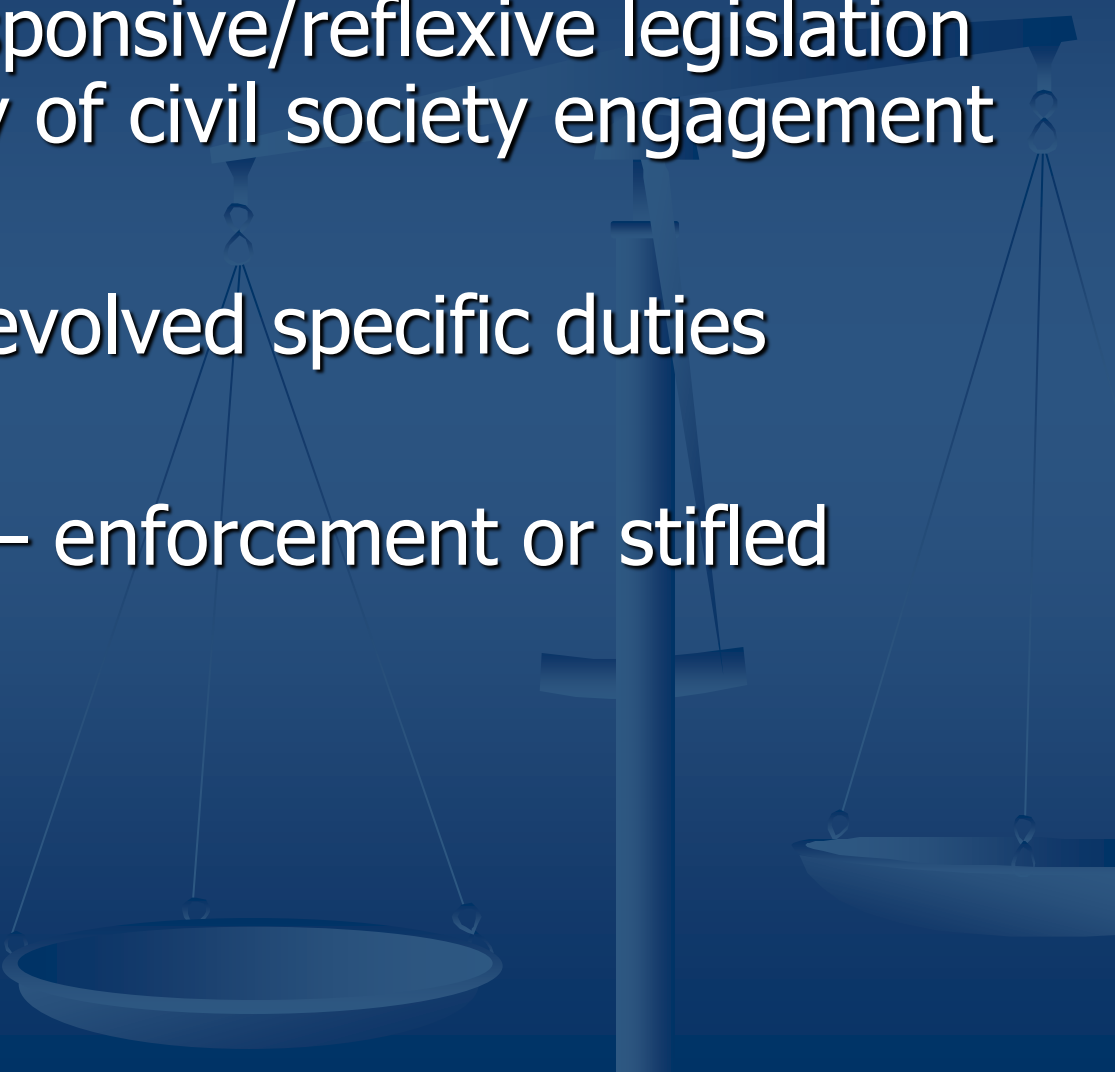
A faint, stylized image of a balance scale is visible in the background, symbolizing justice or equality. The scale is positioned on the right side of the slide, with its pans hanging from a central beam.

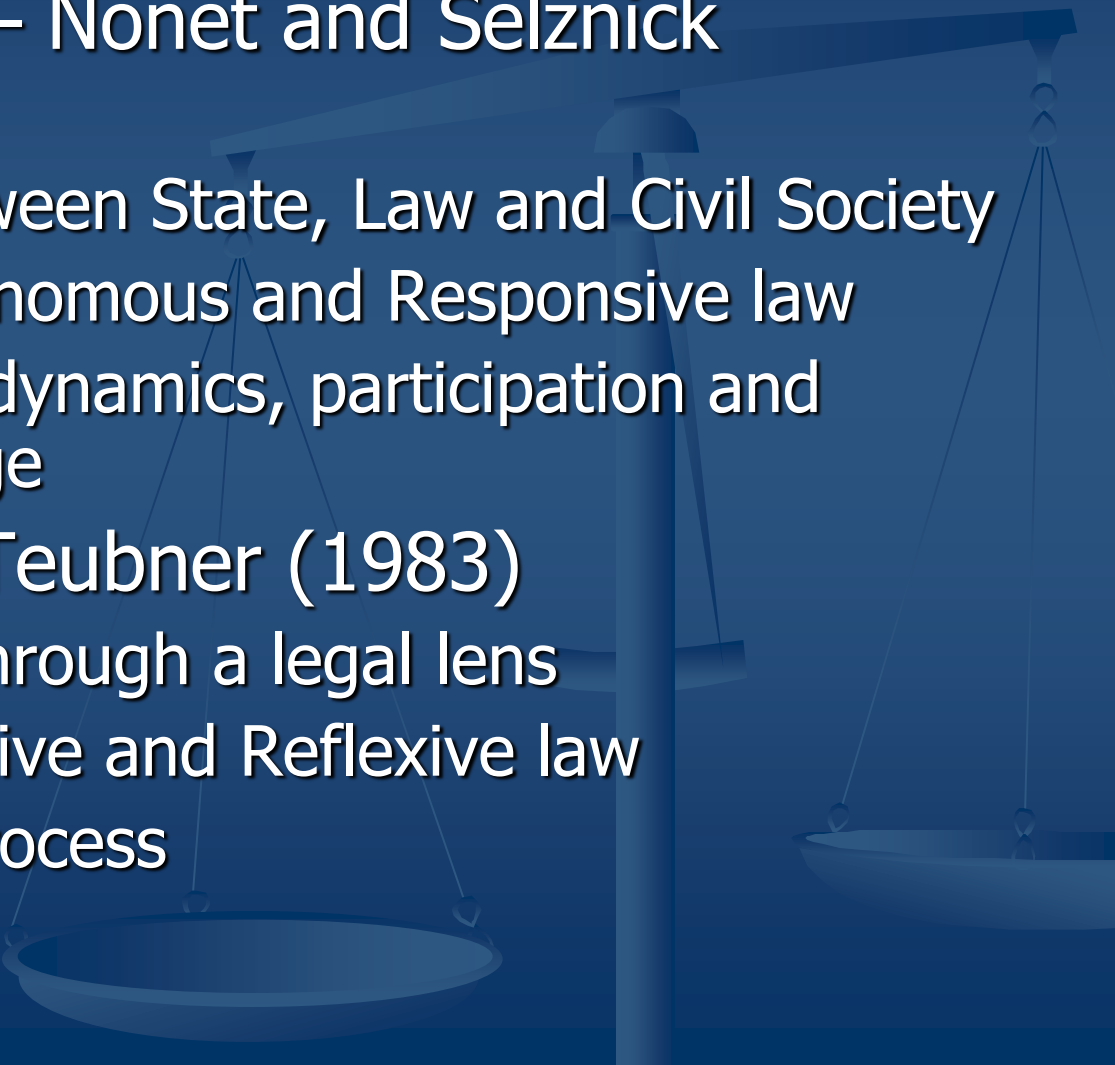
# ***Demonstrating Due Regard: Rethinking Equality Impact Assessment (EIA)***

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# Introduction

- The theory of responsive/reflexive legislation and the centrality of civil society engagement
  - PSED, EIA and devolved specific duties
  - Judicial Reviews – enforcement or stifled engagement?
  - Conclusions
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- A faint, stylized image of a balance scale is visible in the background of the slide. The scale is positioned vertically, with its pans hanging from a central beam. The image is rendered in a light blue color that blends with the dark blue background.

# Responsive v Reflexive Law

- Responsive Law – Nonet and Selznick (1978/2001)
    - Relationship between State, Law and Civil Society
    - Repressive, Autonomous and Responsive law
    - Focus on power dynamics, participation and negotiated change
  - Reflexive Law – Teubner (1983)
    - Society viewed through a legal lens
    - Formal, Substantive and Reflexive law
    - Focus on legal process
- 

# Participation, the PSED and Local Democracy

- Social justice, organizational learning
  - Giving a voice to (electoral) minorities
  - Improving civil society engagement in local democracy/politics
  - Improving equality practice of public authorities
  - Social 'cohesion'
- 

# EqA 2010

## ■ s.149 – The General Duty

- 1) A public authority must, in the exercise 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.

## ■ s.153 – power to impose specific duties devolved to English, Scottish and Welsh Ministers

# Enforcement

- s.156 – does not confer rights at private law
- EHRC – power to enforce compliance (s.31 Equality Act 2006)
- Judicial Review – can be taken by EHRC (s.30 EA 2006) and individuals or civil society groups “with sufficient interest” (*s. 31(3) Senior Courts Act 1981 (formerly Supreme Court Act 1981)*)

# The Role of EIA

- Mechanism for demonstrating due regard
- Controversial following David Cameron's announcement that public authorities need not do them...
- ... but central position in judicial review (i.e. Brown Principles)
- Should EIA be 'expert-bureaucratic' (reflexive) or 'participative-democratic' (responsive)?

# Engagement in Specific Duties

- England – None
- Scotland – reasonable steps to involve persons with protected characteristics and their representatives in relation to preparing equality outcomes
- Wales - requirement to undertake an EIA and to engage with persons with protected characteristics and their representatives and have an interest in the way the authority carries out its functions

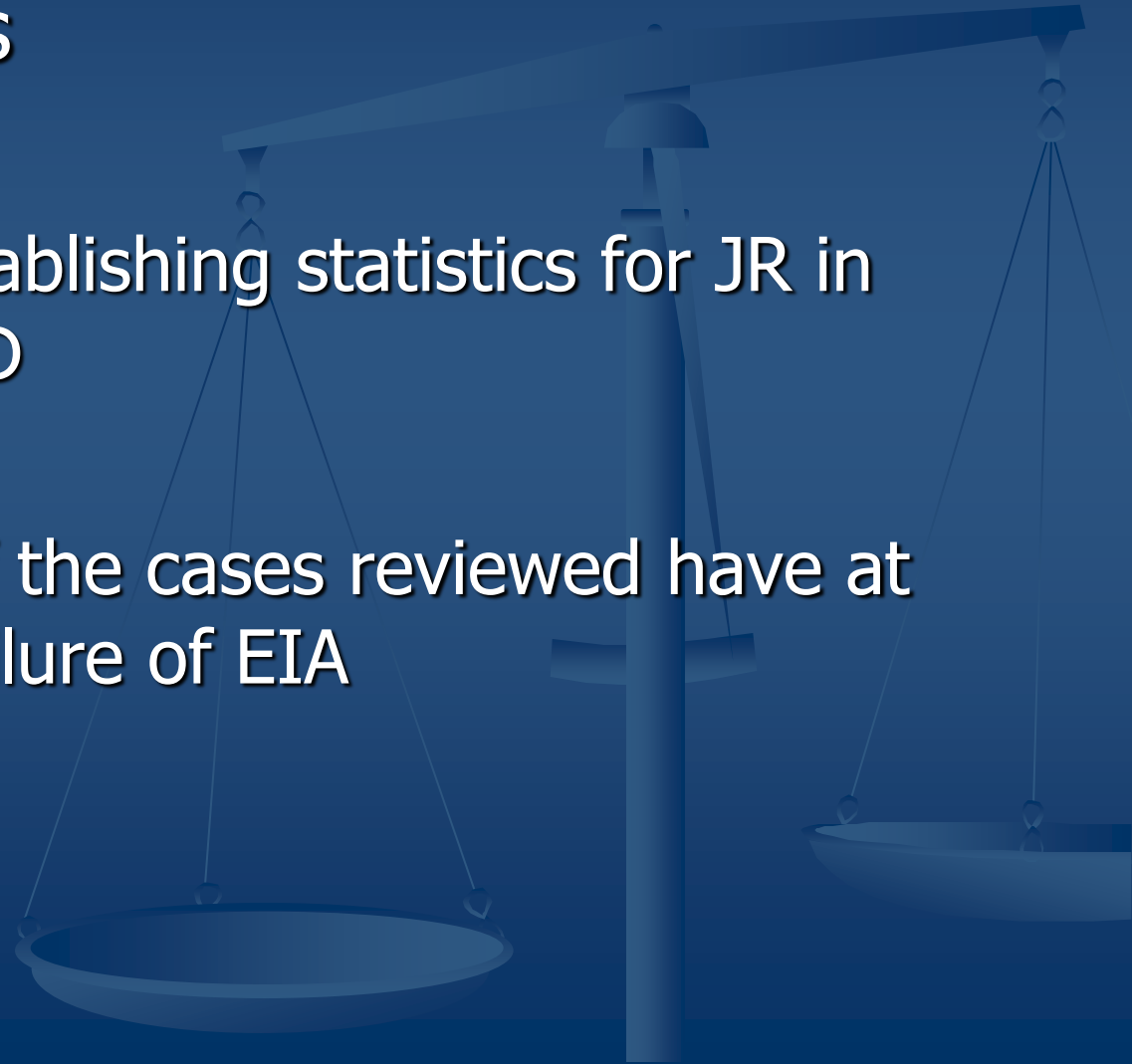
# Assessment

- Only approx. 50% of English authorities comply with the PSED. English specific duties “so weak as to be of questionable relevance” (House of Lords Select Committee 2016 pg. 101).
- Welsh specific duty on engagement has, “led to improved and more responsive service delivery” and “improvements in the level and quality of engagement undertaken” (EHRC, 2015: 1)
- In Scotland EIA “is a key element of good policy making, helping to ensure that policies recognise the diversity of people and are shaped around diverse needs and experiences” (Scottish Government 2015:15).

# Outcome

## ■ Judicial Reviews

- Difficulty of establishing statistics for JR in relation to PSED
- The majority of the cases reviewed have at their heart a failure of EIA



<b>Year</b>	<b>Total number of judicial reviews involving PSED</b>	<b>Number of judicial reviews involving PSED in England</b>	<b>Number of judicial reviews involving PSED in Wales</b>	<b>Number of judicial reviews involving PSED in Scotland</b>
<b>2016</b>	18	14	2	2
<b>2015</b>	21	19	1	1
<b>2014</b>	24	22	2	0
<b>2013</b>	23	23	0	0
<b>2012</b>	18	18	0	0
<b>2011</b>	12	12	0	0
<b>Total</b>	116	108 (93%)	5 (4%)	3 (3%)

\*These figures are based on data from the BAILII website and a search in the England and Wales and Scottish Courts databases for “judicial review” and “public sector equality duty”.

\*Where a case had been appealed only the case of first instance was included

# Conclusions

- PSED needs to be reflexive and responsive
  - Requires strengthening of engagement provisions in specific duties
  - Judicial Review = failure of PSED
  - Stifled engagement?
  - Specific duties that include EIA work better
  - EIA needs to be participatory (democratic) to move away from focus on process (bureaucratic) and qualitatively improved equality practice by public authorities
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