

LEGAL EQUALITY

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1	Introduction	84
2	The Basic Components of Equality	84
3	Legal Equality with Respect to Subjects	85
4	Legal Equality with Respect to Objects	86
5	Discrimination	87
6	The Symbiotic Nature of Legal Equality	87
7	The Proper Direction of Legal Equality	88
8	Direct and Indirect Legal Discrimination	89
9	Discrimination in Disguise	90
10	Equality before the Law. Equality in the Law. Equality through the Law	91
11	Procedural Legal Equality	92
12	Undue Discrimination and a Life of Human Dignity	93
13	Post-script	97

1 Introduction

Early in history, the close connection between law and certain ideas of equality has been perceived and discussed. Of all general values attachable to law, the value of equality seems to be the one closest to law. If there is one single value about which one might be tempted to say that there is a necessary connection between it and the law, that would be the value of equality. Alas, history offers an abundance of violations of that value by legal institutions, in the name of law. However close the connection is between law and equality, it is certainly not a necessary one (whatever that would amount to). Indeed, for that very reason legal equality is a law-state value.

The basis for this close connection between law and equality we find in the, perhaps two most elementary, qualities of law: the generality of its rules and the crucial role of the legal process (adjudication). If we have general rules, singling out *sets* of situations, the very functioning of these rules presupposes that they are complied with by everyone in such a situation, who is normatively addressed by a rule. The idea of the legal process, on its part, is based upon the generality of legal rules. The administration of law within the framework of the legal process is no free decision-making, it is decision-making in accordance with general rules. Administration of law is a matter of regularity. This state of affairs is suited for promoting ideas of legality (legalism). If there are general rules, the law-applier shall keep himself within their scope. Legalism, further, is suited for promoting the idea of impartiality. If a case falls within the scope of the general rule, it should not matter which persons "belong to" that case. The idea of impartiality, finally, is suited for promoting ideas of equality. Impartiality is disregarding legally not relevant circumstances favouring or disfavouring a party in a litigation. The value of equality is one important argument for having a regime of general rules and an institutionalized legal process.

Why, more exactly, is legal equality a law-state (*Rechtsstaat*) value? It is a law-state value since (i) undue discrimination is a violation of a life of human dignity, (ii) undue discrimination, as a matter of tragic fact, has often been performed in the name of law, by legal institutions, and (iii) only legal institutions can remedy and prevent undue legal discrimination. Those responsible for the maintenance of legal equality are legal functionaries, notably legislators and law-appliers.

2 The Basic Components of Equality

Equality (EQ) is a relation having the following structure

(EQ) x as regards F ranks equal with y as regards G

where x and y are individual human beings or collectives of such (x and y are *the subjects* of EQ), and F and G are entities attributed to the subjects (be it rights, duties, rewards, punishments or whatever; F and G are *the objects* of EQ). (The relation can easily be extended to cover more than two subjects or objects.) The

subjects and objects of EQ are the basic components of EQ. Equality meeting the demands of the law-state ideology requires equality both with respect to the subjects and to the objects involved.

3 Legal Equality with Respect to Subjects

It must be possible to ascertain whether or not an individual's legal equality has been violated or not, i.e., whether or not he or she has been *unduly discriminated legally* (a concept that will be analysed in sect. 12 *infra*). Undue discrimination is a relation having the following structure

(UD) x as regards F is unduly discriminated as compared to y as regards G .

Suppose that, in some society, members of a certain caste, C , share some facilities equally among themselves, perhaps even with an extreme egalitarianism regulated by the law of that society, while no member of that society outside C has access to these facilities. Suppose further, that somebody argues that this is not a *legal* discrimination, due or undue, at all, since the status of individuals outside C is not regulated by law at all with respect to these facilities.

From the point of view of the law-state ideology, this answer won't do. The answer would amount to the stand that some human beings are situated outside the scope of law and regarded as legal objects rather than subjects (e.g., slaves or Jews in Nazi Germany). A basic principle of the law-state ideology, fundamental to the value of legal equality, is what we may call *the principle of universal legal subjectivity*, meaning that every human being shall be treated as a legal subject in the respect that he or she is capable of having legal rights and duties. The question whether or not a person is in a certain legal position should always be answered under the condition that the person in question *can be* in that legal position. From the point of view of legal discrimination this means that everybody is capable of being legally discriminated (duly or unduly). Nobody is outside the law – and, hence, every human being is entitled to law-state protection.

The idea of all human beings having equal value (which, of course, cannot be taken to mean that all human beings are equally valuable; cf. I. Hedenius, *Om människovärde* [On human dignity], Bonniers, 1982, p. 12 ff) can perhaps best be understood as another (less clearer) formulation of the principle of universal legal subjectivity and its law-state consequences.

A special relationship between subjects involved in a UD-comparison is an *agonistic* (as opposed to a *non-agonistic*) situation (from Greek *agôn*, contest, trial). (I do not use the word “antagonistic”, since that word has a wider meaning than is intended here.) By an agonistic situation I mean a formalized opposition (hostile or friendly) between two (or more) *parties* such as, e.g., the participants in a game, the competitors in a race or the parties in a litigation, where the game, the race and the litigation constitute such a formalized opposition. Not least the kind of legal equality called equality before the law comes to the fore in the last example.

Finally, another important law-state principle pertaining to legal equality with respect to subjects must be mentioned, viz. the idea that the state shall act as a private law subject when the state is dealing with private law matters, e.g., when the state is renting or buying a house, or being a shareholder in a private limited liability company. The state should be equal to (have no special privileges as compared with) a private adverse party in a legal process. Let us refer to this idea as *the principle of the state's subordination to private law* (including civil procedure). Its importance with respect to the value of legal equality is obvious.

We find this principle well formulated by Hobbes (*Leviathan* [1651] Chap. 21, quoted from C.B. Macpherson, ed., Penguin Books, 1968, p. 271): "If a Subject have a controversie with his Sovereigne, of Debt, or of right of possession of lands or goods, or concerning any service required at his hands, or concerning any penalty corporall, or pecuniary, grounded on a Precedent Law; He hath the same Liberty to sue for his right, as if it were against a Subject; and before such Judges, as are appointed by the Sovereign".

4 Legal Equality with Respect to Objects

Let us now pay some attention to the objects of equality (F and G). We shall make a simple but important distinction between two different situations:

- (i) Monoobject-based equality: $F=G$. This is the case when x and y are sharing *the same thing* equally, e.g., cutting a cake into equal pieces, or sharing an inheritance or a debt in equal parts.
- (ii) Polyobject-based equality: $F \neq G$. What matters here is not sharing a thing in equal parts. This kind of equality has to do with *two (or more) different things* being equivalent.

The equivalence principle – expressed by the old Egyptian symbol of scales in balance – is deeply rooted in Western legal thinking and is brought to the fore in all fields of law. In the law of contracts it takes the form of equivalence as fair exchange (e.g., goods should be paid for by a sum equal to their value). In the law of torts it takes the form of equivalence as fair compensation (redressing the balance). In criminal law it takes the form of equivalence as (fair) proportionality, i.e., proportionality between the suffering of the victim and the suffering of the offender by his being punished. An extreme form of equivalence as proportionality in criminal law is the most radical variant of the principle of retaliation, viz. the "mirroring" punishment ("an eye for an eye").

Perhaps the distinctions made here could shed some light upon the Aristotelian distinction between distributive and corrective (or commutative) justice. Distributive justice seems to be related to monoobject-based equality, while corrective justice is about polyobject-based equality. Corrective justice seems to be relevant mainly in agonistic situations, while distributive justice is relevant mostly in non-agonistic situations.

5 Discrimination

Fundamental to the idea of legal equality is the concept *discrimination*. It is here conceived as a value-free concept: to discriminate is taken to mean that some distinction is made within the category of human beings or within some sub-category of human beings. Discrimination is an indispensable component of law. The very function of law is fulfilled by discriminating for social purposes between categories of human beings: between children and all others, bakers and all others, criminals and all others, mentally handicapped and all others, etc.

An advantage of regarding the concept "discrimination" in a value-free (neutral) way is that it provides us with a framework within which we can make meaningful distinctions based on evaluative considerations. Crucial for our purpose here is the distinction between *due* and *undue legal discrimination*. *Undue legal discrimination is the kind of discrimination that violates the ideal of legal equality*. Hence, by ascertaining what undue discrimination is, we have ascertained what the ideal of legal equality amounts to.

The explication of the idea of undue legal discrimination is inseparable from the justification of the ideal of legal equality (to be dealt with in section 12 *infra*). Suffice it, for the moment, to say that, as I see it, undue legal discrimination is legal discrimination that violates a life of human dignity.

6 The Symbiotic Nature of Legal Equality

Undue discrimination is, apart from being a violation of the value of legal equality, always a violation also of some other value. Legal equality has a symbiotic character as being necessarily tied to another value ("the host value"). Undue discrimination is making some evil even worse. Suppose that you are unduly deprived of a certain right that other people have, just because you belong to a special kind of people. Having this right would be something good for you and, hence, to be deprived of it is something evil for you. To this evil is connected the additional evil of being unduly discriminated in relation to some other people. Or suppose that you are subjected to a penalty for a certain offence while some other person, who has committed the same kind of offence, is unduly exempt from penalty or get a less severe one. To the evil of penalty is added the evil of undue discrimination. In this way the host value and the value of legal equality are connected.

The host value is the value attached to objects of EQ: *F* and *G*. The host value can be a positive value (attached to a right or a reward) or a negative value (attached to a duty or a punishment).

Of course, undue discrimination can be more or less severe. The combination of (i) the degree of mischief attached to the deprivation (or inflicting) of the host value and (ii) the degree of mischief attached to the discrimination as such determine the degree of mischief attached to a certain undue discrimination as a whole. For that reason it is important to keep the host value and the value of legal equality apart. It might, for instance, well be the case that the deprivation of the host value is of little importance to a person while the humiliation of her

being unduly discriminated by that deprivation is profound. It might also be the case that undue legal solutions (in legislation as well as in the administration of law) are regarded as undue discrimination, although this is not the case. In this article we shall concentrate on undue discrimination as such.

Examples: 1 Suppose that women of a certain country do not have the vote. Not having the vote is a violation of the (host) value of having the vote. The insult to women not having the vote while men have it is a violation of the value of legal equality (or, in other words, an undue discrimination). 2 Suppose that the respected managing director A gets a one year sentence for currency smuggling to the value of ten million crowns, while young B gets a three years sentence for stealing a TV set, in both cases by means of a correct application of valid statutes. There are good reasons to regard this piece of legislation as a violation of the value of equality in the law. The host value is the negative value of being imprisoned. And in addition to that B is unduly discriminated in comparison to A.

7 The Proper Direction of Legal Equality

Closely connected to the "host value – undue discrimination" distinction is the question of what might be called the proper direction of legal equality.

Fundamental to the idea of equality is uniformity, or equal treatment. If you are duly equally treated, you are equal. (You are not unequal only because some persons *think* you are inferior to others in some respect.) But uniformity can take two opposite directions. Either some object of equality should be assigned to all, or to none.

In the Slovakian town Spisske Podhari, a decree was issued the 1st of July 1993 prohibiting "citizens of gypsy extraction and other suspect persons" to stay outdoors between 11 p.m. and 4.30 a.m. (reported by the Czech news agency CTK the 10th of July 1993).

This is an example of undue discrimination. It could be cured in two ways. Either it should be the case that nobody is allowed to stay outdoors during that period of time or that everybody is allowed to it. In both cases undue discrimination would be eliminated.

This seems to indicate that the choice between these two directions is irrelevant from the point of view of legal equality. What we are faced with would rather be a matter of an ordinary choice between two opposing (host) values. But the whole thing, however, is not always as easy as that. The question concerning equality could be considered in different ways depending upon whether or not the *proper* direction is chosen.

It seems obvious that the proper direction in our example is that all should be allowed to stay outdoors during the period of time mentioned – there was no indication that a state of emergency was called for. Then undue discrimination is at hand as soon as any person or group of persons is deprived this right without due reasons. But if the proper direction is chosen, due reasons to make exceptions are, in fact, – exceptional. Suppose, on the other hand, that the improper direction (prohibition for all) is chosen. Then we are faced with the strange situation that *due* reasons to make exceptions are not exceptional at all

but for the most part outweighing the reasons for upholding the rule – since there are no due reasons for that rule at all.

From this follows that, when an improper direction is chosen, it might in some, admittedly extreme, situations be appropriate to make as many exceptions as possible even at the cost of what would normally be regarded as undue discrimination. Nobody would, I guess, think rescuing certain groups of Jews from Nazi Germany an undue discrimination of those Jews who were not thus saved, even if the criteria for the choice of those rescued were not particularly honourable. Laws having such a cruel content should apply to no Jew. *Owing to the improper direction of the host value, the value of legal equality is perverted.*

8 Direct and Indirect Legal Discrimination

Since Aristotle the ideas of equality and justice are often summarized in the formula "Treat likes cases alike and different cases differently". This formula indicates four possibilities:

- 1 Like cases are treated alike.
- 2 Like cases are treated differently.
- 3 Different cases are treated alike.
- 4 Different cases are treated differently.

Legal equality prevails in case 1 and 4. What usually enters our mind when thinking of unequal treatment is no doubt unequal treatment of type 2, whether or not it appears in the law or before the law. Discrimination of this type we might call *direct discrimination* (the distinction made here between direct and indirect discrimination seems to me to correspond to how these terms are used, at least sometimes, in the discussion within legal science on discrimination, e.g., sex discrimination). For instance, statutory law contains provisions to the effect that Jews shall be deprived of rights that other people have, or a judge is bullying one of the parties in litigation.

Unequal treatment of type 3, *indirect discrimination*, might sometimes be more difficult to distinguish. As regards direct discrimination, the law *contains* (the legislator constructs, or the judge invents on his own responsibility) some discriminating criterion (prerequisite) which, if undue, should not be there. The scope of application is too narrow. As regards indirect discrimination, on the other hand, the law *does not contain* some discriminating criterion that should be there in order to preventing the law, or some order of a legal character, from being unduly discriminating. The scope of application is too wide. Take, for instance, an employer who, without strong reason, demands from employees that they must be able to cope with every step in a chain of production. One single step happens to be of such a kind that women, for physical reasons, are unable to cope with it. From the point of view of the employer, the condition in question facilitates the planning of the production a bit but is of no particular importance

to him. But it definitively excludes women and is therefore a case of undue discrimination. This undue discrimination is most easily cured by, in addition to the order in question, discriminating between men and women to the effect that women are exempt from fulfilling the step in question.

This example also shows that what should be characterized as direct or indirect discrimination respectively is sometimes not easy to decide. If the employer had had no reason whatsoever to impose this condition upon his employees, the situation would better be qualified as a case of direct discrimination and the order better abolished altogether.

In situation 1 direct legal equality and in situation 4 indirect legal equality prevails.

Of course, the set of different cases, unlike the set of like cases, is a very strange, utterly wide and open, kind of set. For example, a murder and the payment of a debt are different cases. But when we talk about different cases in the discussion about legal equality we in fact talk about sets of different cases as (proper) subsets of sets of (in some wider respect) like cases (the universe of discourse).

A standard trick used by political gangsters for persecuting and harassing a certain category of human beings is to invent discriminatory criteria – used as prerequisites in legal rules – thereby being able to lean on the principle of different treatment of different cases. A horrifying example is the Nazi idea of *Volksgenosse* (roughly “compatriot”; see A. Azolla, “Die rechtliche Ausschaltung der Juden aus dem öffentlichen Leben im Jahre 1933. Ein Beitrag zur Vorgeschichte eines Genozids”, in *Recht und Justiz im “Dritten Reich”*, ed. R. Dreier and W. Sellert, Suhrkamp, 1989, pp. 104-117). Item 4 of the programme of NSDAP reads: “Staatsbürger kann nur sein, wer Volksgenosse ist. Volksgenosse kann nur sein, wer deutschen Blutes ist...Kein Jude kann daher Volksgenosse sein”, and item 5 adds: “Wer nicht Staatsbürger ist soll nur als Gast in Deutschland leben können und muß unter Fremdengesetzgebung stehen”, [“Only a compatriot can be a citizen. Only a person of German blood can be a compatriot... Hence, no Jew can be a compatriot. --- A person who is not a citizen can live in Germany only as a guest and subject to laws concerning aliens”].

9 Discrimination in Disguise

It might happen that some discrimination is made explicitly in the law and that this discrimination is causing another discrimination, intended or not intended by the legislator. If intended, the legislator more often than not tries to hide an undue discrimination behind a more or less due one. In both cases – but more seriously, of course, in the case of intentionally disguised discrimination – this amounts to nothing less than legal functionaries abusing the legal order, the handling of which they are entrusted with. For that reason devices of the kind are violations of the law-state ideology.

Also discrimination in disguise is sometimes referred to as “indirect discrimination” in literature. But then it is important to realize that indirect discrimination as defined in the section 8 *supra* is not identical with indirect

discrimination as discrimination in disguise. Discrimination in disguise can also be of the direct kind, and I think it usually is. Suppose (to borrow an example from L. Lerwall, *Könsdiskriminering. En analys av nationell och internationell rätt* [Discrimination on Grounds of Sex – An Analysis of (Swedish) National Law and International Law], Iustus, 2001, p. 142) that an employer without good reasons demands a minimum height of 175 centimetres from his employees. This causes the undue discrimination in disguise that most women are deprived of the possibility of getting employed. But the discrimination in disguise in this example is of the direct kind of discrimination (like treated differently).

There are, unfortunately, outrageous examples from real life of discrimination in disguise. In the first period of Hitler's time in power, the Nazis tried to cloak somewhat their discrimination of Jews – before letting go of all inhibitions and letting loose of naked dictatorialness. Arguing that Jews were overrepresented in certain professions and higher education and at schools (which, in fact, they were not), the Nazis pretended that equality (!) demanded a *numerus clausus* with respect to Jews.

10 Equality before the Law. Equality in the Law. Equality through the Law

1. Equality before the law. It is an outrage upon the individual to be unduly discriminated in legal affairs by legal authorities (the state) themselves. Such a discrimination occurs when some people are placed “above the law” by allotting to them advantages not allowed by the law, or exempting them from burdens or penalties imposed by the law – or when some people are placed “outside the law” by depriving them from rights given to them by the law, or inflicting upon them burdens or penalties not allowed by the law.

The highly metaphoric expression “equality before the law” means that *all* human beings to whom a certain legal rule is applicable (i.e., all human beings in situations described by the prerequisites of the rule) shall be treated in the way indicated by the legal consequence of the rule. Nobody belonging to that category of people shall be placed “above” or “outside” the law. Equality before the law is a matter of uniform application of the law.

2. Equality in the law. As has already been pointed out, in order to organizing social life, legal orders must inevitably discriminate between different categories of people. Of course, “equality in the law” can not be taken to mean that no discrimination whatsoever is allowed in the law. As a law-state principle it can only mean that the law must have a content such that, if the law is loyally and strictly applied to all cases falling under it, no individual is victim of undue discrimination (to be dealt with in section 12 *infra*).

3. Equality through the law. Now and then legislation is used for the very purpose of attaining a state of equality between some categories of people in society. Equality shall be attained through the law. Different legal technical arrangements have been invented for the purpose.

Equality through the law is not the same as equality in the law. The latter prevails when there is no undue discrimination in the law, i.e., where there is no

undue discrimination created and maintained by the legislator. The former is a means of counteracting undue discrimination outside the law and its handling by legal functionaries. This is the case, e.g., when women or members of a certain race, although not unduly discriminated in the law itself or through its handling by legal functionaries, that notwithstanding are discriminated by other fellow-beings. Unlike equality in, and before, the law, equality through the law is not a value at all, but a means of attaining a generally spread equality in society.

Equality through the law is neither a law-state value nor a means of attaining a law-state value. Violation of the value of equality in the law is an abuse by legal functionaries (the legislators) of the legal order: undue discrimination is introduced into or maintained in the legal order. If, on the other hand, the legislator for some reason or another does not take measures in order to attaining extra-legal equality, he is not abusing the legal order – undue discrimination is not introduced into or maintained in the legal order.

But could not the legislator's refusing to take measures in order to achieving equality through the law be a greater evil than allowing some, perhaps only slightly undue, discrimination in the law? Yes, of course. But that does not make it a violation of the basic law-state value – protection of individuals by means of law from being violated by legal functionaries (the state) by means of law.

And one is wise to remember that attaining equality in the law would be no small achievement indeed. An elimination of all unduly discriminatory elements in the law would surely be an immense improvement of any legal order.

It might happen that some devices for achieving equality through the law come into conflict with the value of equality in the law, e.g., affirmative action, preferential treatment and quota systems. I shall deal with that kind of conflict in section 12 *infra*.

11 Procedural Legal Equality

The judicial process is a corner-stone of the legal order and the way it is handled by its functionaries, notably the judges, is a crucial test of, to which degree a given society lives up to being a law-state. Let us differentiate between five standard kinds of undue procedural discrimination (before or in the law).

I. A party is discriminated with respect to his accessibility to process. A spectacular example is the so-called *mort civile* (civil death), introduced into French law by *Code pénal* of 1810, meaning that criminals having committed certain serious crimes lost their status as legal entities. They had no party capacity and were not allowed to give evidence. *Mort civile* was abolished in 1854. In the Swedish process concerning tax assessment, to take a less severe but still a not particularly flattering example, the taxpayer had, until 1994, the duty to pay his litigation costs even if he won the litigation, a piece of legislation well suited for discouraging taxpayers from coming into their right.

II. A party is discriminated with respect to fair trial. Many of us has seen the secret, horrifying films from the crumbling Nazi Germany where the notorious judge of “the people's court”, Roland Freisler, in the last moments of the *Reich*,

is wildly roaring at the defendants, who are, among other humiliations, forced to take off their trousers. Threats and sarcasm are thrown into their faces and the boundary between the prosecutor's role and the judge's is completely ignored. Similar reports are given by eyewitnesses of the mock trial against Sinjavski and Daniel in the Soviet Union 1965.

Equality before the law is satisfactorily attained only within the adversary litigation. The inquisitive litigation, not drawing a clear dividing line between prosecutor and judge, is, for obvious reasons, dubious from the point of view of equality before the law.

Fundamental for attaining equality before the law is the observance of the principle *Audiatur et altera pars*.

III. A party is discriminated with respect to the evaluation of evidence. This is the case, e.g., when, in comparison with other people, to testimony given by policemen is regularly attached greater importance, or to testimony given by gypsies less importance, without any individual examination in each case.

IV. A party is discriminated with respect to the interpretation of law. Suppose, for instance, that courts of law in tort cases would have demands above the standard with respect to what shall be considered negligence when the state is the defendant, with the result that it would be more difficult to get damages from the state than from private legal subjects.

V. A party is discriminated with respect to the choice of legal sanction – whether criminal, civil or administrative. It is widely held, for good reasons it seems, that black people in the South of the U.S.A. are discriminated by getting a more severe punishment than white people for the same type of crime.

As regards procedural legal equality we can separate between two kinds, *intraprocedural* and *interprocedural* equality. Intraprocedural equality pertains to the relation between the parties in each individual process, i.e., between plaintiff or prosecutor on the one hand and defendant on the other. Interprocedural equality prevails when there is conformity in treatment of the same kind of parties wherever the legal order in question is applicable, e.g., that drunken drivers or fathers in trials concerning custody of children are treated equally under Swedish law irrespective of whether they are tried before, say, the district court of Stockholm, Gothenburg or Malmö.

12 Undue Discrimination and a Life of Human Dignity

Why and when is legal equality a value? How can we justify the value of legal equality, i.e., explicating our intuitive response to this question?

The question can not be answered by any, however thoroughgoing, analysis of the concept of equality itself. Neither can it be answered by mechanically enumerating traditional grounds for serious undue discrimination, such as race, sex, religion, origin, nationality, language etc. And it can not be answered only by stating that, if some constant qualities of men, above all hereditary characters, are used as discriminatory criteria, the value of legal equality is violated (J. C.

Smith, *Legal Obligation*, 1976, p. 122). The answer is to be found deep in the human soul.

Certainly I don't have the presumption to think myself capable of fathom even slightly the immense depth and elusiveness of human soul. But the cause for our strong revolting at undue discrimination even when it happens to completely unknown, or even imagined, persons clearly shows that we are dealing here with something very fundamental in our mental life. For that reason it is important to try to investigate it, and the following is a most humble effort in that direction.

The basis of the law-state idea, and hence of the value of legal equality, is individualism, not tribalism or some other kind of collectivism. Of course, undue discrimination is often, not to say usually, directed against some *kind* of individuals, e.g., those who belong to a certain race, sex or religion. But the sufferers of undue discrimination are always individuals.

Legal equality is a value, since undue discrimination is violating a life of human dignity. To discriminate an individual unduly is to put that individual beneath his dignity; it is to degrade him, to belittle him, to inflict an indignity upon him. Georges Simenon, a man who more than most others has penetrated the human soul, writes, drastically but to the point: "On peut tout faire à un homme, même le tuer, mais pas l'humilier" ["One can do anything to a man, even kill him, but not humiliate him"]; G. Simenon, *A la recherche de l'homme nu*, 1976].

Let us outline the picture of a man's life of human dignity. Such a picture provides a humanistic basis for – or justification of – the value of legal equality (as well as the other fundamental law-state values). Let us proceed by means of contrast. Out of a display of the ugliness of undue discrimination a picture of a man's life of human dignity will, hopefully, emerge. We find that picture outlined in many old cultures. In ancient Greece it took the form of a high reverence for the virtues of moderation (*sophrosunê*) and justness (*dikaiosunê*) and a deep contempt of overweening pride and arrogance, *hubris*.

It must be strongly emphasized that this is a normative picture – a picture of an ideal. Of course, a lot of people do not find it appalling at all to humiliate others by discriminating them unduly, some even enjoy it (history is full of them). Things being otherwise and this essay would be unnecessary. Neither is there any lack of people yielding to humiliation, some even deriving a perverse pleasure from it. But measured by the picture of a life of human dignity all this is something evil.

Undue discrimination is a form of abuse of power. Abuse of power is something ugly in three respects; let us call them (i) *the insult of abuse of power*, (ii) *the arrogance of abuse of power*, and (iii) *the decadence of abuse of power* respectively. In this article we shall concentrate on the insult, arrogance and decadence of undue discrimination.

The insult of undue discrimination hits, of course, in the first place the individual who is the immediate object of its negative consequences, but also the compassionate witnesses thereof. In the Soviet Union there was a time when it was forbidden to import or possess gramophone records from Western countries. People who did were punished. But within the reigning *Nomenklatura* itself there was no shortage of Western records – and who was that public prosecutor

who dared to prosecute people in those circles? The immediate objects of the insult of undue discrimination were ordinary Russians longing for Western records of the kind the *Nomenklatura* was enjoying. Another such immediate object of insult would be the Jewish advocate in Germany 1933, who was not allowed to practice his profession due to the *numerus clausus* imposed for the only purpose of persecuting Jews. Or take European farmers in the 18th century subject to the nobility's "right to neck and hand" (i.e., the right to condemn subordinates to death by beheading or to mutilation by hand chopping). Still further examples would be the aforementioned gypsies of Spisske Podhari, the Swedish taxpayer who is the winning party in a tax process but nevertheless has to pay his own litigation costs, Julij Daniel in the mock trial of 1965, an "ordinary" witness whose testimony is regarded *per se* as less reliable than that of a policeman and a black criminal in the south of the U.S.A. at the sight of white criminals getting off much more lightly for equivalent or even worse crimes.

What, then, is "the insult" in these cases? It consists, as far as I can see, of three components: the deceitfulness of undue discrimination, the erroneousness of it and the powerlessness of it.

Undue legal discrimination surely has its causes. It can have its roots in hostility, contempt, feelings of superiority, fear or dislike, or in belief in prejudiced doctrines about reality. By the deceitfulness of undue discrimination I mean the insult of being betrayed by the power-holders' use of the law as a means for private or otherwise irrelevant ends. An adequate response to this is anger.

Erroneousness of undue discrimination is there, when the grounds of discrimination are erroneous. *x* is hostile to *y* although *y* is no real enemy of *x*. *x* despises *y* although *y* is not despicable. *x* feels superior to *y* although *y* is not inferior to *x*. *x* fears *y* although *y* is no threat to *x*. *x* dislikes *y* although *y* does not deserve *x*'s dislike. *x* believes that *y* threatens the stability of the nation since *y* is a Jew, although the belief that Jews threaten the stability of nations is false.

Feelings and beliefs of these kinds are, as we all know, not exceptional, and of course they cannot be made forbidden. But when they influence legal activity in a discriminatory direction the insult becomes at once more concrete and more serious. And if erroneous, the insult is even greater. You are treated worse than others, since the power-holders have got you wrong. An appropriate response to this is wounded feelings and anger – for being misunderstood, for not being given due respect for your merits, for being subject of simplification and prejudice, in certain extreme cases for not even being counted as a human being. This is the erroneousness of undue discrimination.

The powerlessness against undue discrimination lies in being deserted, at the power-holders' mercy, exposed to their spite or prejudice. Also to this aspect of insult anger is an appropriate response.

The arrogance of undue discrimination lies with those who indulge into discriminatory legal deeds, and their sympathizers. But also the non-discriminated (the privileged) runs the risk of being afflicted with it. To violate another individual's life of human dignity is, in addition, to violate one's own life of human dignity. Respecting others is a part of one's own self-respect. It is

a characteristic of a life of human dignity not to violate others by unduly discriminatory means.

Components of this kind of arrogance are conceit, pomposity, hubris – in extreme cases self-apotheosis (“*L’état c’est moi*”). There is also an element of ruthlessness in it: to treat another individual as if that individual is at one’s own free disposal is indeed the very height of arrogance. Just because most of us – besides being of intrinsic value, at least to ourselves and to those close to us – are means to other people’s ends, restrictions must be laid upon human rampage.

Why is the arrogance of undue discrimination (violation of somebody else’s life of human dignity) a violation of the arrogant person’s own life of human dignity?

The answer is the following. Because of the ugliness of it. Conceited, pompous, pretentious, corrupt, deceitful, dictatorial power-holders are not only dangerous, they are ugly to behold. Power to discriminate between human beings tends to bring out an aptitude for arrogant behaviour in those who have such a power. The essence of arrogance is an overestimation of oneself, and to overestimate oneself is to violate one’s own life of human dignity. Overestimating oneself is to transgress the border of moderation and self-control (*sophrosynê*), and, from a humanistic point of view, that is something ugly to behold.

The decadence of undue discrimination, especially when more advanced and comprehensive kinds of it prevail, consists in the decadence of the victims or potential victims to undue discrimination. It lies in the coming into existence of a lot of dejected, cringing, obsequious, self-pitying, self-denying beings, regarding each other with suspiciousness and envy.

These three aspects of undue discrimination are hideous contrasting pictures, bringing out the beautiful picture of a human being’s life of human dignity in full relief.

It is, no doubt, easier to ascertain whether a discrimination before the law is undue or due than one in the law. The mere placing of someone outside the law, thereby giving the adverse party an undue favour, is violating his life of human dignity. In the case of equality in the law, the task can be much more difficult.

As was touched upon in section 10 *supra*, it might happen that devices for achieving equality through the law come into conflict with the value of equality in the law, notably affirmative action, preferential treatment and quota systems. Finally, I will say something about that problem.

As we all know, the conflict is this. The technical device as such of attaining equality among some categories of people through the law by means of, e.g., a quota system, consists in the making of a new discrimination in the law, and that discrimination might be undue.

From the point of view of the law-state ideology and its underlying value-basis in the idea of a life of human dignity there are strong reasons to be sceptical about these devices. They might be ideologically contraproductive. (I will not dwell upon the factual effectiveness of devices of the kind. Whether they have a mere cosmetic effect or are highly efficient – which, or so it seems, they are not –, that would not affect very much a judgment made from a point of view of principle.) As a reason for this scepticism the following could be argued. Let us, as a paradigmatic example, take the case where, by means of preferential

treatment with respect to women's access to higher education, a more qualified man is passed over by a less qualified woman.

1. The discrimination is a violation of the man's life of human dignity. His qualifications are counted less.
2. The discrimination is a violation of the woman's life of human dignity. It is a gross insult to her not being judged on her merits but treated in a patronizing manner like a child.
3. The discrimination is a violation of the life of human dignity of other women who are judged on their merits. Also their qualifications are thereby being depreciated.

The law-state ideology has strong claims on the methods used to attain equality. Equality through inequality is to be looked upon with suspicion. The cardinal rule must be that, when eliminating inequality, no new kind of inequality must be created. Other methods must be tested.

13 Post-script

Dear Jes! We have known each other for almost 35 years by now. We met as post-graduates at a symposium in the mountains of Norway in 1971 and became friends very soon. We found ourselves on the same (liberal) side in the endless nightly debates with the Neo-Marxists (quite common those days). When the latter disappeared we continued the discussion between ourselves. The discussion is still going on. It has taken place in many parts of the world, all with striking conformity characterized by late nights and innumerable bottles of wine. Being, old friend, familiar with your interest in legal ideological matters of the kind treated in this essay, I hope you will derive some pleasure from it. I am more than convinced that you will find a lot to criticize in it.