

Is it a Problem that Sex Discrimination Against Men is Prohibited?

By Jake Savile-Tucker¹

John Gardner's statement, 'discrimination is a virtue'² may be dramatic but his understanding of discrimination is accurate. Discrimination is simply the drawing of distinctions and is an everyday occurrence. Despite the negative connotations of the word 'discrimination', discrimination is not wrongful in of itself. What exactly makes certain discrimination wrongful has been subject of much academic debate and lies at the heart of this question. The question's use of the word 'problem' invokes the question of whether the law offends the theoretical understanding of discrimination. By referring solely to sex discrimination against men the focus of this essay is placed on the debate regarding the role, if any, of group disadvantage in the determination of wrongful discrimination. First, this essay will look at the main arguments regarding whether there should only be prohibition of sex discrimination against groups that are disadvantaged. The arguments for symmetrical protection will then be advanced and it will be argued that sex discrimination against men should be prohibited and that this prohibition is not problematic for the theory of discrimination. In reaching this conclusion, a theory of wrongful discrimination will be discussed that places the concept of meritocracy at the heart of discrimination law theory.

1) *The Position in Law: How is Sex Discrimination Prohibited?*

The current law unequivocally prohibits sex discrimination against men. Article 21(1) of the EU Charter of Fundamental Rights states that '...discrimination based on any ground such as sex...shall be prohibited.' Similarly, in national law, sex discrimination against men is prohibited via the Equality Act 2010 and the Sex Discrimination Act 1975. In this way the law takes an approach based on strict equality treatment when looking to the question of prohibition of discrimination. This essay aims to address whether the law ought to take this approach or whether alternative theoretical underpinnings can show this equal treatment approach to be problematic.

2) *When Could Prohibition of Sex Discrimination Against Men be Problematic?*

Wintemute sets out two tests for whether a ground of discrimination is an improper ground and wrongful: the immutability status test and the fundamental choice test. Wintemute contends that immutable status is unchangeable, but also something

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² John Gardner, *On the Ground of her Sex(uality)* 18 *Oxford Journal of Legal Studies* (1998) 167.

which the person lacked the capacity to change.³ On the other hand, fundamental choice, as the name suggests, is a status that the individual has chosen. However, Wintemute does not expound a detailed understanding of what will constitute a fundamental choice, although he does state that 'a person's choice of the sex of the partner with whom they engage in emotional-sexual conduct would certainly seem to be an 'important decision[s] intimately affecting their private [life]'.⁴ Moreover, Gardner uses Wintemute's tests to introduce his own core principle. He explains that both these tests have their foundations in the justificatory principle of the 'familiar liberal ideal of an autonomous life'.⁵

Wintemute advocates for this test from the position in law without examining why the law may seek to take this approach. According to Gardner, what makes these tests useful is that it is only where there is endemic discrimination on these grounds that the discrimination is sufficiently wrongful to herald prohibition. This is because where the discrimination on a person's immutable status or fundamental choices is endemic, their ability to exercise 'valuable choices' will be severely affected. It is for this autonomy-based reason that the imposition of a legal non-discrimination duty can be justified. Endemic discrimination on the basis of an immutable status affects one's range of choices and opportunities available to you if you share the characteristic in question, whilst endemic discrimination on the basis of one's fundamental choices affects how one makes that fundamental choice. Therefore, the law's prohibition of sex discrimination against men would be problematic according to Gardner's autonomy-based rationale.

A key example would be that women have been subject to discrimination historically on the basis of their sex. There can be said to be endemic discrimination justifying the prohibition of sex discrimination against women. On the other hand, men cannot be said to be subject to endemic discrimination on the basis of their sex. Therefore, on Gardner's conception of wrongful discrimination, sex discrimination against men is not sufficiently wrong to justify its prohibition. This has many similarities with Collins' argument in which he sets out a justification of anti-discrimination law based upon the goal of social inclusion. The ultimate goal of social inclusion is to reach 'the outcome of social cohesion'.⁶ Therefore, wrongful discrimination is discrimination which has an adverse impact on social inclusion: 'the policy of social inclusion asks for proof that the rule or practice tends to reinforce the exclusion of an individual member of an excluded group or most members of the excluded group'.⁷ Anti-discrimination historically attempts to address social exclusion, and as such, Collins posits that protection should not be afforded to men, since men are not subject to structural or systemic disadvantage.

³ [3] Robert Wintemute, *Sexual Orientations and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford: Oxford University Press, 1995), 177.

⁴ *Ibid*, 187.

⁵ John Gardner, *On the Ground of her Sex(uality)* 18 *Oxford Journal of Legal Studies* (1998) 167, 170.

⁶ Hugh Collins, *Discrimination, Equality and Social Inclusion* 66 *Modern Law Review* (2003).

⁷ *Ibid*, 32.

A theoretical justification for prohibition of discrimination can be seen in the concept of second-class citizenship, as elaborated on in Sunstein's 'anticaste principle'. Sunstein considers that 'without good reason, social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systematic social disadvantages'.⁸ This involves protecting individuals against not only systematic disadvantage due to endemic discrimination, but also any stigma being associated with the characteristic upon which the discrimination is based. Since prejudices are based on a highly visible, morally irrelevant characteristic, this attaches a stigma that Sunstein argues is damaging to a person's self-respect, thus relegating them to second-class citizenship. Therefore Sunstein's 'anticaste principle' embodies two aspects requiring protection: the systemic disadvantage and the systemic denial of self-respect. To warrant protection a group does not need to have suffered historical disadvantage, although this will be highly probable if a group is to be held to be a lower caste.⁹ This represents another understanding of anti-discrimination law that would most likely find the prohibition of sex discrimination against men to be problematic, as they are lacking the lower caste element requisite for protection.

In contrast to the aforementioned arguments, a number of academics advocate a theory of wrongful discrimination that does not rely on group disadvantage. Wintemute advocates symmetrical protection, reasoning that as the tests for wrongful discrimination, of immutability and fundamental status, are met equally by the characteristic of sex for both groups, this heralds the conclusion that both are wrongful. Moreover, Gardner suggests a possible reason why the satisfaction of the aforementioned tests warrants symmetrical protection: the expressive nature of discrimination on these grounds, the 'social meaning of an attack on key aspects of someone's identity'.¹⁰ It is not the aforementioned tests themselves that necessitate the prohibition of sex discrimination against men, rather the way in which these tests recognize features that are of integral importance to a person's conception of self-identity. Gardner elaborates: 'status or choice goes to the heart of their self-definition in a way that turns an act or discrimination on the ground of that status or choice into an attack on their identities.'¹¹ Symmetrical protection therefore is not problematic if prohibition is justified on the basis of a need to protect a person's sense of self-identity and self-autonomy.

There are clear parallels with the principle of equality of moral worth. This argument, postulated by Hellman, renders certain discrimination wrongful insofar as it is demeaning, thus contrary to the principle of equality of moral worth. Hellman contends that two elements are required for discrimination to be demeaning: first, it must be an act capable of expressing disrespect for equal moral worth and second, it must be made by someone 'in a position such that this expression can subordinate the

⁸ Cass R. Sunstein, *The Anticaste Principle* 92 *Michigan Law Review* (1994) 2410, 2429.

⁹ *Ibid*, 2433.

¹⁰ *Ibid*, 178.

¹¹ *Ibid*.

other'.¹² Therefore Hellman's justification for anti-discrimination law requires a social and a power dimension.¹³ The power dimension involves evaluating the status of the victim and the discriminator; if the discriminator has no power or elevated status over the victim, then the discrimination is likely to be insulting but not demeaning, meaning the discrimination would not be wrongful. The expressive dimension incorporates historical, social and cultural conventions of the discriminatory act. However, Hellman does not go so far as to explicitly state that historical and social disadvantage is a requirement for discrimination to be wrongful. Instead, Hellman notes that the presence of historical or social disadvantage is 'a rule of thumb...not an absolute requirement'.¹⁴ In some circumstances, Hellman concedes the possibility that grouping people in a way free from historical and social connotations could still have a demeaning effect, thus constituting wrongful discrimination.¹⁵ Therefore, Hellman's equal moral worth conception of discrimination does not necessarily have a problem with the prohibition of sex discrimination against men; instead it would depend on the context in which the discrimination arises.

3) Meritocracy and Wrongful Discrimination

The aforementioned arguments have validity, strength and merit in their own right. It is certainly the case that the principles of social inclusion,¹⁶ removal of second-class citizenship, self-respect, equal moral worth¹⁷ and autonomy, are all values worthy of protection, and discrimination which acts contrary to these principles warrants prohibition. However all these arguments avoid the question of the most fundamental wrong: discrimination on the basis of irrelevant grounds offends the principle of meritocracy. For example, the criterion of sex is not generally relevant to a decision regarding employment; therefore it is wrong insofar as it does not form the basis for a meritocratic distinction. The impact of this lack of meritocracy will range depending on the manner in which the discrimination affects the other aforementioned principles. For example, discrimination by a single employer against a man on the grounds of his sex will be less serious than a woman who is denied multiple jobs on the basis of her sex, as this would affect the man's autonomy much less. However, despite the fact that the discrimination against the woman may have a more profound adverse impact, both in a group and individual sense, it could not be ignored that the man would also have suffered a wrong for being denied a job on an irrelevant basis. Arguably, both disadvantaged groups should be protected from the most fundamental wrong of arbitrary non-meritocratic decision-making

¹² *Ibid.*

¹³ *Ibid*, 35.

¹⁴ *Ibid*, 58.

¹⁵ *Ibid.*

¹⁶ *Discrimination, Equality and Social Inclusion*, 16.

¹⁷ *The Anticaste Principle*, 2410.

Relevance lies at the heart of meritocracy. If a characteristic relied upon is irrelevant to the rationale behind the decision, it is a non-meritocratic one. In an employment context, the rationale behind the discrimination is to find the best person for the role, and therefore this relevance to rationale will be relevance to their ability to perform the job. The definition, without reference to ability but to rationale is used in order to incorporate a non-employment context. For example, if tax relief was granted for a new businesses on the basis of the company director's sex, this would be non-meritocratic as sex is not a relevant criterion to the rationale of incentivizing economic growth. Therefore, meritocracy can be seen to have the flexibility to deal with a range of scenarios. Moreover, meritocracy ties the decision-making process to the core rationale of the decision. This is distinct from the rationality of the decision-maker's decision. Rational discrimination may still be wrongful discrimination and warrant prohibition by the law. In the employment context, it may be rational to discriminate on the grounds of sex, for example due to the financial impact of childcare responsibilities or consumer prejudices. However, the core rationale behind the decision is to find the person who can perform the role best, not necessarily most profitably. As such, only characteristics relevant to the ability of the candidate to perform the role are relevant to a meritocratic decision. In this way, meritocracy provides the core moral value to the decision.

It could be construed that meritocracy and Hellman's social dimension align closely. If the cultural convention dictates that a certain criterion is relevant to the distinction that is being drawn, then there will not be any wrongful discrimination in relying upon that characteristic as it will not necessarily be a non-meritocratic distinction. For example, social convention would dictate that in selecting someone for the role of Desdemona in Shakespeare's Othello, sex would be a relevant criterion for occupying that role. However, the place of social convention can be problematic. For example, consider what would occur in the circumstance when a social convention dictates that only men can occupy certain professions such as investment banking. Hellman attempts to deal with this difficulty by stipulating that where the social convention would demean the parties involved, it is demeaning and should therefore not be followed. However, this seems to be a circular argument, since Hellman also contends that what determines whether something is demeaning is based in turn on the social and historical connotations of the discrimination. Meritocracy however, relies on relevance to the rationale. Therefore, in the acting example, intrinsic to the ability of the person to be able to perform that role is that she is a woman. However, whilst social convention may dictate solely women for jobs such as make-up artists or air stewards, both a man and a woman could fulfil the elements inherent to the role.

Clearly, this is a very inclusive test for wrongful discrimination. However, it is perhaps the strength of the theory that it enables the incorporation and protection of the principles embodied in the works of the aforementioned authors. Hellman's equal moral worth will be protected if prohibition of discrimination is in line with meritocracy; a person's sense of identity will be protected if arbitrary decisions on the basis of irrelevant characteristics are not permitted. The promotion of meritocracy via symmetrical protection will also consequentially protect the principles of autonomy,

social inclusion and the anticaste principle. By striving to promote distinctions based upon merit rather than prejudice, the individuals will be able to choose valuable options, thus providing individuals with autonomy. Furthermore, if distinctions were made on the basis of merit, this would eliminate the marginalisation of groups within society, which forms the core both of theories of social inclusion and the anticaste principle.

It would also appear that academics are debating about the whereabouts on the spectrum of wrongful discrimination 'sufficiently wrong' lies, so as to establish the beginning point of law's intervention. This restriction of prohibition could be based on a theoretical as well as a practical assumption. The theoretical assumption may be due to the differing value accorded to the liberal ideal of the autonomy of the employer. Western democratic societies strive to uphold the value of liberty. This liberty cannot be unrestrained, although the importance of the ideal of liberty means that any action contrary to this ideal must be sufficiently justifiable. However, the accordance of great weight to the discriminator's autonomy, such that there must be a severe and pervasive wrong in order for legal prohibition to be implemented, is challengeable on two grounds. First, it is questionable whether this is an autonomy worth protecting at all, since this accords importance to the freedom to make decisions which are not meritorious. Secondly, legal prohibition infringes individuals' autonomy for goals which are less worthy than the principles which meritocracy seeks to protect. For example, planning laws can infringe an individual's autonomy to make his home his own, a valuable and cherished social enterprise, simply due to the fact that some neighbours may not like the aesthetics of the building. Therefore, there would appear to be no justification for failing to reach a theoretical standpoint which calls for the protection against all wrongful discrimination, the fundamental wrong being discrimination which is not meritocratic.

However, the practical assumption appears most persuasive. The law cannot prohibit all forms of wrongful discrimination simply on a logistical basis. This could be the reason for the differing opinions of what makes discrimination sufficiently wrong; there must be a process of prioritizing due to practicality. Therefore, the scope of meritocracy must be curtailed. This can be done, first, by adopting Wintemute's immutable status and fundamental choice tests in order to identify those characteristics that are inherently tied to one's self-identity. The second approach can prioritize by focusing on group disadvantage. As Khaitan argues, group disadvantage or systemic discrimination can be used as a 'trigger'¹⁸ for protection, with the existence of group disadvantage providing the impetus for increasing legal protection.¹⁹ Therefore, the goals of autonomy and social inclusion will invariably be promoted. This acts solely as a trigger for symmetrical protection, since meritocracy incorporates the individual wrongs which non-meritocratic distinctions inflict on a person's sense of self-identity and equal moral worth. Thus the principle of meritocracy can protect

¹⁸ Tarunabh Khaitan, *Prelude to a Theory of Discrimination Law* (forthcoming) in Hellman and Moreau eds, *Philosophical Foundations of Discrimination Law* (OUP 2013) available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2208020, 9.

¹⁹ Deborah Hellman, *When is Discrimination Wrong?* (HUP 2010).

against both the core individual wrong of discrimination and the group based adverse impact in a practically and theoretically justifiable way.

4) *Indirect Discrimination*

Indirect discrimination is a term referring to a practice that is ostensibly neutral and fair, but in reality has a disadvantageous effect on those who share a certain characteristic. As discussed, the law currently protects against both direct and indirect discrimination on the grounds of sex. This is not problematic for the theory of discrimination, since Doyle's argument that indirect discrimination should not be dealt with differently from direct discrimination is compelling. First, whilst this indirect discrimination may most likely be lacking the intention, the wrongful nature of discrimination does not rest on the mentality of the discriminator but in the effect of the discrimination.

Discrimination law is not punitive against the discriminator but protective of the effects of the discrimination on an individual or group level. Whether these effects are intended or unintended does not affect their substantive impact and as such they should be accorded the same concern and treatment.²⁰ Secondly, Gardner has suggested that indirect discrimination is of secondary concern as it relies upon a history of direct discrimination. However, as Doyle makes clear with a powerful example of the adverse impact on homosexuals due to indirect discrimination in the 1970s and 1980s, indirect discrimination can operate alone more subtly with just as dramatic impact. Therefore, the prohibition of indirect sex discrimination against men is not problematic for a conception of discrimination based upon the principle of meritocracy.

5) *Affirmative Action*

Affirmative action or positive discrimination occurs when a certain group characteristic is used and considered in order to make decisions to actively counteract systemic disadvantage. Broad positive discrimination would be contrary to the law; it is contrary to the principle of meritocracy for a characteristic that is not relevant to play any role in decision-making, even if the characteristic is being considered in order to promote a social good. Moreover, to positively discriminate in favour of one group is tantamount to directly or indirectly discriminating against another. It is debatable whether the greater good of trying to combat systemic disadvantage justifies the infringement of the advantaged group's autonomy. To contradict the approach taken regarding direct and indirect discrimination undermines the power and clarity of the principles that the law strives to promote. To allow positive discrimination might also have potentially damaging effects beyond simply contradicting foundational principles. By making decisions which are non-meritocratic, even if for a valuable goal such as social inclusion, there can be damaging effects for an individual's sense of equal moral worth. It is potentially demeaning to say that we must actively

²⁰ Oran Doyle, *Direct discrimination, Indirect Discrimination and Autonomy* 27 Oxford Journal of Legal Studies (2007) 357, 548.

discriminate in one group's favour because it portrays the message that, without such steps, that group would be unable to persevere. On the other hand, by promoting pure meritocracy, the law upholds the idea that everyone is of equal moral worth and that everyone has equality of opportunity, thus the most meritorious will succeed. It may, by contrast, be contended that the reality of inequality of opportunity requires positive discrimination. However, the solution to social inequality, detracting from a perception of equal opportunity, does not lie in the law; it lies in political measures, such as providing equal access at the level of education. Therefore, the prohibition of positive discrimination is not mal-affected by the prohibition of sex discrimination against men.

6) *Conclusion*

The core principle that renders discrimination based upon irrelevant considerations wrong is meritocracy. The extent of the wrongfulness of discrimination contrary to meritocracy will vary hugely depending on how it affects wider principles such as equal moral worth and autonomy. The individual wrong of non-meritocratic discrimination affects both disadvantaged and non-disadvantaged groups in the same way and therefore warrants equal protection. Moreover, it would undermine the principle of meritocracy if some discrimination contrary to meritocracy was granted free reign, and thus prohibiting indirect and positive discrimination is justified. In this way, prohibition of all types of sex discrimination against men is not problematic for the theory of discrimination law.