Equality and Non-Discrimination Under International Human Rights Law

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Together with equality before the law and equal protection of the law without any discrimination, non-discrimination provides the foundation for the enjoyment of human rights. As Shestack has observed, equality and non-discrimination "are central to the human rights movement."[1] This paper offers an overview of the sources of non-discrimination and the historical development of the concept, and examines in detail the scope of the principle of non-discrimination. The paper emphasis the domestic l implementation of the principle with a discussion of its application in China.

Sources of Non-Discrimination and Equality

UN Charter

Before 1945, the prohibition of discrimination was only dealt with in the so-called minority treaties, which were severely limited in their scope.[2] With the adoption of the UN charter, a non-discrimination clause applying to everyone became a recognized part of international law. The idea that the United Nations should become the international protector of the rights of the individual grew out of the tragic experience of the Second World War and the horrendous violations of human rights committed in the Holocaust. Many wartime leaders believed that the rise of Hitler could have been averted had there existed a strong international organization with the authority to address human rights issues in the 1930's. These leaders felt it was critical that the experience with the inter-war League of Nations, which was weak and lacked the power to deal with human rights issues, not be repeated. It was therefore expected that the UN Charter would contain provisions establishing an effective system for the protection of human rights. Unlike the League Covenant, which specifically excludes mention of racial and religious equality, the United Nations Charter drawn up at San Francisco has the promotion of human rights - in particular equality and non-discrimination – as one of its basic provisions. One delegate to the Third Committee went so far as to say that the "United Nations Organization had been founded principally to combat discrimination in the world."[3] The three main provisions discussing human rights in the UN Charter are Articles 1(3), 55(c) and 56. In addition, other Articles of the Charter make it clear that human rights protection is a fundamental part of the UN's mission: the Charter states that the UN aims to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"[4] and "promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[5]

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[1] Jerome Shestack, " The Jurisprudence of Human Rights", in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues,* 1984, p. 101.

[2] Such treaties were signed between the victorious Allies and Poland, Czechoslovakia, Yugoslavia, Romania, Greece, Austria, Bulgaria, Hungary, and Turkey, and were guaranteed only in so far as they affected members of such minorities.

[3] UN document. A/C 3/ S.R 100, 7, cited in Warwick Mckean, *Equality and Discrimination under International Law*, 1983, p. 59.

[4] UN Charter Article 1(2).

[5] id Article 13 (1).

However, these provisions did not establish immediate obligations to guarantee or observe human rights, nor did they define what was meant by "human rights and fundamental freedoms." Instead, they imposed the vague obligation to "promote…universal respect for, and the observance of, human rights" and to take "joint and separate action in co-operation with the Organization" to achieve this purpose. The only unambiguous provision in the Charter is the prohibition of discrimination.[6]

Universal Declaration of Human Rights

At the inaugural conference of the United Nations held in April 1946, the representatives of Cuba, Mexico and Panama had proposed that the conference should adopt a declaration on the essential rights of man. However, there was insufficient time available to discuss the proposal, and at the first session of the UN General Assembly, Panama submitted a draft declaration on fundamental human rights and freedoms. The General Assembly decided to refer the draft to the Economic and Social Council for detailed consideration by its Commission on Human Rights. The Commission spent two years working on a draft, with the instruction that the bill should be acceptable to all, short, simple and easy to understand. The draft bill was presented to the third session of the General Assembly, and in December 1948 Resolution 217A was adopted, known thereafter as the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights (UDHR) elaborates the UN Charter's equal rights prescriptions; the principle of equality pervades the declaration. Of the thirty articles, some are in one way or another explicitly concerned with equality, and the rest implicitly refer to it by emphasizing the all-inclusive scope of the UDHR, as in the following Articles (emphasis added):

> Article 1. *All* human beings are born free and equal in dignity and rights.
>
> Article 2. *Everyone* is entitled to all the rights and freedoms set forth in the Universal Declaration 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 4. *No one* shall be held in slavery or servitude.
>
> Article 7. *All* are equal before the law and are entitled without any discrimination to equal protection of the law.

International Covenants

Just beneath the Charter and the Universal Declaration in importance are two international covenants which offer detailed provisions and provide means of implementation: the Covenant on Civil and Political Rights (ICCPR, 1966), and the Covenant on Economic, Social, and Cultural Rights (ICESCR, 1966). The principal clause on non-discrimination is found in Article 26 of the ICCPR:

[6] Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights", 19 *Human Right Quarterly*, 1997, p. 707.

> *All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit 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 ICESCR also contains general and specific non-discrimination clauses, which are similar to the ICCPR[7].

Treaties in Specific Fields

The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) is one of the first major conventions to elaborate on the contents of one of the non-discrimination grounds of the UDHR. Although it largely repeats the discrimination provisions of the covenants, its existence as a separate instrument underscores the significance which the international community places on non-discrimination. Another addition to the body of United Nations equal rights jurisprudence is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), promulgated in 1979.

Regional Human Rights Conventions

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR,1950) and the American Convention on Human Rights (ACHR,1969) also contain similar non-discrimination clauses. (ECHR Article 14, ACHR Article 24)

The Scope of the Right to Equality and Non-Discrimination

What is Meant by Discrimination?

Before proceeding with the discussion of the right to equality and non-discrimination, it is important to review the concept of discrimination and its relationship with the concept of equality. It is widely accepted that equality and non-discrimination are positive and negative statements of the same principle.[8] In other words, equality means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality.

The Sub-commission on the Prevention of Discrimination and Protection of Human Rights was created by the United Nations specifically to deal with questions of discrimination. Early in its first session, the 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

[7] See ICESCR Article 2 (3), 3.

[8] Ann F. Bayefsky, "The principle of Equality or Non-discrimination in International Law", *11 Human Rights Quarterly*, 1990, p. 5.

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.[9] 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 word '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.[10]

The ICCPR and ICESCR neither define the term "discrimination" nor indicate what constitutes discrimination. However, CERD Article 1 defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on the equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. CEDAW Article 1 also defines "discrimination against women" as 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.

Although these conventions deal only with cases of discrimination on specific grounds, the term discrimination should be understood to imply 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 equal footing, of all rights and freedoms.[11]

From the definitions of discrimination provided in the above-mentioned conventions, we can see that a universal 'composite concept of discrimination' can contain the following elements:

Stipulates a difference in treatment;

And has a certain effect;

Which is based on a certain prohibited ground.

A. Differential Treatment

The common terms 'distinction,' 'exclusion,' 'restriction,' and 'preference' are all used to describe differential treatment. Any one of these terms would suffice to establish an

[9] Warwick Mckean, Equality and Non-Discrimination Under International Law, 1983, p. 82.

[10] See UN doc.E/CN. 4/S.R.32-41, cited in Warwick, supra note 12, p. 83.

[11] See The Human Rights Committee General Comment No. 18.

action for the purpose of discrimination. 'Preferences' suggests 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."[12] As one commentator has noted, "the discriminatory or equal treatment of one person must be measured by the relative treatment of somebody else."[13]
Although differential treatment is a prerequisite, it is not in itself sufficient to establish a case of discrimination. For example, in some cases, preference may legitimately be given to members of specific racial groups for the purpose of authenticity, e.g. a film producer might require an actor of a particular racial background. In the *Mauritian women's* case,[14] the Human Rights Committee in finding a violation of articles 2(1) and 3 of the ICCPR considered that a distinction based on gender was not in itself conclusive. The determining factor was that no 'sufficient justification' had been given for such a distinction. It is clear that not all differentiation of treatment constitutes discrimination under the Covenants. 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 Netherlands*.[15] Mr. and Mrs. Van Oord are former Dutch nationals who immigrated to the United States, where they remained and later became US nationals. Their Dutch pensions were taxed, whereas former Dutch nationals who had emigrated to Australia, Canada and New Zealand, and who had become nationals of those countries, received Dutch pensions which were not taxed. The different treatment was due to the details in separate bilateral treaties that the Netherlands signed with those countries. Mr. and Mrs. Oord claimed, *inter alia*, that the difference in pension treatment violated their rights to non-discrimination under 26 of the ICCPR. The Human Rights Committee held that there had been no violation of Art. 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,[16] 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 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 that objective. It is

[12] Concluding observations on report of Vietnam, E/C. 12/1993/8, at p. 2.

[13] Y. Dinstein, "Discrimination and International Human Rights," (1985), Israel Yearbook of Human Rights, cited in Matthew C.R. Craven ,*The International Covenant on Economic, Social, and Cultural Rights*, 1995, p. 164.

[14] HRC Resen. 9/35, UN Doc. A/36/40, at 134.

[15] http://www.unhchr.ch

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

normally not difficult for the 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.

B. Purpose or Effect

There are four human rights treaties which contain explicit definitions of discrimination. In addition to the CERD and CEDAW which were mentioned above, the International Labor Organization (ILO) Convention No.111 Concerning Discrimination in Respect of Employment and Occupation (1958) states:

> *For the purpose of the this Convention the term 'discrimination' includes: (a) any distinction, exclusion or preference made on the bases of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.*

According to the UNESCO Convention Against Discrimination in Education (1966),

> *For the purpose of this Convention the term 'discrimination' includes distinction, exclusion, limitation or preference which being based on race colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.*

All of the four conventions refer to the 'effect' of that differential treatment. Three of them, except the ILO Convention, find discrimination by looking at 'purpose or effect.' 'Purpose' can be inferred as containing a meaning of 'intention'. The ILO Convention No.111 refers only to 'effect', omitting the concept of 'purpose,' while the other three conventions use the words 'purpose or effect.' The use of the word 'or' rather than 'and' indicates that 'purpose' can be deprioritised in comparison with 'effect'. Since the concept of purpose contains a meaning of intention, it is difficult to define and prove the subjective intention necessary in order to establish a discriminatory act. Consequently, a discriminatory intention is not a necessary element of discrimination. The emphasis on the 'effect' of policy rather than the intention means that neutral measures will be considered 'discriminatory' if in fact they negatively affect a group in society that has been singled out for protection. In the *South West Africa* cases (second phase) 1966,[17] Judge Tanaka in his dissenting opinion dealt with the substantive issues raised by the applications. South Africa argued that the policy of apartheid was required for the purpose of the promotion of the well-being and social progress of the inhabitants of the Territory, and produced many witnesses and experts to support their claim. Judge Tanaka, in explaining what was in his view a customary interpretation of the international law on non-discrimination based on race, found that different treatment is permitted when it is just or reasonable, and justice or reasonableness excludes arbitrariness. He said, "The

[17] *South West Africa Case*, Second phase, I.C.J Report, 18 July, 1966.

arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to motive or purpose." He concluded, "The practice of apartheid is fundamentally unreasonable and unjust. The unreasonableness and injustice do not depend on the intention or motive of the Mandatory, namely its *mala fides*."

It is instructive here to consider the ways in which domestic courts in their jurisdictions have dealt with these questions.

A central trend in the development of discrimination law in many domestic jurisdictions has been the movement from a requirement of intention to ground a complaint to the recognition of adverse effect of discrimination. Initially, liability for discrimination was circumscribed very narrowly, requiring a form of intention that was tantamount to malice. Now discrimination law has tended to swing from one extreme to the other, from an exclusive focus on the moral blameworthiness of the defendant to a focus solely on the effects of discrimination on its victims. Some commentators analyze this change from the perspective of tort law.[18]

The word 'discrimination' taken alone is now commonly used in the pejorative sense, as being an unfair, unreasonable, unjustifiable or arbitrary distinction, both in English and in other languages. 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. In the United Kingdom, for example, one of the most common reactions to domestic claims of discrimination is, 'How can this be proven?', and the assumption is that a discriminatory intention must be an essential element of the wrong.

Proof of discrimination has three elements: first, we must know how discrimination is defined in the legal context in which it is purported to appear. Secondly, we must identify what must be proved in order to establish that discrimination has occurred. Here the question of intention arises. Thirdly, there is the question of obtaining the necessary evidence. In *Peake v Automotive Products,*[19] there was a prior question before the court to be considered, namely, whether there had been any intention on the part of the respondent to discriminate. Mr. Peake claimed sex discrimination because his employer allowed women to leave work five minutes earlier than men. It was accepted that they did this for the benevolent motive of avoiding the congestion which would occur if all employees finished work at the same time. It was obvious that men and women were differently treated, and that men were treated less favourably by having to wait or work for an extra five minutes, but was the treatment 'on the grounds of sex'? Judge Phillips in the Employment Appeal Tribunal held that motive was immaterial. He stated, "[Sex Discrimination Act] requires one to look to see what in fact is done amounting to less favourable treatment, and whether it is done to the man or woman because he is a man or woman. If so, it is of no relevance that it is done with no discriminatory motive."[20]

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[18] Denise G. Reaume, " Harm and Fault in Discrimination Law: the Transition from Intentional to Adverse Effect Discrimination", *http: /www.paper.ssm.com*.

[19] I.R.L.R 1977, p. 105, cited in Bob Hepple, Erika M. Szyszczak (eds), *Discrimination: The Limits of Law*, 1992, p. 54.

[20] Bob Hepple, Erika M. Szyszczak (eds) supra note 23.

Sitting in the same Employment Appeal Tribunal, Lord Denning took a different view, arguing that the employer's worthy motive justified his action. Another way to put the argument advanced by Lord Denning would be to say that it is permissible to treat a person of one sex or race less favourably than another sex or race, provided one does so with an overriding benevolent purpose. This would be to permit acts disadvantaging minorities in the interest of what an individual judge might decide to be a counterbalancing advantage to society as a whole or to another section of it.[21]

Moreover, there is a way for the employer to achieve her original aim without raising the spectre of discrimination: allowing some of the employees (including both women and men) to leave five minutes earlier and requesting the other employees (including both women and men) to remain longer, while allowing them to take turns between groups. (interview with Ronald Craig)

In the United Kingdom at least, the tide of case law has moved against such a subjective approach. *In R. Birmingham City Council ex prate Equal Opportunity Commission*,[22] the House of Lords upheld the decision of the Court of Appeal, namely that the test of Judge Phillips in *Peake* was the correct one: motive was immaterial, and what was relevant was whether the differential treatment was based on the target's sex or race.

C. Grounds upon which Discrimination is Prohibited

Concerning the grounds upon which discrimination is prohibited, there are three types of ways to address this issue in legislation. One is to frame a broad open-textured equality guarantee, stating simply that all persons are equal before the law, without specifying any particular grounds. This approach leaves it to judges to decide when a classification is prohibited. For example, the US constitution simply states, in the Fourteen Amendment, that no state may "deny to any person within its jurisdiction the equal protection of the law". A second approach is to formulate legislation containing an exhaustive list of grounds. This contrasts with the first approach in that the choice of ground leaves no discretion to the judges. Grounds can be added or removed only legislatively, and not judicially. This fixed-category approach is found in both United Kingdom anti-discrimination legislation and in the law of the European Union.

The last approach specifies a list of grounds of discrimination, but indicates that the list is not exhaustive. This is the approach adopted not only in the primarily international human rights instruments like the ICCPR, the UDHR and the ECHR but also in some domestic legislation, e.g. the Canadian charter of rights and the South African constitution. This approach is distinguished by two factors. The first is that these non-discrimination articles contain an enumeration of grounds of discrimination, concluded by referring to "other status." Secondly, they do not impose any standard whatsoever as to how to assess what constitutes unequal treatment. The definition of what exactly constitutes discrimination in the context of these articles is left to the courts. It gives judges some discretion to adopt variable standards, lends weight to the notion of

[21] Bob Hepple, Erika M. Szyszczak (eds) supra note 23.

[22] I.R.L.R. 1989, p. 173.

reasonable justification and extends the list according to a set of judicially generated principles.[23]

During the drafting of the United Nations Charter, it was argued that it would be unwise to limit possible bases for discrimination to race, sex, language, or religion, since discrimination, whether open or disguised, could also occur based on opinion, country of origin, nationality, social status, etc. However, the phrase used in Article 55 of the Charter did not attempt to limit definitively the types of distinction upon which it was forbidden to discriminate, but merely enumerated the most common variants. Article 62 empowers the Economic and Social Council to make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedom *for all*. The affirmative 'equality' formulation '*for all*' is very important. Later formulations such as that in Article 14 of the European Convention of Human Rights not only give a longer list of types of distinction but also add the phrase 'such as' or 'other status,' to indicate that these are not exhaustive. It is clear that the use of words 'such as' means that other unstated grounds for discrimination could also contravene these articles. This open-ended provision has one particular significance: in determining whether a given distinction violates the non-discrimination principle, it whether the ground is covered by the non-discrimination provision or not is not germane to the argument. For example, the European Convention on Human Rights Article 14 has been interpreted by European human rights courts in the context of the following distinctions, none of which is expressly set out in Article 14: stateless individuals, migrant workers, refugees, unmarried couples and parents, people with AIDS, homosexuals, individuals with disabilities, the poor and the elderly. Clearly, this does not mean that all differences in treatment based on such grounds are discriminatory. For example, it is accepted in a number of countries that elderly may be deprived of their right to work through compulsory retirement. But it does mean that differences justified on such grounds will be subject to a stricter level of scrutiny than others.[24] However, according to Bayefsky,[25] some individual communications suggest that the Human Rights Committee does not intend to interpret the ICCPR in the same way as the European Court interprets the similar language of the European Convention. In *B. v Netherlands* a distinction was made by a public administrative agency between physiotherapists who had been directly notified of the lack certain insurance obligations and those physiotherapists who had not been directly notified. The Committee found the case to be inadmissible and in so holding stated:

> *The Committee also recalls that Article 26, second sentence provides "…other status." The Committee notes that the authors have not claimed that their different treatment was attributable to their belonging to any identifiably distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status" referred to in Article 26.*

In other words, the Committee is suggesting that despite the language of Article 26, which states that discrimination is prohibited on any ground, they will nevertheless limit the scope of the Article to cases involving grounds which are explicitly enumerated or

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[23] Sandra Fredman*, Discrimination Law*, 2001, p. 68.

[24] Craven, supra note 16, p. 171.

[25] Anne F. Bayefsky, supra note 11, p. 6.

which can be said to come within the words of "other status." But European Court of Human Rights did not even find it necessary to state the particular ground of distinction involved. In *Rasmussen v Denmark*,[26] the court states:

> *For the purpose of Article 14, the Court accordingly finds that there was a difference of treatment as between Mr. Rasmussen and his former wife as regards the possibility of instituting proceeding to contest the former's paternity. There is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive.*

Then comes the question: is there a hierarchy of forms of discrimination? Professor Hilary, in analyzing the inadequacies of the international legal account of equality and non-discrimination, pointed out that international law has developed a hierarchy of forms of discrimination.[27] In his opinion, discrimination based on race is typically regarded as considerably more serious than other forms of discrimination. This hierarchy can be seen most clearly in judicial and academic discussion of norms that have attained the status of *jus cogens* or obligations *erga omnes* (binding all states).In the *Barcelona Traction case* the International Court of Justice referred to the category of *erga omnes* obligations as including specifically "the basic human rights of the human person, including protection from slavery and racial discrimination."[28] Other forms of discrimination are seen as more easily justified, particular in the case of discrimination against women.

Although discrimination on the grounds of sex is prescribed by treaty, and the Women's Convention has over 160 parties, its lesser status in the hierarchy is indicated by the reservations made by states. More than fifty states have entered reservations to the Convention, many of which undermine the basic obligations set out in the treaty.[29] The most sweeping reservations have been made in the name of religious and cultural rights. For example, New Zealand made a reservation to provisions of the Convention with respect to the Cook Islands, "to the extent that customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with Article 2(f) and 5(a)".[30]

Clearly, treaty prohibition of discrimination has been fully developed mainly in the limited contexts of race and sex. Although Article 26 of the ICCPR uses the extremely wide language of "other status", the practice of Human Rights Committee has indicated, as Professor Hilary notes, that "there is little development outside the specified grounds. International law has not seemed able yet to respond to issues of inequality on the basis of disability or sexuality."[31]

What is Meant by 'Equal Protection of the Law'?

UDHR Article 7 reads: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Almost identical language is found in the first sentence of Article 26 of the ICCPR. From the beginning, the words "equal

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[26] HRLR17, 1985.

[27] Hilary Charlesworth, "Concept of Equality in International Law," Grant Huscroft & Paul Rishworth (ed) *Litigating Right*s, 2002, p. 143.

[28] I.C.J Report, 1970, pp. 3, 32.

[29] see http://www.untreaty.un.org

[30] Hilary Charlesworth, supra note 31.

[31] Hilary Charlesworth, supra note 31.

protection of the law" caused confusion.[32] During debates on the draft of Declaration, one representative described the principle of equality of rights as "a very ambiguous one," while others claimed that it was a very clear principle which had been defined for centuries. . Mr. Cassin agreed, quoting the famous phrase from Article 1 of the 1789 French Declaration of Rights: "Men are born equal and remain free and equal before the law." This was a broad definition but it was not, in his view, necessary to specify the principle in too much detail. But Belgium opposed the immediate acceptance of the principle of equality, arguing that it was necessary to define the concrete rights attached to the concept.[33]

Article 7 embodies two concepts:

(1) equality of all before the law;

(2) equal protection of the law without discrimination ;

It is unclear what the relationship is between the ideas expressed in (1) and (2). Does formulation (2) mean that there should be laws which should be applied equally, or that all are equally entitled to the protection of whatever laws existed?[34] According to the Australian representative, it meant that all individuals are entitled to equal treatment under whatever laws existed. 'Equality before the law' means that everyone is entitled to the impartial application of the law, whatever that law may be. A statement that certain rights are to be equally enjoyed by everyone irrespective of race, sex, religion, or other status merely means that only those rights are to be enjoyed equally by all. The 'equal protection' formulation, on the other hand, has a much broader application. It means that the substantive provisions of the law should apply to everyone equally. This does not mean that everyone should be treated in exactly the same way but that they should not be discriminated against, i.e. treated differently on irrational, arbitrary grounds. Despite this explanation, the drafting of the articles was not entirely felicitous and there was no compelling reason for not amalgamating them.

This lack of clarity and felicity persists under ICCPR. Professor Robertson analyzes the alternative interpretation as follows:[35]

> Broadly speaking, two quite different meanings seem possible: that the substantive provisions of the law should be the same for everyone; or that the application of the law should be equal for all without discrimination. The former interpretation would seem unreasonable; for example, in most countries women are not required to perform military service, while it is unnecessary that the law should prescribe maternity benefits for men. It would seem therefore that the meaning rather is to secure equality, without discrimination, in the application of the law, and this interpretation is borne out by the travaux preparatoires.

This view was reaffirmed by the General Comment of Human Rights Committee No. 18, which states, "the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.

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[32] Richard B. Lillich, "Civil Rights" in Theodor, supra note 1, p. 132.

[33] Warwick Mckean supra note 3, p. 63.

[34] See e.g. United Kingdom representative in the Commission, UN doc. E/ CN.4 S.R.52, cited in Warwick Mckean, supra note 3.

[35] A. Robertson, *Human Rights and the World,* 1972, pp. 86-90, cited in Theodor, supra note 1, p. 132.

Professor Eide offers an overview of this historical development of the concepts of equality before the law and equal protection of the laws and non-discrimination by way of the law:

> *The terms "equality before the law," "equal protection of the laws" and "non-discrimination by way of the law" express related but distinct ideas. However, they seem to have developed in that order at different stages during the 18th, 19th and 20 centuries. ...The range of human rights was considerably extended from the 18th-century notion of "natural rights" to the international system of the 20th century. The concern with equality expanded correspondingly.*
>
> *The scope of state legislation was rather narrow in the 18th century. Equality before the court, which interpreted and applied customary law, was therefore a priority. The other priority was to avoid arbitrariness in the use of power by the executive; hence the concern with legality. Interference by the state with the freedom of the individual, being made in accordance with the general law which in itself, should be equally applicable to all, hence "equality before the law".*
>
> *During the period of economic liberalism in the early and middle part of the 19th century, the state was not expected to interfere much with the private sphere, roughly coinciding with the domain regulated by private law. Social or material inequality was not held to be something with which the state should interfere. The private sphere was extensive, including most economic activities, where inequality became rampant. At its extreme, some even held that slavery was within the private sphere since slavery is a form of property. This, however, was very difficult to reconcile with the notion that everyone was born and should remain free. Slavery was prohibited during the course of the 19th century. To give effect to this prohibition, however, states had to extend protection to persons who might otherwise have been treated like slaves. From this and similar concerns emerged the notion that everyone should have the right to "equal protection of the laws". Since slavery had in recent centuries been based on race, its initial focus was on equal protection regardless of race….*
>
> *Industrialization made social relations more complex, and the scope of legislation extended greatly. Protection had to be provided against disability resulting in from industrial accidents, against loss of income caused by illness, by old age, or by unemployment. To some extent the burden was placed on the employer. Equal protection by law thus received a more extended meaning, in addition encompassing economic and social rights ….*[36]

Autonomous or Limited Character?

(A) ICCPR Article 26

ICCPR Article 26 stipulates in part 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 discrimination….." (emphasis added). It is suggested that the second sentence of Article 26, if it stood alone, would constitute an important and far reaching commitment and a general protection against discrimination. But the words "in this respect" were added at the beginning of this sentence, so that its scope is now limited to

[36] Asbjørn Eide & Tørkel Opsahl, "Equality and None- Discrimination", written communication presented in Proceedings of the 7th International Colloquy on the European Convention on Human Rights, p. 103.

the general statement of equality and equal protection contained in the preceding sentence.[37] According to one of the experts on this subject,

> *The second sentence as amended…makes the article an accumulation of tautologies. It now says, inter alia, that the law shall prohibit any discrimination in respect of the entitlement not to be discriminated against. It says further that the law shall guarantee to all persons equal and effective protection against discrimination in respect of their entitlement to equal protection of law. In other words, the second sentence (of Article 26) has no normative content at all…*[38]

This interpretation is consistent with the approach taken in Articles 2 and 7 of the UDHR. As Robertson argues, Article 2 does not lay down a general rule of equality but only of equality in regard to the rights and freedoms set forth in the declaration. In other words, Article 2 cannot be considered as having established the right to equal treatment as a human right, but only as a principle of Declaration. Therefore inequality in anything which does not specially represent a human right under Declaration could not be considered a violation of Article 2.[39] Therefore, both Articles 2 and 7 of the UDHR and Articles 2(1) and 26 of the CCPR mandate non-discriminatory treatment only in so far as the rights set out in the respective human rights instruments are concerned. Although they guarantee one important civil right to all persons on a non-discriminatory basis, they cannot be read to constitute a general norm of non-discrimination invocable in other contexts, but rather limited to the rights considered in the instruments.

However, there is a contrary view. While Article 2(1) of the CCPR prohibits discrimination with regard to any of the rights guaranteed in the Covenant, Article 26 provides an autonomous human right. This means that Article 26 may be violated although no other right in the Convention is violated or applicable. Therefore Article 26 has what is regarded as an autonomous existence. This can be seen quite well in the *Brooks* case. Mrs. Brooks was a married woman who became disabled, and was dismissed by her employer. Subsequently she received unemployment benefit until June 1980. She did not qualify for further unemployment benefits because she was not a breadwinner under the Unemployment Benefits Act. If she had been a married man, however, she would have received further payment.

The Dutch Government argued, *inter alia*, that Mrs. Brooks could not invoke Article 26 in order to claim the benefit of Article 9 of the Economic, Social and Culture Convention because that convention is completely separate from the Civil and Political Convention. The negotiators of the CESCR had not included a complaints procedure because it was not intended to allow individual complaints to be submitted in connection with what was meant to be an essentially 'programmatic' treaty.

The Human Rights Committee upheld the argument that the Dutch Government had in fact violated Article 26 because the applicant had been treated in a discriminatory way. The Committee stated,

> *Although Art. 26 requires that legislations should prohibit discrimination, it does not of itself contain any obligation with respect to matters that may be provided for by*

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[37] Richard B. Lillich, supra note 49.

[38] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", 15 *Int'l & Comp Law*, 1966 p. 996, citing Theodor supra note 1, p. 357.

[39] A. Robertson, supra note, 52.

> *legislation. Thus it does not, for example, require any states to enact legislation to provide for social security. However, when such legislations are adopted in the exercise of a state's sovereign power, then such legislation must comply with Art. 26 of the Covenant.*

What is at issue is not whether or not social security legislation should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in Art.26….[57]

Since the *Brooks* case, the Committee has confirmed several times that Article 26 protects against discrimination in relation to economic and social rights as well as civil and political rights. It has considered allegations concerning employment in *Bwalya v Aambia*, education in *Waldman v Canada* and children's benefits in *Oulajin & Kaiss v the Netherlands*, all of which are rights not guaranteed in the ICCPR.
The Human Right Committee makes this explicit in its General Comment No. 18 (YEAR):

> *While Article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, Article 26 does not specify such limitation…. In the view of Committee, Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right.*

(B) Articles 2 and 26 of the ICCPR, compared

Unlike Article 26, Article 2 (1) of the ICCPR links the prohibition of discrimination to a general obligation to implement the Convention. It states that "Each state party … undertakes to respect and to ensure to all individuals … the rights recognized in the present Convention, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other statuses." Its general and accessory nature is thus obvious. The responding provision in the ECHR is in Article 14. It is quite clear that the Human Rights Committee from the outset confirmed the meaning of Article 2 in a way analogous to Article 14 of the ECHR:

> *Whenever restrictions are placed on a right guaranteed by the Covenant , this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of the right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination.*

(C) Article 14 of the ECHR

The Convention for the Protection of Human Rights and Fundamental Freedoms, of the Council of Europe, adopted in Rome in 1950, was heavily influenced by the UDHR. Since it was concluded at a much earlier stage, however, attention to equality and non-discrimination was less prominent. It does not express for example the idea of equality before the law. It has been suggested that its authors perhaps thought it too self-evident to be worth mentioning.[40]

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[57] *Textbook on International Human Rights Law* (Chinese edition), edited by project group of NCHR, CUPL and FAC, 2002, p. 389.

[40] Paul Sieghart, *The lawful rights of mankind,* 1985, p. 134.

The main provision in this area is Article 14, which provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground…."
It is clear from the wording of this article that it is a derivative equality provision: only the rights and freedoms set forth in the Convention must be secured without discrimination. The result is that no claim can be made of unequal treatment except in conjunction with one of the specified rights. This limitation is somewhat softened by the fact that it has been held not to be necessary to show an actual breach of one of the substantive rights. For example, a right may justifiably be restricted under one of the specified headings, but would amount to a breach of Article 14 if the restriction were applied in a discriminatory way. Nevertheless, there is still no stipulated right to equality outside of the enumerated areas.
The limitations of the dependent nature of Article 14 have been acknowledged in recent years, and a more general equality guarantee, in the form of Protocol 12, was opened for signature on November 4, 2000. Article 1(1) provides that "the enjoyment of any right set forth by law shall be secured without discrimination on any of the specified grounds." Article 1(2) states that "no one shall be discriminated against by any public authority on one of the specified grounds." Thus there can be no discrimination, not just in the enjoyment of Convention rights but also in the enjoyment of any right specifically granted to individuals by law. Professor Fredman goes even further in stating that, "the equality right arises even if the right has not been specially granted, but inferred from a duty imposed upon a public authority. For example, the statutory duty to provide education for school-age children, or to house unintentional homeless, while not necessary creating rights in individuals, would attract the duty not to discriminate."[41]

The Implementation of the Principle of Non-Discrimination

Enforceability of the UN Charter and the UDHR

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 with explicit, enforceable provisions.
The UDHR has been universally accepted. As Professor Humphrey writes,[42] "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*. This statement goes too far if intended to assert that all the rights enumerated in the UDHR have this character. But there is little

[41] Sandra Fredman, supra note 46, p. 86.

[42] Humphrey, "The Implementation of International Human Rights Law", 24 *NYL Rev.*, 1978, p. 32, cited in Theodor, supra note 1.

doubt that the right to equality and non-discrimination has the character of *jus cogens*, because this right appears in both UDHR and ICCPR. The *jus cogens* status is made explicit in the ICCPR provision that even when the life of a 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.

State Obligations

Obligations under international human rights law are addressed in the first instance to states. Their obligations are threefold: to respect, to ensure and to fulfil these rights. A state complies with the obligation to "respect" the recognized rights by not violating them. To ensure was to take the requisite steps, in accordance with its constitutional process and the provisions of 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 HR Committee looked towards concrete legislative measures as evidence of a state's commitment to eliminating discrimination. One member of the ICESCR commented that:

> *The ICESCR did not automatically imply that legislation was an indispensable component of a policy designed to eliminate discrimination in employment, for example. However, it was evident that, if that were the interpretation adopted by governments, the burden of proof would lie with those governments, which would therefore be expected to show that the non-legislative measures that they had taken effectively ensured the elimination of discrimination and that it was not essential to take legislative measures.*[43]

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. The elimination of *de jure* discrimination does not involve significant economic expenditure. In the case of Zaire, which was criticized for having a law that required women to ask permission from their husbands to work outside home, it was felt that the question of economic development was irrelevant. 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. For example, the elimination of discrimination as regards remuneration in employment or retirement age may involve employees being paid more for a longer period of working time. Secondly, 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 fulfil 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 .The right to claim is to be determined by competent judicial,

[43] E/C. 12/ 1987/ SR6, p. 3.

administrative or legislative authorities. Neither the ICCPR nor the ICESCR in general prescribes what kinds of remedies are to be provided in respect of particular rights. However, the Human Rights Committee proposed offering compensation for many rights violations, including discrimination.

The "to respect and to ensure to all individuals" clause of Article 2(1) of the ICCPR implies that the states are obliged to ensure compliance by private persons with some of the Conventions' norms, or at a minimum, to adopt measures against private interference with enjoyment of the rights protected in the Conventions. In the case of *X and Y v The Netherlands*, the European Court of Human Rights addressed the duty of states to conform to the ECHR by adopting legislative measures governing certain relations between private individuals. The applicant claimed that the rights of both his daughter and himself to respect for their private life guaranteed by Article 8 of the European Convention had been infringed, and that Article 8 required that parents must be able to have recourse to remedies in the event of their children being the victims of sexual abuse. Finding that Article 8 had in fact been breached, the court stated:[44]

> *The court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life…. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.*

The international Convention on the Elimination of All Forms of Racial Discrimination requires states to bring an end to "racial discrimination by any persons or group or organization."[45] Article 2(e) of the Convention on the Elimination of All Forms of Discrimination Against Women targets discriminatory behaviour by "any person, organization or enterprises". As Professor Meron states:

> *Although contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another, for example the perpetration of acts of egregious discrimination, cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness.*[46]

Indeed, human rights obligations stated in international human rights instruments increasingly extend to private individuals and their private actions. The most obvious example concerns the relationship of terrorist acts to the human rights of individuals. Here the norms of international law have been interpreted to apply directly to the perpetrators of the prohibited acts. These norms thus have a dual character. They impose upon the states the obligation to attempt to prevent terrorist acts and to punish or extradite the perpetrators, and impose upon the perpetrators and non-governmental actors to respect the norms implicated.[47]

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[44] 91 ECHR, Ser. A, 1985.

[45] See CERD Article 2(1) D.

[46] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law,* 1989, p. 162.

[47] Dinstein, International Criminal Law, 20 *Israel Law Rev.* 1985, p. 206, 217, cited in Meron , supra note 68.

The purpose of human rights law is to protect human dignity. Since some essential human rights are often breached by private persons, the obligation of states to observe and ensure respect for human rights and to prevent violations cannot be confined to restrictions upon governmental powers, but must also extend to at least some private interference with human rights. Whether a particular human right delineated in an international human rights instrument must be respected not only by governments or other public actors but also by private or non-governmental actors depends on the content and the interpretation of the provisions, i.e. its language, purpose and object. Because the object of human rights treaties is to ensure effective protection of human dignity, due weight must be given to the principle of effectiveness in construing human rights treaties. When the human rights treaty establishes an obligation of result,[48] and that result may be frustrated by private action, the arguments for an interpretation reaching private action are compelling.[49]

Non-Discrimination and its Application in China

The Chinese Constitution provides some protection against discrimination. Apart from constitution, there is some limited protection in Chinese law against particular forms of discrimination. For example, the Employment Act, Education Act and Legislation on Protection of the Interests of Women and Children all contain language prohibiting discrimination.

Of course, the mere existence of rules does not ensure observance of them. It is far easier to identify particular rights than to provide effective mechanisms to enforce them. As The UN High Commissioner for Human Rights pointed out, "eliminating *de facto* decimation is much more complex and difficult task than enacting laws which recognize equal rights to all."[50]

This aptly characterizes much of Chinese practice. In 1995, the Standing Committee of the Beijing People's Congress enacted a regulation concerning non-Beijing residents applying for jobs and doing business in the city, with the intent of preventing people other than Beijing residents from engaging in certain types of business and accepting certain types of employment in Beijing. In 1999, the Beijing Labour Bureau promulgated the Occupational and Professional Scope on the Allowance and Restrictions of Beijing

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[48] Theodor Meron classified two types of obligation: obligation of means and obligation of result. Obligation of means, also known as obligation of conducts, comes from the International Law Commission's draft articles on state responsibility. Article 20 reads, "There is a breach by a state of an international obligation requiring it to adopt a particular course of conduct when the conduct of that state is not in conformity with that required of it by that obligation."

Obligation of result leaves the state with the discretion to choose the means necessary for achieving the desired goal. It comes from the ILC's draft article on state responsibility. Article 21 reads as follows: "1. There is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does not achieve the result required of it by that obligation. 2. When the conduct of the state has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of that state, there is a breach of the obligation only if the state also fails by its subsequent conduct to achieve the result required of it by that obligation."

[49] Theodor Meron, supra note 68, p. 169.

[73] http://www.aspeninst.org

Residents Without Formal Residence Permits (which went into effect starting in 2000). The number of restricted professions increased from 34 to 103, bringing to 108 the number of jobs for which it is prohibited to employ non-Beijing staff. Such regulations carry an obvious discriminatory character, based on residential registration, and thus result in inequality. That Article 26 of the CCPR uses the words "such as" and "other status" implies that any criterion used to impose disadvantage on certain individuals without justification can be a prohibited ground.

The thorough-going violations of the right to equality and non-discrimination currently permitted under Chinese law are exemplified in the different treatment residents of various provinces receive in the university admissions process. In general, the entrance examination for acceptance to university is regarded as the most equal and fair competitive system conducted by the Ministry of Education. For the examinees and their parents, it is extremely important as their lives for it can change the students fate. However, the minimum score required for examinees resident Beijing to be admitted the university is more than 100 points lower than those from other places. That is to say, an examinee from Beijing who scored456 points on the 2001 examinations was qualified to be admitted to the top university in the country, while an examinee in, for example, Shandong province who scored 539 would fail to be admitted to any university.

Article 26 of the UDHR reads, "higher education shall be equally accessible to all on the basis of merit," but "merit" is not defined. However, even a limited definition of merit would at least preclude admission policies based on wealth, social standing or similar factors, including the residential registration system peculiar to China. A similar article is found in the CESR, which China has also ratified, and which is thus applicable in China. Article 13(2) states, "higher education shall be made equally accessible to all, on the basis of capacity." "Capacity," in my opinion, should be interpreted as admission on the basis of tests and scores.

The right to equality, according to Professor Richard, also means equality of opportunity. Equality of opportunity implies that all people should be treated as individuals in the sense of having the opportunity to compete on equal terms for the goods which society has to offer.[51] Inequality of opportunity is often the result of inequalities in the economic situation of various groups in society. It has been suggested in the Human Rights Committee that states are expected to undertake programs to combat the discriminatory attitudes and prejudices of domestic society. In particular, action should be directed toward the elimination of stereotypes, whether racial, religious or otherwise.[52]

Of course, this does not exclude affirmative action policies, i.e. a program of positive measures taken by states to improve the status of a disadvantaged group. The purpose of affirmative action is to achieve substantial equality. For example, Chinese education policy admits minorities to universities on the basis of grades and examination scores below those of Han (Chinese) nationality. However, in the present case, Beijing residents without formal residence permits are neither a minority nor a disadvantaged group. On the contrary, Beijing residents have access to privileged educational resources and more financial support. This differentiation policy thus has no reasonable and objective purpose, and constitutes discrimination against all examinees resident outside of Beijing.

[51] Richard B. Lillich, supra note 49, p. 73.

[52] E/C. 12/ 1990 /SR. 18 p. 8.

The situation is reminiscent of Judge Tanaka's dissenting opinion in the South West Africa case.[53] In his conclusion he states:

> *The principle of equality does not mean absolute equality, but recognizes relative equality, namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, different treatment of the sex regarding public convenience, etc. In these cases the differentiation is aimed at the protection of those concerned, and it is not detrimental and therefore against their will.*

It is encouraging that three examinees from Qingdao recently filed a case with the Supreme Court against the Ministry of Education, claiming that the policy violated their equal right to education. Chinese Education Law Article 36 reads, "people in education have the equal rights provided by law with respect to admission, promotion and employment etc." The Chinese Constitution stipulates that, "all citizens of People's Republic of China are equal before the law" and "all nationalities in People's Republic of China are equal. Discrimination against …any nationality is prohibited."[54] The plaintiffs in this case may also argue that the principle of non-discrimination and equality has become customary international law and has *jus cogens* status in almost all of the international human rights covenants (including the ICESR, to which China is a state party).[55]

It should be noted that the introduction of legislation to ensure equality and non-discrimination can only be seen as formal equality. *De facto* equality can only be achieved through enforcement of the law. The Chinese Constitution and some other domestic legislation are important components of any strategy to eliminate discrimination. However, experience elsewhere demonstrates that such legislation is far from enough. In particular, discrimination by a government in its administrative decision-making cannot be challenged in judicial review proceedings. Moreover, at least until recently, in Chinese judicial practice, the constitution was not evoked in any claim action. Consequently, a person claiming to be discriminated against could not in practice file an application based on the infringement of constitutional rights. This deficiency makes the notion of equality weaker and more frustrating. A diversified approach will be necessary to ensure real rather than merely formal equality, including a comprehensive anti-discrimination law, and the establishment of a Commission with the competence to deal with violations of human rights.

Effective judicial process and national institutions are generally regarded as a necessary component of anti-discrimination and human rights law. Although states remain the central addressee in human rights law, most problems of discrimination occur in the

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[53] I.C.J Report 1966, p. 4.

[54] Chinese Constitution Article 44.

[55] 13 August, 2001, the Chinese Supreme Court promulgated a judicial interpretation (called an 'Instruction') on how to apply law in cases where fundamental rights provided in the Constitution are violated. Before that the Chinese Constitution was not justiciable. This instruction is a landmark, opening the way for the remedy of infringement of rights provided in the Constitution through judicial process.

private sector, in housing, employment, education and so on. Effective implementation of international human rights standards is ultimately a national issue.[56]
Domestic anti-discrimination law serves the following functions: to provide a formal remedy for individuals who have suffered direct discrimination at the hands of the state, and if horizontal remedies are to be provided, by an individual; to promote preventive measures through legislation, in order to diminish the incidence of racial and sex discrimination; to use the law as a vehicle of social engineering in order to counteract not only direct discrimination but also the social, cultural, political and other factors which may underpin indirect discrimination and racial disadvantage. Therefore such legislation is designed to:

(1) Provide an unequivocal declaration of public policy;

(2) Provide protection and redress to minority groups;

(3) Reduce prejudice by discouraging the behaviour in which it finds expression;

(4) Reduce systematic discrimination by changing policies and practices which result in indirect discrimination;

(5) Establish standards by which public and private behaviour may be measured and improved;

In addition to passing human rights related legislation, many countries have established human rights institutions. National human rights institutions are important for improving the implementation of national human rights law, and also play a role in increasing the impact of international human rights covenants, in particular to increase their protection of disadvantaged and vulnerable groups. These institutions provide information and promote awareness and education about human rights, advise the government on human rights affairs and investigations of alleged violations.

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. There are also vulnerable groups, such as indigenous people or people with HIV/AIDS, who are not protected by any specific instruments. The effectiveness of even the most advanced protective structures, based on international conventions, is diminished by the fact that they are not 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 not put in place any enforcement mechanisms at the national level. In light of these limitations a

[56] B. Burdekin and A. Gallacher, "The United Nations and National Human Rights Institutions", *Human Rights* / Droits de l'Homme No.2, 1998, pp. 21-26.

call for further development of anti-discriminatory law would seem to be fully justified. It is important for states to implement their international obligation by adopting legislative and other measures to give effect to the nondiscrimination rights, especially to provide individual alleging discrimination an adequate effective and readily accessible machinery to settle these complaints. 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.

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