Trends in Interpreting the General Concept of Discrimination

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The interpretation of the general and universal aspect of the concept of non-discrimination as a human right is moving in a direction which could be described in terms of the following trends:

(i) **Away from the rigidity and the hierarchy of prohibited grounds.** At the advocacy level, among activists and experts, efforts to transcend identity boxes and level up protections against discrimination on all grounds have begun. For example, inside the anti-racism movement, the hierarchy of victims has been denounced and the need for different racial, ethnic or religious communities to make common cause on equal rights has been recognized[1]. It has been acknowledged that existing standards of protection against discrimination on different grounds are themselves too disparate. In the European Union for example, non-discrimination on grounds of religion, language, sexual orientation, disability or age is not covered by protections as strong as those applicable to gender and race. This has driven representatives of the less protected groups to demand reform[2].

Conceptual issues related to the inherent indivisibility of dignity also call for further elaboration of the definition and scope of the "grounds". The multiplying of grounds listed in law, which is a natural result of the successes of various pressure groups, has blurred the borders of each established ground (or protected class). Some grounds (protected classes) overlap, while new life situations hoist onto the lists of prohibited grounds new items, such as chronic disease, HIV/AIDS status, genetic features, etc. Ultimately, whatever the type of discrimination, the individual suffers abuse on the basis of a characteristic that is arbitrary or irrelevant in the context of the treatment in question. **The assault on dignity through less favorable treatment is not made less damaging if its ground is not among the ones mentioned explicitly in the law. Activists have begun therefore to question the legal feudalism in the land of equality. The**

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[1] However, intolerance between disadvantaged groups remains widespread. For example, the Czech Roma NGO report on Holocaust compensation policies for Roma (September 2005) states: "It is unacceptable to lump Romany Holocaust victims together with Jehovah's Witnesses, homosexuals or disabled persons because Roma constitute a nation as well as Jews." The global NGO community is still sharply divided over the impact of the World Conference against Racism (Durban, 2001): some view this event as an important contribution to anti-racism while others see it as a racist and anti-Semitic hate parade.

[2] See e.g. European Union consultation results on Green Paper "Equality and Non-Discrimination in an Enlarged European Union", COM (2004) 562, August 2004.

trend is to gradually re-connect the boxes that the tradition of earlier single identity struggles has jealously isolated from one another.

The international human rights law basis for further development in this respect is derived from the adding of the phrase **"any other status" to the list of prohibited grounds in most international human rights provisions outlawing discrimination**. In its judgments concerning violations of Article 14 ECHR, the European Court of Human Rights increasingly relies on the definition of discrimination in *Willis v the United Kingdom*: **"treating differently, without an objective and reasonable justification, persons in relevantly similar situations"**. It is worth noticing that no fixed grounds are implied in this type of definition. Any ground, according to this standard, could be illegitimate if the characteristic in question (sex, ethnic origin, etc., but also deriving from any other status, which could be given by any group identity) does not *per se* justify objective and reasonable difference in treatment. From this more general definition, it is obvious that some characteristics, such as ethnicity, would almost never be justified, therefore they would almost always be arbitrary. Other characteristics that have never been considered as prohibited grounds can however also be a basis of discrimination, if they become an arbitrary basis in a given context and cannot objectively and reasonably justify different treatment. Clothing, for example, could be such "other status". For example, if an employer requires wearing a designer suit as an essential part of a job, e.g. in an advertising industry, and an employee refuses to wear such a suit, the employer requirement would not constitute discrimination, as it would in situations in which wearing a designer suit is not a genuine and essential occupational requirement.

(ii) **Toward a single equality law and a single implementing equality body.** Further to leveling up protections and ending the hierarchy of grounds found in current laws and policies, some equality advocates press for a "single (or unified) equality framework".[3]. This tendency is set apart despite its intrinsic link with the first tendency commented above, insofar as it is possible to defend narrow definitions for a closed list of prohibited grounds while advocating a single overarching law covering these grounds. On the other hand, it is possible to insist on a fluid and flexible concept of ground but believe at the same time that there ought to be separate laws covering different grounds.

[3] The current process of harmonizing UK anti-discrimination law to achieve more consistency across the grounds is an example. See www.odysseustrust.org/equality

To be sure, introducing a unified equality framework does not appear to be simple or unproblematic. One should not want to obscure or downplay the stark differences between the different types of discrimination. Since the causes, manifestations, scope and experience by victims of discrimination on different grounds may be very specific, a unified equality framework should not dissolve these differences but rather seek to develop the aspects where they have something in common as types of the same general phenomenon -- discrimination, while seeking adequate remedy for each type.

Some advocates of particular disadvantaged groups, namely the elderly and people with disability, have cautioned that a unified equality framework may mean the same treatment of people whose equal access to rights actually requires **perpetual special treatment**. However, a developed right to equality is not about sameness and uniformity but about fairness and equal opportunity to participate in society. This concern must be incorporated by ensuring that equality is not construed by courts (and misunderstood by the public) as a barrier to diversity. The unified framework should not impose common solutions to different cases; achieving substantive equality requires different policies for the different groups[4].

(iii) Emancipation from the reliance on purpose/intent. We are currently witnessing a tendency, particularly strong in Europe, to interpret discrimination as any "distinction, exception, restriction or preference" (ICERD, Art. 1) that has **the effect** to put a person carrying certain characteristic in a less favorable position, but not necessarily **the purpose** to do so.

In the European Court of Human Rights (ECtHR) jurisprudence, the legal interpretation of the concept of discrimination passes at present through a syncretic stage, apparent in the landmark 2005 *Nachova and Others v. Bulgaria* case, as well as in several further judgments that followed *Nachova*. At this stage, the ECtHR concept of discrimination has not yet extricated itself from its association with subjective aspects related to purpose, or intent. The European Court of Justice, by contrast, has been developing case law on discrimination that is in line with the modern

[4] Some of the best works defending a right to substantive equality as opposed to equality as equal (same) treatment is found in: Sandra Fredman, "Combating Racism with Human Rights: The Right to Equality", In: Discrimination and Human Rights. The Case of Racism. Ed. By Sandra Fredman, Oxford University Press, 2001; See also Christopher McCrudden, "International and European Norms Regarding National Legal Remedies for Racial Inequality", *idem*.

understanding that the purpose to discriminate is irrelevant when finding whether discrimination has occurred.

(iv) Emancipation of non-discrimination from its accessory status and developing its relationship with other human rights. The status of the right to non-discrimination vis à vis other human rights has been uncertain, hesitating between that of a general underlying principle, an autonomous human right[5], and a subsidiary accessory right that is attached to another right. Article 14 ECHR, for example, protects only from discrimination in the enjoyment of another Convention right. Overcoming the limitation of this provision, a gigantic step forward was the adoption of Protocol 12 ECHR, which unchained the right to non-discrimination from other Convention rights, providing for a general autonomous prohibition of discrimination in respect to any right defined in law. For example, since ECHR does not protect a right to citizenship, discrimination in access to citizenship could not be complained of, whereas after the entry into force of Protocol 12 in April 2005, such a possibility exists in respect to States parties that have ratified Protocol 12.

Once emancipated, the right to equality will develop in the next decades through further elaboration of the **relationship of equality with other autonomous human rights**, such as freedom of expression, freedom of religion, or the right of ethnic minorities to promote their own culture[6]. For example, complex issues arise when gender equality provisions are in conflict with the right of minority members to enjoy their own culture, in particular when the culture in question prevents women from enjoying such rights as equality in marriage, property, child custody, inheritance, or access to education. Weighing non-discrimination against other human rights will be an important mechanism of integrating the right to equality in human rights law.

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[5] See Footnote 2 *supra.*

[6] On the evolving relationship between the anti-discrimination framework and the minority rights framework, see: Rethinking Non-Discrimination and Minority Rights. Ed. by Martin Scheinin and Reetta Toivanen, Institute for Human Rights, Åbo Akademi University, Turku/Åbo, German Institute for Human Rights, Berlin, 2004.