PRINCIPLE OF EQUALITY IN INTERNATIONAL LAW: THE RIGHT TO EQUALITY

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Abstract
Equality is not substantive norm of international law in the same sense as, for example, jurisdiction, or recognition, or the use of force. But it is concept that is much invoked, by judges, advocates, and scholars alike. Equality and the principle of non-discrimination are central to the enjoyment of human rights and freedoms. The article outlines the fundamental principles of the international law of equality and non-discrimination and their place in human rights law. It also examines the application of these principles to selected contemporary circumstances.

Keywords: *international law, principle of equality, dignity of human person, principles of non-discrimination*

1. Introduction

The traditional perception of the concept of equality in international law is rooted in Aristotelian thought, in which equality is defined as the corrective of the law.[1] Aristotle felt that the lawgiver could draft laws in general terms only, and that consequently laws could not attain their intended purpose in every case. Accordingly, in special cases the law needs to be tempered by equality in order to achieve a just result – a result the lawgiver would presumable have sought if he had foreseen the exceptional case. The Aristotelian concept of equality as the corrective of law made an early appearance in public international law.[2]

The right to equality and non-discrimination was not easily accepted by the international community. During the 1919 Paris Conference, held in the aftermath of the First World War, Japan worked intensively to have the principle of racial equality inserted in the Covenant of the League of Nations. Although a majority of eleven out of seventeen members of the Conference Commission voted in favour of the Japanese proposal, President Wilson of the United States "suddenly declared from the chair that the amendment had failed". In spite of vigorous protests by several delegates against this rejection of the amendment, President Wilson insisted – to the great disappointment of the Japanese delegation – that the amendment had not been adopted.[3] Logically, the League Covenant did not even contain any express reference to the principle of equality between States.[4]

In the 19th and early 20th centuries references to equality and the equitable powers of international arbitral tribunals appeared not infrequently. Following the conclusion of the peace treaties after World War I, there was considerable debate regarding the possible modification of

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[1] Encyclopedia of Public International Law, North-Holland, 1992, Vol. II, p. 109.

[2] Grotius, H., The Rights of War and Peace, Book 2, Chapter 16, Section 26.

[3] Paul Gordon Lauren, *Power and Prejudice – The Politics and Diplomacy of Racial Discrimination,* 2nd edn. (Boulder/Oxford, Westview Press), pp. 99-100, and, in general on the issue of racial discrimination, Chapter 3 on "Racial Equality Requested – and Rejected".

[4] See Keba Mbaye, "ARTICLE 2, Paragraph 1", *La Charte des Nations Unies – Commentaire article par article,* 2nd edn, Jean-Pierre Cot and Alain Pellet, eds. (Paris, ECONOMICA, 1991), p. 83.

terms of the treaties unfair to Germany by courts giving equitable competence to correct the legal rules.[5] These developments led to doctrinal debate between adherents of the schools of positivism and natural law regarding the role of equity in international law. Because the concept envisages the judge correction positive rules of law, positivists attacked its use as an unwarranted encroachment on State sovereignty and as an unwise grant of judicial discretion. On the other hand, the advocates of natural law applauded equity and judicial discretion as a means to attain more fairness and justice in international law.[6]

Progress was made, however, during the elaboration of the Charter of the United Nations after yet another global war of unspeakable horror which had its origin in deliberate and carefully systematized discriminatory practices embracing entire state structures. The world could no longer close its eyes to such vile practices and the threat to peace that they represented.

In the second preambular paragraph to the Charter of the United Nations, the peoples of the Organization express their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

According to Articles 1(2) and (3) of the Charter, the purposes of the United Nations are, inter alia, "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" and "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

While Article 2(1) expressly confirms that the "Organization is based on the principle of the sovereign equality of all its Members", the principle of non-discrimination in the observance of human rights is reaffirmed in Articles 13(1)(b), 55(c) and 76(c). The Charter of the United Nations testifies to the fact that international peace and security depend to a large extent on "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 55(c)).

What can with some justification be called international constitutional law is thus today solidly based both on the principles of equality between States and the equal worth of all human beings, although only the latter principle will be dealt with in this chapter.

Finally, equality has been considered, by the International Court of Justice (ICJ) in the North Sea Constitutional Shelf Cases, not simply as a matter of abstract justice but as 'a rule of law that calls for the application of equitable principles'.[7] This jurisprudence was more specifically developed in the Tunisia – Libya Continental Shelf Case where the legal concept of equality is held to be 'a general principle directly applicable as law'. The Court distinguishes this concept from other meanings of the term equality which have been used in the history of legal systems to define various legal concepts. To apply this principle means that the Court 'is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result'. This task is distinguished from rendering a decision *ex aequo at bono*:[8] 'While it is clear that no rigid rules exist as to the exact

[5] Ibid. Supra 1.

[6] See Jenks, C.W., Equality as a Part of the Law Applied by the Permanent Court of International Justice, Law Quarterly Review, Vol. 53, 1937, pp. 519-524; and Chen, B., Justice and Equality in International Law, Current Legal Problems, Vol. 8, 1955, pp.185-211.

[7] ICJ Reports, 1969, p. 48

[8] Article 38(2) of the Statute of the ICJ (which employs the identical wording as was used in Article 38 of the Statute of the Permanent Court of International Justice) provides that the Court has power to 'decide a case *ex aequo et bono*, if the parties agree thereto'. The notion *ex aequo et bono* had been little used before its addition to the

weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice'.[9]

Equality as the basis of decision can be applied as a rule of law only in connection with an evaluation of the circumstances relevant in the concrete case. These circumstances can be either facts or legal situations, or combination of both. To avoid the subjective elements of this evaluation running over into a decision *ex aequo et bono*, the relevance of the factual and legal circumstances and their relative weight must be elaborated using rational argument.[10]

2. Equality: Defining the Concept

The terms 'equality', 'equal', and 'equally' signify a qualitative relationship. 'Equality' (or 'equal') signifies correspondence between a group of different objects, persons, processes or circumstances that have the same qualities in at least one respect, but not all respects, i.e., regarding one specific feature, with differences in other features.[11]

'Equality' and 'equal' are incomplete predicates that necessarily generate one question: equal in what respect?[12] Equality essentially consists of a tripartite relation between two (or several) objects or persons and one (or several) qualities.[13] 'Equality' denotes the relation between the objects that are compared. Every comparison presumes a *tertium comparationis*, a concrete attribute defining the respect in which the equality applies – equality thus referring to common sharing of this comparison-determining attribute.[14] However, above all equality serves to remind us of our common humanity, despite various differences and in its perspective usage has, of course, a close connection with morality and justice in general and distributive justice in particular.[15]

It should be noted that equality was used frequently in international law during 19th century. Many international arbitrations provided for decision according to international law and equity. Then somehow at the beginning of 20th century things quited down and equity was used much less.[16] In 1960's when the ICJ began to consider disputes related to maritime boundaries in the

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PCIJ's Statute and was included there, with little debate, arguably to give the Court somewhat greater flexibility. However this result has not been achieved. No case to date has been heard by Court where it has been given this *ex aequo at bono* power. Article 38(2) poses a difficult problem for the Court. If *ex aequo et bono* is understood as a power to decide a case equitably outside the rules of law, should the Court be powerless to apply equality in the absence of specific agreement of the parties? It is with this question in mind that a distinction has sometimes been drawn between the *ex aequo et bono* power and the power to apply equality as a general principle of law. See Individual opinion of Judge Manley O. Hudson in the 1937 PCIJ Meuse Case (PCIJ, Series A/B, No. 70, p.73).

[9] ICJ Reports, 1982, p. 60.

[10] Ibid. Supra 1, p. 525

[11] 'Equality' needs to thus be distinguished from 'identity'- this concept signifying that one and the same object corresponds to itself in all its features: an object that can be referred to through various individual terms, proper names, or descriptions. Thus to say e.g. that the men are equal is not to say that they are identical. Equality rather implies similarity but not 'sameness'. See Westen, P., Speaking Equality (Princenton University Press, 1990), pp. 39, 120.

[12] See Rae, D., et.al., Equalities (Harvard University Pres, 1981), p. 132.

[13] Two objects a and b are equal in a certain respect if, in that respect, they fall under the same general terminus.

[14] Ibid. Supra 11, p. 10.

[15] See Albernethy, G.L., The Idea of Equality (John Knox, 1959); and Brown, H.P., Egalitarianism and the Generation of Inequality (Clarendon Press, 1988).

[16] In fact equality principles were applied in quite a number of cases, although often without express reference to equity. The Court would state it was well known that a particular principle existed as a general principle of international law accepted by most nations and then would apply it, never mentioning equity. See D'Amato, Anthony, International Law Anthology (Anderson Publishing Company, 1994), p. 102.

North Sea Continental Shelf Cases, it rediscovered equitable principles. The Court relied on the Truman Proclamation that said if the United States had any disputes about the continental shelf, they would be solved by agreement with the other country concerned, in accordance with equitable principles.[17] Because the Proclamation was followed by number of other states, the Court cited it as the beginning of a trend that established the principle the Court would follow.[18]

Certainly, in the North Sea Continental Shelf Cases and a number of following cases, various problems arose about what is equity, what are 'equitable principles' and what is an equitable result.

The first problem is the old distinction between equity meaning principles of general international law and equity meaning that the court should decide according to what is just and proper, which some call *ex aequo et bono*, an old well-known phrase. The phrase '*ex aequo et bono*' was used in a large number of treaties, starting with the General Act of Geneva in 1928, and the arbitration treaties that followed it. [19] Those treaties provided that, in principle, cases sent to the ICJJ should be decided according to Article 38(1), of the Statute of the Court.[20] There was also Article 38(2), however, which allows the Court to decide *ex aequo et bono* when the parties agree and, of course, some of those treaties amounted to such agreement. The majority of those treaties did not provide, however, for the court to decide *ex aequo et bono*; they provided instead for an arbitral tribunal to deal *ex aequo et bono* with disputes that were not legal. There was a second group of treaties, including the European Treaty on Peaceful Settlement in the 1950s, [21] that provided that if a tribunal could not find a rule of international law on the subject, it might deal with the subject *ex aequo et bono.*

Substantive principles present more of a problem, however. Equity under Anglo-American law means one thing, equity under continental law derived from Roman principles means something different. The same is true for equitable principles under Islamic law, Hindu law, Chinese law, and so on. Therefore, equity under international law is distinguished from equity under any national law. As the Court has said in several cases, equity under international law is different from equity in the domestics system. The Court has gone though this already. In North Sea Continental Shelf Cases,[22] the Court surprised the legal world by stating very clearly that it was going to apply equitable principles, and the only reason that Court had to give was that it did not want to apply the equidistance principle there, because it would have been so clearly unjust in that case.[23]

To better understand the role of equality in international law, legal doctrine identifies three possible applications of equality: *infra legem*, *praetor legem*, and *contra legem*. The first category

[17] ICJ Reports, 1969, p. 53. The Court was not actually required to delimit boundaries in North Sea Continental Shelf Case, this being achieved by successful negotiation among the parties after delivery of the Court's judgment. However, in two subsequent cases, the 1977 Continental Shelf Arbitration (France/United Kingdom) and the 1982 ICJ Tunisia-Libya Continental Shelf Case, the judges were themselves responsible for the actual demarcation. In both cases judgment followed the North Sea Continental Shelf Case and called for the application of equitable principles.

[18] Ibid.

[19] There are several multilateral treaties that provide for the settlement of international disputes by arbitration, including the Geneva General Act for the Settlement of Disputes of 1928, adopted by the League of Nations and reactivated by the UN General Assembly in 1949. That act provides for the settlement of various disputes, after unsuccessful efforts at conciliation, by an arbitral tribunal of five members.

[20] Namely, the four basic sources of international law.

[21] European Convention for the Peaceful Settlement of Disputes, (ETS No. 23), entered into force April 30, 1958.

[22] Ibid. Supra 7.

[23] The Court, in looking for solution, did not do what it was supposed to do, namely, to apply the law. In every decision that comes out of the Court, there are often some fascinating things hidden. See Ibid. Supra 16, p. 103.

is said to refer to the possibility of choosing between several different interpretations of the law. The making of such choices is inherent in the function of the judge and, as such, needs no special consent of the parties in a dispute. What is gained by terming the need to make choices as 'equal', is less certain – especially if no pretence is made that equality assists in how one makes choice.[24]

For some others every rule has various interpretations, all acceptable from the legal point of view, and equality allows the judge to choose in accordance with justice, having regard to the circumstances and balancing the rights and obligations of the parties.[25] Whether this is done by the use of compromise, or by giving different weight to alternative interpretations of law, or by focusing on the desired result, is never specified.

In the second sense, equality is seen as a gap-filler when the law is silent. The importance attached to this role depends upon an interior debate – namely, whether indeed there are lacunae in international law. For some authors equality *praetor legem* is not acceptable, because, while they believe that lacunae do exist, they hold that the role of the judge is simply to pronounce a *non liquet*.[26]

The third category is that of equality *centra legem* – that is to say, a softening of the application of an applicable norm, for extra-legal reasons. There is an almost infinite number of purposes which courts and writers see equity as fulfilling. For some, it allows the decision rather to embrace a 'just' solution. Thus the ICJ, in said that: 'When applying positive international law, a court may choose among several possible interpretations of the law to one that appears, in the light of the circumstances of the case, to closest to the requirements of justice'. This would be the application of equity *infra legem*.[27] In 1969 the Court, when elaborating a general basis of equity, said: ' Whatever the legal reasoning of a court of justice, its decisions must be definition be just and therefore in that sense equitable.[28] Justice is thus said to be the end served by equity; but also to be synonymous with equity.

Lastly, concerning the role of equality in international law two very general conclusions can be made. First, equity is one device by international law may be interpreted, supplemented or corrected. As such, its attractiveness will very depending upon perceptions regarding whether the established rules of international law should be changed and, if so, by whom and under what circumstances. Second, while notions of equity are often controversial in municipal legal systems, the role of equity in international law is especially difficult. With no effective international legislature, there will always be differences of opinion over the appropriate means of changing or even clarifying existing rules of international law. Thus the place of equality in international law will be as inherently controversial and problematic as are the fundamental questions regarding the creation and dissolution of the rules of international law themselves.[29]

3. The Scope of the Right to Equality and Non-Discrimination

The Universal Declaration of Human Rights (UDHR) in its preamble proclaims that 'recognition of the equal and inalienable rights of all members of the human family'. Likewise in its first article it states 'All human beings are born free and equal in dignity and rights'. Further in making reference to specific types of rights, the Declaration states that 'everyone. . . is entitled to

[24] See Higgins, R., Problems &Process: International Law and How we Use it (Clarendon Press, 1996), p. 219.
[25] Ibid.
[26] The specifying by the Court of criteria for shelf delimitation closely resembles equality *praetor legem*; but it is never characterized by the Court as such. Ibid. p. 220
[27] ICJ Reports 1982, p. 18, para. 71.
[28] ICJ Reports 1982, p. 11, para. 71
[29] Ibid. Supra 1, p. 112.

the realization . . . of economic, social and cultural rights indispensable for his dignity', and that these rights ensure 'an existence worthy of human dignity'.[30]

Likewise the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize in their preambles that the rights contained therein are derived from the inherent dignity of human person.[31]

It is widely accepted that equality and non-discrimination are positive and negative statements of the same principle.[32] In other words, equality means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality.[33]

Early in its first session the UN Sub-commission did not attempt to agree upon a legal definition but merely indicated the considerations which should be taken into account in framing the proposed Universal Declaration of Human Rights. 'Prevention of discrimination' was described as the prevention of any action which denies to individuals or groups of people the equality of treatment which they may wish. The Sub-commission held that differential treatment of such groups or of individuals was justified when it was exercised in the interests of their contentment and the welfare of the community as a whole. One illuminating conceptual breakthrough contained in the definitions was the clear distinction made between differentiation which may be justified in the interest of true equality, and discrimination which is based upon 'unwanted', 'unreasonable', or 'invidious' distinctions and which is never justified.[34] The Sub-Commission's formula was commented upon in a memorandum of the Secretary General of the UN entitled 'The Main Types and Causes of Discrimination'.[35] The text indicated that discrimination was meant any act or conduct which denied to certain individuals equality of treatment with other individuals because they belonging to particular groups in society. The prevent discrimination, therefore, some means had to be found to suppress or eliminate inequality of treatment which my have harmful results, aiming to prevent any act or conduct which implies that an unfavorable distinction is made between individuals solely because they belong to certain categories or groups in society.[36]

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[30] See the full text of the Declaration reprinted in Brownlie, I., Basic Documents on Human Rights (Clarendon Press, 1981), p. 25.

[31] Ibid., p. 118 and 128. Non-discrimination is also established in regional human rights instruments, including the European Convention, The European Social Charter and the Declaration Regarding Intolerance: A Treat do Democracy, all adopted by the Council of Europe; the African Charter on Human and Peoples' Rights, adopted by the Organization of African Unity; and the American Convention of Human Rights, adopted by the Organization of American States. Some UN conventions define discrimination. Article 1 (1), of the International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly resolution 2106 A(XX); and Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (Assembly resolution 34/180.

[32] Bayefsky, F., The Principle of Equality or Non-discrimination in International Law, 11 Human Rights Quarterly, 1990, p. 5.

[33] As regards to the individual rights to equality Dworkin distinguishes the right to equal treatment from the right to be treated as an equal. Equal treatment implies a right to an equal distribution of a opportunity, resource or burden. However, the right to treatment as an equal means sometimes the right not to receive the same distribution or some burden or benefit but to treated with the same respect and concern as anyone else. See Dworkin, Taking Rights Seriously (Harvard University Press, 1977), pp. 226-227.

[34] Mckean, W., Equality and Non-discrimination Under International Law (1983), p. 82

[35] UN Sales No. 49. XIV.3 paras. 6 and 7.

[36] The protection of minorities, on the other hand, although inspired by the 'principle of equality of treatment of all peoples' required positive action: concrete service is rendered to the minority group, such as establishment of schools in which education is given in the native tongue of the members of the group. The guiding principle is equality – 'if a child receives its education in language which is not its mother tongue, this might imply that the child is not treated on en equal basis with those children who. . . receive their education in their mother tongue'.

In the Commission on Human Rights, some delegates considered that the description of 'prevention of discrimination' was 'loose and unscientific' because the mention of equality of treatment without qualification was unacceptable given that absolute equality of treatment was obviously impossible to achieve. The insertion of the world 'justified' before 'equality' was suggested, but was opposed on the grounds that the word 'equality' used here in its legal sense did not mean 'absolute' equality but fair or justified equality, and that there was therefore no need for a qualifying adjective.[37]

The common terms 'distinction', exclusion', 'restriction', and 'preference' are all used to describe different treatment. Any of these terms would suffice to establish an action for the purpose of discrimination. 'Preferences' suggest that the action does not necessarily have to be directed against the group alleging discrimination, but may be effected through unreasonable promotion of one group at the expense of others. The Committee on Economic Social and Cultural Rights noted in the case of Vietnam that there was evidence of discrimination 'on the basis of preferences in favour of persons from certain groups'.[38] Moreover, the Human Rights Committee has stated in General Comment No. 18 that differentiation of treatment is permissible if: (1) the goal is to achieve a legitimate purpose; (2) the criteria for such differentiation are reasonable and objective, as illustrated in *Van Oord v The Netherlends*. [39] The Human Rights Committee held that there had been no violation of Article 26, observing that a differentiation in treatment is legitimate if it is based on reasonable and objective criteria. The difference in treatment in this case was based on different treaty arrangements.

In the *Belgian linguistic case*,[40] the court held that the non-discrimination principle was only violated if the distinction had no 'reasonable and objective justification'. The existence of such a justification must be assessed in relation to the aim and effects of the measures under consideration. That means that there must be a legitimate aim and a reasonable relationship of proportionality between the legitimate aim and the discriminatory measure under review. The objective of differentiation must be legitimate, and the means chosen must be appropriate and proportionate to the objective. It is normally not difficult for state to show that the policy under challenge has a rational aim. As to the means chosen, the court is relatively deferential to what is termed the 'margin of appreciation', that is, the state's discretion as to the appropriate manner in which to achieve its policy objective.[41]

However, like the Inter-American Court of Human Rights, the European Court of Human Rights has accepted that "the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment." On the other hand, "very weighty reasons" would have to submitted by the respondent Government before the Court would regard a difference in treatment as a legitimate differentiation under article 14, particularly if it was based exclusively on gender39 or birth out of wedlock.[42] These are some of the most detailed and authoritative legal rulings on the notion of equality of treatment and non-discrimination in international human rights law. They form the basis of the examples chosen below from the jurisprudence of the Human Rights Committee and the

Thus the protection of minorities requires positive action, provided that those concerned wished to maintain differences of language and culture. See UN Doc. E/CN.4/Sub.2/8 (October 1947).

[37] See UN Doc. E/CN. 4/S.R.32-41.

[38] See Doc. E/C. 12/1992/8, p. 2.

[39] CCPR General Comment No. 18: 10/11/89.

[40] Townshend-Smith, Richard, Discrimination law: Text, Cases and Materials, 1998, p.137.

[41] Weiwei, L. Equality and Non-Discrimination Under International Human Rights Law (Norwegian Centre for Human Rights, University of Oslo, 2004), pp. 7-10.

[42] Eur. Court HR, Case of Inze v. Austria, judgment of 28 October 1987, Series A, No. 126, p. 18, para. 41.

Inter-American and European Courts of Human Rights. The common traits of the case law of these bodies may be summarized as follows:

The principle of equality and non-discrimination does not mean that all distinctions between people are illegal under international law. Differentiations are legitimate and hence lawful provided that they:

- pursue a legitimate aim such as affirmative action to deal with factual inequalities, and
- are reasonable in the light of their legitimate aim.

In general, we can identify three elements, which are common to all forms of discrimination:

- actions that are qualified as discriminatory such as distinction, exclusion, restriction and preference;
- causes of discrimination, personal characteristics such as race, colour, gender, age, physical integrity etc.;
- purposes and/or consequences of discrimination, which have the aim, or effect of preventing victims from exercising and/or enjoying their human rights and fundamental freedoms. [43]

Finally, the word 'discrimination' taken alone is now commonly used in the pejorative sense, as being an unfair, unreasonable, unjustifiable or arbitrary distinction. The most obvious meaning of discrimination emphasizes hostility or prejudice, but it is important that a wider definition be adopted: first because the evidence suggests that disadvantageous differential treatment frequently occurs in the absence of prejudice or hostility, and second because of the difficulty inherent in defining or proving prejudice or hostility. Thirdly, there is the question of obtaining the necessary evidence.[44]

4. The Implementation of the Principles of Equality and Non-Discrimination: State Obligations

What is the effect of these equal rights provisions of the Charter and UDHR? Some scholars have characterized them as too vague to be enforceable, and are therefore opposed to undertaking international obligations which would supersede domestic jurisdictions which explicit, enforceable provisions.

The UDHR has been universally accepted. . As Humphrey writes,[45] 'whatever its drafters may have intended in 1948, it is now part of customary law of nations, therefore binding on all states.' This assertion is supported by the many statements of international conferences referring to it, and by state practice. It has been suggested that the UDHR has the attributes of *jus cogens*. As Weiwei writes,[46] 'This statement goes too far if intended to assert that all the rights enumerated in the UDHR have this character. But there is little doubt that the right to equality and non-discrimination has the character of *jus cogens*, because this right appears in both UDHR and

[43] Subsequently, a distinction has to be made between direct discrimination (describing the purpose), where the actor intends to discriminate against a person/group and indirect discrimination (related to consequences), where an apparently neutral provision or measure de facto disadvantages one person/group compared to others. See Understanding Human Rights: Manuel on Human Rights Education (Edited by Wolfgang Benedek, European Training and Resarch Centre for Human Rights and Democracy, Graz, 2006)pp. 105-106.

[44] See I.R.L.R 1977, p. 105; and I.R.L.R 1989, P. 173.

[45] Humphrey, The Implementation of International Human Rights Law, 24 NYL Rev., 1978, p. 32, cited in Weiwei, supra note 39.

[46] Ibid. Supra 39, pp.19-20.

ICCPR'. The *jus cogens* status is made explicit in the ICCPR provision that even when the life of nation is threatened by a public emergency, although the parties may take steps derogating from certain obligations under the Covenant, such measures may not involve discrimination solely on the ground of race, colour, sex, language, religious or social origin.[47]

Obligations under international law are addressed in the first instance to states. Their obligations are threefold: to respect, to ensure and to fulfill these rights.[48] Furthermore, Governments combat discrimination based on race, gender or ethnic origin by (a) promoting equality of opportunity by outlawing discrimination and making health care and education available to all and (b) seeking equality of results by granting preferences to members of disadvantaged groups. The second approach has been given a variety of labels, including benign quotas, reverse discrimination, reservation policy, employment equity, positive discrimination, positive action and affirmative action. In contrast with equal opportunity, which focuses on procedures and individuals, this approach is results oriented and group oriented. The two approaches are not mutually exclusive. [49]

It would seem apparent that states are capable of eliminating most *de jure* discrimination immediately. There is certainly little justification for introducing new legislation or administrative practices that are discriminatory. However, it would be wrong to suggest that the elimination of discrimination will always be capable of being achieved immediately. First, it is true that certain forms of corrective action will involve considerable financial expenditure. Second, where *de jure* discrimination may be eliminated by the creation and enforcement of relevant legislation, the existence of de facto discrimination, as evidenced through material inequalities and individual prejudice, is a matter that necessitates longer term social and educational efforts. Thirdly, the obligation under Article 2(1) of the ICESCR is progressive in nature. To fulfill the rights means that any person whose rights are violated would have an effective remedy. Rights without remedies have little value. The ICESCR requires states to ensure that effective and enforceable remedies are available to individuals in case of discrimination.[50]

Many Governments have created specialized bodies to promote equality of opportunity across races and between men and women. Typically these organizations report to a government department or ministry and have only promotional or consultative powers, although some have been given independence and the authority to investigate and act on complaints.[51]

There is an increasing tendency for legislatures to impose substantial penalties, including imprisonment, for discrimination by race or gender in recruitment, training and conditions of employment. A few countries, such as France, the Netherlands and Sweden, incorporate these provisions in the Penal or Criminal Code, but most countries enumerate them in specific acts of legislation.[52]

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[47] Article 4 (1) (2).

[48] To ensure was to take requisite steps, in accordance with its constitutional process and the provisions of the Covenant, to adopt such legislative or other measures which are necessary to give effect to these rights. Most Covenant rights need to be protected by specific legislative measures. The Human Rights Committee looked towards concrete legislative measures as evidence of state's commitment to eliminating discrimination. See UN Doc. E/C 12/1987/SR6, p. 3.

[49] In the United States, for example, courts frequently impose hiring quotas on organizations found guilty of discrimination against women or disadvantaged minorities.

[50] Ibid. Supra 39, p.23.

[51] Examples of the latter include the Equal Opportunities Commission and the Commission for Racial Equality in the United Kingdom, the Human Rights and Equal Opportunities Commission in Australia, the Human Rights Commission and Race Relations Conciliator in New Zealand and the Equal Opportunity Commission in the United States.

[52] See "Equality in employment and occupation", International Labour Conference, 83rd session (Geneva,

Furthermore, Adhering to a strict interpretation of equality before the law, many Governments and legal systems refuse to allow any discrimination, even benign discrimination, based on race, gender or ethnic origin. Others sacrifice the principle of non-discrimination (*de jure* equality) to varying degrees in order to promote de facto equality. The conflict between these two approaches is real. [53]

In addition, individuals are endowed with unequal amounts of wealth, talent, intelligence, physical strength and beauty. The International Bill of Human Rights does not address these inequalities or the income inequalities that result from them; it promises only *de jure* equality, not de facto equality.

No person has a right to a high paying job or to a university place; everyone has a right to compete, on the basis of merit, for jobs and university admission. Equal opportunity is a human right; equality of results is not.

The International Convention on the Elimination of All Forms of Racial discrimination and the Convention against Women allow Governments to implement temporary programmes that deny members of advantaged groups their right to equal opportunity in order to give preferences to members of disadvantaged groups. Such policies are discriminatory and violate the International Bill of Human Rights. Derogation of human rights, even temporarily, ought not to be done lightly. Article 4, paragraph 1, of the International Covenant on Civil and Political Rights allows similar derogation of human rights "in time of public emergency which threatens the life of the nation", but only "to the extent strictly required by the exigencies of the situation". The language that permits preferential policies is less restrictive, but it does suggest that preferences are acceptable only as an instrument to achieve equality of opportunity and rare never justified as permanent policy.

Effective enforcement of laws against racial, ethnic and gender discrimination can generate equality of opportunity for all members of society. But enforcement of anti-discrimination laws will not produce equality of results. To move towards this type of equality Governments routinely use taxation, along with expenditure on health, education and welfare to redistribute income from affluent members of society to the poor. Such income redistribution does not constitute a preferential policy, nor is it a violation of human rights, as long as an individual's tax bill and his or her access to public health, education and welfare does not depend on race, gender or ethnic origin.[54]

5. Conclusion

The legal principles of equality and non-discrimination are at the core of international human rights treaties and declarations. However, the progress achieved in the development of international covenants against discrimination does not mean that this system as a whole is now fully satisfactory. The advancement of standards prohibiting discrimination of persons belonging to various vulnerable groups is uneven. In some cases the prohibition is established by conventions, in others by non-binding declarations. The effectiveness of even the most advanced protective structures, based on international conventions, is diminished by the fact that they are not

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International Labour Office, 1996), pp. 80-83, and "Equality in employment and occupation", (International Labour Conference, 75th session (Geneva, International Labour Office, 1988), pp. 232-235.

[53] See Seymour Martin Lipset, "Affirmative action and the American creed", *Wilson quarterly,* vol. 16 (Winter 1992), pp. 52-62; and Jack Citrin, "Affirmative action in the people's court", The Public Interest, No. 122 (Winter1996), pp. 39-48.

[54] See UN Expert Group Meeting on Managing Diversity in the Civil Service, UN Headquarters, New York, 3-4 May 2001, pp. 6-9.

ratified by all states, and that upon ratification or accession many states parties have stipulated reservations that in many cases significantly limit the scope of the convention. Many more countries have ratified the conventions but have no put in place any enforcement mechanism at the national level. In the light of these limitations a call for further development of anti-discriminatory law would seem to be fully justified. A big step forward in eliminating discrimination can only be achieved if a collective effort is made both at the international level and by governments.[55]

[55] Ibid. Supra 39, pp. 25-6.