CEDAW and related instruments – the concept of equality and non-discrimination

*From formal equality and equality of opportunity

*Substantive equality and equality of result
CEDAW article 1

• “..any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing, nullifying the recognition, enjoyment or exercise by women.... Of fundamental rights or freedoms”

• Sex and gender/biological and social

General recommendation No. 28. 5
Objective and purpose

Substantive equality, general recommendation 25, 4 and 8 achieve de jure and de facto equality

• Direct discrimination

• Indirect discrimination

• Structural/systemic discrimination

• Multiple discrimination
Direct Discrimination

Direct discrimination occurs when an individual is treated less favourably than another in a similar situation for a reason related to a prohibited ground – sex – it also includes detrimental acts or omissions related to sex where there is no comparable similar situation.

- Advertisement for a job for one sex
- Insurance fees based on statistical sex difference - c-236/09
- Different sterilizations prices women/men
- Inheritance laws widows/daughter – Behe case, SA Constitutional Courts
- Pregnancy dismissal: Tele Denmark Case-
Objective justification

Absolute protection
Objective justification – aim a real equality
  * Rights to breastfeeding, abortion, pregnancy leave (article 4.2)
  * Use of temporary special measures (article 4.1)
  * Crizis centers for women, separate language classes for migrant women,
    separate swimming hours for women.
  * Male semen donor/female egg donor
  * Tenor/sopran singer
Indirect discrimination

- Indirect discrimination occurs when a law, policy, program or practice appears to be neutral as it relates to women and men, but has a discriminatory effect in practice on women, because pre-existing inequalities are not addressed by the apparently neutral measure.

* Not objectively justified, reasonable and proportional

- Exclusion of part-time working women from pension scheme - Bilka case
Indirect

- Prohibition against headscarves in the workplace
  - SAS Hotel Case – Equality tribunal – 8/2001

* Gender neutral crisis centre regulations

* Marriage laws defining contribution to matrimonial property as monetary
  * Women’s contribution kind and care

- Water investment projects that only encompass irrigated cash crop
  * Women often feed families with food from urban/rural kitchen gardens
Structural/systemic discrimination

- Systemic discrimination understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups and disadvantages for others (CESCR gen.rec.20, 12

* CEDAW includes elimination of the causes of discrimination against women, including the elimination of the causes and consequences of de jure or de facto inequality. Therefore temporary special measures is a means to realize substantive equality (CEDAW gen rec 25, 14
Article 4.1

CEDAW article 4.1 – Temporary special measures for women

- Necessary – documented under-representation of women

- Proportionate in relation to individuals from overrepresented sex
  - Politics – representativeness
  - Work – quality and competition
Proportionality test

- EU- case law
- The Marschall Case
- The University of Oslo case
- Quoata in favour of men
  - Strong reasons required
The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion of belief, health status, caste, sexual orientation. Discrimination on the basis of sex or gender often affect women from these groups in different ways and different degrees than men.

- Multiple grounds
- Intersecting grounds – the discriminatory result not ascribed to one single norm

- Norwegian Equality Tribunal – Hotel Opera
  - gender and race
Article 5.a

CEDAW article 5a and 2(f) duty for states parties to “take appropriate measures” 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 superiority of either sex or on stereotyped roles”

1) Formal laws based on stereotypes – change law
1) Decisions, actions based on stereotypes – individual complaint procedures, CEDAW Committee

- At v Hungary – Hungary found in violation of 5 a in conjunction with article 16.
- Juidad Juarez Inquiry

2) Measures to change stereotypes
- Gender segregated labour market Norway
  - Comment to Norway’s 7th report
- Customs inhibiting equal property rights
  - Abolition of custom
  - Dialogue with states brokered by civil society and different stakeholders