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Only Relatively Equal? – The unintended consequences of the Equality Act 2010

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The Equality Act 2010

- **Culmination of various campaigns:** 1960's race; 1970's sex; 1980's and 1990's pregnancy and disability; 2000's age, religion and belief, sexual orientation, transgender....ongoing
- Up until 2010 piecemeal development of the law – myriad of statutory and regulatory provisions
- Equality Act 2010 (the Act) - 5th generation of equality and anti-discrimination legislation in the UK
- Response to Discrimination Law Review June 2007
- **anticipated consequences:-**
 - harmonise, simplify and modernise the old incoherent framework of laws to be enforced by a single Equality Commission
 - Greater clarity and consistency
 - Increased levels of protection

The Equality Act 2010

- The Act brings all protected characteristics together into one piece of legislation, all separate 'silos' (Solanke, 2011) but equal before the law. **No hierarchies just equal treatment.**
- Law requires **certainty** but equality law involves people with not just singular characteristics but with multiple characteristics and identities which can be challenging for employers in the workplace (Act also protects other areas of society – goods and services, education etc.)
- Finkin (2002) argues that when we enter the workplace and interact with others, we must contract away some of our privacy and autonomy. But if we give up so much of ourselves that we cease to be persons, then it must fall to the law to decide what is alienable and what is not
- But, what do we mean by **equality** and what impact has the Act had?

The Equality Act 2010

- ❑ **Unintended/unanticipated consequences** of the Act are to be found in some of the tensions experienced within the legal framework:-
 - ✓ Multiple meanings of equality and what the law is trying to achieve
 - ✓ Equal treatment can lead to inequality
 - ✓ Unequal treatment might be necessary to achieve equality which leads to more favourable treatment for some of the protected characteristics
 - ✓ Perceptions amongst those protected - that they are at the bottom of a 'hierarchy' of protected characteristics – disability, religion, sexual orientation, sex, transgender – can't all be at the bottom!
 - ✓ Clashing rights and competing equalities rather than a balance
 - ✓ Non-discrimination rather than equality
 - ✓ Fails to treat people as individuals
 - ✓ Two examples/ case studies:
 - ❑ Disability discrimination
 - ❑ Religion Vs Sexual Orientation

Multiple meanings of equality

- **Formal equality/consistent treatment** – treat like alike – when are two people sufficiently similar to be treated alike?
- **Direct discrimination s 13 Equality Act 2010**
 - ‘Why can’t a woman be more like a man’ *My Fair Lady* -Prof Higgins. *Equal to what? Equal to a man?*
 - **Pregnancy and new mothers discrimination** – EHRC Report (2016) in this area that clearly the law on pregnancy discrimination has been in place for quite some time BUT it hasn’t had the necessary impact. The % of women who report discrimination related to pregnancy has risen from 45% to 75%
 - **Disability Discrimination** – recent Select Committee Report ‘The Equality Act 2010: the impact on disabled people’ published 24th March 2016. Has to be different treatment. Fairness rather than equality?
 - **Manifestation of religious belief** and tensions created in the case law can like to be treated alike?

The problem with 'equality'

- **Formal equality** – consistent treatment
 - Formal equality does not work for some protected characteristics. Doesn't take into account **difference**. So the protected characteristics are not equally treated. Organising people into groups according to their inherent characteristics – wholly negative??
 - Only a relative principle – treating people equally well is the same as treating people equally badly. Levelling down as well as up
 - Need for a **comparator** problematic. The law requires us to disregard the race or sex of the parties but are we alike if we just disregard these singular characteristics – who is the comparator – white, male, Christian, able-bodied and heterosexual - is this person the 'measure of all things'
 - **So is there a hierarchy? If there is that was not the intention of the Equality Act 2010**

The problem with 'equality'

- **Substantive Equality:** Removing Barriers to equal treatment in response to criticism of formal equality **indirect discrimination** was introduced in 3rd generation of equality laws - s19 Equality Act 2010. Problematic
 - **Group disadvantage:**
 - Groups of religious people/ Groups of disabled people?
 - Problems of **justification** cf. direct discrimination
 - **Expanding equal treatment:** Recent ECJ decision *CHEZ Razpredelenie Bulgaria C-83/14* radical departure from previous case law expanding indirect discrimination to people who do not possess the protected characteristic
 - It is reactionary not anticipatory in employment so is dependent on people asserting their rights – more problematic because of the dependence on individual enforcement and the introduction of fees
 - **Fails to treat people as individuals – Unintended?**

The problem with 'equality'

➤ Alternative conceptions of equality

- Eliminating status discrimination and prejudice or stereotyping – problems of unconscious bias
- Human Rights Perspective – equality seen as a fundamental human right
 - Respect for equal worth or dignity of the individual
 - Recognition of identity, difference and diversity
- Transformative Equality
 - Equality of outcomes
 - Equality of capabilities
- Social Inclusion (Collins, 2003)
- Fairness

The Equality Act 2010

- **Unintended Consequences (perverse effect of streamlining the law):-**
- **Developing hierarchies:**
 - Between protected characteristics
 - Between concepts of discrimination – direct and indirect
 - Between public (PSED) and private sector employment
 - Single protected characteristic discrimination and intersectional discrimination
- **Clash of rights between protected characteristics**
 - Balance competing interests
 - Ever expanding through case law
 - Added to complexity of the law
- **Red Tape challenge significant impact on enforcement of equality rights**

Case Study: Disability

- The essence of anti-discrimination protection in the area of disability is wholly different from other protected characteristics which requires **equal treatment** yet disability sits alongside the other protected characteristics in the one piece of legislation. Disability discrimination cannot be about equal treatment, difference has to be recognised and protected
- **Answer?**
 - Disability Discrimination Act 1995 “a historic advance for disabled people” William Hague. Amended in 2003, 2005. Own Commission – Disability Rights Commission
 - Equality Act 2010
 - Reasonable Adjustments and Discrimination arising from a disability
- **Unintended Consequence?** Disabled people treated more favourably – but they perceive they are treated less favourably and they are the ‘poor relation’. Evidence 

Case Study: Disability

- House of Lords Select Committee Report 24 March 2016 ‘The Equality Act 2010: the impact on disabled people’ after 9 months call for evidence
- Disability is different
- “embedding disability with the other eight protected characteristics has served to mask the differences between disability and those other characteristics...For the modest advantages of consolidation and uniformity, as may be inevitable given the greater variety of rights in play, the new regime has complicated the challenge of combating disability-focused discrimination, rendering even more critical the need for access to those enhanced rights” (The Bar Council)
- Loss of focus on disability and a sense of a loss of rights

Case Study: Disability

- Reasonable adjustments: **More favourable** treatment to achieve equality: *Archibald v Fife Council [2004]*
- Myriad of evidence that it is not happening: Why?
 - Individual enforcement in a private action
 - Hard for various reasons, fees, lack of public funding
 - Provisions neither well known nor well understood – **ignorance**
 - **ignorance** of the fact that a reasonable adjustment could well mean more favourable treatment ‘special treatment’ ‘perks’ - ‘no favouritism’ as this is not equal treatment

Case Study: Religion

- Does a **hierarchy** of rights exist with regard to the protection of religion?
 - Perceived lower priority than other protected characteristics such as sexual orientation which has led to tensions and perceived clashes in the case law
 - *Ladele v Islington LBC [2010]* and *McFarlane v Relate [2010]*
 - *Bull v Hall [2013]*
 - BUT exemptions within the Act for religious organisations and a genuine occupational requirement in employment exemption *allowing* sex, sexual orientation, marital status and transgender discrimination where employment is for the purposes of an organised religion

Case Study: Religion

- Arguable that this is not a hierarchy between protected characteristics (eg religion and sexual orientation) but between different types of discrimination (direct and indirect) (Pitt, 2011); (Pearson, 2016). Priority given to **direct** in the case law and **indirect** can be justified
 - *Ladele* would have **directly discriminated** against others because of sexual orientation even though there was **indirect discrimination** against her because of religion, but the Council could justify the indirect discrimination

Case Study: Religion

- **Undervalued** – or less sympathetic perhaps?
 - *Eweida v British Airways [2010]* – problems of group disadvantage in indirect discrimination claims, no group of Christians who shared *Eweida's* belief about wearing a cross on a chain either as a whole or as 'an identifiable section of the workforce'. Can the group be a group of one?
 - Later ECtHR [2013] decision treatment *Eweida* suffered was a contravention of Article 9
 - *Mba v Merton LBC [2013]* refusal to work Sundays not a core belief of Christianity, again group might be small – indirect discrimination justified in the work context
 - Some instances of religious discrimination may be direct sex discrimination as only female Muslims would wear the niqab – *Azmi v Kirklees MBC [2007]* (McColgan) cf. pregnancy discrimination-comparable?

Case Study: Religion

- Perception that religion and the manifestation of religious belief is **different**
 - The equality of treatment principle does not sufficiently protect religious individuals and the myriad ways this can be manifested as the Act is drafted – so should there be a different approach – reasonable accommodation?
 - Treating religion in the same way as other protected characteristics within the Act may affect the whole scheme within the Act (McColgan, 2009, 2014)
 - All of the other characteristics are objective characteristics, religion is a matter of choice – Sedley LJ in *Eweida*. Fails to recognise importance of faith
 - Religious beliefs may well conflict with the rights of the others – relevant difference
 - Religion should not have been included at all and should be left to Article 9 ECHR – gaps in protection

Conclusions: Relative equality?

- **Causes of unintended consequences:**
 - **Ignorance** particularly seen in cases of disability discrimination
 - **Perverse effects** developing hierarchies which is the opposite of what was intended? BUT is this inevitable given the range of meanings attributed to equality and the complexity of the area.
 - **Negative consequences** 'one size fits all' Equality Act 2010 causes more problems for some of the protected characteristics - disabled individuals and arguably for those manifesting their religious beliefs in particular ways
 - Equality is a complex, long-term interest and although the **immediate benefits** of streamlining the law had obvious anticipated benefits this may have **overridden the longer term** interests of those seeking equality and the variety of ways this might be achieved.