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4

The Architecture of Discrimination Law*

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If on the road a shoe falls off my horse, and I come to a smith to have one put on, and the smith refuses to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuses to entertain guests where his house is not full, an action will lie against him and so against a carrier, if his horses are not loaded, and he refuses to take a packet proper to be sent by a carrier...¹

This is Chief Justice Holt's summary in 1701 of the English common law duty on the providers of certain public utilities. It is perhaps one of the earliest examples of something akin to the anti-discrimination principle in the common law tradition. Although relied upon by a famous black cricketer as late as in 1944 to successfully challenge a London hotel's refusal to accommodate him (because of objections made by some of its white guests),² it lacks key features of contemporary discrimination law: the salience of grounds and groups (See Khaitan 2013). The duty in English law protected everyone who was

willing and able to pay for the service, irrespective of the grounds on which the inn-keeper (or the carrier, etc.) refused to serve. A person who was turned away because of the colour of her eye, or the first letter of her first name, or on no ground at all, would still have a remedy. It also protected everyone to the same extent, irrespective of the group they belonged to. But what we now understand as discrimination law has at its core the protection of certain definite grounds—race, sex, religion, age, disability, sexual orientation, and so on—and the groups that these grounds classify us into. Contemporary discrimination law also has a much wider scope and imposes duties on many more actors than the old common law duty on public utilities.

Rules enacted in the second half of the nineteenth century in India and the United States are much closer to what we have come to regard as discrimination law. This is hardly surprising, for these two regions witnessed the most pervasive and entrenched forms of prejudice and disadvantage faced by caste and racial groups respectively. While the American focus was on a constitutional guarantee of equal protection under the Fourteenth Amendment, the emphasis in Indian discrimination law was decidedly towards affirmative action for 'low' caste groups in education and employment—³ an emphasis that continues to this day.

This chapter will provide an overview of the architecture of discrimination law as it has developed since these early beginnings in other common-law democratic jurisdictions. This architecture is best understood as framed around three issues. First, the protégés of discrimination law need to be identified. The early duties in India and the United States protected disadvantaged caste and racial groups respectively. Contemporary discrimination law has a much wider scope. Who is entitled to the protection of discrimination law is perhaps the most central (and controversial) issue in this area of law. This question will be explored in the first section. Secondly, jurisdictions need to decide who the duty bearers are. All of these aforementioned measures relate to state action. However, the unsuccessful attempt by the US Civil Rights Act of 1875 to impose anti-discrimination duties on private persons gave rise to an enduring controversy about who can be legitimately required to shoulder these duties. The responses of the chosen jurisdictions to this question will be presented in the second section. Finally, the scope of the duty has to be determined.

The early attempts focused on what we would now refer to as direct discrimination or affirmative action. But in the last few decades, new tools have been invented, as discrimination law becomes increasingly sophisticated. Controversies relating to whether discrimination law should only regulate acts or also omissions, whether the causative event for triggering the duty is harm to the victim or fault of the perpetrator or both, and the interrelationship between different duties when they conflict will be outlined in the third section. How Indian discrimination law currently fits within this framework is outlined in (Table 4.1) at the end of the chapter.

These questions are interrelated rather than insular. Our answer to any of them has an impact on all the others. Different groups of potential defendants may shoulder the obligation to refrain from discriminating to different extents. Similarly, not all the protégés of anti-discrimination law are protected to the same extent. What results, therefore, is a complicated web of interrelationships. Obviously, there are other aspects to the practice of discrimination law—mainly matters of detail—which will not be captured by these questions.⁴ In particular, the issue of appropriate enforcement mechanisms will be entirely overlooked.

Protectorate

Discrimination law protects persons—especially groups of persons defined by certain personal characteristics that are technically called grounds. Groups disadvantaged by these grounds are protected more than those advantaged because of them. But, at least with respect to certain grounds like disability and age, we are all potentially subject to ground-based disadvantage. Because of the ground-sensitive nature of its protection, we can elliptically say that grounds constitute the protectorate of discrimination law. Every duty that discrimination law imposes—prohibition on direct and indirect discrimination and harassment, provision for reasonable accommodation, provision for affirmative action—is sensitive to grounds. A state could, of course, prohibit harassment *per se*, rather than merely sexual or racial harassment. It could also—and many states do—provide material benefits whose distribution is not sensitive to grounds protected by discrimination law: provisions for minimum wages, fuel allowance,

bus passes etc are good examples. These norms, however, are not norms of discrimination law, for the simple reason that they are not sensitive to grounds (just as we would not consider *Lane v. Cotton* as a discrimination law case either).

Grounds are personal characteristics that are protected by discrimination law in the sense that disadvantaging people on the basis of these grounds is usually prohibited and advantaging them on these grounds is sometimes required. The (dis)advantaging may be direct or indirect. It is direct when the protected grounds are relied upon directly. It is indirect when the apparent ground is not protected, but is a proxy for a protected ground such that any benefit or burden distributed on the basis of the unprotected apparent ground (say educational qualification) gets distributed in a manner that implicates the protected ground (say race). Thus, the list of apparent grounds on which discrimination is prohibited is potentially limitless, for any such ground may be a proxy for a protected ground under certain circumstances. But these apparent grounds do not matter for their own sake—they matter because they act as proxies for protected grounds in these circumstances (Fishkin 2014: 246f). Directly protected grounds are therefore key to our understanding of discrimination law.

Section 9(3) of the South African constitution, for example, prohibits discrimination 'against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'. Comparable provisions can be found in statutory as well as constitutional provisions in other jurisdictions.⁵ Given the importance of the list of protected grounds, it is no surprise that judges and legislators have faced a growing (and often successful) clamour in the last couple of decades for expanding the list of protected grounds—candidates such as weight (Kristen 2002: 7), physical appearance (Post et al. 2001), and genetic identity (Silvers and Stein 2002: 1341) are offered as 'analogous' to the ones already listed.⁶ Fiss famously called this phenomenon the 'proliferation of the protectorate' (Fiss 1974; McCrudden 1991 and 2004). Commentators and law-makers have struggled to evolve principled criteria which can be employed to determine these claims. Judgments from jurisdictions that have an open-ended list of protected grounds⁷ are perhaps the

most instructive in this regard. When invited to determine whether a candidate ought to be added to this list, judges in these jurisdictions appear to be applying the following two cumulative requirements that a ground must satisfy in order to be protected by discrimination law:

- (i) It must be a ground that classifies persons into groups with a significant advantage gap between them, and
- (ii) It must either be immutable or it must constitute a fundamental choice.

Groups

Let us consider the first condition first. Sex is a protected ground because there is a significant advantage gap between women and men. All protected grounds divide persons into groups with a significant advantage gap between them: protected groups suffer relative disadvantage in comparison to cognate groups (that is, that is, different groups defined by the same ground, such as men and women). Instead of adopting a blinkered view of disadvantage as economic alone, courts have usually been sophisticated in unpacking the notion of relative group disadvantage. They have recognised that disadvantage may be political, socio-cultural, material—more often, a complex combination of these different facets of disadvantage. Affluent members of racial minorities may have overcome material disadvantage, but are likely to remain saddled with political and socio-cultural disadvantage, which can be even more difficult to shake off. As Justice Wilson insisted in *Andrews*, the 'place of the group in the entire social, political and legal fabric of our society' was relevant to determining whether it should be protected.⁸

Political disadvantage is evidenced by factors such as the numerical strength of a group as an electorate (foreigners,⁹ people living with HIV/AIDS,¹⁰ and gay and lesbian people¹¹ have been protected because of their numerical insignificance in the electoral process); the quantity and quality of actual representation of the group in the offices of state;¹² and the nature and the degree of attention paid by state institutions to the group in question.¹³ Political disadvantage can be a cause, as well as an effect, of other forms of disadvantage. The socio-cultural disadvantage that women face in our societies

leaves them underrepresented in and under-catered for by our public institutions. On the other hand, the important role of political power in material distribution means that politically disadvantaged groups may also fail to secure fair distribution of society's resources.¹⁴

Socio-cultural disadvantage is usually (although not exclusively) indicated by the prevalence of prejudice against and (certain) stereotypical assumptions about the members of a group. Prejudice (or bias) is 'a judgment that those with a certain trait are morally less worthy than others merely by virtue of possessing that trait'. For example, prejudice against Dalits signifies a belief that a person is less deserving morally because of her 'lower' caste status. This is a categorical preference against certain groups of people, simply based on who they are. A person's belief in his moral superiority can spring not just from caste—religion, sex, sexual orientation, race and various other attributes have been, and still are, the bases for prejudice in our societies. Stereotypes (or proxies) do not entail such categorical judgments about persons (Timmer 2011: 707). Instead, they involve a judgment—rightly or wrongly—that a person with a certain trait is quite likely to possess other, descriptively relevant, traits. When the judgment is accurate, the correlation between the traits could be due to biological factors (for example a woman is likely to live longer than a man), socio-cultural factors (for example a woman is more likely to quit her job to accommodate her husband's career than the other way around), or because of the reaction of others (for example a black cop is likely to be more effective than a white cop in policing a black neighbourhood). The stronger the statistical correlation, the more accurate a stereotype will be. Often, stereotypes are inaccurate, such that there is little evidence for the supposed correlation (for example the belief that the poor are lazy). Fuelled by anecdotal rather than statistically significant evidence, inaccurate stereotypes are often attempts to rationalize prejudices.¹⁶

Apart from being accurate or inaccurate, stereotypes can also be positive, neutral, or negative, depending on the desirability of the correlative trait. The assumption that women are caring is a positive stereotype, and that men are violent is negative. Things get complicated because these traits may be objectively positive or negative, and still be subjectively judged differently in any given society. It may be, for example, that caring is seen as a sign of weakness, whereas

a proclivity to violence is seen as strength. Furthermore, even positive stereotypes which a society correctly views as positive can have disadvantageous effects—assumptions about women's care-giving nature results in them being saddled with most of the child-rearing responsibilities while men can focus on their career advancement.

Groups against whom prejudices or subjectively negative stereotypes are widespread in a society are more clearly disadvantaged socio-culturally. They affect the members' ability to take pride in their membership of a group, especially in cases where such membership partly constitutes personal identity. Positive stereotypes that have negative effects can also contribute to social disadvantage, as also other forms of disadvantage. In fact, socio-cultural disadvantage generally has a causal relationship with other facets of disadvantage. It may result in political disadvantage for two reasons. First, political officials, as members of the society, may often share the prejudices and negative stereotypes prevalent in society, which are then gets reflected in official acts. The second reason is that even if public officials themselves do not hold these beliefs, the fact that they are responsible electorally to those who do gives them an incentive to act on these prejudices or stereotypes. It is for this reason that Justice O'Connor applied 'a more searching form of rational basis review' when a law was designed to harm 'a politically unpopular group'.¹⁷ The implication seems to be that the group faces such a degree of social hostility that acting against them may accrue political dividends for public officials. Similar causal connections can sometimes be drawn between socio-cultural disadvantage and material disadvantage. The socio-cultural disadvantage of a group is often the cause of hostility and violence against, and boycotts and ghettoization of, its members—factors that render them materially disadvantaged.¹⁸

The third indicator of disadvantage is material disadvantage. While primarily determined by economic indicators like income and wealth, it can be given a broader interpretation to include access to education and employment,¹⁹ freedom from private and public violence and hostility,²⁰ longevity, and health, among other factors. To identify these groups.²¹ These factors indicate the socio-economic security of the material status of a group.²²

On similar lines, the criteria for 'backwardness' evolved by the Second Backward Classes Commission to determine eligibility for

affirmative action programmes in India include 'social factors' ('classes considered socially backward by others', dependence on manual labour, etc.), 'educational factors' (school attendance, drop-out, and matriculation rates) and 'economic factors' (value of assets, loans owed, and proximity to drinking water facilities) (Mandal 1980). Although economic factors were accorded relatively low weight, they 'were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also' (Mandal 1980).

The disadvantage we are concerned with is relative—it is the gap between the protected and the cognate groups that counts. It may well be, of course, that a protected group is also disadvantaged in some absolute sense—that it may fall below any absolute threshold of well-being necessary to live a decent life. But it seems that for judges to protect a particular ground, relative disadvantage between any two groups defined by that ground would suffice. Thus, a group need not be entirely excluded from the political process—the fact that it is a political minority will be sufficient. No doubt men bear the burden of social stereotyping too—it is enough that, on the whole, women face a significantly greater degree of social disadvantage. 'Backward classes' in India may not be poor in absolute terms—relative material disadvantage is all that is required. That said, the advantage gap between relevant groups must be significant rather than trivial. Hence our first condition that makes a ground eligible for the protection of discrimination law: it must classify persons into groups with a significant advantage gap between them. Notice that the relative disadvantage of a group (say women) makes the entire ground (sex) eligible for protection, at least in a *prima facie* sense. We will see shortly that sometimes the duties imposed by discrimination law do apply asymmetrically such that disadvantaged groups are given a greater degree of protection.

Grounds

The second, additional, requirement that judges have insisted upon is that a candidate ground must either be immutable or it must constitute a fundamental choice (See generally, Wintemute 1995) if it is to

be protected. These requirements together amount to a demand that the ground be normatively irrelevant, that is, our possession of these grounds should not affect how successful our lives are.

Immutability of a characteristic has been the most frequently used rationale, especially in cases involving racial classifications. In *Korematsu*, the US Supreme Court noted that the appellant 'belongs to a race from which there is no way to resign'.²³ Courts have understood 'immutability' broadly, at least inasmuch as they include not only characteristics that cannot be changed, whether a characteristic is mutable,²⁴ but also those whose initial acquisition itself was not based on a choice made by the possessor. Apart from race, first place.²⁵ Other characteristics that have been protected for immutability-based reasons include sex,²⁶ marital status of one's parents,²⁷ place of residence of young children,²⁸ and citizenship.²⁹

Judicial reliance on immutability as the sole test for selecting a protected characteristic has been severely criticized (Yoshino 1998: 510–15, 530–6). It has been shown that it tends to be biased towards protecting corporeal grounds, that is, that is, i.e. those defined by nature, for example race, sex, etc. Non-corporeal or social grounds like religious status, linguistic identity, marital status, sexual orientation, etc, which are more easily hidden and (arguably) changeable, are less favourably treated.³⁰ These behavioural grounds manifest themselves to the outside world only through behaviour or conduct. In *High Tech Gays*, Judge Brunetti held that homosexuality is behavioural, 'hence [it] is fundamentally different from traits such as race, gender, or alienage'.³¹ Thus, the argument goes, homosexuals should not be part of the protectorate. Reacting to these types of cases, Sunstein rhetorically asked if the discovery of an accessible race-altering drug could have any implication on the protection of race (Sunstein 1994: 2410, 2443). Feminists have also raised the same concerns, arguing that the immutability test can be (and has been) used to deny protection to pregnancy, since pregnancy is (assumed to be) within the control of a woman (Kessler 2001: 371). Furthermore, immutability is in any case a matter of degree—even one's sex can be changed, while gender is reasonably mutable, to the extent that it is possible to distinguish sex from gender.³² Even grounds such as caste and race can be hidden, if not changed.

The judicial reaction to these criticisms was two-fold. One way in which courts reacted to this problem was by distinguishing between 'strict' and 'effective' mutability:

It is clear that by 'immutability' the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex... the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty...³³

There are other similar cases where courts have been satisfied with effective immutability, where changing the trait would impose significant personal costs.³⁴ Obviously, these costs are more than mere economic ones, and include psychological and social costs as well (Gibson 1991: 772, 786-7).

Once this is accepted, it is easy to see how effective immutability merges with fundamental choice, for 'immutability may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.'³⁵ This explicit recognition of fundamental choice alongside immutability as an alternative basis for protection of a ground was the second judicial response to the criticisms against the immutability test. Thus, while grounds such as marital status, pregnancy, and religious status are (to an extent) a matter of choice and could be changed, such change is usually impossible without significant personal costs to the individual.³⁶ When judges were already protecting characteristics over which we lack effective control, protection for characteristics that constitute a fundamental choice merely lay further along the same spectrum, rather than in a separate category altogether. By protecting grounds constituting fundamental choice, discrimination law resists assimilationist demands that those carrying these grounds must convert (that is, that is, give up), pass-off (that is, that is, hide), or cover (that is, that is, not-flaunt) their chosen characteristic (Yoshino 2001-2002: 769).

To be plain, the choice in question is important because it is fundamental to the person whose choice it is.³⁷ Justice L'Heureux-Dubé in *Miron* equates marital status to religion and citizenship: they may be matters of choice, but involve such fundamental personal judgments

that legal outcomes should not depend on the failure to make a particular choice.³⁸ Justice O'Regan echoed the point in *Harksen*, where she held that 'the decision to enter into a permanent personal relationship with another is a momentous and defining one'.³⁹

In addition to being fundamental, the choice should be valuable (or, at least, not-without-value). In *Nyquist*, for example, while rejecting the justification offered by the State that the law giving scholarships to citizens but not permanent resident aliens was intended to encourage naturalization, the majority held that resident aliens pay their full share of taxes and often provide leadership in many spheres of community life, and that the state is not harmed in providing them equal benefits.⁴⁰ Thus, the second requirement for eligibility for protection is that the ground in question must be an effectively immutable trait or constitute a valuable fundamental choice. Examining these alternative features—immutability and fundamental choice—through the lens of 'choice' makes them appear contradictory. We seem to be protecting grounds over the possession of which we have no choice, and also grounds that constitute a fundamental choice. But that is the wrong lens to examine these selection criteria. It is clear that judges have used these criteria to identify grounds that are normatively irrelevant. When a ground is immutable, possessing it is not generally immoral. When a ground represents a valuable fundamental choice, it is positively valuable, rather than merely not-immoral.

The shape of the protectorate of discrimination law is not symmetric.⁴¹ While a ground may be protected, the protection offered to all its cognate groups is not necessarily the same. The question is whether women alone are protected from sex discrimination, or also men; and, when both are protected, whether they are protected to the same degree. There are three mutually incompatible positions a jurisdiction could adopt on the question of symmetrical protection of groups: (i) completely symmetric protection, where the cognate and the protected groups are offered exactly the same degree; or (ii) completely asymmetric protection, where only the protected group gets any protection at all; or (iii) largely asymmetric protection, where both groups benefit, but protected groups benefit more than cognate groups.

The prohibition on direct discrimination usually applies symmetrically for most grounds. There are, however, exceptions. The

most stable exception common to all jurisdictions is the asymmetric protection of disability: only a disabled person can bring a claim of discrimination, an able-bodied person cannot claim disability discrimination. Even though the actual prohibition on direct discrimination is usually symmetric, members of cognate groups who lose out because of the operation of a justified affirmative action measure are deemed not to have suffered direct discrimination. Thus, all jurisdictions under study adopt the third position by providing largely asymmetric protection for most grounds, and completely asymmetric protection for some grounds (mainly disability).

To summarize, the scope and shape of the protectorate of discrimination law is determined by a complex interaction between two factors: grounds and groups. Its scope is determined by two cumulative requirements for protecting a ground: that it must classify persons into groups with a significant advantage gap between them, and that it must either be immutable or constitute a fundamental choice. The shape of the protectorate is largely asymmetric, in favour of greater protection for protected groups and less so for cognate groups.

Duty-bearers

Having looked at the protectorate of the duties of discrimination law, it is time to examine who the bearers of the duties imposed by discrimination law are. Unlike typical duties in criminal law or the law of torts, the duties of discrimination law are not borne by everyone. Instead of a universal approach, the law identifies specific types of persons to shoulder its burdens. In many respects, discrimination law has expanded beyond what the lay model would characterize as discriminatory. In respect to the question currently under consideration, however, the law is more restrained: it refuses to regulate certain types of conduct that laypeople would view as discriminatory. At the start of this chapter, we looked at the English common law duty on the providers of certain public utilities—innkeepers, blacksmiths, common-carriers—to refrain from discrimination (although this prohibition on ‘discrimination’ was not ground-sensitive in the contemporary sense). However, when the US Congress sought to extend legal protection to ground-sensitive discrimination by private persons in 1875, it hit a judicial roadblock. The Civil Rights

Act of 1875 had declared that had declared that ‘all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.’ The US Supreme Court struck it down as unconstitutional, asserting that the 14th Amendment governed state action alone.⁴² Discrimination law has come a long way from this nineteenth-century controversy. As far as the practice of discrimination law is concerned, it is no longer contentious that anti-discrimination duties apply to public as well as private persons—, that is, in ‘vertical’ as well as ‘horizontal’ relationships respectively. The debate has shifted to the determination of which private persons

In most jurisdictions, constitutional as well as statutory provisions impose the anti-discrimination duties and license affirmative action.⁴³ The legal source of the duties usually has implications for who the duty-holder is. In general, duties imposed by constitutions and bills of rights apply only to the ‘state’ or ‘public authorities’,⁴⁴ whereas statutory obligations tend to apply to public as well as private bodies. The two exceptions to the general rule regarding constitutional texts are South Africa⁴⁵ and the European Union—⁴⁶ constitutional texts of both these jurisdictions have provisions that are worded broadly enough to impose non-discrimination obligations not merely on public authorities but also on private bodies, although these horizontal constitutional duties are normally given effect to by statutes. Constitutional provisions are framed vaguely, and usually guarantee a right to equality—the right against discrimination is usually understood to be an aspect of this right in all jurisdictions. Judges have interpreted the duties corresponding to these rights in relation to (but not necessarily mirroring) the more specific duties imposed by statutes.⁴⁷ Although applicable usually to the state, judges have sometimes given these constitutional duties ‘indirect’ horizontal effect (not to be confused with ‘indirect discrimination’).⁴⁸ They have done so by exercising their law-making powers to develop the common law in light of constitutional principles. The Canadian Supreme Court has, for example, held that:

Where ... private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the Charter [of Rights and Freedoms] will not apply.... this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.⁴⁹

The House of Lords went a step further by suggesting that:

'the time has come to recognise that the values enshrined in articles 8 and 10 [of the Human Rights Act] are now part of the cause of action for breach of confidence.... The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body ... as they are in disputes between individuals and a public authority.'⁵⁰

Even in the context of anti-discrimination law, the House of Lords has used its interpretative power under section 3 of the Human Rights Act to give indirect horizontal effect to the right against discrimination in the context of a landlord-tenant relationship.⁵¹ Comparably, the US Supreme Court has held that the judiciary, as an organ of the state, is constitutionally prohibited from enforcing private discriminatory contracts.⁵² It appears, therefore, that a constitutional prohibition on discrimination by the state has implications for the anti-discrimination duties of private persons. It is better to consider the state's refusal to enforce discriminatory contractual terms as flowing from its constitutional obligations *qua* state. This is because the law does not prohibit non-state bodies from agreeing upon such terms—unlike the activities that we are going to examine shortly. It simply refuses to extend the contract enforcement services that the state normally provides to discriminatory contractual terms.

Statutory (non-constitutional) duties identify certain types of persons as the duty-bearers—usually employers,⁵³ landlords,⁵⁴ associations,⁵⁵ retailers,⁵⁶ service-providers,⁵⁷ educational institutions,⁵⁸ and so on. These duties apply irrespective of whether these are state institutions or non-state. So, the state—wearing its employer or service-provider hat—carries these statutory duties in addition to

its constitutional anti-discrimination obligations. The duty-bearers under statutory regimes tend to be limited in three different senses. First, the sectors of human activity to which these duties apply are limited. Second, within these sectors, these duties apply unidirectionally. Finally, these statutory duties are not comprehensive, in that they govern some but not all activities of these duty-bearers.

The sectoral limitation essentially means that statutory duties in discrimination law operate in sectors such as employment, health care, provision for goods and services, education, etc. All these sectors are quasi-public inasmuch as they exclude deeply personal areas of human relationships—such as friendships and romantic relationships. It is, of course, possible to discriminate against protected groups in one's choice of friends or romantic partners—but the law tends not to regulate discrimination in deeply intimate and personal spheres. The state, on the other hand, must never discriminate: constitutional provisions are not limited to specified sectors as statutory regimes are (admittedly, it is difficult to think of examples of intimate and personal activities that the state could perform).

Second, statutory duties tend to be unidirectional, in the sense that they attach to employers but not employees or independent contractors,⁵⁹ to providers of goods and services but not to consumers,⁶⁰ to landlords but not tenants.⁶¹ Another way of understanding this point is to reimagine the protectorate as consisting of specific groups such as consumers, employees, patients, students, tenants, citizens/subjects.⁶²

Finally, unlike constitutional duties, statutory duties are not comprehensive. Constitutional duties are comprehensive in the sense that they apply to all state action.⁶³ It is not just certain functions that the state must discharge without discrimination. Instead, whatever the state does must be done while respecting its anti-discrimination duties. As Bamforth rightly notes, 'highly significant anti-discrimination issues nowadays arise in the context of the criminal law, police practice, judicial review (particularly in the context of immigration law), family law and property law' (Bamforth 2004: 693–5). Statutory duties, on the other hand, burden the duty-holders only when they perform certain specified functions. For example, section 29 of the UK Equality Act 2010 forbids a service-provider from discriminating in providing services. This third qualification is slightly different from, and applies in addition to, the sectoral limitation we have already discussed.

Employers usually carry anti-discrimination duties only when they do things in their capacity as employers—decisions about recruitment, terms of employment, pension, dismissal, etc. An employer is usually free to discriminate—even on protected grounds—in choosing his friends, in determining which suppliers to buy goods from, in patronizing restaurants for workplace parties, etc.⁶⁴

The scope and weight of the duties of discrimination law vary depending on who the duty-bearer is. We will see in the next section that the state generally shoulders a heavier burden of these duties than private persons—especially when it comes to affirmative action duties. But even amongst private persons, the duty is heavier on those with greater power. For example, the UK Equality Act 2010 makes exceptions for landlords with ‘small premises’,⁶⁵ while the South African Employment Equity Act 1998 imposes mandatory affirmative action duties only on ‘designated employers’—apart from public bodies, this category includes private employers who employ more than 50 employees or have an annual turnover above a fixed threshold.⁶⁶—Title VII of the US Civil Rights Act only applies to employers who have 15 or more employees workers.⁶⁷ Although controversial amongst theorists, it is clear that the law is sensitive to at least some concerns relating to costs and affordability.

The Duties

The third step towards understanding the overall structure of discrimination law is to examine the shape and scope of the duties that it imposes. Contemporary discrimination law prohibits direct and indirect discrimination and harassment, requires reasonable accommodation, licenses (or mandates) affirmative action. In this section, I will explain the broad contours of each of these concepts. Before we do that, it is worth noting that there are significant differences between jurisdictions over the use of these terms—for example, reasonable ‘accommodation’ is reasonable ‘adjustment’ in British law. ‘Direct’ discrimination (or ‘disparate treatment’) was simply called discrimination, until the need to distinguish it from ‘indirect’ discrimination (or ‘disparate impact’) arose. Scholars disagree on the proper characterization of ‘affirmative action’—depending on whether or not they approve of it, people characterise it as ‘positive

discrimination’, ‘positive action’, ‘reverse discrimination’, ‘compensatory discrimination’, etc. Based on the form it takes, specific affirmative action measures are referred to as ‘quotas’, ‘reservations’, ‘preferential treatment’, ‘outreach’, ‘access programmes’, ‘diversity programmes’, ‘indirect affirmative action’, ‘positive duties’, and such like. I do not intend the terms to settle any ideological disputes by the choice of labels.

Most non-lawyers would associate a prohibition on discrimination primarily with a prohibition on direct discrimination. Direct discrimination (or ‘disparate treatment’) entails unfavourable or less favourable treatment ‘on the ground of’ a protected characteristic (such as race, sex, religion) or, sometimes, a combination of such characteristics (to deal with intersectional or multiple ground discrimination faced by, say, black women).⁶⁸ The first thing to note is that direct discrimination is used to characterise some form of ‘treatment’—this may be an act or an omission. In other words, the norm against direct discrimination is an action-regarding norm—it makes essential reference to something done (or the failure to do something)—as opposed to a situation-regarding norm (Holmes 2005: 175). Contrary to what the American label ‘disparate impact’ implies, we will see shortly that the norm against indirect discrimination is also an action-regarding norm.

Second, the treatment must be ‘on the ground of’ (or ‘because of’, ‘based on’, ‘for a reason related to’) a protected characteristic. Some causal connection between the protected ground and the treatment in question is required. Opinions diverge on whether this is an objective standard or a subjective one. In the United States, courts have held that this connection is established only if a discriminatory motive, purpose, or intention on the part of the discriminator has been proved.⁶⁹ This subjective approach probes the mental state of the perpetrator in order to determine whether the causal requirement has been satisfied. A somewhat broader subjective approach—where the causation requirement is satisfied by proof of conscious as well as sub-conscious intention—has been endorsed by Lord Nicholls in the UK.⁷⁰ On the other hand, in the landmark *James v. Eastleigh Borough Council* case, Lord Goff considered that ‘cases of discrimination ... can be considered by asking the simple question: would the complainant have received the same treatment ... but for his or her

sex?⁷¹ This objective 'but-for' formula was motivated by a desire to avoid 'complicated questions relating to concepts such as intention, motive, reason or purpose'.⁷²

In *James*, there was an exact correspondence—rather than a mere correlation—between the actual ground on which the distinction was made (pensionable age) and a protected characteristic (sex). Cases where the objective test is satisfied but the (broader) subjective test isn't will be rare. Notice that the required intention/purpose/motive is only to use the protected ground in some way—the law does not require the intention to be malicious. A subjective intent under Lord Nicholls's standard can usually be inferred from any distinction that directly relies on a protected ground. Cases where a protected ground is not directly relied upon to make a distinction are far more likely to involve indirect discrimination rather than direct discrimination à la *James*.

Third, while discrimination law sometimes requires proof of unfavourable treatment, at other times the claimant must show less-favourable treatment. In other words, sometimes the claimant has to show relative disadvantage owing to the treatment in comparison with a similarly situated real or hypothetical comparator, at other times non-relative disadvantage will suffice. The traditional position in most jurisdictions has been to insist upon the comparator analysis⁷³—unsurprising given the assumption about the ties between discrimination and equality. Often the case turns on the choice of the appropriate comparator,⁷⁴ making the issue of comparators extremely controversial.

Apart from the difficulties in choosing the right comparator, an insistence on a comparator raises problems in cases where there is no appropriate comparator.⁷⁵ The prime example is that of discrimination based on the ground of pregnancy. In *Turley*, for example, a pregnant woman was recognised as 'a woman, as the Authorised Version of the Bible accurately puts it, with child, and there is no masculine equivalent'.⁷⁶ Other courts, in their desperation to find a comparator, have compared pregnancy with sickness.⁷⁷ The inadequacy of such fantastical comparisons forced courts (and legislators) to seek a non-comparative approach.⁷⁸ The non-comparative approach to pregnancy discrimination has also been extended to disability discrimination⁷⁹ and cases where multiple grounds are

involved or intersectional discrimination has been claimed.⁸⁰ In other areas, although comparators are technically required, different jurisdictions place a varying degree of emphasis on this requirement. For example, in *Shamoon*, Lord Nicholls urged that:⁸¹

[T]ribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground ... or was it for some other reason?

There is some recognition that the comparator analysis is only a means to determine the causation question. Similar rulings expressing a general scepticism over the requirement of a comparator for proving direct discrimination have been made in Canada.⁸² The South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 gives an entirely non-comparative definition of discrimination.⁸³ It is in recognition of these trends that Principle 5 of the 'Declaration of Principles of Equality' developed by the Equal Rights Trust defines direct discrimination in a manner which embraces the comparative as well as the non-comparative approach:

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment.⁸⁴

Finally, whether and to what extent direct discrimination can be justified depends on the protected characteristic concerned and whether the norm is constitutional or statutory. There are significant jurisdictional variations too. Constitutional anti-discrimination clauses almost always permit the justification of direct discrimination, although the standard that must be met is often quite high.⁸⁵ In statutory contexts, jurisdictions differ more significantly. The US Civil Rights Act of 1964 permits limited justification of direct discrimination.⁸⁶ Canadian and South African statutes also permit the justification of direct discrimination, although the justificatory standard is quite high.⁸⁷ In the UK, direct discrimination cannot normally be justified in an adjudicative context, although there are numerous legislative exceptions to this prohibition.⁸⁸ For certain

grounds, such as age, the UK allows the justification of direct as well as indirect discrimination. What remains of the blanket prohibition has been criticized by some judges who have called for some form of justification for direct discrimination.⁸⁹ The overall consensus seems to allow limited justification of direct discrimination; it also agrees that the standard of review for justifying direct discrimination is higher than that for justifying indirect discrimination.

Indirect discrimination (or 'disparate impact' as it is called in the US) involves an apparently neutral practice or policy which puts persons belonging to a protected group at a particular disadvantage.⁹⁰ The concept was first developed in the landmark American case *Griggs v. Duke Power Company*. The US Supreme Court held that the requirement of an educational qualification which disproportionately disqualified blacks from employment would violate Title VII of the Civil Rights Act of 1964 unless the requirement could be justified on the touchstone of business necessity.⁹¹

Like direct discrimination, indirect discrimination is an action-regarding norm. It is triggered by some provision, policy, practice, or criterion that the alleged discriminator applies (or seeks to apply) to the complainant. Of course, indirect discrimination is established if and only if a situation-regarding criterion—disproportionate impact on a group—is also satisfied (Holmes 2005: 175, 184). But a mere statistical disproportionality in, say, a workforce, will not amount to indirect discrimination unless it can be linked to some action, such as a provision or a policy.⁹²

Second, the connection between the protected ground and the act in question is different from that in the case of direct discrimination. Instead of the decision being based on a protected characteristic, it should have a disproportionate impact on a protected group. For example, in *Griggs*, the decision had a disproportionate impact on blacks, a protected group. Indirect racial discrimination in *Griggs* was direct discrimination on the ground of educational qualification. However, educational qualification is not a protected ground, while race is. The claimant is not required to prove any discriminatory intention, motive, or purpose on the part of the employer. The apparent ground of discrimination could be anything whatsoever, what is moot is its connection with a protected ground in the context of a given case. Thus, the list of apparent grounds on

which discrimination is prohibited is potentially limitless, for any such ground may be a proxy for a protected ground under certain circumstances. But these apparent grounds do not matter for their own sake. They matter because—and only because—they are proxies for protected grounds in these circumstances.

Thirdly, although indirect discrimination is structurally comparative, the nature of the comparator analysis is very different from that used in direct discrimination cases. The comparative analysis for indirect discrimination involves groups rather than individuals. Section 19(2)(b) of the UK Equality Act 2010 requires that the offending measure must put 'persons with whom [the claimant] shares the characteristic at a particular disadvantage when compared with persons with whom [the claimant] does not share it'. This usually avoids the need to find an individual 'appropriate comparator'—a search that has plagued direct discrimination jurisprudence. There are, of course, controversies surrounding comparison in indirect discrimination too—but they are of a different character. The first problem is the determination of the relevant pool within which the two comparator groups are to be identified. In the case of employment discrimination, for example, should the relevant pool be the entire population of the jurisdiction, or only the pool of persons qualified to perform the job in question, or simply the workforce of the employer? We will often arrive at different conclusions about whether a policy disproportionately excludes women in comparison to men depending on our relevant pool. The second controversy surrounds the extent of disproportionality required for it to count as indirect discrimination. For example, section 1(1)(b)(i) of the UK Sex Discrimination Act 1975 required proof of the fact that 'the proportion of women who can comply with [the requirement or condition] is considerably smaller than the proportion of men who can comply with it'.⁹³ Following developments in EU law, the UK Equality Act 2010 has now replaced this standard by only insisting on proof of 'particular disadvantage'.⁹⁴ Related to this is the issue of whether a claimant needs to provide statistical evidence to prove disproportionate impact, or whether a rule of thumb assessment of likely impact will suffice.⁹⁵

Fourth, indirect discrimination is almost always justifiable. The discriminator is entitled to show that the discriminatory policy is a

necessary and proportionate tool to pursue a sufficiently important objective. Although the standard required to justify indirect discrimination is usually quite high, it tends to be less exacting than justifying direct discrimination. This, along with the fact that the two forms of discrimination are considered to be mutually exclusive,⁹⁶ has led to expansionary pressures on the scope of direct discrimination, from claimants, and a concomitant backlash from defendants. These difficulties in clarifying the boundary between direct and indirect discrimination motivated the Canadian Supreme Court to reject the bifurcated approach and adopt instead a common legal response to either form of discrimination.⁹⁷ This strategy has not found favour in any of the other jurisdictions so far.

The usual remedy for unjustified indirect discrimination is a change in the offending rule, practice or policy—either the abandonment of the rule in favour of a new, non-discriminatory one, or the retention of the old rule but with exceptions to accommodate the disadvantaged minority. In the absence of discriminatory intent, it is rare for damages to be awarded for indirect discrimination.⁹⁸

Reasonable accommodation (or 'reasonable adjustment') is yet another facet of anti-discrimination law. Section 20 of the UK Equality Act 2010 imposes three requirements that amount to 'reasonable adjustments' in the context of disability:

a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

'Reasonableness' must be seen as a limit to the accommodation that can be sought. The considerations that go into deciding whether

an adjustment is reasonable are similar to those that determine whether an instance of indirect (or, sometimes, direct) discrimination can be justified. The right to reasonable accommodation under the Americans with Disabilities Act 1990 is available only to a 'qualified individual with a disability',⁹⁹ which is defined as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'¹⁰⁰ There is no logical reason why reasonable accommodation should be limited to disability alone. Meenan argues that 'the reasonable accommodation approach of disability law could be applied to physiological changes associated with ageing' (Meenan 2007: 278, 283). Although not characterised as such, flexible working hours and parental leave provisions are examples of reasonable accommodation for women, who bear the brunt of child-care duties. So is a provision for flexible holidays to accommodate diverse religious festivals. In fact, sections 7(e) and 8(h) of the South African Equality Act require 'steps to reasonably accommodate the needs' of persons on the basis of their race and gender respectively. Here is an example of a development that is ground-sensitive in most jurisdictions, but one that is sensitive to different sets of grounds in each of them. Almost all jurisdictions provide for reasonable accommodation for disability discrimination. But some also allow it for religion, others for sex, and Canada and South Africa for all grounds. The ground-sensitivity of reasonable accommodation does not seem to be stable, and I will therefore assume that the jurisdictions are moving towards allowing it for discrimination based on any ground.

Each of the aforementioned jurisdictions envisages the failure to provide reasonable accommodation (in certain specified contexts) as a distinct wrong in discrimination law. Conceptually, however, it is difficult to imagine a case where a failure to provide reasonable accommodation will not also amount to indirect discrimination (and, sometimes, even direct discrimination, if we follow the broader understanding of this concept as envisaged in *James v. Eastleigh Borough Council*). This failure will always result in a protected group being disproportionately disadvantaged or even entirely excluded.¹⁰¹ Thus, the duty to provide reasonable accommodation can be thought of as a form of remedy for discrimination—one that works by requiring exceptions to the general norm instead of a change in the norm

itself. Indeed, in *Simpsons-Sears*, the Canadian Supreme Court accepted that reasonable accommodation was an available remedy for all forms of indirect discrimination:

Where there is adverse effect discrimination on account of creed, the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general workforce which must be considered. In such cases, there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation. The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.¹⁰²

The conceptual difference between the Canadian approach and that of other jurisdictions boils down simply to the fact that Canada permits discrimination to be remedied by creating exceptions to the discriminatory norm in all cases where it is possible. Other jurisdictions normally require the offending rule to be replaced by a non-discriminatory rule, except where the retention of the offending rule with exceptions is specifically authorized. The difference is significant: although it is easier to create exceptions than to reformulate general rules, the former also give the impression that a certain group is getting 'special treatment' and may be more controversial for that reason. Furthermore, the availability of a separate cause of action for reasonable accommodation in jurisdictions other than Canada allows litigants to avoid having to prove the onerous requirements for establishing indirect discrimination. These practical distinctions aside, what emerges from our discussion is the notion that the right to reasonable accommodation is best understood as a secondary right that one becomes entitled to upon breach of the primary right against direct or indirect discrimination. Secondary rights are therefore parasitic on primary rights. This understanding also shows the poverty of the simplistic approach that divides anti-discrimination duties on the basis of whether they are negative (do not discriminate) or positive

(provide reasonable accommodation), and of the concomitant discomfort with reasonable accommodation duties as if they represent a startling departure from 'traditional' anti-discrimination duties (Karlan and Rutherglen 1996: 1).

We have seen that the duty to refrain from direct and indirect discrimination, and the duty to provide reasonable accommodation are usually subject to the justification defence—although some jurisdictions do not permit this for direct discrimination. For this reason, we will fail to fully understand those duties without first understanding this concept. Justification usually entails a means-end analysis where the law tests the desirability of the objective sought to be achieved, and the proportionality and necessity of the discriminatory means employed. This is often expressed as the need to demonstrate that the protected characteristic is a necessary 'bona fide occupational qualification'. The degree to which the discriminator is morally culpable and the degree to which the victim is harmed are relevant to this analysis. The intensity of judicial scrutiny of the justification defence is sensitive to the nature of the duty infringed, the protected ground in question, and the nature of the discriminator (especially whether it is a public or a private person and the degree to which it is able to bear the cost of non-discrimination).

Anti-discrimination legislation also tends to prohibit harassment 'based on' a protected characteristic, and also victimization of (or retaliation against) a complainant for having made the complaint.¹⁰³ The Equal Rights Trust defines harassment thus:

'Harassment constitutes discrimination unwanted conduct related to purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment'.¹⁰⁴

Harassment cannot be justified, perhaps because of the significant extent to which the harasser is morally culpable. This is also the reason why direct discrimination is often not justifiable, or is more difficult to justify—although the moral culpability of the direct discriminator is often less evident than that of the harasser.¹⁰⁵ Justification may be possible if the defendant failed to protect the claimant from harassment by a third person (for whom the defendant is legally responsible, as is an employer for the behaviour of his subordinates), especially if she can show that the harassment took place despite the reasonable steps she had taken to prevent it.

In addition to regulating discriminatory harassment, jurisdictions can, and do, prohibit harassment per se. This prohibition may constitute a criminal offence, and usually requires proof of intent. This harassment, which need not be ground-based, is not a part of discrimination law.

Finally, there is the issue of affirmative action. The term covers a wide variety of measures designed to benefit a protected group. The extent to which they actually achieve this purpose is a matter of empirical investigation and will depend on a number of contextual factors. What is essential is that their chief purpose is to benefit a group that is, in some sense, disadvantaged. Section 15 of the South African Employment Equity Act, for example, requires affirmative action in favour of 'designated groups'—section 1 defines 'designated groups' to mean 'black people, women and people with disabilities'. Similarly, Article 15(4) of the Indian Constitution permits 'any special provision for the advancement of any socially and educationally backward classes of citizens'.¹⁰⁶ It is, of course, possible that a group is wrongly characterised as disadvantaged—this mischaracterization may even be insidious. What is important is that even in such cases, those undertaking the measure will feel compelled to insist that the beneficiary group is actually disadvantaged. No one advocates 'affirmative action' measures for groups they openly acknowledge not to be disadvantaged. Some may object to the characterization of affirmative action as part of 'discrimination law' (See Abram 1986: 1312). Admittedly there are important distinctions between affirmative action and the other concepts examined above. What is also clear is that the practitioners—lawyers, judges, litigants, legislators—all assume that there is an essential connection between affirmative action and discrimination. Several references in the discussion that is to follow allude to anti-discrimination statutes that regulate ground-based affirmative action. At least insofar as the practice is concerned, discrimination and affirmative action seem to be inseparable. Because the practice is so unequivocal, theorists must not be too quick to deny this connection.

Affirmative action measures come in a variety of shapes and sizes.¹⁰⁷ In their broadest usage, they can be remedial or non-remedial. Remedial measures, understood narrowly, are those measures that benefit the same particular persons who suffered disadvantage due

to discrimination. They respond to specific acts of direct or indirect discrimination against particular persons and are usually undertaken by the discriminator who caused the disadvantage in the first place. A good example is found in the facts of *Ricci v. DeStefano*, where a city discarded the results of a promotional test because no black fire-fighter passed it, and conducted a new test.¹⁰⁸ The city was worried that the original test may have been indirectly discriminatory. Its cancellation and the institution of a new test was therefore a remedial affirmative action. The city lost the case because it failed to show that the original test would have amounted to unjustified indirect discrimination. While this ruling is controversial for several other reasons, it does not cast doubt on the fact that at least in cases where discrimination has been or can be established, affirmative measures may be taken to stop or remedy it. This category of affirmative action measures in fact concerns the question of appropriate remedies, and is likely to be less illuminating for our purposes the notion that discriminatory acts sometimes require affirmative action to be remedied is pedestrian.

We are mainly concerned with non-remedial affirmative action measures. These measures are not designed to remedy specific acts of discrimination against particular persons, although they may well aim to remedy past discrimination against a group generally.¹⁰⁹ Even so, the beneficiaries need not have suffered the past discrimination personally, and the person or body undertaking the affirmative action measure may not be responsible for this past discrimination. Non-remedial affirmative action measures come in a variety of shapes and sizes. They could range from light-touch transparency-increasing measures (such as requiring the publication of the diversity profile of a workforce) to very demanding measures (such as quotas). They can be entirely voluntary, or imposed through public procurement contracts, or statutorily mandated. They can be direct, in that they directly allocate benefits to a protected group; or they can be indirect, in the sense that they are facially neutral (that is, that is, not based on a protected ground) but are designed to primarily benefit a protected group. A good example of such indirect measures is the Texan 'Top Ten Percent Law'. In 1996, the US Court of Appeal Fifth Circuit had declared direct affirmative action programmes for racial minorities unconstitutional.¹¹⁰ Following this ruling, Texas enacted the Top Ten

Percent Law, requiring that 'each general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class'.¹¹¹ Increasing the intake of underrepresented minorities was the announced target of this measure, and it did succeed in increasing the number of racial minorities being admitted to Texan Universities.¹¹² Thus, a facially neutral policy relied on the lack of racial diversity in the high school system to increase the access of racial minorities to higher education. It is an indirect affirmative action measure because it does not rely upon race directly in order to achieve its intended objective, which is to disproportionately benefit racial minorities.¹¹³

We can now see the entire range of duties imposed by discrimination law—duties to refrain from direct and indirect discrimination and harassment, duties to provide reasonable accommodation, and duties to undertake positive action. These duties do not, in themselves, require the conferment of a substantive benefit (such as education, housing, employment, etc) to all members of a protected group. They control the manner in which certain allocative decisions can be made. As a result of their operation, some, but not all, members of protected groups will get access to these scarce tangible benefits. Together, these duties determine the scope of the protection of anti-discrimination law.

This chapter and its predecessor should have made it clear that discrimination law is unusual and complex. It protects all of us, but to varying degrees depending on the context. In particular, its protection depends on the sensitivity of the impugned act or omission to certain personal characteristics called grounds, and our membership of a protected group. This sensitivity to grounds is what distinguishes discrimination law from other welfare measures such as legal guarantees to food, healthcare, housing, etc. Any theory of discrimination law must account for this ground sensitivity generally, and explain the basis on which the protected grounds are selected. It must also justify the role that relative group disadvantage plays in determining the protection afforded.

Anti-discrimination duties are imposed not on members of advantaged groups, but on certain categories of persons which primarily include the state, employers, and providers of goods and services. These duties are imposed unidirectionally—on the employer but not the employee, on the service-provider but not the consumer, etc. Again, the scope of the duties vary depending on who the duty-holder is (especially whether it is a public or a private body) and the context where the duty is applicable. Theoretical explanations must help us understand these peculiarities.

Finally, the duties that discrimination law imposes do not guarantee access to any substantive benefits that flow from the sectors it regulates, including employment, health care, education, housing, etc. A theoretical account must tell us what interest it is, then, that discrimination law protects, and why can its infringement sometimes be justified. Some of these duties give rise to concomitant rights, others don't. An intention to discriminate is relevant for evidential or remedial reasons, but is generally not essential to prove discrimination. The role of comparators, at least in the context of direct discrimination, is shaping into a similar framework.

These are some of the central features of the doctrine of discrimination law in the chosen democratic, culturally-conversant, English-speaking, doctrine-swapping, common-law jurisdictions. These features gloss over important matters of detail, where the practice in these jurisdictions is significantly divergent. Even with respect to these core features, there are issues on which a chosen jurisdiction is an outlier. But there is remarkable consensus on most of the core issues identified in this chapter, even in the atypical jurisdictions.

Appendix: Overview of Discrimination Law in India

Duty Ground	Direct Discrimination		Indirect Discrimination ⁱ		Reasonable Adjustment ⁱⁱ		Affirmative Action ⁱⁱⁱ		Harassment ^{iv}
	Public Sector	Private Sector	Public Sector	Private Sector	Public Sector	Private Sector	Public Sector	Private Sector	
Sex	Prohibited ^v	Prohibited in employment ^{vi}	Unclear	Unclear	Provision in certain specified contexts ^{vii}	Provision in certain specified contexts ^{viii}	Permitted generally, ^{ix} mandated in certain contexts ^x	Not prohibited	Prohibited ^{xi}
Caste	Prohibited ^{xii}	Prohibited in certain contexts ^{xiii}	Unclear	Unclear	No provision	No provision	Permitted generally, mandated in certain contexts ^{xiv}	Not prohibited	Prohibited in certain contexts ^{xv}
Religion	Prohibited ^{xvi}	Prohibited in very limited contexts ^{xvii}	Unclear	Unclear	No provision	No provision	Unclear ^{xviii}	Not prohibited	Not prohibited
Tribe	Prohibited ^{xix}	Not prohibited	Unclear	Unclear	No provision	No provision	Permitted generally, mandated in certain contexts	Not prohibited	Prohibited in certain contexts ^{xx}
Disability	Prohibited in certain contexts ^{xxi}	Not prohibited ^{xxii}	Prohibited in certain contexts ^{xxiii}	Not Prohibited ^{xxiv}	Limited provisions ^{xxv}	No provision	Mandated in certain contexts ^{xxvi}	Not prohibited	Not prohibited
Sexual Orientation	Not prohibited ^{xxvii}	Not prohibited	Not prohibited	Not prohibited	No provision	No provision	Not prohibited	Not prohibited	Not prohibited
Gender	Prohibited ^{xxviii}	Not prohibited	Unclear	Unclear	No provision	No provision	Mandated in certain contexts ^{xxix}	Not prohibited	Not prohibited
Identity	Not prohibited	Not prohibited	Unclear	Unclear	provision	provision	in certain contexts ^{xxix}	Not prohibited	Not prohibited
Linguistic Identity	Prohibited ^{xxx}	Not prohibited	Unclear	Unclear	No provision	No provision	Not prohibited	Not prohibited	Not prohibited

Notes: i. The concept of 'indirect discrimination' is woefully underdeveloped in the Indian context. One of the few references to it in the constitutional context was made by the Delhi High Court in the now-overruled judgment in *Naz Foundation v. Union of India* 160 (2009) DLT 277[93]. The draft Equal Opportunities Commission Bill also mentions 'indirect discrimination'.

ii. There does not appear to be any general duty to provide reasonable accommodation under any law. The Table mentions some specific measures that may be provided in certain contexts.

iii. Although affirmative action by the state is usually permitted under the Indian constitution, there is vast jurisprudence on the extent to which it is permissible, and also on the question of identification of legitimate beneficiaries.

iv. The Delhi High Court has suggested that constitutional prohibitions on discrimination include a prohibition on harassment: see *Naz Foundation v. Union of India* 160 (2009) DLT 277, para 93. However, the High Court judgment was overturned by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1.

v. Articles 14, 15(1), 16(2) of the Constitution, ss 4, 5 of the Equal Remunerations Act, 1976.

Appendix: (Contd.)

- vi. s 4, 5 of the Equal Remunerations Act, 1976.
- vii. S 48 of the Factories Act 1948, s 12 of the Plantation Labour Act 1951, s 14 of the Beedi and Cigar Workers (Conditions of Employment) Act 1966, etc., provide for crèches in certain contexts. S 4(3) of the Maternity Benefits Act 1961 prohibits an employer from requiring work that may interfere with the pregnancy or affect the health of a pregnant woman. S 5, Maternity Benefits Act 1961 grants a right to paid maternity leave.
- viii. Same as footnote vii.
- ix. Article 15(3), Constitution of India. Unlike SCs, STs and OBCs, women (in general) do not get the benefits of reservations in public employment.
- x. Articles 243D and 243T reserve seats for women in local government. A Constitutional Amendment Bill pending before Parliament mandates reservation of seats for women in central and state legislatures.
- xi. *Vishaka v. State of Rajasthan* AIR 1997 SC 3011.
- xii. Articles 14, 15(1) and (2), 16(2), 17, 29(2) of the Constitution; Caste Disabilities Removal Act 1850; Protection of Civil Rights Act 1955. Although the Caste Disabilities Removal Act was passed by the colonial state to facilitate religious conversions, it was amended by independent India in 1951 and has potential for application beyond its initially intended objective.
- xiii. The Caste Disabilities Removal Act 1850 prohibits the enforcement of any legal disability following 'loss of caste'; Article 15(2) and 17 of the Constitution and the Protection of Civil Rights Act 1955 prohibit certain discriminatory practices.
- xiv. See Articles 15, 16, 243D, 243T, 330, 332 and 335 of the Constitution of India.
- xv. S 3(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 criminalizes one who 'intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe within public view'.
- xvi. Articles 14, 15(1), 16(2), 29(2) of the Constitution.
- xvii. The Caste Disabilities Removal Act 1850 prohibits the enforcement of any legal disability following conversion; Article 15(2) of the Constitution prohibits discriminatory denial of access to shops and other public places.
- xviii. It may be possible to provide affirmative action to religious groups if they constitute an 'other backward class'.
- xix. Even though Articles 15(1) and 16(2) do not expressly mention tribal status as a prohibited ground, such discrimination will surely fall foul of the general provision in Article 14.
- xx. S 3(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 criminalizes one who 'intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe within public view'.
- xxi. (Arguably) under Article 14 of the Constitution; also Persons with Disabilities Act 1995.
- xxii. In *Dalco Engineering v. Padhye* (2010) 4 SCC 378, the Supreme Court held that the Persons with Disabilities Act 1995 does not apply to the private sector.
- xxiii. Ss 44-46 of the Persons with Disabilities Act 1995 appear to prohibit indirect discrimination on public transport, roads and buildings, without expressly using the term 'indirect'.
- xxiv. In *Dalco Engineering v. Padhye* (2010) 4 SCC 378, the Supreme Court held that the Persons with Disabilities Act 1995 does not apply to the private sector.
- xxv. S 38(1)(d) of the Persons With Disabilities Act 1995, for example, makes provision for the 'creation of a non-handicapping environment'. A proposed amendment to the Act seeks to introduce a general right to 'reasonable accommodation' by stating that its denial amounts to discrimination.
- xxvi. See s 43 of the Persons with Disabilities Act 1995.
- xxvii. *Koushal v. Union of India* (2014) 1 SCC 1.
- xxviii. National Legal Services Authority v. Union of India 2014 (5) SCALE 1.
- xxix. National Legal Services Authority v. Union of India 2014 (5) SCALE 1 [60].
- xxx. Articles 14, 29(2) of the Constitution.

Notes

- * This chapter is based on material from Khaitan (2015), chapter 3.
1. *Lane v. Cotton* [1558–1774] All ER Rep 109 KB, 114. The quotation is from a dissenting opinion, but the statement of law contained therein is not contested by the majority.
 2. *Constantine v. Imperial London Hotels* [1944] KB 693. See also, *Rothfield v. The North British Railway Company* [1920] SC 805; Kline (1917–18: 123; 1919: 109); Avins (1968: 1–7).
 3. (Galanter 1978). In footnote 1 on page 1821, Galanter cites an affirmative action policy dating back to 1895.
 4. (Bamforth, O’Cinneide, and Malik 2008: 19–23). Other questions include the possibility of justifying impermissible discrimination in certain contexts, any exceptions from the protection, clash between anti-discrimination and other rights, non-legal remedies, etc.
 5. See Canadian Charter, SA Promotion of Equality Law, ECHR, Canadian Human Rights Act.
 6. See generally, *Law v. Canada* [1999] 1 SCR 497 [39], [62]–[75]. US 14th Amendment is an exception, in that there are no specified grounds—all protected grounds have been determined by judicial interpretation.
 7. For example, Canadian Charter of Fundamental Rights and Freedoms, s 15.
 8. *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143[51]. See also, *R. v. Turpin* [1989] 1 SCR 1296 [52]; *Egan v. Canada* [1995] 2 SCR 513[180].
 9. Apart from their numerical insignificance, foreigners often do not have the right to vote. *Graham v. Richardson* 403 US 365 (1971), 372. See also *In Re Griffiths* 413 US 717. *Sugarman v. Dougall* 413 US 634; *Examining Board of Engineers v. Flores de Otero* 426 US 572; *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143[31], [51].
 10. *Hoffmann v. South African Airways* 2001 (1) SA 1 [28].
 11. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 [25] and fn 32.
 12. *Frontiero v. Richardson* 411 US 677 (1973) 686 fn 17: although women were not a numerical minority, they ‘are vastly underrepresented in this Nation’s decision making councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And ... this underrepresentation is present throughout all levels of our State and Federal Government.’ See also, *Watkins v. United States Army* 875 F2d 699, 727: the ‘very fact that homosexuals have historically been underrepresented in ... political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government’.
 13. *Frontiero v. Richardson* 411 US 677 (1973) 685: In the past, women could not ‘hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children’—even the right to vote was denied to them for long. See also *United States v. Virginia* 518 US 515, 531. See generally, *United States v. Carolene Products* 304 US 144, 153 (1938), footnote 4, per Justice Stone: ‘prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.’
 14. For an analysis of the institutional implications of political disadvantage, see J.H. Ely (1980).
 15. Most of the insights in this paragraph are borrowed from Alexander (1992).
 16. (Choudhry. 2000: 145, 156). ‘...Irrational proxies are so tightly linked to prejudice that discrimination relying on the former is tantamount to discrimination motivated by the latter.’
 17. *Lawrence v. Texas* 539 US 558, 580.
 18. See, for example, *R. v. Turpin* [1989] 1 SCR 1296[52].
 19. ‘The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment’: *President of RSA v. Hugo* 1997 (4) SA 1 CC [38]. ‘In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches’: *Watkins v. United States Army* 875 F2d 699, 724. See also, *Frontiero v. Richardson* 411 US 677 (1973) 686; *Harksen v. Lane* NO 1998 (1) SA 300 CC[63]; *Hoffmann v. South African Airways* 2001 (1) SA 1[28].
 20. The South African Constitutional Court has taken notice of incidents of societal hostility and threats faced by aliens as evidence of their disadvantage: *Larbi-Odam v. Member of the Executive Council for Education* 1998 (1) SA 745[20]. See also, *Watkins v. United States Army* 875 F2d 699, 724: ‘it is indisputable that homosexuals have

- historically been the object of pernicious and sustained hostility' and that 'reports of violence against homosexuals have become commonplace in our society'. See further, *Egan v. Canada* [1995] 2 SCR 513 [182]; *M v. H* 171 DLR (4th) 577 [64], [69].
21. Sen criticizes the focus on income as the primary focus in analysing inequality (Sen 1992: 28–30).
 22. *Regents of the University of California v. Bakke* 438 US 265, 395–6.
 23. *Korematsu v. United States* 323 US 214 (1944) 243. See also, *Fullilove v. Klutznick* 448 US 448, 496: Justice Powell said that 'Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision'. See also *R. v. McKitka* [1987] BCJ No 3210 [20]. Sunstein also talks of the 'accident of birth' being irrelevant morally: Cass R. Sunstein, 'The Anticaste Principle' (1994) 92 *Michigan Law Review* 2410, 2434; likewise, Justice Murphy noted the 'accident of race or ancestry' while reluctantly concurring with the racial classification: *Hirabayashi v. United States* 320 US 81, 111.
 24. *Korematsu v. United States* 323 US 214 (1944) 243: the appellant 'belongs to a race from which there is no way to resign'; *Fullilove v. Klutznick* 448 US 448 (1980) 496: 'Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.'; *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143 [75]: 'The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.'
 25. *R. v. McKitka* [1987] BCJ No 3210 [20]: 'the enumerated categories of s 15 all tend to reflect ... how, when and where we come into this world, matters over which we have no control.'; *Hirabayashi v. United States* 320 US 81 (1943) 111: 'The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.'; *Weber v. Aetna Casualty & Surety Company* 406 US 164 (1972) 175: 'no child is responsible for his birth and penalizing the illegitimate child is ... unjust'.
 26. *Frontiero v. Richardson* 411 US 677 (1973) 686: Sex is determined 'solely by the accident of birth'.

27. '[N]o child is responsible for his birth and penalizing the illegitimate child is ... unjust': *Weber v. Aetna Casualty & Surety Company* 406 US 164, 175. See also *Mathews v. Lucas* 427 US 495, 505; *Clark v. Jeter* 486 US 456, 461; *Milne v. Alberta* [1990] 5 WWR 650 [37]. In *Plyler*, a law denying educational benefits to children of unlawful immigrants was held to be 'directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control': *Plyler v. Doe* 457 US 202, 220.
28. In *San Antonio*, the dissenting opinion of Justice Marshall held that classification 'between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live' was a basis upon which the 'individual has no significant control' *San Antonio Independent School District v. Rodriguez* 411 US 1 (1973), 96.
29. *Larbi-Odam v. Member of the Executive Council for Education* 1998 (1) SA 745 [19]. See also, *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143 [75]: 'The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.'
30. (Yoshino 1998: 495–8) This distinction between corporeal and social characteristics must be taken with a pinch of salt. Almost all 'corporeal' characteristics are mediated by socio-cultural norms to some extent. Clothing, contact lenses, artificial colour, high-heeled boots, and make-up are capable of masking our 'corporeal' characteristics like sex, eye-colour, hair-colour, height, and physical appearance respectively. See also (Butler 1999: 10–11) 'If the immutable character of sex is contested, perhaps this construct called "sex" is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.'
31. *High Tech Gays v. Defense Industrial Security Clearance Office* 895 F2d 563, 573. See also *Miron v. Trudel* [1995] 2 SCR 418 (Canada) [28], [57]; *R. v. Baig* [1990] BCJ No 203 (British Columbia County Court, Canada); *Delisle v. Attorney General of Canada* [1999] 2 SCR 989 (Canada) [44].
32. See Butler 1999: 10–11, quoted in note 30.
33. *Watkins v. United States Army* 875 F2d 699.
34. Justice Mokgoro seems to have effective mutability in mind when she says that 'citizenship is a personal attribute that is difficult to change':

- Larbi-Odam v. Member of the Executive Council for Education* 1998 (1) SA 745[19]. *Corbiere v. Canada* [1999] 2 SCR 203 [13]: 'what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity'. See also, *Egan v. Canada* [1995] 2 SCR 513 [5]: Justice La Forest considered sexual orientation to be either 'unchangeable or changeable only at unacceptable personal costs'.
35. *Watkins v. United States Army* 875 F2d 699, 726. See also Yoshino (2001–2002: 769).
 36. *Miron v. Trudel* [1995] 2 SCR 418 [97]–[98]. See also, *Harksen v. Lane* NO 1998 (1) SA 300 CC [92]: 'the decision to enter into a permanent personal relationship with another is a momentous and defining one'; *Harksen v. Lane* NO 1998 (1) SA 300 CC[123]–[124]: classifications on the basis of marital status degraded the 'moral citizenship (independence and self-fulfilment) of persons who happen to be married'; *Watkins v. United States Army* 875 F2d 699, 726: 'allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws'; *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143[19]: 'Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination'.
 37. See *Brooks v. Canada Safeway Ltd.* [1989] 1 SCR 1219 (Canada) [31].
 38. *Miron v. Trudel* [1995] 2 SCR 418 [97]–[98].
 39. *Harksen v. Lane* NO 1998 (1) SA 300 CC [92].
 40. *Nyquist v. Mauclet* 432 US 1, 12.
 41. See generally, Fiss (1976: 107); Abram (1986: 1312); Yoshino (1988: 485).
 42. *United States v. Stanley* (The Civil Rights Cases) 109 US 3 (1883).
 43. See generally, Bamforth (2004: 693–701).
 44. See, for example, the 14th Amendment to the Constitution of the United States ['No state shall ... deny to any person ... the equal protection of the laws']; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, read with Protocol 12 ['No one shall be discriminated against by any public authority ...']; Article 15 of the Constitution of India

- ['The state shall not discriminate against any citizen ...']; Article 15 of the Canadian Charter of Rights and Freedoms ['Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ...'].
45. Section 8(2) of the Constitution of the Republic of South Africa: 'No person shall be unfairly discriminated against...'
 46. Article 19 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 115, 09/05/2008 P. 0001 - 0388: The European Union ... 'may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' See also, Article 21(1) of the Charter of Fundamental Rights of the European Union: 'Any discrimination based on any ground ... shall be prohibited.'
 47. *Washington v. Davis* 426 US 229 (1976).
 48. See generally, Hunt (1998: 429–35); Bamforth (1999: 159, 168–70).
 49. *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd* [1986] 2 SCR 573[39].
 50. *Campbell v. MGN Ltd* [2004] UKHL 22[17].
 51. In *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, a private landlord was not allowed to take possession of a flat from the surviving same-sex spouse of the deceased tenant. The House of Lords interpreted the law governing landlord-tenant relationship to protect same-sex as well as opposite-sex couples.
 52. *Shelley v. Kramer* 334 US 1 (1948).
 53. S 39 UK Equality Act; 42 USC § 2000e-2, s 7 Canadian Human Rights Act.
 54. UK Equality Act s 33; 42 USC § 2000a; s 6 Canadian Human Rights Act.
 55. UK Equality Act s 101.
 56. S 29 read with s 31(2) UK Equality Act; s 5, Canadian Human Rights Act.
 57. UK Equality Act 2010 s 29; s 5 Canadian Human Rights Act.
 58. UK Equality Act ss 85, 91; 42 USC § 2000c-1.
 59. It is possible for an employer to be vicariously liable for the discriminatory acts of an employee: s 110 UK Equality Act.
 60. *Mingeley v. Pennock* [2004] EWCA Civ 328, [2004] ICR 727 (CA).
 61. For a general treatment of this argument, see McCrudden (1982: 303).
 62. Constitutional duties prohibit the state from discriminating against all citizens/subjects, even when it is a consumer of goods and services

- rather than the provider, and not just when it is a landlord but also when it is a tenant.
63. See, for example, the 14th Amendment to the Constitution of the United States ['No state shall ... deny to any person ... the equal protection of the laws']; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, read with Protocol 12 ['No one shall be discriminated against by any public authority ...']; Article 15 of the Constitution of India ['The state shall not discriminate against any citizen ...']; Article 15 of the Canadian Charter of Rights and Freedoms ['Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ...'].
 64. The one exception to these differences between constitutional and statutory duties is found in the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000, which prohibits all forms of unfair discrimination by all persons—public and private—in all contexts, perhaps due to the bitter legacy of apartheid.
 65. Schedule 5 paras 3-4.
 66. Section 13 read with section 1, South African Employment Equity Act 1998.
 67. 42 USC § 2000e (b).
 68. Canadian Human Rights Act s 3.1, UK Equality Act s14, *Corbiere v. Canada* [1999] 2 SCR 203[61].
 69. *Washington v. Davis* 426 US 229 (1976), 240, 2048.
 70. *Constable of West Yorkshire Police v. Khan* [2001] UKHL 48, [29]; *Nagarajan v. London Regional Transport* [2000] 1 AC 501, 511-2.
 71. *James v. Eastleigh Borough Council* [1990] 2 AC 751, 774.
 72. *James v. Eastleigh Borough Council* [1990] 2 AC 751, 774.
 73. UK Sex Discrimination Act 1975 s 1: 'In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if—(a) on the ground of her sex he treats her less favourably than he treats or would treat a man...'
 74. See *Auton v. British Columbia* [2004] 3 SCR 657 Supreme Court of Canada.
 75. It is also alleged that insisting on a comparator encourages assimilation of minority cultures (especially religious and queer cultures). Because the relevant comparator is invariably an idealised member of the majority community, it is claimed that such comparisons normalize majority values and make them aspirational (even when there may not be anything intrinsically wrong with minority values).
 76. *Turley v. Allders Department Stores Ltd* [1980] ICR 66, 70. See also, *Geduldig v. Aiello* 417 US 484 (1974).
 77. *Hayes v. Malleable Working Men's Club* [1985] ICR 703, 708: 'the proper approach is to ask whether pregnancy with its associated consequences is capable of being matched by analogous circumstances such as sickness applying to a man...'
 78. *Dekker v. Stichting (VJV- Centrum) Plus C-177/88* [1991] IRLR 27; *C-32/93 Webb v. EMO Air Cargo* [1994] ECR I-03567 [24-5]. See also, Paul Lewis, 'Pregnant Workers and Sex Discrimination: the Limits of Purposive Non-Comparative Methodology' (Spring 2000) *The International Journal of Comparative Labour Law and Industrial Relations* 55, the United States Pregnancy Discrimination Act 1978 and United Kingdom Equality Act 2010 s 18.
 79. UK Equality Act 2010, s 15: although this provision is entitled 'discrimination arising from disability' and treated distinctly from 'direct discrimination' in the statutory scheme, it is best understood as an instance of direct discrimination.
 80. *Hassam v. Jacobs* [2009] ZACC 19.
 81. *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [11].
 82. *R. v. Kapp* 2008 SCC 41 [22]; *Withler v. Canada* [2011] SCC 12 [2], [60].
 83. s 1: "discrimination" means any act or omission ... which directly or indirectly—(a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more prohibited grounds'.
 84. Declaration of Principles of Equality (Equal Rights Trust 2008).
 85. In the United States, this standard is famously sensitive to the protected ground involved. Race discrimination gets 'strict scrutiny' while gender gets 'intermediate scrutiny'. See generally, Suzanne Goldberg, 'Equality Without Tiers' (2004) 77 *Southern California Law Review* 481.
 86. 42 USC § 2000e-2(e) (2013).
 87. Canadian Human Rights Act 1985, s 15; SA Employment Equity Act 1998, s 6(2).
 88. UK Equality Act 2010, s 15, schedules 5, 7, 9, 11, 16 and 18.
 89. *R. (on the application of E) v. Governing Body of JFS* [2009] UKSC 15 [9]: 'there may well be a defect in our law of discrimination. In contrast to the law in many countries, where English law forbids direct discrimination it provides no defence of justification.'

90. See, *Griggs v. Duke Power Co* 401 US 424; section 703 of Title VII of the US Civil Rights Act of 1991. See also, section 19(2) of the UK Equality Act 2010: 'a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.'
91. *Griggs v. Duke Power Co* 401 US 424 (1971).
92. *Wards Cove Packing Co v. Atonio* 490 US 642 (1989), 656.
93. Emphasis mine.
94. UK Equality Act 2010 s 19(2)(b).
95. *Wards Cove Packing Co v. Atonio* 490 US 642 (1989), C-237/94 *O'Flynn v. Adjudication Officer* [1996] 2 CMLR 103 ECJ.
96. *R. (on the application of E) v. Governing Body of JFS* [2009] UKSC 15 [57].
97. *British Columbia (Public Service Employee Relations Commission) v. BCGEU* [1999] 3 SCR 3.
98. UK Equality Act s 124(4)&(5), 42 USC § 1981a.
99. 42 USC 12112(a).
100. 42 USC 12111(8).
101. See also, Section 21(2), UK Equality Act 2010.
102. *Ontario Human Rights Commission v. Simpsons-Sears Ltd* [1985] 2 SCR 536 [23]. See also, Canadian HRA s 15(2).
103. See, for example, sections 14 & 14.1 of the Canadian Human Rights Act 1985.
104. Principle 5, Declaration of Principles of Equality (Equal Rights Trust 2008).
105. *R. (on the application of E) v. Governing Body of JFS* [2009] UKSC 15 [9]: 'Nothing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy of JFS in particular or the policies of Jewish faith schools in general, let alone as suggesting that these policies are "racist" as that word is generally understood.'
106. Also see UK Equality Act 2010 s 158 and Canadian Employment Equity Act 1995 s 2.

107. These distinctions are adapted, with significant modifications, from McCrudden (2011: 157).
108. *Ricci v. DeStefano* 557 US 557 (2009).
109. See *Canadian National Railway v. Canadian Human Rights Commission* [1987] 1 SCR 1114.
110. *Hopwood v. Texas* 78 F 3d 932 (1996) US Court of Appeal 5th Circuit.
111. Texas Education Code § 51.803 (1997).
112. *Fisher v. University of Texas at Austin* 631 F 3d 213 (2011) US Court of Appeals 5th Circuit 224.
113. On indirect affirmative action, see generally, Sabbagh (2011: 470).

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