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GENDER AND THE RIGHT TO NON-DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW

Bistra Netkova, PhD

South East European University, Macedonia

[bistra_nl\[at\]yahoo.com](mailto:bistra_nl@yahoo.com)

Abstract

Discrimination against women based on the fact that they are women is a deeply rooted practice in all societies. However, the level of discrimination varies greatly with the level of development of the given society and strongly influences and vice versa it is influenced by the status of women in a given society. Addressing this gender-based discrimination is a difficult task because it is closely linked to the concept of equality, and state's action and inactions. The article establishes that the States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws, sanctions, and other remedies and those women are protected against discrimination in the public, as well as, in the private spheres.

Key words: Gender; Direct and Indirect Discrimination; Affirmative action

INTRODUCTION

Discrimination against women based on the fact that they are women is a deeply rooted practice in all societies. However, the level of discrimination varies greatly with the level of development of the given society and strongly influences and *vice versa* is influenced by the status of women in a given society. Addressing this gender-based discrimination is a difficult task because is closely linked to the concept of equality, and state's action's and inactions. There are several international legal instruments that starve to eliminate discrimination of women in a more systematic way, headed by the CEDAW, the ECHR and the quazi-jurisprudence of the ECtHR, and finally the Human Rights Committee (HRC) of the ICCPR. The article will analyse the scope of application of the right to be free of discrimination, the concept of equality and the positive state obligations stemming from the relevant international legal documents, with the aim of showing precisely identified positive state obligations that will ultimately lead to the best possible actions on national level in forms of laws, policies and measures to eliminate gender based discrimination and to achieve actual equality.

Scope of application

The CEDAW Convention is designed to redress discrimination against women, and explicitly aims to benefit women. (Steiner and Alston 2000, at158) CEDAW's Article 1 reveals that gender based discrimination is '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.' (Article 1 1981) The Convention's definition and scope of protection of gender discrimination goes beyond the concept of discrimination used in many national and international legal standards and norms as acknowledged in the General Recommendation 25 pointing out that while such standards and norms prohibit discrimination on the ground of sex, *inter alia*, and protect both men and women from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the Convention focuses only on types of discrimination against women, *i.e.* gender based discrimination, emphasizing that women have suffered and continue to suffer from various forms of discrimination, only because they are women. (CEDAW 2005)

Concept of equality

Before investigating the definition of discrimination and the concept of this right, it is important to explore the concept of equality because it presents a broader, all encompassing concept. The term equality is an elusive but very rich one because it has many different but interrelated dimensions: discrimination, affirmative action, equality before the law, and equal protection of the law-to name the major ones (Henrard 2006).

This equality cannot be achieved by simply erasing any distinction between men and women; it calls for taking actions, sometimes even radical ones, with the aim of bringing special legal and non-legal measures to ensure *de facto* and substantive equality (Nowak 1993). In 1990, Asbjorn Eide and Torkel Opsahl opined that non-discrimination was the only road to reaching the vague idea of equality (Eide and Opsahl 1990). Similarly, under the international law, the concept of equality can be said to incorporate two meanings-the principle of non-discrimination that propels governments to refrain from differentiating on unlawful, arbitrary and unreasonable grounds, and the principle of protection or adoption of special measures in order to achieve actual or substantive equality (McKean 1985). The concept of 'actual' equality, understood in a broader sense, could mean the assumption of 'sameness'-that is to say treating the same cases in same manner and thus, not making a differentiation (McKean 1985). This translates into the non-discrimination requirement or the prohibition of the law on discrimination on basis of sex, race, and religion. However, with respect to the second meaning of the concept of equality, certain exceptions pertaining certain groups could be said to justify the accepting of the fact that there are differences among the 'same' cases (Wentholt n.d). For example, even though treating women and men equally in a formal sense is the general requirement and ensures formal equality, the disadvantaged position of women in societies and the different characteristics of the women *vis-à-vis* men (pregnancy, child birth, children etc.), could be justification enough to adopt a different treatment in order to achieve substantive equality cases (Wentholt n.d). This, in other hand, would mean acceptance that like cases in a

formal sense could be treated as unlike cases in a substantive sense; more specifically, in a way that allows reflection of their differences (Mulder n.d) or as Henrard observes: “full equality acknowledges differences in starting positions which might necessitate differential treatment in order to reach real, effective equality.” (Henrard 2006).

This distinction between formal and substantive equality has been on the agenda of legal literature in recent times. The essence of substantive equality has been argued and understood differently by various authors; however, Mulder points out that it implies a right to better material conditions and social opportunities for those who have fallen behind (Mulder 1999). The European Court of Human Rights has expanded its non-discrimination jurisprudence by pointing at the issue of substantive equality in the case of *Thlimmenos v. Greece* (2000). However, it is important to investigate to what extent the prohibition of discrimination furthers substantive equality. This arguably depends (*inter alia*) on the extent to which the supervisory body recognizes indirect discrimination and an obligation to differentiate and also on the evaluation of affirmative action measures in relation to the prohibition of discrimination (Henrard 2006).

Not every differentiation amounts to a prohibited discrimination. (McKean 2002) Understanding substantive equality as the starting point of gender protection allows us to see the extent to which the supervisory body recognizes the indirect discrimination, an obligation to differentiate, and the evaluation of affirmative action measures (in relation to the prohibition of discrimination). Finally, in view of the pervasiveness of discrimination against women, it is also important to assess to what extent the prohibition of discrimination would impose positive obligations on states to eradicate ‘private’ discrimination.

Establishing discrimination

In order to establish the positive obligation on states it is paramount to look at the quasi-jurisprudence of the ECtHR. Namely, the ECtHR uses certain criteria in addressing complaints of discrimination (Ovey and White, 2002). The first criteria would be the establishment of whether the complaint of discrimination falls within the sphere of a protected right. Article 14 of the ECHR prohibiting discrimination is a parasitic provision (1998). It has always been looked at by the Court in conjunction with some other substantive right (Henrard 2006). The Court has described the prohibition of discrimination in Article 14 as autonomous in meaning but an accessory in applications (Rasmussen v Denmark 1984):

‘71. According to the Court's established case-law, Article 14 (art. 14) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (art. 14) does not necessarily presuppose a breach of those provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter. (Abdulaziz, Cabales and Balkandali v The United Kingdom 1985).

However, the new Protocol 12 broadens the scope of application of Article 14, so that it is no longer parasitic by needing to invoke it along with another right. However, this extension only applies to the conduct of public authorities and does not extend to private persons (Explanatory Report n.d). The modern approach is to consider a complaint of a violation of Article 14 read together with the substantive provision, if there is clear inequality in treatment in the enjoyment of the right in question as a fundamental aspect of the case (*Burghartz v Switzerland* 1994). Even though it is no longer required that the right in combination with which article 14 is invoked is also violated in itself (*Belgian Linguistics* n.d), the Court, after finding violation of the substantive article, no longer has the duty to investigate the discrimination complaint (McKean 1985). The second criteria would pose itself as the question of whether there is a different treatment.

The jurisprudence of the ECtHR stresses the use of a comparability test that requires the proof of a differential treatment of persons that are comparable in relation to the norm making the differential treatment. (Henrard 2006) The HRC often seems to use this test (*VandenHole* 2005). However, this test is often not actually used (*Inze v Austria* 1987) by the Court, or it is replaced by a disadvantage test (*Elsholz v Germany* 2000). The latter test requires the proof of a differential treatment, which results in considerable disadvantage for the claimant. Whether the disadvantage is serious enough depends on the exact circumstances of the case.

In the case of *Thlimmenos v Greece* (2001) the Court held that Article 14 is also violated when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different. This aspect of Article 14, may help in an argument for *reasonable adjustments*. Only a differential treatment of sufficiently comparable cases is reviewed under the justification test. The starting point is to consider if the applicants can prove that they have been treated less favorably than the group that is being compared with based on identified characteristics.

However, the comparability test does not always produces positive results, especially when differential treatment concerns situations are said not to be comparable. (Henrard 2006) A case that illustrates this is *Van der Musel v Belgium* (1983), where the applicant unsuccessfully argued that the comparators are different professional groups. But comparability issues cannot be totally neglected; the prohibition of discrimination can be violated when there is no differential treatment of situations, which are not comparable, without reasonable and objective justification. (Henrard 2006) As Henrard observes: “this obligation to differentiate as flowing from the prohibition of discrimination simply contains the reverse situation and hence would require a proof of the absence of differential treatment of not comparable situations.” (Henrard 2006). Where the differential treatment is between men and women, as in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985), weighty reasons are required by the Court to justify the differential treatment (Vierdag n.d).

The next criteria is to see whether the treatment pursue a legitimate aim. In arguing a legitimate aim for differential treatment, the respondent State has to show the nature of the legitimate aim pursued and the link between the legitimate treatment and that legitimate aim (Ovey and White 2002). The European Court of Human Rights, since the *Belgian linguistics case*, has created a jurisprudence in which it points out that a difference of treatment only amounts to a prohibited discrimination if it has no objective and reasonable justification-that is if it does not pursue ‘a legitimate aim (Belgian Linguistic

case 1968). In regard to the requirement of a legitimate aim, it should be noted that in contrast to the doctrine of legitimate limitations, Article 14 does not contain a limitative enumeration of possible legitimate aims (Henrard 2006). Where limitation on the rights in Articles 8-11 is expressly authorized, a State cannot limit the right in a discriminatory way, even though by doing so would not violate the substantive article where the limitation is legitimate, but it will violate Article 14 (*Grandrath v Federal Republic of Germany*). The European Court of Human Rights has not enumerated or imposed substantive requirements as to the type of aim that was invoked by states. There are some cases in which the Court has identified some substantive requirements, such as in *Buchen v Czech Republic* (2002). The aim should be in line with the foundational principles of a democratic society. This relationship between differentiation and the legitimate aim pursued has been further clarified by the Court. The Court has emphasized that the distinction made should be pertinent and adequate or relevant to the achievement of the legitimate aim. However, even though this requirement of pertinence is often distinguished from the proportionality test, they are closely connected in a way that “when the legitimate aim is not sufficiently related to the differential treatment, the measure complained of shall not pass the proportionality test either.” (Henrard 2006). Finally, the last criteria examines whether the means employed are proportionate to the legitimate aim and does the difference of treatment goes beyond the State’s margin of appreciation? In the *Belgian linguistics case* (1968), the European Court of Human Rights stated that a difference of treatment only amounts to a prohibited discrimination if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realized (*Belgian linguistics case* 1968). This was also confirmed in *Lithgow and others v United Kingdom* (1986).

First of all, proportionality requires there to be a reasonable relation between the legitimate aim on the one hand and the differential treatment on the other hand. In other words, differential treatment should not go beyond what is strictly necessary in order to achieve the goal (*Karner v Austria* 2003). In the case law of the ECtHR, the presence of this proportionality test implies the grant of a certain margin of appreciation to the contracting states. It is exactly the extent of this margin of appreciation in a particular case, which determines (more or less) the outcome. Where a limitations on the rights 8-11 is expressly authorized, a State cannot limit the right in a discriminatory way, even though doing so would not violate the substantive article where the limitation is legitimate, but will violate Article 14 (*Grandrath v Federal Republic of Germany*). As said before, the width of choice available to States to introduce laws that could be discriminatory is based on the context. For example, in cases of discrimination based on sex, the margin of appreciation does not exist. Consequently, it is very difficult to prove no violation as in *Karlheinz Schmidt v Germany* (1994). The ECtHR, in *Nachova v Bulgaria* (2005), has said that in cases of discrimination, the Court may require the respondent government to disprove an arguable allegation of discrimination. If they fail to do so the Court may find a violation of Article 14 of the Convention on that basis.

CEDAW’s prohibition of discrimination only concerns the grounds of ‘gender.’ Since it is not parasitic it has a broader field of application (Smith 2005), with respect to women than the ECHR. The Convention acknowledges indirect horizontal application-thus protecting individuals from interference with their right by non-state actors. For example, Article 11 of the CEDAW requires parties to the Convention to enact measures that will

eliminate discrimination in employment. Furthermore, the CEDAW includes the obligation to promote-a provision, which blurs the public private divide (Steiner and Alston 2000).

Types of discrimination: direct and indirect discrimination

Discrimination can be direct and indirect. Direct discrimination affects certain groups within society, in this case women, through clear stipulated laws and policies that differentiate between groups, for example, on bases on sex. An illustration would be the introduction of policies that restrict women's freedom of movement.

It is important that the prohibition of discrimination also targets indirect discrimination. However, indirect discrimination is hard to detect because it occurs when a neutral criterion, which in reality affects persons of (for example) different sex, is used (Heringa). According to Schultz et al, "indirect discrimination occurs when a practice, rule, requirement, or condition is neutral on its face, but impacts disproportionately upon particular groups." (Tobler 2005). Heringa observes that indirect discrimination can be realised in bad intention hidden behind objective criteria referring to different selection criteria on the basis of sex for example, or it can be in good faith when requiring certain job skills that exclude women. However, in the end, it is not the intention that matters, but the effect of the measure or law in question because the effect that indirect or direct discrimination against women has on women and their lives in a given country, pushes them to migrate in search for better life, whereas the intention could be argued either way.

The HRC has been contradictory in its recognition of the indirect discrimination, as seen from its conflicting decisions (Henrard 2006) in *Ballantyne et al v Canada* (1993) and *Diergaardt v Namibia* (2000) concerning the impact of prohibition of the use of languages. In the first case the HRC was oblivious to the indirectly discriminatory impact of a measure and did not take into account concerns about indirect discrimination. However, relatively recently, the HRC has fully acknowledged the phenomenon of indirect discrimination (General Comment no 16 2005), in *Althammer v Austria* (2001) and in *Derksen v the Netherlands* (2001):

The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such *indirect discrimination* (emphasis added) can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision *exclusively or disproportionately affect persons*_(emphasis added) having a particular race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (...)" (Althammer v Austria 2001).

Even though the Committee remarks that a certain measure is neutral on its face and does not have any intent to discriminate, it concludes that this measure nevertheless results in discrimination because of its exclusive or disproportionate adverse effects on a certain category of persons. The HRC seems to use exactly the same model of review as in cases of direct discrimination and seeks to establish whether or not the 'distinction' (which must refer back to the disproportionate impact) is based on 'reasonable and objective criteria' (Henrard 2006). The European Court of Human Rights, even though initially very

reluctant to recognize indirect discrimination, has recently expanded its non-discrimination jurisprudence by considering the issue of indirect discrimination in the case of *Thlimmenos v. Greece* (2000). However, the ECtHR is still struggling with the creation and application of the appropriate model of review to the extent that it seems to continue to question the concept of indirect discrimination. An example of this is the case of *Abdulaziz, Cabales and Balkanda* (1985) where the Court said that it would be virtually impossible to successfully rely on indirect discrimination, since it classified as irrelevant the disparate impact on certain groups (because of their typical characteristics) of, on first impression neutral rules (Henrard 2006). The Court tended to give a strong impression of not investigating thoroughly enough whether a certain measure could indirectly have discriminatory effects because it neglected the broader context determining the position of the people concerned when it assessed the alleged discriminatory treatment. (Schutter) The latter is particularly problematic in cases of systemic discrimination, as is the case in regarding minorities like the Roma (*Buckley v UK* 1996). However, in the recent case of *Kelly v UK* (1996), the Court explicitly acknowledged “where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.” (*Kelly v UK* 2001).

Progress was made in this direction by the admissibility decision in *Hoogendijk v the Netherlands* (2005), in the Courts reasoning with respect to the issue of ‘indirect discrimination.’ The Court indicated that “although statistics are not automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14” statistics could be used, as it is no longer ruled out that statistical evidence would do in order to establish a ‘*prima facie*’ case. In this case, the Court proposed a model to assess complaints of indirect discrimination by indicating that “where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent government to show that this is the result of objective factors unrelated to any discrimination on the ground of sex.” (*Hoogendijk v. Netherlands* 2005).

Similarly, CEDAW/C relying on the extensive definition in Article 1 of the Convention has taken the position that the prohibition includes both direct and indirect discrimination by public as well as, private actors. CEDAW, General Recommendation 25 states (General recommendation No. 25 2005):

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

In other words, the States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws, sanctions, and other remedies and that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals in the public as well as, the private spheres.

It is important to point out that while the direct discrimination against women is easier to spot (such as the gender based violence ignored by State legislation) indirect discrimination may be present and closely linked to the issue of achieving substantive equality. This means that even though States adopt laws, which are not discriminately but equal in form, they do not achieve substantive equality because of the negative impact these apparently neutral rules have on a specific group. For example, having to work a certain amount of shifts is an obligation and right of all men and women; however, this legal provision certainly targets pregnant women or women with children in a negative way by creating a disadvantaged position with respect to the labour market. This active and passive requirement of non-discrimination in achieving equality must be comprehensively implemented by governments in order to fulfil the negative and the positive State obligations arising from the rights proscribed in the international human rights instruments relating to freedom from discrimination. Furthermore, in fighting the overall discrimination of women providing of not only formal but also substantive equality for women it is an important tool. The elimination of direct discrimination and efforts to eliminate indirect discrimination against women will eliminate the root factors to many harmful practices that affect women., and will greatly improve the status of women if societies (United Nations Economic and Social Council 2000).

CONCLUSION

The CEDAW has produced the most comprehensive definition of gendered based discrimination against women and has offered all encompassing international legal standards in order to eliminate discrimination against women. The ECHR also in Article 14, provides prohibition of discrimination and the Court uses several criteria in its assessment whether there is discrimination in cases of individuals against states. However, it is very important to note that, in order to fight discrimination its important to achieve equality, *i.e.* substantial equality as theorized by many human rights authors. In order to do so it is necessary to establish the positive state obligation in the private sphere as well as, in the public sphere, as analyzed by the HRC of the ICCPR, *vis-à-vis* discrimination against women based on gender, and to differentiate between direct and indirect discrimination. These efforts will ultimately lead towards better legal regulation that ensures substantial equality of women; permits affirmative action; and strives towards promotion of status of women within societies.

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