

NON-DISCRIMINATION AS AN OVERARCHING PRINCIPLE OF MODERN HUMAN RIGHTS LAW

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INTRODUCTION

Non-discrimination has been described as the ‘equal treatment of people in equal position and treating as unequal those in unequal position’.²The opposite of non-discrimination is discrimination. Black Law’s Dictionary defines discrimination both as using a law to confer privileges on people or denying them same based on race, age, sex nationality or religion, and giving preferential treatment to people when there is no reasonable distinction between them.³Non-discrimination as a principle in international human rights law has become a fundamental concept. Overtime, it has gained prominence across almost all legislations in modern human rights practice. Entrenched at the international, regional and national level, the obligations created by the principle are indeed *erga omnes*, it having been accepted to possess the distinct character of *jus cogens*.⁴Thus, states are not permitted to derogate from it. Non-discrimination is at the central theme of present human rights law given that it cuts across all spheres of humanity; be it race, color, religion or something else.

In the light of the foregoing therefore, this paper explores the dominant theme of non-discrimination in some treaties on modern human rights law. Starting with the UN Charter, much attention will be focused on the ICERD from the angle of racial discrimination, which seems to be the most dominant issue in discrimination claims. It also examines decisions, recommendations and general comments of the committee on the elimination of racial discrimination and other human rights bodies. Regional treaties dealing with non-discrimination will also be examined, with particular focus on Africa and Europe. The paper further examines the attitude of judicial and quasi-judicial bodies in the interpretation of these instruments across various regions. It concludes with findings.⁵

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²Dinah L. Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar, Cheltenham 2014) 128.

³*Black’s Law Dictionary* (7th edition, 1999) 479.

⁴Erika De Wet, ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 543.

⁵Subsequent in this paper, the acronyms UN Charter, UDHR, ICERD AND ICCPR will be used to refer to: ⁵Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A(III), International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 respectively.

NON-DISCRIMINATION: A RECURRING THEME

A famous phrase from the American Declaration of Independence recognizes that “[a]ll men are created equal.”⁶ It is this recognition of equality of all humans that forms the foundation for the consensus of opinion that upholding human rights, non-discrimination inclusive, should be an integral part of a state’s obligation.⁷ Thus, with the development of international treaties, States found it imperative that the principle of non-discrimination be enacted in the United Nations Charter,⁸ proclaimed in the Universal Declaration of Human Rights,⁹ amongst others. Arguably, the most prominent piece of international legislation dealing with the principle of non-discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁰ It has been described as ‘the most radical instrument so far adopted’¹¹ in the area of human rights under the UN auspices. Throughout human rights legislations, the dominant principle of non-discrimination echoes as will be examined hereunder.

THE UN CHARTER, UDHR AND ICCPR

One of the core purposes and principles of the United Nations is ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’.¹² By this, the UN Charter recognizes that the basis for discrimination against any human may either be based on racial, sexual, linguistic or religious orientation. Given the multi-racial and multi-cultural makeup of the human race, there is this acknowledgment that humans cannot peacefully co-exist if these discriminations abound.

The UDHR on its own declares in clear terms that ‘[a]ll human beings are born free and equal in dignity and rights’.¹³ It declares further that the rights and freedoms recognized in the declaration are to be enjoyed by all persons ‘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’.¹⁴ Beyond providing for equality before the law, the declaration also provides for equal protection from discrimination and making inciting discriminatory remarks.¹⁵

THE ICCPR

⁶The Declaration of Independence (U.S. 1776) paragraph 2.

⁷Mary Hunt, ‘Introduction’ in Mary Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 7.

⁸Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119.

⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A(III)).

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination 1965.

¹¹Warwick McKean, *Equality and Discrimination under International Law* (Oxford University Press, 1983) 165.

¹²Charter of the United Nations, article 1(3).

¹³ Universal Declaration of Human Rights 1948, article 1.

¹⁴ Ibid., article 2.

¹⁵ Ibid., article 7.

Under the ICCPR, articles 2(1), 3 and 26(1) expressly provide for non-discrimination. Article 2(1) obligates States to ‘respect and ensure’ to everyone in their jurisdiction the covenant rights without distinction on the same basis as the other conventions. Article 3 could be argued to be superfluous because it rehashes non-discrimination based on sex when it guaranteed that the covenant’s rights are to be enjoyed equally by men and women. While article 26(1) is a reiteration of grounds for non-discrimination, it goes further to mandate states not to adopt discriminatory legislation and the application of such. The CCPR has noted that article 26 ‘prohibits discrimination in law or in fact in any field regulated and protected by public authorities.’¹⁶ The essence is to ensure equality of all persons before the law.¹⁷ Thus, when states make laws, the statutory provisions are not to run contrary to the dictates of article 26(1).

Article 26 could be argued to be the litmus test every national legislation must pass. The language of article 26 has been argued as imposing on state law-makers ‘positive obligation’ not to pass discriminatory legislations.¹⁸ Thus, in *Zwaan-de-Vries v Netherland*¹⁹ the Human Rights Committee held that married women being denied equal rights as compared to their male counterparts under the social security system of the Netherlands based on the assumption that men are the breadwinners violates article 26 on the basis of sex discrimination. However, not every difference in treatment amounts to discrimination. As observed by the CCPR, where the criteria adopted for differentiation is both reasonable and objective and seeks to achieve a legitimate purpose under the covenant, such would not amount to discrimination.²⁰

Taken holistically, it may be argued that from the provisions of the ICCPR, decisions by the CCPR in the cases, the general comments and recommendations, the main thrust of the covenant is that states have mandatory obligations to implement measures within their jurisdictions that promote non-discrimination.

RACIAL NON-DISCRIMINATION (ICERD)

Among the most prominent areas where discrimination abounds, racial discrimination is arguably at the forefront. The ICERD defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”²¹ Some salient points are worth noting regarding the expanded definition in this convention.

¹⁶General Comment no 18 Non-Discrimination Adopted at the Thirty-seventh Session of the Human Rights Committee on 10 November 1989 UN Doc. HRI/GEN/1/Rev.9 paragraph 12.

¹⁷ Lord Lester of Herne Hill, ‘Non-Discrimination in International Human Rights Law’ (1993) 19 Commw L Bull 1653, 1654.

¹⁸ Olivier De Shutter, *International Human Rights Law* (2ndedn, Cambridge University Press 2014) 690.

¹⁹ Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987).

²⁰ General Comment no 18 Non-Discrimination, paragraph 13.

²¹ International Convention on the Elimination of All Forms of Racial Discrimination 1965, article 1(1).

First is the basis for outlawing discrimination. The basis upon which discrimination is outlawed includes; ‘race, color, descent or national or ethnic origin.’ Therefore, anybody, whether individually or collectively, coming within the ambit of this categorization is automatically protected by the convention. The Committee on the elimination of racial discrimination established under the convention,²²herein CERD, has expanded on this categorization of protected persons. In general recommendation XXV, it noted, while expanding the scope to include women, that, there are instances where racial discrimination affects only women or in a different degree than men.²³The second point to be noted from the article 1 definition is the category of rights forming the basis for non-discrimination. It cuts across many scopes. These are: human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The CERD has recommended that list of rights listed in article 1(1) is not exhaustive.²⁴ As a corollary to non-discrimination, state parties are required to guarantee ‘equality before the law’ for everyone within their domain regarding the enjoyment of the rights listed.²⁵ For this happen, states are under an obligation to make conscious efforts to review government policies, amend, repeal and nullify legislations and regulations that promote racial discrimination.²⁶

Akey provision of the CERD is the prohibition of racial hate and discrimination through racial propaganda,²⁷otherwise known as hate speech. Despite this laudable provision of the convention, current events demonstrate that racial hatred, even among top government officials exists. Thus, in *Armenia v Azerbaijan*,²⁸pending before the International Court of Justice, one of the grounds for the request of provisional measures by Armenia is that Azerbaijan authorities are sponsoring a policy of hate against Armenians. Armenia contends that this has given rise to systematic discrimination against those individuals in Azerbaijan.²⁹ Armenia further contends that Azerbaijan gravely violates its obligations under the CERD in their 2020 conflict with instances on; glorifying, rewarding and condoning acts of racism directed against Armenians.³⁰Also, that the rights of Armenians under the CERD were being violated ‘on a daily basis through a constant rhetoric of hate.’ In fact, this rhetoric was used by high-ranking officials of the government, including the Azerbaijan President himself.³¹After a consideration of these and other submissions, it was the Court’s opinion that ‘promoting racial hatred and incitement to racial

²² Ibid., article 8(1).

²³General Recommendation No. 25 on Gender-related Dimensions of Racial Discrimination, paras. 2-6; in Report of the Committee on the Elimination of Racial Discrimination, 6-24 March 2000, Annex V (A/55/18).

²⁴General Recommendation No. 32 The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, para. 9 (CERD/C/GC/32, 24 September 2009)

²⁵ International Convention on the Elimination of All Forms of Racial Discrimination 1965, article 5(a)-(e).

²⁶ Ibid., article 2(1)(c).

²⁷Ibid., article 4(a)-(c).

²⁸*Application of the International Convention on The Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Request for the Indication of Provisional Measures: Order)General List No 180 [2021] ICJ 1.

²⁹ Ibid., para 21.

³⁰ Ibid., para 22.

³¹ Ibid., para 49.

discrimination or to acts of violence against any group of persons based on their national or ethnic origin ... may have serious damaging effects on individuals belonging to the protected group.’³² The Court therefore made a provisional order directing Azerbaijan to, amongst others, take every measure which is necessary for the prevention of incitement and promotion of racial hatred and discrimination. This includes its officials of state and public institutions which target persons of Armenian national or ethnicity.³³

There may be arguments regarding how to balance the freedom of expression with the provisions of article 4. However, a closer look at the provision reveals that the phrase ‘with due regard to the principles embodied in the Universal Declaration of Human Rights’ seems to balance the two. In fact, the CERD tries to strike a balance between the liberty to express oneself and the responsibilities and consequences that come with such expression.³⁴ The ICJ underscored this point when it observed in *Armenia v Azerbaijan* that high ranking officials of State espousing racial rhetoric can have damaging effects.³⁵ These include but are not limited to, the risk of bodily or psychological harm and distress.

Sometimes, discrimination may not be directly manifest so as to lead to outrage or outright condemnation. It may be indirect. For example, in the enactment of a piece of legislation, a law may have discriminatory undertone no matter how well intentioned, thereby running contrary to the provisions of the ICCPR or CERD. This is so because, there is a sense in which a law may appear to be neutral on the surface, but has adverse effect(s) on a particular set of people.³⁶ This would result in those affected feeling that they have been targeted and discriminated against. This appears to be the current opinion among civil rights’ activists regarding the Nationality and Borders Bill³⁷ being debated in UK Parliament. The Bill gives the government the power to deprive a person of his citizenship without notice where “reasonably practical” to do so. Further grounds are in respect of national security, diplomatic relations or otherwise in the public interest.³⁸ The Bill has attracted outrage by civil rights groups who have in strong terms condemned it as discriminatory and targeted at specific ethnic minorities and religious groups. Francis Webber, vice-chair of the Institute of Race Relations has argued that the proposed law ‘unapologetically flouts international human rights obligations and basic norms of fairness’.³⁹ His

³² Ibid., para 83.

³³ Ibid., para 92.

³⁴ W. M. Reisman, ‘Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination’ (1971) 1 Denv J Int’l L & Poly 29, 50.

³⁵ *Application of the International Convention on The Elimination of All Forms of Racial Discrimination*, supra para 83.

³⁶ Richard Stone, *Civil Liberties and Human Rights* (6thedn, Oxford University Press 2006) 498.

³⁷ Nationality and Borders HC Bill (2021-2022).

³⁸ Nationality and Borders HC Bill (2021-2022) clause 9.

³⁹ Haroon Siddique, ‘New Bill quietly gives powers to remove British citizenship without notice’ *The Guardian* (London, 17 November 2021) <www.theguardian.com/politics/2021/nov/17/new-bill-quietly-gives-powers-to-remove-british-citizenship-without-notice> accessed 16 December 2021.

argument is that the proposed law puts in precarious situation, rights of persons of certain racial and religious background.⁴⁰

From the purview of the ICCPR particularly article 26 and the ICERD, critics may argue that the controversial clause 9 of the Nationality and Borders Bill runs contrary to the text and spirit of these treaties and some other conventions. While defenders of the Bill may argue that nothing on its face is discriminatory, the CERD is of the opinion that ‘presumed victims of racial discrimination are not required to show that there was discriminatory intent against them.’⁴¹ This was reiterated by the CERD in its Communication No. 52/2012.⁴² As the CCPR communicated in *Simunek&Ors v The Czech Republic*⁴³ the intention of the legislature alone is not dispositive when making a determination as to whether article 26 of the ICCPR has been breached. An act may contravene article 26 of the ICCPR if its effects are discriminatory even if not politically motivated. While it is not certain if clause 9 in the bill will eventually be included in the final draft, it may be argued that if the Bill eventually becomes a law, the clause may someday be a subject of recommendation by the CCPR or CERD for its amendment depending on how it is applied.

REMEDIES FOR DISCRIMINATION UNDER THE UN TREATIES

Under the ICCPR, there is no specified requisite remedies for victims of discrimination save for the general provisions that such persons are entitled to ‘effective remedy.’⁴⁴ Similar expression is found in the ICERD and includes the right to ‘just and adequate reparation or satisfaction for any damage suffered as a result of discrimination.’⁴⁵ Further actions required by States involve reviewing of government policies, the amendment, rescission and nullification of laws that contribute to racial discrimination.⁴⁶ The language of the treaties suggests a firm and conscious implementation by each State of the provisions on remedies by the use of the word “shall”. This demonstrates a determination to make good any wrong occasioned by discrimination. While non-discrimination at the UN level has been a topical issue, it has had its share of discussions and legislative enactments at the regional level. The subsequent discussions now turn attention to non-discrimination under the African and European human rights legal framework.

NON-DISCRIMINATION UNDER THE AFRICAN HUMAN RIGHTS FRAMEWORK

The principle of non-discrimination is a concept well recognized within the framework of African human rights jurisprudence. The principal legal framework in this regard is the African

⁴⁰ Ibid.

⁴¹ *V.S v Denmark* (2015) CERD No. 56/2014 (Committee communication, 4 December 2015) paragraph. 7.4.

⁴² *Laurent GabreGabaroum v France* (2016) CERD No. 52/2012 (Committee communication, 10 May 2016) paragraph 7.2.

⁴³ Communication No. 516/1992, CCPR/C/54/D/516/1992 (1995).

⁴⁴ International Covenant on Civil and Political Rights, 1966 article 2(3)

⁴⁵ International Convention on the Elimination of All Forms of Racial Discrimination 1965, article 6.

⁴⁶ Ibid., article 2(1)(c).

Charter on Human and Peoples' Rights⁴⁷ herein ACHPR. Just like UN human rights treaties, article 2 of the Charter explicitly prohibits discrimination regarding the enjoyment of the rights in the Charter on the basis of race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. It further expanded on the principle of non-discrimination by prohibiting mass expulsion of non-nationals from the state where they are domiciled on the basis of national, racial, ethnic or religious affiliation.⁴⁸ This has been argued to be normative, expansive and a substantial departure from other similar human rights documents.⁴⁹

Decisions on the Charter provisions illustrate a purposive interpretation accorded to treaties of this nature. Thus, in *Legal Resources Foundation v Zambia*⁵⁰ the country amended its Constitution and inserted provisions that candidates seeking to be elected to the office of the President has to prove that both parents are Zambians by birth or descent. This was found to be discriminatory by the African Commission on Human and People's Rights. It violated the provisions of article 2 of ACHPR amongst others. In another case, *OCMT & Ors v Rwanda*⁵¹ the Commission found that Rwanda breached article 2 of the Charter when it expelled Burundians living in Rwanda as refugees and denied them access to defend themselves in court.⁵²

Despite the Charter provisions, one of the areas that the enjoyment of the rights in the Charter has faced difficulty in implementation within the African continent is gender-based discrimination. This is notwithstanding that obligation is placed on states to ensure the elimination of every form of discrimination against woman and also to ensure that their rights are protected.⁵³ Thus, in some African countries, women 'are still regarded as underdogs.'⁵⁴ In fact, in some ethnic groups within African countries, women are not allowed to partake of their deceased father's estate. This can be traced to archaic and barbaric customs and traditions. Recently an issue of legal dispute, in *Ukeje v Ukeje*⁵⁵ the Nigerian Supreme Court was of the opinion that a custom prohibiting a woman from inheriting her deceased father's estate is discriminatory and contrary to the Constitution. Such custom in the Court's opinion must be abolished.

⁴⁷African (Banjul) Charter on Human and Peoples' Rights, 1981.

⁴⁸ African Charter on Human and Peoples' Rights, 1981 article 12(5).

⁴⁹Makau Mutua, 'The Construction of the African Human Rights System: Prospects and Pitfalls' in Samantha Power and Graham Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact* (Palgrave Macmillan 2000) 145.

⁵⁰Communication No. 211/98, 14th ACHPR AAR Annex V (2000-2001).

⁵¹Communication No. 27/89, 46/91, 49/91, 99/939, 10th ACHPR AAR Annex X (1996-1997).

⁵² Ibid., para 22.

⁵³ African Charter on Human and Peoples' Rights, 1981, article 18(3).

⁵⁴P. Nnaemeka-Agu, 'Discrimination and the African Charter on Human and Peoples' Rights' (1993) 19 Commw L Bull 1670, 1673.

⁵⁵ (2014) 11 NWLR part 1418 page 384.

In a further bid to eradicate discrimination against women, the African Union come up with a protocol in 2003 to supplement the ACHPR.⁵⁶ The thrust of the protocol is the elimination of all forms of discrimination against women by state parties through legislative, institutional and other measures.⁵⁷

NON-DISCRIMINATION UNDER THE EUROPEAN FRAMEWORK

Just like other human rights treaties, non-discrimination is a prominent feature of the human rights jurisprudence of Europe. The European Convention on Human Rights⁵⁸ is the key legislation in this regard. Article 14 of the Convention enshrined the principle of non-discrimination. It covers non-discrimination ‘on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ The enjoyment of convention rights and freedoms must be “secured” without discrimination of these grounds. Just like other human rights treaties, it is accepted that the provisions of article 14 is open-ended.⁵⁹

Within Europe, cases bothering on non-discrimination on various grounds abound. The jurisprudence of the European Court of Human Rights has equally been outstanding. In *Bayatyan v Armenia*⁶⁰ the applicant refused military service as a conscientious objector on religious grounds. As a result, he was arrested, tried and later imprisoned. Having exhausted local remedies, he appealed to the ECtHR. He lost and appealed further to the Grand Chamber of the Court. The Grand Chamber ruled that Armenia violated the right of the applicant, when he was prosecuted, convicted and imprisoned for refusal to perform military service. This became a precedent at the EU level and has been followed in subsequent cases with respect to conscientious objections to military service.⁶¹

CONCLUSION

So far, attempt has been made to analyze the various human rights treaties on the singular and topical theme of non-discrimination. The analysis reveals that at the UN level, while the UN Charter merely provides for non-discrimination on grounds of race, sex, language or religion, other treaties and declarations have expanded on the grounds for non-discrimination. The CERD has also recommended that the list is not exhaustive and other human right committee have issued recommendations or general comments on what is expected of States. At the regional

⁵⁶Protocol on the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003.

⁵⁷ Ibid., article 2.

⁵⁸Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁵⁹Michael Connolly, *Discrimination Law* (Sweet & Maxwell 2006) 21.

⁶⁰App no 23459/03 (ECtHR, 7 July 2011).

⁶¹*Tsaturyan v. Armenia* App no. 37821/03 (ECtHR, 10 January 2012); *Erçep v Turkey* App no. 43965/04 (ECtHR, 22 November 2011); *FetiDemirtaş v Turkey* App no. 5260/07 (ECtHR, 17 January 2012).

level, the ACHPR and ECHR employed similar languages in the provision of grounds for non-discrimination. The judicial interpretations by the Courts, the recommendations and general comments of the various committees could be argued to demonstrate a purposive interpretation of these documents. States are now alive to the reality that human interactions require a certain level of acceptable standards for society to properly function. Thus, while the jurisprudence of the principle of non-discrimination continues to develop and expand, it is safe to conclude that it has become a dominant theme of modern human rights law.

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