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Discrimination Law

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BOOK REVIEWS

A Discriminating Read:
Discrimination Law

Sandra Fredman

London: Clarendon Law Series, 2002 (205 pp.)

Reviewed by Tina Piper¹

Fredman's project in writing *Discrimination Law*¹ was to instill in her readers a "renewed faith in the ideal of equality, and... a heightened sensitivity to the problems to be faced."² She achieves this goal admirably through a well-organized and accessible text that addresses both the philosophical underpinnings and the practical implementation of discrimination law.

Discrimination Law, despite its clear language and explanations, is not a book for those with no prior exposure to this specialized area of the law. *Discrimination Law* is of particular interest to readers familiar with discrimination law in Canada, in particular the decisions of the Supreme Court of Canada under the s.15 equality provisions of the *Canadian Charter of Rights and Freedoms*³ and the activities of the federal and provincial human rights commissions. The book also has a great deal to say to Canadian readers interested in a comparative/international perspective since it discusses Canadian discrimination law predominantly in the context of United States and European law.

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² S Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002).

³ *Ibid.* at vii.

³ *Constitution Act*, 1982 (79), enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, cif April 17, 1982.

The sequence of topics addressed in the book is intuitive and Fredman's argument is well-organized and structured. She begins by introducing the concept of equality and the values that underpin a desire for equality, such as dignity, restitution, distributive justice and participatory democracy. It would have been helpful if, at this early stage, the concepts of discrimination and equality had been explicitly connected since the relationship may not be obvious to the less-experienced reader. Fredman provides a theoretical framework that escapes the narrow margins of the case law and legislation to draw on stimulating thinkers ranging from Aristotle to Dworkin.

Discrimination Law proceeds to outline the social and historical context of discrimination in Britain, addressing the categories of women, race, religion, ethnicity, sexual orientation, disability and age. Fredman comprehensively highlights the important contours of the debate, addressing key issues such as "intersectionality" and the concept of the "Other". The discussion is an excellent combination of history and analysis; not content to merely recount the facts, Fredman also attempts to analyse past, present and future trends and their connection to broader theories of equality and discrimination.

While the title *Discrimination Law* implies a general discussion, Fredman uses Britain as the starting points for her analysis of discrimination law. She fails to clearly situate the debate in this manner in her introduction. However the second chapter is devoted entirely to the social and historical context of various kinds of discrimination in Britain. Thus, throughout the book it is unclear whether the scope of the book's argument is discrimination law as it applies to Britain or the state of international discrimination law generally. Fredman's failure to explicitly face this issue means that she also does not address the important debates within comparative law as to the utility, pitfalls and advantages of drawing comparisons between different legal regimes and traditions.⁴ These arguments are particularly pronounced in an area such as discrimination, which is so intimately connected to a country's social, economic and political history. A discussion, even in summary, would greatly improve the theoretical impact of her argument.

⁴ M.A. Glendon, M.W. Gordon, C. Osakwe, *Comparative Legal Traditions* (2nd ed) (St Paul, Minn: West, 1999).

The book proceeds to discuss the grounds of discrimination by addressing those who define them and how existing grounds are stretched and new ones generated. Fredman then outlines the scope of current discrimination law in the U.K. and the European Union generally. She discusses important legal concepts of discrimination, particularly direct and indirect discrimination and suggests approaches to discrimination law that embrace equal opportunity and positive duties on states. Fredman provides a refreshingly frank analysis of the role of public and private actors and the influence of business and market constraints on discrimination law. The book does not deal, however, with important new trends that explore socio-economic status or social condition as grounds of discrimination. The discussion could have extended to an evaluation of the inclusion of some of these more contentious grounds of discrimination, particularly given the expressed acknowledgement that such claims could exist.⁵

The fifth chapter in *Discrimination Law* is devoted almost entirely to a justification of reverse discrimination based on a substantive, not formal, view of equality. Fredman mounts a rigorous theoretical defence of affirmative action programs based on a reconception of the groups who suffer discrimination and a re-evaluation of the role of the state. She does accept, however, that there are limits to the strategy of affirmative action, particularly since the new voices of the previously disenfranchised groups only have a limited impact on the entrenched structure into which they are introduced. She concludes that affirmative action should be part of a broader based strategy that seeks to refashion institutions that perpetuate exclusion. Again, the imprecise jurisdictional focus of the book was highlighted since the discussion focused largely on U.S. caselaw and legislation in the area of affirmative action. If the book's focus is on British discrimination law then the discussion of the U.S. cases could have been shortened or summarized more succinctly and the European context dealt with more extensively.

The final chapter addresses the practical issues of enforcement and remedies. This chapter might have been more useful earlier on in the book as issues of process are integral to the effectiveness of any equality strategy. The book's obvious attachment to the theory of discrimination

⁵ *Supra* note 1 at 66.

law should have been complemented by a much more substantial discussion of process. The book addresses the ineffectiveness of administrative tribunals, the relative advantages and disadvantages of the courts (county, High Court and the European Court of Justice) and critiques the individual-focussed remedies granted by these bodies. It is at this point that Fredman could have supplemented her study with a comparative analysis, but fails to discuss solutions from other countries, for example the Canadian Human Rights Commissions structure, and instead suggests class actions as a possible solution. The analysis could also have been strengthened by an analysis of the institutional capability of the various actors to decide issues of discrimination, e.g. the identity and training of the judges in the higher courts in Britain. Fredman ultimately advocates shifting the focus of discrimination law from “individualized, retrospective, passive enforcement and remedial structure[s]” to positive duties to promote equality.⁶ A concrete proposal or solution to the problems she has so clearly outlined could have strengthened the conclusions.

Discrimination Law provides an excellent overview of the area with reference to the social and historical context of discrimination, as well as an extremely clear enumeration of the theoretical advantages and disadvantages of various approaches to discrimination law. Fredman’s knowledge of British and foreign caselaw is encyclopedic and impressive. Her account is straightforward yet challenging and full of novel ideas and insights into the area of discrimination law and should be read by anyone seeking a deeper, comparative understanding of discrimination law.

⁶ *Supra* note 1 at 176.