

THE UNIFIED PERSPECTIVE ON EQUALITY

By Dimitrina Petrova*

Several arguments can be proposed in favour of a unified perspective on non-discrimination and equality, as opposed to understanding and combating each type of discrimination in isolation from the other types.

1. The Weakness of Non-discrimination and Equality in the Human Rights Framework: the unified perspective would strengthen non-discrimination as an autonomous right.

Discrimination on forbidden grounds¹ is a pervasive social evil and a type of injustice. Most states around the world are parties to international and regional human rights treaties that contain guarantees of equality before the law and prohibitions against discrimination on an open list of grounds. But anti-discrimination legislation is weak or non-existent in most countries. Public understanding of the concept of discrimination is vague and inadequate. Many policy makers and ordinary people do not know what conduct or policy amounts to a violation of equal rights provisions and what remedies should be available to victims.

The right to non-discrimination is a separate, autonomous human right², and the general historic tendency of its interpretation goes in the direction of giving a meaning closer to substantive equality in practice. And yet, **adequate legal definitions of discrimination are not consolidated in international jurisprudence and rarely included in national legislation. The important concept of indirect discrimination is not widely understood, and the case law - international and national - is weak and inconsistent.**

International organizations, including the United Nations, the Organization of American States, the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe, and the European Union, have recognized the need to move towards a common level of legislative standards in this field. Several bodies of these organizations have acknowledged that there is a need to develop at the national level comprehensive, consistent, and enforceable anti-discrimination legislation, and have set minimum standards for some areas of national anti-

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¹ An open list of prohibited grounds is provided in the Universal Declaration on Human Rights, and repeated in later UN conventions, e.g. the International Covenant on Civil and Political Rights, Article 1, according to which, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See also European Convention on Human Rights, Article 14 and Protocol 12 Article 1, prohibiting discrimination on the same grounds plus "association with a national minority."

² According to the UN Human Rights Committee (HRC), discrimination, as used in the International Covenant on Civil and Political Rights (ICCPR), "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 an equal footing, of all rights and freedoms." **The HRC also found that Article 26 ICCPR does not "merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities."** Para. 7 and 12, Human Rights Committee, "General Comment No. 18: Non-discrimination", CCPR/C/21/Rev.1/Add.1 (1989), 10, November 1989.

discrimination legislation. One such set of minimum standards is contained in the UN Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination³. Another is provided by the Council of Europe's European Commission against Racism and Intolerance⁴. These guidelines however cover only discrimination on certain grounds such as race, ethnicity, nationality, and color of skin. **To date, there is no model of comprehensive anti-discrimination law covering all grounds and promoted by a multilateral organization.** In the OSCE, there has been increased attention to tolerance and non-discrimination, in particular on the basis of gender, ethnicity, and religion, but little has been done toward developing national anti-discrimination legislation.

At the national level, in several countries including Belgium, Bulgaria, Canada, Hungary, Ireland, Mexico, the Netherlands, South Africa, Sweden, and the UK, relatively strong and detailed anti-discrimination legislation indeed exists, though none may be perfect. **Out of the approximately two hundred sovereign states in the world today, only a few have adopted comprehensive anti-discrimination legislation, providing clear definitions of types of discrimination, identifying unacceptable conduct in various sectors of life, specifying remedies and creating positive duties of governments to prevent discrimination and promote equality of treatment and opportunity.** At the opposite end, in the zone of bad practices, cases of blatant, explicit discrimination inscribed in national laws have not disappeared entirely in several countries. In the remaining bulk of states - approximately 80-85% of all existing states, discrimination - though officially denied - persists in the deliberate, convenient silence of the law when there is every evidence that society is permeated by xenophobic, racist, sexist and other discriminatory practices. In the majority of existing national jurisdictions, the law has failed to date to give effect to the internationally recognized right to non-discrimination. This is regrettable, as national anti-discrimination law is potentially a very powerful tool for strengthening rights protection, with repercussions across the entire human rights spectrum.

2. The unified perspective provides a stronger basis of public education regarding the phenomenon of discrimination.

Adoption of comprehensive anti-discrimination legislation by states is complicated by the problem that anti-discrimination law is relatively recent, difficult, and uses specialized terminology. As a result, most non-experts, including victims of discrimination and their advocates, cannot efficiently conceptualize life events and practices in the terms of anti-discrimination law as it is developed in current jurisprudence.

In terms of cultural context and political philosophy, too, anti-discrimination law poses challenges. Every definition of discrimination and its interpretation is a summary expression of underlying ideas of equality. The notion of equality however varies across political and cultural borders and is intertwined with notions of fairness, freedom, justice, disadvantage, and so on. Therefore, challenges lie not only in the technical area of legal competence, but also in the inherent interplay of various political positions, thus turning the field of anti-discrimination and equality into an evolving controversy.

³ This document was developed in the context of the Third Decade to Combat Racism and Racial Discrimination (1993-2003), see <http://www.unhchr.ch/html/menu6/2/pub962.htm>. Its revision and update are under consideration in the UN Office of the High Commissioner for Human Rights.

⁴ See in particular European Commission against Racism and Intolerance (ECRI). General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination. Adopted on 13 December 2002. Strasbourg: Council of Europe, February 2003.

In sum, existing anti-discrimination law - both at the international and national level - is to date insufficient and ineffective, with few court cases filed, low rate of success at national courts, and rudimentary international jurisprudence. For example, the European Court of Human Rights found violation of the anti-discrimination provision (Article 14) with regard to race/ethnic origin only as late as 2004.⁵ Furthermore, procedural guarantees and remedies for discrimination are underdeveloped in most jurisdictions and the implementing legislation is weak or utterly absent in most countries.

3. The unified perspective would make the field of equality more coherent across borders.

A further factor impeding the struggle against discrimination is the existing very significant difference in the levels of development of non-discrimination laws and policies in the different countries of the world. On the whole, **advancement in the field of equality - both at the level of international human rights law and in regional contexts is sporadic, uneven and at risk of regression. This is a threat to the long-term sustainability of achievement in challenging discrimination globally.**

In the last decade, important new legislation, particularly in the European Union, resulted in new, higher standards of protection against discrimination⁶. This has inspired many advocates in Western and Eastern Europe to engage with issues surrounding equality⁷. At the same time, the civil rights community in the United States, which has vast experience in the struggle against discrimination, is faced with tough obstacles, including in litigating unintentional disparate impact cases, due to conservative, obstructing court interpretations. Recent encouraging European⁸ and South African developments⁹ in anti-discrimination law and policy are however not well known outside the circle of experts.

⁵ Nachova and Others v Bulgaria, www.echr.coe.int/Eng/Press/2004/Feb/ChamberJudgmentNachovaandothersvBulgaria260204.htm

⁶ See European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and European Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=32000L0078&lg=EN

⁷ This engagement was stimulated by funding made available under Council Decision 2000/750/EC establishing a Community Action Programme to Combat Discrimination (2001 to 2006) (27/11/00), http://europa.eu.int/comm/employment_social/fundamental_rights/legis/legin_en.htm

⁸ In addition to the European Council anti-discrimination Directives, some European states, such as Belgium, Bulgaria, France, and Hungary have adopted excellent comprehensive anti-discrimination laws and established independent equality bodies with strong mandates. The European Commission set up the European Network of Legal Experts in the Non-discrimination Field which began publishing the journal *European Anti-Discrimination Law Review* in 2005, covering the grounds of race and ethnic origin, age, disability, religion or belief, and sexual orientation in the 25 EU member states.

⁹ South Africa is ahead of the world in several aspects of anti-discrimination law, particularly positive action (special measures). The leading Constitutional case on racial equality, *City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)) is a textbook example of contextualizing alleged unfair discrimination. In this case, the white plaintiff Walker complained (unsuccessfully) that residents of wealthy suburbs were charged electricity at metered rates on a higher tariff than the residents of the neighbouring townships. Regarding effective remedy, a broad range of orders can be issued by the "Equality Courts" -- specially

4. The unified perspective would help integrate the right to equality in the human rights framework.

A further obstacle to better fluency in **anti-discrimination law is the fact that it is not well integrated in the human rights discourse. Since the mid-1970s, it has developed into a distinct highly specialized field, most prominent in a small number of common law countries**, such as the UK, in which a Discrimination Lawyers Association has been functioning for some time¹⁰. Anti-discrimination and equality standards and surrounding issues are unfamiliar to the majority of the human rights community. Due to the relative novelty of the field, human rights advocates are often confused about the meaning and boundaries of the concept of discrimination. Some tend to see discrimination as an aspect of nearly every violation of human rights. There is a hazy zone between "equal application of the law" and "substantive equality in practice" that is waiting to be illuminated. Even civil society organizations focusing on the human rights situation of distinct disadvantaged groups make little use of the tools of anti-discrimination law. For example, those focusing on the right to education for members of a certain group (a social right) are rarely making use of the option to additionally claim the right to non-discrimination in education (a civil right). **Non-discrimination, being a recognized fundamental civil right, may help frame issues in ways that are more efficient than the framework of economic, social and cultural rights.**

To sum up, there exists a need for the broader human rights community to focus on equality, develop it as a human right, and synchronize this right with the rest of the human rights corpus. In the international human rights movement, further debate on discrimination and equality is needed to propel equality to the centre of human rights concerns. Human rights advocates could bring equality forward through articulation of issues in terms of unfair and unlawful discrimination, and promote equality through advocacy, litigation and public education.

5. The unified perspective would help overcome the fragmentation problem.

The Fragmentation Problem and the Integrated Approach

At present, the anti-discrimination struggle suffers the burden of extreme fragmentation.

- **Different grounds of discrimination (gender, race, religion, sexual orientation, language, disability, age, etc.) are regulated differently. In those jurisdictions where there is more case law the issue of equality is entangled in the fragmentation, hierarchy and inconsistency of the prohibited grounds.**
- **Protections against discrimination are not spread across all relevant sectors of social life, such as the administration of justice, employment, education, provision of goods and services, healthcare, etc. Thus, for example, protection against religious discrimination may be provided in the field of employment but not in education or housing in certain countries.**

constituted chambers of the regular courts. Regarding the prohibited grounds, the Equality Review Committee, established under Chapter 7 of the Equality Act, was issued with a Directive to report back to Parliament within one year as to whether the additional grounds of HIV/AIDS, nationality, socio-economic status and family responsibility and status should be added to the prohibited grounds in Section 1(xxii). The Committee concluded that all of them should be expressly added to the present list of 16 prohibited grounds.

¹⁰ See www.discrimination-law.org.uk

- **There is little cooperation of actors such as government agencies and advocacy groups across the different strands of equality. The patchy progress of legal norms specifying protections within certain strands (gender, race, religion, sexual orientation, etc.) or within certain sectors of social life (employment, administration of justice, education, public services, etc.) reflects the uneven and incoherent realm of identity politics. The latter has been the dominant approach in recent times to the relationship between individuals, groups and society, as opposed to a more universalistic, holistic approach.**

In view of the foregoing, the **universal civil right to be free from discrimination on any arbitrary ground** does not receive adequate protection. The widespread perception of the right to non-discrimination as related only to some disadvantaged minorities rather than as a universal entitlement hinders the further advancement of this right.

The extremes of identity politics and identity-based claims for separate protections against discrimination has led many to believe that **in the long run the governing principle of equality of treatment without discrimination will be strengthened if the different strands are brought together; and that anti-discrimination law and policy are best pursued from a coherent, unified equality framework¹¹**, whereby the links between the different strands of equality would come into focus. For example, it should not be necessary for a person whose dignity has been assaulted by discrimination, to choose the correct pigeonhole in which to put her case, whether on the ground of her race, gender, disability or other arbitrary characteristic. Equality is an over-arching principle: there is no hierarchy of grounds of discrimination. The definition of discrimination applied in recent years by the European Court of Human Rights (*Willis v UK*) relied neither on the presence of intent nor on the specification of a ground of alleged discrimination, if it can be demonstrated that a person has been treated less favorably in a relevantly similar situation without objective and reasonable justification.

MAIN POINT: the definition of discrimination should not ultimately depend on either or ground. Intent is irrelevant. Any arbitrary ground should be a valid ground when determining that discrimination occurred.

Single-identity causes - struggles for redressing discrimination against certain groups singled out as victims - have been historically instrumental in empowering the most disadvantaged. But struggles limited in isolated identity boxes are no more self-sufficient. Although coalitions and joint efforts across identity lines exist and grow, the scattered equality agendas undermine the very foundation of equality as a human right.

Therefore time has come for reflection and for a synthesis. The next agenda is to overcome the existing fragmentation at a conceptual level in the spirit of the Universal Declaration on Human Rights, and simultaneously to streamline cooperation between defenders of the different disadvantaged groups.

¹¹ Such a framework is implicit in Article 2(1) of the 1948 Universal Declaration on Human Rights: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, **without distinction of any kind, such as** race, color, sex, language, religion, political or other opinion, national or social origin, property, birth **or other status.**" (*Emphasis added*). In the half-century following the adoption of the UDHR, the listed grounds became the organizing principle of the corresponding anti-discrimination struggles, while the general, overarching aspect has been eclipsed.