Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law

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1. Introduction

An avalanche of literature is now emerging on the concept of intersectionality,[2] some of it quite fancy and fashionable. So fashionable that it is in danger of being reified – a formula in place of an understanding, concealing more than it reveals. I am naturally skeptical. Holmes once said that we should pour "cynical acid" over every new idea to see if something of value remains.[3] Something important indeed remains of intersectionality but it requires a deeper look beyond the familiarly narrow legal frame.

To get to the heart of intersectionality and why it offers a way out of a well-known problem, one must connect it with a common intuition or nagging doubt that something important is missing from our traditional conception of non-discrimination. The concept of intersectionality provides both a critique of non-discrimination law as it is currently framed and practiced and offers a way forward. So far, it is probably more successful in the former than the latter.

To see what is missing from the traditional non-discrimination framework and why, it is first necessary to reflect on the mischief the framework aims to resolve (both in terms of the rights of the individual as well as the more systematic goal of holding civic space open in a diverse culture), to examine how identities, groups and grounds form and are used negatively, to look at non-discrimination law as one corrective to this use, to see what is left out of its framing of reality, and to assess what intersectionality intends to put in its place.

This is not intended as an extended doctrinal paper – simply as a thought piece to stimulate reflection. Nor is it a disquisition on the many layers and deep theories of equality. It is simply

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2 A quick search of the term intersectionality on HeinOnline reveals 2,998 items.

3 Holmes, Jr., O.W., "The Path of the Law", *Harvard Law Review*, Vol. 10, 1897, p. 462.

a collection of thoughts on the significance of intersectionality with respect to the non-discrimination idea and law.

2. The Human Impulse to Close Down Space vs. the Political and Ethical Imperative of an Open Society

In understanding the intersectional critique of non-discrimination law, it is important to bring to the foreground some general considerations that have political implications and are often assumed and left unexamined. All societies are defined as much by whom they exclude as by whom they include. This applies literally at our borders. Internally, our societies tend to arrange themselves in concentric circles of exclusion. This affects the economic sphere, the social sphere and public life.

There are many reasons why discrimination is wrong – whether ethical, political, social and economic – and a fitting object of reform. These reasons seem deeply etched in how societies are imagined and constructed.[4] No doubt, socio-biologists have something to say about these "natural" tendencies to build elaborate social structures around a seemingly innate preference for kith and kin.[5] The default, the thing that makes non-discrimination law so vitally necessary, seems to be a deep reflex to parse the political community into those who fully belong and those who do not.

The wellsprings for these impulses of exclusion (manifested as differential treatment or subordination) are many and varied. They include the moral – the ascription of moral inferiority to a particular group and the insistence of "our" moral superiority (justifying "our" privileged position). Of course one can never be quite sure that those who adhere to this view do so out of a sense of their so-called moral superiority or whether they use it as a mask to hide much more naked calculations of advantage. Perhaps a self-righteous combination of the two is always at play. Most legal cultures reject any ascription of moral inferiority, as does all international law.

The wellsprings for exclusion also include the purely economic: the impulse to make the "other" appear so different to "us" as to justify their economic powerlessness and by implication "our" economic dominance. It is often easy to see this at work, but hard to figure out whether it simply serves to rationalise exclusion that has already been generated for other reasons or whether it is, in itself, a driver of exclusion. Its effects, especially its cumulative effects over the generations, are devastating.

The wellsprings for exclusion can also include the persistence of stereotypes and prejudice that "naturally" incline people against the "other". Stereotypes take many shapes and forms

4 Alexander, L., "What Makes Wrongful Discrimination Wrong: Biases, Preferences, Stereotypes and Proxies", *University of Pennsylvania Law Review*, Vol. 141, 1992, pp. 149–172.

5 See Wilson, E.O., *The Meaning of Human Existence*, Norton, 2014.

and have different sources. They can represent the lingering afterlife of policy choices taken decades ago in favour of blatant exclusion. They can be doubly hard to erode since no society feels comfortable having a mirror put up to it to reveal its anachronistic belief systems. This is one reason why change can be so hard even in the face of the total and provable irrationality of most stereotypes. Stereotypes are especially hard to erode when they (or a kernel of them) might conceivably have some basis in fact. For example, it is true to say that some persons with disabilities have a reduced working capacity. Of course, this framing helps to mask a much deeper truth: that most people with disabilities have at least an equal capacity for productive work – and perhaps even a higher than average commitment to work.[6] But, as Karl Schmitt insisted, he who controls the exception can control the rule![7] In a way the group (people with disabilities) get defined by the exception, which explains the seeming paradox that when they are protected by non-discrimination law (especially in the employment context) they are said to be protected not so much *because* they are disabled but *despite* it.

Stereotypes can function as a pivot that almost unselfconsciously carves out broad exceptions to treating others respectfully and on an equal basis. Almost every society harbours these deep mental reservations with respect to some group or other. My country, Ireland, is no exception when it comes to extending equal human rights to members of the travellers' group. Indeed, the shameful treatment of unmarried mothers in Ireland in the past meant they were treated not merely as un-belonging but almost as if they were not human.[8] It was as if their (socially imposed) shame had banished them to purdah and worse.

3. The Aetiology of Identities, Groups and Grounds

We, as a species, are not so radically atomised as to form legitimate categories all of our own. Like it or not, we are often defined by traits we share with others – or are simply assumed to share with others. Often those traits become constitutive of who we are as individuals (Irish and proud). Sometimes it is hard not to be smothered by them. This is not to say that these traits are always objectively stable, immutable or universal. But it is to say that they obviously play a significant part in the whole process of exclusion and differential treatment.

We can, throughout legal history, see certain identities or groups "marked apart" in social or folk narratives and then "kept apart" by deliberate laws and policies. For example, certain laws and policies in the District of Columbia actually banned persons with disabilities

6 See statement by International Labour Organization Director General, Guy Ryder, "Millions of Men and Women with Disabilities Face Exclusion", 3 December 2015, available at: http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_432312/lang--en/index.htm.

7 Schmitt, C., *Political Theology: Four Chapters on the Concept of Sovereignty*, University of Chicago Press, 2006.

8 See, for example, Department of Children and Youth Affairs, *Report of the Inter-Departmental Group on Mother and Baby Homes in Ireland*, July 2014, available at: http://www.dcya.gov.ie/documents/publications/20140716InterdepartReportMothBabyHomes.pdf.

from even being seen in the streets (so-called "ugly laws")![9] An extreme version is the phenomenon of "civil death", which is the denial of the very personhood of an individual, as his or her personhood rights are given to others (for example, a slave becomes the property of a slaveholder) and the individual "disappears". The chillingly suggestive phrase "civil death", first coined by Blackstone, has applied (and to some extent still applies) to many groups in several parts of the world, including women,[10] prisoners,[11] and persons with intellectual disabilities.[12] Law, "the witness and external deposit of our moral life",[13] has often been used (abused) in the past to cement into place these exclusions. In practical terms this is felt by the individual members of the affected group very adversely. In symbolic terms, the law's endorsement of exclusion or relative exclusion valorizes an exclusionary worldview and weaves its assumptions into the background fabric of what is considered "normal". Over time, this can have the perverse effect of diverting people away from addressing any contradiction between what they profess to believe and their actual practice. But just as the law can embed exclusionary ideas (and almost inoculate people against critical self-reflection) it can also be used to unpick the legacy of the past. This performs not just the practical task of removing barriers but also an educative role of conscientising people toward right behavior.

Regardless of whether these differentiating traits exist before or as a result of exclusion, the social construction of these "traits", "identities" or "grounds" in non-discrimination law is not of course a closed set.[14] New identities may emerge in the future arising, for example, from breakthroughs in biomedicine. It has been remarked that mankind has, up to now, used technology to extend its power over nature but that in the future, technology will actually be used to change the nature of mankind.[15] What, therefore, of the impact of technology on humans who have their cognitive capacities augmented – do these "post-humans" deserve to be called human with the benefit of human rights (or do they attract some other set of rights) as well as the benefit of the protection of non-discrimination law?[16] What or who are they? Here scientific (or other) advances create a new class or change circumstances.

9 Schweik, S., *The Ugly Laws: Disability in Public*, NYU Press, 2010.

10 Blackstone, W., *Commentaries on the Laws of England,* Vol. 1, Clarendon Press, 1765, pp. 442–445.

11 See Chin, G.C., "The New Civil Death: Rethinking Punishment in the Era of Mass Conviction", University of Pennsylvania Law Review, Vol. 160, 2012, pp. 1789–1933.

12 See Quinn, G., "From Civil Death to Civil Life – Perspectives on the right to supported decision-making for persons with intellectual disabilities", paper delivered at Tbilisi State University, 20 December 2015, available at: http://www.nuigalway.ie/research/centre_disability_law_policy/documents/Tbilisi%20State%20University%20Talk%20GQfinal%20Dec%202015.pdf.

13 See above, note 3, 1897, p. 459.

14 See Gergen, M. and Gergan, K.J., *Social Construction – a Reader*, Sage, 2003.

15 See Harari, Y., *Sapiens: a Brief History of Humankind*, Harvill Secker, 2011.

16 See Nayer, P. K., *Posthumanism*, Polity Press, 2013, Para. 47.

But what about situations where this is nothing new, simply an unwillingness (or inability) to face accumulated disadvantages from the past? Often the disadvantages felt by a group (as yet unnamed or identified, much less self-identified) seep very slowly into public consciousness. Perhaps it is an awareness of the unfair disadvantages that leads us to define the group affected (or the ground to be protected). Indeed, one might speculate that as the disadvantages are ameliorated, the need for the ascription (or self-ascription) of group identity is lessened (if not eliminated). At least one leading commentator believes so.[17]

It is clear that sharing the traits of a group or shared identity can trigger negative as well as positive reactions and outcomes. Why use law to challenge and roll back the resulting exclusion and discrimination? There are two sets of overlapping reasons why exclusion and discrimination must be opposed. First, there is the ethical imperative of preserving the life chances of individuals caught in the net. While exclusion may be directed against a group, its effects are most keenly felt by individuals. Secondly, there are also clear systems-based reasons why space for belonging, attaching and participating regardless of difference should be preserved. This has to do with the concept of an open and hence successful society – a good in itself but which also serves the instrumental purpose of honouring the rights of individuals.

In a famous encounter in the 19th century, Lord Acton took issue with John Stuart Mill on the value of homogeneity and the "nation" – and the legitimacy of treating others differently.[18] Lord Acton took the view that tests of belonging and un-belonging had no place in a respectable liberal democracy – one that was capable of adapting to rapid change. It is not hard to see why. Left unchecked, the centrifugal tendencies of such an approach makes for an inward-looking political community and generates social dislocation as well as endemic economic jealousy. Such closure often results in political instability as well as economic inefficiency. Indeed the strains are such that this closure can only be sustained over time by reliance on increasingly authoritarian measures and political institutions. So, from a purely instrumental or political perspective, this tendency toward closure (by abusing and excluding groups and group identities) needs to be checked. Successful societies that can adapt even in the face of massive economic, social and political dislocations need public, social and economic space to be kept open.

Put another way, the preservation of common space for the expression of diversity and respect for pluralism is an instrumental end in itself. Polities that are successful in keeping such space open tend to minimise friction, adapt better to challenges – and respect rights. There is therefore a powerful "systems" rationale for non-discrimination law just as there is an ethical one from the perspective of the individual.

17 This emerged in discussions between the author and Professor Anna Lawson (Professor of Law and Director of the Centre for Disability Studies, University of Leeds).

18 See Kurelic, Z., "What can we learn from Lord Acton's Criticism of Mill's concept of nationality", *Politika misao*, Vol. 43, 2006, pp. 19–27.

4. Groups, Identities, Grounds and Non-Discrimination Law

Non-discrimination law provides a tool chiefly in the hands of individual litigants to challenge differential treatment and exclusion. At the heart of non-discrimination law is an insistence on the inherent self-worth of all human beings – and on their *equal* inherent self-worth. Like any Enlightenment idea, it forces existing social and economic practices to pass muster under an ethic of justification.[19] We principally use the tool of non-discrimination law to dissolve and reverse the concentric circles of exclusion and un-belonging at the behest of individual law suits.

Although ultimately resting on a deep conception of the human being, and the equal worth of all human beings, non-discrimination law can be described as normatively empty in at least one respect. Its primary focus is on relativities, how one person or one group is treated *relative* to another. To do this one must set aside context (for example, health care) as secondary and focus instead on identifying and measuring relative treatment. To do this one must clearly identify the groups or traits to be weighed up in terms of their respective and relative treatment. To do this one must abstract a reckonable trait (like gender, race, age, disability, or genetic predisposition towards illness). This is obviously a uni-sectional approach – and not a multi or inter-sectional approach.[20]

To qualify as a member of the uni-sectional protectorate one must show that one shares the relevant trait (such as gender or age). So much so that one often gets the impression that the primary reality is the group and the primary object of protection is the group, with the individual only protected to the extent they share important group traits. Again, this is somewhat reversed when considering the ground of disability because one often gets the impression that the person is being protected *despite* sharing some core traits with disabled people (extending employment protection to me because I *can* do the job despite being disabled).

What we tend to let happen is that the non-discrimination analysis becomes an end in itself: how to identify differences of treatment; how to explain those differences away; and if they cannot be explained away, whether the gap is sufficiently wide to warrant condemnation. But, from a systems-based perspective, it is not actually the relativities that are of ultimate concern. The gap between the treatment of one group relative to another *reveals* both injustice toward a particular group and a lack of openness in our systems that allow such impulses breathing space in the first place. When the gap between the relativities is egregious then this triggers all sorts of alarms about the presence and influence of illicit impulses that have to be pushed back. It is not just the gap in treatment that makes discrimination wrong, it is how these gaps reveal impulses that cannot be tolerated in a self-respecting open society.

19 See Michelman, F., "Justification (and Justifiability) of Law in a Contradictory World", *Nomos*, Vol. 28, 1986, pp. 71–99.

20 For a discussion of the distinction between these approaches, see Fredman, S., "Double Trouble: Multiple discrimination and EU Law", *European Anti-Discrimination Law Review,* Vol. 2, 2005, pp. 13–20.

5. What Do We Miss in Traditional Non-Discrimination Analysis?

Our uni-sectional approach to non-discrimination analysis – though connected at a deep, albeit remote, sense on a very positive mission of inclusion – tends to screen important things out of the frame. How?

First of all, its very reductionism (I am a white male) is demonstrably counter-factual. Very few people ever define themselves in terms of one core trait they happen to share with others. Those that do we tend to associate with ideological extremists or with persons who (rather naturally) commit to an exaggerated sense of identity as a reaction against extreme prejudice, violence and injustice. Forcing people to wear their badge of David to qualify for the benefit of non-discrimination law seems highly artificial and inattentive to the complexity, and plasticity, of the human condition. Identities change. Emphasis changes. Identities are merged and are nearly always in a process of flux. Indeed, one often gets the sense that the state creates (or at least artificially sustains) the nation as an identity and not the other way around.

Secondly, traditional non-discrimination analysis tends to leave the background or ambient "political economy" of hatred or bias intact. It peels away at the surface but does not get to (because it cannot) the underlying causes of the accumulated disadvantages of discrimination and exclusion.[21] One can peel away at the surface manifestations of these exclusionary impulses without ever dislodging them. Indeed, there are probably no purely judicial remedies to tackle these causes. Put another way, a successful non-discrimination suit (especially if brought as a high profile test case) can be the occasion for a deeper soul-searching as to the root causes of the structural disadvantage and the kinds of programmatic remedies needed to remove it. Not many legal systems cater for structured settlements or judgments that demand, and then monitor, such programmatic changes. In such cases the politics of discrimination take over.

Clearly a much broader strategy is needed to become more self-aware of the "causes" for these illicit impulses to exclude (which differ from society to society) and to work out a way of revealing and dissolving them and the accumulated disadvantages that they generate. For example, everybody in Ireland knew that unmarried women with children born out of wedlock were effectively institutionalised right up to the 1980s. What happened behind closed doors stayed behind closed doors. Nobody said anything or did anything. This closure of the mind, heart and soul was the root cause of allowing discrimination to happen. That closure itself had causes – principally the way in which civic moral sensibilities were appropriated by institutionalised religion from independence in 1921 until the 1990s – leaving no space for moral revulsion except along carefully canalised lines. The "cure" had to await a re-balancing of relations between Church and State that came about for other reasons from the 1990s onwards.

21 See Barnard, C. and Hepple, B., "Substantive Equality", *Cambridge Law Journal*, Vol. 59, pp. 562–585.

Thirdly, traditional uni-sectional non-discrimination analysis does not (because it generally cannot) get at the socio-economic determinants or effects of exclusion nor reach broader socio-economic strategies that, in the long term, can liberate many disadvantaged people and groups from a disadvantaged status. The non-discrimination frame tends to be synchronic, examining how group X is treated relative to group Y in the here and now. It struggles to be diachronic, to weigh in to the balance historic treatment and especially systems-based reasons for ascribing a lower status to certain groups. That is not to say there are not many bridges between non-discrimination and, for want of a better phrase, social justice. After all, positive action measures to redress the systemic causes of unequal treatment are welcomed (or at least permitted) within non-discrimination law. The innovation of "reasonable accommodation" obviously stretches in the direction of positive obligations. Yet, despite its origins in the grounds of religion it remains largely confined to the ground of disability at the moment. Some non-discrimination judgments may indeed have long-term systemic effects. A major non-discrimination judgment can be the trigger for deeper social and economic reform. But the point is that there is no necessary or logical reason why this deeper process of reform has to happen just because of an episodic victory in the courts on the basis of non-discrimination law.

And lastly, non-discrimination analysis can be circular. The non-discrimination idea does not determine in any hard way how we identify and frame difference, how we judge difference and the kind of response we deem appropriate to difference. The circular nature of the analysis leaves ample room for a judge, for example, to simply import (mostly un-self-consciously) a lot of prevailing social assumptions about certain characteristics such as disability. It is plain, for example, that the lower chamber of the European Court of Human Rights in *D.H. and Others v Czech Republic* felt that the segregation of children with intellectual disabilities from a mainstream or inclusive school environment was a matter best left to the policy prerogatives of the Contracting Parties, and not a matter to be closely scrutinised under the European Convention on Human Rights.[22] So rather than flush out bias, traditional non-discrimination analysis can in fact give it an opportunity to periodically re-legitimate itself. Rather than provide an occasion for deep self-questioning, it can afford a license to allow prejudice to masquerade as deliberative judgment. [23] There is nothing inherently necessary in this and, in this case, it was effectively overturned by the judgment of the Grand Chamber. But on those rare occasions when it happens (and visibly happens) it reflects poorly on the judging process. This is an exaggeration of course. But most judges are not Hercules and many lapse easily into seeing difference and differential (i.e. segregationist) treatment as "normal".[24] The point is that the traditional frame does not in itself force decision-makers to probe their own assumptions. Maybe this is no surprise. The Legal Realists have long told us that the human element in the judging process is unavoidable. One would hope that the disciplining virtues

22 *D.H. and Others v Czech Republic,* Application No. 57325/00, 7 February 2006, Para. 47.

23 See the classic statement of the Legal Realist creed in Frank, J., *Law and the Modern Mind*, Brentano, 1930.

24 For a highly perceptive analysis see: Colker, R., *When is Separate Unequal: A Disability Perspective*, Cambridge University Press, 2009.

of the law would compel judges to narrow down the scope for reflecting popular assumptions but, as *D.H. and Others* shows, they have a tendency to creep back into the analysis.

6. Is the Prescription as Good as the Critique?

The above analysis is a caricature of the uni-sectional approach. But there may be enough truth in it to leave us wondering about how and why traditional non-discrimination analysis has its limits and puzzled as to whether there is a better way forward. At a very general level the very term intersectionality sums up this inchoate feeling that something is not quite right. As a vantage point, it expresses a sentiment and a perspective and a rallying point. That is probably the most important thing about it right now. At a more practical level what does intersectionality offer?

Well, first of all, it is an antidote of sorts to the uni-centric or ground-centric way of framing reality in traditional non-discrimination analysis. I am more than a ground. I am more than several grounds. I am a person who may be inter-subjectively formed and defined but who is also more than that.[25] Many people see intersectionality as a way of creating awareness about the accumulated disadvantages experienced by someone who happens to have overlapping (and disadvantaged) identities, for example, gender, race, disability. To a certain extent, this is stating the obvious – if certain grounds have been identified because the people who identify within them have generally been disadvantaged, then it makes sense that those who fall within several of these grounds have been multiply disadvantaged. It does not necessarily follow that discrimination will be found just because one happens to share many overlapping identities. It is probably more relevant to the design of the programmes intended to reverse cumulative disadvantage. A decent attempt at reflecting this kind of intersectionality was made in the UN Convention on the Rights of Persons with Disabilities, which contains specific articles on both women and children with disabilities.[26] A matter of regret is the failure to include a specific article dealing with age and disability which was due entirely to the fact that elder rights groups were absent from the negotiations.[27] The core message of the intersectionality thesis to me is that I am more than the sum of my parts – and my moral claims (alongside my relativity claims) are the most important thing to me as a human being.

Secondly, intersectionality is an antidote to the creeping hierarchies of the excluded.[28] Is discrimination on the ground of race really "worse" than discrimination on the ground of age? Can advances on one ground impede advances on another? For example, for a long time in the 1990s, the

25 See Crenshaw, K., "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory, and Anti-racist Policies", *University of Chicago Legal Forum*, 1989, pp. 139–167.

26 Articles 6 and 7.

27 This observation is based on the author's personal observations as a member of the Rehabilitation International negotiating team during the proceedings of the UN Ad Hoc drafting committee (2002–2006).

28 For discussion of these hierarchies in EU law, see Schiek, D., "A New Framework on Equal Treatment of Persons in EC Law?", *European Law Journal*, Vol. 8, 2002, pp. 290–314.

European Commission resisted opening up its Equal Opportunities Directorate beyond a focus on gender. The theory was that to do so would risk diluting some of the hard-fought high(er) standards on gender.[29] The point is not that this was good or bad – but that a uni-centric focus almost required it. A more intersectional approach would not have warranted carving out a privileged space for one group or identity. Another example comes from litigation. In litigation, for example, we typically push hard for one group (identity) that is the focus of the case. Sometimes this can be done by setting to one side (which can be interpreted as implicitly accepting) the discrimination felt by another group. A more self-consciously intersectional practice of law might require us to hesitate before pressing certain arguments lest it would (unintentionally) consolidate the disadvantage of other groups. It follows that a consciousness of intersectionality can heighten sensitivities in the practice of law. We cannot address all issues of discrimination and all grounds at the same time, but we can fashion arguments that cut down space for the judiciary to make easy assumptions. That can be as simple as saying "we do not mean by our argument to suggest that unequal treatment between X and Y is justifiable". Or it could mean inviting others to draft an amicus brief to address surrounding issues or groups indirectly affected by the case at hand.

Thirdly, an emphasis on intersectionality leads us to understand justice from a social justice perspective as well as a civil rights perspective. It should generate more thought into "accumulated disadvantage", which often locks disfavoured groups into endemic cycles of poverty. Through time people begin to believe the stereotypes set about themselves – they conform to the image, and re-start the cycle of exclusion and leave intact closed systems that tolerate this. The slogans about interdependence of civil and political rights on the one hand and economic, social and cultural rights on the other are generally vacuous. There is a deep nexus between the two – and intersectionality helps bring this to life.

There is another reason to factor in social justice. Very often our social entitlement system is rigged to exclude and make people feel unwanted. Given that many "vulnerable" groups are dependent, or more dependent than others, on our welfare system and that the State will often try to achieve indirectly (for example, by rigging entitlements programmes) what it cannot do openly or directly to exclude such groups there is every reason to be attentive to the architecture of our social systems. Intersectionality makes this come alive for us.

So, in sum, intersectionality reveals some of the partiality of the uni-sectional approach of traditional non-discrimination law – a tool that does not (because it cannot) capture the full essence of the more positive vision of an open society that we want to achieve. Intersectionality can and should lead to a more self-conscious practice of the law – one that does not endorse any hierarchy of the excluded and which pays attention to the unintended collateral damage that might be experienced by one group as a by-product of argumentative strategies on behalf of another. Intersectionality also helps to broaden the policy agenda if we are seriously interested about reversing not just the epiphenomenon of discrimination but its underlying political economy. What is less clear is what difference a heightened consciousness of intersectionality makes for courts and how they deal with non-discrimination claims based on it.

29 See Fredman, S., "Equality: A New Generation?", *Industrial Law Journal*, Vol. 30, 2001, pp. 145–168.