

DISCRIMINATION

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Introduction

Under its most basic understanding, discrimination refers to unwarranted unequal treatment of persons based on group membership. Racial discrimination is discrimination based on race or ethnicity. This concept emerged in the legal field in the middle of the 20th century. It appeared in major international instruments adopted in the aftermath of the Second World War. While the Charter of the United Nations (UN), adopted in 1945, uses the term ‘distinction’ – referring to the promotion of ‘respect for human rights and for fundamental freedom for all without *distinction* as to race, sex, language, or religion’ (art. 1(3) and 13(1)(b)) –, the Universal Declaration of Human Rights, approved three years later by the UN General Assembly, establishes that all ‘are entitled to equal protection against any *discrimination*’ (art. 7). Similarly, the 1950 European Convention on Human Rights prohibits any *discrimination* based *inter alia* on race in the enjoyment of the rights and freedoms it sets forth (art. 14). The *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted in 1965, was the first UN treaty on human rights. It defines racial discrimination as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’ (art. 1(1))

While initially a legal concept, discrimination has soon attracted the attention of social scientists, in particular sociologists, social psychologists, and economists. Each discipline has brought its own perspective on the phenomenon, enriching and complexifying its understanding. Intense debates have arisen on the meaning, causes and impact of discrimination as well as on which policies are adequate to combat it.

The rise of a structural approach to discrimination

In the realm of law, discrimination was initially understood in a narrow sense, as a behaviour that was both individual and intentional, consisting in the application of a different treatment to one person compared to others because of his or her race. Until the late 1950s, a similar approach prevailed in social sciences. Discrimination was seen as the external manifestation of prejudice (McCrudden, 1982). This changed during the 1960s: increasingly, United States (US) sociologists emphasized the institutional and structural aspects of the exclusion affecting Blacks. Discrimination came to be seen as a group-level phenomenon, involving a ‘system of social relations’ (Antonovsky, 1960, p. 83). It was analysed as a social mechanism allowing the production and reproduction of structural power relations between majority and minority social groups (Bereni & Chappe, 2011).

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Black activists Carmichael and Hamilton put forward the phrase 'institutional racism' to refer to covert and subtle forms of racism that permeate society as a whole (Carmichael & Hamilton, 1967). In their view, the problem was so entrenched that solution to it necessarily involved revolutionary challenges of existing society. While not endorsing such radical stance, many sociologists took up and developed this concept. From the 1970s onward, the terms 'institutional', 'structural', or 'systemic' discrimination became widely used in sociological literature to designate 'the range of policies and practices that contribute to the systematic disadvantage of members of certain groups.' (Pager & Shepherd, 2008, p. 197) As underlined by Pager and Shepherd (2008), three different approaches to this concept may be distinguished. The first perspective focuses on the legacies of historical discrimination. It stresses how the effects of past practices of exclusion and unequal treatment of certain minorities endure in the present and explain persisting significant socio-economic disparities. The second approach puts the emphasis on contemporary policies and practices that systematically disadvantage certain groups. Such disadvantage may not be deliberate: in some contexts, facially race-neutral policies may generate or reinforce race-based social inequalities. Discriminatory acts, moreover, are not necessarily motivated by racial animus, they may stem from action which simply reproduce institutionalized behaviour patterns (Stryker, 2001; McCrudden, 1982; Mayhew, 1968, p. 67-72). In this line of thought, Knowles and Prewitt define 'institutional racism' as situations where 'behaviour has become so well institutionalized that the individual generally does not have to exercise choices to operate in a racist manner. The rules and procedures of the large organization have already prestructured the choice. The individual only has to conform to the operating norms of the organization and the institution will do the discriminating for him.' (Knowles & Prewitt, 1970, p. 143) The third conceptualization of structural, institutional, or systemic discrimination centres around the phenomenon of 'cumulative disadvantage': it shows how the impact of discrimination in one field or at one point in time (e.g. access to education as a child) may have spill-over effects in other domains and through the life course (e.g. access to higher education or employment). These multiple occurrences of discrimination reinforce each other and their effects are amplified (Blau & Duncan, 1967; DiPrete & Eirich, 2008; Reskin, 2012).

Social psychology research, in turn, has demonstrated that discriminatory treatment may result from subtle and nonconscious bias that influence perception and behaviour. Various studies have shown that implicit prejudice and stereotypes about racial and ethnic minorities may influence people's judgments, decisions and behaviours, even absent any explicit negative attitudes and beliefs (Greenwald & Krieger, 2006; Dasgupta, 2004; Fazio & Olson, 2003). This helps explaining why racial discrimination continue in contemporary societies even while it is legally prohibited and racism largely considered as illegitimate. However, it becomes more covert, making it more difficult to detect and measure scientifically.

Widening the legal understanding of discrimination: the disparate impact doctrine

The notion that discrimination is not necessarily intentional and that it may have a systemic dimension also made its way in the legal field, leading to an enlargement of the legal understanding of the concept. This evolution first took place in US law. It owes much to the efforts of civil rights group engaging in litigation and the US Equal Employment Opportunity

Commission (EEOC), i.e. the agency created under the 1964 Civil Rights Act to enforce federal laws prohibiting discrimination in employment, which, although initially deprived of the power to bring cases to courts, played an important role through its interpretive guidelines and the submission of amicus curiae (Pedriana & Stryker, 2004; Stryker, 2001). Through the late 1960s, they joined forces to target certain widespread employment practices that appeared racially neutral on their face but had the effect of excluding a very high number of black workers, like seniority systems and employment tests. They argued that Title VII of the Civil Rights Act, the provision outlawing employment discrimination, prohibits not only intentional, explicit, discriminatory treatment but also decisions and policies that are neutral in appearance in the sense that they do not have any racial content but discriminatory in their effects insofar as they have a disproportionate adverse impact on one racial group.

Such interpretation was endorsed by the US Supreme Court in the famous case *Griggs v. Duke Power Company* decided in 1971.¹ A group of African-American employees complained that their employer required from workers who wanted to work in all but the company's lowest paying labour departments to register satisfactory scores on two general intelligence tests as well as have a high school education. The plaintiffs claimed that these requirements fell much more heavily on blacks than whites, while not being related to the jobs to be performed. They provided statistical data that only 12% of North Carolina blacks graduated from high school, compared to 34% for whites. With respect to the intelligence tests, EEOC gave evidence that in a similar testing case, only 6 % of blacks had passed the tests as compared with 58 % of whites. The Court ruled that the Civil Rights Act 'proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.' In the case at stake, it concluded that the policy was indeed discriminatory. The Court thus recognized that discrimination within the meaning of the law encompasses *disparate impact* discrimination in addition to *disparate treatment* discrimination. Importantly, disparate impact discrimination does not require proving discriminatory *intent*: regardless of the intention of the employer, a practice will constitute *prima facie* disparate impact discrimination if it is shown to have disproportionate prejudicial effects on one racial group. This typically calls for the use of statistical evidence to highlight the impact of the impugned practice or decision on different racial groups (Stryker, 2001).

The European law approach: the concepts of direct and indirect discrimination

While the scope of the disparate impact doctrine was later restricted by US Courts (Selmi, 2006), it had an important influence transnationally. In the late 1970s, it was imported in British law under the name of 'indirect discrimination': this concept was explicitly enshrined in the Race Relations Act 1976, which replaced previous legislation on racial discrimination. It also permeated European Union (EU) law, while being transformed in the process. The so-called 'Race Directive', adopted in 2000 to combat racial and ethnic discrimination,² defines the notion of 'indirect discrimination' as occurring 'where an apparently neutral provision,

¹ 410 U.S. 424.

² Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’ ‘Direct discrimination’, by contrast, is the situation where ‘one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’. Like disparate impact discrimination, indirect discrimination thus stems from a measure that is neutral on its face but discriminatory in its consequences, meaning that it entails a particular disadvantage for persons of a given racial or ethnic origin compared with other persons. Contrary to the US law concept, however, indirect discrimination as envisaged in EU law does not necessarily depends on statistical evidence: it leaves open the possibility to demonstrate the particular disadvantage created by the contested measure through other means than statistics, like showing that this measure, by its very nature, based on facts that are common knowledge, has such an effect (Schiek, 2007). This choice of the European legislators is due in large part to the circumstance that in most EU countries, racial or ethnic statistical data are usually not available. Yet in practice cases where indirect discrimination can be established without relying on statistical evidence seems to be rare. The unavailability of racial and ethnic data in many EU countries thus limits the ability of plaintiffs to claim indirect discrimination in court (Simon, 2012; Ringelheim & De Schutter, 2010).

The recognition of systemic discrimination

In some jurisdictions, most notably Canada, the concept of *systemic discrimination* has also gained legal recognition. This particular category of discrimination was first acknowledged by the Canadian Supreme Court in a 1987 ruling concerning sex discrimination within the national railway company.³ The concept was applied to race discrimination in the 1997 Canadian Human Rights Tribunal decision *National Capital Alliance on Race Relations (NCARR) v. Health and Welfare Canada*.⁴ Essentially, systemic discrimination, as construed by Canadian courts, results from a pattern of behaviours, policies, and practices that are part of the structure of an organization, rather than from one isolated act. It stems from a set of attitudes and practices, formal or informal, which interact with each other and combine to produce a global effect of exclusion or disadvantage on one protected group. Both direct and indirect discrimination may be involved in this process. Elements taken into account by Canadian Courts to arrive at a finding of systemic discrimination include data showing under-representation of female or minority workers among occupants of certain categories of job combined with evidence of prejudicial attitudes on the part of supervisors or managers (like negative stereotypical comments; harassment; application of different selection criteria; less encouragement provided to minority workers to apply to training or promotion opportunities) and organizational practices with discriminatory impact on members of concerned groups (such as recruitment policies targeting schools attended by few women; absence of women or minority in selection boards; management’s failure to respond to concerns about prejudice or discrimination in the workplace) (Beck et al., 2002; Sheppard, 2018).

³ CN v Canada (Canadian Human Rights Commission), [1987] 1 SCR 1114 at 1139.

⁴ 28 C.H.R.R. D/179 (Can. H.R.Trib.).

Discrimination and affirmative action

Despite these legal evolutions, it has been widely observed that merely prohibiting discrimination and providing a legal remedy to victims is insufficient to eliminate discrimination. Many scholars have pointed out the shortcomings of a litigation-centred approach. Access to justice is particularly burdensome in discrimination cases. Research shows that only a minority of people who feel they have experienced discrimination file discrimination claims. This is due to various factors, among which the fear of retaliation, the cost and length of legal proceedings, and the fear of negative outcome (Nielsen et al., 2008; Nielsen & Nelson, 2005; Bumiller, 1987). Further, those who do go to court face important challenges. Most notably, proving discrimination in court often remains an uphill task. In effect, studies realized in the US indicate that only a minority of discrimination claims are successful (Berrey et al., 2017). In addition, litigation appears ill-suited to address institutional, structural or systemic discrimination – also characterized as ‘second-generation discrimination’ (Sturm, 2001). One reason for this is that legal claims supposes targeting clearly identified decisions or policies attributable to one specific perpetrator (be it an individual or an organization), while this form of discrimination typically results from a set of processes and practices which cannot be traced to one single actor. Individual litigation, moreover, when successful, usually only leads to individual compensation, rather than structural changes (Fredman, 2010, p. 189-190). To be sure, in various countries, different forms of collective action are allowed, like class action or proceedings initiated by public interest organizations or equality agencies. In practice, however, such cases are complex, long and costly and therefore quite rare. Most discrimination proceedings are brought by individual plaintiffs (Nielsen et al., 2008; Sheppard, 2018).

Accordingly, many discrimination experts claim that legal prohibition of discrimination needs to be supplemented with proactive strategies, like affirmative action or positive action policies, aimed at promoting structural changes within institutional and organizational culture and practices (McCrudden, 2019; Anderson, 2010; Fredman, 2008; Kang & Banaji, 2006; Sturm, 2001; Bergmann, 1996).

Discrimination and intersectionality

While scholarship on racial discrimination naturally centres around the notion of race, analyses of discrimination have attached increasing importance to the interplay between different grounds of discrimination. This concern is expressed in the ‘intersectionality’ concept, originally theorized by the US legal scholar Kimberle Crenshaw. In her 1989 seminal article, she criticized the tendency of antidiscrimination law as well as feminist theory and antiracist policy ‘to treat race and gender as mutually exclusive categories of experience and analysis.’ (Crenshaw, 1989) Dominant conceptions of discrimination, she argued, assume that subordination and disadvantage occur along a single categorical axis. This has the effect of marginalizing the experience of those who, like black women, suffer from a *combination* of racism and sexism and of obscuring claims that cannot be understood as resulting from discrete sources of discrimination. It also means that the focus is placed on the most privileged within subordinated racial or gender groups, thereby distorting the analysis of racism and sexism. Crenshaw introduced the term ‘intersectionality’ to convey the various ways in which race and gender interact to shape the multiple dimensions of black women’s

experience of discrimination, subordination and violence (Crenshaw, 1989, 1991). This concept has been widely embraced by feminist scholars from various disciplines who have extended it and applied it to multiple phenomena and contexts. It has also given rise to vivid debates, in particular regarding its implications for the conceptualization of identity (Collins & Bilge, 2020; Carastathis, 2014; Davis, 2008). In the legal sphere, a number of authors have further analysed the structural obstacles deriving from the design and working of antidiscrimination law that hinder the recognition of so-called 'intersectional' or 'multiple' discrimination, i.e. discrimination based on more than one ground. Adjustments of the legal framework have been proposed to address these types of discrimination. Some states have introduced explicit mention of intersectional or multiple discrimination in their legislation. International bodies, such as the UN Committee on the elimination of Racial Discrimination, the UN Committee on the elimination of Discrimination against Women and the UN Human Rights Committee, have incorporated an intersectional perspective into their work. In many places, however, victims of intersectional discrimination continue to face important institutional and procedural challenges (Fredman, 2016; Hannett, 2003).

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