Discrimination and the foundation of justice: hate speech, affirmative action, institutional opinions

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English Summary

DISCRIMINATION AND THE FOUNDATION OF JUSTICE
Hate Speech, Affirmative Action, Institutional Opinions

The promise of the modern human rights discourse is that we are all entitled to certain fundamental rights. In this work, I investigated one aspect of this promise: whether group-based approaches to the right to be protected against discrimination in our relationships with other citizens are compatible with the universal and individual characterization of our fundamental rights. This project was based on two premises: a. that we experience suffering as individuals – even if we are targeted as assumed or professed members of a group – and b. that the universal and individual characterization of our fundamental rights is under pressure. The resulting report of my project consisted of two parts. First, I unearthed the prevailing foundation of justice in liberal states, our fundamental rights, and illustrated why their universal and individual characterization is so important. This illustration enabled me to present an interpretation of this foundation of justice with which I could evaluate current group-based approaches to fundamental rights obligations as they are often employed in liberal states. I called this framework a liberalism of fear. In the second part of this work I applied this framework to evaluate three Dutch group-based approaches to discrimination. More specifically, I investigated if these measures were fit to address discrimination in the relationship between citizens and whether they did not irrevocably clashed with the foundation of justice as established previously. I concluded this work with the observation that group-based approaches might be necessary to a certain extent. However, they always need sufficient substantiation, as they do present a deviation from the aforementioned foundation of justice. As such, a more general approach might better fit our universal and individual fundamental rights.

THE FOUNDATION OF JUSTICE

A rough genealogy of the prevailing foundation of justice in liberal states

begins with humanism, moves to the central tenets of liberalism, and ends with the modern human rights discourse as it came about with the Universal Declaration of Human Rights in 1948. The building blocks of this rough genealogy have one thing in common: their point of departure is the worst that humanity has to offer. These atrocities were often committed along the lines of personal characteristics that condemn persons to groups in the eyes of their assailants. States and institutions were the most influential instigators of such historical horrors, often through privileging some groups and disadvantaging others. But one should not ignore the misdeeds of private parties and associations, which were often aided in their terror through the assistance or willful neglect of institutions. Even previous attempts at a human rights framework were exclusionary in this way. As such, the central tenets of the liberal movement and the modern human rights discourse specifically intended to prevent a return to privileges for some individuals and groups, as well as disadvantages for others.

The characterization of our fundamental rights as universal and individual is one of the foremost instruments that can prevent a revival of these various forms of oppression. Especially persons who are disadvantaged and/or belong to marginalized groups benefit from its continuation, as they will be the first to feel the brunt of oppression when the state and other institutions resume their previous ways or allow private parties and associations to do so. This characterization, as said, is arguably under pressure. Rights are increasingly presented by states as an imposition or neutral governance variable, whereas they are the undeniable product of political choices. As this political nature is obscured, the defense of the universal and individual characterization of our rights might be in danger. This is illustrated by the fact that not all codified rights appear to be warranted equally and that the rights plight of some seems to get more attention than others. All without a substantiation that can be judged sufficient in light of the previously elaborated foundation of justice. To address these developments, which I encapsulated with the phrase human rights overreach, I proposed a liberalism of fear as a necessary evaluative framework.

A liberalism of fear, contrary to more traditional interpretations of the central tenets of liberalism and the modern human rights discourse,

focusses on injustice instead of justice. It recommends that liberal states *at a minimum* safeguard certain basic capabilities for all their citizens to explore during their lifetime. These capabilities can be derived from the existent rights catalogues and – where there is room for discussion – the capabilities lists that political philosophers propose. The goal of a liberalism of fear in one word is: access. Access to those physical, human, and social resources that provide us with resilience against those manifested vulnerabilities that make a human life unworthy of being called dignified. With regard to the state, this demands both action and restraint, as we saw already that the state can contribute to injustice instead of remedying it.

With the evaluative framework of a liberalism of fear, we are able to discern a few requirements of discrimination law. These statutes should account for our rights as universal and individual in nature, in addition to being both general and legible. As a consequence of these requirements, not all differential treatment in the relationship between citizens can be addressed and not in any way. Differential treatment qualifies as wrongful and thus as discrimination if it prohibits citizens the full enjoyment of their rights, relative to others, on account of their personal characteristics. The lower limit for state action would be when such treatment takes away one's ability to partake in society on an equal footing with others and make one's own life choices. But even then, as an aspect of the required state restraint, states and other societal institutions should probably avoid group-based approaches, considering the drawbacks and the dilemmas they encompass.

GROUP-BASED APPROACHES TO DISCRIMINATION

These dilemmas were subsequently illustrated with three case studies of a ditto number of group-based approaches to discrimination in the Netherlands. These case studies pertained to the Dutch hate speech ban, quota laws and *ad hoc* institutional opinions. I will summarize the results in turn.

Hate speech bans were rated as a necessary instrument against exclusion and harm through speech. However, the Dutch group-based approach, which protected merely some groups but not others that arguably fit the underlying interests as identified by the government, could not be

justified. Such an approach clashed with the foundations of criminal law, where the individual occupies a central position in order to prevent abuse of the criminal justice system. Furthermore, as alluded to above, many of those that could need support against hate speech were excluded from the protection offered through this statute. Especially those that suffered as a consequence of the prejudices that target intersections of personal characteristics were left without a proper recourse. In addition, the possibility of second-order discrimination, or that some persons are allowed to utter more harmful speech than others, might rear its head. This group-based approach could also entrench group identities, strengthening existing stigmas and creating new ones. As a result, persons within a group, whether they claimed membership or were assumed to be a member against their wishes, had less avenues to reform, avoid, or leave such groups. Lastly, there was the risk of a struggle between groups for the acknowledgment as marginalized and the subsequent legal protection against hate speech.

The Dutch quota laws to achieve a more equal gender representation at the top of corporations entailed many of the same dilemmas. This instrument also clashed with the foundations of the area of law in which it operated: private law. The goal of this area of law is to create a social sphere where citizens can associate as normative equals without too much interference of public interests. Some interventions on account of fundamental rights are naturally necessary to ensure this normative equality, especially with regard to the right to be protected against discrimination. The Dutch quota laws in their previous and current iterations, though, seemed unfit for the goal of opposing discrimination. This was primarily due to their group-based design and the fact that chiefly the better-situated within the selected category benefited. In addition to this lack of utility, this interference could also not be justified on account of the other aforementioned dilemmas. Most prominently the exclusion of the persons that are in the same circumstances as those who benefit from this statute, the lack of consideration with regard to matters of intersectionality, the apparent hierarchy of suffering implicit in the anatomy of this anti-discrimination measure, the entrenchment of stigmas – both old and new – and the power imbalances that this discrimination law causes within the collective it aims

to protect as well as between this group and other disadvantaged persons.

Institutional opinions, like a hate speech ban, are arguably necessary with regard to the duty that liberal states have to ensure the right to be protected against discrimination for all at a sufficient level. This instrument is specifically crucial if a state aims to address the exclusion that remains beyond more traditional discrimination laws. However, a measure of state neutrality is indispensable in any liberal state. As such, there is but limited room for deviations from strict neutrality, and these deviations should be properly substantiated. It is difficult to assess whether the *ad hoc* opinions that are disseminated by Dutch institutions are a legitimate deviation or adequately justified, because there is currently no legal framework. We could observe, though, that a number of Dutch institutions have disseminated opinions to address discrimination with regard to merely some groups. As a result, we encountered much of the same dilemmas as with the Dutch hate speech ban and quota laws. Many persons who needed the same protection, especially on account of intersecting personal characteristics, lacked it. There was again an apparent hierarchy of suffering. Stigmas could also be reinvigorated or created. And struggles within or between groups emerged as a risk once more. These risks are perhaps more acute here than with the preceding two instruments, and for two reasons. First, certain group identities are now promoted by institutions instead of used as a mere shorthand to address persons' disadvantages that are the result of the prejudices relating to their (assumed) personal characteristics. Furthermore, as there is no legal framework, persons who are or are not included in an opinion, or have other problems with it, do not possess a viable way to address perceived oversights by the opinionated institutions.

In summation, it is clear that these three anti-discrimination measures, whether they are effective or not, merely present an illusion of justice.

AN ILLUSION OF JUSTICE

The surveyed instruments to oppose discrimination in the relationship between citizens combined a group-based approach with an insufficient substantiation why this approach was employed and how the selected groups

differ from those other disadvantaged persons which could use this protection. Among other remedies, this illusion of justice could be ameliorated with an universal and individual approach, as proposed by a liberalism of fear. Especially, if we also emphasize the need for compassion.