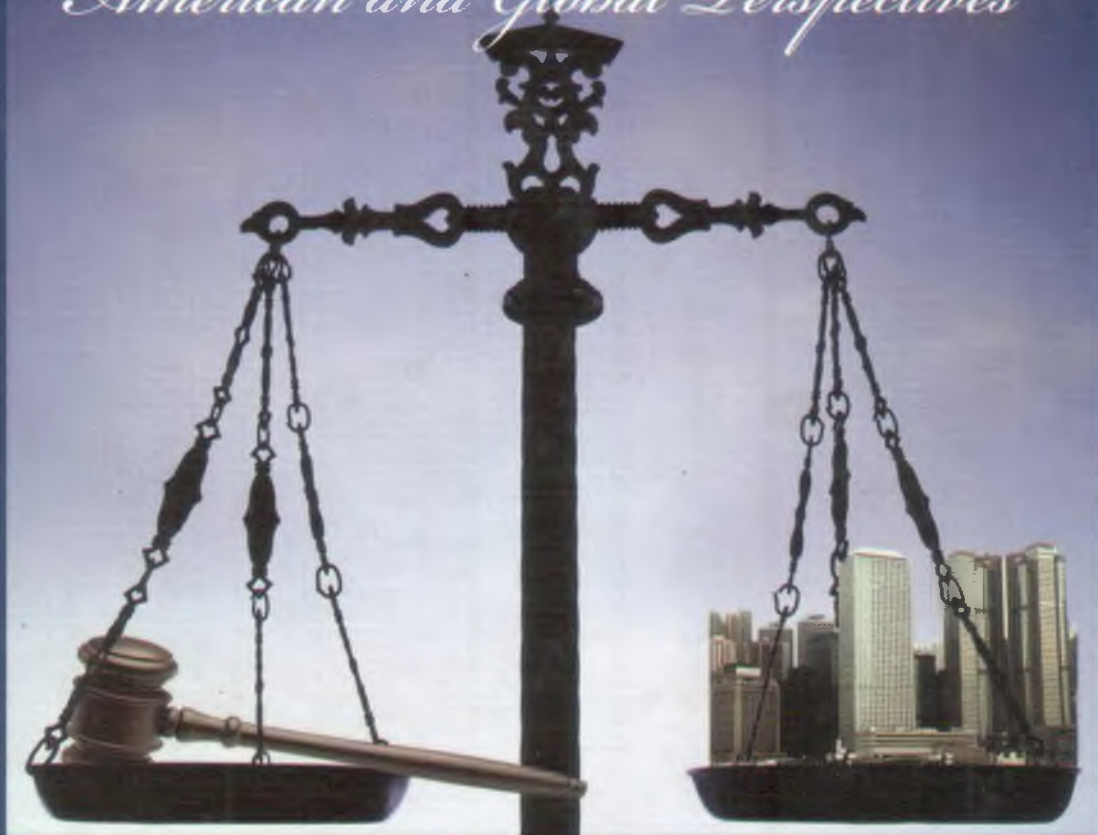


ENCYCLOPEDIA OF LAW & SOCIETY

American and Global Perspectives



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A SAGE Reference Publication

 SAGE Publications
Los Angeles • London • New Delhi • Singapore

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DISCRIMINATION, SOCIOLOGY OF

Discrimination, conscious or subconscious, differentiates between individuals based on race, caste, creed, religion, age, gender, health status, physical disabilities, economic circumstances, or even their sexual preferences. Students often study the topic of law-based discrimination under the subject of constitutional law or even ethics, the discipline concerned with what is morally good or bad, right or wrong.

History and Extent of Discrimination

Discrimination has occurred widely throughout history and across societies. Although many forms of discrimination are prevalent, those most frequently causing serious social problems have occurred based on race or caste. In general, discrimination based on race exists more often in the Occident, while that based on caste exists in the Orient. African Americans, who earlier had lived under a system disparagingly called Jim Crow, achieved effective equal legal status only in the 1960s.

Discrimination was sometimes justified on very flimsy grounds. Some Christian ministers and theologians taught that God supported racial segregation, favored whites as His chosen people, and cursed

blacks to be servants. Craniologists, eugenicists, phrenologists, and social Darwinists, at every educational level, buttressed the belief that blacks were innately intellectually and culturally inferior to whites. The famous English short story writer Rudyard Kipling (1865-1936) went to the extent of calling blacks and other people of color the "white man's burden," implying that people of color have no capacity to govern or progress and that it was thus the burden of whites to do so.

In the Orient, discrimination exists more often based on caste. Among the communities most frequently discriminated against are the Dalits, or so-called untouchables, of South Asia, including Nepal, Bangladesh, India, Sri Lanka, and Pakistan; the Buraku of Japan; the Osu of Nigeria's Igbo people; and certain select groups in Senegal and Mauritania. According to a rough estimate, over 250 million people worldwide continue to suffer from a hidden apartheid of segregation, modern-day slavery, and other extreme forms of discrimination, exploitation, and violence.

Reactions to Discrimination and Criminal Justice

Discrimination often leads to grievances that in turn lead to protest and rebellion. In the United States, for instance, Huey Newton and Bobby Seale in California in 1966 formed the Black Panther Party to address black grievances. In the early 1990s, it transformed into the New Black Panther Party for Self Defense (NBPP). Such efforts are mirrored by the efforts of white supremacists, whose organizations have sprung up or, like the Ku Klux Klan (KKK), reemerged to counter black resistance.

Contemporary Americans remember police discrimination against blacks by the 1991 beating of Rodney King by several white Los Angeles police officers. King became a symbol of police brutality against blacks. When the four officers were acquitted a year after the beating, the city erupted in riots in the hours following the jury's verdict. In the four days of violence in South Central Los Angeles, 55 people died, 2,383 others suffered injury, and the police arrested more than 8,000. In an effort to end the riots, King issued his

famous plea: "Can we all get along?" In a second, this time federal, prosecution in 1993, a jury found two of the officers guilty of violating King's civil rights. The officers served thirty months in federal prison.

Sociological and Political Dimensions

In certain cultures—most notably that of India—discrimination is so deeply entrenched in everyone's psyche that people take excesses against disadvantaged classes as the norm. Politicians fight elections on a caste basis, with lower caste people voting for candidates belonging to their own caste—irrespective of their efficiency. Political parties choose candidates based on local population caste surveys. Governments even choose ministers based on caste, and declare it openly.

Discrimination often reaches embarrassing proportions. After the September 11, 2001 (9/11) terrorist attack in the United States, any person who bore a Muslim-sounding name or appearance stood a significantly greater chance of being searched by inspectors or police at airports and other sensitive places. Mobs killed some Sikhs just after 9/11, because they looked very much like Osama Bin Laden, the one who claimed responsibility for 9/11.

Most societies have sought to remove discrimination through their constitution or legislation. In the United States, the Fourteenth Amendment to the Constitution provided equality to all persons; the Fifteenth Amendment granted voting rights to all citizens irrespective of race, color, or previous condition of servitude; and the Nineteenth Amendment extended voting rights to women. Articles 14, 15, and 16 of the Indian Constitution seek to remove discrimination based on religion, race, caste, sex, descent, or place of birth.

Employment Discrimination

Employment provides an example of an area of social life in which law has attempted to encourage equal treatment, sometimes on principles other than that of equality. Race discrimination is illustrated by the

seminal American case, *Griggs v. Duke Power Company* (401 U.S. 424, 1971). Duke Power had an "inside" transfer policy, whereby an employee who wanted to avoid working in the company's lowest paying labor department had to register a minimum score on two separate aptitude tests and have a high school education. Since most African American employees did not have a high school education at that time, this policy acted as a subtle company policy whose purpose was simply to safeguard its long-standing tradition of giving job preferences to white employees. The court ruled that this indeed amounted to discrimination against the African American employees, violating a federal civil rights act, since neither the high school graduation requirement nor the two aptitude tests measured an employee's ability to learn or perform a particular job or category of jobs within the company.

The U.S. Supreme Court, in *Hicklin v. Orbeck* (437 U.S. 518, 1978), struck down an Alaska statute that discriminated against nonresidents in employment. In 1972, the Alaska Hire statute allowed work in Alaska's oil and gas industry only to go to qualified Alaska residents. The basis for the decision was the privileges and immunities clause of the Constitution.

The Supreme Court protected a state statute to reduce discrimination based on gender against a freedom to associate argument. In *Board of Directors, Rotary International v. Rotary Club of Duarte* (481 U.S. 537, 1987), the local California Rotary Club of Duarte admitted women members despite a rule by its parent organization, Rotary International, that membership be limited to men only. The Court found that this form of discrimination violated a California statute and upheld a lower California court's decision.

Discrimination based on pregnancy has received attention too. In 1971, the Cleveland Board of Education asked two junior high school teachers to go on forced unpaid leave because they were pregnant. In *Cleveland Board of Education v. LaFleur* (414 U.S. 632, 1974), the Supreme Court ruled that the Board had indeed violated the due process clause in the Fourteenth Amendment, but based on an arbitrary interference with a woman's right to bear children. This decision effectively put an end to all mandatory maternity leave policies. Pregnant women could work

as long as reasonably able and could return to their jobs as soon as they were medically fit to do so.

Conclusion

Discrimination has obviously led to the marginalization of disadvantaged groups. Several countries, most notably India, have tried to correct this through legislation, where the disadvantaged are preferred in jobs through reservation. Thus, if a person declares that he or she belongs to a protected class, that person stands a better chance of getting a job. Many have termed this "reverse discrimination." Advocates of reverse discrimination maintain that it will ultimately lead to equalization through filling of important and powerful posts by members of the disadvantaged class. If, for instance, there were a low caste person occupying the position of a high-ranking police officer, other officers serving under that person would be less likely to discriminate against people of low castes. People are still debating whether this would ultimately lead to a "social correction" or not. One fact is clear, however. Both discrimination and reverse discrimination serve strongly to accentuate differences created by law as well as social custom. Whether even legal equality, much less social equality, can ever be attained is an open question.

—Anil Aggrawal

See also Affirmative Action Programs; Caste; Discrimination, Economics of; Equality; Gender; India; Labor Law, Economics of; Police

Further Readings

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DISPUTE AVOIDANCE

Because of its method, doctrinal legal scholarship focuses on the pathology of the legal system—on law as dispute resolution seen in reported judgments. Sociolegal studies are free to look at law in different ways; however, the focus in the majority of such studies tends to be on those aspects of law that relate to dispute resolution—on the courts and the way in which various officials and other actors function in relation to the courts. Yet law is as much a way of avoiding disputes as it is of resolving them, and much of the effect of law lies outside the arenas where disputes are resolved.

Consider a cohabitation contract, setting out the rights and duties of unmarried partners. Jennifer Robbennolt and Monica Johnson show that, depending on the jurisdiction concerned, such a contract may be something that a court can turn to if the partners separate. However, the contract is also something that allows the partners to determine the structure that their lives will have with regard to things like property, thus meaning that separation and any consequent court case is less likely. More generally, Brian Tamanaha emphasizes that a society creates a system of laws not simply to provide courts with a body of rules by which individuals may adjudicate cases. It also serves as a code by which people can live to avoid disputes, although, within any particular system of law, the question of the extent to which law does in fact contribute to the maintenance of social order is an empirical question that needs to be examined.

Some forms of law facilitate dispute avoidance to a greater degree than other types of law. Patrick Atiyah demonstrated that contract law, in its classical form, is perhaps the preeminent example of law promoting dispute avoidance, since its principal purpose is to provide people with a framework within which they can make agreements about how to conduct their lives.



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