

Individual v. collective or group rights

- 'Rights' are in principle individual claims or entitlements in so far as they are directed towards a nation-state. However, many phenomena, such as 'culture', are (1) best enjoyed in community with others. Or they are (2) also in principle collective entitlements to be enjoyed collectively; e.g. the rights to continued existence, development, peace and security, and «a generally satisfactory environment» in ACHR.
- (1) Art 27 of ICCPR: «in those states where ethnic, religious, linguistic minorities exist», «persons belonging to...» shall not be denied the right «in community with other members of the group», to enjoy their own culture ...
 - From this article come the tradition of minority protection in which, juridically, cases are treated as (violations) of collectivised individual rights, i.e., cases where rules of non-discrimination and measures of effective protection (e.g., affirmative action) shall apply.
 - But observe the difference between groups as (a) categories (socially constructed; gender, etc.) and groups as (b) permanent culturally distinct communities (filiative groups).
- (2) Rights associated with a principle of self-determination (external and internal). This is primarily about indigenous peoples (who have a right to maintain distinct political and legal systems irrespective of the rules of the nation-state where they belong), but it also applies to 'peoples' in relation to self-determination, development, environment, etc.
 - But observe the difference between territory-based and culturally based political autonomy.

Equality and Non-Discrimination

- These principles are the «twin pillars of the system», because they are:
 - ensuring democracy, everyone's participation and ability to pursue happiness
 - guaranteeing a level playing field, in societies organised as states
- the big problem of collective v. individual rights: how do HR enable self-realisation? How should IHR contribute to identity formation? What about solidarity rights?
 - individual self
 - gendered self
 - family self
 - community self
 - national (nation-state) self
- 'rights–obligations' : contractual perspective on identities
- relational perspectives: (god-given, traditionally prescribed) set of relations (blueprints)
 - legal specifications v. equilibration or harmonisation

Equality

Art. 1 of the Universal Declaration of Human Rights: *“All human beings are born free and equal in dignity and rights”.*

Art. 7 UDHR: *“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

Equality is “a basic and general principle” (GC 18 of CCPR); the **cornerstone of all democratic States** (equality of persons before the law, equality of opportunity, equality of access to e.g. education), for the state is the regulator of what we have in common.

Discrimination is therefore the negative side of the coin of equality.

Non-Discrimination

CERD; CEDAW and many others are designed to give additional protection to vulnerable groups, i.e., categories of individuals that fall short of the putative 'male standard'. For instance, as expressed in CEDAW, Art. 1:

For the purposes of the present Convention, *the term "discrimination against women" shall mean 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.*

Discrimination

- **Not every differentiation** of treatment constitutes discrimination.
- A situation is discriminatory or unequal if **like situations are treated differently or different situations are treated similarly, without pursuing any legitimate aim in a proportionate way.**
- The onus is on the state to justify any interference implying unequal treatment.
- New demands (e.g. sexual orientation): first step is recognition of unequal status (and systematic suffering because of ...), next step is taking measures to guarantee effective protection of these individuals, such as positive discrimination or affirmative action

Direct and Indirect Discrimination

- **Direct discrimination**: a person (or a group of people), is **openly** treated less favourably than another person or group **because of certain “personal characteristics”**, such as a person’s ethnic origin, sex, marital status, age, disability, sexual orientation, gender identity.
- **Indirect discrimination (de facto discrimination)**: there is an unreasonable rule or policy that is the same for everyone but has an **unfair effect** on people who share a particular attribute. It results from the **use of apparently neutral criteria**, procedures, or practices, **the effect of which** is similar to that of direct discrimination. Such an effect is **not necessarily intentional**. E.g. an employer who requires staff to commit to working from 8pm to 11pm every evening indirectly discriminates against women, who are more likely to be taking care of children.

There is no indirect discrimination if there is an **objective justification** and the differentiation is a **proportionate** tool to achieve a **legitimate aim** -- this will be **affirmative action**.

Principle of Equality and Affirmative Action

The HR Committee stressed that “*the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance*”.

The principle of substantial equality might sometimes require States parties to take **affirmative action** in order to **diminish or eliminate conditions** which cause or help to perpetuate discrimination prohibited by the Covenant.

E.g. In a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take **specific action to correct those conditions**. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters.

Affirmative action programs are meant to break down visible and invisible barriers in order to make sure everyone is given an equal break.

They are also called “**temporary special measures**”, as they are **NOT** meant to be permanent, but rather to “correct” specific structural inequalities. Once such inequalities are fixed, the measures should be withdrawn.