Analyzing judicial discrimination

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Abstract. When an individual is treated in a judicial decision in a way that is affected by his race, socioeconomic status or some other legally irrelevant characteristic, he is subjected to discrimination. In this paper, various methods for analyzing discrimination of this type are discussed. Mathematically, the severity of a correct decision can be seen as a function of various characteristics of the individual and his behavior. It is argued that in ordinary cases the form of this function must be known for any analysis of discrimination to be possible. A method is presented for the analysis when the function has linear form but unknown structure.

1. Introduction

When an individual is treated in a judicial decision (concerning, for example, arrest or sentencing) in a way that is affected by his race, socioeconomic status or some other legally irrelevant characteristic, he is subjected to discrimination. In this paper, various methods for analyzing discrimination of this type are discussed.

Before starting the discussion, the meaning of some basic concepts will be specified. “Legal” and “extra-legal” factors are characteristics of the individual or his behavior that may affect the decision. By legal factors are meant those factors which the law specifies as relevant to the decision, such as gravity of a committed crime and prior criminality; by extra-legal factors are meant those factors which the law does not specify as relevant to the decision but which nevertheless may affect it (such as race and socioeconomic status).

Following the principle of justice according to which equal cases should be treated equally, it is assumed that the mathematical function – here called the prescriptive function – according to which the legal factors ought to affect the severity of the decision must have the same form and its parameters must have the same values, that is, it must have the same structure, for all individuals decided on. However, it may be difficult to determine exactly which form and which structure. To a certain extent, the precision in form and structure in many cases depends on how the “law” is defined. Obviously, the written text of statutes never or practically never prescribes exactly how legal factors ought to affect decisions. To obtain more precise rules for this, interpretations must be made. Authorized means for assisting decision-
makers can, for example, be found in sentencing guidelines; but even with such interpretations, exactitude is seldom achieved. Certainly, there is a variation in expert opinions about how legal factors should affect decisions in many cases. Ideally, however, there should be a single severity value of the prescribed handling for a certain combination of legal factor values; if not, individuals who are equal could be treated unequally.

In this paper, no attempt is made to determine how the "law" should be defined – that is, which interpretations should be included in this concept. There are various possibilities here.

The concepts of "justness" and "discrimination" will now be defined. Structures, parameter values, and treatments that accord with the law (including the principle of equal treatment of equal cases) are "just"; structures, parameter values, and treatments that do not are "unjust". Individuals who receive an unjust treatment are subjected to "discrimination". If they receive a just treatment, they are not subjected to discrimination. Individuals who receive a treatment that is harsher than what is just are subjected to "negative" discrimination, and individuals who receive a treatment that is more lenient are subjected to "positive" discrimination.

The definition of discrimination used here might be objected to for the reason that it does not consider the intentions underlying unjust treatments. It could be argued that "discrimination" should only refer to treatments that are intentionally worse or better than what is just. However, this objection can be refuted. Admittedly, it is probably quite true that "discriminatory" treatments are often conceived of as treatments decided upon intentionally in the ways mentioned. However, one may ask whether a necessary condition for finding a treatment to be discriminatory would be that the decision was made intentionally. The common association of discrimination with an intention could also reflect the fact that consistent deviations from the law are seldom totally unintentional. However that may be, it is quite clear that an intention to discriminate may be difficult to ascertain. Decision-makers who intentionally treat individuals worse or better than what is just are often unwilling to admit or reveal this. They prefer instead to claim respectable motives. The intention to discriminate is therefore difficult to measure, and in fact it has very seldom or never been measured in studies on judicial discrimination. This speaks for the reasonableness of studying deviations from the law without considering the intentions underlying them. Actually, such studies may be good starting-points for further inquiry into the intentions.

If decision-makers have false notions of the values of the legal factors, it could be argued that there may also be consistent deviations from the law with no intention by the decision-makers to discriminate. Such deviations