

The principle of non-discrimination

Ingunn Ik Dahl

ingunn.ikdahl@jus.uio.no

Non-discrimination in the 1966 Covenants

CCPR Art. 2.1: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized 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.”

CCPR Art. 26: “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.”

CESCR: Art. 2.2: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised **without discrimination** of any kind as to race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status.”

CEDAW preamble: “Concerned, however, that despite these various instruments extensive discrimination against women continues to exist”

CEDAW definition of discrimination

- Art. 1: “For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”
- CERD (1965) Art. 1.1
- CCPR Gen.Comm. 18 (1989) paras. 6-7
- CDESCR GC 16 (2005) para. 11

Laws with gender-biased effects

- Gender-specific laws
- Gender-neutral laws & the gender-specific reality
 - “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” (Anatole France)

Direct discrimination

- “Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.”
 - CESCR Gen.Comm. 16 (2005), para. 12
- “ ‘Direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.”
 - EU law: Directive 2006/54/EC (“implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”), Art. 2.1.a

Indirect discrimination: CEDAW

- “Indirect discrimination against women may occur when laws, policies and programmes are based on **seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women.** Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women’s life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.”
 - CEDAW Gen.Rec. 25 (2004), footnote 1

Indirect discrimination: CESC and EU

- “Indirect discrimination occurs when a law, policy or programme **does not appear to be discriminatory, but has a discriminatory effect** when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.”
 - CESC Gen.Comm. 16, para. 13
- “ ‘indirect discrimination’: where an **apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage** compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.
 - Directive 2006/54/EC, Art. 2.1(b)

Can differential treatment be allowed?

- Legitimate and objective distinctions
- Temporary special measures

Legitimate and objective distinctions

- “Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is **reasonable and objective**. This will include an assessment as to whether the **aim and effects** of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of **proportionality** between the aim sought to be realized and the measures or omissions and their effects.” CESCR GC 20, para. 13
- “ ‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, **unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary**”. Directive 2006/54/EC, Art. 2.1(b)

Temporary special measures: CCPR

- “The Committee also wishes to point out that the principle of equality sometimes 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. Such 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.”

CCPR GC 18, para. 10

Temporary special measures: CDESCR

- "The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.

Temporary special measures aim at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women. However, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination. As long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved, such differentiation is legitimate."

CDESCR GC 16, para. 15

Temporary special measures: CEDAW

- CEDAW Art. 4.1: “Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”
- CEDAW Gen.Rec. 25 (2004), para. 14:

“The Convention targets discriminatory dimensions of past and current societal and cultural contexts which impede women’s enjoyment of their human rights and fundamental freedoms. It aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.”

Ex: temporary special measures

- Different fields:
 - Politics
 - Academia
 - Education
 - Economic institutions
- Various justifications:
 - representation, qualifications, justice, signal effects...
- Different types:
 - Radical vs moderate
 - Quotas vs advantages vs encouragement

Differential treatment and gender equality

- The 1966 Covenants
 - CCPR Art. 3: “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.”
 - CESCR Art. 3: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”
- CEDAW
 - Art. 3: “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”
- Formal and substantive equality
 - CCPR GC 28 paras. 2-4, CESCR GC 16 paras. 6-8

Obligation to change structures: CEDAW

- Negative gender stereotypes
 - Art. 5: "States Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"
- And:
 - eliminate discrimination by private parties (Art. 2.e)
 - modify or abolish discriminatory "customs and practices" (Art. 2.f)

Preparations for seminar no. 1, Monday 1 March

- Get a copy of your home country's latest state report to the CEDAW Committee, and the Committee's comments ("concluding observations")
 - F.ex. from www.bayefsky.com
- Make yourselves familiar with:
 - The main problems in the implementation of the CEDAW, as identified in the report and comments
 - Which rights are most difficult & urgent?
 - Key obstacles to realisation of women's human rights
 - Advice & recommendations made by the Committee
 - Advancements made by the state