

ERA seminar on EU Equality Law for academics - 17-18 September, Maleiha Malik, Professor of Law

For further reading and full discussion see:

(1) Maleiha Malik, 'From Conflict to Cohesion: Competing Interests In Equality Law and Policy', Equality and Diversity Forum: London, November, 2008

Available at:

http://www.edf.org.uk/blog/wp-content/uploads/2009/02/competing-rights-report_web.pdf

(2) Bamforth, Malik and O' Cenneide, Discrimination Law: Theory and Practice, (London: Sweet and Maxwell, 2008)

Introduction

- This presentation will examine conflicts of rights and competing interests in the context of the equalities framework.
- The expansion of the grounds of discrimination law beyond the traditional categories of race and sex to also include disability, sexual orientation, gender identity, religion or belief and age has made this an issue.
- In addition, the increasing recognition of 'equality' and 'non-discrimination' as important rights raises the spectre of conflict with other human rights such as the right to freedom of expression. This is potentially a vast area for analysis.
- This paper is a selective treatment of some of the main issues. It sets out these issues and some general principles for reform as a first step in developing a principled approach to conflicts in equality law and policy.

Part 1. What are Equality Conflicts?

Conflicts and Competing Interests

Conflicts or competing interests can arise in equality law and policy in a number of ways.

(a) Multiple Discrimination

- In some cases, an individual can bring themselves within more than one protected ground: e.g. an African woman may be able to argue for legal protection under sex, race and religious discrimination law.
- These types of situations can be called multiple discrimination because the presence of more than one ground of discrimination 'adds' to the nature of the discrimination.
- If there are two grounds the quantity is doubled, and if there are three grounds, it is trebled.

(b) Intersectional Discrimination

- There can also be situations where the presence of more than one ground of discrimination leads to a qualitative transformation in the nature of the discrimination experienced.
- In these situations, the sex and race components of an African woman's discrimination cannot be easily distinguished.
- It could be argued that the presence of both these categories at the same time transforms the grounds of both sex and race: i.e. she experiences discrimination as a woman in a way that is distinct from other women who are not African; and she experiences discrimination as an African in a way that is distinct from other Africans who are not women.
- Where an individual falls within more than one protected group, and where there is a qualitative change in the nature of the discrimination, we can call this intersectional discrimination.

(c) Conflicts of Rights

- There may be situations which give rise to a conflict between equality rights and other types of rights.
- Where fundamental human rights conflict this raises a serious problem because the foundational principles of constitutional and human rights law seem to be irreconcilable. This can lead to an overall weakening of the system of liberal democracy.
- ‘Conflicts of rights’ can arise when it is not possible to reconcile two or more competing rights. There often seems to be an overlap between ‘conflicts of rights’ and ‘conflicts of grounds’ (discussed below) especially in those situations where equality norms are protected in a constitutional or human rights document (e.g. the Canadian Charter). However, it is worth keeping these two types of conflict separate.

(c) Conflicts of Rights Continued...

- Conflicts of rights which involve constitutional and human rights norms can and do arise in the context of a wide range of constitutional settlements, including the Human Rights Act 1998. These conflicts cannot be resolved permanently because no constitution or Bill of Rights can provide an answer to all situations.
- It is worth pointing out that the issue of conflicts of these rights needs to be distinguished from other situations, such as the issue of disagreement about rights or the question of limits to rights. These situations do not create a problem of inconsistency for the whole system because they do not give rise to the problem of two incompatible constitutional or human rights norms: e.g. where *either* one or the other can be followed, but not both, because the two norms contradict each other.
- Moreover, issues concerning fair distribution of resources may raise questions about distributive justice (and therefore some aspects of equality); these may be difficult questions for government and public authorities, but they do not raise an issue of conflicts of rights or conflicts of grounds.

(d) Conflicts and Tension between Grounds

- ⦿ In some cases it may be impossible to reconcile the claims of one group to non-discrimination on one protected ground (e.g. sex) and the claims of another group that is also relying on a right in discrimination law on a different protected ground (e.g. religion).
- ⦿ This can be an example of a *tension or conflict between grounds* of discrimination. In some cases, discrimination law has recognised that there may be such conflicts and made exceptions for these situations by creating specific exclusions (e.g. the appointment of ministers of religion is not covered by the prohibition on sex discrimination in employment).

(d) Conflicts and Tension between Grounds Continued...

- ⦿ The problem of 'conflicts of grounds' raises a different set of questions. This problem arises when there is an incompatibility or conflict between giving effect to the principle of non-discrimination to protect one group (e.g. women) at the same time as protecting another group (e.g. believers in a particular religion).
- ⦿ In some cases the failure to consider the grounds of discrimination (e.g. sex) in a sufficiently wide way to accommodate all those who may fall within its protection (e.g. women who are also racial or religious minorities) means that a situation is misleadingly treated as a conflict of grounds or rights.

Part 2. Summary and Overview of the Paper

(a) General Principles

- The main argument of the paper is that competing interests and conflicts in equality law and policy are a reality, however, there are also political forces that exaggerate the extent and nature of these conflicts.
- In particular, the principles of gender equality and secularism are sometimes used as a weapon with which to attack minority communities rather than acting as a guide to pursuing a coherent equalities framework.
- At the most general level, this paper recommends that competing interests and conflicts should be resolved by treating human rights standards as the non-negotiable floor within which all equalities law and policy analysis takes place.
- At the national level, this requires that equalities law and policy is related to constitutional and human rights law, which can be done through the introduction of a purpose clause in the proposed Equality Act.

(a) General Principles Continued...

- These principles can also be translated by local authorities into concrete policies through the introduction of a harmonised equality duty which has been used in the United Kingdom to promote equality goals in the design and delivery of public services (e.g. the race equality public duty introduced by the Race Relations Amendment Act 2000; or the disability and gender equality duties introduced by the Equality Act 2006).
- In relation to age and disability, one of the main issues concerns the fair distribution of resources to individuals and groups that are often victims of social exclusion.
- There may also be conflict between, as well as within, racial and religious groups that needs to be addressed by a coherent and principled policy of community cohesion. In the UK, the introduction of a harmonised equality duty across all the equality grounds is one of the main legal policy instruments that can assist national and local government in addressing these types of community tensions.

(b) The Specific Problem of Conflicts of Religion and Belief

- Religion or belief/culture is a particular focus for this discussion because many recent political incidents and cases have involved a conflict between these grounds and sex or sexual orientation.
- Where there is a conflict between religion or belief/culture and sex or sexual orientation discrimination, it is important to take a dual track approach. Discriminatory belief may be given a wider latitude because it is protected as the individual right to religion or belief; however, discriminatory conduct should be strictly regulated.
- In some cases, the conflict can be resolved by taking a more complex view of the definition of equality or the ground of discrimination (e.g. ensuring the category 'woman' includes the viewpoints of Muslim women, or the category religion or belief includes the viewpoint of lesbian, gay, bisexual and transgender (LGBT) faith-holders).

(b) The Specific Problem of Conflicts of Religion and Belief Continued...

- In other situations the issue can be resolved by taking a more complex view of membership of the group and empowering 'minorities within minorities' (such as women and LGBT people) who often lack the power to pursue their interests. In cases of conflicts between religion or belief/culture and women's equality where there is a risk of harm or coercion there should be a policy of zero tolerance which requires state intervention to protect women.
- Situations where women choose to be members of communities that maintain discriminatory practices may be resolved by applying the principles of autonomy and by empowering women within communities.

Part 3. Principles to guide decision makers facing Equality Conflicts

(a) General Principles

- ◉ Where there is a conflict of rights it is important to take an approach that does not create a hierarchy between rights or equality grounds. As Judge Tulkens stated in the context of the Leyla Sahin headscarf cases:

‘In a democratic society, I believe it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.’ (per Judge Tulkens, Leyla Sahin decision of the European Court of Human Rights)
- ◉ It is also important for equality law and policy to recognise diversity within social groups. This should make decision makers more sensitive to power relations within groups, recognising the issue of ‘minorities within minorities’ who are often not fully represented in formal consultations with equality groups and the need to ensure that these individuals are empowered *within* their communities rather than expecting them to ‘exit’ their preferred social group.

(b) Conflicts of Religion and Belief

- ⦿ Where there are conflicts between religion or belief/culture and sex equality it is essential that the state obligation to protect women and children from violence and harm is taken as the starting point. This requires a zero tolerance approach to practices that involve violence and coercion of women.
- ⦿ In this context, there is also a need to recognise women's autonomy so that policies empower women within the communities concerned and facilitate their agency in working towards improved protection. This approach also speaks to the need for better resources to enable women's groups to carry out research and funding for education and public service provision.
- ⦿ Where there is a conflict between religion or belief/culture and sexual orientation discrimination there may be a need to respect the rights of belief and conscience, whilst at the same time taking a strict approach to discriminatory conduct by limiting the scope of exceptions as well as evaluating the impact of these exceptions in practice.

(c) Resolving Equality Conflicts – legal and non-legal solutions

- ⦿ Some conflicts of grounds and conflict of rights cases could be resolved in a forum other than courts. In some situations, it may be appropriate to have a more wide ranging debate that allows greater public participation about the appropriate balance between conflicting equality groups or between equality and other human rights.
- ⦿ In the context of the exemptions that have been granted to religious organisations to discriminate on the ground of sexual orientation (Employment Equality Directive translated into the UK in the SORegs. Regulation 7) the Joint Committee on Human Rights (which is part of the legislative assembly) could hear evidence from a wide range of individuals and groups in civil society (including organisations such as Stonewall) about their experience of the exemptions granted to religious organisations.
- ⦿ The Committee (or legislative body) could then evaluate and report on the impact of these exemptions in an annual review that would be an open and transparent procedure.

(c) Resolving Equality Conflicts – legal and non-legal solutions Continued...

- ⦿ Local authorities implementing an equality duty that covers religion or belief, and sexual orientation or gender should be encouraged to devise processes of consultation with local communities and civil society that bring together a wide range of groups and individuals *before* significant conflicts arise.
- ⦿ An early process of consultation may help to resolve conflicts within and also between different groups. It could also inform the design and implementation of an equality action plan.
- ⦿ Cultural policy which encourages the participation of minorities in ‘free speech’ should be supported as a key way of addressing hate speech in the public sphere.
- ⦿ Supply side investment which increases capacity within minority groups to respond to ‘hate speech’ may be preferable to the use of the criminal law. This could be an alternative to incitement to hatred legislation which often causes a conflict between equality and freedom of speech.

(d) Alternative Dispute Resolution, Consultation, Mediation and Human Resources Training Continued...

- ◎ In some cases it may be possible to use consultation with groups and individuals to resolve an ongoing and recurring problem that causes a conflict. For example, in the case of Muslim objections to guide dogs, a proactive strategy of co-ordinating a response from Muslim representative organisations who re-stated a religious norm to ensure that it is compatible with disability discrimination legislation has successfully and permanently eliminated the conflict.
- ◎ Better training and management in the workplace should be supported to prevent disputes (for example, between religious conscience and sexual orientation equality) becoming acrimonious. In some cases, the reallocation of work duties and rosters can address the issue without the need for disciplinary proceedings or litigation. ACAS should consider whether there is a need to issue guidance or a code of practice about how employers can reconcile their responsibilities under the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003.

Concluding Comments and Reform Proposals

- ⦿ The main argument of this paper is that it is impossible to eliminate altogether conflicts in equality law and policy.
- ⦿ However, it is possible to design legal principles and social policy in ways that prevent some conflicts from arising.
- ⦿ Where the conflicts do emerge it is possible to manage or resolve them through the application of the principles of human rights law, as well as equality principles.
- ⦿ This paper seeks to open up this issue for further discussion rather than providing a blueprint for reform. Nevertheless, there are some common principles that have emerged from the analysis that that can guide decision makers and reform.

Concluding Comments and Reform Proposals Continued...

- ⦿ Conflicts in equality law and policy require a range of responses. The institutional context is critically important in all these cases. The debate about how to resolve conflicts, and the resulting negotiations between groups, needs to be carried out within mainstream political and legal institutions.
- ⦿ Civic society and the media are also important actors within this process. We must recognise diversity within groups as well as being vigilant about the risk of harm to vulnerable individuals from oppression within groups.
- ⦿ This procedure is likely to ensure the broadest range of participation in public debate and political negotiations. In this way the painful compromises that are an inherent part of equality law and policy are more likely to command the consent of all those involved.

Concluding Comments and Reform Proposals Continued...

- ⦿ Points of difference and friction between individuals and groups can often act as a catalyst towards a stable form of integration that avoids the worst injustices of forced assimilation. In some cases we must be satisfied with an outcome that is a patient and resigned *modus vivendi*.
- ⦿ More optimistically, this technique also has some potential to generate a deeper and more meaningful identification with national and local institutions, in a joint enterprise, that creates social cohesion and sustains a coherent political community rather than a plethora of self-interested splinter groups.
- ⦿ Discussions about competing interests and conflicts that are conducted in this spirit may be able to contribute to a sense of belonging on the part of all citizens, which can be effectively hammered out through debate and compromise carried out in the public sphere.