

## **Discrimination is a Sub-set of Unequal Treatment** (for assigned workshop C)

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To consider what theoretical and conceptual development is possible in connection with research into discrimination, two steps are necessary. The first step is to identify what it is that social scientists should attempt to explain, the *explanandum*.

Discrimination is a prohibited form of unequal treatment. There are other forms of unequal treatment that are permitted (e.g., the many forms associated with differences of socio-economic status). The causes of unequal treatment are similar whether or not the behaviour in question takes a prohibited form. Discrimination is a concept within the sphere of law and public policy. A social science problematic cannot be limited in this way. Its objective is different and broader. Yet anyone who undertakes research in this field will encounter the concepts that have been developed for legal purposes, and will therefore need to understand them.

### **Legal concepts**

Legislation has to define the grounds of action that are prohibited (e.g., actions on the grounds of age, sex, race, ethnic or national origin), the classes of person protected by the law (i.e., persons assigned to categories based on age, sex, race, ethnic or national origin, etc.), and the circumstances in which they are protected. For example, international law prohibits discrimination on the grounds of race in public life only, whereas there is no comparable restriction in the convention against discrimination against women.

To establish whether a person has been treated less favourably it is necessary make a comparison. Because of this requirement, the legal prohibition of unequal treatment is in some respects narrower, and in other respects wider, than the philosophical conception deriving from Aristotle's discussion of justice. It is narrower because its prohibitions do not cover permitted forms of unequal treatment. That it can be wider is exemplified in the EC Directive 76/207. This recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman during and after pregnancy; so if an employer dismisses a woman because she is pregnant this counts as sex discrimination, even though no comparison has been drawn with the treatment of a man who has to absent himself from work to obtain lengthy hospital treatment.

The law also permits certain forms of discrimination, such as those that have been called affirmative action, or positive action. It recognises these as exceptions to its definition. In the case of *Abdulaziz* the European Court of Human Rights held that differential treatment may be permitted where there is: a reasonable and objective justification; the differential treatment is in pursuit of a legitimate aim; and there is proportionality between the effects of the measures and the objectives.

Discrimination in European law may be either direct or indirect. The distinction in international law is between action with the purpose of discriminating and action that is discriminatory in effect. In the USA this is the distinction between disparate treatment and disparate effect.

The grounds of discrimination may be those of intention (in which the discriminator wills the objective sought) or those of motivation (e.g., an action may be motivated by prejudice without the actor's being conscious of this motivation). These are subjective considerations. Yet the legal test is not subjective but objective, and this is particularly important to the prohibition of indirect discrimination. An English case concerning the differential age at which men and women became eligible for a pension established that the test to be applied was 'would the applicant have been treated differently *but for* his or her sex?'

The law against racial discrimination differs from the prohibition of incitement to racial hatred. That is an offence against the state and has to be dealt with in the criminal law. Many governments regard discrimination in the workplace as a dispute between private citizens, and therefore provide remedies in civil law. Some countries have separate courts to administer labour law.

By acceding to treaties, governments have accepted legal obligations to combat various forms of discrimination. These treaties take the form of covenants or conventions. Some impose obligations upon states to report to what are called treaty monitoring bodies. Some provide for the possibility that an individual may appeal to such a body if he or she believes that his or her government has failed to protect his or her rights. Many states have concluded that if they are to monitor the effectiveness of their policies they need periodically to measure the incidence of inequalities of treatment and attainment.

States parties to the International Covenant on Civil and Political Rights of 1966 have undertaken to protect the rights of all individuals subject to their jurisdiction 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. It is improbable that any state effectively bars all these kinds of distinction. Since then, further anti-discrimination instruments have been added. The latest is the Convention on the Rights of Persons with Disabilities, adopted in 2006. Some people regard less favourable treatment on grounds of sexual orientation as a form of discrimination, but this is not accepted by certain governments and religious leaders.

### **Social science concepts**

The climax of proceedings in court is a finding of discrimination. For the social scientist such a finding is a station *en route*, and not a terminus. The social scientist has to discover the causes of unequal treatment.

In social science, the concept of disadvantage corresponds to the concept of discrimination in law. Any form of handicap associated with membership in a particular class of persons constitutes disadvantage. It has many causes, of which discrimination is only one. For example, the children of immigrant parents who grow up in a household, and in a minority community, in which the language of the homeland is spoken, and not the language of the country of settlement, may be at a disadvantage in their education. Not all their disadvantage can be attributed to discrimination, though it is possible that if the children's teachers assume that they will respond less well to classroom lessons, that assumption might give rise to a particular form of discrimination.

Social science has established that many forms of disadvantage are cumulative. It is a common joke in teaching beginning students to say that 'if you want to be economically successful in your life you should be very careful when you choose your parents'. Industrial society depends upon financial incentives. These are effective, in part, because parents want to give their children 'a good start in life'. This entails residence in a locality that gives access to good services, including schools. Their children become friends with children whose parents share the same aspirations for them. Later, their opportunities for high-income employment are greater. Thus relative advantage or disadvantage is transmitted from one generation to the next.

The inter-generational transmission of inequalities cumulates many forms of lawful unequal treatment. Some inequalities are based on skin colour. Anyone whose appearance is different from that which is socially preferred will be at a disadvantage. This can be counter-balanced if that person has a claim to higher status based on education, wealth, or some other attribute. There can be a trade-off resulting in the creation of a scale of social status in which colour is one component.

The social scientist has to examine the processes that lead to the creation of new categories that can be the objects of less favourable treatment. Here I encounter a difficulty because in the experiment I wish to discuss the word 'discrimination' was used when, in my present view, it should have been 'unequal treatment'. Tallyrand is reputed to have said that language was given to humans so that they could disguise their thoughts. It can certainly confuse our thoughts.

It is possible that, without any prior dispositions to 'discrimination', unequal treatment may be generated by the encounter itself. Henri Tajfel (1970) conducted a series of experiments to discover the minimal conditions which (as he saw it) gave rise to 'discrimination'. The subjects of the experiment were young male apprentices who were shown slides of pictures by Klee and Kandinsky and asked to indicate which they preferred. They were then led to believe that they had been divided into teams according to their preference for the one artist or the other. Next they completed a task in which they were allocated small sums of money, and in which they could follow alternative strategies. One was that of maximizing joint profits, in which members of their own team got most money but members of the other team (identified only by a code number) did equally well. Another strategy was that of maximum difference, whereby the subjects obtained less for themselves but were able to ensure that those apparently in the other

team received even less than they did. As subjects came to understand the nature of the task, they increasingly preferred the strategy of maximum difference. 'Discrimination' could be produced by simply telling the young men that they had been allocated to different categories even though the categories themselves were of no social significance. Subsequent experiments confirmed this finding and showed that similar effects could be produced even more simply. It would seem that all that is needed to produce social alignment and competition is the belief among subjects that they share membership in some sort of team, even one randomly created. Similarities between people contribute to social alignment by serving as cognitive cues to the creation of social categories and do not create bonds by themselves.

Tajfel described these as experiments in inter-group behaviour. This, I believe, goes too far. The subjects believed that they had been placed in some sort of team, and responded accordingly. They did not know who were their fellow team members and the 'teams' existed only for the duration of the experiment. Membership in a social group has to be more significant than that. Tajfel's experiments were into inter-category behaviour<sup>1</sup>. To describe the resulting behaviour as 'discrimination' also goes too far. The behaviour produced was not discrimination in law. Assignment to what the subjects thought was a team led them to treat more favourably those they believed to be fellow team-members even at a small cost to themselves. This was a very interesting finding. The next question is: where do we go next?

### **The second step**

I began with the assertion that theoretical and conceptual development in this area required two steps. The first was the identification of the *explanandum*. The second necessary step is the recognition that theories and concepts are developed in the process of improving explanations. So, to advance, we need more thought-provoking observations. We need to collect the sort of data that will oblige us to improve our theories and concepts.

A study of the prices paid for new automobiles in Chicago is instructive. It showed how, in that sector of the car market, considerations at the interpersonal level could determine aggregate outcomes (Ayres & Siegelman 1995). Black male testers inquiring about the possible purchase of particular vehicles were quoted prices \$1,100, or 9 per cent, higher than the prices asked of white testers. If the testers bargained, they could secure price reductions, yet the black-white disparity remained. Black female testers were quoted prices \$280 higher than white male testers and, though the price was reduced in the course of bargaining, it finished \$400 higher than the final offer made to male testers for the same vehicle. Initial offers to white female testers were \$55 higher than to white males but the discrepancy in final offers increased to \$130. Several factors apparently contributed to these findings. An earlier study had found that while 31 per cent of white respondents believed that the prices quoted to them were not negotiable, 61 per cent of black respondents believed this. Women were more likely than men to be misinformed about the willingness of dealers to bargain, though the gender discrepancies were not as

great as those between blacks and whites. The research workers concluded that the main reason for the price differences was that dealers, wanting to make profits, drew their own conclusions about how much inquirers might be willing to pay (their 'reservation prices'), and, irrespective of whether the dealership owners or their sales representatives were black or white, they thought they needed to concede less to blacks and to females than to white males. Blacks, particularly black males, were disadvantaged by the dealers' images of them as customers, and this explained much of their disparate treatment.

Blacks and women were treated less favourably because sales representatives, wishing to maximise their earnings, took advantage of purchasers who knew less about how the market operated by concealing the extent to which quoted prices were negotiable. It is improbable that, were legal proceedings instituted, individual sales representatives could have been shown to have discriminated, though it would be possible, by law, to lay an obligation on their employers to see that all classes of customer were treated equally.

In the attempt to account for observations such as these, a social science distinction has been drawn between categorical discrimination and statistical discrimination. Categorical discrimination is the less favourable treatment of all persons assigned to a particular category. The black and female car purchasers were subject to statistical discrimination, i.e., less favourable treatment arising from a belief that people in a particular category are less likely to possess attributes that the discriminator is seeking. Thus it is generally believed that some employers, when considering whether to give employment to young women, will weigh the chances that before long they may be applying for pregnancy leave, so that a replacement will have to be found, and that replacement may require job training before she is of value to the employer equal to that of the woman she is replacing. The black and female would-be car purchasers were at a disadvantage because the sales representatives assumed them to be less well informed about prices. Children from minority families could experience statistical discrimination if their teachers believed that their academic potential was lower. In neither case is there any presumption that the belief is without objective justification.

If we are to tidy up our social science vocabulary, we need to reformulate categorical discrimination as less favourable treatment arising from assignment to a social category. Statistical discrimination would then become less favourable treatment arising from a belief about probabilities associated with assignment to such categories.

### **Discrimination testing**

In 1967-68 research conducted in England established that the incidence of racial discrimination was higher than had been believed. It was instrumental in securing parliamentary approval for the extension of the anti-discrimination legislation. It also inspired an initiative, entitled 'Combating Discrimination against (Im)migrant Workers and Ethnic Minorities' within the Migration Branch of the International Labour Organisation that started in 1989 (Zegers, McClure & Taran, 2001).

Within this programme a study in the Netherlands found that in out of every three responses to advertisements of vacancies for semi-skilled employment a Moroccan applicant received less favourable treatment than a Dutch applicant. When jobseekers had to apply by post even immigrants who had received a Dutch college education and spoke Dutch fluently were seriously disadvantaged (Bovenkerk, Gras & Mourinho 1995). Only in Belgium, Germany, the Netherlands, Spain and the USA could the ILO plans be implemented as originally intended. The findings from all these countries reported an incidence of discrimination not greatly different from that found in the Netherlands and the United Kingdom. Studies were conducted into the efficacy of anti-discrimination legislation in ten countries. They showed that the criminal law is relatively ineffective in preventing discrimination at the workplace and in enabling its victims to obtain compensation. Other studies evaluated anti-discrimination training in six countries.

This line of research has been continued within the Netherlands Institute for Social Research and will be the subject of reports to the conference on audit and corresponding testing. My contention is that this is policy research, not theory-oriented research. European governments have accepted international obligations to combat discrimination. They are subject to political pressures to ascertain the nature and incidence of discrimination. The task for social scientists, however, is to identify questions about the causes of unequal treatment that will provoke better explanations.

### **Ethnic preferences**

Statistics frequently reveal patterned inequalities in earnings. Table 1 appended to my text 'The Settlement in Europe of International Migrants', summarises economists' conclusions about the sources of these inequalities. It refers to Garry Becker's conception of a taste for discrimination and to my contention that this is better seen as a preference for association with co-ethnics. Such a preference is likely to be formed at a point in time prior to the moment at which people of different ethnic origin encounter one another.

My conclusion is that the way ahead in research is to measure ethnic preference and to trace their sources, as outlined in the text just mentioned. These should be studies of all kinds of ethnic preference, not just those likely to lead to discrimination. For example, they can include studies of preferences in the search for marriage partners in ethnically diverse milieux.

As an example (and an example only) of the kind of experimentation I advocate, I recall that over fifteen years ago (Banton 1994:12), I tried, quite unsuccessfully, to persuade others to try out a technique for measuring preferences for ethnic mix in the selection of schools. People were given a small set of cards with the instruction 'Please arrange the cards in the order of preference you think would be shown by the parents of an 11-year-old child who are of similar social background to your self, when choosing a state school.' The cards permuted three variables: high or moderate academic standard, all own ethnic group or 50-50 mix, and a ten or forty-minute journey. They read:

- |                   |                                                                         |
|-------------------|-------------------------------------------------------------------------|
| 1. Albert School  | High academic standard<br>50-50 ethnic mix<br>40 minute journey         |
| 2. Brenda School  | Moderate academic standard<br>All own ethnic group<br>40 minute journey |
| 2. Charles School | High academic standard<br>All own ethnic mix<br>40 minute journey       |
| 3. Diana School   | Moderate academic standard<br>50-50 ethnic mix<br>40 minute journey     |
| 4. Edward school  | High academic standard<br>50-50 ethnic mix<br>10 minute journey         |
| 5. Fiona school   | Moderate academic standard<br>All own ethnic group<br>10 minute journey |
| 6. George school  | High academic standard<br>All own ethnic group<br>10 minute journey     |
| 7. Harriet school | Moderate academic standard<br>50-50 ethnic mix<br>10 minute journey     |

This test asks subjects to predict the reactions of their others. It has some advantages over the alternative procedure of asking subjects how they would behave if they could imagine themselves in such situations, but it runs into the problem psychologists have called pluralistic ignorance. I could place on the website an article about this, but have not done so since it is only tangential to the discussion of unequal treatment.

### **The way ahead**

I have argued that what is chiefly needed for the theoretical and conceptual development of research in this area is more thought-provoking observations, like Tajfel's experimental findings and the differential prices in the Chicago car market. This

conclusion is in line with a principle formulated eight hundred years ago. It is often called 'Occam's razor' (see Wikipedia), or the principle of parsimony. I would express it as 'introduce only constructs necessary to account for the observation under consideration'. If we collect more systematic data on inequalities and preferences, we will be challenged to account for them. That will oblige us to refine our theories and our concepts.

## Note

1. Tajfel (1981:254) was not concerned with the objective nature of social categories but with social categorisation, which he defined as 'a social process of bringing together social objects or events in groups which are equivalent with regard to an individual's actions, intentions and system of belief'.

## References

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