\\_excl\\_woman\\_combat.pdf](http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report_review_excl_woman_combat.pdf), para 13

<sup>8</sup> Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40

The prevailing view at the time was that the Member States retained exclusive competence over all matters concerning their armed forces and thus the ETD had no purchase over the military. Reflecting this opinion the SDA75 contained a provision, s 85(4), which excluded from the scope of the Act “service in...the naval, military and air forces of the Crown” and the military duly acted by dismissing without compensation women from the services who fell pregnant. In a series of cases, the ECJ found Article 5(1) to be directly effective<sup>9</sup> (as was subsequently Articles 2(1), 3(1) and 4(1)<sup>10</sup>), so an individual could bring domestic legal action to claim their EU rights, that dismissal of a pregnant woman on the basis of her pregnancy amounted to direct sex discrimination<sup>11</sup>, that Article 6 had to be interpreted so that no upper limit could be set for compensation for dismissal<sup>12</sup> and any time limit for compensation only started to run once the Directive had been correctly transposed<sup>13</sup>. The result was an appreciation that the policy of dismissing pregnant service women was illegal leading to a considerable number of legal challenges<sup>14</sup> and eventual compensation<sup>15</sup> until maternity leave for pregnant service women was introduced in 1990, that SDA75 s 85(4) was irreconcilable with the ETD and finally that the EU had some undefined competence over military policy.

S 85(4) of the SDA75 was amended, through the Sex Discrimination Act 1975 (after amendment by the Sex Discrimination Act 1975 (Application to Armed Forces etc.) Regulations 1994<sup>16</sup>, to read that “[n]othing in this Act shall render unlawful an act

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<sup>9</sup> Case 152/84 Marshall v Southampton and South-West Hampshire AHA [1986] ECR 723 (ECJ)

<sup>10</sup> Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651 (ECJ) para 55

<sup>11</sup> Case C-179/88 Handels-og Kontorfunktionoerernes Forbund [1990] ECR I-3979 (ECJ) para 13

<sup>12</sup> Case C-271/91 Marshall v Southampton and South-West Hampshire AHA [1993] ECR I-4367 (ECJ) para 24

<sup>13</sup> Case C-208/90 Emmott [1991] ECR I-4269 (ECJ)

<sup>14</sup> R v Secretary of State for Defence, ex parte Leale, Lane and EOC, unreported (HC)

<sup>15</sup> Ministry of Defence v Cannock and others [1994] IRLR 509 (EAT)

<sup>16</sup> SI 1994/3276, The Sex Discrimination Act 1975 (Application to Armed Forces etc.) Regulations 1994

done for the purpose of ensuring the combat effectiveness of the naval, military or air forces of the Crown” but the reach of EU law as it applied to the armed forces was determined by further case law of the ECJ, particularly over the interpretation of the derogations to the prohibition of sex discrimination in Articles 2(2) and (3). In Johnston<sup>17</sup>, a case involving the arming of women in the Northern Irish reserve police force, the Court found that Articles 2(2) and (3), being derogations from an individual right set out in the Directive, had to be interpreted strictly and the principle of proportionality had to be observed for all derogations such that derogations had to “remain within the limits of what is appropriate and necessary for achieving the aim in view”<sup>18</sup>. Furthermore, Article 2(3) did not allow women to be excluded from a certain type of employment because public opinion demanded that women be given greater protection than men against risks which affected men and women in the same way and which were distinct from women’s specific needs of protection<sup>19</sup>. In Sirdar<sup>20</sup> Mrs Sirdar was a chef serving with a commando regiment of the Royal Artillery when, after a review of the number of chefs in the Army, she was issued with a redundancy notice but invited to transfer to the Royal Marines who were short of chefs after passing an initial selection board and a commando training course. Once the Royal Marine authorities discovered that Mrs Sirdar was a woman the invite was rescinded, her redundancy executed and she launched an action for sex discrimination, which was referred to the ECJ for a preliminary reference. The ECJ held that the Member States have competence to take decisions on the organisation of their armed forces in order to ensure their internal and external security, but this did not mean that such decisions fell entirely outside the scope of Union law<sup>21</sup>. Indeed the Court stated categorically that there was no general reservation to the application of the principle of equal treatment for men and women, except for the possible application of the wholly exceptional situation envisaged in Article 224EC (now Article 347TFEU)<sup>22</sup>. Nevertheless, depending on the circumstances, which the

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<sup>17</sup> Op. Cit. n.10 paras 36 and 44

<sup>18</sup> Ibid. para 38

<sup>19</sup> Ibid. para 44

<sup>20</sup> Op. Cit. n.4

<sup>21</sup> Ibid. para 15

<sup>22</sup> Ibid. para 19. Article 347TFEU requires Member states to consult with one another to maintain the internal market in times of extreme emergency constituting serious internal disturbances affecting the maintenance of law and order, war, the threat of war or the conduct of peace and international security operations

Court did not set out, Member States had a margin of discretion when adopting measures to guarantee public security<sup>23</sup>, so long as those measures had the genuine aim of guaranteeing public security whilst being appropriate and necessary to achieve that aim<sup>24</sup>. The maintenance of the all-male Royal Marines was justified first on the basis of the specific conditions for deployment of the assault units that the Royal Marines were organised into, as they were a small force, intended to be the first line of attack or point of the arrow head, and second, and in particular, on the basis of the principle of interoperability, where all personnel within the corps were required to serve as front-line commandos<sup>25</sup>. In comparison to the case of *Sirdar*, *Kreil*<sup>26</sup> involved Article 12a(4) of the German Basic Law's absolute ban on women bearing arms in the German Army. Again Germany argued that this ban derogated from the absolute prohibition of discrimination on the basis of sex in Article 2(1) ETD through Articles 2(2) and (3). The Court did not actually set out the justification that was claimed for the derogation in Article 2(2)<sup>27</sup>, although from Advocate General La Pergola's Opinion this was a moral concern that women should be protected from any activities that could be perceived as acting as a combatant within the meaning of international humanitarian law<sup>28</sup>, which was also deployed as the justification under Article 2(3)<sup>29</sup>. Both justifications were rejected by the Court, under the principle of proportionality for Article 2(2)<sup>30</sup> and as a blanket exclusion of women from military posts bearing arms was not one of the differences of treatment allowed by Article 2(3) out of concern to protect women<sup>31</sup>. Finally in *Dory*<sup>32</sup> the German rules that only men could perform compulsory military service was challenged by Mr Dory. The Court held that this measure was the expression of a Member State's legitimate

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<sup>23</sup> Ibid. para 27

<sup>24</sup> Ibid. para 28

<sup>25</sup> Ibid. paras 30-31

<sup>26</sup> Case C-285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 (ECJ)

<sup>27</sup> Ibid. paras 26-29

<sup>28</sup> Ibid. para 14

<sup>29</sup> Ibid. para 30

<sup>30</sup> Ibid. para 29

<sup>31</sup> Ibid. para 31

<sup>32</sup> Case C-186/01 *Dory v Germany* [2003] ECR I-2479 (ECJ), noted: G Anagnostaras, 'Sex Equality and Compulsory Military Service: The Limits of National Sovereignty Over Matters of Army Organisation' (2003) 28 ELR 713; P Koutrakos, 'How Far is Far Enough? EC Law and the Organisation of the Armed Forces after *Dory*' (2003) 66 MLR 759; M Trybus, 'Case Comment' (2003) 40 CMLRev 1269; and, B Rudolf, 'Case Comment' (2005) 3 iCon 673

choice as to how to organise their armed forces and as such Union law was not applicable<sup>33</sup>.

The derogation identified in Sirdar and the amendment to the SDA 75 s 85(4) has become known as the combat effectiveness exclusion or unit cohesion rule<sup>34</sup>. The term 'combat effectiveness' was mentioned just once by the ECJ in Sirdar when stating the justification advanced by the UK for exclusion of women from the Royal Marines<sup>35</sup>, and 'unit cohesion' was not mentioned in any of the three judgments. However, in both Sirdar and Kreil Advocate General La Pergola discussed the concept of combat effectiveness<sup>36</sup>, and based his Opinions on it. Interestingly he suggested that the requirement in Article 9(2) of the ETD to review derogations from the principle of equality between men and women regularly "in the light of social developments" could allow the military to incrementally open posts up to women<sup>37</sup>. He interpreted "social developments" narrowly and it is submitted incorrectly to mean military society rather than society in general<sup>38</sup>. In 2002 the Ministry of Defence conducted a review of the combat effectiveness exclusion publishing a full report<sup>39</sup> and a summary<sup>40</sup> that provided a conclusion that maintained the exclusion<sup>41</sup>. Little in the way of evidence was provided as there were no close combat operations being undertaken at the time of the report<sup>42</sup>. The summary report suggests that four factors were considered when making the assessment on the exclusion (physiological

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<sup>33</sup> Ibid. para 39

<sup>34</sup> M Trybus, 'Sisters in Arms: European Community Law and Sex Equality in the Armed Forces' (2003) 9 ELJ 631 at 647

<sup>35</sup> Op. Cit. n.4 para 29: "As pointed out in paragraph 7 of this judgment, the reason given for refusing to employ the applicant in the main proceedings as a chef with the Royal Marines is the total exclusion of women from that unit by reason of the 'interoperability' rule established for the purpose of ensuring combat effectiveness."

<sup>36</sup> Ibid. para 33 and Op. Cit. n.26 para 18

<sup>37</sup> Ibid. Sirdar para 45 and Kreil paras 20-24

<sup>38</sup> Ibid. Sirdar para 44

<sup>39</sup> Op. Cit. n.6

<sup>40</sup> Ministry of Defence, 'Women in the Armed Forces', summary report by the Director of Service Personnel Policy Service Conditions, May 2002, accessed at [http://www.mod.uk/NR/rdonlyres/10B34976-75F9-47E0-B376-AED4B09FB3B3/0/women\\_af\\_summary.pdf](http://www.mod.uk/NR/rdonlyres/10B34976-75F9-47E0-B376-AED4B09FB3B3/0/women_af_summary.pdf)

<sup>41</sup> Ibid. para 19

<sup>42</sup> Ibid. paras 14 and 17

factors, psychological factors, combat effectiveness and legal position<sup>43</sup>), although the actual report also considered attitudes of serving personnel<sup>44</sup>. Of the four factors it was not surprising to find that men were stronger than women, although the tests did not take into consideration such factors as women starting from a lower base or women using their initiative to find alternative ways to achieve set tasks apart from brute strength. Psychological factors were not considered to be a concern<sup>45</sup> but on the subject of combat effectiveness the summary report found that it could be easier to achieve and maintain unit cohesion in a single sex team<sup>46</sup>, which appeared to be at odds to the finding of the actual report that leadership was more important to unit cohesion than gender mix<sup>47</sup>. Finally after a statement of the legal position that misinterprets the ECJ's findings in Sirdar<sup>48</sup> the summary report found that due to the lack of empirical evidence from field and other States' experience, military judgment had to form the basis of any decision<sup>49</sup>, which as Trybus notes<sup>50</sup> appears to assume a margin of discretion that provides a safe harbour from judicial consideration. That military judgment was that "under the conditions of a high intensity close-quarter battle, group cohesion becomes of much greater significance to team performance and, in such an environment, the consequences of failure can have far-reaching and grave consequences. To admit women would, therefore, involve a risk with no gains in terms of combat effectiveness to offset it."<sup>51</sup>

This combat effectiveness exclusion has been utilised by the armed forces to continue to limit full integration of women in the military ensuring that women cannot serve in front line army units, the RAF Regiment, the Royal Marines and submarines.

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<sup>43</sup> Ibid. paras 9-15

<sup>44</sup> Op. Cit. n.6 paras 40-42 and Annex D

<sup>45</sup> Op. Cit. n.40 para 12

<sup>46</sup> Ibid. para 13

<sup>47</sup> Op. Cit. n.6 para 47 and Annex E

<sup>48</sup> Op. Cit. n.6 para 15 – the ECJ had found that in accordance with the principle of proportionality the exclusion of women serving in the Royal Marines had to be necessary and appropriate to ensure interoperability, not operational effectiveness as stated in the report

<sup>49</sup> Ibid. para 17

<sup>50</sup> Op. Cit. n.34 at 647

<sup>51</sup> Ibid.

Shuibhne<sup>52</sup> has recently described the ECJ's case law in this area as a "balancing act" and indeed at the time it was. However, as Arnall<sup>53</sup> points out this combat effectiveness restriction was not included in Article 2(2) of the ETD that excluded from the scope of the Directive occupational activities where, because of the nature of those activities or the context in which they were carried out, the sex of the worker constituted a determining factor. This was transposed into UK domestic law by the catalogue of situations in the SDA75 s 7, which, through the amendment to s 85(4), was now applicable to the armed forces and which enabled sex discrimination to be lawful where sex was a "genuine occupational qualification for the job". It could be argued that several of those situations could have applied to the military but they were not considered in Sirdar, or the Women in the Armed Forces report and the effect of the new s 85(4) was to create an exclusion for the armed forces on the basis of combat effectiveness where the sex of the worker was not a genuine occupational qualification for the job<sup>54</sup>. Thus not only did s 85(4) not comply with the ETD, it was also contrary to the domestic provisions of the SDA75, namely s 7. Trybus also questions the retention of the combat effectiveness exclusion on the basis that the Women in the Armed Forces report fails to identify any additional risks creating a negative effect on interoperability<sup>55</sup>.

In 2002 the ETD was revised by an amending Directive<sup>56</sup> to introduce definitions for different types of sex discrimination in Article 2(2). The derogation from the general principle in former Article 2(2) was renumbered as Article 2(6) and reworded. Now Member States could provide, as regards access to employment and the attendant training, that a difference of treatment, based on a characteristic related to sex, would not constitute discrimination if, because of the of the nature of the particular

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<sup>52</sup> NN Shuibhne, 'And Those Who Look Only to the Past or the Present are Certain to Miss the Future' (2012) 37 ELR 115 at 116

<sup>53</sup> A Arnall, 'EC Law and the Dismissal of Pregnant Servicewomen' (1995) 24 ILJ 215 at 233

<sup>54</sup> Ibid.

<sup>55</sup> Op. Cit. n.34 at 647

<sup>56</sup> European Parliament and Council Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/15



occupational activities concerned or of the context in which they were carried out, such a characteristic constituted a genuine and determining occupational requirement. This was provided that the objective was legitimate and the requirement was proportionate. The effect of this was merely to codify the case law of the ECJ. Former Article 2(3) became Article 2(7) and was expanded by paragraphs on maternity leave, pregnancy and breastfeeding, that required the Pregnancy Directive<sup>57</sup> and Parental Leave Directive<sup>58</sup> to be taken into consideration. The requirement to periodically assess exclusions from the general principle remained the same. However, a new Article 1a was included which introduced a mandatory requirement for Member States to mainstream the objective of equality between men and women.

## **DEVELOPMENTS AT THE EU LEVEL**

Since the 2002 amendment to the ETD four significant changes have occurred at the EU level: the introduction of the Equality Directive; the Lisbon Treaty; the Charter of Fundamental Rights; and, ECJ judgments.

### **a. The Equality Directive<sup>59</sup>**

The adoption of the Equality Directive replaced the ETD and other EU legislation on equal treatment between men and women, utilising a new legal basis of Article 141(3)EC (now Article 157(3)TFEU)<sup>60</sup>, referring to Articles 21 and 23 of the Charter of Fundamental Rights<sup>61</sup>, and with the purpose in Article 1 of ensuring the implementation of the principle of equal opportunities and treatment of men and women in matters of employment and occupation. Article 1 goes on to make clear that the Directive provides provisions on appropriate procedures for the effective

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<sup>57</sup> Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1

<sup>58</sup> Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4

<sup>59</sup> Parliament and Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) OJ 2006 L204/23

<sup>60</sup> Recital 4

<sup>61</sup> Recital 5

implementation of the substantive provisions in relation to: access to employment, including promotion, and to vocational training; working conditions, including pay; and, occupational social security schemes. Article 2 sets out the definitions for direct and indirect discrimination, harassment and sexual harassment, pay and occupational social security schemes. Article 14(1) sets out the right to non-discrimination on the basis of sex that is more comprehensive than Article 2(1) of the ETD but Article 14(2) repeats Article 2(6) of the amended ETD. Interestingly the derogation that was previously contained in Article 2(3) of the ETD (paragraph 1 of Article 2(7) of the amended ETD) for the “provisions concerning the protection of women, particularly as regards pregnancy and maternity” has been moved to Article 28(1) in the chapter on General Horizontal Provisions and “any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC” is now treated as discrimination according to Article 2(2)(c). Article 29 on gender mainstreaming requiring Member States to “actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive” is also included in the General Horizontal Provisions chapter. Finally Article 31(3) required the periodic review of derogations to now be carried out at least every eight years.

#### b. The Lisbon Treaty<sup>62</sup>

The Lisbon Treaty came into force on 1 December 2009 and reformed the Treaty on the European Union (TEU) and reformed and replaced the EC Treaty with the Treaty on the Functioning of the European Union (TFEU). Article 2(TEU) provides an exhaustive list of the founding values of the Union that includes equality and the respect for human rights and that are common to the Member States “in a society in which...non-discrimination...and equality between women and men prevail.” The objectives and tasks of the Union are set out in Article 3 TEU and include the duty to “combat social exclusion and discrimination” and “promote social justice and protection” and “equality between women and men”. Article 6 TEU is a particularly important development with Article 6(1) TEU granting the Charter of Fundamental

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<sup>62</sup> [2010] OJ C83/1

Rights the same legal value as the Treaties, Article 6(2)TEU mandating the Union to accede to the European Convention of Human Rights (ECHR) and Article 6(3)TEU continuing to recognise fundamental rights as general principles of the Union's law. Article 9TEU requires the EU to observe the principle of the equality of its citizens, in all its activities.

The framework statements in the TEU are given greater effect by the provisions of the TFEU. Although the catalogue of allocation of competences in Articles 2-6TFEU does not include equality or non-discrimination, Article 8TFEU states "[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women." Article 19(1)TFEU authorises the Council acting unanimously and with the consent of the European Parliament to take appropriate action to combat discrimination based on *inter alia* sex and sexual orientation. It should be noted that this provision is not directly effective<sup>63</sup>, although it may inform the general principle of equality<sup>64</sup>, and so implementing legislation is required to give it effect and "without prejudice to the other provisions of the Treaties". Article 157TFEU provides fuller provisions on equality between men and women with Article 157(1) and (2)TFEU directed at equal pay, Article 157(4)TFEU enabling positive discrimination and Article 157(3)TFEU replacing 141(3)EC to provide the authority for legislative action over equal treatment and equal opportunities.

### c. The Charter of Fundamental Rights<sup>65</sup>

The Charter of Fundamental Rights as outlined above can now be utilised by the European Courts as precedent and the basis for legal judgments<sup>66</sup> whereas before the Lisbon Treaty the Charter was merely solemnly declared by the institutions of the Union and thus only persuasive. Article 1 proclaims that "[h]uman dignity is inviolable. It must be respected and protected." By placing human dignity in the first provision it is suggested that this principle, although not constituted in the language

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<sup>63</sup> S Langrish, 'The Treaty of Amsterdam: Selected Highlights' (1998) 23 ELR 3 at 15

<sup>64</sup> Case C-144/04 Mangold v Helm [2005] ECR I-9981

<sup>65</sup> [2010] OJ C83/389

<sup>66</sup> Case C-555/07 Kücükdeveci v Swedex [2010] ECR I-365 (ECJ)

of a right, is designed to be the underlying concept that pervades the other provisions of the Charter. The general prohibition of discrimination based on any ground, which then provides a non-exhaustive list of grounds including *inter alia* sex and sexual discrimination, in Article 21 appears to be clear, precise and unconditional enough to be direct effective, although how this provision will sit with the more restrictive Article 19(1)TFEU will have to wait for judicial interpretation<sup>67</sup>. Article 23 is also very precise requiring equality between men and women to be ensured in all areas, including employment, work and pay.

#### d. Judgments of the European Courts

Since Dory there have been no judgments of either the ECJ or the General Court concerning the combat effectiveness exclusion or the relationship between the Union and Member State competence over the organisation of national militaries. However, there have been two recent cases in the field of age discrimination that could have significant effect. The ECJ has for many years recognised that provisions of the Treaties and secondary legislation are merely specific enunciations of the general principle of equality which is one of the fundamental principles of Union law<sup>68</sup>, and that the elimination of discrimination on the basis of sex forms part of those fundamental principles<sup>69</sup>. Furthermore the requirements imposed by the fundamental principle of equal treatment are in no way limited by Article 157TFEU or Union Directives adopted in this field<sup>70</sup>. In Mangold<sup>71</sup> the Court found that age discrimination was a general principle of EU law independent from the relevant Directive<sup>72</sup> that required the domestic court to provide “the legal protection which

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<sup>67</sup> S Koukouris-Spiiotopoulos, ‘The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *Acquis* in Gender Equality’ (2008) 1 European Gender Equality Law Review 15 at 18

<sup>68</sup> See Joined Cases 117/76 & 16/77 Ruckdeschel & Hanse Lagerhaus Stroh v Hauptzollamt Hamburg-St. Annen [1977] ECR 1753 para 7 and Joined Cases 124/76 & 20/77 SA Moulins et Huileries de Pont-à-Mousson v ONIC [1977] ECR 1795 para 16

<sup>69</sup> Case 149/77 Defrenne v Sabena [1978] ECR 1365 para 27

<sup>70</sup> Joined Cases 75 & 112/82 Razzouk & Beydoun v Commission [1984] ECR 1509 para 17

<sup>71</sup> Op. Cit. n.64

<sup>72</sup> Ibid. paras 74-75

individuals derive from the rules of [union] law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law"<sup>73</sup>. This was repeated in Kücükdeveci<sup>74</sup> but this time the ECJ employed Article 21 of the Charter<sup>75</sup> to base and support its findings and held that a domestic court must set aside a national provision in conflict with the Union rules without needing to make a preliminary reference to the Court<sup>76</sup>.

## **DEVELOPMENTS AT THE UK LEVEL**

The biggest shake up of UK anti-discrimination law was delivered with the introduction of the Equality Act 2010 (EA10) in the dying stages of the previous Labour government. As Hepple<sup>77</sup> notes the EA10 has three distinctive features. First, it is comprehensive, creating a unitary conception of equality and a single enforcement body, the Equality and Human Rights Commission. Second, it 'harmonises, clarifies and extends the concepts of discrimination'<sup>78</sup>, harassment<sup>79</sup> and victimisation<sup>80</sup> and applies them across nine protected characteristics'<sup>81</sup>, specifically, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation<sup>82</sup>. Third, it transforms anti-discrimination protection into equality law although does not go as far as establishing a constitutional right to equality<sup>83</sup>. This means that, unlike

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<sup>73</sup> Ibid. para 77

<sup>74</sup> Op. Cit. n.66 paras 50-51

<sup>75</sup> Ibid. para 22

<sup>76</sup> Ibid. para 53

<sup>77</sup> B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart Publishing, 2011) 1

<sup>78</sup> Direct discrimination is defined in EA10 s 13, indirect discrimination, applicable to all protected characteristics, is defined in EA10, s 19 and no real comparator is required to assess discrimination (EA10, ss 23 and 24). Furthermore EA10, s 14 contains a new provision on multiple discrimination

<sup>79</sup> EA10, s 26

<sup>80</sup> EA10, s 27

<sup>81</sup> Ibid.

<sup>82</sup> EA10, s 4, with definitions of each characteristic provided in ss 5-12

<sup>83</sup> J. Jowell, 'Is Equality a Constitutional Principle?' (1994) 47 *Current Legal Problems* 1. See also J. Stanton-Ife, 'Should Equality Be a Constitutional Principle?' (2000) 11 KCLJ 133 opposing Jowell's argument

Germany<sup>84</sup> or South Africa<sup>85</sup> that utilise human dignity<sup>86</sup> as the moral value that underpins equality law<sup>87</sup>, no one moral value supports the equality edifice and indeed Hepple identifies seven meanings for equality<sup>88</sup>.

The EA10 contains some innovative developments in general and for the armed forces in particular. The first was the duty on public sector authorities to mainstream equality of outcomes as a result of socio-economic disadvantage when making strategic decisions on the exercising of functions<sup>89</sup>. In the context of the military these authorities included Ministers of the Crown and government departments<sup>90</sup>. Fredman<sup>91</sup> suggested that this duty did not apply to the armed forces and on the face of the Act she was correct but it would have applied to the Ministry of Defence (MoD) and Secretary of State for Defence when making strategic decisions, e.g. the Strategic Defence and Security Review 2011<sup>92</sup>. As it was the Coalition government decided against bringing this duty into force although the aspirational nature of the obligation would have created difficulties for enforcement<sup>93</sup>.

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<sup>84</sup> See J. Jones, "Common Constitutional Traditions": Can the Meaning of Human Dignity under German Law Guide the European Court of Justice? [2004] PL 167

<sup>85</sup> See E. Grant, 'Dignity and Equality' (2007) 7 *Human Rights Law Review* 299

<sup>86</sup> This is a highly contested concept – see for example D. Beylerveld, R. Brownsword, 'Human Dignity, Human Rights, and Human Genetics' (1998) 61 MLR 661, D. Feldman, 'Human Dignity as a Legal Value' [1999] PL 682 and [2000] PL 61 and C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655

<sup>87</sup> See G. Moon, R. Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' [2006] EHRLR 610 who suggest a structured approach to the use of dignity as the basis for equality law

<sup>88</sup> Op. Cit. n.77 above at 12 and B. Hepple, 'The Aims of Equality Law' (2008) 61 CLP 1, 3

<sup>89</sup> EA10, s 1(1)

<sup>90</sup> EA10, s 1(3)(a) and (b)

<sup>91</sup> S. Fredman, 'Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage Onto the Equality Agenda' [2010] EHRLR 290, 297

<sup>92</sup> Ministry of Defence, *Securing Britain in an Age of Insecurity: The Strategic and Security Review*, Cm 7948 (London: HMSO, 2011)

<sup>93</sup> Op. Cit. n.77 at 142

The armed forces are classified as a public authority<sup>94</sup> and the new public sector duty set out in section 149(1)<sup>95</sup> applies to the military and is extended to persons performing a public function who are not public authorities<sup>96</sup>. To demonstrate compliance with this duty, public authorities must publish annual equality information<sup>97</sup> covering all protected characteristics<sup>98</sup>. Furthermore, according to section 29(6) of the EA10 '[a] person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.' However, this is disapplied when relating to relevant discrimination 'for the purpose of ensuring the combat effectiveness of the armed forces'<sup>99</sup> with 'relevant discrimination' made up of four of the protected characteristics, age, disability, gender reassignment and sex but does not include race and sexual orientation.

As a general employer the armed forces are prohibited by section 39(1) from discriminating when deciding who to or not to employ and the terms of employment and in section 39(2) from discriminating against an employee over terms of employment, opportunities for promotion, transfer or training, dismissal or any other detriment. However, there is another exception provided for the military when deciding who to or not to employ and opportunities for employees for promotion, transfer or training 'by applying...a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces'<sup>100</sup>, where a 'relevant requirement' is either to be a man or not to be a

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<sup>94</sup> Schedule 19, s 150(1)

<sup>95</sup> A public authority must 'in the course of its functions, have due regard to the need to: (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

<sup>96</sup> EA10, s 149(2). See S Fredman, 'The Public Sector Equality Duty' (2011) 40 ILJ 405

<sup>97</sup> SI 2260/2011, The Equality Act 2010 (Specific Duties) Regulations 2011 Article 2(1)

<sup>98</sup> Ibid Article 2(4)

<sup>99</sup> Schedule 3, s 4(1)

<sup>100</sup> Schedule 9, s 4(1)

transsexual person<sup>101</sup>. Furthermore, Part 5 on Work, which contains section 39, does not apply to service in the armed forces as far as relating to age or disability<sup>102</sup>.

Finally there is a general exception for national security but only to the extent that it is proportionate to do so<sup>103</sup>. However, there is no definition of national security and so the exception is uncertain.

The EA10 has replaced the SDA75 but the combat effectiveness exclusion remains in place. At the start of 2010 there was much media speculation that the submarine service of the Royal Navy would be opened up to women<sup>104</sup>, especially with a new report on the combat exclusion exemption due<sup>105</sup>. As it turned out the report only considered the exclusion of women from ground close-combat roles, which it decided to keep in place<sup>106</sup>, and did not review the exclusion of women from service in submarines<sup>107</sup>. Indeed compared to the 2002 report, the 2010 report was perfunctory with the basis of the exclusion's maintenance wholly attributed to unit cohesion<sup>108</sup>. However, in a speech to the Royal United Services Institute on 8

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<sup>101</sup> Schedule 9, s 4(2)

<sup>102</sup> Schedule 9, s 4(3)

<sup>103</sup> EA10, s 192

<sup>104</sup> See I. Drury, 'Women Set to Serve in Submarines as Britain Follows US Navy Ruling' published 24 February 2010 at

<http://www.dailymail.co.uk/news/article-1253546/Women-set-serve-submarines-Britain-follows-U-S-Navy-ruling.html> and listen to the BBC's Woman's Hour, 'Should Women Serve on Royal Naval Submarines?' broadcast 8 December 2010 at

<http://www.bbc.co.uk/programmes/b00wdhd5#p00clxdx>

<sup>105</sup> As required by Article 31(3) of the Equality Directive

<sup>106</sup> Ministry of Defence, 'Report on the Review of the Exclusion of Women from Ground Close-Combat Roles', November 2010, para 13 at

[http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report\\_review\\_excl\\_woman\\_combat.pdf](http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report_review_excl_woman_combat.pdf)

<sup>107</sup> Ibid at Annex A

<sup>108</sup> Ibid at para 13. However, it should be noted that this review was based on considerably more evidence obtained through the commissioning of Berkshire Consultancy Ltd. (BCL) to conduct two studies on women's roles in recent operations (BCL, 'Qualitative Report for the Study of Women in Combat' at [http://www.mod.uk/NR/rdonlyres/49C587F5-5815-453C-BEB5-B409BD39F464/0/study\\_woman\\_combat\\_quali\\_data.pdf](http://www.mod.uk/NR/rdonlyres/49C587F5-5815-453C-BEB5-B409BD39F464/0/study_woman_combat_quali_data.pdf) and BCL, 'Study of Women in Combat – Investigation of Quantitative Data' at



December 2011<sup>109</sup>, the new Secretary of State for Defence announced that the submarine service would be opened up to women with officers serving in the Valiant class from 2013, ratings from 2015 and all ranks in the Astute class from 2016.

The qualitative and quantitative studies conducted for the 2010 review threw up some interesting and unexpected results. These studies were unique as they had the opportunity to send out questionnaires, interview and study individuals and small groups of UK service personnel, both men and women, who had engaged in close ground combat. The qualitative study of women in combat by BCL found the following principle concerns over having women in close ground combat roles<sup>110</sup>: lack of women's physical capability/robustness; women being a distraction/problems with relationships between men and women; and, men want to protect women/react differently if hurt/harder to deal with female casualties. It is interesting that these are similar reasons expressed before women went to sea in the Royal Navy that were swiftly negated after a short period of time<sup>111</sup>. In fact unit cohesion, the reason given in the final report<sup>112</sup> maintaining the combat exclusion policy, was only a minor concern in the BCL qualitative study<sup>113</sup> whilst in the quantitative study, just on the basis of answers provided to the questionnaire used, it was concluded that men did

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[http://www.mod.uk/NR/rdonlyres/9BFD1F54-2AB5-4CBA-9E82-9B413AAFBADC/0/study\\_woman\\_combat\\_quant\\_data.pdf](http://www.mod.uk/NR/rdonlyres/9BFD1F54-2AB5-4CBA-9E82-9B413AAFBADC/0/study_woman_combat_quant_data.pdf)) and the Defence Science and Technology Laboratory UK (Dstl) to analyse the experience of other nations and conduct a literature review (Dstl, 'Women in Ground Close Combat Roles: The Experiences of other Nations and a Review of the Academic Literature' at [http://www.mod.uk/NR/rdonlyres/7A18C2A3-C25B-4FA1-B8CB-49204A109105/0/women\\_combat\\_experiences\\_literature.pdf](http://www.mod.uk/NR/rdonlyres/7A18C2A3-C25B-4FA1-B8CB-49204A109105/0/women_combat_experiences_literature.pdf)

<sup>109</sup> P Hammond, 'Delivering on the Frontline: Operational Success and Sustainable Armed Forces', speech at the Royal United Services Institute on 8 December 2011 at

<http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/20111208DeliveringOnTheFrontlineOperationalSuccessAndSustainableArmedForces.htm><http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/20111208DeliveringOnTheFrontlineOperationalSuccessAndSustainableArmedForces.htm>

<sup>110</sup> Op. Cit. n.108 above Qualitative Report at 34

<sup>111</sup> The author served in HMS Invincible in 1990, the first ship on which women served at sea, and heard many arguments similar to these before they joined. Interestingly when the author returned to sea in HMS Cardiff in 1993 following flying training, women were totally integrated and accepted as members of the crew

<sup>112</sup> Ibid.

<sup>113</sup> Ibid. Qualitative Report at 35

not perceive the presence of women to reduce cohesion<sup>114</sup>. Interestingly women appeared to be harder on themselves than men as they considered cohesion to be lower if women were present in small team combat situations<sup>115</sup>. When interviews were conducted to test this finding it was found that in fact both men and women found unit cohesion to be high in mixed gender small team combat situations<sup>116</sup>.

## **CRITICAL ANALYSIS**

Since the case of Dory there have been no challenges over the combat effectiveness exclusion before the UK courts or other Member State domestic courts that have referred questions to the ECJ. However, there has been a noticeable shift in emphasis of policy at the EU level with the introduction of the Member State's duty to mainstream gender by the 2002 amendment to the ETD, carried over into Article 29 of the Equality Directive and given fresh impetus for the EU's institutions in Article 8TFEU. The analysis of the Equality Directive above suggests that little has changed vis-à-vis the combat effectiveness exclusion. However, the reorganisation of the provisions, including a new legal base, reference to the Charter of Fundamental Rights' provisions on equality and the mandatory gender mainstreaming duty on the Member States refocuses equal treatment between men and women. This is taken further by the Lisbon Treaty with the increased importance attached to gender equality clearly demonstrated in the TEU's provisions on the values, objectives and tasks of the Union. However, the recent cases of Mangold and Kücükdeveci, along with the new legal standing of the Charter suggest that the ECJ has understood the new prominence that the Lisbon Treaty and Equality Directive have given to the principle of equality and non-discrimination. Furthermore, although the EA10 continues to include the combat effectiveness exclusion, Arnall's original criticism<sup>117</sup> remains relevant and forceful and is now augmented by the 2010 review with its attendant evidence. As the evidence does not appear to support the finding that the combat effectiveness exclusion can be maintained on the basis of unit cohesion, the

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<sup>114</sup> Ibid. Quantitative Report at 40

<sup>115</sup> Ibid.

<sup>116</sup> Ibid. at 43

<sup>117</sup> Op. Cit. n.53

Ministry of Defence may have unwittingly opened the door to a possible legal challenge.

There are some signs though that the lot of women serving in the UK military is improving, albeit slowly and often after having overcome entrenched male attitudes. The numbers for women serving in the forces have increased over time, though with the figures for 2009 of 9.5%, 2010 9.6% and 2011 9.6%, it could be argued that those figures have now plateaued. The breakdown for each of the forces (Navy 9.4%, Army 8%, RAF 13.8%) appears to suggest a clear correlation between the number serving and the ability of women to serve in a wide range of jobs (73% of jobs are open to women in the Navy, 70% in the Army and 96% in the RAF). Establishing career patterns to the highest ranks<sup>118</sup> will, it is suggested, increase the attractiveness of a military career to young women, and I expect an increased number of women serving in the Navy as the submarine service opens its doors.

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<sup>118</sup> In May 2012 Commander Sarah West became the first woman to command a major Royal Naval warship at <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-18158980>