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Discrimination

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Introduction

Although not all forms of social exclusion derive from discrimination, all forms of discrimination lead to exclusionary behaviour. Examination of social exclusion provides additional insights into the problems of poverty and unemployment. This approach has been defined as a "way of analyzing how and why individuals and groups fail to have access to a benefit from the possibilities offered by societies and economies". It identifies excluded population groups needing assistance and allows for more targeted policies to ensure their participation and integration in the development process.

Viewing poverty through the prism of social exclusion highlights the essence of poverty and deprivation as well as the mechanisms that lead to them. Societal and economic forces create and intensify various forms of exclusion. In the extreme, individuals move from vulnerability to dependence to marginality. Patterns of development in which the benefits of economic growth are shared by only certain identifiable groups increase exclusion.

The issue of livelihood (or its absence) can also be viewed through the prism of exclusion. In this context, exclusion takes various forms, including exclusion from land, from other productive assets, from markets for goods and, particularly in urban areas, from the labour market. Some scholars have suggested that severe ethnic and racial antagonisms can often be traced to the point at which groups first find themselves competing in the labour market. This theory argues that all discrimination by race or ethnic groups originates through this dynamic, in which groups mobilize political and economic resources to further their material interests. The goal of such actions is the exclusion of the competing group from the labour market or, failing this, the creation of a caste system that provides the dominant group with preferential treatment.

It is essential that policies for productive work and the reduction of poverty be accompanied by the application of the principles of rights, social equity and justice. The World Summit for Social Development devoted particular attention to this point, stressing that "policies to eradicate poverty, reduce disparities and combat social exclusion require the creation of employment opportunities, and would be incomplete and ineffective without measures to eliminate discrimination and promote participation and harmonious social relationships among groups and nations. In enunciating the principle of social integration the Summit emphasized the unacceptability of discrimination and called for its elimination in all its dimensions.

What is discrimination? Various United Nations human rights instruments define the meaning and content of the principles of discrimination and equality. The Charter of the United Nations prohibits discrimination on the basis of race, sex, language or religion. The Universal Declaration of Human Rights, adopted in 1948, enlarged the list to include colour, sex, political or other opinion, national or social origins and other status. …

Non-discrimination is also established in regional human rights instruments, including the European Convention, the European Social Charter and the Declaration Regarding Intolerance: A Threat to Democracy, all adopted by the Council of Europe; the African Charter on Human and Peoples' Rights, adopted by the Organization of African Unity; and the American Convention of Human Rights, adopted by the Organization of American States.

Some United Nations conventions define discrimination. Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly resolution 2106 A (XX) annex) defines the term “discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (Assembly resolution 34/180, annex) defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. …

Policies and measures to combat discrimination

Governments combat discrimination based on race, gender or ethnic origin by (a) promoting equality of opportunity by outlawing discrimination and making health care and education available to all and (b) seeking equality of results by granting preferences to members of disadvantaged groups. The second approach has been given a variety of labels, including benign quotas, reverse discrimination, reservation policy, employment equity, positive discrimination, positive action and affirmative action. In contrast with equal opportunity, which focuses on procedures and individuals, this approach is results oriented and group oriented. The two approaches are not mutually exclusive. In the United States, for example, courts frequently impose hiring quotas on organizations found guilty of discrimination against women or disadvantaged minorities.

The Universal Declaration of Human Rights (General Assembly resolution 217 A (III) declares that “all human beings are born free and equal in dignity and rights” (article 1). It emphasizes that “all are equal before the law and are entitled without any discrimination to equal protection of the law” (article 7) and that “higher education shall be equally accessible to all on the basis of merit” (article 26). Signatories to the International Covenant on Economic, Social and Cultural Rights (Assembly resolution 2200 A (XXI), annex) recognize further the “equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence” (article 7)).[1] The language is clear: individuals are to be judged solely on competence and experience, without preferences granted on the basis of race, gender or ethnic origin.

[1] Similar statements in support of the principle of equal opportunity can be found in the Discrimination (Employment and Occupation) Convention, adopted in 1958 by the General Conference of the International Labour Organization, and in the Convention against discrimination in education, adopted in 1960 by the General Conference of the United Nations Educational, Scientific and Cultural Organization.

The International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly resolution 2106 A (XX), annex) permits temporary discrimination in favour of disadvantaged groups: “States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them…. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved” (article 2, para. 2). Similar language is adopted in article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women (Assembly resolution 34/180, annex): “Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.” These conventions allow Governments to abandon the principle of *de jure* equality in order to raise the economic, social or cultural level of members of a disadvantaged group, but the ultimate goal remains equality of opportunity, not de facto equality. By 30 July 1996, 146 countries had ratified the International Convention on the Elimination of All Forms of Racial Discrimination and 153 had ratified the Convention on the Elimination of All Forms of Discrimination against Women.

1. Policies to promote equality of opportunity

Many Governments have created specialized bodies to promote equality of opportunity across races and between men and women. Typically these organizations report to a government department or ministry and have only promotional or consultative powers, although some have been given independence and the authority to investigate and act on complaints. Examples of the latter include the Equal Opportunities Commission and the Commission for Racial Equality in the United Kingdom, the Human Rights and Equal Opportunities Commission in Australia, the Human Rights Commission and Race Relations Conciliator in New Zealand and the Equal Opportunity Commission in the United States.

There is an increasing tendency for legislatures to impose substantial penalties, including imprisonment, for discrimination by race or gender in recruitment, training and conditions of employment. A few countries, such as France, the Netherlands and Sweden, incorporate these provisions in the Penal or Criminal Code, but most countries enumerate them in specific acts of legislation.[2]

Regardless of the severity of penal sanctions, legislation will not deter discrimination unless cases are prosecuted, something that is rare in many countries. Victims of discrimination may be reluctant to file formal accusations for three reasons. First, discrimination is difficult to prove, and the burden of proof lies with the accuser; the person accused of discrimination, who often holds all of the records that might constitute evidence, frequently wins simply by remaining

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[2] See “Equality in employment and occupation”, International Labour Conference, 83rd session (Geneva, International Labour Office, 1996), pp. 80-83, and “Equality in employment and occupation”, (International Labour Conference, 75th session (Geneva, International Labour Office, 1988), pp. 232-235.

silent. Some countries, notably France, Germany, Italy and Switzerland, have responded to this problem by shifting the burden of proof on to the accused once the complainant makes a plausible case for the existence of an illegal discriminatory practice. Second, the prospect of significant financial costs deters many potential claimants, who may not have recourse to legal aid or the backing of a trade union. Some countries deal with this problem by providing free legal assistance. In Spain the Constitution guarantees every person the right to legal assistance; in Australia financial assistance is provided in sex discrimination cases to the side judged better founded. Third, potential claimants may fear reprisal. In employment discrimination this typically takes the form of dismissal of the worker and those who helped him or her. Effective promotion of equal opportunity in employment requires protection against such dismissal.

Discrimination is most difficult to deal with when it is indirect, the result of apparently neutral rules that adversely affect a particular race, gender or ethnic group. Rules based on pregnancy, for example, affect only women; those based on child care affect women disproportionately. Uniform height and weight requirements discriminate against women and some ethnic groups. The requirement that employees work on a given day of the week discriminates against groups whose religion proscribes doing so. In each case a court, tribunal or commission – in extreme cases, a legislature – must determine whether a particular requirement is necessary or is merely a covert way to discriminate.[3]

Language requirements imposed by governments and private employers are perhaps the most common form of indirect discrimination against ethnic groups. Often there is good reason to require fluency in a particular language. Taxi drivers, for example, provide better service if they speak the language of the country in which they work, even if this discriminates against recent immigrants. But language requirements are also used for the sole purpose of discriminating against ethnic groups. In South Africa, employers are known to demand fluency in English and Afrikaans even though the work may not require fluency in both languages.[4] For many years English was the language of Government and the judiciary in Sri Lanka, although no more than 10 per cent of the population understood and spoke the language. Requiring civil servants to speak English was elitist but not discriminatory, since English is the second language of both Sinhalese and Tamils, Sri Lanka's two main ethnic groups. In 1956 the Government proclaimed Sinhala the official language of the country, making it nearly impossible for minority Tamils to obtain government jobs.[5] This precipitated a conflict between Tamils and Sinhalese that

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[3] It is not always obvious whether a requirement is reasonable or not. Sikhs who wear their hair in turbans, for example, are unable to wear safety helmets, which might appear to be a valid reason to exclude them from construction work. But the United Kingdom's Employment Act (Act (1989) exempts Sikhs from wearing safety helmets.

[4] See South Africa, Department of Labour Directorate: Equal Opportunities, *Employment and Occupational Equity,* Green Paper, 1 July 1996.

[5] Tamils also faced administrative regulations that required children to be educated in the language of their parents, effectively blocking Tamil entry into Sinhalese schools. See S.J. Tambiah, *Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy* (Chicago, University of Chicago Press, 1986), pp. 73-76; Chelvadurai Manogaran, *Ethnic Conflict and Reconciliation in Sri Lanka* (Honolulu, University of Hawaii Press, 1987) pp. 115-130; and Thomas Sowell, *Preferential Policies: An International Perspective* (New York, W. Morrow, 1990), pp. 76-87.

continues to this day. In 1988, in an effort to resolve the conflict, the Government of Sri Lanka made Tamil a second official national language.

When effectively enforced, laws against unjustified discrimination by schools and employers can generate equality of opportunity for members of all races and all ethnic groups. When some members of society are severely disadvantaged, however, laws against discrimination are insufficient and meaningful equality of opportunity requires measures to ensure that every child, regardless of race or ethnic origin, receives adequate nutrition and health care, including prenatal care, and a minimum quality and quantity of basic education, including pre-school education. In addition, low-income individuals may require financial aid to enable them to pursue higher education, purchase homes or establish their own businesses. The intent of such programmes is to combat poverty rather than end discrimination, but disadvantaged groups benefit disproportionately because they contain a disproportionate number of families ling in poverty.

With rare exceptions ethnic minorities are not prevented from attending public schools, but their performance suffers when instruction is in a language other than their own. Although minorities typically receive permission to set up their own schools, they seldom have access to taxation or public funds. Some countries, notably Canada, Italy, New Zealand, the Nordic countries, the Russian Federation and the United States, attempt to Russian Federation and the United States, attempt to overcome language barriers by providing bilingual educational programmes for linguistic minorities. In Peru the Government is training 60 bilingual teachers who will train an additional 2,400 teachers to teach in indigenous communities. Nicaragua has also launched a bilingual programme for indigenous communities, which reaches more than 13,000 children in the North Atlantic coast region.

Equal opportunity laws may be necessary to achieve gender equality in the workplace, but they are never sufficient. Women, on average, enter universities and the labour market with a considerable handicap compared with their male counterparts for two reasons. First, discrimination exists within the family. Parents typically expect less – or at least expect different things – of female children and often remove them from school at an earlier age than their male siblings. Parental goals for children can be expected to change only slowly, if at all. In the meantime Governments can help change behaviour by enforcing school attendance laws, making secondary education compulsory for both boys and girls, and increasing the minimum age for marriage so that girls remain in school longer. Second, much legislation exists that discriminates against women and makes it impossible for them to participate in the labour market on equal terms with men. Many countries have laws, for example, that restrict the type of work that pregnant women may perform; others prohibit night work, restrict overtime or forbid the use of heavy machinery by women. However well intentioned such protective laws may be, their repeal should be considered if the goal of full equality of opportunity is to be reached. Similarly, compulsory maternity leave and child-care benefits can raise the cost to an employer of female labour. Governments can solve this problem by funding benefits out of general revenue or by allowing either parent to qualify for leave and child-care benefits. Laws barring women from holding legal title to land or restrict their rights to inheritance represent yet another obstacle to gender equality.[6]

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[6] For a survey of these issues, see World Bank, *Toward Gender Equality: The Role of Public Policy* (Washington, D.C., 1995).

2. *Preferential policies*

Adhering to a strict interpretation of equality before the law, many Governments and legal systems refuse to allow any discrimination, even benign discrimination, based on race, gender or ethnic origin. Others sacrifice the principle of non-discrimination (*de jure* equality) to varying degrees in order to promote de facto equality. The conflict between these two approaches is real. Preferential policies have supporters as well as opponents, and debate between the two sides at times becomes heated, as evidenced by the rash of suicides in India by young Brahmins protesting the reservation for lower castes of coveted university places and civil service jobs[7] or by widespread public opposition to affirmative action in the United States.[8]

Preferential policies can be justified as a means of promoting equality of opportunity. Members of disadvantaged groups may be unfairly perceived as unable to function in a particular trade or profession; breaking down barriers of prejudice with preferences can demonstrate, for example, that a female electrician is as competent as a male, or that a minority student can succeed in medical school. Such reasoning lies behind the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women; it provides a rationale for preferential quotas as long as all (or nearly all) members of the disadvantaged group are blocked from entry into the targeted trade or profession. When the goal is equality of opportunity, preferences must be temporary; there is no justification for retaining preferences until full de facto equality is reached. In practice, however, Governments find it difficult to remove preferences once they are in place. Early in this century British colonial rulers, for example, introduced preferential quotas known as "reservations" to favour disadvantaged groups in the Indian subcontinent, Fiji and Malaysia; the countries retain these quotas to this day.

Preferential policies attack the manifestations of discrimination, but not discrimination itself. Because the principle of merit is retained for applicants within each group, beneficiaries of preferences tend to be the wealthiest and least-deprived group members. (Indians refer to this phenomenon as "creaming".) Such programmes do not therefore substitute for anti-poverty programmes. Nor do they substitute for laws against discrimination, for they provide no benefits for groups such as Chinese or Jewish minorities, which suffer discrimination in many countries but are not, on average, disadvantaged.

A wide range of preferential policies based on race, gender or ethnic origin are in place in countries throughout the world today. In some countries preferences are voluntary; elsewhere

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[7] Dharma Kumar, "The affirmative action debate in India", *Asian Survey,* vol. 33, No. 3 (March 1992), pp. 290-302. See also Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley, California, University of California Press, 1984), which is summarized in J. Faundez, *Affirmative Action: International Perspectives* (Geneva, International Labour Office, 1994), pp. 22-25.

[8] See Seymour Martin Lipset, "Affirmative action and the American creed", *Wilson quarterly,* vol. 16 (Winter 1992), pp. 52-62; and Jack Citrin, "Affirmative action in the people's court", The Public Interest, No. 122 (Winter 1996), pp. 39-48.

they are compulsory. In some countries preferences are limited to the public sector; elsewhere they apply to both private and public organizations. Preferences take many forms, including targets and quotas, bonuses on competitive examinations and subsidization of competitive bids.

A priori, it is impossible to predict whether quotas will be more effective or less effective than other forms of preferences. In a university entrance examination, for example, for any quota for members of a designated group there is a percentage point preference which will produce the same result. Without more information, it is impossible to determine whether a minority is better served by a quota or by a preference, since a bonus of, say, 10 percentage points may be insufficient to lift even a single member of the disadvantaged group to a passing mark, or it may lift the scores of many group members far above those of other candidates.

For the most part States members of the European Union limit preferential programmes to vocational training for women and minorities; like many Governments in the world today, in general they do not allow the use of race, gender or ethnic origin as criteria for admission of students to universities or for recruitment and promotion of employees. In northern Germany local governments in recent years have given preference in some instances to female applicants for government jobs over equally qualified males, but this practice was struck down by the European court of Justice and will likely be suspended.[9]

Some Governments, such as those of Australia, Canada, Namibia and South Africa, encourage the use of preferences to favour disadvantaged groups but do not impose them on universities or employers. In some cases employers are required to establish goals and to file reports on progress in recruiting and promoting members of designated groups. Employers face penalties for failure to file a report, although no penalties are imposed for failure to reach a target. Such programmes serve an educational function: they make employers and universities aware that Governments support ethnic and gender diversity in the workplace and the classroom. They also allow employers and educational institutions to engage in “benign” discrimination without fear of challenge from applicants passed over in favour of less qualified candidates who benefit from preferences.

In most countries with preferential policies that favour disadvantaged groups, participation in the programme is compulsory rather than voluntary. Often, as in India, Israel, Pakistan and Switzerland, preferences are restricted to employment in the civil service and public enterprises. Sometimes, as in India and Pakistan, admission to public universities is also subject to preferences. Private employers in those countries are expected to hire and promote solely on the basis of merit; by law they are not allowed to discriminate by race, gender or ethnic origin. Privatization of public enterprises in these instances can create problems for those who benefit from preferences, since the privatized firm is no longer required to hire and promote a quota of members of designated groups. In countries such as Fiji, Malaysia and the United States, which have strong programmes, preferential policies are imposed on private and public organizations alike, and the ethnicity or gender of the owner of a firm is noted in order to grant preferences in awarding government contracts.

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[9] European Court of Justice, Case c-450/93, “Interpretation of Council Directive 76/207 regarding the implementation of the principle of equal treatment for men and women”, 17 October 1995.

Preferential policies do not extend beyond employment, education and government procurement; most surprisingly, no country has imposed quotas or preferences in housing. *De jure* equality in access to housing is strictly enforced in most countries; it is generally illegal to refuse to rent or sell housing because of race, gender or ethnic origin. In contrast, it is legal to refuse to rent or sell to a person with insufficient income, so de facto equality is nowhere to be found. Governments could conceivably compel builders to supply a minimum proportion of new housing units to members of a disadvantaged group. To reach the assigned target a builder of luxury homes would have to advertise widely and would probably have to reduce the selling or rental price for members of the designated group.

3. Equality of opportunity versus equality of results

The International Bill of Human Rights, which consists of the Universal Declaration of Human Rights the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, guarantees freedom from discrimination to all members of the human family. According to article 26 of the International Covenant on civil and Political Rights (General assembly resolution 2200 A (XXI), annex):

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Individuals are endowed with unequal amounts of wealth, talent, intelligence, physical strength and beauty. The International Bill of Human Rights does not address these inequalities or the income inequalities that result from them; it promises only *de jure* equality, not de facto equality. No person has a right to a high paying job or to a university place; everyone has a right to compete, on the basis of merit, for jobs and university admission. Equal opportunity is a human right; equality of results is not.

The International Convention on the Elimination of All Forms of Racial discrimination and the Convention against Women allow Governments to implement temporary programmes that deny members of advantaged groups their right to equal opportunity in order to give preferences to members of disadvantaged groups. Such policies are discriminatory and violate the International Bill of Human Rights. Derogation of human rights, even temporarily, ought not to be done lightly. Article 4, paragraph 1, of the International Covenant on Civil and Political Rights allows similar derogation of human rights "in time of public emergency which threatens the life of the nation", but only "to the extent strictly required by the exigencies of the situation". The language that permits preferential policies is less restrictive, but it does suggest that preferences are acceptable only as an instrument to achieve equality of opportunity and rare never justified as permanent policy.

Effective enforcement of laws against racial, ethnic and gender discrimination can generate equality of opportunity for all members of society. But enforcement of anti-discrimination laws

will not produce equality of results. To move towards this type of equality Governments routinely use taxation, along with expenditure on health, education and welfare to redistribute income from affluent members of society to the poor. Such income redistribution does not constitute a preferential policy, nor is it a violation of human rights, as long as an individual's tax bill and his or her access to public health, education and welfare does not depend on race, gender or ethnic origin.

When equality of opportunity produces large disparities in average results between groups, Governments do not attempt to intervene with taxation or expenditure policy; Governments rarely adjust their tax rates or welfare payments according to race, gender or ethnic origin. Instead, some Governments ask citizens to give up their right to equal opportunity in order to guarantee all groups that the economic and social status of their members will be closer, on average, to that of the rest of the country. There may exist a consensus that the good of the whole requires such a sacrifice of individual rights. The goal is then the equitable distribution of jobs across groups, not equality of opportunity, and preferences thus become permanent rather than temporary. Examples of such "consensus quotas" include Switzerland, which allocates a fixed proportion of jobs in the public sector to each of the country's main language groups,[10] and international organizations, which recruit staff from nationals of all member States in an agreed-upon proportion. With consensus, quotas can build support for a federal or international bureaucracy. Without consensus, ethnic, gender and racial quotas can be extremely divisive.

Too often Governments impose quotas or other preferences without first building consensus, thus alienating citizens who lose their right to compete for jobs on equal terms with individuals who belong to a disadvantaged group. Nonetheless, Governments find preferences attractive because they do not require increased taxation or expenditure. It is much easier to impose quotas than to attack the underlying causes of de facto inequality between groups, including discrimination, poverty, poor education, malnutrition and geographical isolation.

[10] At the upper levels of the Swiss civil service, recruitment is proportional to the three main language groups, the Italian-speaking minority is deliberately overrepresented in the rest of the federal civil service and in public enterprises. See Carol L. Schmid, *Conflict and Consensus in Switzerland* (Berkeley, California, University of California Press, 1981), especially pp. 39-40 and pp. 150-157.