Non-Discrimination as a Legal Concept

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The former President of the European Court of Justice, Professor Ole Due, used to say that he thought the principle of non-discrimination was the most important legal development in the latter half of the twentieth century. The principle now figures in Article 81 of the Charter of Fundamental Rights and in Book II, Chapter 2, of the Draft Common Frame of Reference, and it has found a place in a variety of contexts in European law, both public and private.

The articles in this book show how the principle has infiltrated European private law, affecting the substance of the law as well as procedure and remedies.

It is important to recognise at the outset that the word 'discrimination' carries with it certain dangers for the lawyer because it can be used in two senses – one neutral, the other pejorative. In origin, it connoted simply the act of distinguishing between two or more things, ideas or concepts. So, in English, a person of 'discriminating taste' (or 'discernment') is someone who is knowledgeable about, for example, art or wine and is able to distinguish the good from the bad.

Nowadays, 'discrimination' is more often used in the pejorative sense of making a distinction between two persons or situations *to the disadvantage of one of them*. Discrimination is something of which we disapprove. It is not only morally objectionable but also, and to an increasing extent, illegal. However, this is a relative modern development.

In English, 'discrimination' was first used in something like its modern sense in about 1845 in the context of customs duties: duties that differed according to the country of origin of the goods were referred to as 'discriminating duties'. About the same time, 'discrimination' was used in the United States to refer specifically to differentiation on grounds of race. And in 1880 Mark Twain says: "I did not propose to be discriminated against on grounds of my nationality"[1].

Discrimination began to be used as a legal concept after the Second World War. Article 2 of the Universal Declaration of Human Rights (1948) says: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without *distinction* of any kind, such as race, colour, sex lan-

[1] *Mark Twain*, A Tramp Abroad, II.153, 1880.

guage, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no *distinction* shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs …" By contrast, Article 7 says: "All are equal before the law and are entitled without *discrimination* to equal protection of the law. All are entitled to equal protection against any *discrimination* or violation of this Declaration and against any incitement to such *discrimination*".

Article 14 of the European Convention on Human Rights (1950), headed (in English) "Prohibition of discrimination" or (in French) "Interdiction de discrimination", uses the word 'discrimination' in the English text but 'distinction' in the French.

'Discrimination' appeared in several articles (4, 63 and 69) of the now-defunct European Coal and Steel Treaty (1951). The "principle of non-discrimination" appeared for the first time in Article 66(2), while the adjective 'discriminatory' appeared in Article 60 (prohibition of 'discriminatory practices').

Robert Marjolin, leader of the French team negotiating the EEC Treaty in 1956/57, tells an illuminating story:

> The agricultural problem was more difficult to resolve. … The French wanted community agriculture to enjoy a tariff preference, to which a number of our partners, notably the Germans, were opposed for doctrinal reasons. … A way had to be found around the obstacle represented by the word 'preference'. … I suggested that the idea of a European preference be dropped and that henceforth one should speak of non-discrimination. … This proposal caused quite a stir. It was easy to reject the notion of 'preference', which was part of the language of protectionism. It was impossible not to accept that of 'non-discrimination', which had a free market connotation. … Such is the power of words![2]

The story is illuminating for two reasons. First, it shows that, although discrimination had already been used in the ECSC Treaty, it had not yet become part of the common currency of European law. Its potentiality as a legal concept had not yet been fully realised. Second, the story shows how the word can be manipulated. The true aim of the French delegation was preference for French agricultural products. Marjolin settled for non-discrimination without feeling that he had lost the battle.

'Discrimination' does not appear very often in the EEC Treaty (now incorporated in the Treaty on the Functioning of the EU). It is interesting to note that Article 36[3], which permits certain exceptions to the prohibition of restrictions on free movement of goods, provides that "Such prohibitions

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[2] *Robert Marjolin*, Architect of European Unity: Memoirs 1911-1986, London 1989, pages 301-302 (in the original French edition, Paris 1986, pages 298-299).

[3] Article 36 TFEU.

or restrictions shall not, however, constitute a means of *arbitrary* discrimination or a disguised restriction on trade between Member States". (Discrimination is permissible: it is objectionable only if it is arbitrary.) Although the competition provisions of the ECSC Treaty outlawed 'discriminatory practices', Articles 85 and 86 of the EEC Treaty[4] refer to "applying dissimilar conditions to equivalent transactions". Article 119[5] sets out the principle of "equal pay for equal work"; only in the definition clause does it refer to "Equal pay *without discrimination* based on sex".

It seems clear from this brief survey of the original Treaties that, at the time when they were written, 'discriminate', 'discrimination' and 'discriminatory' were used in the straightforward sense of 'making a distinction' rather than in the pejorative sense they have since acquired. Non-discrimination was seen as the corollary of the principle of equal treatment.

'Equality' is of doubtful usefulness as a legal concept. It is easy to say that all men are equal and must be treated equally. But the law is not expected to ignore obvious inequalities. On the contrary, in some cases it requires us to take account of them and to remedy them.

'Non-discrimination' is more useful in that it focuses on the *conduct* of one person towards another rather than an abstract state of equality or inequality. Discrimination becomes objectionable when it involves making a distinction between people or situations where no relevant ground for making the distinction exists and, consequently, applying dissimilar treatment to similar situations. It focuses on the particular features of similarity or difference which we are to regard as relevant for the purpose of applying a legal rule.

So, when the law provides that "there shall be no discrimination on grounds of nationality", we are instructed to disregard nationality. It is irrelevant for the purposes of *that* rule whether people are similar or different in other respects: height, colour of hair, facial characteristics, religion, race or gender. Similarly, when the law requires that "There shall be no discrimination on grounds of sex", we are instructed to disregard the many respects in which men and women are different. For the purposes of employment law, wage or salary earners are to be treated as if those differences did not exist.

Legal terminology must, however, be used with precision, and the danger for non-discrimination as a legal concept lies in the fact that 'discrimination' has acquired such a pejorative connotation that, almost by definition, *any* discrimination is considered to be morally objectionable and ought therefore to be illegal. The danger can be illustrated by two sets of

[4] Articles 101 and 102 TFEU.
[5] Article 157 TFEU.

employment cases before the ECJ relating to contributory pension schemes.

The cases of *Nolte, Megner and Scheffel*[6] concerned access to contributory social security schemes. The statutory rule in question excluded workers who worked for less than a given number of hours each week. Since, statistically, this rule affected more women than men, it was contended that the rule was discriminatory, and that it was therefore unlawful because it involved discrimination on grounds of sex. Equality required that full-time and part-time workers should have an equal opportunity to pay contributions and receive benefits.

But there was another side to the argument. In a contributory pension scheme the benefits paid out are related to the contributions paid in. If *all* workers must be included in the scheme (including those who work a very small number of hours and earn very low wages), then one of two results must follow. If the amount of the benefits paid out is to be strictly related to amount of the contributions paid in, then those on low wages will have to pay in a disproportionate amount of their income in order to receive any pension at all. Alternatively, a proportion of the contributions paid by higher earners will have to be used to subsidise the benefits paid to lower earners.

The ECJ concluded that this was not a case of 'discrimination on grounds of sex'. Statistically, it was true that more women were affected by the rule than men, but the reason for the difference lay in the fact that the scheme was a contributory scheme where the sums paid out must be related to the sums paid in. The remedy for the disadvantage suffered by female part-time workers did not lie in changing the rules of the scheme but in other measures of social protection.

A similar problem arose in the cases of *Coloroll* and *Neath*[7]– this time concerning alleged discrimination against men under the rules of private company pension schemes. Pension rights are 'pay' for the purposes of Article 119. The issue was not whether male and female employees received the same wage or salary or whether, on retirement, they would receive the same weekly or monthly pension, but whether, if they withdrew from the scheme or the scheme was brought to an end, they should receive the same capital sum which could be transferred to another pension scheme. The 'acquired rights' of men were lower in capital value than

[6] Cases C-317/93 *Inge Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625 and C-444/93 *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz* [1995] ECR I-4741.

[7] Case C-200/91 *Coloroll Pension Trustees Limited v. Russell e.a. and Coloroll Group Plc*. [1994] ECR I-4389, and Case C-152/91 *David Neath v Hugh Steeper Ltd.* [1993] ECR I-6935.

those of women. Therefore, it was claimed, there was unlawful discrimination against men.

However, the reason why the capital value of the acquired rights was different was the actuarial assessment that lay at the heart of the schemes. Women have a greater life expectancy than men, so it will normally cost more to give the same weekly or monthly pension to a woman than a man. Correspondingly, if a woman wishes to transfer to another scheme, she will have to pay more than a man in order to secure the same pension. Consequently, if the capital value of acquired rights were equal, women would be disadvantaged.

Thus, there was unquestionably a difference in the treatment of men and women, but the difference was not a difference *on grounds of* sex. The reason for the difference was the actuarial assessment which lay at the heart of the pension schemes.

These cases illustrate that the principle of non-discrimination cannot be applied in the abstract. The question for the lawyer cannot be confined to the simple question whether A has been treated in the same way as B. It is particularly important that lawyers should not fall into the trap of the simplistic argument: "There is inequality of treatment; therefore, there is discrimination; discrimination is unlawful; therefore the difference in treatment is unlawful".

Non-discrimination is a broad principle covering many aspects of social, political and economic life. It is useful as a legal principle because it offers a practical way of approaching the problem of giving legal effect to the principle of equal treatment. But it will be useful only if the question at issue is put properly in context. The relevant question is not *whether* A has been treated differently from B, but *why and in what respect* they have been treated differently. Only then can one determine whether the difference in treatment (the 'discrimination') has been lawful or unlawful.