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á Akureyri
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Equality and non-discrimination are they one and the same?

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HUG- OG FÉLAGSVÍSINDAVID

Lokaverkefni til B.A prófgráðu í lögfræði

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Declarations

I hereby declare that I am the sole author of this thesis and it is the product of my own research.

Ari Hólm Ketilsson

It is hereby confirmed that in my judgement this thesis meets the requirements for a B.A. degree in Law at the Faculty of Law and Social Science

Aðalheiður Ámundadóttir

Útdráttur

Hugtökin jafnrétti og bann við mismunun hafa verið til í hundruð ára. Það er samt ekki fyrr en eftir stofnun Sameinuðu Þjóðanna sem þau fá hnattræna viðurkenningu. Mikilvægasta skjalið í þessu öllu var mannréttindayfirlýsing Sameinuðu Þjóðanna sem lagði grunninn að alþjóðasamningnum um borgaraleg og stjórnámálagréttindi og síðan alþjóðasamningnum um efnahagsleg, félagsleg og menningarleg réttindi. Með þessum tveim samningum voru jafnrétti og bann við mismunun orðin viðurkennd réttindi um allan heim. Eru þessi tvö hugtök talin náskyld og við það eitt að lesa greinarnar í ofntöldum yfirlýsingum og alþjóðasamningum er ekki augljóst hvort og þá hver munurinn á þessum tveim hugtökum er.

Í þessari ritgerð verður leitast við að útskýra þessi tvö hugtök og hvernig þau birtast í Stjórnarskrá lýðveldisins Íslands. Í lok ritgerðarinnar er leitast við að útskýra hvað sé líkt og hvað sé ólíkt með þessum hugtökum og komast að niðurstöðu um það hvort að þau séu í raun og veru tvö hugtök um sama hlutinn.

Abstract

The terms of equality and non-discrimination have been around for hundreds of years. However, it is not until after the founding of the United Nations that they get recognised globally. The most important document in that process was the Universal Declaration of Human Rights by the United Nations, it lay the foundation for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. With these two covenants equality and non-discrimination became recognised rights on a worldwide scale. These two terms are closely related and by just reading the articles in the two covenant it is not clear what the difference is between the two if there even is any.

In this paper the aim is to explain these two terms and how they appear in these two covenants, also it is explained how they appear in the Icelandic constitution. By the end of the paper the differences and similarities between the two terms will be explained and finally it will be concluded if they are one and the same.

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1. Introduction

In this paper the principles of equality and non-discrimination will be examined as they appear in international human rights law and as well within the Icelandic constitution. The objective of the paper is to answer the following question: Are equality and non-discrimination one and the same? The interest in the subject began after having read through the Universal Declaration of Human Rights and noticing the striking similarities between the principles of equality and non-discrimination. After having read them and notice that they are almost the same and difficult to explain the difference between the two. In this paper it is tried to explain and demonstrate that difference between those two fundamental principles.

The paper is divided into four main chapters. In chapter two a brief historical overview of equality and non-discrimination is given as well as a general introduction of the major international documents and treaties referred to in the paper. The main part of the paper will be in chapter's three to five. In chapters three and four the two principles will be examined in depth. In chapters three and four the principles of equality and non-discrimination will be examined further. In the begging of both chapters the terms will be defined. In regards to both principles the relevant articles of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights will be listed. In both instances the articles will be compared and further elaborated with case law from the Human Rights Committee and the Icelandic Supreme court as well as general comments from the Human Rights Committee and the Economic and Social Council will be used.

In chapter five the two principles will be compared and their differences and similarities, explained. The two folded elements, formal and substantive, of both principles will be demonstrated as well as how they impose positive and negative duties on States. At last, the main differences of the two principles are dealt with in the last part of chapter five.

2. Sources of law and historical overview

In this chapter, few comments on the sources of international human rights law covering the principles of equality and non-discrimination will be made as well as a brief historical overview on the topic.

2.1 Sources of International law

In this paper the following sources of international law will be used to support the arguments made in this paper; The Charter of the United Nations, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and finally the Icelandic Constitution.

The Charter of the United Nations

The Charter of the United Nations¹ is the foundational treaty of the United Nations and is binding on all member States of the UN.² It was signed on 26th of June 1945 and came into force on 24th of October 1945. It is not a human rights treaty but it lays down many of the fundamental legal principles of international law. The aim of the charter, as well as laying down the purposes of the UN and its main procedural rules, is to maintain peace and security in the world and to try to prevent and to remove possible threats to the before mentioned peace.³

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights⁴ was proclaimed by the United Nations General Assembly on 10 December 1948.⁵ It was agreed upon in a form of a resolution (no. 217 (III)). The declaration was a major milestone at the time, as it set down for the first time, a number of individual human rights articles in legal terms, to be universally protected. Being a declaration it is not legally binding but rather a statement of policy made collectively by member States of the United Nations to protect human rights. The principles covered in the declaration have however for the most part been recognised as international customary law and thus, binding on all States.⁶ The principles of the declaration have for the most part been codified in the two major International Human Rights treaties; The International Covenant on

¹ Hereafter UN Charter

² Hér þarftu að setja fullt nafn sammingsins og fulla tilvísun. Þú finnur flestar tilvísanir til samningana í heimildaskrá bókarinnar okkar Rachaelar.

³ <http://www.un.org/en/sections/un-charter/chapter-i/index.html> accessed 10.8.2016.

⁴ Hereafter UDHR

⁵ G.A. Res. 217A (1948).

⁶ Henry J. Steiner, Philip Alston and Ryan Goodman: International human rights in context. (2007), p. 160-161.

Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights.⁷

The International Covenant on Civil and Political Rights⁸ was drafted and opened for signatures and ratification on the 16th of December 1966 and came into force on the 23rd of March 1976 is binding treaty on its member States⁹

The International Covenant on Economic, Social and Cultural Rights¹⁰ is often referred to as a sister treaty to the ICCPR.

Together these two treaties form the most wide spread international legal documents in the world. The reason for having these two treaties is due to the capabilities of States to ensure the prescribed rights.¹¹ This is shown when the two are compared in the ICCPR the parties are obliged to ensure the prescribed rules in full but in the ICESCR it is stated that there needs to be a progressive realization. Even though the ICESCR has this duty of progressive realization it still puts the same obligations on member States as ICCPR does.¹²

2.2 Brief historical overview

The principle of equality is an old one and has been around for centuries. It started to appear in domestic law in the late 18th century with the main objective of guaranteeing an equal position of people before the courts. The rule then developed through the years and became accepted that the states could not arbitrarily limit rights of individuals. By the 19th century it was believed that the principle was not being applied broadly enough and that the rule should include that the laws themselves should not contain any discriminatory clauses.¹³

The present legal provisions on equality and non-discrimination derive from those rules but have developed through the years particularly through the establishment of the UN and codification of fundamental human rights principles, after which the development of these rules took giant leaps forward and became recognised worldwide.¹⁴

⁷ G.A. Res. 217A (1948).

⁸ Hereafter ICCPR

⁹ International Covenant on Civil and Political Rights 1966, 999 UNTS 171. accessed 10.8.2016.

¹⁰ Hereafter ICESCR

¹¹ Guðmundur Alfreðsson and Asbjorn Eide: *The Universal Declaration of Human Rights: A common standard of achievement* (1999), p. 477. See also Giorgio Baruchello and Rachael Lorna Johnstone: „Rights and value: construing the international covenant on economic, social and cultural rights as civil commons.“ (2011).

¹² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations. Most articles of the treaty are accepted rules within International law, see ICJ judgement in: *Case concerning Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)* 1997, 142. Paraph.

¹³ Schram GG, „Jafnræðisreglan“ in *Stjórnskipunarréttur* (2. útg. edn, Reykjavík: Háskólaútgáfan, 1999). 471.

¹⁴ *Ibid* 471.

3. Equality

In the Icelandic legal dictionary defines discrimination as follows:

“To have an equal right, equal legal status (for example gender equality)”¹⁵

From the above definition it is clear that equality means that the legal system should treat every single individual in the same way. Equality is recognised as one of the fundamental principles of international human rights law. To support this statement it is worth noting that this principle is put forth in article 1.2 in the United Nations Charter.¹⁶ The article contains the presumption that for the world to be able to acquire and keep strong friendly relations, and to preserve the peace worldwide, equality as it is defined above is pivotal.

However, equality takes different forms. It puts the obligation on States that everyone is treated the same at all times in any situation and that the law shall guarantee that. The law should not hinder people’s freedom and liberty so that they are not able to pursue their life as they please as long as what they are doing is in compliance with our laws. It can also be more limited in that everyone should be given the same rights if they are in the same position or doing the same things.

As mentioned above equality can be ensured in different ways, depending on country, law or treaty. This means that equality is not achieved by the same single method everywhere and in every situation but the meaning and content of the principle is always and should be the same. On the basis of the definition of equality everyone should be able to assume that they enjoy equal protection by law and enjoy the same rights and liberties as everyone else in any given situation. The main legal challenges when dealing with equality, is to determine in each case if the given situation in each case is in fact compatible. For example case 1778/2008 where it was debated if a prisoner that was being payed 4500 CZK per month for his work at the prison was being discriminated against because the minimum wages at the time were 7995 CZK per month. The case was considered to be inadmissible since the plaintiff was not able to prove that his work at the prison was available on the open market.¹⁷

The variety and broadness of the principle of equality can be demonstrated by comparing different appearances of the principles in various legal texts.

¹⁵ Páll Sigurðsson and others, *Lögfræðiorðabók: með skýringum* (Páll Sigurðsson and others eds, Reykjavík: Codex: Lagastofnun Háskóla Íslands, 2008) 216.

¹⁶ <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html> accessed 19.4.2016.

¹⁷ Human Rights Committee Communication No. 1778/2008 paragraphs 2.1 and 6.3

Article 7 of the Universal Declaration of Human Rights is as follows:

“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.”

In article 26 of the International Covenant on Civil and Political Rights includes the provision that everyone is equal before the law and should enjoy an equal protection by the law. The article is as follows:

“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 any 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.”

Article 3 of the International Covenant on Economic, Social and Cultural Rights includes the provision that men and women have the same opportunity to enjoy the rights that the covenant prescribes. The article is:

“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

The principles of equality and non-discrimination are set out in article 65 of the Icelandic constitution¹⁸. The English translation of the article is as follows:

“Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.

Men and women shall enjoy equal rights in all respects.”¹⁹

The provisions above all differ from each other but they are all striving for the same goal, and that is for everyone to be considered equal and enjoy the same rights and the same protection

¹⁸ “Allir skulu vera jafnir fyrir lögum og njóta mannréttinda án tillits til kynferðis, trúarbragða, skoðana, þjóðernisuppruna, kynþáttar, litarháttar, efnahags, ættarnis og stöðu að öðru leyti.

Konur og karlar skulu njóta jafns réttar í hvívetna.”

¹⁹ <http://www.government.is/constitution/> accessed 27.4.2016.

of those rights regardless of their status. However, the equality provisions in the different documents all go about ensuring these principles in different ways.

The approaches in the above cited articles differ in two ways. On one hand they state that everyone should be equal before the law and equal protection by the law no matter the status of the person in question. On the other hand, specific rights are guaranteed to everyone. Those specific rights are to be enjoyed by all, and some groups of the society should not have an easier time to enjoy those rights than other groups of the society.

Examples of the first approach can be seen in UDHR, ICCPR and the Icelandic Constitution. The equality provisions in all these documents state that everyone is equal before the law and treated in the same way and that everyone has the same opportunities to be able to use the laws to protect their rights. The ICCPR provision is supposed to ensure that everyone is equal before the law and should enjoy equal protection by the law.²⁰ This incorporates the duty on states to apply their domestic laws equally.²¹ The rule then prescribes the duty on states to act in a comparable manner when resolving cases that are comparable and also to resolve them differently when they are not comparable.²² Based on the above mentioned obligation, the equality principle of article 26 does not only require the law itself to be equal towards persons or parties but furthermore it requires equal applicability of the law to all persons and parties that are in comparable situations.²³ Examples of this are the cases of *Broeks v. The Netherlands* and *Zwaan-de Vries v. The Netherlands*. Both cases concerned the rights of men and women to unemployment benefits. In the *Broeks* cases the plaintiff believed that the government was discriminating against her on the basis of sex. According to the laws women that were married had to prove that they were the providers of the home to be able to enjoy unemployment benefits while the men did not have to prove this.²⁴ The HRC found that the State was in violation of article 26 and discriminated against Ms. *Broeks* on the basis of sex.²⁵

In both of these cases the state protested that the HRC could not take this matter into consideration as they believed that the matter was in compliance with the ICESCR but not

²⁰ Arnljótur Ástvaldsson, *Jafnræðisregla 26. gr. Alþjóðasamnings Sameinuðu þjóðanna um borgaraleg og stjórnmálaleg réttindi: Gildissvið, inntak og beiting* (2009) 33.

²¹ *Ibid* 33.

²² Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd rev. ed. edn, Kehl; Arlington, VA: N. P. Engel, 2005). 606.

²³ Arnljótur Ástvaldsson, *Jafnræðisregla 26. gr. Alþjóðasamnings Sameinuðu þjóðanna um borgaraleg og stjórnmálaleg réttindi: Gildissvið, inntak og beiting* (2009) 33-34

²⁴ Human Rights Committee. Communication No. 172/1984 paragraph 2.3 accessed on 12.8.2016.

²⁵ *Ibid*. See also *Zwaan de-Vries*. Human Rights Committee Communication No. 182/1984

with the ICCPR and therefore the HRC had no jurisdiction to make any judgment on the case. On this point the HCR reached the conclusion that article 26 of the ICCPR was relevant because states are obliged to make sure that their laws are in compliance with the article even though the laws were considered to concern economic or social rights.²⁶

Article 65 of the Icelandic Constitution approaches this in a similar way. The first sentence of the article states that everyone shall be equal before the law and therefore it does not only apply to Icelandic nationals but also applies to foreign nationals within the Icelandic jurisdiction. The text of the article is very broad so it is interpreted in a way that the scope of the article protects all of the human rights that are prescribed in international treaties that Iceland has ratified.²⁷

In case 177/1998 the plaintive, a blind woman, was in a dispute with the University of Iceland. She had enrolled for business studies R believed that the university had not met its obligations to ensure that she would get the assistance that she needed due to her disability. She based her claim on law no. 41/1983 and 59/1992 regarding matters of people with disabilities and also on article 65 of the constitution. The Supreme Court found that the University of Iceland had not done enough to make sure that R would be able to properly attend to her studies with the lack of general statements and policies by the University on how to meet R needs.²⁸ As well in the case 151/1999 B and the association of the deaf demanded that the Icelandic national television network would be obliged to interpret debates between candidates that were running in the parliamentary elections. B's argument was that it was a fundamental part of the right to vote to be able to examine what the candidates were being elected on and that it was in her right to be able to enjoy that right in the same way as people that did not suffer from her disability. B and the association based their claim on the rights prescribed in article 65 of the constitution. The Supreme Court found that the Icelandic national television network did have an obligation to ensure that everyone would be able to enjoy their broadcast, and so based on article 7 of law no. 59/1992 on the rights of people with disabilities and on article 65 of the constitution the court found a violation by the Icelandic national television network since it was technologically possible to have the broadcast interpreted during live broadcasts.²⁹

²⁶ Human Rights Committee. Communication No. 172/1984 paragraph 2.3 accessed on 12.8.2016.

²⁷ Schram GG, „Jafnræðisreglan“ in *Stjórnskipunarréttur* (2. útg. edn, Reykjavík: Háskólaútgáfan, 1999). 472-73

²⁸ Icelandic Supreme Court. Judgement in case no. 177/1998 since 4th of February 1999.

²⁹ Icelandic Supreme Court. Judgement in case no. 151/1999 since 6th of May 1999.

In the bill that was passed through the parliament it was made clear when covering article 65 that the article of the constitution does not contain specific rights but rather its importance is to be a statement that everyone shall be equal and that discrimination shall never be accepted. This applies both to the laws themselves but also when they are applied in practice.³⁰ As has been established before, the article does not contain a substantive right to equality but rather it contains the statement that it shall be recognised throughout the society. When the Icelandic Supreme Court has used the principle of equality, and referred to article 65, it has also referred to other articles of the constitution or articles of other statutes and therefore it has used article 65 as a supporting article to ensure other rights rather than just use article 65 as a specific independent right. In 14/2010 A was being prosecuted for repeated traffic violations and for not respecting the time that truck drivers had to rest between trips. A argued that the charges that were brought against him went against articles 75 and 65 of the constitution due to the fact that his freedom to work was being limited and therefore he was being discriminated against. The Supreme Court did not however accept the arguments made by A, and found him guilty, and sentenced him to imprisonment.³¹ In case 726/2013 G had to pay wealth tax for the years of 2010, 2011 and 2012. However, she felt that she did not enjoy equal rights as others and requested that it would be dropped on the basis that her taxation was in violation of articles 65 and 72 of the constitution. The Supreme Court agreed on the principle that these articles meant that taxation was bound by limits given by the laws but the court did feel that the State had not been in violation of the principles put forth in the constitution. Since it had been agreed upon for a long time that the State had the right either to introduce new taxes or stop collecting some specific taxes. The court felt that it was under the discretion of the State to collect different taxes based on the amount of money that people had. It is not considered to be discrimination to require people that have more to contribute more to the society.³² In case 417/2015 taxation was also debated on the grounds that it was discriminatory. Party E had been given a loan by M Plc. to buy 50% shares in M in 2007. The Icelandic tax authorities believed that the loan was against the law and therefore obliged E to pay taxes from the money he had received. E felt this was in violation of both article 65 and 72 of the constitution and therefore violated his right to property and equality. The Supreme Court, however, found that the actions taken by the tax authorities were compatible with the

³⁰ <http://www.althingi.is/altext/118/s/0389.html> text on article 3.

³¹ Icelandic Supreme Court. Judgement in case no. 14/2010 since 3rd of June 2010.

³² Icelandic Supreme Court. Judgement in case no. 726/2013 since 10th of April 2014.

constitution and therefore there was no violation because the laws did not allow for individuals to receive loans as gifts to use for investment and not repay it because the loan would have been taken over by a company or another individual.³³

Another approach to equality, mentioned above is guaranteeing specific rights for everyone. Article 3 of the ICESCR is a good example. The article states that each man and woman shall be awarded the same opportunity to enjoy the rights stated in the ICESCR. Also in other articles of the covenant, it is stated that each person shall enjoy the rights that are prescribed by that specific article of the covenant such as at articles 7, 11-14 where each article specifically states that each individual shall enjoy the prescribed rights equally.

Despite the absence of a pure equality principle, where it is stated that every individual is equal before the law, it should not be assumed that this is not the idea behind the ICESCR. On the contrary, it is generally assumed that equal enjoyment of equality before the law by all people is one of the core principles of international human rights law.³⁴ The aim of article 3 is to show that all of the rights that are presented within the covenant are supposed to be enjoyed by all and not just in theory but also in practice.³⁵ The concept of all individuals having equal rights is twofold, on one hand it is formal and on the other hand substantive. Formal equality can mean that both law and policy ought to treat all men and women neutrally but for substantive equality it is not enough for the laws and practices just to treat individuals the same as they also need to minimize any advantages that some particular groups in the society enjoy over others.³⁶

That means that article 3 puts the obligation on States to take into account all of the society when enacting new laws and to make sure that they do treat all people neutrally. In other words states must respect equality not only before the law but also within the law.³⁷ Not unlike article 65 of the Icelandic Constitution, article 3 of the ICESCR serves as a support to other articles but not independently. The equality principles further enhance the rights that are prescribed in other articles of domestic statutes or treaties.

The text in this chapter demonstrates the complexity of equality and how it is regulated and put forward, whether considered as a substantive right that can stand on its own, such as article 26 of the ICCPR, or as a supportive right like article 65 of the Icelandic Constitution and article 3 of the ICESCR, where it is not regarded as a substantive right but

³³ Icelandic Supreme Court. Judgement in case no. 417/2015 since 10th of March 2016.

³⁴ CESCR General comment 16 para 1 accessed 19.4.2016.

³⁵ Ibid para 6.

³⁶ Ibid para 7.

³⁷ Ibid para 8 and 9.

rather as a declaration of intent where it will not allow similar situations to be treated in different ways or allow individuals not to be ensured the same rights.

4. Non-discrimination

In this chapter the principle of non-discrimination will be defined and explained. After looking at its definition in-depth, various versions and its provisions in legal texts will be examined with relevant commentaries and case law of courts and treaty bodies.

The Icelandic legal dictionary defines discrimination as follows:

“When two similar situations are treated differently or situations that are clearly not similar are treated in the same manner that cannot be justified with an impartial and unbiased reason.”³⁸

Based on the above definition, discrimination includes treating one or more people differently to others based on their appearance or gender without any legitimate reason for it. Just as with equality, non-discrimination is one of the core principles of international human rights law and it is put forward in paragraph 3 of article 1 of the UN Charter where it is stated that to be able to solve international problems regarding economic, social and cultural differences and to advocate respect for human rights and other fundamental freedoms it is crucial to do so without any discrimination.³⁹ This shows that discrimination was at the immediate aftermath of Second World War, considered a major obstacle to peace and security in the world.

It shows the great emphasis on non-discrimination by the drafters, that its provision is put at the very forefront of the declaration; in article 2 as well as being mentioned in article 1 and 3 of the UN Charter.⁴⁰ Article 2 of the declaration and is as follows:

“Everyone is entitled to all the rights and freedoms set forth in this 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international

³⁸ Páll Sigurðsson and others, *Lögfræðiorðabók: með skýringum* (Páll Sigurðsson and others eds, Reykjavík: Codex: Lagastofnun Háskóla Íslands, 2008) 289.

³⁹ <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html> accessed 19.4.2016.

⁴⁰ Eide A og Guðmundur S. Alfreðsson, *The Universal Declaration of Human Rights : a common standard of achievement* / edited by Guðmundi Alfreðssyni and Asbjørn Eide (Eide, Asbjørn and Guðmundur S. Alfreðsson eds., Hague ; Boston : Martinus Nijhoff 1999) 75

status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”⁴¹

Still 20 years later, non-discrimination is still at the forefront, when drafting the UN human rights covenants. In ICCPR, non-discrimination is mentioned in articles 2.1 and 26. In the ICESCR it is article 2.2 that includes non-discrimination clause. Article 2.1 of the ICCPR is as follows:

*“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 recognized 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.”*⁴²

Article 2.2 of the ICESCR:

*“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*⁴³

As stated in chapter 3 the principle of non-discrimination is put forth in article 65 of the Icelandic constitution, which covers both the principles like article 26 of the ICCPR it. For the text of the article see page 5.

It was not until the UDHR was adopted that the principle of non-discrimination got a worldwide recognition and that it should apply to everyone. The events of the Second World War, which were fresh in people’s minds, was probably a big reason for this. As a result, the principle of non-discrimination is so important both in the UN Charter and in the UDHR and it is actually the only principle that is referred to more than once in the UN Charter which clearly shows how much non-discrimination was valued and how important it was thought to

⁴¹ <http://www.un.org/en/universal-declaration-human-rights/index.html> accessed 26.4.2016.

⁴² <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> accessed 24.4.2016.

⁴³ <https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf> accessed 24.4.2016.

be.⁴⁴ It is worth mentioning that during the drafting of the declaration it was debated whether the principle of non-discrimination should be included in the same article as equality but the conclusion was to have these two principles in separate articles because the non-discrimination principle would guarantee these rights to everyone and the principle of equality would be of more practical use where it was ensuring the rights of this declaration to everyone if the domestic law the member states would violate the rules of the declaration.⁴⁵

As discussed above it is obvious that the principle of non-discrimination is regarded as one of the core principles of international human rights law and therefore it has been put at the forefront of international human rights law by having it included in all the major documents and treaties.

All the above mentioned articles on non-discrimination share the principle that everyone should be given the same treatment as others regardless of race, colour, gender, language, religion etc.

Article 2.1 of the ICCPR contains an accessory prohibition on discrimination in connection with article 3 of the covenant that states that men and women should enjoy all the rights equally.⁴⁶ The text of article 2.1 puts the obligation on states to guarantee the rights of the covenant without differentiate among their subjects on the basis of personal differences.⁴⁷ However not all distinction among people or groups is discrimination. It all depends on the circumstances in each case and on whether the parties in question are in comparable situations and if the treatment is based on fair and valid reasons, and where relevant; if the actions taken by the state are proportionate.⁴⁸

Article 26 of the ICCPR puts the obligation on states to ensure that their domestic law does not discriminate and therefore it does not matter whether the laws are within the scope of the ICCPR and if they concern a field that is outside of the scope of the covenant.⁴⁹ In both *Broeks v. The Netherlands* and *Zwaan-de Vries v. The Netherlands*. The rights of women to unemployment benefits was considered.⁵⁰ The HRC found that the equal protection under the law that is guaranteed with article 26 prohibits discrimination both in the law itself and in

⁴⁴ Ibid 77.

⁴⁵ Ibid 79-80.

⁴⁶ Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd rev. ed. edn, Kehl; Arlington, VA: N. P. Engel, 2005) 45.

⁴⁷ Ibid 46.

⁴⁸ Ibid 46.

⁴⁹ Ibid 608.

⁵⁰ For more illustration of the cases see chapter 3.

practice in any field that is either regulated or protected by public authorities.⁵¹ In the Broeks case the plaintiff believed that the government was discriminating against her on the basis of sex. According to the laws women that were married had to prove that they were the providers of the home to be able to enjoy unemployment benefits while the men did not have to prove this.⁵² The HRC found that the State was in violation of article 26 and discriminated against Ms. Broeks on the basis of sex. This was also the result in Zwaan-de Vries.

With this in mind it is not the case that every distinction that is made is a violation of the non-discrimination principle. However it needs to be reasonably and properly justified so it violate the principle. The HRC did however conclude that in these cases there was discrimination based on the gender of the complainants and therefore there was discrimination based on sex.⁵³

Differential treatment based on prohibited grounds is considered discriminatory if there is not a justification and the differentiation is reasonable and objective. This will assessed on whether the aim and effects of the measures are legitimate, compatible with the nature of the Covenant.⁵⁴

The obligation imposed on States by article 26 is not merely to guaranty protection against discrimination in enjoyment of the rights covered by the ICCPR but also in the application of law and in all fields of law in or outside the scope of the covenant. In the case of Shirin Aumeeruddy-Cziffra and 19 other Mauritian women it was debated if women were being discriminated against due to having different conditions towards marrying foreign citizens. The facts were that foreign wives of Mauritian men had an unrestricted right to live in Mauritius due to their marriage but for foreign husbands of Mauritian women this was not the case. In contrast, the foreign husbands had to apply for a special approval by the Minister of Interior. The HRC reached the conclusion that this was in violation of article 2.1 as it was a gender-specific discrimination and violated articles 17 and 23 of the covenant.⁵⁵

In the case of Toonen v. Australia it was debated if being homosexual was a crime. The circumstances were that homosexuality was forbidden by the Tasmanian Criminal Code. The HRC found that it was in violation with both article 2.1 and article 17 of the covenant.⁵⁶

⁵¹ Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd rev. ed. edn, Kehl; Arlington, VA: N. P. Engel, 2005) 609.

⁵² <http://hrlibrary.umn.edu/undocs/newscans/172-1984.html> paragraph 2.3 accessed on 12.8.2016.

⁵³ See cases Broeks v. The Netherlands and Zwaan-de Vries v. The Netherlands para 12-15.

⁵⁴ General Comment 20 paragraph 13

⁵⁵ Human Rights Committee Communication No. 35/1978.

⁵⁶ Human Rights Committee Communication No 488/1992.

The HRC found that sexuality is covered both by article 2.1 and 26 of the ICCPR with reference to sex in article 2.1 and other status of article 26.⁵⁷ The HRC did not accept the argument of the State that homosexuality was a criminal offence for health and safety reason. It was not accepted that to prevent the infection of HIV/AIDS homosexuality would need to be a criminal offence. Under article 17 Mr. Toonen was free to make his own choice and it was argued that this matter could not be handled domestically by each State because then that might cause the States not to be under the discretion of the HRC.⁵⁸

States must also make sure that there are ways for victims of violation to claim effective remedy in the case of discrimination and if the states fail to do so then they are also in violation of article 26 of the ICCPR.⁵⁹

In the case of *Ms. Ignatane v. Latvia* it was debated if there was a discrimination based on national origin. The facts of the were that a Latvian citizen of Russian origin wanted to participate as a candidate in municipal elections in Riga but was not allowed to due to lack of a high level understanding of the Latvian language. The HRC concluded that this act of not allowing Ignatane to run for office was in violation of articles 2.1 and 25 of the covenant.⁶⁰ That was because by not allowing Ms. Ignatane to run in the election she was not allowed to participate in public life⁶¹ and that went against the before mentioned articles.

This is in conformity with the idea that the most important aspect of non-discrimination principle is to ensure that there are potent remedies when private parties discriminate against people.⁶² The article therefore does not only impose an obligation on the States to prevent all discriminatory practices in the public sector but also in the quasi-public sector of the society.⁶³

The above mentioned arguments show that the state not only needs to ensure that the laws themselves do not discriminate but also needs to ensure that throughout the community the laws and rules are applied in a non-discriminatory manner or at least in a justified and a reasonable manner if there is some discrimination taking place.

⁵⁷ Ibid para 8.6 and 8.7

⁵⁸ Ibid para 8.6

⁵⁹ Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd rev. ed. edn, Kehl; Arlington, VA: N. P. Engel, 2005) 630-31.

⁶⁰ HRC communication 884/1999.

⁶¹ Ibid paragraph 7.4

⁶² Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd rev. ed. edn, Kehl; Arlington, VA: N. P. Engel, 2005) 632.

⁶³ Ibid 632.

Different from ICCPR the non-discrimination clause in the ICESCR only applies to the rights covered by the covenant. Article 2.2 lists what are the most probable grounds for discrimination, for example race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The phrase ‘other status’ indicates that other factors of difference can come into play.⁶⁴ It can include various other characteristics, for example disability, age or nationality.⁶⁵ This is crucial since the principle of discrimination is not static but evolves over time so it is essential to leave room for development and social and cultural changes.⁶⁶ Based on this it is clear that this article is not as wide in principle as article 26 of the ICCPR which has a much wider range of application.⁶⁷ Before moving further on it is worth noting that the rule of non-discrimination is closely linked to the rule on gender equality.⁶⁸ It is safe to say that these principles are fundamental to the covenant as they are expressed repeatedly throughout its text. The text of article 2.2 requires states to do everything in their power to eliminate discrimination. States are expected to do this both through their legislative powers and also through their executive powers, and the judiciary.⁶⁹ It is worth noting that the rights of the ICESCR can be costly and it is included in article 2.1 that states are obligated to constantly improve protection of economic and social rights, The obligation not to discriminate is however not considered to be a part of this involvement. All discrimination is completely prohibited from day one of ratification even though the right to employment and right to education can improve over time

The non-discrimination of the ICESCR is defined as any differential treatment that is either directly or indirectly intended to hinder or exclude the recognition or enjoyment of the prescribed rights of the ICESCR.⁷⁰ For this to happen discrimination must be eradicated both in the formal sense but also in the substantive sense.⁷¹ When discrimination appears in the legal text itself (constitution, domestic law) or governmental actions and public policy, it is viewed as formal discrimination.⁷² Formal discrimination is when the laws and the system

⁶⁴ CESCR General Comment 20 para 15.

⁶⁵ Ibid para 28-30.

⁶⁶ Ibid para 27.

⁶⁷ To see illustration on article 26 of the ICCPR refer to chapter 2 of this paper.

⁶⁸ <https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf> accessed 24.4.2016.

⁶⁹ Eide A, Krause C and Rosas A, Economic, social and cultural rights: a textbook (Eide, Asbjørn, Catarina Krause and Allan Rosas eds, 2nd rev. ed. edn, Dordrecht: Nijhoff, 2001). 154.

⁷⁰ Ibid para 7.

⁷¹ Ibid para 8.

⁷² Ibid para 8.

itself discriminate. Such as the constitution, general laws and public policy made by the government. Substantive discrimination refers to governmental and other social practises that have the effect that one social group or individuals are treated differently from other groups of society in the same or similar situation. In the same or similar situation differently.⁷³ States must make sure that domestic law, public policy and practices are free from discrimination, and to eliminate substantive discrimination. States must strive to ensure that no group or member of society is being discriminated in practice. This means that the state must take the necessary steps to prevent and eliminate conditions and situations that cause discrimination. Equality and non-discrimination in the legal text is not enough, Action must also be taken in practises, both in the public and private sector.⁷⁴

The CESCR has found that there are two types of discrimination; direct or indirect discrimination. Direct discrimination is defined as the act of someone being treated more unfairly than another person in a comparable situation such as at a place of employment or at an educational institution. Direct discrimination can also occur when individuals are not in a comparable situation such as when a man and a pregnant woman are applying for a job and the man is hired because the other applicant is pregnant.⁷⁵ Indirect discrimination refers to an instance where for example laws, policies or practices are causing the ICESCR to be applied in different manners when there is no apparent reason for it. An example of this can also be when a person is required to possess a birth certificates to be able to enrol for schools. An example of this is the above mentioned case of *Ignatane v. Lativa*.⁷⁶ That can discriminate against people that have not been granted such documents or if they are coming from a culture where it is not a custom to have birth certificates.⁷⁷ It is vital that states take the appropriate measure to eradicate discrimination from the society. It is necessary to be on the lookout in all areas of society because discrimination is hiding everywhere, in private homes, at workplaces', where public service is provided and in all kinds of services such as restaurants, and other service companies. The state must ensure that people and parties in the society do not discriminate or suffer from discrimination.⁷⁸

⁷³ Ibid para 8.

⁷⁴ Ibid para 8.

⁷⁵ CESCR General Comment 20 para 10.

⁷⁶ See pages 15 and 16.

⁷⁷ Ibid para 10.

⁷⁸ Ibid para 11.

In this chapter, it has been shown that the principle of non-discrimination appears both in article 2.1 and in article 26 of the ICCPR. Article 2.1 obliges states to ensure that the rights within the covenant are being enjoyed by everyone without them having different treatment based on some individual characteristics. In this respect a few cases that were brought before the HRC were illustrated and show how the citizens were discriminated against by being treated differently by the laws. Also the second part of article 26 was given a closer look and demonstrated how discrimination is banned and how the States have a broad obligation to uphold. The development of the right was examined and shown how it transformed from being an adjacent right to become an independent right through the work of the HRC in cases where gender-specific discrimination took place. The article itself also entails the right to be protected by the law so its field of application is not just based within the rights prescribed in the ICCPR but it is also within rights that are prescribed in other treaties or fields such as the ICESCR.

The principle of non-discrimination within the ICESCR was also examined. It appears in the article 2.2 of the covenant where the obligation is put on the States to ensure that the prescribed rights of the covenant will be enjoyed by everyone regardless of their gender, appearance or views to name a few characteristics. Article 2.2 is closely linked to article 3 which ensures that all men and women shall be able to enjoy the rights equally. It has been shown that the CESCR has pointed out that there can be two types of discrimination. Firstly it is direct discrimination where someone is in the comparable or even exact same position as someone else but is treated differently. Secondly there is indirect discrimination when the laws or practice of states cause the ICESCR to be applied differently between persons without any apparent reason for it. Finally it is worth noting that it has been shown that the rights in the ICESCR cannot be enjoyed fully until discrimination has been removed completely from the society.

As shown above the second part of article 65 of the Icelandic constitution states that everyone is entitled to human rights protection. Just by simply looking at the text it shows that everyone shall be able to enjoy the same rights regardless of origin, sex, language, religion and etc. By stating that everyone shall enjoy human rights it is clear that people shall not be discriminated against. If there is different treatment being upheld then it must be properly justified and explained.

5. Comparison

In this chapter the principles of equality and non-discrimination will be compared with each other. From the text of the articles is clear that the two principles are closely linked. They both strive towards the goal that all people should enjoy the same treatment or the same status. By looking at the definitions of the two terms, their similarities and close connection becomes evident. Equality is defined as to have an equal right, equal legal status⁷⁹ and not to be discriminated against is defined as the right to have similar situations treated the same way and to have situations that are clearly different treated in different way.⁸⁰

5.1. Similarities with Equality and Non-Discrimination

These two definitions show that the aim of the two principles is to ensure that people will be able to enjoy the rights that they have been guaranteed in the same way as other regardless of their origin, status or appearance. Both principles can be separated in two ways. On one hand equality can be ensuring that everyone is treated the same and alternatively equality can be ensuring that everyone has the same opportunities to enjoy some specific rights. The term discrimination is also twofold. It can be either formal or substantive. If it is formal then the legal system itself is discriminating through laws, and to be more precise in the text itself. However, if it is substantive then the discrimination appears in practise, that is when the way the law is applied causes a discriminatory result. For example immigrants are not granted the same rights or the same protection as the natives'.⁸¹

5.1.1. Formal meaning

However there are many differences between the two principles. Equality is a general term that describes how everyone shall have the same rights and opportunities and relates to a positive duty. Discrimination on the other hand focuses on selected groups in the society that are believed to need more protection than others and relates to a negative duty. This will be further illustrated in this chapter. The formal meaning of equality prescribes that everyone shall have equal rights and that the laws themselves cannot treat people in different manners. For example, article 26 of the ICCPR states that everyone is equal before the law and are entitled to equal protection of the law. This clearly indicates that everyone shall be regarded

⁷⁹ Páll Sigurðsson and others, *Lögfræðiorðabók: með skýringum* (Páll Sigurðsson and others eds, Reykjavík: Codex: Lagastofnun Háskóla Íslands, 2008) 216.

⁸⁰ Páll Sigurðsson and others, *Lögfræðiorðabók: með skýringum* (Páll Sigurðsson and others eds, Reykjavík: Codex: Lagastofnun Háskóla Íslands, 2008) 289.

⁸¹ CESCR General comment 16 para 7 accessed 14.8.2016.

as having the same status before the law. This can be further demonstrated by looking again at the cases of *Broeks v. The Netherlands* and *Zwaan-de Vries v. The Netherlands*. In both cases the plaintiffs were married women who lost their jobs and did not qualify for unemployment benefits because they were not able to prove that they provided the main source of income for the household. However, Dutch law did not put this burden on the husbands if they lost their jobs as they automatically qualified for unemployment benefits. This shows a clear case of Dutch law not meeting the conditions of formal equality.

The text of article 65 of the Icelandic Constitution is a clear example of a provision of formal equality as the text specifically states that “*Everyone shall be equal before the law*”. In case 125/2000 the Organisation of the Disabled in Iceland sued the Icelandic Government for decreasing the benefits that people with disabilities got from the State in accordance with the income of their spouse, if they were not receiving the benefits as well. The Organisation believed that this violated the constitution since it would make people with disabilities unable to enjoy the same status as people not suffering from disabilities. The Court found that the government was in violation of the constitution.⁸²

Formal discrimination means that the laws and public policy of the government should include discriminatory clauses. The government cannot make a statement or declaration that it will act in a manner that will be favourable for some rather than others. Article 26 of the ICCPR reflects this when it states that everyone shall have equal protection under the law and that the law shall prohibit discrimination of any kind and ensure that everyone shall have a legal right to effective remedy in case of violation. In general comment 18 of the HRC it is made clear that non-discrimination is essential for the protection of human rights and every State is obliged to respect and make sure that every person enjoys rights recognised in the Covenant without any distinction.⁸³

There is a similar principle and view within the Icelandic Constitution. Article 65 which is based on article 26 of the ICCPR, states that everyone shall enjoy human rights without distinction of any kind and that men and women shall always enjoy equal rights. In the act put before parliament it was explained that everyone shall enjoy human rights without any discrimination and that it needed to be ensured that this would be within every field of law and everyone should enjoy the same protection.⁸⁴ By keeping this in mind it is clear that

⁸² Icelandic Supreme Court. Judgement in case no. 125/2000 since 19th of December 2000.

⁸³ Para 1.

⁸⁴ <http://www.althingi.is/alttext/118/s/0389.html>

if public policy or official statements made by the government are discriminatory it is clear that they are in violation of the Icelandic constitution.

5.1.2. Substantive meaning

Both principles also have a substantive meaning. In the case of equality the substantive meaning is that everyone should have the same opportunities to enjoy specific rights. In the case of non-discrimination, the substantive meaning is that the laws and regulations cannot discriminate in practise. In reality this is often the case even though the text of the law appears to be neutral. The substantive non-discrimination practise can also require o that certain groups in the society need extra services than others, such as people suffering from disabilities might force the State to invest more money so that they can have the possibility of education.

Article 26 of the ICCPR that states that everyone shall be entitled to equal protection of the law and that the law shall prohibit any discrimination. This guarantees that everyone should have the same opportunities to enjoy the rights that the law prescribes. Article 3 of the ICESCR states there is an equal right of men and women to enjoy the rights of the covenant. Also in general comment 16 of the CESCR it is stated that the laws and policies shall not discriminate in practise and should eradicate disadvantages that occur to minority groups in the society. Article 65 of the Icelandic constitution states that everyone shall be equal before the law which enhances equality provisions that state everyone is to be guaranteed equal opportunities to enjoy specific rights.

With regards to non-discrimination, the substantive approach highlights the need for laws and regulations not to be discriminating when applied in practise and the need to take special care of groups of people who might otherwise be treated less favourably in practice. Article 2.1 in the ICCPR states that there should be no discrimination of any kind and that every person shall be able to enjoy the prescribed rights of the covenant without any difficulties regardless of his status in the society. There is a similar tone in article 2.2. of the ICESCR where it is stated that the States are obligated to ensure that every individual is able to enjoy the prescribed rights without any distinction or difficulties. Article 65 of the Icelandic constitution states that everyone shall be guaranteed the enjoyment of human rights without any distinction or restriction.

5.2. Difference between Equality and Non-Discrimination

Even though the principles are similar in many ways they can also be differentiate in some clear ways. In regard to equality there is a positive duty on the state and provisions are

usually worded in a general manner. With regards to non-discrimination there is a negative duty on the state and the meaning is more selective than applies to equality.

5.2.1. Positive and negative duties

Duties on States to uphold and respect human rights do differ. In some cases the States need to act, such as with the right to education by running the school system. Other instances require the States not to interfere, such as with the right to free speech and the right to privacy. There are the duties to ensure that everyone enjoys equal rights and the duty to make sure that no parts of the society will be left out. These duties both apply to equality and non-discrimination.

By taking a closer look at equality and looking at the text of the articles we see that provisions are worded in a general manner to mean that the prescribed rights are intended for everyone. Firstly, article 26 of the ICCPR states that everyone is equal before the law and that everyone shall be entitled to the prescribed rights with an equal protection of the law. Secondly, article 3 of the ICESCR states that the equal rights of men and women shall be ensured. Thirdly, article 65 of the Icelandic constitution states that everyone is equal before the law. These three examples show the equality principle imposes a positive obligation on the State. The principle also has a general and wide reference, meaning that it applies to everyone unconditionally.

With discrimination this is not the case. The Non-discrimination provisions of the treaties and the constitution includes a negative duty in the sense that, it does not prescribe how things should be done but rather how they should not be done. Firstly, article 2.1 of the ICCPR states that everyone shall enjoy the prescribed rights without any distinction for example on grounds of race, colour, sex, language, religion etc. Secondly, article 2.2 of the ICESCR states that the rights guaranteed by the covenant shall be enjoyed without any distinction on grounds of race, colour, sex, language, religion, political or other opinions etc. Thirdly, article 65 of the Icelandic constitution states everyone shall enjoy human rights regardless of sex, religion, opinions, origin, race, colour, etc. These articles show that non-discrimination prescribes what you should not do and the difficulties that can arise and tries to prevent them. Unlike equality that prescribes the general rule on how to act and states what you should do

5.2.2. Conditions

The principles of equality and non-discrimination differ in another fundamental way. The principle of non-discrimination has a narrower focus and deals mainly on certain vulnerable groups of society.

Having described the general nature of equality, it is time to explain the selective nature of non-discrimination. This entails that non-discrimination is not general like equality but rather focuses on particular parts of the society. These provisions might be considered to address groups on the edge of the society and groups that we as a society have agreed need enhanced protection. This is demonstrated within the articles themselves. The articles list particular characteristics that can differentiate persons from other such as race, sex, religion, origin, political opinions or other, language and more. This shows that non-discrimination provisions are more specific than equality provision. As stated above in this paper not all treatment that is different is considered to be a discrimination. An example of this is the case 726/2013 of the Icelandic Supreme Court. In this case G sued the government for discrimination based on taxation as she had to pay a specific wealth tax that she believed went against article 65 and 72 constitution due to the fact that she was not being treated equally compared with other citizens. The Court found that there was no violation of those articles and that it was a long tradition for the government to put more taxes on the people that had the most wealth in the society.

This shows that not all treatment where people are treated differently will be considered to be discrimination as long as the treatment is based on legitimate grounds. However, if treatment is not based on legitimate grounds then there will be discrimination.

6. Conclusion

In this paper it has been demonstrated that equality and non-discrimination are closely linked. Both principles strive to achieve the same goal but go about it in different ways. There are both similarities and differences between the two terms. The similarities are that both terms have a twofold meaning, which is a formal and a substantive. The differences are that they include different duties upon States that are either positive or negative.

The formal meaning of equality is that it guarantees equal rights to everyone like the text of article 26 of the ICCPR and 65 of the Icelandic constitution show. The substantive meaning of the term is that everyone shall have equal chances to enjoy specific rights, for example the right to education or the right to vote. The formal meaning of discrimination is that the legal system itself is discriminating through the text of statutes and public policy statements. The substantive meaning is when discrimination takes place in practise, which is when the laws are applied in a discriminatory manner.

Equality includes a positive duty; that is the duty to act. Meaning that the State is obligated to ensure that the citizens have the possibility of enjoying rights, for example the right to education by running schools. Equality is also worded in general terms so that it is applied to everyone without any distinction. On the other hand non-discrimination has a negative duty. That entails the obligation on States not to interfere, for example with the right of free speech or the right to privacy. States need to ensure that citizens are not suppressed from enjoying these rights. Non-discrimination is as well worded in a more selective manner than equality. Like listing the likeliest ways to suffer from discrimination and mentioning the groups of society that are most vulnerable.

On that note these two principles are more or less inseparable being so closely related but as well it clear that they have some clear differences even though they are not recognisable by simply just reading the text of the treaties or constitutions of States. It is needed to look deeper into the terms themselves to realise the difference of the two. Clearly these principles are at the forefront of human rights law and rightly so since they are fundamental in ensuring that they can be enjoyed by everyone, rather than selected few.

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