

Prof. John Gardner (University of Oxford)

### Discrimination Law: What is it Good For?

Thursday 16 March 2017



“Discrimination Law: What is it Good For?” So ran the title of the latest *laboratorium lucernaiuris* lecture delivered by Prof. John Gardner, Senior Research Fellow at All Souls College and Professor of Law and Philosophy at the University of Oxford. Prof. Gardner’s own research interests – namely, philosophy of law, as well as moral and political philosophy – would be reason enough to speak on the subject. Yet it was in altogether more personal fashion that he drew initial attention to the topic – via an anecdote introducing his eight-year-old stepdaughter, Anika, and Trump (“Trumpf”). As to the question of what discrimination law is “good for”, a simple answer was given at the end of the talk – “for preventing discrimination”.

But what happened in between? Using the above-mentioned example of President Donald Trump and his stepdaughter, Prof. Gardner pointed to discriminatory behaviour in our daily lives. Since he had referred to Trump voters as “foolish”, Anika accused him of discrimination. He denied the charge, providing her – and, by extension, the audience in the lecture hall – with a first attempt at a definition of discrimination:

D discriminates against P if and only if D counts some fact about P (or what D supposes to be a fact about P) against P.

Yet, he continued, this definition does not take into consideration that discrimination does not always have to be bad. One might, for instance, discriminate against someone because of the name “Mohammed”, assuming that person to be Muslim. Yet this assumption might be wrong, and Mohammed could well be a Christian. Therefore, Gardner added to the definition:

D discriminates against P if and only if D counts some fact about P (or what D supposes to be a fact about P) against P. *In acting to P's disadvantage in the allocation of something.*

This definition takes account of two key factors: (a) the ground for discrimination: the fact about P that is counted against P (age/sex/race etc.); and (b) the site of discrimination: the role in which D is acting and the “something” that D is allocating in that role. Not surprisingly, this definition then resembles that of the UK Race Relations Act 1976 s 1(1)(a). Having delineated the differences between direct and indirect discrimination (e.g. denying someone a job on the basis of criteria not listed in the Act), he wanted the audience to understand that discrimination is found only in intentional acts. Still, this does not mean that discrimination is always intended. Nor does it mean that one is always conscious of the facts that constitute the grounds on which one discriminates. Finally, it also does not mean that discrimination is found only in deliberate acts.

Coming to the second part of his talk, Gardner spoke about bad discrimination and its distinction to wrong discrimination. Highlighting that acting to someone’s disadvantage would already be regrettable, he wanted to explore why doing so discriminatorily would add extra “badness”. His hypothesis was that when doing something is already bad, doing it without justification is still worse. The details of this hypothesis he left unexplained, though they will be elaborated more fully in a book study due for

publication in the near future. Yet when and why are discriminatory actions unjustified? According to the speaker, this depends on the (undefeated) reasons. Again referring to example cases, one elementary instance of bad discrimination would be to disadvantage someone for a reason that is not a reason, i.e. counting facts that do not actually count as reasons against someone. Leaving open-ended the decision-making-process regarding reasons and non-reasons, he made general reference to reasons in the context of sex and skin colour that usually carry negative or pejorative connotations - e.g. femaleness associated with unreliability. In such cases, prejudice and superstition frequently play a role. Nevertheless, those reasons can in some cases be right, for example when supported by statistics.



There are two possibilities regarding these reasons: (a) statistical truths about people simply are not reasons to be held against particular people and it is thus irrational to count them, or (b) even though it may be rational to count them, they still should not be counted. Gardner pledged for option (b), saying that sometimes irrationality is needed. But where, precisely, does the “wrongness” in discriminating against someone lie? Referring once again to case studies, the question regarded discrimination for otherwise valid reasons. Related to social problems, one solution would be to tackle social problems by imposing social duties.

In view of these elaborations, Gardner asked: how can the law help? In order to provide an answer to this question, he focused on four main implications:

1. Whether discrimination on certain grounds is wrong depends on many social contingencies. There are no eternal truths (“justice for gingers” can be a joke and/or a truth);
2. Wrongful discrimination is *malum prohibitum*, not *malum in se*. We have to prohibit (by law) in order to make it wrongful;
3. Some discrimination is bad and therefore we make it wrong. Some discrimination we make wrong and its wrongness is what makes it bad. Independently, it would not be bad;
4. Anti-discrimination measures do not target patterns of disadvantage as such, but rather patterns of disadvantage brought about by discrimination. For example, the Civil Rights Act does not promise to tackle the disadvantages of black people as such, but only those aspects that would otherwise be perpetuated by the continuation of discrimination, direct and indirect (that is why the act is a success)



Ultimately, this means – as explained in the third phase of the lecture – that anti-discrimination measures do not promise social or economic equality, workplace diversity etc. Thus they cannot be judged to have failed when such ideals are not achieved.

The lecture ended with a lively discussion round, during which the speaker addressed questions regarding the aspect of his reasons, the stasis of the word “disadvantage”, and the notion of discrimination on a collective level of social communication.

(Dario Haux)