Chapter 2:

Legal Concepts of Equality and Non-Discrimination

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1. Introduction

Equality is not only a legal concept, but also a moral concept. According to the moral principle of equality human beings are considered equal, which is also recognised by law.[50] This latter aspect also ensures that laws fundamentally apply equally to all human beings, except when the law itself allows exceptions to this legal principle. Like equality, discrimination is also both a moral and a legal concept. Discrimination is, generally speaking, considered to be morally wrong when people who are regarded as equals are treated as being unequal.[51] Furthermore, it is illegal if, for example, unequal treatment amounts to discrimination, since this violates rules that prohibit discrimination. In this chapter I will only discuss the legal concepts of equality and discrimination. These concepts will be used in the following chapters as a framework for analysis to review which concepts of equality and discrimination are applied by the Human Rights Committee and CEDAW when interpreting the non-discrimination and equality provisions.

Equality and non-discrimination are considered to be rather complicated legal concepts.[52] The exact content and scope of non-discrimination is not agreed upon in international (human rights) law.[53] The same can be said about equality.[54] This is, amongst others things, due to the dynamic nature of the concepts of equality and discrimination. According to Justice Abella of the Ontario Court of Appeal:

> "Equality is evolutionary, in process as well as in substance, it is cumulative, it is contextual and it is persistent. Equality is, at the very least, freedom from adverse discrimination. But what constitutes adverse discrimination changes with time, with information, with experience and with insight. What we tolerated as a society 100, 50 or even 10 years ago is no longer necessarily tolerable. Equality is thus a process, a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness."[55]

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[50] See e.g. article 1 of the Universal Declaration.

[51] Vierdag, E.W., *The Concept of Non-Discrimination in International Law*. - The Hague: Martinus Nijhoff, 1973, p. 59.

[52] Van Dijk & Van Hoof , *Theory and Practice of the European Convention on Human Rights*. – Deventer: Kluwer, 1990, p. 539

[53] Bayefsky, A., The Principle of Equality or Non-discrimination in International Law. - In: *Human Rights Law Journal*, Vol. 11, No. 1-2, 1990, p. 2; Frostell, K., Gender Difference and the Non-discrimination Principle in the CCPR and the CEDAW. - In: Hannikainen L. and Nykänen E. (eds.), *New Trends in Discrimination law, International Perspectives*. - Helsinki: Turku Law School, 1999, p. 33; Ramcharan, B.G., Equality and Nondiscrimination. - In: Henkin. L. (ed.), *The International Bill of Rights*. - New York: Columbia University Press, 1981, p. 246, 247; Vierdag, The Concept of Non-Discrimination, p. 2.

[54] Bayefsky, The Principle of Equality or Non-discrimination, p. 2; Loenen, T., Rethinking Sex Equality as a Human Right. - In: *Netherlands Quarterly of Human Rights*, No. 3, 1994, p. 253; Ramcharan, Equality and Nondiscrimination, p. 246, 247.

[55] As quoted in: Mahoney, Kathleen, Canadian Approaches to Equality Rights and Gender Equity in the Courts. – In: Cook, R. (ed.) *Human Rights of Women: national and*

In this chapter I will provide in sections 2 and 3 some clarification as to the main concepts of non-discrimination and equal treatment that have been developed in - recent - legal theory. Moreover, I will define what I consider to be the content of these different legal concepts of equality and discrimination, which I will also use as a framework for analysis in the following chapters. When analysing these concepts I will also take the criticism into account of feminist authors, who have sometimes been very sceptical about the relevance and the use of the norms of non-discrimination and equality for improving the position of women.[56] They question whether these norms have the potential to empower women and to transform patriarchal structures. I will indicate that some of these - more recent - concepts can indeed lead to empowerment of women and the transformation of society.[57]

In section 4 I will furthermore analyse how the concepts of equal treatment and non-discrimination are related to each other. The Aristotelian definition of non-discrimination, treating likes alike and unalikes unalike in proportion to their unalikeness, clearly shows that there is a relation between the concepts of equality and non-discrimination. But how are these concepts related? Are non-discrimination and equality equivalent concepts? Or should the concept of equality be considered to be a broader concept than that of non-discrimination?

Finally, in section 5 I will develop a comprehensive three-level framework of analysis that contains all the different concepts of equality and discrimination addressed in this chapter. I will use this framework in the following chapters to analyse and compare the interpretation of the non-discrimination and equality provisions of the ICCPR and the Women's Convention.

2. The Concept of Equality

2.1 Introduction

The Women's Convention and the ICCPR both provide for the equal rights of men and women.[58] But what does this entail? Does it mean that men and women always have to be treated the same as they have equal rights? Or should they be treated differently if they are in a different situation, for example, in the case of pregnancy? To answer these questions, I will analyse in this section the concept of equality from a theoretical legal perspective.

International Perspectives. – Philadelphia: University of Pennsylvania Press, 1994, p. 437.

[56] See e.g. MacKinnon, Catherine, Difference and Dominance: On Sex Discrimination. – In: Freeman, M.D.A (ed.), *Lloyd's Introduction to Jurisprudence*. – London: Sweet & Maxwell, 1994, p. 1081, 1082.

[57] Although I recognize the limited potential of laws and social policies to change society, I do believe that these can contribute to change. See also in this regard: Charlesworth, C. & Chinkin, C., *The boundaries of international law: A feminist analysis.* – Manchester: Manchester University Press, 2000, p. 208-212. An important pre-condition is, as Mahoney has stated, that there must be a legal framework with enough flexibility to permit the development of a theory of equality that will advance women's interests, identify and recognize violations of their rights and lead to effective remedies. (Mahoney, Canadian Approaches to Equality Rights, p. 441).

[58] See articles 2 (a), 3 and 4 of the Women's Convention and article 3 of the ICCPR.

According to the aforementioned Aristotelian definition likes should be treated alike, and unalikes unalike in proportion to their unalikeness. Hence, this definition indicates that when persons should be considered as being in a different situation, they should be treated differently.[59] But when should persons be considered to be in an (un)equal situation? The definition by Aristotle also raises the question of what equal or unequal treatment entails. The first question, when should the compared persons be considered to be in an (un)equal situation, regards the issue of the comparability of the situation in which the involved persons are in, the criteria used to decide when persons should be treated (un)equally and to which extent. The issues of the comparability of cases and the criteria used to decide on (un)equal treatment will be addressed in section 2.5. The second question, what equal or unequal treatment entails, will be addressed in the subsequent section. By using the concepts of formal and substantive equality we can provide a theoretical answer to this question. In relation to the concept of substantive equality, I will also discuss the concept of affirmative action in section 2.4. But before the aforementioned questions will be addressed in the following sections, a few general remarks will first be made.

The concept of equality can only refer to *relative* or partial equal treatment of equal cases, not to absolute or identical equal treatment.[60] This is due to the fact that human beings and the situations they are in can never be completely identically, they can only be relatively or partially equal or unequal, depending upon which criteria are taken into account to distinguish between the otherwise innumerable inequalities.[61] So whether we decide that a person should be treated equally or not, depends very much on the criteria we choose for our comparison. If we consider one person to be in a different situation from another, we should realise that this is a subjective construction, not an absolute and objective truth.[62]

Apart from being a relative concept, equal treatment is also a *relational* concept. The equal treatment of one person must be compared with the treatment of somebody else, in order to establish whether a person is treated the same or differently.[63] By relating the situation of one person to the situation of another, we can, by comparing these situations, come to a decision as to whether to treat these persons equally or not.

In the following section I will discuss two concepts of equality: formal equality and substantive equality.

2.2 Formal and Substantive Equality

[59] While I am aware that Aristotle regarded certain people, like women and slaves, as being unequal compared to male citizens, this will not be the way in which I will use his definition. I will use his definition by referring to the different situations people might be in, not by considering certain people to be as such unequal to others.

[60] Alexy, R., *Theorie der Grundrechte*. - Baden-Baden: Nomos Verlagsgesellschaft, 1985, p. 362; Vierdag, The Concept of Non-Discrimination, p. 9; Ramcharan, Equality and Nondiscrimination, p. 252.

[61] Vierdag, The Concept of Non-Discrimination, p. 9.

[62] Vierdag, The Concept of Non-Discrimination, p. 10; Hendriks, A., The Significance of Equality and Non-discrimination for the Protection of the Rights and Dignity of Disabled Persons. - In: Degener T. and Koster-Dreese Y. (eds.), *Human Rights and Disabled Persons, Essays and Relevant Human Rights Instruments*. - Dordrecht [etc.]: Martinus Nijhoff, 1995, p. 43, 44.

[63] Fawcett, J.E.S., *The Application of the European Convention on Human Rights*. - Oxford: Clarendon Press, 1987, p. 299; Hendriks, The Significance of Equality, p. 43.

Formal Equality

With respect to the concept of equality we can distinguish between formal equality and substantive equality. Formal equality implies having equal rights and being treated equally, whereas under substantive equality the result of the treatment should be equal. Hence, the difference between the two forms of equality is that formal equality concerns the *nature* of the treatment, while substantive equality deals with the *result* of a certain treatment.[64] An example of formal equality is that in most countries women were granted the right to vote in the 20th century, which was a right formerly only granted to men. Thus granting the right to vote equally to women means that women are treated the same when it comes to having the right to vote.

Apart from distinguishing between formal and substantive equality, we can also distinguish between *de jure* and *de facto* equality. *De jure* equality refers to equal treatment in the law, meaning that the law states that persons should be treated equally, for example, on the basis of their sex. *De facto* equality refers to a factual equal situation, which makes it a concept with a very broad scope of application. Whereas formal equal treatment and *de jure* equality are interchangeable concepts, the concept of *de facto* equality can be regarded to be broader than the concept of substantive equality. Although many authors use the concepts of *de facto* equality and substantive equality interchangeably, I consider substantive equality to refer to the equal result of a certain treatment, whereas *de facto* equality deals with the whole factual situation of a certain person. As I have already indicated, the concept of equality can only refer to *relative* or partial equality of equal cases, due to the fact that human beings and the situations they are in can never be completely identical. Hence, I will not use the concept of *de facto* equality for the purpose of this study.

Formal equality is also referred to as "equality before the law". "Equality before the law" concerns the equal application by the administration and the judiciary of the laws involved to those to whom these laws are addressed.[65] This means that when a certain law is applied in a certain way to men, it should be applied in the same way to women. For example, if men are allowed to divorce on certain legal grounds, these grounds should be applied in the same way to women who want to divorce. "Equality before the law" is thus, according to Vierdag, a merely technical principle.[66] Or as Polyviou has similarly explained, "equality before the law" is a procedural principle which requires that the administration and the judiciary treat persons equally in the sense that they do not classify certain persons as being "above the law".[67] However, "equality before the law" can also be understood in the sense that all persons are accorded the same rights.[68] This means that all persons should be accorded the same rights by the law, since in this way the legislator would treat all persons equally. In this sense "equality before the law" is not merely a technical or procedural principle, but it also claims that persons should all have the same rights.

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[64] Vierdag, The Concept of Non-Discrimination, p. 14.
[65] Vierdag, The Concept of Non-Discrimination, p. 16.
[66] Vierdag, The Concept of Non-Discrimination, p. 17.
[67] Polyviou, P.G., *The Equal Protection of the Laws*. - London: Duckworth, 1980, p. 2, 3.
[68] Koopmans, T., *Constitutional Protection of Equality*. - Leiden: Sijthoff, 1975, p. 246; Loenen, T., *Verschil in Gelijkheid: De Conceptualisering van het juridische gelijkheidsbeginsel met betrekking tot vrouwen en mannen in Nederland en in de Verenigde Staten* [= *Difference in Equality: Conceptualising the legal concept of equality with respect to women and men in the Netherlands and the United States*], 1992, p. 17-19.

The limitation of the concept of formal equality is that although persons are granted the same rights, this does not ensure that these rights have the same impact on everyone, since not everybody will be in the same situation. In other words, formal equality puts a strong emphasis on the primacy of the individual and does not take the social and economical background of particular groups in society into account.[69] For example, granting everybody who is suspected of having committed a crime the right to be assisted by a lawyer to defend his or her case, does not lead to legal assistance if the suspect involved cannot financially afford a lawyer. Only if in that case the suspect is provided by the state with free or cheap legal aid will legal assistance also be provided to those who could not otherwise afford it. Formal equality is therefore criticised for assuming an ideal world, in which all human beings are on an equal footing.[70] Or as Gallagher has stated, this prevents the recognition of the fact that equal treatment of persons in unequal situations will invariably operate to perpetuate rather than to eradicate injustices.[71] Moreover, Fredman adds that formal equality is based on the assumption of conformity to a given norm: in order to qualify for equal treatment the claimant must be considered to be "like" the comparator.[72]

We can conclude that formal equality thus calls for the equal treatment of men and women, since they should, as such, regarded to be equal. But what if men and women are not in an equal situation? Should women in those situations be treated differently? If yes, what should this different treatment entail and to what extent should this treatment be different? The concept of formal equal treatment does not provide us with an answer to these questions. It concerns the equal treatment of persons who are considered to be in a relatively equal situation. However, if the persons involved should be regarded as being in a different situation, the concept of formal equality is no longer very helpful, since it does not help us to determine what kind of different treatment these persons should receive.[73] In these situations the concept of substantive equality, which focuses on an equal result, should be applied.

Substantive Equality

The concept of equality used to be seen as only including formal equality. This has changed, though, with the development of the concept of substantive or material equality.[74] As has been said in the foregoing section, the difference between these two concepts of equality is that formal equality concerns the *nature* of the treatment, while substantive equality deals with the *result*. An example of a situation in which the concept of substantive equality should be applied concerns pregnant employees. If a woman employee is pregnant she is in

[69] Kirilova Eriksson, M., *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law*. - The Hague: Martinus Nijhoff, 2000, p. 29; Fredman, S., Combating Racism with Human Rights: The Right to Equality. - In: Fredman, S. (ed.), *Discrimination and Human Rights: The Case of Racism*. - Oxford: Oxford University Press, 2001, p. 17.

[70] Kirilova Eriksson, Reproductive Freedom, p. 30.

[71] Gallager, A., Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System. – In*: Human Rights Quarterly*, Vol. 19, 1997, p. 290.

[72] Fredman, Combating Racism, p. 16, 17.

[73] Fredman, Combating Racism, p. 17.

[74] Loenen, T., *Het gelijkheidsbeginsel* [= *The equality principle*]. - Nijmegen: Ars Aequi Libri, 1998, p. 10 – 12; Kirilova Eriksson, Reproductive Freedom, p. 26, 27 (see footnote 31).

a different situation than a male employee, who can never become pregnant. According to the concept of substantive equality they should be treated differently so that an equal result is reached. This can mean, for example, that the female worker is entitle to a pregnancy leave, which allows her to give birth to her baby and subsequently to return to her job. In order to achieve substantive equality, unequal treatment can thus be necessary to achieve an equal result. Although it might seem a paradox, as Vierdag and Alexy have stated, that the concept of equality also calls for unequal treatment, according to the concept of substantive equality it is required that unequal factual patterns are treated unequally in order to attain an equal result.[75] The legal system can do justice to these (in)equalities by classifying, more or less in a refined manner, the different positions which different human beings find themselves in.[76]

According to the principle of "equal protection of the law"[77] the legislator should, when drafting new legislation, take into account the equal situation of persons as far as they can be considered equal, and take into account the unequal situation of persons as far as they can be considered to be unequal.[78] This principle thus refers to formal equality as long as there are no relevant inequalities to be taken into account, and to substantive equality when these inequalities are to be taken into account and hence provide for differential treatment to achieve an equal result.

It should be noted that striving for substantive equality falls largely within the realm of the legislator, through creating laws that open the possibility for realising substantive equality. Without this kind of legislation the courts are limited in what they can do to achieve substantive equality.[79] It is much more complicated to ask a judge to declare that different treatment has to be undertaken in order to achieve substantive equality, if this is not already clearly provided for in the law. This is due to the division of power between the judiciary and the legislature. [80] It is therefore crucial that the legislator is aware of the different socio-economic situations in which different groups in society find themselves, especially the non-dominant groups. Also the judiciary should be aware of this when interpreting laws. However, Gallagher warns that, at the international level, there has been a widespread failure to consider gender as a factor in defining the substantive content of human rights.[81]

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[75] Alexy, "Theorie der Grundrechte", p. 379; Vierdag, The Concept of Non-Discrimination, p. 13.

[76] Vierdag, The Concept of Non-Discrimination, p. 15.

[77] Also sometimes referred to as "equality in the law" (see Vierdag, The Concept of Non-Discrimination, p. 17).

[78] Alexy, "Theorie der Grundrechte", p. 359 - 363; Vierdag, The Concept of Non-Discrimination, p. 17, 18. However, as Vierdag and Alexy have pointed out, the level of law creation and the level of law application can only be distinguished to some degree. No clear-cut line can be drawn between the two: to create law implies the application of the rules which govern the procedures of law creation, to apply law implies to create law for a particular situation (Vierdag, The Concept of Non-Discrimination, p. 16; Alexy, "Theorie der Grundrechte", p. 385, 386).

[79] Condemning indirect discrimination is easier for a court, and in this way the courts can also contribute to the realisation of substantive equality, although this is limited. See also section 3.2.

[80] Loenen, T., Indirect Discrimination: Oscillating Between Containment and Revolution. - In: Loenen T. and Rodrigues P. (eds.), *Non-discrimination Law: Comparative Perspectives*. - The Hague [etc.]: Kluwer Law International, 1999, p. 205.

[81] Gallager, Ending the Marginalization, p. 290 (see footnote 27 for examples). See in this regard: Charlesworth and Chinkin, A Feminist Analysis, p. 230: "If these rights and

So what are the advantages of using the concept of substantive equality? Using the concept of substantive equality is especially relevant for persons or groups who have a disadvantaged position in society, since unequal factual patterns are treated unequally to attain an equal result. In this way disadvantaged groups are better protected by the concept of substantive equality than by formal equality, since the latter sustains the *status quo* of the disadvantaged position of the less powerful as well as the privileged position of dominant groups in society, because it does not aim to attain an equal result. Substantive equality can thus contribute to the inclusion of disadvantaged groups in society.[82]

However, the concept of substantive equality also has its limitations. It is not very helpful in deciding in which cases persons should be treated equally and in which cases they should be treated unequally, since the concept of substantive equality does not answer the question of which (in)equalities should be taken into account. The concept of substantive equality also does not qualify what the different treatment should entail so as to attain an equal result. This is due to the fact that substantive equality is an open concept, which is as such useful in determining whether or not a treatment should be different, but it does not qualify what kind of different treatment - qualitatively and quantitatively - should be applied.[83] This has resulted in feminist authors criticising the concept of equality, as it is open to interpretations that are contrary, or at least not very helpful, to empowering and advancing the position of women.[84]

I will address the issue of which (in)equalities should be taken into account in deciding on different or equal treatment in more detail in section 2.5. First, I will discuss in the following section the concept of affirmative action. Although the concept of affirmative action does not provide us with an exact answer as to what the content of this differential treatment should be, it can be helpful in deciding what kind of different treatment could lead to an equal result.

2.3 Affirmative Action

In order to achieve substantive equality, affirmative action might be necessary.[85] In the Women's Convention and in the Convention on the Elimination of Racial Discrimination it is provided that in order to achieve equality affirmative action - or special measures as it is called in the respective provisions[86] - should be

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freedoms [as provided by the Women's Convention] are defined in a gendered way, access to them will be unlikely to promote any real form of equality."

[82] Nevertheless, it should not be forgotten that even when people belong to a certain group in society, this does not mean that the interests of all group members are always the same. See also Goldschmidt, J., Back to the Future - An Agenda for a More Equal Future. - In: Loenen T. and Rodrigues P. (eds.), *Non-discrimination Law: Comparative Perspectives*. - The Hague [etc.]: Kluwer Law International, 1999, p. 440.

[83] Loenen, "Het gelijkheidsbeginsel", p. 26-28.

[84] See e.g. Charlesworth and Chinkin, A Feminist Analysis, p. 248.

[85] Affirmative action is sometimes also referred to as positive action. See Bossuyt, M., *Prevention of Discrimination and Protection of Indigenous People and Minorities: The Concept and Practice of Affirmative Action*, UN Report, E/CN.4/Sub.2/2001/15, 26 June 2001, para. 6.

[86] See also Bossuyt: "The concept of affirmative action is generally referred to in international law as "special measures"." In: Bossuyt, M., *Comprehensive Examination of Thematic Issues relating to Racial Discrimination: The Concept and Practice of Affirmative Action*, UN Report, E/CN.4/Sub.2/2000/11, 19 June 2000, para. 4.

permitted.[87] Affirmative action refers to measures designed to tackle structural disadvantage of certain groups in society.[88] In this regard I will apply the term "affirmative action" to entail *different treatment* for the members of disadvantaged groups in society in order to create the same result for them as for the members of more dominant groups in society. In other words, affirmative action measures for women concern those measures that are specifically sex selective measures.

It should be noted that in relation to affirmative action different terminology is being used. Bossuyt points out in this regard that in the United Kingdom the term "positive action" is used. He indicates that in many other countries terms are used, such as "preferential treatment", "preferential policies", "reservations", etc.[89] Bossuyt concludes that "positive action" is equivalent to "affirmative action".[90] Schöpp-Schilling underlines in this regard that "positive action" is also used in international law to describe "positive state action". According to her this makes the term "positive action" ambiguous.[91] In order to avoid unnecessary confusion, I will in this chapter apply the term "affirmative action".

In general, affirmative action programmes can be found in employment, political participation and education. An example of affirmative action with respect to employment is when a man and a woman are both suitable candidates for a particular job, but preference is given to employing the woman if women are underrepresented in that segment or level of the labour market. Other examples are: actively recruiting female candidates for a job vacancy instead of using the "old boys" network, specific training for women and a certain quotas for women MPs. Hence, affirmative action measures can be very diverse.

As Bossuyt has indicated in his report, affirmative action measures that contribute to the ideal of equality of opportunity will include measures aimed at skill-building and gender-blind decision-making (affirmative recruitment and affirmative preference).[92] These are also sometimes referred to as soft affirmative action measures. Affirmative action which has as its aim to contribute to equality of outcome - or equality of results as Bossuyt calls it - will include measures such as quotas, reservations and goals; so-called hard affirmative action measures.[93] These latter measures are thus more far-reaching than affirmative action measures used to ensure equality of opportunity. In this regard, Fredman indicates that equality of opportunity can be considered to be a middle ground between formal equal treatment and equality of results.[94] She explains, by using the metaphor of competitors in a race, that equality of

[87] See article 4 of the Women's Convention and article 1 (4) of CERD.
[88] Dinstein, Y., Discrimination and International Human Rights. - In: *Israel Yearbook on Human Rights*, Vol. 15, 1985, p. 15; Loenen, T., *Het gelijkheidsbeginsel* [= *The equality principle*]. - Nijmegen: Ars Aequi Libri, 1998, p. 56.
[89] Bossuyt, Marc, *Prevention of Discrimination: The Concept and Practice of Affirmative Action*, UN Report, A/CN.4/Sub.2/2002/21, 17 June 2002, para. 6.
[90] Bossuyt, Marc, *Prevention of Discrimination: The Concept and Practice of Affirmative Action*, UN Report, A/CN.4/Sub.2/2002/21, 17 June 2002, paras. 6 and 101.
[91] Schöpp-Schilling,Hanna Beate, Reflections on a General Recommendation on Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women. - In: Boerefijn, I., [et al.], *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*. – Antwerp: Intersentia, 2003, p. 22.
[92] Bossuyt, Affirmative Action, UN Doc. E/CN.4/Sub.2/2001/15, para. 86.
[93] Bossuyt, Affirmative Action, UN Doc. E/CN.4/Sub.2/2001/15, para. 90.
[94] Fredman, Combating Racism, p. 20.

opportunity aims to equalise the starting point, if individuals from certain groups begin the race from a different starting point. According to this approach, once individuals enjoy equality of opportunity, the problem of institutional discrimination has been overcome and fairness demands that persons are treated on the basis of their individual qualities, without regard to sex. Fredman adds that this approach rejects quotas or targets, which have as their aim an equality of outcome.[95] Overall equality of opportunity addresses barriers to the advancement of women or minorities, but it does not guarantee that this will lead to equality of outcome.[96] With respect to equality of outcome, or equality of result, Fredman states that this is a rather controversial principle, as preferential treatment appears to discriminate against men or white people on the ground of their sex or race.[97] This is indeed the point of view of Bossuyt, which I will address and contest in one of the following paragraphs. Here it suffices to conclude that with respect to affirmative action measures in general, two kinds of measures can be distinguished. Those that aim at equality of opportunity (such as skill building) and those that aim at equality of outcome (such as quotas). Hence, depending upon the approach, different affirmative action measures will be chosen.

With respect to the justifications for applying affirmative action measures with respect to certain groups in society, Bossuyt points out that different justifications can be put forward. First, a justification can be found in remedying or redressing historical injustices. Second, affirmative action can be justified as to remedy social or structural discrimination. Third, affirmative action measures can be justified by arguments that they create diversity or proportional group representation. A fourth justification can be found in social utility arguments, such as a better representation of disadvantaged groups in the field of employment or education, which will increase the well-being of society as a whole. Fifth, affirmative action measures can be used to pre-empt social unrest, for example, by balancing internal inequalities of economic and political power. Sixth, affirmative action measures lead to a better efficiency of the socio-economic system, by optimising the labour market. Lastly, a justification can also be found in using affirmative action measures as a means of nation building.[98] Justifications five to seven are not relevant in relation to this study. Justifications one to four show different reasons that can be provided in relation to affirmative action measures that favour women.

According to international law affirmative action is only allowed if it is temporary.[99] It has to be ended when the objective aimed at - to establish *de facto* equality (Women's Convention) or securing adequate advancement (Anti-racism Convention) - has been achieved. That affirmative action is only allowed when it is temporary is related to the fact that affirmative action should be ended when members of a certain group can no longer be regarded as being in a disadvantaged position. If affirmative action measures would not end after the situation of disadvantage ceases to exist, it could constitute a violation of the prohibition not to discriminate. It would also not be in line with the concept of substantive equality, since if we can consider persons to be in an equal situation, this would call for equal and not unequal treatment.

[95] Fredman, Combating Racism, p. 20.
[96] Fredman, Combating Racism, p. 21.
[97] Fredman, Combating Racism, p. 19.
[98] Bossuyt, Affirmative Action, UN Report, E/CN.4/Sub.2/2001/15, para. 20-45.
[99] See article 4 of the Women's Convention and article 1 (4) of CERD.

Taking into account what has been said previously, a distinction should be made between affirmative action and maternity protection measures.[100] Although both categories of measures fall within the ambit of the concept of substantive equality, maternity protection is of a permanent nature, whereas affirmative action measures are of a temporary nature.[101] Even though maternity protection is temporary in the individual case, as such there will always be maternity cases. Affirmative action measures, in contrast, are of a temporary nature, since their aim is to tackle the disadvantage experienced by certain groups in society until these groups are in a similar position as the dominant groups in society.

Some argue that affirmative action violates the principle that individuals should be treated on an equal basis and not be (dis)advantaged on the basis of, for example, race or sex.[102] In this regard, affirmative action is sometimes also referred to as reverse discrimination.[103] Reverse discrimination refers to a situation in which, for example, a less qualified candidate for a job is preferred over a better qualified candidate on account of, for instance, race or sex in order to ensure the participation of more black people or women in the workplace. Sometimes quotas are also used for this. Although affirmative action can lead to disadvantaging individuals who are member of a dominant group in society, affirmative action is allowed under international human rights law - if the aforementioned criteria are fulfilled - in order to achieve substantive equality of a disadvantaged group (member). However, Bossuyt holds a dissenting opinion in this respect.

According to Bossuyt affirmative action measures such as quotas violate the principle of non-discrimination and are therefore *per se* illegal. [104] According to Bossuyt it is the non-discrimination principle that establishes limits to each affirmative action measure.[105] In other words, it are the so-called hard affirmative action measures, that aim at equality of outcome, that constitute discrimination according to Bossuyt. In contrast, Vierdag has stated that if the favourable treatment of certain group members is justified, then this justification renders it impossible for others to complain legitimately about unequal treatment or discrimination against them. However, if the favourable unequal treatment of certain persons cannot be justified by referring to past or current structural disadvantaging, then it constitutes unjustified unequal treatment and possibly the

[100] Dinstein, Y., Discrimination and International Human Rights, p. 15. However, it occurs that maternity leave is seen as some form of affirmative action, as Bacchi points out. She adds that this indicates a male standard in anti-discrimination norms. When women are part of that standard maternity leave would not be considered a "special measure" or an "exception" to discrimination. (Bacchi, C., The Practice of Affirmative Action Policies: Explaining Resistance and How these Affect Results. – In: Boerefjn, I. [et al.], *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*. – Antwerp: Intersentia, 2003, p. 83 and 90).

[101] See also article 4 (1) and (2) of the Women's Convention.

[102] See e.g. Bossuyt, Affirmative Action, UN Report, E/CN.4/Sub.2/2000/11, paras. 64-65.

[103] Pitt, G., Can Reverse Discrimination Be Justified? - In: Hepple B. and Szyszczak E. (eds.), *Discrimination: The Limits of the Law*, London: Mansell Publishing Limited, 1992, p. 282.

[104] Bossuyt, Affirmative Action, UN Report, E/CN.4/Sub.2/2000/11, paras. 44 and 64-65; Bossuyt, Affirmative Action, UN Report, E/CN.4/Sub.2/2001/15, par. 52-6 and 73-75; Bossuyt, Affirmative Action, UN Report, A/CN.4/Sub.2/2002/21, paras. 83, 107-113.

[105] Bossuyt, Affirmative Action, UN Report, A/CN.4/Sub.2/2002/21, 17 June 2002, para. 113.

discrimination of persons who are not favoured by this treatment.[106] In this context, affirmative action is also sometimes referred to as "positive" discrimination, when we refer to the beneficiaries of these policies, and "negative" discrimination when we refer to persons who are not favoured by these policies.[107] However, this terminology is very confusing, since in international law discrimination is commonly used in its pejorative sense and not in the sense of distinguishing between people in a neutral way (see also section 3.1). By referring to negative discrimination when discrimination is already regarded as distinguishing between people in a negative way, this becomes a pleonasm. Moreover, positive discrimination can be considered to be impossible, as discrimination is normally understood in its pejorative sense.[108]

For groups in society who suffer from past or current systemic or structural discrimination, affirmative action can be a very useful tool for addressing the structural discrimination of these groups. Affirmative action policies, which are directed at improving the situation of disadvantaged groups in society by giving support or preference to individuals of these groups, can contribute to achieving substantive equality for members of disadvantaged groups. Hence, this should not be regarded as leading to the discrimination of members of dominant groups in society, as the situation of members of disadvantaged groups cannot be regarded as being equal to a member of a dominant group in society. The concept of formal equality should not be applied in these situations. However, it cannot be denied that affirmative action measures, especially quotas and preferential treatment, encounter resistance. Members of dominant groups feel that they are the victims of unfair/discriminatory measures.[109]

Some feminist authors have also criticised affirmative action measures, though for different reasons. They regard these measures as having a limited impact, because they fail to change the organisational culture.[110] In contrast, Bacchi sees a potential for transformation if affirmative action measures can be reconceptualised by challenging privileges enjoyed by the "ingroup".[111] According to Bacchi the problem with affirmative action is that the disadavantaged group - the "outgroup"- can be seen as abnormal and special, instead of reasonable. Those who are "damaged" by past discrimination need to be "helped". Bacchi indicates that this makes the recipients of affirmative action the "problem". This characterisation puts the recipient groups on the defence. She points out that as a result members of these groups, fearing stigmatisation, dissociate themselves from affirmative action. In order to reverse this dynamic, Bacchi states that attention should be directed towards the characteristics of the "ingroup" and highlight that affirmative action corrects the advantages that some

[106] Vierdag, The Concept of Non-Discrimination, p. 68.
[107] See e.g. Dahl, T.S., *Women's Law: An Introduction to Feminist Jurisprudence*, Norwegian University Press, 1988, p. 39 - 44.
[108] Loenen, "Het gelijkheidsbeginsel", p. 56; Bossuyt, Affirmative Action, UN Report, E/CN.4/Sub.2/2001/15, para. 6.
[109] Bacchi, The Practice of Affirmative Action Policies, p. 81-83.
[110] See e.g. Charlesworth, and Chinkin, A Feminist Analysis, p. 230: "The [Women's] Convention's endorsement of affirmative action programmes in article 4 similarly assumes that these measures will be temporary techniques to allow women eventually to perform exactly like men."
[111] Bacchi, The Practice of Affirmative Action Policies, p. 94. Bacchi also refers to theorists who question the assumption that appointment procedures are objective and that the merit of candidates is an easily measured quantum. They insist that outgroups remain outgroups because ingroups assess them by their own standards.

groups enjoy due to privileging particular activities.[112] Although it will depend on how affirmative action measures are regarded and conceptualised whether these measures can lead to some form of transformation, they can lead to the empowerment of women, simply by addressing and/or correcting the under-representation of women in certain areas/levels of education, the labour market and public office.

It is clear from the foregoing that the concept of affirmative action has some important limitations. Its transformative potential might be regarded as being rather limited. At the same time it has some radical potential, as can also be concluded from the opposition quotas and preferential treatment encounter from privileged groups who fear to lose their advantageous position.

After having discussed the concepts of formal and substantive equality, including affirmative action, the questions of when persons should be considered to be in an (un)equal situation and when this should lead to equal or unequal treatment are still pending. These two questions will be addressed in the following section.

2.4 Comparability and (Un)Equal Treatment

As Alexy and Vierdag have stated, there exists a paradox of equal treatment.[113] On the one hand, it is prohibited to treat a person unequally, whereas at the same time a person should be treated unequally under certain circumstances. The question is when should persons be treated equally and when should they be treated unequally. This concerns the issue of which criteria should be used to decide that persons should be treated equally or unequally and the issue of whether the cases that are compared can indeed be compared with each other. Concerning this matter of comparability, it could be questioned whether a member of a non-dominant group should be compared with the general or dominant standard in society in order to establish if this person should be treated equally or differently. Another option is to look at the situation of that individual and establish whether this person was disadvantaged and should consequently be treated equally or unequally. In the following sections the issue of comparability will first be discussed, followed by the issue of the criteria used to decide on (un)equal treatment.

Comparability: Sameness, Difference or Disadvantage

In order to be able to conclude that a certain treatment should be equal or unequal, it is first necessary to make a comparison between the subjects involved. To that end it is necessary to establish with which person(s) a certain person will be compared. In the case of the equal treatment of women it seems to be logical to compare their situation with those of men, in order to decide whether women should be treated equally or differently. As MacKinnon has pointed out, in order to decide whether or not a woman is discriminated against on the basis of her sex, her situation will be compared to that of men.[114] This

[112] Bacchi, The Practice of Affirmative Action Policies, p. 75, 76.

[113] Alexy, "Theorie der Grundrechte", p. 379; Vierdag, The Concept of Non-Discrimination, p. 13.

[114] MacKinnon, C., Difference and Dominance: On Sex Discrimination. - In: Barnett, H., (ed.) *On Feminist Jurisprudence*. - London [etc.]: Cavendish Publishing Limited, 1997, p. 211 - 221. See also Lacey, N., From Individual to Group? - In: Hepple B. and

comparison makes the male standard the measure against which a woman's sameness or difference is determined. According to MacKinnon, in this way women are granted access to what men have, as far as women are considered equal to men. Moreover, she indicates that where women are considered to be or are different from men, this is reaffirmed and in that situation women are not granted access to what men have, since women are considered to be different.[115] This latter point could indeed be the case if we would only apply the concept of formal equality. However, by applying the concept of substantive equality this issue can be tackled by means of treating women or men differently so as to ensure an equal result.[116] This can be illustrated with the example of a dismissed pregnant employee.

When comparing the situation of women with men regarding pregnancy, it seems to be obvious that men and women are in a different situation, as men cannot become pregnant. If, however, in these cases the concept of formal equality is applied, this can lead to bizarre results, as the Webb case shows.[117] Ms Webb was dismissed because she was pregnant. The English court decided that this did not amount to discrimination on the ground of sex, because a man in need of substantial sick leave in similar circumstances, for example, when undergoing a hip replacement operation, would also have been dismissed. Obviously, the English court made a false comparison, as men and women cannot be regarded to be in the same situation with respect to pregnancy. Hence, women need to be treated unequally with respect to pregnancy as men cannot become pregnant and be dismissed for being pregnant. The European Court of Justice decided in the same case that the situation of a pregnant woman could not be compared with that of a man being incapable of working for medical reasons. Hence, the European Court acknowledged that men and women need to be treated differently with respect to pregnancy.[118]

However, the previous example indicates, as Rao and Lacey state, that the "sameness and difference" test that is generally used can be problematic.[119] According to this test, men are used as the standard against which it is measured whether women should be either treated the same or differently. The focus on the male standard in order to decide whether women should be treated the same or differently is considered to be problematic in this context. It is a test in which the individual position of a man and a woman are compared, without taking into account the social position they are actually in. Hence, it is also referred to as a symmetrical approach (see also section 3.4). It represents a liberal notion that all individuals have the same right not to be discriminated against.[120] As Lacey points out, according to this test protective or remedial measures addressing disadvantage, especially affirmative action, are suspect.[121] Therefore, it is argued that a disadvantage test should be used in order to decide whether women are

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Szyszczak E. (eds.), *Discrimination: The Limits of the Law*, London: Mansell Publishing Limited, 1992, p. 103, 104.

[115] MacKinnon, Difference and Dominance, p. 211 - 221.

[116] Frostell, Gender Difference, 1999, p. 29, 30.

[117] Banton, M., Discrimination Entails Comparison. - In: Loenen T. and Rodrigues P. (eds.), *Non-discrimination Law: Comparative Perspectives*. - The Hague [etc.]: Kluwer Law International, 1999, p. 113, 114.

[118] Webb v. EMO Air Cargo (UK) Ltd., Reports 1994-7 I 3069-3640 Case C-32/93, as quoted by: Banton, Discrimination Entails Comparison, p. 113, footnote 13.

[119] Rao, Arati, Home-Word Bound: Women's Place in the Family of International Human Rights. - In: *Global Governance*, Vol. 2, 1996, p. 255.

[120] Lacey, From Individual to Group?, p. 104.

[121] Lacey, From Individual to Group?, p. 104.

being unjustly treated equally or unequally. According to this test, this is the case if a person is a member of a persistently disadvantaged group and can show that a distinction is made on the basis of the personal characteristics of this individual which continues or worsens that disadvantage.[122] Moreover, it takes into account the social position of an individual who is a member of a disadvantaged group within society. It is for these reasons that it is argued that the disadvantage test is more suitable to addressing the unequal position of men and women in society.[123]

Equal or Unequal Treatment

In order to be able to conclude that a certain treatment should be equal or unequal, it is necessary to make a comparison between the subjects involved. To that end it is first necessary to establish with which person(s) a comparison will made. Next it has to be decided on which criteria the comparison will be based. Finally, we need to establish to which extent the treatment should be unequal, if we conclude that the persons involved are in an unequal situation.

Regarding the criteria for comparing the subjects involved, Loenen states that *relevant* differences and equalities should be used for this comparison.[124] But what are relevant differences or equalities? Do they also include social and economic differences? This will depend upon the test we chose to apply. In relation to the disadvantage test, as described in the previous section, we would also include social and economic differences. In relation to the liberal sameness and difference test, this would not be the case. Hence, it will depend upon the test to be applied which criteria will be considered to be relevant.

If we conclude, after having made a comparison, that the person involved would need to be treated differently, to which extent should this treatment be different? Based on the Aristotelian definition of equal treatment, Loenen states that unalike cases should be treated in an unequal manner, in proportion to their unlikeness.[125] A difference in treatment is in the Aristotelian definition justifiable if unequal treatment is in proportion to the (in)equalities. Vierdag also stated that non-discrimination requires equal treatment of equals and unequal treatment of unequals, in proportion to their inequality.[126] It can thus be concluded that unequal treatment is appropriate in case the differences or disadvantage can be considered to be proportionate to justify unequal treatment. However, this does not give us a concrete answer to the question, after we have established that persons need to be treated differently, what this treatment should entail.

2.5 Conclusions

The concept of equality refers to relative equal treatment, since it is impossible to treat persons absolutely equally or identically, due to the fact that they are never in an identical situation. The concept of equality is furthermore a relational concept. The equal treatment of one person must be compared with the treatment

[122] Rao, Home-Word Bound, p. 255.
[123] See also in this regard: Gerards, J., *Judicial Review in Equal Treatment Cases*. – Leiden: Martinus Nijhoff, 2005, p. 669 – 675.
[124] Loenen, Rethinking Sex Equality, p. 256, 257.
[125] Loenen, Rethinking Sex Equality, p. 257.
[126] Vierdag, The Concept of Non-Discrimination, p. 7.

of somebody else, in order to establish whether a person is treated the same or differently.

The concept of equality entails that persons should in principle be treated equally, if they can be considered to be in an equal situation. This is referred to as formal equality. But the concept of equality also entails that if persons are in a different situation they should be treated differently, in proportion to the relevant inequalities of the persons involved, to ensure substantive equality. Whereas formal equality implies being treated equally, substantive equality deals with the result of the treatment that should be equal. In order to achieve substantive equality affirmative action can in certain situations be necessary. It is by means of affirmative action programmes that structural disadvantage of certain groups in society can be diminished.

With respect to affirmative action measures, we can make a distinction between so-called soft and hard affirmative action measures. The first entail measures such as special training programmes, the latter deals with measures such as preferential treatment and quotas. In this regard a distinction can also be made between measures that aim at equality of opportunity (training programmes) and those that aim at equality of outcome (quotas). Equality of opportunity addresses barriers to the advancement of women or minorities, but it does not guarantee that this will lead to equality of outcome. Hence, depending upon the approach, different affirmative action measures will be chosen.

However, which cases should be compared in order to decide whether the persons involved should be treated equally or unequally? This concerns the issue of the comparability of the cases compared. With respect to equal or unequal treatment of women, their situation is usually compared to that of men. However, this could lead to a problematic outcome if men and women are regarded as being in the same situation even if they are obviously not, as in the case of pregnancy. Hence, men and women cannot always be regarded as being in the same situation. If we apply the so-called sameness and difference test this issue is partly resolved, as this test provides for different treatment if the situation of women is differently. However, the sameness and difference test is criticised by feminist authors as the focus is on the male standard in order to decide whether women should be treated the same or different. It is a test in which the individual position of a man and a woman are compared, without taking into account the social and economic position they are in. It has therefore been suggested that the disadvantage test is more appropriate, as this test also takes the social and economic position of an individual, who is a member of a disadvantaged group within society, into account.

Next it has to be decided on which criteria the comparison will be based. Which criteria will be considered to be relevant will also depend upon the test - sameness, difference or disadvantage - which we will apply. If we would finally conclude that the person involved would need to be treated differently, this treatment should be different in proportion to the relevant inequalities.

In the following sections I will examine what the concept of non-discrimination entails and how this concept is related to the concepts of formal and substantive equality.

3. The Concept of Non-discrimination

3.1 Introduction

Although non-discrimination is regarded as the cornerstone of international (human rights) law, the content and reach of non-discrimination is not agreed upon in international (human rights) law.[127] It is important to note that the verb to discriminate has two meanings. The verb originates from the Latin verb *discriminare*, which means to divide.[128] According to the *Cambridge International Dictionary of English* it has two meanings:

> "a) to discriminate (from, between) in the meaning of to see a difference between two things or people, and b) to discriminate (against, in favour of) in the sense of to treat a person or particular group of persons differently, especially in a worse way."[129]

In international law, the prohibition of discrimination is commonly used in the latter sense.[130] However, in debates on what discrimination actually entails these two meanings are sometimes used simultaneously, which can lead to confusion and misunderstanding. I will only use discrimination in the pejorative sense, the way in which it is commonly used in international law.

Before I will examine the concept of non-discrimination in more detail, I would like to make a few remarks. The concepts of non-discrimination and equality are closely related. How they are related, whether they are positive and negative statements of the same principle or whether the concept of equality has a wider scope of application than non-discrimination, will be discussed in more detail in section 4. Furthermore, I want to point out that what has been said in section 2.4 about comparability and (un)equal treatment similarly applies to the concept of non-discrimination. Since these issues have already been dealt with in section 2.4, I refer to that section for more information about these issues.

In the following section 3.2 I will analyse the concepts of direct and indirect discrimination. This is followed by section 3.3, in which I will examine the symmetrical and asymmetrical approach of non-discrimination and the consequences of these approaches for affirmative action. In section 3.4 I will address the recently developed concept of systemic discrimination. Finally, some conclusions will be drawn in section 3.5.

3.2 Direct and Indirect Discrimination

We can distinguish between direct and indirect discrimination. Direct discrimination occurs when persons who should be treated equally are explicitly treated unequally. If, for example, women are not allowed to vote because they are women, this constitutes direct discrimination. In the case of direct discrimination the concept of formal equality, which implies that equals should

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[127] Bayefsky, The Principle of Equality or Non-discrimination, p. 2; Frostell, Gender Difference, p. 33; Ramcharan, Equality and Nondiscrimination, p. 246, 247; Vierdag, The Concept of Non-Discrimination, p. 2.

[128] Collins Dictionary, third edition updated 1994, reprinted 1995, Harper Collins Publishers, Glasgow, p. 449.

[129] Cambridge Dictionaries online, Cambridge University Press 2000: http://www2.cup.cam.ac.uk/elt/dictionary/

[130] Lerner, N., *Group Rights and Discrimination in International Law*. – The Hague: Martinus Nijhoff, 2003, p. 31; McKean, W., *Equality and Discrimination under International Law*, Oxford: Clarendon Press, 1983, p. 10-11.

be treated equally, is violated. The prohibition of direct discrimination thus protects the formal equality of, for instance, men and women.

Indirect discrimination, also sometimes referred to as disparate impact,[131] occurs when a neutral regulation that applies equally to all persons has a discriminatory effect and there exists no objective justification for this result. For example, if for a cleaning job it would be required to speak Dutch fluently, this would have a discriminatory effect for migrants who are not fluent in Dutch. In this case there exists no objective justification for asking cleaners to be fluent in Dutch, since this requirement is not necessary to perform the tasks properly. This is different, though, if the vacancy would be the position of a schoolteacher. In that case it is justified to require excellent proficiency of the Dutch language. Another example of indirect discrimination is the famous case of Bilka-Kaufhaus.[132] The European Court of Justice decided in this case that the exclusion of part-time workers from a supplementary retirement pension scheme constitutes indirect discrimination against women, as (a) a far greater number of women than men were affected by this exclusion due to the fact that most part-time workers were women and (b) no objective justification existed for this result.[133]

Vierdag defines indirect discrimination as discrimination through equal treatment.[134] He states that indirect discrimination occurs when no specific classification has been made in a given regulation and because of the combination of the particular subject-matter and particular elements of the inequality of the addressees of the regulation, the regulation discriminates against this specific group of addressees. As Vierdag states, the discrimination is thus found in the effect of the rules, rather than in their wording.[135] Hence, indirect discrimination is linked to substantive equality, since they both concern the result of a treatment. However, there exists an important difference between these concepts: indirect discrimination only takes place if there is no objective justification for the difference in the result.

The advantage of the concept of indirect discrimination is that it can draw attention to the underlying values of certain measures or regulations which at first sight seem to be neutral, but in effect disadvantage or exclude members of less powerful groups.[136] However, the limitation of the concept is that the underlying inequalities themselves are not necessarily addressed.[137] Thus the concept of indirect discrimination can challenge dominant standards in society, but it will not necessarily change those standards.[138] Substantive equality, which requires more than eradicating indirect discrimination,[139] is in that respect more suitable for changing dominant standards, since it calls for differential treatment.

[131] Disparate impact is the American equivalent of indirect discrimination, see: Loenen, Indirect Discrimination, p. 196, 197.
[132] ECJ 13 May 1986, *Bilka-Kaufhaus GmbH v. Karin Weber Von Hartz* (case 170/84), European Court Reports 1986, p. 01607.
[133] ECJ 13 May 1986, *Bilka-Kaufhaus GmbH v. Karin Weber Von Hartz* (case 170/84), European Court Reports 1986, p. 01607, para. 31.
[134] Vierdag, The Concept of Non-Discrimination, p. 70.
[135] Vierdag, The Concept of Non-Discrimination, p. 71.
[136] Loenen, Indirect Discrimination, p. 199.
[137] Loenen, Indirect Discrimination, p. 204; Loenen, Rethinking Sex Equality, p. 266.
[138] Loenen, Indirect Discrimination, p. 204.
[139] Loenen, Indirect Discrimination, p. 204.

Another limitation of the concept of indirect discrimination is that indirect discrimination can be justified by an objective justification.[140] It will depend on whether the court interprets an objective justification in a wide or narrow sense, and what kind of impact the concept of indirect discrimination can have on improving the position of the disadvantaged members of society. Furthermore, there also exists a difference between the application of the concept of indirect discrimination by the legislator or by a court. The legislator can amend the law in the case of indirect discrimination, but a court cannot change the law.[141] However, it should be pointed out that there is no guarantee that the legislator will amend the law if it constitutes indirect discrimination, let alone in a way that is beneficial to the disadvantaged (members of a) group.[142]

It can be concluded that although the concept of indirect discrimination has its limitations, it has the important advantage that, contrary to the concept of direct discrimination, it can draw attention to the underlying values of certain measures or regulations which at first sight seem to be neutral, but in effect tend to disadvantage or exclude members of less powerful groups.

Apart from distinguishing between direct and indirect discrimination, we can also distinguish between *de jure* and *de facto* discrimination. *De jure* discrimination is discrimination in the law, meaning that the law states that persons should be treated differently, for instance, on the basis of their sex.[143] An example of this is not granting the right to vote to women. This is a form of direct discrimination. This also means that *de jure* discrimination is related to formal equality. In contrast, *de facto* discrimination is related to substantive equality, since *de facto* discrimination refers to a discriminatory result.[144] This could be the result of either direct or indirect discrimination.

3.3 A Symmetrical or Asymmetrical Approach of Discrimination

When deciding on whether a certain treatment results in discrimination on, for example, the ground of sex, which factors should be taken into account? This will depend on whether we approach discrimination in a symmetrical or asymmetrical way.

If we want to take into account that members of certain groups in society have a structurally disadvantaged position in society, we would opt for an asymmetric approach. The starting point for our analysis would then be a contextual approach, instead of an abstract approach to the concept of non-discrimination.[145] An asymmetrical approach to the concept of non-discrimination means that non-discrimination is to be interpreted as being primarily aimed at the protection of structurally disadvantaged groups, and not primarily aimed at prohibiting the discrimination of members of dominant groups in society. When applying this approach, affirmative action is considered to be a legitimate tool for tackling the structural disadvantage of non-dominant groups in society. Furthermore, when an asymmetrical approach is used, the test as to whether a member of a disadvantaged group is discriminated will be stricter than when it concerns

[140] Loenen, Rethinking Sex Equality, p. 265; Loenen, Indirect Discrimination, p. 208.
[141] Loenen, Indirect Discrimination, p. 204, 205.
[142] Loenen, Rethinking Sex Equality, p. 265.
[143] Dahl, An Introduction to Feminist Jurisprudence, p. 44-48.
[144] Dahl, An Introduction to Feminist Jurisprudence, p. 48, 49.
[145] Loenen, Rethinking Sex Equality, p. 268.

members of a dominant group.[146] Also objective justifications should be interpreted narrowly in the case of the alleged discrimination of a person belonging to a disadvantaged group in society. Contrary, these justifications could be interpreted more leniently in the case of a member of a dominant group.[147]

If a symmetrical approach is used, the context in which discrimination is taking place is not taken into account. Thus in a symmetrical approach to non-discrimination affirmative action policies run the risk of being jeopardised, since they could be regarded as violating the principle of direct discrimination with respect to members of a dominant group in society.[148] For example, if a man and a woman are both suitable candidates for a job and preference is given to employing the woman, this could then be regarded as constituting direct discrimination of the suitable male candidate.

Whether we opt for a symmetrical or an asymmetrical approach depends upon whether we regard non-discrimination as being primarily aimed at protecting (members of) systematically disadvantaged groups in society, or whether we believe that members of dominant groups should be protected in exactly the same way. The first would make us opt for an asymmetrical approach, the second would make us opt for a symmetrical approach. By using a symmetrical approach of non-discrimination it is not taken into account that the reason for including the prohibition to discrimination on the basis of, for example, sex in the UN human rights conventions was to eliminate the structural discrimination of women, and not to eliminate the discrimination of men. Thus when applying the prohibition to discriminate on the basis of sex, using the asymmetrical approach would do more justice to the objective of protecting women from discrimination. This is also in line with the notion that discrimination on the ground of sex (regarding women) and race (regarding blacks) is more suspicious.[149] We should be more suspicious about discrimination on these grounds since this concerns groups in society which have historically been discriminated against in a structural fashion. Therefore, these cases should be reviewed more strictly than discrimination on other grounds.[150] In the case of Abdulaziz the European Court of Human Rights also stated in its decision that:

> " ... it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that *very weighty reasons* would have to be advanced before difference of treatment on the ground of sex could be regarded as compatible with the Convention"(emphasis added).[151]

3.4 Systemic Discrimination

Systemic discrimination is a fairly new concept. It addresses underlying causes that can lead to direct or indirect discrimination. There is as yet no agreed definition of systemic discrimination. Some authors define it as patterns of behaviour that are part of the social and administrative structures that create or

[146] Loenen, Indirect Discrimination, p. 205, 206.
[147] Loenen, Rethinking Sex Equality, p. 269.
[148] Loenen, Rethinking Sex Equality, p. 270.
[149] Bayefsky, The Principle of Equality or Non-discrimination, p. 19.
[150] Loenen, "Het gelijkheidsbeginsel", p. 52.
[151] ECHR, 28 May 1985, *Abdulaziz*, Serie A, 94.

perpetuate a position of relative disadvantage for some groups, and privilege for other groups.[152] Others regard systemic discrimination to entail - employment - policies and practices, neutral on their face, that perpetuate a differentiation in the treatment of certain applicants because of their race, sex, national origin or handicap; in other words indirect discrimination.[153] However, the latter definition according to which systemic discrimination is considered to entail indirect discrimination does not, in my view, add anything as it basically considers systemic discrimination to be the same as indirect discrimination. Hence, I will use the concept of systemic discrimination in the sense that it *directly* addresses the underlying causes that can lead to direct and indirect discrimination. For this study I will regard the concept of systemic discrimination as entailing social and administrative structures and systems that create or perpetuate a position of relative disadvantage and/or the exclusion of non-dominant groups, and privilege for other groups, that do not fall within the concepts of direct and indirect discrimination.[154]

What issues are more concretely considered to fall within the concept of systemic discrimination? It regards, amongst other things, the stereotyping of certain groups, such as women. Stereotypes and prejudices concerning the role and position of women, within the family and in public life, can lead to discrimination and unjust unequal treatment. They can limit the possibilities of women, both inside and outside the private sphere. Stereotypes and prejudices can also reinforce the so-called public/private divide, entailing the exclusion of women in public life and considering women's role to be in the private sphere as a mother and caretaker. Although stereotypes and prejudices do not always lead to acts that can be regarded as constituting discrimination, they can create an enabling environment for acts of discrimination. Stereotypes and prejudices can in a subtle and unconscious manner lead to the exclusion of certain groups, such as women. This can also come into play in relation to certain structures for hiring new employees that can lead to reinforcing under- or over-representation of women in certain segments of the labour market. Furthermore, also the role of men and women in relation to parenting can lead to systemic discrimination. According to Fredman:

> "The future is not simply one of allowing women in a male defined world. Instead, equality for women entails a re-structuring society so that it is no longer male-defined. […] It requires a dismantling of the private-public divide and a reconstruction of the public world so that child-care and parenting are seen as valued common responsibilities of both parents and the community. It aims to facilitate the full expression of women's capabilities and choices, and the full participation of women in society."[155]

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[152] Agocs, C., Systemic Discrimination in Employment: Mapping the Issue and the Policy Responses. – In: Agocs, C. (ed.), *Workplace Equality: International Perspectives on Legislation, Policy and Practice*. – The Hague: Kluwer Law International, 2002, p. 2.

[153] Definition of systemic discrimination from the University of North Florida's Office of Equal Opportunity Programs' list of terminology (Source: www.fsc.edu/ffy/classism.html, consulted at 26 May 2004).

[154] With respect to qualifying systemic discrimination as not being the same as direct and indirect discrimination, see also: Holtmaat, R., "Een agenda voor wetgeving, beleid en onderzoek op het gebied van discriminatiebestrijding en gelijke behandeling". – In: Holtmaat, R. (ed.), *De Toekomst van Gelijkheid* [= *The Future of Equality*]. – Deventer: Kluwer, 2000, p. 261.

[155] Fredman, S., Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Defintion of Equal Rights - In: Boerefijn, I. [et al.], *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the*

Systemic discrimination can be considered to be one of the most pervasive forms of discrimination, as it is difficult to address. Agocs has stated that:

> "These [organisational] institutionalised patterns shape the behaviour of individuals who enter the organisation through processes of socialisation as well as formal and informal rewards and sanctions that serve to reinforce and perpetuate patterns of discrimination, even if this is not intended. [...] What is needed is not a determination of guilt, but a rigorous analysis of the processes through which systemic discrimination is created and perpetuated, in order to eliminate discriminatory behaviours and provide appropriate and fair remedies and future opportunities for those who have been disadvantaged."[156]

The role of culture, traditions and religion is very important in this regard. Family relations are strongly influenced by traditions, culture and religion. This often leads to a gender-stereotypical divide within the family, as the role of women is traditionally defined by patriarchal norms. Hence, stereotyping and the influence of traditions, culture and religion are closely related in that sense. Discrimination against women is, as Gallagher points out, also often justified by governments on the basis of culture and religion.[157] In this regard, Chinkin and Charlesworth underline that it is striking that "culture" is much more frequently invoked in the context of women's rights than in any other area of human rights.[158]

As can be deduced from the aforementioned, non-state actors play an important role with respect to systemic discrimination. Non-state actors can apply consciously or unconsciously gender-stereotypes about the role and position of women in private and public life. This can take place both within the family and in society. With respect to the job market, non-state actors can apply certain structures and systems in the case of the hiring or promotion of personnel, which could lead to reinforcing under- or over-representation of women in certain segments and levels of the labour market. Hence, it is important not only to address the role of the state, but also to focus on the role of non-state actors with respect to systemic discrimination.

Overall, systemic discrimination is a rather revolutionary concept, as it calls for a transformation of structures and ideas about the role and position of women in society, in the private and public domain, in order to achieve substantive equality. Hence, systemic discrimination can be regarded to be a rather far-reaching concept. Systemic discrimination can be considered mainly to fall within the realm of the policy maker and probably only partly within the realm of the legislator. For example, eliminating stereotypes and prejudices is an issue that can be better addressed by social policies than by enacting legislation. Moreover, it will be difficult to address these issues in court. Hence, systemic discrimination can be regarded to be a concept that, for a large part, goes beyond the legal concepts of equality and non-discrimination.

Systemic discrimination is closely related to some of the previously discussed concepts of non-discrimination and equality. It is closely related to substantive

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Elimination of All Forms of Discrimination Against Women. – Antwerp: Intersentia, 2003, p. 115.

[156] Agocs, Systemic Discrimination in Employment, p. 3.

[157] Gallager, Ending the Marginalization, p. 291.

[158] Charlesworth and Chinkin, A Feminist Analysis, p. 222.

equality, affirmative action and indirect discrimination. Substantive equality focuses on an equal *result* for both men and women. However, substantive equality does not in general directly address the underlying causes of unjust equal or unequal treatment. Though substantive equality *might* have transformation potential, depending on how we phrase affirmative action - if we address the privileges of dominant groups -, this potential is probably limited (see previously section 2.3). Through the application of the concept of indirect discrimination we can *identify* rules and policies that are neutrally formulated, but in fact lead to discrimination against certain groups. By applying the concept of systemic discrimination we can directly address the underlying values and structures that can lead to indirect discrimination, as systemic discrimination calls for changing these values and structures. Or, in other words, it calls for a transformation of society.

3.5 Conclusions

The concept of non-discrimination entails direct and indirect discrimination. Direct discrimination occurs when persons who should be treated equally are explicitly treated unequally. In the case of direct discrimination the concept of formal equality, which implies that equals should be treated equally, is violated. The prohibition of direct discrimination thus protects the formal equality of, for example, men and women. Indirect discrimination occurs when a neutral regulation that applies equally to all persons has a discriminatory effect and no objective justification for this result exists. The concept of indirect discrimination is particularly useful in order to draw attention to the underlying values of certain measures or regulations which at first sight seem to be neutral, but in effect tend to disadvantage or exclude members of less powerful groups.

An asymmetrical approach of the concept of discrimination, which is primarily aimed at the protection of structurally disadvantaged groups in society and not at dominant groups in society, does justice to the objective of non-discrimination, that is to protect the disadvantaged groups in society against discrimination. Consequently, affirmative action is in an asymmetrical approach which is in principle allowed if it temporarily benefits disadvantaged groups in society, even though affirmative action measures may violate the prohibition of direct discrimination with respect to the members of dominant groups in society.

As has been indicated in previous sections, the content and reach of discrimination is not agreed upon in international (human rights) law. Comparing the definitions of discrimination put forward in this section will show the difference in these definitions, concerning the content and reach of non-discrimination. When comparing these definitions it can be concluded that most definitions focus on the unequal treatment of equals, whereas the definition by Vierdag also considers the equal treatment of persons who should be considered to be in an unequal situation. In other words, Vierdag’s definition does not only regard formal equality, but also includes substantive equality. Hence, this definition has a much broader scope of application. How discrimination is defined also affects the relation between the concept of non-discrimination and the concept of equality. This issue will be addressed in the following section.

Systemic discrimination is a fairly recent and a rather far-reaching concept. It concerns social and administrative structures and systems that create or perpetuate a position of relative disadvantage and/or exclusion of non-dominant groups, and privilege for other groups. The concept of systemic discrimination

directly addresses the underlying causes that can lead to direct and indirect discrimination. Hence, it addresses, amongst other things, the stereotyping of the role of women in public and private life, since this can lead to acts of direct or indirect discrimination. Systemic discrimination calls for a transformation of society, by changing the structures and systems that disadvantage or exclude non-dominant groups in society. It is in that sense more far-reaching than the other concepts of non-discrimination and equality.

4. The Relation between the Concepts of Equality and Non-discrimination

Non-discrimination can be defined as treating likes alike, and unlikes unlike. This definition clearly shows that there is a relation between the concepts of equality and non-discrimination. But how are they related? Could it be said that non-discrimination and equality are content-wise equivalent concepts, as Fawcett has stated?[159] Or should the concept of equality be regarded as being a broader concept than the concept of non-discrimination?

Those who consider the concept of non-discrimination to entail only direct discrimination and the concept of equality to entail only formal equality, would regard these concepts as equivalent. This seems to be the view of Fawcett. He is supported in his point of view by Dinstein[160], Bayefsky[161] and Ramcharan,[162] who all consider equal treatment and non-discrimination as merely positive and negative statements of the same principle.

Meron is of the opinion that the concept of equal treatment is wider than non-discrimination,[163] a position which is also adopted by Craven. [164] According to Craven the concept of non-discrimination is only a limited means by which to pursue equality. He argues that non-discrimination is merely a procedural principle or an obligation of conduct to treat persons equally, which may be conditioned by the wider concept of equality that may take factual social inequalities into account.[165] In other words, Craven seems to regard the concept of equality as not only entailing formal equality, but also substantive equality. However, in relation to the concept of discrimination Craven does not seem to take the concept of indirect discrimination into account. This concept prohibits a neutral regulation from having a discriminatory result; consequently different treatment is necessary to come to an equal result. But the concept of indirect discrimination does not cover the whole scope of the concept of substantive equality. The latter is indeed a much broader concept. On this basis Loenen also concludes that the concept of equality is wider than the concept of non-discrimination.[166]

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[159] Fawcett, The Application of the European Convention, p. 299.
[160] Dinstein, Discrimination and International Human Rights, p. 19.
[161] Bayefsky, The Principle of Equality or Non-discrimination, p. 1, 2.
[162] Ramcharan, Equality and Nondiscrimination, p. 252.
[163] Meron, T., The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination. - In: *American Journal of International Law*, Vol. 79, 1985, p. 286.
[164] Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development.* - Oxford: Clarendon Press, p. 155, 156.
[165] Craven, The International Covenant on Economic, Social and Cultural Rights, p. 155, 156.
[166] Loenen, "Het gelijkheidsbeginsel", p. 42.

It should be pointed out that it is also possible to define the prohibition of discrimination to include both the concept of formal equality and of substantive equality In this regard Vierdag defines discrimination as "wrongly equal, or wrongly unequal treatment."[167] Vierdag explains that discrimination thus "occurs, for example, through equal treatment of cases that must be considered as essentially unequal."[168] He adds to this that to qualify a certain equal treatment as "wrong" it must be possible to point to relevant elements of inequality that should have led to unequal treatment.[169] In other words, Vierdag has defined non-discrimination to include the prohibition of unequal treatment of equal cases and the prohibition of equal treatment of unequal cases. If we use this definition of non-discrimination, it also covers the concept of substantive equality. However, the definition by Vierdag is not the definition of non-discrimination which is generally used. In most definitions of non-discrimination only formal equality is protected and not substantive equality.

It will depend on the definition of discrimination which one uses whether one will conclude that discrimination and equality are equivalent concepts, or whether equality is wider than the prohibition to discriminate. If discrimination is defined as to also entail substantive equality, it can be said that the prohibition of discrimination is, by including the concept of substantive equality, equivalent to the concept of equality. But as stated previously, generally the definitions of discrimination do not include the concept of substantive equality. Hence, if we compare the concept of non-discrimination and define it so as to entail the concepts of direct and indirect discrimination, and then compare it with the concept of equality - entailing formal and substantive equality -, we would conclude that the concept of equality is wider. This is also how I will apply the concepts of discrimination and equality in this study.

In addition, it could be asked whether it makes any difference that the concept of equality entails a positive duty, whereas the concept of non-discrimination concerns a prohibition, a negative duty. In this regard Craven explains that non-discrimination tends to concentrate on the prohibition of differential treatment, rather than identifying those forms of action that are necessary to achieve material equality.[170] Fredman also underlines that non-discrimination entails a reactive and negative approach, which is better replaced by proactive equality laws, which include a substantive equality approach, that entail positive duties to promote equality.[171] Indeed, if the focus is on the prohibition to discriminate, differential treatment will often be considered to be suspect, as it might be deemed to violate the prohibition to discriminate. If, however, we take equality as a starting point, this entails a positive duty to advance equality. With a broad concept of equality, that includes substantive equality, this would entail that differential treatment is regarded as an essential part of the concept of equality.

Fredman adds, moreover, that a substantive equality approach moves beyond the individual focus of non-discrimination.[172] The latter applies if an individual can show that he/she is a victim of an act of discrimination, whereas substantive equality entails a recognition that discrimination moves beyond individual cases by drawing attention to the exclusion of certain non-dominant groups in society.

[167] Vierdag, The Concept of Non-Discrimination, p. 23, p. 60.
[168] Vierdag, The Concept of Non-Discrimination, p. 23.
[169] Vierdag, The Concept of Non-Discrimination, p. 23.
[170] Craven, The International Covenant on Economic, Social and Cultural Rights, p. 156.
[171] Fredman, Combating Racism with Human Rights, p. 27.
[172] Fredman, Combating Racism with Human Rights, p. 26.

It should be added that due to its novelty and less legal focus, the concept of systemic discrimination is usually not included in the definition of discrimination. Hence, it is not included in the analysis in this section. Systemic discrimination addresses underlying structures that can lead to discrimination, which are not directly addressed by the concept of substantive equality. It calls for the transformation of society, which is more far-reaching.

5. Framework for Analysis

In the last section of this chapter I will, on the basis of the foregoing sections, establish a framework for analysing the non-discrimination and equality provisions of the ICCPR and of the Women's Convention.

With respect to the provisions on equality and the respective interpretations of these provisions, I will analyse whether the concept of formal equality as well as the concept of substantive equality, including affirmative action, are applied in determining whether men and women should treated the same or differently. Furthermore, I will assess whether the treaty bodies recommend the use of affirmative action measures and, if so, what kind of measures they recommend. Do they recommend measures that aim at equality of opportunity (so-called soft measures, like special training for women) or measures that aim at equality of outcome (so-called hard measures, like quotas)?

Concerning the concept of non-discrimination, I will analyse whether the concepts of direct and indirect discrimination fall within the scope of application of the non-discrimination provisions and if these concepts are applied by the respective treaty bodies. In this context I will also examine if CEDAW and the Human Rights Committee use a symmetrical or an asymmetrical approach in deciding whether or not women are discriminated against. Moreover, I will also analyse whether the provisions of the respective treaties and the interpretation thereof by the treaty bodies include the concept of systemic discrimination.

The different concepts of discrimination and equality, as addressed in the foregoing sections, can be regarded as addressing discrimination and equality on several levels. The concepts partly overlap, and partly not. In order to clarify the relation between these concepts an integrated framework can be developed that includes these different concepts. The framework I have developed in this regard is inspired by the framework used by Fredman.[173]

Taking the previous section of this chapter into account, I have developed the following framework in which I include the different previously discussed concepts of discrimination and equality. The concept of direct discrimination and formal equality, whereby the first creates a negative duty and the second a positive duty, both provide for equal treatment. In contrast, the concept of substantive equality - including affirmative action - and indirect discrimination, which partly overlaps with the concept of substantive equality, may also provide for unequal treatment. Finally, the concept of systemic discrimination provides

[173] Fredman distinguished three main phases in the development of equality. Phase 1 regards formal legal equality. Phase 2 entails recognition that equal treatment can lead to disparate results and therefore the focus is on equality of opportunity. Phase 3 requires equality of outcome by changing underlying structures (Fredman, Beyond the Dichotomy of Formal and Substantive Equality, 2003, p.111).

for society to change structures that can lead to discrimination. Inspired by the framework established by Fredman, I will use the following three-level framework for analysis that includes the following concepts of equality and non-discrimination:

- level 1: direct discrimination and formal equality (regarding the same treatment of men and women)
- level 2: indirect discrimination and substantive equality, including affirmative action (regarding different treatment, including treatment that advances the position of women)
- level 3: systemic discrimination (addressing underlying structures that can lead to the discrimination of women)

In practice, a sharp distinction between the different levels cannot always be made, as certain issues can have implications for different levels. For example, gender stereotypes can lead to direct discrimination (level 1), but they can also be addressed in the context of systemic discrimination (level 3). In addition, as also each of the abovementioned levels also has its limitations, they need to be taken together to be effective. Together the three levels, including the respective concepts of equality and non-discrimination, provide for an integrated approach to non-discrimination and equality.

The framework for analysis which I have developed in this section will be used in the following chapters to analyse the respective non-discrimination and equality provisions of the ICCPR and the Women's Convention. It will allow us to place the different concepts of discrimination and equality in relation to each other. Moreover, it will enable us to analyse whether the respective provisions and the interpretation of these provisions focus on equal treatment, different treatment and/or transformation.