Grounds of discrimination: A dilemma

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1. PROBLEM

My starting point is the hypothesis that the focus of prohibitions of discrimination on specific groups leads us into a dilemma: On one side it is necessary, on the other side it is problematic, because it bears the risks of reconstructing difference and the ineffectiveness of anti-discrimination law.

I will argue on the basis of the Swiss Law. Article 8 para. 2 of the Federal Constitution of the Swiss Confederation enumerates a series of grounds of discrimination. These include such attributes (or grounds) as origin, race, gender, age, disability and way of life, to name just a few from the non-exhaustive list. Over and above the constitutional prohibitions against discrimination, efforts have resulted in the passing of specific laws to prohibit discrimination against certain "category members" or grounds – as I call them, following the prevailing terminology – to wit: the Swiss Equality Act for women and men, which entered force in 1996 (addressing the ground of gender) after long decades of political toil by the feminist movement; and the Federal Act on the Elimination of Discrimination against People with Disabilities, which was passed in 2002 and entered force in 2004 after years of lobbying by disability groups. So, to nobody's great surprise, Swiss anti-discrimination law – and hence the anti-discrimination movement – is inherently oriented to specific groups. It focuses on the people affected by discrimination.

This groupist perspective of Swiss legal language carries over into the rulings of the highest court: according to the standard wording used by the Swiss Federal Supreme Court, prohibitions on discrimination cover all discriminatory treatment based on "*membership* of a certain group which had a tendency historically and in the present social reality to be excluded or treated as inferior (…) Discrimination represents a qualified type of unequal treatment (…) that can be characterised as disparagement or exclusion, because it attaches to a differentiating attribute that is an essential component of the affected person's identity and impossible or very difficult to give up."

You already see the contradiction that opens up in this definition: It is unclear whether it follows an asymmetrical or a symmetrical conception of protection. But that ist not whalt I

want to stress. I would like to thematize the groupist perspective of the prohitions of discrimination, to wit: Whichever the case, it is beyond dispute in both conceptions – the symmetrical or the asymmetrical – that prohibitions on discrimination aim to define disadvantages on the grounds of apparent or actual identity traits – be they self-assigned or ascribed by others – which may not be exhaustively listed in Art. 8 para. 2 but are nevertheless clearly stated.

And here the problem is manifested, which – I think – all of us on this panel call "the categorical Dilemma". On the one hand – by hard-fought grassroots political effort and/or top-down advances in human rights resulting from historical events – socially salient groups are designated, so that instances of unequal treatment based on membership of precisely these groups can be combated – we can call it strategic essentialising. On the other hand, by naming particular groups in this way, we run the risk of reifying differences as apparently natural, or diverting attention from societal attribution and normalisation processes. If we take a look at legal practice, we encounter three concrete problematic effects:

- First, the group focus in the application of law can lead to exclusion from anti-discrimination protection, despite the existence of discrimination. Here I refer to this problem as **groupist exclusivity**. For example, a criminal law ruling of 2005 found that because the court – rightly – did not classify Kosovo Albanians as a race or an ethnic group, the same court wrongly excluded them from the protection afforded by the prohibition on discrimination based on race, ethnicity or religion. Or – to cite another example – in a recent ruling of the Swiss Federal Supreme Court of May 1st of this year, the court found that giftedness accompanied by an emotional or social disorder or impairment of well-being is not a disability, despite the fact that insufficient stimulation was causing a child massive difficulties. Ultimately this led to a decline in achievement and, partly for that reason, exclusion by other schoolmates.
- The second problem is: the **essentialisation or over-rating of difference**, particularly where the disadvantaged person is recognised as a discriminated category member: in rulings on the question of whether children with disabilities should be assigned to integrative or separate special education, implicit assumptions are made about the interest of the child with the disability, on the one hand, and the interest of the able child on the other. This dichotomising view that there seem to be two types of children's interest clouds the perspective on discriminatory school structures; that is to say, it is too hastily assumed that, for seemingly "natural" reasons, integration into regular structures is an impossible or at least barely feasible undertaking.
- Thirdly I would like to touch on the third problematic – or challenging – aspect of the groupist perspective challenge, the **homogenisation of unequal relations**: for example, quotas for people with disabilities – despite the targeting of specific subgroups in some cases – very rarely result in the recruitment of people with a hearing disability. Or more general: People with an unproblematic disability benefit from quotas; the difficult cases do not. For example, migrants with a disability go almost unnoticed.

After that telegram-like overview of the three problematic effects I would like to illustrate the problematic nature of the groupist perspective with reference to a concrete judgement of the Swiss Federal Supreme Court from the year 2006.

2. EXAMPLE (RULING: BGE 132 I 49): DRINKERS AT STATIONS: MEMBERS OF A GROUP THAT FALLS UNDER A DISCRIMINATION GROUND?

In the course of a coordinated operation by the city of Bern police force on November 28, 2003 inside the concourse of Bern railway station, twelve individuals – consuming alcohol – were stopped and checked. On the same day, the city of Bern police issued a removal order covering key areas of publicly accessible spaces in and around the station. The statutory basis is a provision in the applicable Police Law (*Polizeigesetz*, PolG) entitled "Police measures and police compulsion", which allows temporary removal or exclusion from an area if there is reason to suspect that the persons concerned or others pose a threat or disturbance to public security and order (Art. 29 lit. b PolG).

The provision is intended for use in tackling the drug scene and maintaining public order and security, but can also be applied to other groups, particularly skinheads or hooligans.

At the court of final instance, the Swiss Federal Supreme Court, the complainants claimed to have been discriminated by the removal and exclusion orders. According to the complainants, the measures taken were directed at people with a very specific way of life – as mentioned as a ground of discrimination in Art. 8 of the Swiss Constitution – and had a specific kind of impact on marginalised social groups because of their supposedly unconventional and unusual appearance and behaviour, which differs from behaviour subjectively defined as "normal".

The Federal Supreme Court rejected the complaint.

The problematic aspect is not necessarily the outcome, but the argumentation: the Federal Supreme Court deemed Art. 8 para. 2 of the Federal Constitution to be inapplicable, reasoning that the complainants had not demonstrated in concrete terms how they belonged to a socially definable minority or group. The Court took the view that in the present case, complainants who possibly came from a wide diversity of origins, life circumstances and places of residence, did not obviously form a specific group defined by special attributes, which were not freely chosen or easy to relinquish and which therefore required special constitutional protection.

The argumentation of the Federal Supreme Court is highly problematic: the Court's reasoning requires the complainants to present themselves as a homogenous group – the complainants had to construct a quasi-natural equality within this group, or to over-emphasise a difference in its external relations which does not exist in effective reality – what they lawyer indeed tried to manage in the complaint. The Court itself concedes the absurdity of this, but all too hastily draws the wrong conclusion: "Merely the fact that they gather occasionally,

frequently or regularly in the station concourse does not make them into a group that can lay specific claim to constitutional anti-discrimination protection."

On the other hand, the Court did not see any duty to address the real question of relevance to anti-discrimination law, namely that of the stigma that might attach to this group. On the contrary: in its statement of reasons, the Federal Supreme Court adopts the social categorisation expressed by "numerous passers-by" that "alcoholics or the associated visibility of deprivation and homelessness" are something "unacceptable".

Counter to the Federal Supreme Court's argumentation, a more appropriate post-categorical approach, in my view, would be to examine more closely where the real societal stigmatisation occurs, considering that it is enshrined not only in the public-order authority's collective decision-making process but in this case perhaps also in the justice system, and ultimately results in a discriminatory exclusion mechanism or culminates in the non-recognition of stigmatisation. The possibility of significant stigmatisation becomes clear if we look into the morass of discursive debate about this group of people, who congregate each day to consume their beers and talk to each other. To take just one example from a reader's letter to Bund, a local newspaper: "Parasites, living on state handouts and squandering tax money on beer."

If it took a post-categorical view, the Court might decide to scrutinise more closely whether the removal order represents a presumably discriminatory form of categorisation and stigmatisation. Then it might recognise that orders of this kind are presumably targeted at marginalised social groups and ought to be subjected to a stringent assessment of justification.

3. TO COME TO AN END: WHAT IST THE APPROACH TO SOLVING THE PROBLEM?

Let us get back to the purpose of anti-discrimination law: anti-discrimination laws as equality principles are stringent by nature in their aim to capture instances of qualified unequal treatmet, providing a strong instrument against powerful conditions of inequality. **To accomplish this successfully, what are needed instead of social-group categories are categories that convincingly describe the *process of discrimination***. These tend to be "isms" rather than attributes or grounds. On a linguistic level, this might result in the rewording of the constitutional prohibition on discrimination as follows:

> The wording "No one may be discriminated against, in particular on grounds of (...)" would then read, "Any one-dimensional or multi-dimensional discrimination is prohibited. This shall include racial discrimination, heterosexist discrimination, ageist discrimination, ableist discrimination, classist discrimination, etc. (...)"

The authorities applying the law are thereby challenged to engage more closely and critically with the sociological literature on discrimination issues and have an in-depth-look at the social reality of stigmatizing and exclusion. As an associated aim, both misinterpretations in legal practice and reifications would be made more difficult, and the risks of exclusivity, essentialisation and homogenisation would be minimized.

Finally: Post-categorical should not be misunderstood as non- or even anti-categorical. Rather and beyond it is a shift of the attention from the groups that are discriminated towards the discriminator as an actor and the discrimination as an act of structural, interpersonal and institutional exclusion.

Under this perspective:

- The prohibition of direct and indirect discrimination is the answer to an act that leads to a disadvantage because of a interpersonal or structural stigma
- A duty to positive measures commits the state to favor persons that are factually discriminated.

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