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Fiat aequalitas et pereat mundus? - How "Anti-Discrimination" is Undermining the Legal Order

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"How "Anti-Discrimination" is Undermining the Legal Order"

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1.

Those who are keeping abreast of the intellectual fashions of our time will notice the increasingly prominent role that reference to "human rights" is playing in the justification and drafting of proposed new legislation. They will also notice that within the politics of human rights a certain edifice of issues is pushing itself to the fore: "equal treatment", or conversely expressed, the "fight against all forms of discrimination."

In recent years many European countries have passed laws for the purpose of enforcing "Equal Treatment" in various areas of public and private life. And clearly, this is no longer simply a matter of applying the principles of "equality before the law" by treating all citizens equally regardless of state in life, sex, religion or ethnicity. Instead, it has been turned into a matter of encroachment into the private autonomy of each citizen: an obligation to provide equal treatment is now, we are told, to be applied between all and everyone. A businessman may no longer freely decide whom he will hire, a homeowner may no longer decide to whom he will rent his house, an operator of a restaurant or nightclub may no longer decide whom he will admit. Due to laws which forbid discrimination, laden with fines, and/or warranting claims for 'compensation for loss suffered', each citizen is now faced with the threat of having to defend in court those decisions which, up until now, he has been able to make according to his own preferences and needs.

From the Catholic perspective, it is certainly legitimate to consider how the "politics of anti-discrimination" will affect the life of the Church and its believ-

ers. For example, according to the Catholic faith, women are excluded from ordination (and so undoubtedly, in this respect, are not treated equally to men). Whoever does not want to accept this teaching could regard this as discrimination and consequently endeavour to legally force the admission of women to the priesthood in court. Likewise, militant homosexuals could apply equal treatment requirements as a starting point for attempting to force the Church, which, as is generally known, does not consider homosexual practice an alternative form of sexual activity but rather as sin, into the recognition of same-sex "marriages" by means of legal action. In addition, the Church requires from its employees to respect the precepts of its moral teaching in their private lives, and considers, for example, a lifestyle that is openly contradictory to these teachings as grounds for dismissal from service. Up until now secular legislators have respected the Church's right (and that of other organisations which pursue ideological aims) to place special demands for loyalty upon its employees. But are these regulations compatible with broadly understood laws that forbid discrimination?

Will the Church soon be forced to ordain women or to offer the sacrament of marriage to homosexuals? Will the Church continue to be allowed to proclaim her teachings, for instance in questions of sexual morality, and will her faithful be able to follow her teachings without having to fear legal prosecution? Will Catholic schools soon be forced to hire teachers who adhere to other faiths, or even teachers who exhibit a hostile attitude towards the faith?

The proponents of comprehensive anti-discrimination policies point out that relevant legislation could be mitigated through "provisions for legal exceptions", which would give leeway to religious communities within their particular spheres of activity. But the Church's doctrine that, inter alia, prevents her from admitting women to the priesthood or offering the sacrament of marriage to homosexuals, is for some contemporaries – including some who are otherwise indifferent to questions of religion – a provocation. The underlying anthropology stands in open contradiction to the anthropology which holds sway in

modern society (and which consequently expresses itself in anti-discrimination policies): that women and men are different from one another and that homosexual and heterosexual relations are not the same.

Thus we are ultimately dealing with a conflict of diametrically opposed anthropologies. If the Church were to avoid this conflict by allowing itself to be content with various provisions for legal exceptions, it would therewith be accepting an erroneous anthropology to be erected as a general dogma, which the world at large must obey. The proclamation of and adherence to the Church's teachings, then viewed from this new dogma, would be tolerated only within narrowly drawn confines. We have seen multiple times in recent years how provisions for legal exceptions are rapidly called into question as "unjustifiable privileges" by certain circles that apparently view the so-called fight against discrimination primarily as an opportunity to attack the Church and its believers. These attacks range from the pressure placed upon Christian adoption agencies to place children with homosexual couples, to the punishment of a Bishop who refused to hire a homosexual man for a position as pastoral youth worker, to the verdict of the European Court of Human Rights prohibiting a Catholic university from withdrawing the professorship of a university teacher who publicly attacked the Christian faith. Similarly, there are attempts by various "human rights experts" to stigmatize as "human rights offenders" those medical practitioners who, in line with the law of their countries, refuse to partake in abortions. Not he who takes the life of the unborn is thus suspected of violating human rights, but he who, for reasons of conscience, refuses to do so. It is precisely this last example that shows how the anti-discrimination rhetorics of contemporary politicians and judges is disposed towards being twisted into an instrument against human rights.

It would therefore be a much too limited (narrow) perspective for the Church to examine the continuously growing anti-discrimination discourse solely under the prism of its own specific ecclesial interests. Even if, from a short term view, it might seem clever to ensure ensure that her own sheep's hooves stay

dry through the use of provisional exceptions and conscience clauses, it is rather unlikely that the interests of the Church will thus be preserved in the long term, if, outside an area of specifically defined protections, a new system of values that contradicts fundamental principles of natural law is allowed to lay claim to unlimited validity.

In the final analysis this is not a matter of protection of Church interests, but rather a question of more fundamental significance, namely whether a general equal treatment stipulation, encroaching into the rights of self determination of all citizens in yet unknown manner and measure, must be expected to drastically change the underlying principles of our understanding of 'justice'. An erroneous concept of justice would leave no area of law unaffected. Its impact would be similar to a programming error that causes an entire computer program to crash, or similar to a calculating error in a mathematical operation that causes the entire calculation to be flawed.

2.

In this brief examination we would like to use as a point of departure the traditional concept of the term "justice", which runs like a scarlet thread through the history of law, and which can be traced back to the beginnings of human thinking in recorded history. We find the most concise expression for the concept of the term "justice" in the Codex Iustinianus:

Iustitia est constans et perpetua voluntas ius suum cuique tribuens.
Justice is the constant and perpetual will to render to every man his due.

If we were to subject this formula to a more comprehensive interpretation, we might observe that justice is primarily a virtue attributed to the individual, which, once it is generally accepted as such within a given society, becomes a virtue inherent to the State as a whole. We might also note that, since justice is the expression of a 'constant and perpetual will', its essence cannot be subject

to substantial changes, but must of necessity remain consistent over the span of time and space. Within the given context, however, the most important point is this one: that the phrase "suum cuique" (to each his own) is not to be understood as a general obligation to provide equal treatment to all and everything. In fact, equal treatment is a requirement of justice only where, due to specific circumstances in the concrete case, a person can show to be entitled to such equal treatment.

The fact that the formula "suum cuique" is found with identical formulation in two highly prominent places in the Codex (namely directly at the beginning of the Digestae[1] and also at the beginning of the Institutiones[2]) shows that this is the very cornerstone of the legal code. In other words, it is the foundation upon which all else is built. The Codex Iustiniani is the codification of the laws and legal principles of the time, but the formula given here is substantially older. It originates from the Roman jurist Ulpian, but appears nearly identically in the writings of Cicero, from where it can be traced back to classical Greek philosophy – for example, to the Nikomachean Ethics of Aristotle. Already there we find the argument that, although equality constitutes the fundamental principle of justice, it necessarily can only apply between equals. That which is unequal would need to be treated unequally:

"... if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints-when either equals have and are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be 'according to merit'; for all men agree that what is just in distribution must be according to merit in some sense... the just, then, is a species of the proportionate"[3]

Of course this does not imply that justice has nothing to do with 'equality' or 'equal treatment.' On the contrary, equality plays a central role in Aristotle's reflections on justice. But both are not necessarily always the same. At the least, the following aspects should be noted:

First of all, the question whether equal treatment is due is always dependent upon the 'tertium comparationis' (a third aspect of the comparison in question), which serves as criterion for determining the equality or inequality of the two objects of comparison. Since no two cases are ever exactly alike, it will indeed always be possible to discover differences which one can draw upon to justify unequal treatment. The converse is also true: whoever looks long enough will always be able to find like elements upon which he may build a claim for equal treatment. Claims for equal treatment are therefore only applicable where the tertium comparationis is adequately chosen. By drawing inappropriate comparisons one can claim equal treatment for just about anything if one wants to. The result is not justice but rather arbitrariness.

Secondly, therefore, the use of appropriate distinguishing criteria will often lead to a situation where justice requires unequal, and not equal, treatment. For example, there can be no doubt that it is fair to pay a diligent and competent employee more than you would pay a negligent and incompetent employee, even though both work the same length of time. It is fair that a brand new automobile should cost more than a used automobile that is several years old, even though both cars may be the same type and model with the same equipment and extras. It is fair that a small-time pick-pocket be less severely punished than a murderer or robber, even though both have broken the law out of the same motive (namely to usurp property). Accordingly, it is perfectly legitimate for the state to grant specific tax and legal benefits to married couples who, by founding families, perform an important service in contribution to the continuation of society, while it does not grant the same benefits to citizens who do not provide the same contribution to the common good. In short, the principle of suum cuique does not forbid such differentiations, but indeed demands them.

Thirdly, a distinction is traditionally made between distributive and commutative justice. This reflects that justice places other demands upon the dealings of the state than it does upon the legal transactions of citizens with one another. That is to say that, even though the state is unquestionably bound by the

principle suum cuique, it is also required to treat all citizens equally. For example, while citizens pay different taxes dependent upon their respective financial capabilities, they have (in view of their citizenship) the same right to vote. In contrast, regarding the exchange of services and payments between free citizens, it is generally considered that participants in the marketplace must be allowed to decide for themselves, whether or not they want to conclude any given contract: this is called "private autonomy". Commutative justice does demand that services and payments be of equivalent value, yet this appraisal must be, as far as possible, left up to the individual parties so that the general freedom of action of citizens not be undermined.

'Suum cuique', is thus also to be understood as a liberal principle. It means that each person must be allowed to freely decide upon the use of his own property. This is a prerequisite for personal freedom. A rigid anti-discrimination legislation that places each and every legal transaction under constraints of justification would rob citizens of the freedom to use their own property as they see fit. Instead of granting each his due, this would lead to depriving each of his due. The control over citizens' property would then be in the hands of judicial and administrative authorities, or other "thought controllers". Such legislation would constitute not only a perversion of justice, but also a threat to civil liberties and personal responsibility.

3.

Virtuous and just action is action that is adapted to reality. Yet the common basic principle of all anti-discrimination politics is that they rest upon prefabricated victim-/perpetrator stereotypes, which often do not at all conform to reality. For instance, it does happen that men are disadvantaged in relation to women, or that immigrants tyrannize local residents, and it even happens that homosexuals publicly incite hatred against the Church. Such cases have no place in the universe of anti-discrimination because they stand in contradiction

to the pre-ordained roles of "victims" and "perpetrators".

Concerning the instruments of anti-discrimination politics, this is their primary common denominator: for the purpose of "correcting destiny", they interfere with the life of citizens in a patronizing manner that extirpates their freedoms and responsibilities to speak and act. And there is a marked disparity if not outright self-contradiction in the measures taken, which betrays the arbitrariness of the political objectives. For, while the classical formula of 'suum cuique' is understood to the effect that equal is to be treated equally and unequal is to be treated unequally according to appropriate and proper criteria, the instruments of antidiscrimination politics achieve the exact opposite:

a) The Unequal Treatment of the Equal. In order to overcome alleged discrimination, legislators adopt openly discriminatory measures. Examples of this are gender quotas, or legal provisions according to which women are preferred over men in consideration of several candidates with equal qualifications for a job vacancy. Indeed, the noble objective of anti-discrimination is thus inverted into its exact opposite: instead of eradicating it, such measures institutionalise discrimination, – and the bemused public learns that certain types of discrimination – which are termed "positive discrimination" – are good, and not bad. What is concealed here is that a discrimination that is "positive" for one group by necessity must be "negative" for another.

b) The Equal Treatment of the Unequal. Overtly unequal circumstances are treated as equal with the intent that differences will be evened out or, if that is not possible, at least eliminated from the consciousness of the general public. One example of this is educational policies that work towards the elimination of a differentiated school-system: talented and less talented children should attend the same classes so that all are put on a par. In this way existing differences in intelligence and talent in individual children may perhaps not be completely evened out, but at least the gifted children will be prevented from advancing too quickly. Another goal for which some are striving is

the equal treatment of homo – and heterosexual relationships. But the fact that they are different, and not equal, is self-evident. The apparent purpose of "equal treatment" is to erase the difference from the moral consciousness of society.

Yet another very recent example is found in the conclusion pronounced by an Advocate General of the European Court of Justice, who finds it an unacceptable discrimination if women to have to pay higher premiums than men for retirement insurance. In economic terms, this is explained by the statistical evidence that women have a higher life expectancy and concurrently spend a smaller proportion of their lifetime in employed work than men. Yet according to the Advocate General such unequal treatment is not justifiable because the differing insurance risks for men and women "can only be shown statistically, at best, to have any connection with gender." This leaves an important question open: on what, if not upon statistical probabilities, should insurance companies base the assessment of risks?

A similar approach to "equality" is apparently being promoted by the Equal Treatment Commission of the Federal Chancellery of the Republic of Austria, which recently expressed the view that it constitutes discrimination when a hairdresser asks for a higher price for haircuts for women than for men...

This leads us to the most striking and radical example of a policy that strives to eliminate natural differences by means of equal treatment – in this case the difference between man and woman: "Gender-Mainstreaming", which in a short period of time has penetrated all areas of public life.

Initially, the apparent aim was to procure more freedom to shape individual ways of life by breaking out from all too rigidly established gender roles (for example, the man as "provider", the woman as mother and housewife). But, in the meantime this issue has escalated into absurdity. Without further ado it is being denied that traditional role models have anything to do with the natural predispositions inherent in the sexes; instead, it is pretended that differences between the sexes are only social constructs superimposed over the

actual wishes and needs of the individual, which hinder its development. As a consequence, "gender mainstreaming" strives to systematically fight all role models and eliminate them from the public consciousness. The employment of women is being promoted by means of social benefits (for example, state-financed kindergartens), whereas such benefits are deliberately withheld from women who raise their children themselves. Immense efforts are being undertaken to recruit girls for technical vocations and boys for household and nursing or caretaking staff, or to 'reshape public consciousness' by the exclusive use of inclusive or, 'gender-neutral' language. The climax of absurdity in this development is reached when the terms "father" and "mother" are eliminated from legal vocabulary by parliamentary decree.

Quite obviously, this no longer has to do with creating more freedom. Rather it has to do with the realisation of a new ideology, the quintessence of which is that the human person has no other identity than the one that it defines for itself: The sex (gender) of a person, which from now on is termed 'sexual identity', is chosen by itself and can therefore also be re-defined at any time. In other words: a man who thinks he is a woman may use the ladies' toilet. Or, a woman who decides she wants to be a man is allowed to enter a Catholic seminary to become a priest. But with what right can one, in context of such mutability and temporariness, speak of identity? Isn't identity something that remains constant?

In the final analysis therefore, this has to do with taking from people, whether they want it or not, their fixed identity as man or as woman, and replacing it with a temporary identity. Does this really correspond to the wishes and aspirations people actually have, or is this not rather an imposition forced upon them? Is the campaign against "traditional role models" not actually a campaign against a substantial proportion of society, probably the overwhelming majority, against people who identify themselves with these roles and who have no need whatsoever for "liberation" from their identities?

c) Inappropriate Criteria: Anti-discrimination policies force the state and its citizens to make decisions supported by inappropriate criteria. If, for example, the decisive factor in the awarding of a political office or professorship is no longer the personal qualifications of a candidate, but rather his or her skin colour, sex etc., then foreseeably the result of such recruitment policies will be a decrease, rather than an increase, in quality. This is certainly of no concern for those who have attained office or high positions (which would have been otherwise unattainable) by means of such mechanisms – but it does seriously harm the public interest. An obligation to appoint other than the most competent candidates as members of the board can put at risk the very existence of a company; the recruitment of second-rate university teachers will, first and foremost, harm the interest of students, but indirectly also that of their future employers and, ultimately, the entire national economy.

Another example of the use of inadequate criteria for misguided comparisons is the attempt to place homosexual relationships on equal standing with marriage. In order to justify such claims, both marriage and homosexual relationships are reduced to the one thing wherein they possibly can be said to have some likeness: to the "love" between two people. Nota bene: it remains unclear whether those using the word "love" in this context understand it to be more than mutual physical attraction or whether, as in some circles, they use it as a mere synonym for sexual intercourse. In any case, what they fail to see is that the institution of marriage does not exist to reward "love" between two persons, however this term is understood, with social benefits. Instead, it has the purpose of offering a stable social environment for the procreation and rearing of children. Accordingly, the idea of "marriage" for homosexuals is an absurd distortion, erasing the natural concept of marriage from public consciousness and replacing it with an artefact. The economic consequences will soon become apparent: to the degree that society begins to subsidise the homosexual lifestyle by means of allocation of social resources, this will have to be financed by the rest of society, including those who, through their "gen-

uine" marriages and families make an important contribution for safeguarding the future of society. This is not only unjust, but also indeed harmful to the common good.

Already from these few examples it clearly results that anti-discrimination policies, well-intentioned as they may be, will not lead to greater justice. Instead, they will turn the classical understanding of justice upside down.

4.

Another characteristic of anti-discrimination legislation is the creation of group rights. This results from the fact that discrimination is not defined as "unequal treatment on inappropriate grounds", but rather as unequal treatment based on certain criteria that are rather arbitrarily selected by the legislator and referred to as "suspect grounds": race, sex (gender), age, religion, ethnic origin, the presence of a physical or mental handicap, or 'sexual orientation'. A person is discriminated against if it is treated unequally on the basis of one of these grounds. If, by contrast, someone is discriminated against for other reasons than these, he receives no protection: by definition he is no victim.

The term 'suspect grounds' already shows what we are dealing with: a general suspicion, which, as we must observe, is becoming more and more institutionalized. The worldview at the bottom of the 'fight against discrimination' divides humankind sweepingly into oppressed and oppressor groups, into victims and perpetrators. Women, homosexuals, single parents, migrants, etc., are preordained as 'victims'; men, heterosexuals, married couples in intact marriages, local inhabitants, etc., are potential 'perpetrators', who are put under permanent suspicion and obliged to justify themselves before the tribunal of political correctness for each of their actions, even within the area of private autonomy. This can be seen as a new form of class struggle: the battle of the proletariat against the capitalist may belong to the past, but in its place emerges the battle of women against men, or of homosexuals against heterosexuals and a mor-

al code that is termed as 'hetero-normative'. It is not surprising that this field of operation has been discovered to be particularly attractive by those political parties that draw their orientation from Marxism. It provides a vocabulary with corresponding conceptual formulas such as 'justice', 'equality', 'non-discrimination' which all have positive connotations in public opinion, and which allow the neo-Marxists to attack, from what they pretend to be a moral high ground, the very two institutions which they view as the source of all ills: economic freedom and the family.

Now naturally there is no question that the principle 'suum cuique' justifies – and even at times requires – that for particular groups precautions need to be taken to ensure that their specific needs are met. Children and youth need kindergartens and schools, handicapped persons need special social provisions; it is important to provide for ethnic minorities the possibility to foster their particular language and culture. In this way each can be given that which is his due. This has however nothing to do with 'equal treatment' or a 'fight against discrimination', but rather with answering specific needs through appropriate problem-solving.

The politics of anti-discrimination, however, goes in the opposite direction. Rather than finding real solutions for real problems, it specialises in mere 'clientele' politics. The recurring pattern of argument is to label as "unjust privileges" the benefits enjoyed by other groups in society in view of their special needs and to demand their expansion, irrespective of the fact that the group for which such "equal treatment" is claimed does not have the same needs. Behind the facade of 'equal treatment' one usually finds a diehard group self-interest.

Nowhere is this aberration more evident than where legal norms, which have been created with married couples in view, are being applied to homosexual relationships. These legal norms are not a "reward" for the mutual "love" of a married couple, but they correspond to the contribution to the common good that is typically provided by married couples, and only by them: the procreation and rearing of offspring. It is precisely the fulfilment of this task which

places manifold limitations upon married couples: often one spouse is not employed outside the home, or has only a part-time job, in order to care for household and children. This is of direct benefit to the common good: without children there is no future for our society. The love and care that parents provide for their children cannot be substituted by the state. Where parents are absent, there is a resulting rise in costs to society in the forms of youth delinquency, lower educational achievement, etc. It is thus neither a moral devaluation of homosexuality nor a discrimination of homosexual partnerships to observe that they typically do not make a similar contribution to the common good, given that such partnerships are generally not entered into with the intent of begetting and raising children. Regardless of one's moral evaluation of homosexuality: there is no necessity for a homosexual person to give up his occupation in order to manage the household for his 'partner'. And even where a homosexual couple exceptionally does organize their living together in this way, it is legitimate to ask why the general public should subsidize this particular lifestyle. It is evident that tax benefits for married couples, common health insurance coverage, entitlement to a widow's pension for the surviving spouse of a sole wage earner of a family, etc., are appropriate for the traditional concept of marriage – for a homosexual couple, on the other hand, this is not the case. "Equal Treatment" is therefore in reality an undue privileging of homosexual couples, for which the general public must pay with higher taxes and social security payments.

5.

The pinnacle of absurdity is achieved where anti-discrimination politics is transposed to the meta-level. According to what is recently being put forth, the fact that not all causes of discrimination are treated equally in the legal system must in itself be viewed as discrimination. For this reason, it is argued, the discrimination of persons with different 'sexual orientations' must be addressed

through the same legal instruments and the same legal sanctions that are used against the discrimination of women, handicapped persons, or persons of different skin colour. Again we see that with the rhetorics of anti-discrimination politics anything can be turned into everything.

Once again, this meta-level of the politics of anti-discrimination is a mere smoke-screen used to cover up the promotion of the particular agenda of certain pressure groups. As soon as the discrimination of one such pressure group has been established in social consciousness, the obvious next step is to draw benefit from the achievements of other groups of pre-ordained "victims". This is all the more worthwhile when one's own clientele has a less-favoured standing and is faced with less sympathy than the group upon which it would like to adhere itself.

A manifest example of this, which one can call a 'strategy of political free-riding', is the European Commission's proposal for a new anti-discrimination directive, published in 2008. The Commission originally had announced its intention to propose a directive that was intended for the specific protection of handicapped persons. Intensive lobbying of homosexual activists led to the last minute revision of the proposal: as of now it is directed against discrimination on the basis of "race, ethnic origin, age, sexual orientation, religion or belief and disability". In other words, the Homosexual Lobby has hijacked the interests of the disabled. Ever since, the negotiations on the new directive have been moving forward rather sluggishly.

6.

The extravagant expansion of "anti-discrimination" policies inevitably generates an uncontrolled expansion of new laws and institutions. It precipitates a flood of vaguely defined legal concepts that, in order to cover a wide range of possible circumstances, allow for an extremely wide margin of interpretation. This leads to legal uncertainty and a loss of freedom of action for every

citizen. Conversely, the wide scope and uncertain meaning of these laws entails immense growth in power for public authorities and courts, which henceforth will be allowed to intrude into areas which have up until now not been within the range of their access. Entrepreneurs will have to justify before the authorities and courts their choice of whom they decide to hire or fire. Homeowners will have to explain why they have given a lease to party A and not to party B. A general obligation to equal treatment could even, in the long or short term, lead to the situation wherein a person's every legally-relevant act could be contested because of breach of 'equal treatment". It would be sufficient for a member of a 'victim caste' (or the institution which has been commissioned by law for the defence of the rights of these 'victims') to disagree with a particular decision. Possibly, given the stereotype that the 'victims' are 'poor', they will not even be asked to bear the expenses for their litigation, which in turn could contribute to inciting even more frivolous court proceedings.

7.

The "fight against discrimination" is more than a transient political fashion. It is a symptom of crisis of a society with no sustainable values, in which a sentimental and morally excessive attitude of self-pity as 'victim of unjust circumstances' has become a successful strategy for asserting the most questionable forms of group self-interest at the expense of the common good. Having abandoned the traditional concept of justice, legislators and politicians seem to have lost orientation. Whereas the traditional concept of justice was based upon the principle of giving each his due, the politics of anti-discrimination has given up the use of objective and appropriate criteria as a basis for legislation; instead, they place a premium on the 'victim role', which is carefully rehearsed by individual interest groups. This enables these groups to masquerade, with the help of arbitrarily applied distinguishing criteria, any fanciful desideratum as a legitimate claim. We are thus witnessing major shift of axis, resulting in the over-

turning of the concept of justice that, up to the present, has formed the basis of the European legal system.

The consequences of these changes will soon be felt, even in the most remote areas of the legal system. For 'anti-discrimination' is an all-encompassing principle: if homosexual relationships are put on a par with marriage, then so must dogs be placed on equal standing with horses, stock corporations with partnership companies, churches with associations, bicycles with motorcycles and apples with pears. Whoever wants will always find some points of a comparison that can be used to claim equal treatment. Similarly, it is always possible to find points of difference. As far as we can observe from examples of policies regarding women or the equal placement of homosexual relationships with marriage, we see that the fundamental problem with the politics of equal treatment is not that comparisons are made or that categories are drawn. Rather it is that the use of appropriate criteria is being marginalized, and that arbitrariness holds sway in its stead.

It can hardly be expected that a 'more just' society will emerge from all this. On the contrary, we have to fear that the "fight against discrimination" could evolve into a new totalitarianism, in which all power lies in the hands of those persons and institutions which have usurped control over the definitions of the term "discrimination" and who, thereby, will be empowered to a new form of arbitrary rule. With a flood of new laws citizens' freedoms are more and more constricted and subject to the control executed by specialized equal treatment officers, equal treatment commissions, fundamental rights agencies and other bureaucratic structures. This is comparable to the communist experiment, which promised a classless society, but which indeed created a slaveholder society. The slaveholders were the bureaucrats and ideologues who exercised control over the means of production that were confiscated from their former owners. While allegedly this control was exercised in the name of public interest, it was in reality driven by the self-interest of the new ruling caste.

The fight against discrimination, well intentioned though it may be, is today

on the verge of turning totalitarian.

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1 Dig. 1, 1
2 Inst. 1, 1
3 Aristotle, Nikomachean Ethics, Book 5