

Chapter 2

Concepts of Discrimination



The principle of equality constitutes the core of contemporary societies. Equality in dignity and rights provides the foundation of the Universal Declaration of Human Rights from 1948, and the right to equal treatment is the basis of the antidiscrimination acts that started spreading from the US and the UK in the mid-1960s onwards. Indeed, equality and discrimination are inherently connected: As legal scholar Sandra Fredman has pointed out (2011, 4), “classical and medieval societies were not founded on a principle of equality,” and in these societies, there was no expectation of equal opportunities. Of course, this was, in practice, not the case in the early phases of modern societies either. For centuries, many groups – women, slaves, and racial and religious minorities – were excluded from the liberal rights that white men enjoyed. However, when the principle of equality was expanded to all groups and coupled with the prohibition of slavery and unequal treatment, women and various minority groups were formally granted the full scope of rights – including the right to not experience discrimination. Today, as legal scholar Tarunabh Khaitan (2015, 3–4) has suggested, “a system of law regulating discrimination has become key to how states define themselves.” Of course, granting members of society formal equality of opportunity does not in itself eliminate inequalities, which have many roots. However, within the framework of formal equality, what role discrimination plays in shaping inequality becomes a major question.

Despite the fact that equality of opportunity is a core feature of contemporary societies, the concept of discrimination remains multifaceted. In the most straightforward definition, discrimination is the unequal treatment of similar individuals placed in the same situation but who differ by one or several characteristics, such as race, ethnicity, gender, (dis)ability, sexual orientation, or other categorical statuses. Discrimination may result from an explicit reservation or exclusion based on some of these characteristics or be the outcome of seemingly neutral rules or procedures that disproportionally disadvantage certain individuals or groups compared to others. These disadvantages might spur from organizational or societal cultures that favor some groups over others due to historical legacies, laws, or public policies. In earlier phases of many modern societies, discrimination was grounded in

institutionalized ethnic and/or racial segregation, which prevented minority groups from applying for certain jobs or residing in specific areas (Anderson 2010). Such legally discriminatory systems were abolished mainly in the 1960s and 1970s. Yet, more subtle forms of exclusion in the educational system, labor market, criminal justice system, and public spaces remain the reality for many racialized groups today (Pager and Shepherd 2008; Reskin 2012).

These different forms of discrimination share two common features. First, discrimination is a matter of comparison: For discrimination to take place, the discriminated individual or group must be treated unfavorably compared to some other individual or group. Second, the basis for the unequal treatment is ascribed membership in a certain category that cannot be readily chosen or changed (whether the ascription reflects the actual identity if the individual is not important). Race, color, ethnic origin, and national descent constitute the grounds of what we here define as ethnic and racial discrimination. These categories are part of broader systems of status inequality, which help constitute the uneven distribution of wealth, power, and resources in society (Ridgeway 2014). As discrimination often occurs in processes of allocation of goods and positions – such as housing or employment – discrimination is fundamentally a matter of access to opportunities, power, and resources.

This chapter gives an overview of some of the key concepts in the field. It starts by distinguishing between direct and indirect discrimination in legal definitions. Next, we define the interrelated concepts of multiple discrimination and intersectionality, which increasingly are used in both legal studies and the social sciences, before giving an account of the interrelated concepts of organizational, institutional, and systemic discrimination. The chapter ends by reflecting on the complex relationship between discrimination and the endurance of categorical inequalities in societies where all members formally enjoy the principle of equality.

2.1 Direct and Indirect Discrimination

Direct discrimination is equivalent to the straightforward definition of discrimination. Ethnic or racial discrimination, according to the International Convention on the Elimination of All Forms of Racial Discrimination from 1965 (The CERD convention), takes place when individuals or groups are treated unequally because of their race, color, descent, or national or ethnic origin. However, “equal treatment may well lead to unequal results,” as Fredman (2011, 177) points out. Indirect discrimination, therefore, refers to situations where seemingly neutral rules, provisions of procedures in practice produce disproportionate disadvantages for one category of individuals or groups compared to others. These two basic concepts – direct and indirect discrimination – constitute the main definitions in antidiscrimination laws in the EU, and they are equivalent to the concepts of disparate treatment and disparate impact discrimination, which are more frequently used terms in the US (Khaitan 2015).

Two important directives at the EU level protect individuals against direct and indirect discrimination: The Race Equality Directive and The Employment Equality Framework Directive (see also Chaps. 1 and 6). The predominant conception of antidiscrimination, which serves as the basis of both the two EU directives, defines as discrimination both actions, procedures, and provisions that have the purpose of unequal treatment and those that have differential treatment as an effect. This is important because it distinguishes discrimination from related concepts, such as prejudice, stereotypes, and unconscious forms of bias. To be sure, and as we will return to in the next chapter, discrimination can be caused by prejudice, stereotypes, or implicit bias. However, discrimination is not an ideology, belief, sentiment, or bias. It is a form of behavior, procedure, or policy that directly or indirectly disadvantages members of certain categories compared to others, simply because they happen to be members of that category (Fiske 1998). Consequently, defining an action as discriminatory does not require any underlying intention or motivation (Khaitan 2015). The concept of indirect discrimination makes this point particularly clear: By acknowledging that disadvantages may be produced or reinforced even by neutral rules and procedures, attention is drawn to the fact that unjustified categorical inequalities might occur independently of the intentions of individuals.

2.2 Multiple Discrimination and Intersectionality

In antidiscrimination law, as well as in theoretical and empirical discrimination research, concepts often refer to a specific ground of discrimination, such as “ethnic and racial discrimination,” “gender discrimination,” or “age discrimination.” In recent years, however, increasing attention has been directed to the fact that discrimination may be based on multiple grounds. Black women, for example, may experience discrimination on the basis of both their racial appearance and gender. Similarly, gay Muslim men may experience discrimination based on their sexual orientation and religious background. Often, it might be hard to disentangle the various components of the differential treatment from each other. Such combinations of dimensions of difference are referred to as multiple discrimination or intersectionality (Khaitan 2015, 137). Importantly, dimensions of categorical differences – such as gender, ethnicity, race, religion, disability, sexuality, and age – can work together in ways that reinforce, multiply, or neutralize each other, depending on the context.

According to sociologist Patricia Hill Collins (2015, 2), the term intersectionality “references the critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities.” Originating from critical race theory, which criticized traditional feminism and the women’s struggle for being concerned with the lives of white women and the civil rights movement for being predominantly represented by and concerned with the situation of African American men (cf., Crenshaw 1989), the term intersectionality

has spread globally. Today, intersectionality may refer to a field of study, an analytical strategy that provides new perspectives on social phenomena, and as critical practices that inform social movements (Collins 2015). The concept has also had an important impact on antidiscrimination law in the sense that in the 2000s, in many countries, various grounds of discrimination have been gathered in comprehensive laws, replacing previous laws, which targeted singular grounds (Krizsan et al. 2012). In law, however, the term used is often multiple discrimination rather than intersectionality, yet some legal scholars also refer to intersectional discrimination (e.g., Fredman 2011, 140).

The term intersectionality was originally coined by the American lawyer, civil rights advocate and philosopher Kimberlé Williams Crenshaw in the article “Demarginalizing the Intersection of Race and Sex. A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, published in *University of Chicago Legal Forum* in 1989. In this article, Crenshaw articulates the ideas of Black feminism as a critique of both the (male-dominated) civil rights movement and the (white female-dominated) women’s movement. According to Crenshaw, both of these movements tended to marginalize black women, who experienced the multiple burdens of both racial and gender subordination. Crenshaw’s ideas has influenced the development of antidiscrimination policy and laws in the US and the EU, it has inspired antiracist and feminist social movements across the globe, and it has been an important benchmark for the further theorizing of intersectionality in the humanities and the social sciences, not least in the important work of scholars such as Patricia Hill Collins and Leslie McCall.

2.3 Organizational, Institutional, and Systemic Discrimination

These key concepts of discrimination – direct, indirect, and multiple – are often used somewhat differently by legal scholars and social scientists, partly because they use the concepts for different purposes. The former needs precise and exhaustive definitions to be able to clarify whether single cases are discriminatory or not. The latter are more interested in broader patterns of group disadvantage and the role discrimination plays in creating such disadvantages. Social scientists are typically also more interested in subtle forms of exclusion that occurs in everyday interaction, as well as in the historical accumulation of group disadvantage. For these reasons, social science literature often entails broader conceptualizations of discrimination than are typically found in legal textbooks.

Since Gordon Allport published his seminal book *The Nature of Prejudice* (1954), social psychologists have argued that the formation of “in-group loyalty” often leads to “out-group rejection” and ultimately to discrimination. As will be

detailed in Chap. 3, this basic insight is often applied to the workplace context, in which processes of exclusion may occur as members of privileged groups favor co-members of the same group, while “out-groups” systematically receive fewer opportunities in terms of training and development, promotions, and work assignments. Such in-group favoritism, in which people give advantages to individuals similar to themselves, is often referred to as homosocial reproduction (Kanter 1977; see also Chap. 3).

Organizational cultures may also shape patterns of interaction that over time exclude non-dominant groups. For example, in an extensive study of employment and housing discrimination suit files in the state of Ohio, Vincent Roscigno and colleagues (Roscigno 2007, 10) argue that discrimination involves much more than direct exclusion, “it also entails differential treatment once employed or once housed, where the outcome is status hierarchy maintenance.” Focusing on “in-group favoritism” and not simply instances of differential treatment at the point of initial hiring implies that the structures of advantage within organizations also must be taken into account when considering the dynamics of contemporary discrimination.

Compared to direct differential treatment at the individual level, these forms of “systemic” discrimination are harder to prohibit by legislation, which normally protects individuals from differential treatment by providing the right to complain to a legal body when discrimination is perceived to have occurred. Due to the limits of prohibitions, these complaint-based models of antidiscrimination legislation have been supplemented by proactive obligations to promote equality in many European countries, as well as in North America. We will return to this development in Chap. 7. For now, it suffices to say that the introduction of proactive means implies, as the legal scholar Ronald Craig (Craig 2007, 175) has put it, a shift in focus “from the compensation of individuals for unlawful discrimination to the transformation of organizational policy, practice, and culture at the workplace.”

Because proactive measures are intended to change organizational culture and not simply the behavior of single, discriminatory individuals, they are also more controversial. As pointed out in a classic text by sociologist Robert Merton (1971), social problems that are direct products of deviant behavior are easy to fight because they stand in conflict with the existing organization of society. Social problems that are by-products of social organization, by contrast, tend to remain latent due to the “normative force of the actual” (Merton 1971, 816). Reducing systemic discrimination requires a critical evaluation of organizational and administrative structures and implies that the problem might be the everyday policies of the organization itself. This represents a major challenge for antidiscrimination legislation because it presupposes a shift – psychologically and politically – which acknowledges that discrimination may be deeply entrenched in everyday practices and existing organizational cultures. Clearly, it requires a strong will to change such cultural practices to control biases in, for example, processes of selection, allocation of goods, and delivery of public services.

Importantly, these forms of organizational or systemic discrimination are not exclusive to the labor market but may apply to all kinds of institutional

settings – schools, public apparatuses, housing, and criminal justice systems – as well as to the society at large. Thus, concepts such as “institutional discrimination” and “structural discrimination” are frequently used to capture the same types of phenomena. These terms are often used somewhat loosely in the literature and there are few guidelines in making clear distinctions between the concepts. A useful way of pinpointing the key content of these concepts, however, is to say that they “refer to the range of policies and practices that contribute to the systematic disadvantage of members of certain groups” (Pager and Shepherd 2008, 197; see also Chap. 3).

Particularly in the context of American race relations, structural, systemic, or institutional discrimination are often used interchangeably with the concept of institutional racism. Ward and Rivera (2014) define institutional racism as “a self-perpetuating and opaque process where, either intentionally or unintentionally, barriers and procedures which disadvantage ethnic minority groups are supported and maintained.” Indeed, members of minority groups may be disadvantaged not only because of differential treatment at the individual level, but because they are part of broader societal structures that over time has come to privilege some groups over others. Present-day disadvantages that are products of discrimination in the past – for example, when children of disadvantaged parents face constrained opportunities due to historical discrimination and segregation but without necessarily being the subject of direct discrimination themselves – is often referred to as cumulative discrimination (Blank et al. 2004) or *über* discrimination (Reskin 2012) in the literature. The idea behind these concepts is to point out the potential feedback effects by which patterns of disadvantage are transferred across time, domains, and generations.

2.4 Discrimination and Inequality

The notions of cumulative disadvantage and *über* discrimination highlight the difficult relationship between racial and ethnic inequalities in society, on the one hand, and racial and ethnic discrimination, on the other. From a systems perspective, many racial and ethnic disparities in residential patterns, education, work, and health reflect deep-seated disadvantages that are due to different forms of discrimination, past and present (Anderson 2010; Pager and Shepherd 2008). In the realm of law, affirmative action has in some places been installed as a legal measure to compensate for such historical (and sometimes continuous) forms of structural discrimination, for example in the US (slavery and Jim Crow segregation), India (the caste system), and in South Africa (Apartheid) (Khaitan 2015; see also Chap. 7). In the social sciences, however, scholars are mostly concerned with distinguishing non-discriminatory factors that contribute to racial and ethnic disparities (e.g., group differences in human capital and access to social networks) from discrimination in access to opportunities. These scholarly efforts, which are obviously important in disentangling discrimination from legitimate bases of differentiation in access to resources, are nonetheless focusing exclusively on the individual level and may thus

contribute to conceal more complex processes of discrimination that shape broader patterns of inequality.

However, it is not evident whether and how the effects of discrimination may cumulate over time, not least because traditional research designs measuring discrimination at one point in time and in single domains are not able to grasp the ways in which race and ethnicity may affect access to opportunity even in the absence of differential treatment (Reskin 2012). Furthermore, countries differ enormously in their historical legacies when it comes to experiences of slavery and colonialism, which arguably offer the strongest cases of historical discrimination. The US does in some respects constitute an “outlier” in discrimination research due to its history of slavery and, later on, the Jim Crow system of racial segregation and discrimination. Yet many European countries’ pasts as colonial powers may clearly also affect current discourses and ethnic relations, as discussed in Chap. 1. How national histories affect the actual level of present discrimination have only recently been addressed by empirical research (Quillian et al. 2019). Suffice to say, this topic warrants more research: Whether and how racial and ethnic inequalities are reproduced across generations, and what role discrimination plays in this process, constitute a major concern in Europe today.

2.5 Conclusion

In the most straightforward sense, discrimination is defined as the unequal treatment of otherwise similar individuals due to their ascribed membership in a disadvantaged category or group. Partly as a response to a marked decrease in the most blatant forms of racism and discrimination, explicitly excluding minorities from access to housing and jobs, much attention today – in both research and law – focuses on the more subtle, indirect and covert forms of discrimination, and the extent to which discrimination contributes to prevailing racial and ethnic inequalities in societies at large. This is of crucial importance as discrimination continues to shape the access to power and resources for members of disadvantaged groups, as well as their everyday experiences and identity constructions. However, the change in focus also opens up a conceptual landscape that is more complex, more difficult to legislate and harder to enforce in practice. On top of this complexity comes the difficulties in identifying discrimination when it occurs, measuring its prevalence, and assessing its remedies and consequences. The next chapters delve into these important issues.

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