Non-discrimination in International Human Rights Law[1]

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Discrimination, inequality, and prejudice are problems that occur throughout the world. They can involve the most insidious human rights problems, especially if historically, and even unconsciously, they are rooted in a population's psyche. Slavery in the United States, the Holocaust, and South African apartheid are among the countless tragic episodes that show how discrimination can engender gross human rights abuses, affronting human dignity.

In recognition of the devastating consequences of discrimination, the international community has adopted important legal measures. General guarantees of non-discrimination for protected rights, on a wide range of non-exhaustive grounds, are contained in the International Covenant of Civil and Political Rights (ICCPR)[3], the European Convention of Human Rights (the ECHR)[4], the American Convention on Human Rights 1969[5] and the African Charter of Human and Peoples' Rights.[6] European Community Law forbids only certain types of discrimination, notably on grounds of nationality[7] (but not colour or race), and sex.[8] Similarly, the UN Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) are aimed at eliminating specific types of discrimination. In view of their nature as fundamental constituents of international human rights law, the principles of equality and non-discrimination may be regarded as part of the *jus cogens*[9].

This paper concentrates upon the jurisprudence of the Human Rights Committee, the treaty body which monitors the ICCPR, as a potentially significant source of international legal standards. However, the ICCPR jurisprudence is rudimentary and undeveloped compared with that of the European Court of Justice and of the European Commission and Court of Human Rights, to whose case law reference will also be made. The paper will not attempt to summarise the abundant comparative case law on non-discrimination at national level.

The Meaning of "Discrimination"

The Human Rights Committee, in its General Comment no. 18[10] on "Non-Discrimination", defined discrimination in broad terms as including:

> "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, 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."[11]

The jurisprudence of the ECHR organs is similarly broad. The concept of discrimination includes cases where an individual or a group are treated less favourably, without sufficient justification, than a comparable individual or group, even when the Convention does not

require the more favourable treatment to be provided.[12] Less favourable treatment may arise where an individual or group is given less choice than a comparable individual or group.[13]

The principle of equal treatment, viewed as a general principle of European Community law[14], requires[15] that similar situations must not be treated differently and that different situations must not be treated in the same manner unless such differentiation is objectively justified.

Content of Non-Discrimination Obligations under International Law

The ICCPR contains three Articles which expressly forbid discrimination, Articles 2(1), 3, and 26. Other Articles of the ICCPR also include a non-discrimination proviso, such as the derogation provision, Article 4, which may not be implemented in a discriminatory fashion against certain groups. It has been suggested that "equality and non-discrimination constitute the dominant single theme of the Covenant."[16]

Article 2(1) states that:

> "Each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 3 states that:

> "The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

It is arguable that Article 3 is superfluous, and serves only to underline the prohibition on discrimination on the basis of sex.[17]

Article 26 states that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Human Rights Committee has observed in General Comment no. 18 that:

> "[T]he application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant."[18]

In its landmark decision of *Zwaan-de-Vries v Netherlands*[19], the Human Rights Committee held that the denial of equal rights to married women as compared to married men under Dutch social security law, on the basis of the assumption that men are the breadwinners,

breached Article 26 as impermissible sex discrimination. The Committee reached this conclusion even though the ICCPR guarantees no right to social security payments as such.

The guarantees in Articles 2(1) and 3 (unlike those in Article 26) are expressly limited to discrimination in the enjoyment of the Covenant's enumerated rights[20].

General Comment no. 18 continues:

> "Article 26 ... prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligation imposed on states parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content not be discriminatory."[21]

Article 26 obliges States not to adopt or maintain discriminatory legislative standards and trends, thus ensuring "equal protection of the law"; and not to apply that legislation in a discriminatory manner, thus ensuring "equality before the law". The guarantee of the equal protection of the law secures de jure equality, so that the law itself dispenses rights and benefits to all equally. Equality "is a principle above the law", circumscribing the legitimacy of laws themselves.[22] This obligation is imposed on legislators and lawmakers. The guarantee of equality before the law secures de facto equality, so that the law is applied correctly and consistently no matter who the parties may be. This obligation applies to all public officers, such as judges and police, prison, immigration, and customs officers. A third limb of the Article 26 obligation arguably involves a duty to prohibit, or protect against, discrimination.[23] This obligation is discussed below in the context of obligations to take positive measures.

Zwaan-de-Vries established that the scope of Article 26 extends to non-discrimination in the enjoyment of economic rights, and probably social and cultural rights. However, an HRC minority prefers to minimise the HRC's competence to question discriminatory aspects of a State party's economic and social policy.[24] The HRC consensus incorporated some of the minority's language when it specifically noted in obiter in *J.H.W. v the Netherlands*[25] that "social security legislation and its application usually lag behind socio-economic developments in society",[26] possibly implying that at least a small hiatus is allowed before an outmoded distinction regarding welfare rights can be considered to violate Article 26. This concession was not expressly made in *Zwaan-de-Vries*.[27] In any case, there is no doubt that Article 26 maintains a significant impact in the field of social, economic and cultural rights.

Both the ICERD and CEDAW Conventions prohibit discrimination in relation to civil, political, economic, social and cultural rights.[28] In *Yilmaz-Dogen v The Netherlands*[29], the Committee on the Elimination of Racial Discrimination (CERD) found a breach of Article 5(e)(i) of ICERD, which guarantees the right to work without discrimination. However, CERD has also recognised[30] that the rights protected by Article 5(1)(e) are:

> "of programmatic character, subject to progressive implementation. It is not within the Committee's mandate to see to it that these rights are established; rather, it is the Committee's task to monitor the implementation of these rights, once they have been granted on equal terms."

Grounds of Discrimination

Articles 2(1) and 26 of the ICCPR contain identical lists of prohibited grounds of discrimination : race[31], colour, sex[32], language[33], religion[34], political[35] or other opinion[36], national or social origin,[37] property, and birth, or "any other status". The reference to "sex" has been interpreted as including "sexual orientation".[38]

The following grounds have been found to constitute "other status" by the Human Rights Committee: nationality[39], marital status[40], a distinction between "foster" and "natural" children[41], a difference in funding between public and private schools,[42] and a difference between employed and unemployed persons.[43] The latter two distinctions do not relate to any personal characteristic of the complainant, unlike the specifically enumerated grounds, so it seems to widen the applicability of the phrase, "other status".[44]

However, the non-exhaustive nature of permissible grounds of Articles 2(1) and 26 does not mean that every distinction, no matter how obscure, raises an issue of discrimination.[45] Messrs Aguilar Urbina and Wennergren, in a separate opinion in *Vos v the Netherlands*[46], explained that "whenever a difference in treatment does not affect a group of people but only separate individuals, a provision cannot be deemed discriminatory as such; negative effects on one individual cannot then be considered to be discrimination within the scope of Article 26." This comment gives no guidance as to when a group of separate individuals qualifies as a distinct group. The Human Rights Committee have not defined when an "other status" arises, preferring to develop its jurisprudence in this area on a case-by-case basis.[47]

Direct and Indirect Discrimination

Direct discrimination[48] involves the less favourable treatment of the complainant than of someone else on prohibited grounds and in comparable circumstances. Indirect discrimination[49] traditionally arises when a practice, rule, requirement or condition is neutral on its face but hits disproportionately at particular groups, and does so without any objective justification. In other words, it has the effect of impairing the rights of members of that group unjustifiably. For example, minimum height requirement may hit disproportionately at women and Asians, and may be an unjustifiable job requirement.

European Community law has the most developed case law about the important concept of indirect discrimination.[50] For example, Article 119 of the EEC Treaty and the Equal Pay and Equal Treatment Directives forbid indirect as well as direct discrimination. The ECJ, in *Enderby v Frenchay Health Authority*,[51] agreeing with Advocate-General Lenz's liberal approach towards the concept of "indirect discrimination" in his *Enderby* Opinion, found that a prima facie case of discrimination is established if unequal treatment (ie. substantial disadvantage) can be shown to occur without objective justification; there is no need to show any additional factor, such as the means by which such inequality occurs (such as the application of a discriminatory "requirement").[52] Proof of direct discrimination is therefore determined by a comparison between individuals, whereas proof of indirect discrimination involves a comparison between groups.[53] Advocate-General Lenz's view also diminishes the importance of the formalistic characterisation of discrimination as either direct or indirect in favour of a "practical result-orientated" approach.[54] Indeed, the ECJ itself did not specify

whether direct or indirect discrimination was involved on the facts in *Enderby*. The characterisation is only important if different consequences flow from such characterisation.[55]

The Human Rights Committee's definition of "discrimination" in General Comment no. 18[56] proscribes certain acts which have a discriminatory "purpose or effect". The reference to "effect" makes it unnecessary prove a discriminatory intention or "purpose", and indicates that indirect discrimination is also forbidden under the Covenant.[57]

Case law also indicates that indirect discrimination is prohibited. In *Singh Bhinder v Canada*,[58] the law complained of required that all persons wear hard hats in certain jobs. This rule indirectly prejudiced Sikhs, whose religion requires the wearing of a turban. The Committee rightly did not dismiss the complaint because of the indirectness of the alleged discrimination; rather, the rule was found to be justified for reasons of worker safety.[59] The Singh Bhinder decision indicates that obvious instances of indirect discrimination will breach the ICCPR.[60]

However, the Committee's case law regarding indirect, or less obvious, discrimination is inconsistent. In the recent decision of *Oulajin & Kaiss v the Netherlands*[61] the Committee noted that the complainants had not substantiated their claim that the law, which differentiated between foster and natural children vis-a-vis eligibility for child benefit, affected migrants more than Dutch people. This indicates that claims of indirect discrimination may be examined if adequate proof of actual discrimination is adduced. However, in *Oulajin*, the Committee reaffirmed[62] that "the scope of Article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits". However, indirect discrimination traditionally occurs precisely when the equal application of a rule in a formal sense has a disproportional adverse impact on a group or groups of individuals. In *A.P.L.-v.d.M. v the Netherlands*[63] and *Vos v the Netherlands*,[64] the result of the "uniform application" of certain rules caused the author in each case, a woman, to receive a lesser amount of benefit than a man would have received in exactly the same circumstances. In those cases, it is submitted that the Committee should have focused on the discriminatory result of the application of the legislation at issue.

More recently, the Committee expressly noted a claim of "indirect discrimination" by the author in *Cavalcanti Araujo-Jongens v the Netherlands*[65] but found the distinction concerned to be justifiable. However, the Committee seemed only to examine the legitimacy of the direct distinction made, between employed and unemployed people, rather than the legitimacy of the consequent adverse impact on women.

In contrast to the Human Rights Committee's uncertain approach to the question of the proscription of indirect discrimination, its fellow UN body, the Committee on the Elimination of Racial Discrimination (CERD), has confirmed its proscription by Article 1(1) of ICERD in a General Comment:[66]

> "In seeking whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." [67]

The European Court of Human Rights has not had occasion to develop the concept of indirect discrimination in interpreting Article 14 of the ECHR. However, the Commission has recently recognised that a rule which is not formally discriminatory can nevertheless be discriminatory in its practical application.[68]

Permissible Differentiation

In General Comment no. 18, the Human Rights Committee indicated[69] that

> "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."

A differentiation is "objective" if it has a legitimate aim, whereas it is "reasonable" if it has a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[70] Unfortunately, the Committee have accompanied findings of "reasonableness" and "objectivity" with sparse reasoning. For example, the Committee rarely analyse the two parts of the test separately.[71] Ultimately, such criteria are established on a case-by-case basis,[72] so it is hard to use existing cases as pointers for future decisions.

It must be noted that the Committee have found breaches of the Covenant in only a minority of Article 26 cases, indicating that it is difficult for authors to show that the laws and/or practices at issue are not "reasonable and objective".

The following are examples of the HRC's "reasonable" and "objective" test as applied in practice. Tax laws which treated married and unmarried couples differently were found to be legitimate in *Sprenger v the Netherlands*[73] and *Danning v the Netherlands*,[74] as were differences in state funding for public as opposed to private schools in *Blom v Sweden*[75] and *Lindgren et al v Sweden*.[76] In *Gueye et al v France*,[77] the Human Rights Committee found French legislation which had frozen the pensions of Senegalese veterans of the French army, resulting in smaller pensions for these veterans as opposed to French veterans, was not legitimate. The legislation was aimed at alleviating administrative difficulties in preventing pension abuse in Senegal. The Human Rights Committee observed that "mere administrative inconvenience ... cannot be invoked to justify unequal treatment." However it seems that administrative convenience may have justified a difference in the length of national service between performers of military service and conscientious objectors performing alternative service (who had to serve four months longer) in *Jarvinen v Finland*.[78]

When considering the State's justification of a given difference of treatment, the European Court of Human Rights expressly interprets the ECHR as a living instrument, and requires the State to keep the justification for the measure under review in the light of present-day conditions.[79] Some of the Human Rights Committee's decisions regarding social security[80] reveal a similar attitude by rejecting the outmoded "breadwinner" argument in sex discrimination cases.

The Committee's test of "reasonableness" and "objectivity" leaves wide scope for subjective interpretation and application of equality principles. The problems of subjectivity are

aggravated at the international level by the existence of substantial cultural differences. Though some human rights norms are readily capable of common universal interpretation, such as the right not to be tortured or arbitrarily executed, the determination of the legitimacy of alleged discrimination is made much more difficult where there are conflicting cultural attitudes about what is reasonable or objective - for example, religious attitudes about the status of women, or traditional hostility to private homosexual behaviour between consenting adults.[81]

The Margin of a State's Appreciation

The European Court of Human Rights has held that States parties enjoy a "margin of appreciation" in determining whether differential treatment is justifiable. The boundaries of this margin, within which Contracting states possess discretion to implement potentially discriminatory policies[82], are not clear or fixed. They "vary according to the circumstances, the subject matter and its background."[83] If an allegedly discriminatory practice departs from the common practice in most or perhaps many States parties, the European Court or Commission are more likely to condemn it. Conversely, an area of law or practice in which no common European practice exists will be more likely to come within a State's "margin of appreciation".[84] Thus, the emergence of a common European practice will shift the boundaries of the margin of appreciation in a given area.[85]

Unlike the ECHR organs, the Human Rights Committee has only rarely alluded to the elastic and elusive doctrine of a margin of appreciation. The HRC minority in *Oulajin* allowed States parties a wide margin of appreciation in implementing social and economic policies; the opinion did not seem to affect a State's margin of appreciation in the sphere of civil and political rights. However, the Committee's cautious case law, even in relation to civil and political rights, indicates that in practice it often allows a wide margin of appreciation.

In the Optional Protocol case of *Hertzberg et al v Finland*[86], the Human Rights Committee majority found that the censorship by the State's broadcasting authorities of television programmes about homosexuality did not breach Article 19 of the ICCPR (protecting freedom of expression), noting that "public morals differ widely. There is no universally applicable standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities"[87]. Though *Hertzberg* was not a discrimination case, its reasoning might well be used in determining the legitimacy of a certain distinction.

However, it is submitted that habitual deference to a State's margin of discretion or appreciation by the Human Rights Committee would be inappropriate in situations where no common international pattern exist, because it is often impossible to identify a common international practice among the highly diverse parties to the ICCPR.

The Human Rights Committee, as a quasi-judicial body monitoring human rights on a world-wide scale, confronts more acute cultural differences than does a regional body like the European Court of Human Rights. How then should the Human Rights Committee proceed in determining the "reasonableness" and "objectivity" of a distinction in the absence of universal standards if the grant of a large margin of appreciation to States is not satisfactory?

There is a difficult dilemma. If the Human Rights Committee were to develop regional standards, paying great heed to the attitudes of domestic populations, this would fragment the essential universality of fundamental human rights and freedoms. A similar problem would arise if the Committee were to do as has been suggested[88] and replace the practice of adopting consensus opinions with a system of majority voting. The Committee's jurisprudence might become fragmented.

On the other hand, the Committee's consensus opinions often represent a watered-down compromise gleaned from the true views of HRC members, and the search for a consensus within such a diverse body of jurists results in the lowest common denominator of opinion being reflected in the Committee's published views. It is noteworthy that recently the Committee has increasingly resorted to the formulation of individual opinions, which are appended to the majority views, instead of insisting on the achievement of consensus.[89]

Suspect Distinctions and Stricter Scrutiny

Some grounds for differences in treatment are inherently suspect and call for stricter scrutiny, so that the State's margin of appreciation is correspondingly narrower. Racial distinctions are particularly suspect, as is indicated by the existence of CERD, and a body of cases in the International Court of Justice, which suggest that non-discrimination on the bases of race, colour, descent, national or ethnic origin has become a norm of customary international law.[90] The European Commission of Human Rights has found that racial discrimination against citizens (but not apparently non-citizens) of a Contracting State amounts to an affront to human dignity and constitute degrading treatment in breach of Article 3 of the ECHR.[91]

Since progress towards sex equality is an important objective of the Member States of the Council of Europe, only very strong reasons could justify a difference of treatment based on sex under the ECHR.[92] European Community law is particularly active in countering sex discrimination. The notion that this approach extends beyond Europe is strengthened by the existence of CEDAW, numerous other international treaties concerned with women's rights[93], and the arguably superfluous inclusion of Article 3 of the ICCPR. Of course, it must be acknowledged that the treatment of women varies considerably between States at the international level; and that the domestic practice of States regarding sex and race discrimination often diverges from the lip service paid to the notion at the international level.[94] It must be noted that the Committee, by consensus, has consistently found distinctions based on sex to violate the ICCPR.[95] However, as noted above, the Committee have been unwilling to delve beneath the surface of complex and apparently neutral social security laws which have caused women to be treated worse than men in the same position. This may be due to the Committee's relatively unsophisticated approach to laws which are not blatantly discriminatory, rather than any manifest tolerance of sex discrimination on the part of the Committee.

Some commentators have argued that religion has also become an internationally suspect category, in view of the adoption by the General Assembly in 1981 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.[96]

The decision of the European Court of Human Rights in *Inze v Austria* indicates that distinctions made on the basis of illegitimacy may have joined the group of "suspect distinctions", at least under the ECHR, in the light of the 1975 European Convention on the Legal Status of Children born out of Wedlock.[97] In that case, the Court rejected the Austrian government's argument that the law reflected the population's "traditional outlook".[98] Here, the State's margin of appreciation in this area had been narrowed by the development of a European pattern of tolerance regarding illegitimate births, and the Court followed that lead by obliging the Austrian government to update its attitudes. It seems likely the Human Rights Committee would similarly treat distinctions based on illegitimacy as suspect, at least in a European context.

Special Measures and Affirmative Action

It is generally accepted in international human rights law that[99]

> "the provision of special measures of protection for socially, economically or culturally deprived groups is not discrimination, so long as those special measures are not continued after the need for them has disappeared .... The other type of protective measure which is permissible is the provision of special rights for minority groups to maintain their own languages, culture and religious practices and to establish schools, libraries, churches and similar institutions ....
>
> "'Discrimination' is defined under international law to mean only unreasonable, arbitrary or invidious distinctions, and does not include special measures of protection of the two types described above .... The principle of equality of individuals under international law does not require mere formal or mathematical equality but a substantial and genuine equality in fact."[100]

The Human Rights Committee has confirmed in its general comments that affirmative action is sometimes required by States in order to combat discrimination. In General Comment no. 18, the Committee pointed out "that the principle of equality requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions."[101] General Comment no. 3 (on Article 2) states that "the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by States parties to enable individuals to enjoy their rights."[102] General Comment no. 4 (dealing with Article 3) states 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."[103]

The gist of these General Comments is that positive measures to implement the ICCPR's non-discrimination obligations are mandatory, though the content of those positive measures, and the situations in which positive measures must be taken, are unclear.[104]

General Comment no. 18 confirms that such positive "action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."[105] It is not clear when a duty to take affirmative action against structural discrimination arises.[106] The alleged discrimination in *Stalla Costa v Uruguay*[107] was found to be permissible affirmative action in favour of a formerly disadvantaged group (the admission to the public service of former public officials who had been unfairly dismissed on ideological, political, or trade union grounds).

Affirmative action is an exception to or derogation from the fundamental right of equal treatment without discrimination. It is well established under European Community law that special protective measures must be construed strictly, and in accordance with the principle of proportionality, so that the derogations remain within the limits of what is appropriate and necessary for achieving the aim in view.[108] Derogations from the principle of equal treatment are construed strictly even though their purpose is to promote the interests of women by reducing past or existing inequalities. Similarly, measures for the protection of women, particularly as regards pregnancy and childbirth have a benevolent purpose, but must nonetheless be strictly construed to avoid undermining the principle of equality itself[109].

Measures to Combat Private Discrimination

Positive action may be required to protect a particular group against discrimination by other groups. Such action may take the form of legislative measures to combat discrimination or promotional extra-legal measures.[110] The ICCPR prohibits discrimination by State agencies, but it is as yet uncertain whether and to what extent the ICCPR obliges States to prevent and punish discrimination by private persons. If discrimination at a private level is allowed to flourish, a society will not give full effect to the norms of non-discrimination and equality. On the other hand, the forbidding of discrimination by individuals and private bodies potentially interferes with their rights, such as those of expression, choice, thought, and association.

The existence of a general duty upon States to take positive action to combat private discrimination has been the subject of much scholarly debate.[111] Such a duty can be derived from the Article 2 obligation to "ensure to all individuals ... the rights recognised in the Covenant", and from the Article 26 obligation to prohibit or protect against, discrimination.[112] It is submitted that States parties do have a duty to prevent discrimination by private persons in the public sphere where such discrimination adversely affects the rights - whether civil, political, economic and social - of the person discriminated against.[113] However, the prohibition of discrimination in the purely domestic sphere would interfere unduly with the discriminator's right to personal privacy, and would, in any case, be virtually impossible to enforce.[114]

General Comment no. 18 states that:

> "the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by

persons or bodies. The Committee wishes to know the legal provisions and administrative measures directed at diminishing or eliminating such discrimination."[115]

This comment may imply that States parties are under a duty to tackle some forms of private discrimination.

The ICERD and CEDAW texts[116] go further than the ICCPR text as regards private discrimination. These instruments confirm that UN treaty bodies are willing to actively enter the private sphere to eliminate discrimination. For example, in the CERD decision in *Yilmaz-Dogan v the Netherlands*[117], the Committee decided that the State party had not sufficiently protected the complainant's right to work under Article 5(e)(i) of the Convention, as an employment tribunal had not properly taken into account discrimination against the complainant by her private employer.[118]

Another CERD decision, *L.K. v the Netherlands*[119], suggests the direction of future ICCPR jurisprudence. Article 4(a) of the Convention, which obliges States parties to prohibit incitement to racial hatred and discrimination,[120] gives greater definition to Article 20(2) of the ICCPR, which provides more generally as follows:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

In *L.K.*, the CERD Committee found a violation of Article 4(a), CERD, because domestic anti-racist legislation had not been properly enforced against persons who had made racist remarks and threats against the complainant[121]. The Committee stated[122] that it could not

> "accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with [article 4(a)]."

Furthermore[123]

> "When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition."

Thus, Article 4(a), CERD (and, by implication, Article 20 of the ICCPR) require not only the enactment of anti-racist laws (and, under the ICCPR, laws to counter extreme forms of nationalist and religious discrimination), but also their effective implementation by the State party's organs of justice, such as the police and courts.

The CERD precedents are likely to encourage the Human Rights Committee to overcome its hesitancy in extending the reach of the ICCPR non-discrimination provisions to some "private" acts of discrimination in the public sphere[124].

Conclusion

International human rights law is not fully developed as regards the relevant principles guaranteeing equality of treatment and non-discrimination. However, it provides some useful persuasive authority for national courts in interpreting constitutions and ordinary legislation. This body of law is likely to become more significant as the jurisprudence develops on issues such as the meaning of direct and indirect discrimination, the nature of the comparisons called for in discrimination cases, the burden and standard of proof, the nature of the justification of directly and indirectly discriminatory measures, the need for effective remedies, and the proper approach towards exceptions, including affirmative action.

Endnotes

1. The main research for this paper has been done by Sarah Joseph, Airey Neave Research Fellow in the Department of Law at the University of Nottingham to whom I am greatly indebted. A fuller version was delivered at a conference under the auspices of the University and the Airey Neave Trust on 29th September 1993, and will be published in a volume of essays by Oxford University Press in early 1995.

2. Practising member of the English Bar; Honorary Professor of Public Law, University College London; President of Interights.

3. Articles 2(1), 3, and 26.

4. Article 14.

5. Article 24.

6. Articles 2 and 3.

7. Article 7 of the EEC Treaty provides that within the scope of application of the Treaty, and without prejudice to any special conditions contained therein, any discrimination on grounds of nationality shall be prohibited. Article 7 is a specific expression of the general principle of equality : Case 36/75, Rutili v Minister for the Interior [1975] ECR 1219, at 1229.

8. See Article 119 of the EEC Treaty and various sex equality directives on equal pay, and on equal treatment in employment, occupational pensions, and social security.

9. McKean, Equality and Discrimination under International Law, 1983, p. 283. See also Brownlie, Principles of Public International Law, 4th ed., 1990, pp. 598-601.

10. Published in UN doc HRI/GEN/1, 4 September, 1992, p. 25.

11. Ibid; this definition draws upon the definitions of racial discrimination and sex discrimination given, respectively, in Article 1 of ICERD, and Article 1 of CEDAW.

12. Abdulaziz, Cabales and Balkandali Case, Series A No. 94, p. 39, paragraph 82.

13. Paragraph 48 of the Commission's Report of 14 January 1993 in Application no. 13580/88, Karlheinz Schmidt v Germany, pending before the European Court of Human Rights.

14. The general principle of equality of treatment is derived not merely from the specific terms of the Treaties of the European Communities but from a broader general principle of law: see e.g., Case 199/84, Procuratore della Repubblica v Tiziano Migliorini [1985] ECR 3317, at 3331. The earliest cases in which the European Court of Justice defined the meaning of the concept of discrimination did not arise in a human rights context. They involved the interpretation of the European Coal and Steel Community Treaty : see e.g., Joined Cases 7 and 9/54, Industries Sidérurgiques

Luxembourgeoises v High Authority [1954-6] ECR 175, at 197; Joined Cases 32 and 33/58, Société Nouvelle de Pontlieue Aciéries du Temple v High Authority [1959] ECR 127, at 143; Joined Cases 17 and 20/61, Klöckner v High Authority [1962] ECR 325, at p. 345. See generally, Richard Plender QC, "Equality and Non-Discrimination", paper given at a seminar at University College London on 2nd November 1992, on Developments in European Administrative Law.

15. Case 147/79, Hoechstrass v Court of Justice [1980] ECR 3005 t 3019; Case C-217/91, Spain v Commission [1993] ECR.

16. Ramcharan, B., "Equality and Non-Discrimination", in Henkin, L. (ed), The International Bill of Rights: the Covenant on Civil and Political Rights, 1981, p. 246.

17. Ibid p. 251, at 253, suggests that Article 3 does not add anything to Article 2(1); see McKean, op. cit., n 9, p. 182 for opposite view.

18. Loc. cit., n 10, paragraph 12.

19. Communication no. 182/84. See also, to the same effect, Communication no. 172/84, Broeks v The Netherlands.

20. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the ECHR:

"shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Like Article 2(1) and 3, but unlike Article 26 of the ICCPR, the guarantee in Article 14 of the ECHR has no independent existence in the sense that it relates solely to discrimination in the enjoyment of matters covered by other Convention rights and freedoms : Marckx Case, Series A No. 31, pp. 15-16, paragraph 32. This does not mean that Article 14 is without meaning. It complements the other substantive guarantees, and is to be read together with them: Inze Case, Series A No. 126, p. 17, paragraph 36. For example, Article 6 of the ECHR (which guarantees a right of access to courts) does not compel States to institute a system of appellate courts. A State which does set up appellate courts goes beyond its obligations under Article 6. However, it would violate Article 6 read with Article 14 if it were to debar certain persons from those remedies, without a legitimate reason, while making them available to others : Belgian Languages Case (merits), Series A No. 6, pp. 33-34, paragraph 9. In Schuler-Zgraggen v Switzerland, Series A No. 263, the Federal Insurance Court was held to have discriminated on grounds of sex in breach of Article 14 by rejecting the applicant's claim to an invalidity pension on the basis of an assumption that women give up work when they give birth to child.

21. Loc. cit., n 10, paragraph 12.

22. Opsahl, T. "Equality in Human Rights Law with Particular Reference to Article 26 of the International Covenant of Civil and Political Rights", Festschrift für Felix Ermacora, 1988, p. 51, at pp. 53, 61.

23. Ibid, p. 52; Nowak, M., U.N. Covenant on Civil and Political Rights: CCPR Commentary, 1993, p. 459.

24. See minority opinion in Sprenger v the Netherlands (Communication no. 395/90) and Oulajin & Kaiss v the Netherlands (Communication nos. 406/90, 426/90). Such a limitation upon the justiciability of economic, social and cultural rights conforms to the more conventional view of the nature of these rights.

25. Communication no. 501/1992.

26. Paragraph 5.2, compare minority opinion in Sprenger.

27. The State party raised an argument at paragraph 8.3 that social security legislation tended to lag behind societal developments, to which the Committee did not expressly respond. A.W. Heringa interpreted this as a rejection of the State party's argument that the Article 26 obligations were not always of immediate application - see "Article 26 CCPR and Social Security", Newsletter, 6 NQHR (1988) 19, at 20, 24.

28. See Article 5, ICERD, and Parts I to IV of CEDAW.

29. CERD Communication no. 1/1984 (racially discriminatory termination of the employment of a Turkish national living in The Netherlands).

30. Diop v France, CERD Communication no. 2/1989. The Committee therefore considered a complaint to be ill-founded made by a Senegalese citizen living in France, who was excluded from the Bar of Nice on the basis of his nationality. There are, of course, limits as to what can be achieved by the judicial process, at a domestic as well as international level, in implementing the principle of equality of treatment without discrimination. Courts cannot provide a remedy for every social injustice or economic malady. Judges lack the constitutional authority as well as the expertise to make political decisions about the raising and disposition of public revenue on economic and social programmes, or about how those programmes should be planned and carried into effect. The judicial branch of government cannot take the place of the legislative and executive branches. Even an "activist" American Supreme Court, under Chief Justice Berger's leadership, was understandably unable to use the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution to tackle alleged "wealth discrimination" in the system of local property taxation in Texas, which had an adverse impact upon the educational opportunities of children of the poor : San Antonio School District v Rodriguez, 411 U.S. 1 (1972). See generally, Michaelman F., "On protecting the Poor through the Fourteenth Amendment", 83 Harv L. Rev. 7, 1969. However, it is submitted that it is well within the proper province of the CERD Committee to decide a case of the kind raised by Diop, and that its decision is too narrowly restrictive.

31. See e.g., E.H. v Finland (Communication no. 170/1984) (unsubstantiated claim to have been sentenced more heavily on the ground of belonging to the Romany minority in Finland; the "ground" here could also have been "national or social origin").

32. See e.g., Zwaan-de-Vries, above.

33. See e.g., T.K. v France (Communication no. 220/1987) and M.K. v France (Communication no. 222/1987)(complaints about the French courts' refusal to allow the use of the Breton language).

34. See e.g., Singh Bhinder v Canada (Communication no. 208/1986). In Hoffman v Austria Series A No. 255C, the European Court held that Article 8 read with Article 14 of the ECHR had been breached, where a mother was refused the custody of her children in the course of divorce proceedings mainly on the ground that she was a Jehovah's Witness and on account of the principles applied and the practices followed by that group.

35. See , eg., Bahamonde v Equatorial Guinea (468/1991).

36. See Jarvinen v Finland (295/1988), (distinction between those performing military service and conscientious objectors whose beliefs meant they had to perform alternative civilian service).

37. see above, n31.

38. Toonen v Australia (Communication no. 488/1992), paragraph 8.7.

39. Gueye et al v France (Communication no. 196/1985); "nationality" refers to one's administrative status as a certain State's citizen, whereas "national origin" refers to one's ethnic background.

40. Danning v the Netherlands (Communication no. 180/1984); and Sprenger v the Netherlands (Communication no. 395/1990).

41. Oulajin & Kaiss v the Netherlands (Communication nos. 405, 426/1990).

42. Blom v Sweden (Communication no. 191/1985) and Lindgren et al v Sweden (Communications no 298-99/1988).

43. Cavalcanti Araujo-Jongens v Netherlands (418/1990). However, a similar complaint in A.P.L.v.d.M. v the Netherlands (478/1991) was found inadmissible. It seems the Cavalcanti admissibility decision was influenced by the State party's failure to raise objections to admissibility.

44. Bayefsky, A., "The Principle of Equality or Non-Discrimination in International Law", 11 HRLJ 1, 1990, at p. 6.

45. See, e.g., B.d.B. v the Netherlands (Communication no. 273/1989).

46. Communication no. 218/1986, paragraph 1 of separate opinion.

47. The grounds of forbidden discrimination specifically mentioned in Article 14 of the ECHR, are also by way of example, rather than exhaustive. Any difference of treatment between individuals or groups in comparable circumstances, in an area covered by other Convention rights and freedoms, is capable of being discriminatory : Sunday Times Case (No. 2), Series A No. 217, p. 32, paragraph 58. One does not therefore have to establish membership of a "group" in order to ground a claim of

discrimination under the ECHR, as long as one can show that comparable individuals are being treated better than oneself. The test of "other status" may therefore be easier to satisfy under the ECHR than under the ICCPR.

48. Known in American legal parlance as "disparate treatment" discrimination.

49. Known in American legal parlance as "disparate impact" discrimination.

50. European Community case law was influenced by the decision of the U.S. Supreme Court in Griggs v Duke Power Co. 401 U.S. 424 (1971), and its progeny. That case law was effectively overruled in Wards Cove Packing Co. v Antonio 490 U.S. 642 (1989), where the Supreme Court severely weakened the degree of judicial scrutiny of employment practices which are fair in form but discriminatory in their effect. The Congress in turn overruled Wards Cove in the Civil Rights Act 1991. However, the Supreme Court has unfortunately ruled that disparate impact discrimination is not covered by the Equal Protection Clause of the Fourteenth Amendment to the American Constitution, even in cases of indirect racial discrimination, so that under the Equal Protection Clause, as distinct from Title VII of the Civil Rights Act, what is required is a racially discriminatory purpose: see e.g., Washington v Davis 426 U.S. 229 (1976).

51. [1994] 69 CMLR 8.

52. At 33-34; see Advocate-General Lenz at 26.

53. Advocate-General Lenz at 26.

54. At 22.

55. Eg. in UK law and maybe EC law (the ECJ was silent on the issue), direct discrimination is unjustifiable whereas indirect discrimination is capable of justification. Advocate-General Lenz took the view that both types of discrimination were capable of justification at 24. See generally Hepple, B., "Can direct discrimination be justified" EOR No. 55, May/June 1994, 48.

56. Loc. cit. n 10.

57. Advocate-General Lenz pointed out at 22 in his Enderby opinion that direct discrimination could be unintentional and unconscious; see also James v Eastleigh B.C. [1990] 2 AC 751, HL.

58. Communication no. 208/1986.

59. Paragraph 6.2.

60. See also Bayefsky, loc. cit., n44, p. 10.

61. Communication nos. 406/1990 and 426/1990), paragraph 7.5.

62. See also P.P.C. v the Netherlands (Communication no. 212/1986), paragraph 6.2), Vos v the Netherlands (Communication no. 218/1986), paragraph 11.2, H.A.E.d.J. v the

Netherlands (Communication no. 297/1988, paragraph 8.2), and A.P.L.-v.d.M. v the Netherlands (Communication no. 478/1991), paragraph 6.4.

63. Communication no. 478/1991.

64. Communication no. 218/1986.

65. Communication no. 418/1990, paragraph 7.4.

66. Adopted on 24th March 1993; paragraph 2.

67. This accords with the interpretation given to the Convention by Meron T., in "The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination", 79 AJIL 283, 1985, at p. 289: "facially neutral policies or practices that have a disparate impact on some racial groups should be prohibited, despite the absence of discriminatory motive."

68. Application no. 17175/90, D.S. v The Netherlands, Admissibility Decision of 12 October 1992.

69. Loc. cit., n 10, paragraph 13.

70. See Belgian Linguistics Case, A/6 (1968), paragraph 10, and commentary thereon by Eissen, M. "The Principle of Proportionality in the European Court of Human Rights", in MacDonald R., Matscher F., and Petzold H. (eds.), The European System for the Protection of Human Rights, 1993, 141. The Human Rights Committee based their test on the Belgian Linguistics test (Nowak, op. cit., n 23, 473, n 77), so it is submitted that the test has the same meaning as under the ECHR.

71. Oulajin & Kaiss v Netherlands (Communication nos 406/1990 and 426/1990) is a rare case where the Committee considered the questions of "objectivity" and "reasonableness" separately; see paragraph 7.4.

72. Nowak, op. cit., n 23, p. 473.

73. Communication no. 395/1990.

74. Communication no. 180/1984.

75. Communication no. 191/1985.

76. Communications no. 298-99/1988.

77. Communication no 196/1985.

78. Communication no. 195/1988.

79. Cossey Case, Series A No. 184, p. 17, paragraph 42.

80. E.g., Zwaan-de-Vries, Pauger v Austria (Communication no. 415/1990).

81. Compare the liberal approach of the Human Rights Committee in Toonen v Australia (Communication no. 488/1992) and the European Court of Human Rights in Dudgeon v United Kingdom Series A No. 45 with the illiberal approach of the U.S. Supreme Court, in Bowers v Hardwick 106 S. Ct. 2841 (1986).

82. The margin of appreciation applies in the enjoyment of other ECHR rights : see, e.g., Rees Case, Series A No. 106 at pp. 14-15, paragraphs 35-36 concerning Article 8, ECHR.

83. Inze Case, Series A No. 126, p. 18, paragraph 41.

84. See Rasmussen Case Series A No. 87, which concerned alleged discrimination against men in paternity litigation, at p. 15, paragraphs 40 and 41.

85. See Marckx Case, Series A. No. 31, p. 19, paragraph 41.

86. Communication no. 61/1979.

87. Ibid, paragraph 10.3.

88. See Schmidt. M., "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform", 41 ICLQ 645 (1992), at 657.

89. Ibid, p. 657.

90. See judgment of Judge Tanaka in South West African Cases (Second phase), ICJ reports, 18 July 1966, at 293, and ICJ advisory opinion in Namibia Case [1971] ICJ Reports 3, 57; see also the ECHR decisions in Abdulaziz, Cabales and Balkandali v UK, Series A No. 94, p. 40, paragraph 85; and Schuler-Zgraggen v Switzerland, Series A No. 263, paragraphs 64-67.

91. See Report of the Commission in East African Asians v United Kingdom, 14 December 1973, 3 E.H.R.R. 76.

92. Abdulaziz, Cabales and Balkandali Case, Series A No. 94, pp. 37-38, paragraph 78. In Schuler-Zgraggen v Switzerland, Series A No. 263, the Court held that a judicial decision based upon an assumption that many married women give up their jobs when they gave birth to a child involved unjustifiable sex discrimination in breach of Article 14 read with Article 6 of the ECHR.

93. See Bayefsky, loc. cit., n 44, p. 21, n 100.

94. For example, only Belgium has entered a reservation to Article 3 of the ICCPR.

95. See, e.g., Zwaan-de-Vries, Broeks v the Netherlands (Communication no. 172/1984), Avellanal v Peru (Communication no. 202/1986), Mauritian Women's Case (Communication no. 35/1978), Pauger v Austria (Communication no. 415/1990).

96. See Bayefsky, loc. cit., n 44, p. 23.

97. Inze Case, Series A No. 126, p. 18, paragraph 41; see also Vermiere Case Series A No. 214C.

98. Ibid, p. 19, paragraph 44.

99. McKean, op. cit. n 9, p. 288.

100. See the Advisory Opinion of the Permanent Court of International Justice in the case concerning Minority Schools in Albania, 6 April 1935, P.C.I.J. Series A/B No. 64, p. 19; and the Dissenting Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), [1966] ICJ Rep. 6, at pp. 250 and 284 et seq. The European Court of Human Rights has recognised that "certain legal inequalities tend to correct factual inequalities", and are compatible with the principle of non-discrimination : Belgian Languages Case (Merits), Series A No. 6, p. 34, paragraph 10. Accordingly, such policies are permissible provided that they do not undermine the principle of non-discrimination itself.

101. Loc. cit., n 10, paragraph 10. Emphasis added.

102. loc. cit., n 10, p. 3, paragraph 1.

103. loc. cit., n 10, p. 4, paragraph 2. Emphasis added.

104. See Nowak, M., op. cit., n 23, pp. 476-478.

105. Loc. cit., n 10, paragraph 10.

106. Nowak, M., op. cit., n 23, p. 477.

107. Communication no. 198/1985, paragraph 10.

108. see e.g., Johnston v Royal Ulster Constabulary [1987] Q.B. 129, ECJ, paragraphs 36 and 38.

109. In Case 345/89, Ministère Public v A. Stoeckel, decision of 25th July 1991, the ECJ held that the Equal Treatment Directive obliges the Member States not to prohibit night work from being done by women.

110. Non-legal measures are envisaged in the HRC's General Comment no. 4 (on Article 3), paragraph 2, loc. cit., n 10.

111. see, in favour of a duty to proscribe private discrimination, Ramcharan, op. cit., n 16, p. 261ff, Nowak, op. cit., n 23, p. 475ff, and, arguing the opposite view, Tomuschat, C., "Equality and Non-Discrimination under the International Covenant of Civil and Political Rights", in Festschrift fur Hans-Jurgen Schlochauer, 1981, at 691.

112. See also Kabaalioglu, H., "The Obligations to "Respect" and "Ensure" the Right to Life", in Ramcharan, B., (ed.), The Right to Life in International Law, 1985, 160, 161-2.

113. See Nowak, M., op. cit., n 23, p. 478; UN doc. A/C3/SR 1098 at paragraphs 6, 25; SR 1099, paragraph 2, and SR 1101, paragraphs 18, 52, where various State members of the Third Committee of the General Assembly suggested that, under the draft Article 26, States were obliged to eliminate discriminatory practices among private

parties in the sectors of education, employment, transportation, access to hotels, restaurants, theatres, parks and beaches; see also HRC member Mr Tarnopolsky at CCPR/C/SR 170, paragraph 82.

114. See McKean, op. cit., n 9, p. 139; UN docs. A/C3/SR 1097, 187; A/C3/SR 1098, 191; A/C3/SR 1099, 194; A/C3/SR 1100, 198; A/C3/SR 1101, 202; A/C3/SR 1102, 209.

115. Paragraph 9, loc. cit., n 10.

116. Article 2(1)(d) of ICERD and Article 2(1)(e) of CEDAW specifically oblige States parties to take all appropriate measures to eliminate race or sex discrimination, respectively, by any persons, group, or organisation.

117. CERD Communication no. 1/1984.

118. Ibid, see paragraph 9.3.

119. CERD Communication no. 4/1991.

120. Article 4, ICERD, reads, in part, as follows:

"States parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, ...

(a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

121. See paragraph 6.3.

122. Paragraph 6.4.

123. Paragraph 6.6.

124. The European Court of Justice has interpreted the non-discrimination provisions of the EEC Treaty as having direct effect upon individuals : see Case 36/74, Walrave and Koch v Association Union Cycliste Internationale [1974] ECR 1405 (discrimination based on nationality); and Case 43/75 Defrenne v SABENA (No. 2) [1976] ECR 455 (equal pay without sex discrimination). The equality directives are directly binding only upon public authorities : Case 152/84, Marshall v Southampton and South West Hampshire Area Health Authority [1986] ECR 723. However, the ECJ has also held that the objective of such directives is "to arrive at real equality and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed .... [T]hose measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the [private] employer." Case C-271/91, Marshall v Southampton and South West Hampshire Area Health

Authority (No. 2), decision of 2nd August 1993, paragraph 24. Furthermore, where a member State has not correctly transposed a directive into domestic law, so that a victim of discrimination has no remedy against his or her private employer, the victim may be able to obtain compensation from the State for the failure to take the necessary legislative measures : Joined Cases C-6/90 and C-9/90, Francovich and Others v Italian Republic [1991] ECR I-5357.