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Prohibited Discrimination in International Law

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CHAPTER SEVENTEEN

PROHIBITED DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW

Dinah Shelton[*]

Humanity is as diverse as the number of persons who have ever lived: each individual is unique in attributes and potential, goals and abilities. Human rights law recognizes and celebrates this diversity by aiming to ensure the conditions necessary for each person to exercise individual self-determination in realizing her or his goals and potential as fully as possible consistent with other persons' self-fulfillment. To do this, the law emphasizes not the diversity, but the shared attributes and inherent nature of human beings. Thus, everyone is entitled to the same freedoms to speak, learn, think, vote, express opinions, hold office, marry and have children, and choose a religion. The physical and mental integrity of each person is guaranteed along with equal access to public services, medical care, justice, education and employment. Equality and non-discrimination are implied in the fact that human rights instruments guarantee rights to "all persons", "everyone", or "every human being". In fact, the right to be free from discrimination and to enjoy equality in the exercise of rights has been called "the most fundamental of the rights of man ... the starting point of all other liberties".[1]

Although human rights texts expressly recognize the rights of "all persons", in practice probably few if any of the rights mentioned are absolutely guaranteed in full equality to all humans at all times. The

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[1] Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, New York, 1945), p. 115. On equality and non-discrimination in international law, *see* Anne Bayefsky, *The Principle of Equality or Non-Discrimination in International Law* (1990) 1:1-2 *Human Rights Law Journal* pp. 1–34; Marc Bossuyt, *L' interdiction de la discrimination en droit international des droits de l'homme* (Bruylant, Bruxelles, 1976); Lauri Hannikainen and Eeva Nykänen (eds.), *New Trends in. Discrimination Law – International Perspectives* (Turku University, Turku, 1999); Warwick A. McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law* pp. 177–192; Warwick A. Mc Kean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983); Bertrand G. Ramcharan, *Equality and Nondiscrimination* in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981), pp. 246–270; Egbert. W. Vierdag, *The Concept of Discrimination in International Law* (Martinus Nijhoff, The Hague, 1973).

rights to marry and to vote, for example, are limited by age; access to justice is restricted by procedural rules, including statutes of limitations and filing fees that may effectively bar some persons; political rights are often guaranteed only to citizens.

Laws draw distinctions. Even when a law is neutral on its face it may disparately impact particular groups or individuals, leading those affected to claim that the measure is discriminatory. Structural factors can lead certain groups to fall behind the rest of society, regardless of formally equal treatment or a prohibition of direct discrimination. As a result, consistency of treatment may fail to ensure the broader aims of equality, if applied on its own without taking into account differences as well as similarities within the population.

In principle, non-discrimination as a part of distributive justice involves treating equally those who are in an equal position and treating unequally those who are in unequal positions insofar as relevant criteria are concerned. The difficulty lies in determining what differences are relevant in comparing the equality or inequality of individuals and groups. The problem is two-fold: determining what attributes have relevance and deciding what reasons are sufficient to make distinctions based upon those attributes. Although international human rights instruments have core equality provisions in common, variation in language of the different texts, the interpretations given their provisions, and the nature of the cases considered, lead to a spectrum of different results.

This essay attempts to assess how the prohibition of discrimination is understood in contemporary international human rights law. It aims to determine whether there are coherent theories applied consistently by human rights bodies in deciding which distinctions are permitted and which are invidious. The essay begins by surveying the provisions of human rights instruments that call for non-discrimination and equality.[2] Next, the essay examines the jurisprudence of international tribunals and monitoring bodies, including judgments, advisory opinions, general comments, and observations on state periodic reports. The conclusion attempts to draw from this body of law a general approach to discrimination in international human rights law.

It may be noted at the outset that in the early twentieth century, concern with equality and non-discrimination arose primarily in the law of state responsibility for injury to aliens[3] and in the protection afforded

[2] The chapter will not discuss the Convention on the Elimination of All Forms of Racial Discrimination or the work of its Committee.

[3] Discrimination between nationals and aliens was generally held to violate international law, arising most frequently in cases of expropriation of property. *See e.g.*,

certain national minorities. After World War I, the protection of minority groups was included among the stipulations required of new states and those defeated in the war. Minority clauses guaranteed non-discrimination, but also sought to preserve the identity and culture of the minority groups, whose demands for equality and recognition were seen as among the causes of past conflicts. The treaties thus required not only equal rights, but specific measures for the preservation of the protected groups, which lacked political power to ensure this preservation themselves.[4] The required protective measures differed from modern affirmative action, however, because they were not temporary means to achieve equality, but rather permanent rights for minority groups, treating differently the unlike situations of majority and minority groups as their different situations demanded. The groups were thus ensured language rights, separate educational and religious institutions, an equitable share of public funds, and respect for religious holidays.[5] Equality in law precluded discrimination of any kind, while equality in fact necessitated different treatment in order to attain "equilibrium" between those in different situations.[6]

I. EQUALITY AND NON-DISCRIMINATION IN THE UN CHARTER AND CHARTER BODIES

A delegate to the UN General Assembly's Third Committee once claimed that "the United Nations Organization had been founded

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John H. Herz, *Expropriation of Foreign Property* (1941) 35:2 *American Journal of International Law* p. 243-262; Samy Friedman, *Expropriation in International Law* (Stevens & Sons, London, 1958), pp. 189, 193; Gillian White, *Nationalisation of Foreign Property* (Praeger, New York, 1961), chapter 6. *See more generally*, Shigeru Oda, *The Individual in International Law* in M Sørensen (ed.), *Manual of Public International Law* (Macmillan, London, 1968), p. 486.

[4] For a discussion of the drafting history of the League of Nations Covenant and the unsuccessful efforts to include provisions on racial and religious equality, *see* McKean, *supra* note 1, pp. 14–26.

[5] In its first advisory opinion, the Permanent Court declared that under the minorities treaties there must be "equality in fact as well as ostensible equality in the sense of absence of discrimination in the words of the law". *Settlers of German Origin in Poland*, 10 September 1923, Permanent Court of International Justice, Ser. B, No. 6, p. 24.

[6] *Minority Schools in Albania*, 6 April 1935, Permanent Court of International Justice, Ser. A/B, No. 64, p. 19 turned on a law that was neutral on its face (abolition of all private schools), but one which had a disparate and discriminatory (in the eyes of the court) impact on the Greek minority population in Albania. *See also* Advisory Opinion on *Treatment of Polish Nationals and Persons of Polish Origin or Speech in the Territory of the Free City of Danzig*, 4 February 1932, Permanent Court of International Justice, Ser. A/B, No. 44.

principally to combat discrimination in the world".[7] Commentators agree that equality and non-discrimination "are central to the human rights movement".[8] Indeed, the stated objectives of the United Nations, which set the stage for the organization's human rights work, indicate the drafters' concern for equality and non-discrimination:

> The Purposes of the United Nations are (UN Charter, Art. 1):
>
> 1. To maintain international peace and security ...
>
> 2. To develop friendly relations among nations based on respect for the principle of *equal rights and self-determination of peoples* ...
>
> 3. To achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language or religion* ... (emphasis added).

The Charter's numerous references to human rights only expressly mention two rights: self-determination and non-discrimination. With one exception in Article 62, each time the phrase "human rights and fundamental freedoms" appears in the Charter, the phrase is followed by the words "without discrimination on the basis of race, sex, language or religion." While the list of prohibited grounds for discrimination has considerably expanded in subsequent texts and jurisprudence, the combined focus on equality and self-determination has directed much of the work of the United Nations bodies on human rights issues.

The UN emphasized its commitment to combating discrimination in the mandates member states conferred on its new organs. The former Commission on Human Rights was directed to address the protection of minorities and the prevention of discrimination on grounds of race, sex, language, or religion.[9] The Economic and Social Council empowered the Commission to create a sub-commission on this topic, the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[10] The Economic and Social Council also

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[7] UN Doc. A/C.3/SR.100, p. 7, quoted in McKean, *supra* note 1, p. 177.

[8] Jerome Shestack, 'The Jurisprudence of Human Rights' in Th. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues, Vol. 2* (Clarendon, Oxford, 1984), p. 101. John Humphrey says that discrimination, like human rights, runs through the UN Charter like "a golden thread"; John P. Humphrey, 'Preventing Discrimination and Positive Protection for Minorities: Aspects of International Law' (1986) 27 *Les Cahiers de Droit* pp. 23, 27.

[9] *Report by the Executive Committee to the Preparatory Commission of the United Nations* (UN Doc. PC/EX/113/rev.1), 12 November 1945, pp. 52–53.

[10] In its early years, the Sub-Commission undertook to study discrimination in

created the Commission on the Status of Women to promote equality between men and women, without regard to nationality, race, language or religion and to eliminate all discrimination against women in law and practice.

From the beginning, UN member states invoked the Charter references to equal rights to speak out against systematic discrimination. During the first session of the General Assembly in 1946, India criticized segregation in the United States; the U.S. responded by deriding the caste system in India.[11] Egypt, supported by Latin American states, introduced a resolution, unanimously adopted, to condemn racial and religious persecution.[12] An Indian-sponsored resolution to condemn South Africa for its policies of racial discrimination passed with the required two-thirds majority, despite opposition from Australia, Britain, Canada and the United States, each of which had its own racial policies that contravened the Charter guarantees.[13] The first session of the General Assembly also produced action on genocide, declaring it to be a crime under international law.[14]

Similar condemnations of discrimination followed in subsequent sessions of the General Assembly. In fact, during the first 30 years of human rights discussions in the General Assembly and ECOSOC,[15]

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education, occupation and employment, political rights, religious rights, residence, and freedom of movement. *See* Charles D. Ammoun, *Study of Discrimination in Education* (E/CN.4/Sub.2/181/rev.1), 1956; Arcot Krishnaswami, *Study of Discrimination in Respect of Religious Rights* (E/CN.4/Sub.2/200/rev.1) 1959; Hernan Santa Cruz, *Study of Discrimination in Respect of Political Rights* (E/CN.4/Sub.2/213/rev.1), 1961 and (E/CN.4/Sub.2/370), 1976; Jose. D. Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including his Own, and to Return to his Own County* (E/CN.4/Sub.2/220), 1960; Vieno V. Saario, *Study of Discrimination against Persons Born out of Wedlock* (E/CN.4/Sub.2/265), 1966; Hernan Santa Cruz, *Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres* (E/CN.4/Sub.2/288), 1968; José Martinez Cobo, *Study of Discrimination against Indigenous Peoples* (E/CN.4/Sub.2/415), 4 July 1978. In 1952 the ILO began work on discrimination in employment and occupation, leading to a convention on the topic. In addition, the Sub-Commission study of discrimination in education, undertaken in cooperation with UNESCO led to conclusion of the UNESCO Convention on Discrimination in Education.

[11] (1946–47) 1 *Yearbook of the United Nations* (United Nations, New York, 1947), p. 207.

[12] Res. 103(1), 48th plenary meeting, 29 November 1946 (UN Doc. A/64/add.1), 11 December 1946, p. 200. The resolution called for an end to religious and racial persecution and discrimination and for states to conform to the letter and spirit of the UN Charter.

[13] Resolution 44(I), I (pt. 2), *ibid.*, p. 69. The issue of South Africa's racial policies remained on the agenda of the United Nations in every session until the end of apartheid.

[14] GA Res. 96(1), concerning the crime of genocide.

[15] Jack Donnelly, 'Human Rights at the United Nations, 1955–1985: The Question of

racial discrimination was the topic most often on the agenda, taking up almost as much time as all civil and political rights combined. In 1962, the General Assembly established the Special Committee on the policies of apartheid of the Government of South Africa. Several years later, in Resolution 2145 (XXI) of 27 October 1966, the General Assembly terminated South Africa's mandate over South West Africa (now Namibia). In a 1971 advisory opinion, the ICJ agreed that South Africa's denial of human rights and fundamental freedoms on the basis of race constituted "a flagrant violation of the purposes and principles of the Charter". The court thus emphasized the importance of non-discrimination in the language of the Charter and the practice of the UN organs.

II. GLOBAL AND REGIONAL HUMAN RIGHTS TREATIES

The Universal Declaration of Human Rights (UDHR) begins its Preamble by reaffirming human solidarity, recognizing the inherent dignity and "equal and inalienable rights of all members of the human family". In Article 1 it proclaims that "[a]ll human beings are born free and equal in dignity and rights". Article 2 adds that everyone is entitled to all the rights in the UDHR "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The use of the words "such as" and inclusion of "other status" make clear that this list is not exhaustive. Article 7 provides for equality before the law and equal protection of law, as well as equal protection against discrimination and incitement to discrimination. This provision is reinforced by Article 10 which guarantees everyone "in full equality" a fair and public hearing before an independent and impartial tribunal. The right to marry, in Article 16, is guaranteed "without any limitation due to race, nationality or religion." Men and women are provided equal rights to marriage, during marriage and at its dissolution. Article 23 assures everyone the right to equal pay for equal work.

As the provisions of the UDHR suggest, terms such as equality, equal protection, non-discrimination and without distinction seem to be used almost interchangeably. This usage also occurs in the treaties drafted shortly thereafter, the 1965 Convention on the Elimination of All

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Bias' (1988) 32:3 *International Studies Quarterly* p. 275. Donnelly attributes the focus on racial discrimination and self-determination in the UN to the growing membership of African and Asian countries, not to the language of the Charter. *Ibid.*, p. 277.

Forms of Racial Discrimination (CERD), and the two Covenants[16] whose articles prohibiting discrimination also recognize that the provisions on equality cannot be taken to require absolute equal treatment, because some legal classifications distinctions may be appropriate or even necessary.[17] Indeed, express distinctions are made in some provisions: prohibiting imposition of the death penalty on those under the age of 18 at the time of the offense and on pregnant women (ICCPR art. 6(5)); requiring the separation of juvenile and adult offenders and accused persons from those convicted (ICCPR art. 10); and limiting some political rights to citizens of a state (ICCPR, art. 25).

Among the early human rights treaties, only CERD, ILO Convention No. 111 (Employment and Occupation), and the 1960 UNESCO Convention on Discrimination in Education defined the word discrimination. Later, CEDAW[18] and the Migrant Workers Convention added their own provisions.[19] In general, the respective articles provide that for the purpose of each treaty, discrimination means any distinction, exclusion or restriction (CERD adds "or preference") which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise on an equal footing of human rights (CERD adds "and fundamental freedoms") in the political, economic, social, cultural, (CEDAW adds civil) or any other field (CERD adds "of public life"). Unlike Article 2(1) of the ICCPR and Article 14 of the European Convention on Human Rights (ECHR), which only address distinctions in the enjoyment of rights recognized by the respective treaties, CERD

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[16] International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 993 *UNTS*, p. 3 (hereinafter ICESCR); International Covenant on Civil and Political Rights, 19 December 1966, GA Res. 2200A (XXI), 999 *UNTS*, p. 171 (hereinafter ICCPR).

[17] It has long been held that treating unequals equally should be considered a wrong similar to treating equals unequally. This principle underlies the acceptance of affirmative action in favor of members of disadvantaged groups. *See* UN Doc. A/C.3/SR.1182 (1962), para. 17. And A/C.3/SR.1259. Members of the CCPR have said that affirmative measures in favor of a disadvantaged group may sometimes be "essential". UN Doc. CCPR/C/SR.189 (1980), paras. 10, 14.

[18] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, GA Res. 34/180, 1249 *UNTS*, p.13.

[19] The UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by GA Resolution 45/158, 18 December 1990, contains a non-discrimination provision in Article 7: "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

and CEDAW prohibit discrimination in respect to all rights and freedoms guaranteed by national and international law. Special temporary measures of preferential treatment for women or disadvantaged racial or ethnic groups or individuals are not considered discrimination if their sole purpose is to secure their advancement towards equality (CERD, Art. 1(4) and CEDAW Art. 4(2)). Recent texts have recognized that individuals may belong to more than one disfavored group, resulting in increased discrimination. The Durban Declaration and Program of Action, for example, recognized that racial discrimination may be aggravated by multiple forms of discrimination based on other grounds, such as sex, language, religion, political or other opinion, social origin, property, birth or other status.[20]

The ILO 1958 Employment and Occupation Convention (No. 111) was perhaps the first international instrument to define discrimination. During the drafting, discrimination was tentatively defined to mean any adverse distinction which deprives a person of equality of opportunity or treatment in employment and occupation and which is made on the basis of race, color, sex, religion, political opinion, national extraction, or social origin.[21] The Committee of Experts on Discrimination proposed adding a provision to make clear that this definition should not apply to differentiations made on objective consideration of the genuine needs or inherent requirements of different types of employment.[22] Another proposal, which became Article 5, excluded from the definition special measures of protection or assistance allowed by other ILO Conventions or recommendations and, more problematically, allowed any member to consider non-discriminatory other special protective measures based on the particular requirements of persons due to sex, age, disability, family responsibilities or social or cultural status.[23] In the end, Article 1 defined discrimination as any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, with the exception that *bona fide* occupational requirements could be imposed. Member states could add further categories of prohibited distinction, but language, age and citizenship were omitted, while political opinion was deemed to exclude

[20] Durban Declaration and Program of Action, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001), para. 2.

[21] Proceedings, I.L. Conf., 40th session, 1957, p. 741.

[22] I.L. Conf., 42nd session, 1958, report IV 91, p. 29.

[23] Proceedings, I.L. Conf., 42nd session, 1958, p. 713.

measures taken against an individual suspected of or engaged in activities prejudicial to the security of the state[24] – opening the door to considerable abuse.[25]

UNESCO was established in part to realize gradually "the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social" (UNESCO Constitution, Art. 2(b)). On 14 December 1960, UNESCO adopted its Convention against Discrimination in Education, which entered into force on May 22, 1962. Article 1 of the Convention defines the term discrimination to include "any distinction, exclusion, limitation or preference which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education". The Convention adds examples of particular disapproved practices: (a) depriving any person or group of persons of access to education of any type on any level; (b) limiting any person or group of persons to education of an inferior standard; (c) establishing or maintaining separate educational systems or institutions for persons or groups of persons (except for girls and for linguistic and religious minorities that seek them); and (d) inflicting on any person or group of persons conditions which are incompatible with the dignity of man. Article 2(1) permits states to establish separate educational systems for boys and girls and is problematic because it requires only "equivalent" access to education and "equivalent" courses of study. Later, CEDAW's Article 10 strengthened the educational guarantees for girls and women by requiring that states provide the "same" rather than "equivalent" educational opportunities. States parties are required to change laws and practices that involve discrimination in education. They are also required

[24] Article 4.

[25] The jurisprudence of the Human Rights Committee has allowed preferential treatment of those previously and wrongfully dismissed on political grounds. *See, e.g., Stalla Costa* v. *Uruguay*, No. 198/1985, where the applicant complained of preferential treatment in admission to the public service given to former public officials who had been dismissed on ideological, political or trade-union grounds by the prior military regime. He complained that this preferential treatment unfairly prejudiced his own chances of gaining a public-service job. The Committee observed that those preferred were victims of violations of the right to equal citizen participation in public life under ICCPR Article 25 and as such were entitled to have an effective remedy under ICCPR Article 2, paragraph 3(a). The enactment of the law complained of was such a remedy. Thus, there was neither a violation of Article 25(c) nor discrimination within the meaning of Articles 2 and 26 of the Covenant. The alleged discrimination was found to be a permissible "measure of redress" to persons who had previously suffered from discrimination.

to take positive measures to guarantee non-discrimination in education by private actors.[26]

The ICCPR restates many of the provisions of the UDHR, but also imposes corresponding obligations on each state party to respect and ensure the rights recognized by the Covenant to all individuals within its territory and subject to its jurisdiction "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The General Assembly added Article 3, which specifies the equal rights of men and women, to emphasize and reinforce the obligation of non-discrimination. Article 26 calls for effective protection against discrimination with regard to all rights and benefits recognized by law and Article 20 imposes a duty to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence. Taken together, the provisions make non-discrimination the "dominant single theme" in the Covenant.

Like the ICCPR, the ICESCR prohibits discrimination of any kind in respect to the enjoyment of rights within the scope of the Covenant, with one notable and controversial exception. Article 2(3) provides that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals". Many western countries argued that this provision had destroyed a basic principle of the covenants, that of non-discrimination.[27] Defenders said it was necessary to eliminate economic inequality between nationals of developing and developed countries.

The most recent of the UN's core conventions on human rights, the Convention on the Rights of Persons with Disabilities,[28] is fundamentally about equality and non-discrimination, recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support. It proclaims that "discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human

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[26] During the preliminary studies and drafting of the Convention, states debated the question of protective and compensatory measures intended to assist those previously discriminated against, with the view prevailing that there should be no quota system because it would ignore individual merit. *See* UN Doc. E/CN.4/721, s. 5 and UN Doc. E/CN.4/740.

[27] UN Doc. A/C3/SR.1207, p. 362. The paragraph was narrowly adopted 41–38, with 12 abstentions. UN Docs. A/5365, pp. 22–23; A/C3/L.1027/revs. pp. 1–4; A/5365, pp. 15–16.

[28] Adopted by the UN General Assembly on 13 December 2006. The Convention entered into force on 3 May 2008. As of May 2009, 36 states had ratified it.

person". The key obligations of the parties are contained in Article 5, which emphasizes the equal rights of all persons, while calling for reasonable accommodation to recognize relevant differences:

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
>
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
>
> 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 12 adds equal recognition in law, while the remainder of the Convention reflects the dual aim of equal treatment where possible but also respect for the different needs and diversity of those who are disabled.

On the regional level, Article 14 of the ECHR proscribes discrimination in the enjoyment of Convention rights. Article 14 has been called "an almost parasitic provision, which has no independent existence as it is linked exclusively to the enjoyment of the rights and freedoms laid down in the other substantive provisions".[29] The European Court of Human Rights (ECtHR) has concluded that unlawful discrimination occurs where (i) there is different treatment of persons in analogous or relevantly similar situations and (ii) that difference in treatment has no "objective and reasonable justification." "Objective and reasonable justification" is established if the measure in question has a legitimate aim and there is "a reasonable relationship of proportionality between the means employed and the aim sought to be realized".[30] In the past the European Court often refused to consider a claim of discrimination after finding a violation of one of the rights in the Convention, but this approach seems to have changed in recent years.[31]

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[29] Luzius Wildhaber, 'Protection against Discrimination under the European Convention on Human Rights – A Second-Class Guarantee?' (2002) 2 *Baltic Yearbook of International Law*, pp. 71–72.

[30] *See* the *Belgian Linguistic* case, 23 July 1968, European Court of Human Rights, Application Nos. 1474/62, etc., para. 10.

[31] In *Dudgeon* v. *UK*, 22 October 1981, European Court of Human Rights, Ser. A, Application No. 45, (1982) 4 *European Human Rights Reports* p. 149, for example, the

Out of concern with the limitations of Convention Article 14, the Council of Europe concluded Protocol No. 12, which entered into force on April1, 2005. The Protocol prohibits discrimination in the enjoyment of any right set forth by law, in recognition of the need for an "independent" or "free standing" right to strengthen the Convention's protection of equality. The preamble to Protocol 12 reaffirms, however, that the principle of non-discrimination does not prevent states from taking positive action, provided that it is objectively and reasonably justified.

Within the European Union, Article 13 of the EC Treaty gives the EU specific powers to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation. Based on this mandate, the Council has passed two Directives prohibiting direct and indirect discrimination, including harassment, on grounds of race, religion and belief, disability, age, and sexual orientation related to employment and occupations, including education and vocational training, membership in professional or related bodies; social protection; access to and supply of goods and services; and "social advantages" (e.g., concessionary travel on public transport, reduced prices for access to cultural or other events and subsidized meals in schools for children from low-income families).[32]

Article 1(1) of the American Convention on Human Rights and Article 2 of the African Charter on Human and Peoples' Rights affirm the right of all persons to enjoy all guaranteed rights without discrimination. The American Convention's provision broadly prohibits discrimination on grounds that include "any other social condition"

Court stated that "there is no useful legal purpose to be served" in examining a claim of discrimination once a breach of another substantive right has been found, *ibid.*, para. 69. Such an approach considerably undervalues the additional harm caused by being denied a right on a discriminatory basis. In *Nachova and Others* v. *Bulgaria*, 6 July 2005, European Court of Human Rights, Application Nos. 43577/98 and 43579/98, the Court saw matters differently. A Grand Chamber held that the authorities failed in their duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a role in the killings of two young Roma by police officers. According to the Court, state authorities have the duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have been involved in deaths at the hands of state agents. "Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones *would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights*" (para. 158, emphasis added). The Court added that a failure to take such motives into account may itself violate Article 14, *ibid.*

[32] Council Directive 2000/43/EC, 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the 'Race Directive') and Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (the 'General Framework Directive').

suggesting that it is an open-ended prohibition of discrimination, like some UN treaties that prohibit discrimination on the basis of "other status". Article 24 adds a guarantee of equality before the law and equal protection of the law like Article 26 of the ICCPR. In Advisory Opinion OC–4/84, the Inter-American Court of Human Rights held that Article 1(1) is dependent on linkage to a right guaranteed by the Convention while Article 24 guarantees equality not only in the enjoyment of the rights set forth in the Convention but also in the application of any domestic legal norm.

The African Charter, in addition to its Article 2 general prohibition on discrimination, adds that every individual shall be equal before the law and entitled to equal protection of the law (Art. 3), thus adding a 'free standing' guarantee of non-discrimination similar to Article 26 of the ICCPR and Article 24 of the American Convention on Human Rights. Article 12(5) recognizes the considerable problem of mass and discriminatory expulsions of non-nationals. Article 18(3) further provides that each state party shall ensure the elimination of discrimination against women, as well as protection for the rights of women. Finally, unlike other international and regional instruments that focus only on the individual, the African Charter expressly prohibits domination or discrimination of one group of people by another group, including with respect to economic, social and cultural development. On 11 July 2003, the African Union supplemented the Charter with a separate detailed Protocol on the Rights of Women in Africa, which entered into force on 25 November 2005, concentrating on the principle of equality with regard to sex and gender. It prohibits direct and indirect discrimination "in all spheres of life" and promotes positive action.

All human rights treaties that permit states to suspend rights by derogation during periods of national emergency include a non-discrimination requirement in the relevant provisions. Art. 4 of the ICCPR, for example, provides that any measures taken by a state following a notified derogation may "not involve discrimination solely on the ground of race, color, sex, language, religion or social origin". The language of Article 27 of the American Convention is virtually identical.

The pervasiveness of the treaty obligations of non-discrimination, equal rights, and equality before the law, taken with domestic laws and practices, provide adequate evidence that a norm of non-discrimination in the respect and observance of human rights and fundamental freedoms is now viewed as part of the corpus of customary

international law.[33] Indeed, the Inter-American Court of Human Rights has termed the prohibition of discrimination part of *jus cogens*.[34] Taking another approach, the former European Commission on Human Rights held that some forms of discrimination may amount to prohibited degrading treatment.[35]

III. THE MEANING AND SCOPE OF PROHIBITED DISCRIMINATION

Some of the early UN special rapporteurs appointed by the Sub-Commission made efforts to define the term discrimination or fell back on the dictionary definition.[36] Nearly all of the rapportuers acknowledged that not all differential treatment constitutes discrimination, but only that which is unreasonable, unjustified, and adverse to the individual. Special measures to accommodate those with, e.g., physical disabilities would thus be legitimate. In sum, differentiations based on merit, capacity or individual ability are permitted, but classifications based on purported or stereotypic group characteristics are not.

More recently, human rights treaty bodies have interpreted and applied the norms against discrimination and in favor of equality in judgments, decisions, comments on state reports and general comments. The tribunals, applying or articulating definitions of discrimination, have determined which groups of individuals are protected, the nature of the prohibited acts or omissions, the purpose or effect of the actions taken, and what distinctions may be permissible. The jurisprudence on each of these issues will be reviewed in the following materials.

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[33] *See* Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79:2 *American Journal of International Law* p. 283, citing Restatement of the Foreign Relations Law of the United States (Revised) sec. 702 (referring to the prohibition of racial discrimination as a norm of customary international law).

[34] *Juridical Condition of the Undocumented Migrants*, 17 September 2003, Inter-American Court of Human Rights, Advisory Opinion OC–18/03, Ser. A, No. 18.

[35] *East African Asians* v. *the United Kingdom*, 14 December 1973, European Commission on Human Rights, Application No. 4403/70.

[36] Hernan Santa Cruz, in his study adopted the definition contained in the Random House Dictionary of the English Language: "to make a distinction in favor or against a person or thing on the basis of the group, class or category to which the person or thing belongs, rather than according to actual merit"; Santa Cruz, *supra* note 10.

A. *Distinctions, Exclusions, Restrictions or Preferences*

The UN treaty bodies share a common approach to the meaning of discrimination. The UN Human Rights Committee, in paragraph 7 of its General Comment 18, defined 'discrimination' for purposes of ICCPR Article 2 and Article 26 in language very similar to that contained in several other agreements:

> The Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[37]

In practice, while preferences accorded to dominant groups generally are deemed discriminatory, most treaties and jurisprudence permit or even require that the disadvantaged situation of vulnerable or disfavored groups be the focus of positive measures. The concept of taking into account relevant differences is long-standing. In the *South West Africa* cases, Judge Tanaka's dissenting opinion set forth the basic theory:

> The principle of equality before the law does not mean ... absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal ... To treat unequal matters differently according to their inequality is not only permitted but required.[38]

At the third session of the Commission on Human Rights, Eleanor Roosevelt similarly noted that equality did not mean identical treatment for men and women in all matters – maternity benefits, for example, necessitated differential treatment.[39] Taking this into account, an early draft of the UDHR prohibited only "any arbitrary discrimination". The word arbitrary was deleted because most delegates

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[37] CCPR, *General Comment 18: Non-discrimination (1989)*, in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (HRI/GEN/1/Rev.8), 8 May 2006, p 185.

[38] *South West Africa* cases (*Liberia* v. *South Africa*, *Ethiopia* v. *South Africa*), 18 July 1966, International Court of Justice, dissenting opinion of Judge Tanaka, I.C.J. Reports 1966, p. 305.

[39] UN Doc. E/CN.4/SR.50, p. 9.

agreed that in law discrimination means harmful or invidious (arbitrary) distinctions and not every differentiation.[40]

Positive action in favor of individuals or groups who have been subject to discrimination is a way to recognize the resulting inequality. ICCPR General Comment 4 provides that "Article 3, as Articles 2(1) and 26 ... requires not only measures of protection but also affirmative action to ensure the positive enjoyment of those rights". General Comment 18 similarly recognized the need for positive action "in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant". CEDAW's Article 4(1) permits positive measures by states to facilitate equality.

International tribunals may approve positive action, but they insist that all such action be reasonable, objective, and proportionate to their goals. Taking this into account, positive action is often limited in time and scope to respond to the specific disadvantage suffered by a person or group. In General Comment 23 on ICCPR Article 27, the Human Rights Committee recognized that the minority rights protected under Article 27 are individual rights. However, it stressed that "positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the groups" (para. 6.2).

Positive action is sometimes criticized because it runs counter to a strictly formal notion of equality. It also tends to focus on group rather than individual treatment. As a result many systems reject inflexible positive measures, such as strict quotas, in favor of approaches that focus more on the rights of the individual. Nonetheless, the HRC has approved the use of quotas in several of its country reports. For example, in its concluding observations on India, it approved a constitutional amendment in India that reserves one third of seats in elected local bodies for women. It also approved the practice of reserving elected positions for members of certain tribes and castes.[41]

Regionally, European case law has defined discrimination as inequality of an arbitrary nature, or distinctions lacking an objective and reasonable justification or disproportionate in nature.[42] States parties have a margin of appreciation, but certain grounds for distinctive treatment may require "particularly serious" reasons in order to be

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[40] UN Docs. E/CN.4/99, 24 May 1948, E/CN.4/82/add.8, 6 May 1948, and E/CN.4/SR.52, pp. 6, 8.

[41] UN Doc. CCPR/C/79/Add.81, para. 10.

[42] *Belgian Linguistic* case, *supra* note 30, sec. 1B, para. 10.

justified.[43] If the applicant proves that a distinction has been made, it is up to the state to prove that the difference in treatment is reasonably and objectively justifiable, *i.e.* pursuing a legitimate aim and proportionate to that aim. Reasonable distinctions and those that are designed to promote rather than to undermine equality are not discriminatory, as long as they are not disproportionate to their aim. In *Thlimmenos* v. *Greece* the Court held that discrimination also arises if states "without objective and reasonable justification fail to treat differently persons whose situations are significantly different".[44]

The American Convention on Human Rights not only allows, but may require positive action to ensure equality. In its 1996 Human Rights Report on Ecuador, the Inter-American Commission on Human Rights (IACHR) said:

> Where a group has historically been subjected to forms of public or private discrimination, the existence of legislative prescriptions may not provide a sufficient mechanism for ensuring the right of all inhabitants to equality within society. Ensuring the right to equal protection of and before the law may require the adoption of positive measures, for example, to ensure non-discriminatory treatment in education and employment, to remedy and protect against public and private discrimination.

In its 1993 Annual Report to the OAS General Assembly, the Commission similarly stated that the broad principles of Articles 1 and 24 require state action to address inequalities.

The Inter-American system has often cited to the European jurisprudence on discrimination, but has also developed its own approach. In Case 3/98, *Carlos Garcia Saccone* v. *Argentina*, the I-A Commission defined 'unequal treatment' for the purposes of American Convention Article 24 as: (i) the denial of a right to someone which is accorded to others; (ii) diminishing the right to someone while fully granting it to others; (iii) The imposition of a duty on some which is not imposed on others; or (iv) the imposition of a duty on some which is imposed less strenuously on others. Allegations of unequal treatment require a standard of comparison and in this regard, the Commission referred to the test set out in Advisory Opinion OC–4/84:

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[43] '*Belgian Linguistic* Case' (1968) 11 *Yearbook of the European Convention on Human Rights* p. 832; '*National Union of Police* Case' (1975) 18 *Yearbook of the European Convention on Human Rights* p. 294; *Sunday Times* case (*The Sunday Times* v. *United Kingdom*), 26 April 1979, European Court of Human Rights, Application No. 6538/74, Ser. A, No. 30, (1979–80) 2 *European Human Rights Reports* p. 245.

[44] *Thlimmenos* v. *Greece*, 6 April 2000, European Court of Human Rights, Appliction No. 34369/97, para. 44.

> there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.[45]

In Case 73/00, *Marcelino Hanríquez et al.* v. *Argentina*, the Commission stated that under Article 24 a distinction involves discrimination when "a) the treatment in analogous or similar situations is different, b) the difference has no objective and reasonable justification and c) the means employed are not reasonably proportional to the aim being sought" (para. 37). The Commission has also employed the European Court's demand for 'weighty reasons' regarding the justification for different treatment based on sex. In *María Eugenia Morales de Sierra* v. *Guatemala*, Case 4/01, for example, the Commission noted that:

> Statutory distinctions based on status criteria, such as, for example, race or sex, therefore necessarily give rise to heightened scrutiny. What the European Court and Commission have stated is also true for the Americas, that as "the advancement of the equality of the sexes is today a major goal ... very weighty reasons would have to be put forward" to justify a distinction based solely on the grounds of sex.

For its part, the Inter-American Court, in Advisory Opinion OC–18/03, made clear its view that the American Convention obliges states to take positive measures to promote equality. The Court held that:

> States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.[46]

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[45] *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, 19 January 1984, Inter-American Court of Human Rights, Advisory Opinion No. 4, para. 10, Ser. A, No. 4, (1984) 5 *Human Rights Law Journal* p. 161.

[46] OC–18, para. 104.

B. *With the Purpose or Effect of Nullifying or Impairing Guaranteed Rights*

Most treaties, like ICCPR Article 26, address measures having the purpose *or* the effect of nullifying or impairing the equal recognition, enjoyment or exercise by all persons of their rights and freedoms. Thus, it is not necessary to demonstrate intent to discriminate and many cases have been based on disparate impact. In *Singh Binder* v. *Canada*, for example, the Human Rights Committee found a Canadian law to be indirectly discriminatory because it required all persons to wear hard hats in certain jobs, which had a negative impact on Sikhs whose religion requires them to wear turbans. The Canadian government ultimately prevailed in the matter, however, when it demonstrated that the disparate treatment was justified as "reasonable and directed towards objective purposes that are compatible with the Covenant".[47]

The European Court's approach to the issue was revealed in *Hugh Jordan* v. *the United Kingdom* where the Court said: "Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group."[48] Nonetheless, the European Court has not found a violation of Article 14 arising out of disparate impact. In Advisory Opinion OC–18/03, the Inter-American Court also suggested that disparate impact may give rise to a violation, opining that "States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination" (para. 103).

In general, however, it appears that states may enact and enforce uniform measures concerning the allocation of benefits, even where there is a disparate impact on particular individuals or groups. The Human Rights Committee has suggested that it will afford more deference to state authorities when the issue is one of distribution of economic resources, where, in its view

> it is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate

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[47] *See also* Althammer *et al.* v. *Austria*, 8 August 2003, No. 998/2001; *Simunek et al.* v. *Czech Republic*, 19 July 1995 No. 516/1992.

[48] *Hugh Jordan* v. *United Kingdom*, 4 May 2001, European Court of Human Rights, Application No. 24746/94, para. 154.

> the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.[49]

In the African system, the text of Articles 2 and 3 does not refer to the "purpose or effect" of actions, but the jurisprudence of the African Commission suggests that indirect discrimination is prohibited. In the case of *Association Mauritanienne des Droits de l'Homme* v. *Mauritania* the African Commission stated that:

> Article 2 of the Charter lays down a principle that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective underpins the Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities adopted by the General Assembly of the United Nations in resolution 47/135 of 18 December 1992. From the foregoing, it is apparent that international human rights law and the community of States accord a certain importance to the eradication of discrimination in all its guises (para.131).

Article 18(3) also makes reference to the prohibition of "every discrimination" against women in accordance with international declarations and covenants.

International tribunals have also expanded the rights included in the guarantee of non-discrimination. In the *Broeks* and *Zwaan-de Vries* cases, the Human Rights Committee agreed that ICCPR Article 26 is not limited to ensuring equality with respect to civil and political rights guaranteed by the Covenant. Thus, while the Covenant does not require any state to enact legislation to provide for social security, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with the equal rights guarantees in Article 26 of the Covenant.[50] The Committee's General Comment 18 explains

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[49] *Oulajin and Kaiss* v. *the Netherlands*, 23 October 1992, separate opinion, Nos. 406/1990 and 426/1990.

[50] *S.W.M. Broeks* v. *the Netherlands*, 9 April 1987, No. 172/1984, para. 12.4. The Committee has extended Art. 26 to other economic and social benefits, including various types of pensions (*Danning* v., 9 April 1987, No. 180/1984, *Gueye et al.* v. *France*, 3 Aril 1989, No. 196/1983, *Pauger* v. *Austria*, 26 March 1992, No. 415/1990, *Pepels* v. *the Netherlands*, 19 March 1983, No. 484/1991, *Hoofdman* v. *the Netherlands*, 3 November 1998, No. 602/1994, *Johannes Vos* v. *the Netherlands*, 26 July 1999, No. 786/1997); unemployment and educational benefits (*S.W.M. Broeks* v. *the Netherlands*, 9 April 1987, No. 172/1984, *Hendrika Vos* v. *the Netherlands*, 29 March 1989, No. 218/1986, *Blom* v. *Sweden*, 4 April 1988, No. 191/1985, *Lindgren et al.* v. *Sweden* and *Lundquist et al.* v. *Sweden*, 9 November 1990, Nos. 198 and 199/1988, *Waldman* v. *Canada*, 3 November 1999, No. 694/1996; property rights (*Adam* v. *Czech Republic*, 23 July 1996, No. 586/1994); employment (*Sprenger* v. *the Netherlands*, 22 March 1991, No. 395/1990) and severance pay (*Orihuela Valenzuela* v. *Peru*, 14 July 1993, No. 309/1988).

that Article 26 provides an autonomous right by prohibiting discrimination in law or in fact in any field regulated and protected by public authority. In other words, the ICCPR requires that any rights or benefits granted by legislation must be provided without discrimination, even if there is no legal obligation on the State to provide such rights or benefits in the first place.

C. *Based on Identification with a Specific Group*

The non-discrimination clauses single out certain distinctions as unacceptable: race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ICCPR Article 26 is not a closed list, because it adds "other status" to the list of prohibited grounds of discrimination. In *Gueye* v. *France*, for example, the Human Rights Committee held that, although the ICCPR did not explicitly mention nationality, discrimination on grounds of nationality was prohibited by the words "other status" in Articles 2 and 26.

Applicants under the Optional Protocol to the ICCPR must allege that difference in treatment was attributable to their status as a member of an identifiable and distinct group.[51] This is not the same as arbitrary action or abuse of discretion in making distinctions between individuals.[52] Prosecutorial discretion, for example, may be exercised in an arbitrary or abusive manner, without it necessarily constituting discrimination. Thus, the Human Rights Committee found no discrimination in *B.d.B. et al.* v. *the Netherlands*, where a public administrative agency notified some physiotherapists about insurance obligations but not others. The Committee noted that the authors "have not claimed that their different treatment was attributable to their belonging to any identifiably distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status" referred to in Article 26". This does not mean that rights

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[51] *B.d.B. et al.* v. *the Netherlands*, 30 March 1989, No. 273/1989. Groups recognized as falling within the "other status" category include grandparents, marital status, nationality, citizenship, age, unemployed, and having or not having a law degree. *See, e.g*: *Danning* v. *the Netherlands*, 9 April 1987, No. 180/1984; *Sprenger* v. *the Netherlands*, 31 March 1992, No. 395/1990, *Hoofdman* v. *the Netherlands*, 3 November 1998, No. 602/1994, *Gueye et al.* v. *France*, 3 April 1989, No. 196/1985, *Griffin* v. *Spain*, 4 April 1995, No. 493/1992, *Adam* v. *Czech Republic*, 23 July 1986, No. 496/1994, *Jong* v. *the Netherlands*, 16 July 2001, No. 855/1999, *Oulajin and Kaiss* v. *the Netherlands*, 23 October 1992, Nos. 406 and 426/1990, *Gomez* v. *Spain*, 22 October 2001, No. 865/1999. The Committee has also indicated that sexual orientation and illegitimacy are included.

[52] *See Gauthier* v. *Canada*, 7 April 1999, No. 633/1995 and Tufyal Choudhury, 'Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights', (2003) 8:1 *European Human Rights Law Review* pp. 24-52.

were not violated: due process may be implicated or the right to a remedy for arbitrary administrative action. Such exercises of discretion may be reviewed and need to be justified, without constituting discrimination.

Finding discrimination requires identifying the appropriate comparison groups. In *Ballantyne et al.* v. *Canada,* English-speaking residents of Quebec argued that the language law of Quebec, which prohibited commercial shop signs in a language other than French, discriminated against them on the grounds of language in violation of Article 26. The Committee compared the applicants' situation to that of French speakers in Quebec and found no discrimination because the restriction on the use of the French language applied equally to both groups; the Committee failed to examine the disparate impact on English shop-owners, perhaps because English-speaking citizens represent a majority in Canada as a whole.[53]

Certain distinctions are particularly problematic. For example, differences in laws and practices within federal states have sometimes been challenged as discriminatory by those who reside in a state or territory whose laws are unfavorable compared to those of another federal unit. In *Hesse* v. *Australia,* the CCPR found that differences among Australian states in the length of the statutes of limitations were insufficient to substantiate a claim of discrimination. In contrast, the Inter-American Human Rights Commission determined in *Roach and Pinkerton* v. *the United States* that disparate sentencing laws for juvenile offenders among the states within the United States constitute unlawful discrimination.

Claims of discrimination based on nationality and claims of religious discrimination have proven particularly contentious. In respect to the first issue, certain rights, not least of which is the right to enter and remain in a country, may be restricted to nationals of a state. Both CERD and ICESCR have general provisions concerning the rights of aliens. CERD Article 1(2) establishes that the entire Convention is inapplicable to distinctions, exclusions, restrictions or preferences made by a state party between citizens and non-citizens, but Article 1(3) precludes

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[53] *Ballantyne et al.* v. *Canada,* 31 March 1993, Nos. 359/1989 and 385/1989. The Committee did find a violation of Article 19 (freedom of expression) and also held that the authors could not claim the rights of linguistic minorities under Article 27 of the ICCPR because looking at the country as a whole, English-speakers constitute the majority. Contrast *Diergaardt et al.* v. *Namibia,* 25 July 2000, No. 760/1997 in which the authors claimed that the failure by the Namibian government to introduce legislation to permit the use of official languages other than English denied them the use of their mother tongue in public life in violation of Article 26. The Committee agreed that the state's action disproportionately affected Afrikaans speakers and violated Article 26.

singling out any particular nationality for discriminatory treatment in respect to nationality, citizenship or naturalization. In *B.M.S.* v. *Australia*, CERD assumed that a distinction aimed at or adversely affecting a particular group of non-citizens would violate the Convention.

The ICCPR applies to "all persons" unless otherwise specified, as the Human Rights Committee has emphasized in its General Comment 15. Nonetheless, ICCPR Article 25 allows states to limit the political rights of aliens, while freedom of movement is guaranteed only to those 'lawfully' within a country. Article 13 protects aliens against arbitrary treatment, providing that an alien lawfully residing on the territory of a state party may be expelled from that territory only in pursuance of a decision reached in accordance with law. Except where compelling reasons of national security dictate different treatment, the alien should also be allowed to submit reasons against being expelled, be granted representation and be accorded a review by a competent authority.

In its concluding observations on periodic state reports, the Human Rights Committee has criticized some state practices that discriminate on grounds of nationality, including distinctions between citizens by birth and those who are naturalized,[54] requirements for non-nationals that do not apply to nationals,[55] and stringent criteria for citizenship that discriminate against minority or foreign groups who are permanent residents.[56] Other disapproved measures include the failure to confer nationality on stateless persons born in the state, stripping persons of citizenship who are critical of the government, mass expulsions of non-nationals and discriminatory rules that prejudice women in the transmission of nationality to children.[57] Tribunals generally agree that naturalization, although it is the prerogative of the state, should be

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[54] Human Rights Committee, *Concluding Observations: Ireland* (A/48/40) (1993), paras. 551 *et seq.*

[55] Human Rights Committee, *Concluding Observations: Japan* (A/49/40) (1994), paras. 98 *et seq.*

[56] Human Rights Committee, *Concluding Observations: Latvia* (A/50/40) (1995), paras. 334 *et seq.* Examples of discriminatory criteria include a language requirement that no foreigner can meet (*e.g.*, Human Rights Committee, *Concluding Observations: Estonia* (A/51/40) (1996), paras. 99 *et seq*).

[57] In its concluding observations on state reports, the CESCR has criticized laws preventing a woman from vesting nationality in her child or depriving women of their original nationality when they marry foreign men. *See e.g.*, CESCR, *Concluding Observations: Egypt* (E/2001/22), p. 38, paras. 159 and 175; and CESCR, *Concluding Observations: Jordan* (E/2001/22), p. 49, para. 234.

granted on the basis of objective criteria and within a reasonable time frame, especially for persons who have lived in the state for many years.

The Human Rights Committee has examined cases of discrimination on the grounds of nationality or "national origin" in the context of (i) employment,[58] (ii) property,[59] (iii) voting rights, (iv) tax and social security, (v) pensions[60] and (vi) immigration. In these cases, "mere administrative inconvenience" cannot be invoked to justify unequal treatment, nor can differences in economic, social or financial conditions. Deportation of migrant workers who have lived and worked in the state for a long period has also been criticized.[61] The European Court of Human Rights has also condemned discrimination on the basis of nationality,[62] concluding that "very weighty reasons" would have to be put forward before it would regard differential treatment on the basis of nationality as being in compliance with the European Convention.[63]

The African Commission has been skeptical of changes in nationality laws or application of such laws to deprive individuals of their nationality. In Comm. No. 97/93, *John K. Modise* v. *Botswana* the African Commission held that the deprivation of the applicant's citizenship by Botswana denied him the right of equal access to the public services of the country guaranteed under Article 13(2) of the Charter.[64] In Comm. 159/96, *UIDH, FIDH and Others* v. *Angola*, the African Commission held that mass expulsions of any category of

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[58] *Karakurt* v. *Austria*, 4 April 2002, No. 965/2000.

[59] *Adam* v. *Czech Republic*, 23 July 1986, No. 496/1994, *Simunek et al.* v. *Czech Republic*, 19 July 1995 No. 516/1992, *Blazek et al.* v. *Czech Republic*, 12 July 2001, No. 857/1999, and *Des Fours* v. *Czech Republic*, 30 October 2001, No. 747/1997, *Drobek* v. *Slovakia*, 14 July 1997, No. 643/1995, *Malik* v. *Czech Republic*, 21 October 1998, No. 669/1995, and *Schlosser* v. *Czech Republic*, 21 October 1998, No. 670/1995.

[60] In *Gueye et al.* v. *France*, 3 April 1989, No. 196/1985.

[61] *See e.g.*, CESCR, *Concluding Observations: Dominican Republic* (E/1991/23), p. 55, para. 249; and CESCR, *Concluding Observations: Nigeria* (E/1999/22), p. 27, para. 105.

[62] *See e.g.*,*Gaygusuz* v. *Austria*, 16 September 1996, European Court of Human Rights, Application No. 17371/90.

[63] *See also Koua Poirrez* v. *France*, 30 September 2003, European Court of Human Rights, Application No. 40892/98; *John Murray* v. *the United Kingdom*, 8 February 1996, European Court of Human Rights, Application No. 18731/91 and *Moustaquim* v. *Belgium*, 18 February 1991, European Court of Human Rights, Application No. 12313/86.

[64] *Legal Resources Foundation* v. *Zambia*, Comm. 211/98 similarly resulted in the Commission finding a violation, this time of Article 2, due to a proposed new constitutional provision that required anyone seeking the office of the President to prove that both parents were Zambians by birth or descent. The African Commission made clear that any measure which seeks to exclude a section of the citizenry from participating in the democratic process, as this constitutional amendment sought to do, is discriminatory and falls foul of the Charter.

persons, whether on the basis of nationality, religion, ethnic, racial or other considerations "constitute a special violation of human rights".[65] The Commission also stated that "a government action specially directed at a specific national, racial, ethnic or religious group is generally qualified as discriminatory in the sense that none of its characteristics has any legal basis" (para. 15).

In its 2003 Advisory Opinion OC–18/03, the Inter-American Court of Human Rights examined fully the issue of discrimination against alien migrant workers. According to the Court, a state's human rights obligations includes an obligation to take affirmative action, to avoid taking measures that restrict or infringe a fundamental right, and to eliminate measures and practices that restrict or violate a fundamental right. The general obligation to respect and ensure the exercise of rights is imposed on States to benefit the persons under their respective jurisdictions, irrespective of the migratory status of the protected persons. The Court advised further that:

> States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights ... The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment (para. 119).

The opinion suggests more expansive rights and corresponding state obligations than are probably found in the laws and practices of most states.

The area of religious discrimination is also problematic, because the desire to practice or manifest religious belief often leads individuals to claim exemptions from laws neutral on their face. It is extremely difficult to distinguish between the permissible enforcement of laws that have a legitimate need for uniform applicability and those whose enforcement amounts to unwarranted discrimination against a particular religion because its different beliefs entitle it to different treatment.

Neutral government regulations—ones that do not demand adherence to religion in general or a specific religion in particular—

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[65] *See also* OMCT *and others* v. *Rwanda*, Comm. Nos. 27/89, 46/91, 49/91, 99/93. In *RADDHO* v. *Zambia* Comm. 71/92, the manner of the expulsions violated the Charter. The Commission stated that "simultaneous expulsions of nationals of many countries does not negate the charge of discrimination. Rather the argument that so many aliens received the same treatment is tantamount to an admission of a violation of Article 12(5)" (para. 25).

should generally apply to all persons in society. However, certain exemptions or accommodations need to be recognized, where the governmental interest can be served by other means and where the demands of the law are particularly onerous on religious objectors.[66] Difficult issues may arise where normal activities or requirements of, e.g., a school, including dress codes, compel a student to act in contravention of religious beliefs. The state has a legitimate interest in conducting a consistent and comprehensive educational program. If the religious beliefs result in seeking exemptions that would substantially disrupt the educational program or interfere with the rights of other students, the authorities may legitimately decide that exemption is not warranted, especially if alternative schooling is available that conforms to the religious dictates of the student. Nonetheless, guarantees of equality and non-discrimination in matters of religion and belief may imply that everyone has the right to reasonable accommodation in employment, in military or alternative service, schools and prisons, for manifestations of their religion or belief.

Achieving appropriate accommodation may require recognizing indirect discrimination or actions based on religious prejudice.[67] In *Thlimmenos* v. *Greece,* the European Court held that Greek legislation discriminated on the basis of religion. Greek authorities had refused to appoint the applicant, a Jehovah's Witness, as a chartered accountant, because he had a previous criminal conviction for disobeying an order to wear a Greek military uniform. The applicant proved that he refused to wear military uniform as a conscientious objector, because Jehovah's Witnesses are committed to pacifism. The Court found that Greek law wrongly treated him like any other criminal, whereas his criminal conviction arose from the exercise of his freedom of religious belief; the law's failure to make the distinction was discriminatory.

Other problems stem from laws regulating religions and their relationship with the state. Some national constitutions establish the primacy of a particular religion and grant it privileges that are not afforded other religions or non-believers, raising issues of equality and non-discrimination. Conversely, governments sometimes repress religious activities, providing that no one may invoke religious liberty contrary to secular law. International jurisprudence has recognized that the existence of established or official state religion can result in

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[66] *See Cha'are Shalom Ve Tsedek* v. *France,* 7 April 1997, European Court of Human Rights, Application No. 27417/95.

[67] *See e.g., Hoffmann* v. *Austria,* 23 June 1993, European Court of Human Rights, Application No. 12875/87; *Palau-Martinez* v. *France,* 16 December 2003, European Court of Human Rights, Application No. 64927/01.

discrimination against other religious groups. In *Waldman* v. *Canada*, the Human Rights Committee held that where a state party chooses to provide public funding to religious schools, the funding must be made available without discrimination. In *Canea Catholic Church* v. *Greece*, the European Court of Human Rights similarly found a violation of Article 14 (non-discrimination) in conjunction with Article 6(1) (right to a fair hearing) because both the Greek Orthodox Church and the Jewish community had legal personality to protect their property rights under Greek law, but the Roman Catholic Church did not and there was no objective and reasonable justification for it to be treated any differently.

D. *Arbitrary, Unreasonable, Disproportionate or Unjustified*

Not all distinctions in law or practice are unjustified. Age restrictions are perhaps those most often found to be reasonable.[68] In *Lovelace* v. *Canada,* a Canadian law imposed different treatment of men and women in identical circumstances, depriving the applicant of her 'Indian' status and the benefits that came with such status, because she married a non-Indian. The Human Rights Committee regarded the measure as establishing *de jure* discrimination on the ground of sex and focused on whether such interference was justified. The Committee said that distinctions "must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole" (para. 16). Since the stated purpose of the relevant part of the Indian Act was to preserve the identity of the tribe and Lovelace's marriage had broken up, the Committee decided that to deny her the right to reside on the reserve was not reasonable, because it was not necessary to preserve the identity of the tribe.[69]

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[68] *See e.g.*, Love *et al.* v. *Australia*, 25 March 2003, No. 983/2001; *Schmitz-de-Jong* v. *the Netherlands*, 16 July 2001, No. 855/1999.

[69] *Lovelace* v. *Canada*, 30 July 1981, No. 24/1977, For other cases assessing the reasonableness of measures making distinctions on the ground of sex, *see S.W.M. Broeks* v. *the Netherlands*, 9 April 1987, No. 172/1984, *Zwaan de Vries* v. *the Netherlands*, 9 April 1987, No. 182/1984, *Pauger* v. *Austria*, 26 March 1992, No. 415/1990 and *Johannes Vos* v. *the Netherlands*, 26 July 1999, No. 786/1997, wherein the Committee held that distinctions on the grounds of sex in social security laws had no reasonable or objective aims and thus violated Article 26 of the ICCPR. *See also Avellanal* v. *Peru*, 28 October 1988, No. 202/1986 (a Peruvian law that prevented married women from representing matrimonial property before the courts held to violate Article 26); *Young* v. *Australia*, 6 August 2003, No. 941/2000 (the State had failed to show reasonable and objective reasons for the unequal treatment of same-sex partners compared to unmarried heterosexual partners) and the *Mauritian Women* case (*Mauritian Women* v. *Mauritius*), 9 April 1981, No. 35/1978 (Mauritian immigration law that limited residency rights of alien husbands of Mauritian women but not of alien wives of Mauritian men, discriminated on the grounds of sex).

Views about the reasonableness of distinctions may change over time and this inherent subjectivity has led to some inconsistency in the jurisprudence. In *Järvinen* v. *Finland*, for example, the author claimed that new Finnish legislation requiring conscientious objectors to do 16 months alternative civilian service compared to eight months for military service discriminated against him on the basis of philosophical opinion. The Committee found that the prolongation of the term for alternative civilian service was based on reasonable and objective criteria, but in *Foin* v. *France*, the Committee reversed itself, finding that a longer term of alternative service for conscientious objectors violated Article 26 on the grounds of opinion, rejecting the State's argument that doubling the length of service was the only way to test the sincerity of an individual's convictions.[70]

IV. THE MEANING OF DISCRIMINATION

Based on the above, one may conclude that discrimination involves a distinction of any kind (exclusion, preference, limitation or restriction) between similarly situated individuals or groups unless there is an objective and reasonable justification and the measure of distinction is proportional to the aim. The principle of equality is the positive side of this prohibition, but raises the issue of whether the obligation is one of equality of opportunity or equal outcomes, with its redistributive consequences. The Racial Committee seems to have adopted the second position and decided that the Convention is aimed at ensuring that equality is actually enjoyed in practice.[71] One consequence is that disparate impact, without a motivation of discrimination, may still be prohibited, since the goal is *de facto* equality. Such demands for equality of outcome also may require addressing historical injustices that created systemic patterns of inequality.

In addition to direct and indirect discrimination, there may be a requirement that states reasonably accommodate differences, by modifying laws and practices to make it possible for a qualified individual to apply for, perform the essential functions of, and enjoy the benefits and privileges available to others. The requirement to

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[70] *Järvinen* v. *Finland*, 25 July 1990, No. 295/1988, *Foin* v. *France*, 11 July 1997, No. 666/1995. *See also H.A.E.D.J.* v. *the Netherlands*, 30 October 1989, No. 297/1988; *R.T.Z.* v. *the Netherlands*, 5 November 1987 No. 245/1987; *M.J.G.* v. *the Netherlands*, 24 March 1988, No. 267/1987, and *Drake and Julian* v. *New Zealand*, 3 April 1997, No. 601/1994.

[71] *Statement by CERD at the 1978 World Conference to Combat Racism and Racial Discrimination* (UN Doc. A/33/18) (1978), pp. 108, 110.

accommodate difference has arisen most frequently in the context of disabilities.

The principle of equality does not exclude distinctions, and distinctions do not amount to wrongful discrimination where (1) differentiations are based on character and conduct seen as matters of individual choice (e.g. honesty, carefulness, industriousness, morality, etc.) or (2) differentiations are based on giving effect to competing and compelling social values even when the relevant individual characteristics are innate and not matters of choice (physical strength for firefighters, for example). Thus, employers may lawfully discriminate based on certain personal characteristics such as race or religion in limited circumstances where they are essential to the job.

Based on these concepts, during the drafting of the ICCPR's Article 26, it was affirmed that equality does not require identity of treatment and permits instead "reasonable differentiations" between individuals or groups of individuals on relevant and material grounds.[72] Earlier, the UN Secretariat submitted memoranda to the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities that similarly defined discrimination to include "any conduct based on a distinction made on grounds of natural or social categories, which have no relation either to individual capacities or merits, or to the concrete behavior of the individual person".[73]

Much of this definition begs the question about what differences are relevant for purposes of determining the necessity of equal treatment. Madagascar has argued that husbands and wives are different and that "prerogatives" given to the husband during marriage "impart unity and direction to the household".[74] States and cultures historically have pointed to the physical differences between men and women as legitimate bases for different treatment in law and policy. In *Van der Mussele* v. *Belgium*,[75] the applicant lawyer claimed discrimination in relation to the obligation to work without payment, a duty not imposed on other professions. The Court held that there are fundamental differences between the professions as to legal status and the nature of

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[72] UN Doc. A/2929 (1955), para. 34.

[73] UN Doc. E/CN.4/Sub.2/40 (1949), paras. 33–36. An earlier memorandum indicated that discrimination implies unequal and unfavorable treatment, either by the bestowal of favors or imposition of burdens, based on impermissible grounds. *Definitions of the Expressions "Prevention of Discrimination" and "Protection of Minorities" (Memorandum by the Division of Human Rights)* (E/CN.4/Sub.2/8) (1947), p. 2.

[74] UN Doc. A/33/40, 33 GAOR Supp. 40 (1978), para. 290.

[75] 23 November 1983, European Court of Human Rights, Application No. 8919/80, Ser. A, No. 70, (1983) 6 *European Human Rights Reports* p. 163.

the functions involved that made the situations disparate. Therefore, there was no discrimination involved.

The views of society invariably impact the jurisprudence on discrimination. *Hoffman* v. *Austria*, a 5–4 decision of the European Court of Human Rights, considered whether denying custody to an applicant because of her religion (Jehovah's Witness) constituted impermissible discrimination on the basis of religion or was a legitimate distinction based on the independent test of the best interest of the children.[76] The Court held that there was both a distinction and a legitimate aim, but the measure was disproportionate and therefore an impermissible discrimination. A strong dissent argued for deferring to the state's determination of the interests of the children. The HRC has made clear that traditional notions of gender roles in employment and the home do not justify discrimination. In *Broeks* v. *the Netherlands* the HRC found that the denial of social security benefit to Mrs. Broeks, as a married woman, on an equal footing with a married man constituted discrimination under Article 26 of the ICCPR. The HRC observed that, under relevant Dutch law, a married woman in order to receive unemployment benefits, had to prove that she was a 'breadwinner', a condition that did not apply to married men. Such a differentiation placed married women at a disadvantage compared with married men.

Views about illegitimacy and homosexuality have changed in many societies and have made distinctions on these bases less acceptable. Distinguishing those born in and out of wedlock for purposes of inheritance has been disapproved,[77] as has been distinction between legitimate and illegitimate children in respect of the rights of access of fathers.[78] Differential treatment based on sexual orientation has been found discriminatory in some circumstances,[79] but not when the matter

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[76] 23 June 1993, European Court of Human Rights, Application No. 12875/87, Ser. A, No. 255–C, (1994) 17 *European Human Rights Reports* p. 293.

[77] *Marckx* v. *Belgium*, 13 June 1979, European Court of Human Rights, Application No. 6833/74, Ser. A, No. 31, (1979–1980) 2 *European Human Rights Reports* p. 330; *Inze* v. *Austria*, 28 October 1987, European Court of Human Rights, Application No. 8695/79, Ser. A, No. 126, (1988) 19 *European Human Rights Reports* p. 394.

[78] *Sahin* v. *Germany*, 8 July 2003, European Court of Human Rights (Grand Chamber), Application No. 30943/96, (2003) 36 *European Human Rights Reports* p. 43; *Sommerfeld* v. *Germany*, 8 July 2003, European Court of Human Rights, Application No. 31871/96, (2004) 38 *European Human Rights Reports* p. 35.

[79] In *Toonen* v. *Australia*, 30 March 1994, No. 488/1992, the Human Rights Committee found that Tasmanian laws criminalizing sexual relations between consenting males violated Toonen's right to privacy protected under the ICCPR. The Human Rights Committee noted (para. 8.7) that the ICCPR's reference to 'sex' in its Articles 2(1) and 26 included sexual orientation. In *Young* v. *Australia*, 6 August 2003, No. 941/2000, the Committee held that sexual orientation was covered by the 'other status' ground of Article

concerned the adoption of a child and the state refused the adoption because of the applicant's "lifestyle".[80] It seems that the determination of what is a reasonable and relevant distinction cannot be decided without reference to other values in society which evolve over time. What is an appropriately 'fair' distinction is derived from current standards – whether universal, regional, or national, is still to be resolved.

In a recent study on gaps in international human rights law on the issue of discrimination, a study group appointed by the UN Human Rights Council identified certain groups as under-protected: religious groups, refugees, asylum-seekers, stateless persons, migrant workers, internally displaced persons, descent-based communities, indigenous peoples, minorities, and people under foreign occupation.[81]

A look at several cases in the European system concerning the Roma indicates the need for further evaluation of what constitutes discrimination and what distinctions are permissible. A number of UK cases involved allegations by migrants ('travelers' and Roma) that planning and enforcement measures taken by local authorities in the UK against their occupation of land amounted to racial discrimination.[82]

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26 of the ICCPR, rather than as an aspect of sex. *See also Joslin* v. *New Zealand*, 17 July 2002, No. 902/1999. For European Court cases, *see e.g., L and V* v. *Austria*, 9 January 2003, Application Nos. 39392/98 and 39829/98; *Karner* v. *Austria*, 24 July 2003, Application No. 40016/98, (2004) 38 *European Human Rights Reports* p. 24; *B.B.* v. *the United Kingdom*, 10 October 2004, Application No. 53760/00; *Smith and Grady* v. *the United Kingdom*, 27 September 1999, Application Nos. 33985/96 and 33986/96; and *Lustig-Prean and Beckett* v. *the United Kingdom*, 27 September 1999, Application Nos. 31417/96 and 32377/96. The last-mentioned case represents the most overt consideration of changing societal attitudes. The ECtHR considered that it could not ignore widespread and consistently developing views or the legal changes in the domestic laws of contracting States in favor of the admission of homosexuals into the armed forces of those States. Accordingly, convincing and weighty reasons had not been offered by the UK Government to justify the discharge of the applicants, which was a direct consequence of their homosexuality. *See also Beck, Copp* and *Bazeley* v. *the United Kingdom*, 22 October 2002, Application Nos. 48535/99, 48536/99 and 48537/99, and *Perkins and R.* v. *the United Kingdom*, 22 October 2002, Application Nos. 43208/98 and 44875/98.

[80] *Frette* v. *France*, 26 February 2002, European Court of Human Rights, Application No. 36515/97, (2004) 38 *European Human Rights Reports* p. 21. *But see Salgueiro Da Silva Mouta* v. *Portugal*, 21 December 1999, European Court of Human Rights, Application No. 33290/96.

[81] *See Complementary International Standards: Report on the study by the five experts on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance* (A/HRC/4/WG.3/6), 27 August 2007, para. 20.

[82] *See Beard* v. *the United Kingdom*, 18 January 2001, European Court of Human Rights, Application No. 24882/94; *Chapman* v. *the United Kingdom*, 18 January 2001, European Court of Human Rights, Application No. 27238/95; *Coster* v. *the United Kingdom*, 18 January 2001, European Court of Human Rights, Application No. 24876/94; *Jane Smith* v. *the United Kingdom*, 18 January 2001, European Court of Human Rights,

Despite the obvious negative impact of the planning laws, interference with the applicants' rights was held to be permissible as a proportionate measure to serve the legitimate aim of preservation of the environment. The Court gave little weight to allegations of systematic discrimination against members of the group.

It does appear that the notion of discrimination has evolved from "perception of discrimination as, primarily, intentional unfavourable treatment of a section of the community ... to a broader notion embracing unintentional or even traditional differentiation and more recently recognition that discrimination may be indirect, where identical treatment has disproportionately adverse effects on members of a particular group."[83] At the same time, examination of whether or not a rule is reasonable is closely linked to and often dependent on the issue of who decides. As noted by one author, "[d]iscrimination is often the product of inequalities that are embedded deep within the structure of society and express themselves as social norms and common understandings".[84] Prevailing social views cannot always be the test of what is reasonable. In the end, who decides may be as significant as the test for what constitutes discrimination.

Application No. 25154/92; and *Lee* v. *the United Kingdom*, 18 January 2001, European Court of Human Rights, Application No. 25289/94.

[83] Wildhaber, *supra* note 29, pp. 71–72.

[84] Choudhury, *supra* note 52, p. 41.