



Discrimination, algorithmic decisions, and rights

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Structure of the presentation

- I. Discrimination and algorithmic decision-making
- II. Algorithmic decision-making and the right to asylum



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DEFINITIONS:

AI: any machine technology that attempts to do ‘what humans do when humans do things’. Chang 2025

Algorithmic decision making: “any decision that is informed or made using machine learning classifiers”. Lagioia, Rovatti, Sartor 2022

Fairness: It is a very broad notion, varies according to the conception of political justice, definitions vary in computer science, law, and ethics and are only partially overlapping. Fairness includes the respect for anti-discrimination norms.

Discrimination: An act – a *practice*, e.g. the administrative and the judicial procedures, a *rule*, e.g. the laws governing asylum, or a *policy*, e.g. the policies on immigration and asylum – that puts or has the potential to put a specific person at disadvantage because of a trait that is either possessed or attributed to this person. Hellman 2008, Kaithan



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Art. 1 CEDAW - 1979

For the purposes of the present Convention the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.



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Article 21 EU Charter of Fundamental Rights

1. Any discrimination based on any ground such as **sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation** shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.



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The spectrum of Fairness and AI movement's positions

The 'optimists' ...

...the 'realists' ...

...the 'pessimists'...



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The fundamental disagreements on the notion of discrimination:

- on the *justification* of the norms prohibiting illicit or wrong discrimination – the systematic group disadvantage or the why of the treatment?
- on the focus of the relative disadvantage: is it the outcome or the treatment?



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Suggested remedies by Barocas, Hardt, Narayanan 2023:

- a. At the level of the decision making process – treat like cases alike in relation to the task at hand
- b. At the institutional and socio-economic level – Design Rawlsian-inspired just institutions
- c. In between – refining computer science tools and in some cases Treat non-alike cases alike.



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- 'ensuring equality of opportunities requires assessing people as they would have been had they been afforded in the past opportunities comparable to other people of equal potential seeking the current opportunity' BHN 2023
- Target: 'specific decisions that can create a sudden step change in people's life prospects' BHN 2023



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Critics to BHN:

- Too narrow view of discrimination: it does not mean equality of opportunities only
- Unwittingly introduces positive discrimination or affirmative actions
- The counterfactual judgment is sometimes impossible, inapplicable
- It is a matter of dispute whether the decision maker has a moral duty not to compound previous injustice. Certainly there is not such a duty in the law.



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- BHN suggest to modify, to adjust computer science statistical criteria with the aim to equalize outcomes across groups – They suggest to use demographic parity, calibration, the similarity criterion, randomization...to equalize outcomes between groups.
- They are not the first. A paper by Lagioia, Rovatti and Sartor anticipated this in 2022:
- ‘equalisation of classifications/decisions between groups can be achieved thorough group-dependent thresholding. We discuss contexts in which this approach may be meaningful and useful in pursuing policy objectives. We claim that the implementation of group-parity standards should be left to competent human decision-makers, under appropriate scrutiny, since it involves discretionary value-based political choices. Accordingly, predictive systems should be designed in such a way that relevant policy goals can be transparently implemented. Our paper presents three main contributions: (1) it addresses a complex predictive system through the lens of simplified toy models; (2) it argues for selective policy interventions on the different steps of automated decision-making; (3) it points to the limited significance of statistical notions of fairness to achieve social goals.
- However, the adjustments do not interfere with reality.



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The ALIGNMENT PROBLEM

- It is 'the problem of insuring that ai processes and outputs aligns with our best considered judgments about a value – good or bad'. Ruth Chang 2025
- A fundamental problem in AI design: solution, the research on small AI by Ruth Chang



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The 'quest' for modelling causation

- 'so far, the technical tools relating to the identification and formal transposition into AI systems of the causal chains that determine disadvantageous effects in the real life of individuals and groups must be refined'
- we must keep the interdisciplinary approach because AI models can provide us with solutions, but 'we must first decide which are the relevant causes of discrimination to take into account when developing the models... if we are not clear about the relationship between causes of discrimination and effects in the real world, it is impossible to translate them into formulas and computational models' BHN 2023



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Asylum: subjective right

1951 Geneva Convention Relating to the Status of Refugees, Article 1
(2)

[A person who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.



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Arguments against the automation of decision-making in asylum

1. Decision made with the aid of machine learning are compatible with the definition of statistical discrimination by F. Schauer:

‘a distinction based on a correlation between a predictor trait (indicator/classifier) and a target trait (target), when the correlation is empirically based, sound, statistically relevant – and, therefore, accurate’ Schauer 2018

Such decision are generalised but not universal. They are probabilistic, non causal relationships in nature.



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E.g.: «safe country of origin».

ECtHR, Grand Chamber, M.S.S. v. Belgium and Greece, Application
no. 30696/09, 21 January 2011

Court of Justice of the European Union, Case C-406/22, Ministerstvo vnitra
České republiky, Odbor azylové a migrační politiky, 4 ottobre 2024.



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- 2. Extreme dependence of the claim for international protection from contextual elements
- 3. Unbearable cost of false negatives
- 4. There are strong reasons to believe that the asylum system is not equitable in its operation, therefore, the application of machine learning tools would contribute to 'reify it'.
- As such, we believe that in the context of asylum as things stand now, individualised case by case decision making by humans must be preferred to any other method.

Thank you!