BACK TO BASICS: WITHOUT DISTINCTION - A DEFINING PRINCIPLE?

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1. Introduction

The duty placed upon states to ensure human rights without distinction is the starting point from which modern human rights law sprang. This fundamental duty was first encapsulated within the UN Charter[1] and has been given weight and reiterated in every human rights treaty since. It is the foundation upon which the wider concept of non discrimination and equality has been built, and is currently recognised as a fundamental norm of international law[2]. One might, therefore, have assumed, from the primacy given to the duty within the UN Charter and subsequent international human rights treaties that the non distinction norm would have had a prominent role to play in the normative development of the content of each human right. Strangely, this has not been the case. The importance and primacy rightly given to the non distinction norm within the UN Charter has been eroded by the norm's later conceptualisation in international human rights jurisprudence.

Judicial bodies, rather than treating the non distinction norm as integral to, and part of, each human right, have separated the duty not to discriminate, in the fulfilment of each human right, from the development of the scope of that human right. In effect, they have developed each human right independently of the duty to ensure them without distinction and treated the non distinction norm as a substantive human right to be balanced alongside any other human right[3]. The practical effect of this judicial approach has been to import limitations into the fundamental norm of non distinction in order to enable a balancing of that norm against another allegedly competing human right or legitimate aim. It is contended that the non distinction norm was designed to shape the content of each human right internally so as to guarantee that human rights were ensured without distinction. The norm cannot therefore be used in an external balancing process. It is a part and foundation of each human right.

It is submitted that the current judicial approach of balancing the non distinction norm against a human right or other legitimate aim fails to capture the true intent behind the norm. States, and the international community as a whole, have bound themselves to ensure all human rights through the prism of non distinction. The current conceptualisation of the non distinction norm does not accurately express the true extent of states' obligations in this area. Judicial bodies have a duty to act now to accurately redefine a state's obligations in respect to the non distinction norm. In particular, judicial bodies should start by accepting that a state's duty to ensure human rights without distinction is an integral part of the determination of the scope of each human right. For example, it would be disingenuous to frame a conflict between a

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1 Charter of the United Nations, articles 1(3), 55 (c), 56.

2 The Vienna Declaration and Programme of Action specifically states that *"respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law"* UN Doc. A/CONF.157/23, para. 15.

3 While there is a separate 'stand alone' equality right, as illustrated by article 26, International Covenant on Civil and Political Rights (ICCPR), this is a different legal concept from that of the fundamental duty to ensure human rights without distinction. This article will only be examining the duty on states to ensure human rights without distinction.

sexually discriminatory religious rule and gender equality as a conflict between the right to freedom of religion and gender equality. On application of the non distinction norm, it is clear that a practice, rule or law is only protected under the umbrella of a human right, if it is non discriminatory. The practice, rule or law would first have to pass the non distinction test before being accepted as falling within the remit of a human right. In this example therefore, the proponents of a sexually discriminatory religious rule would be unable to justify the discrimination by reference to their alleged right to freedom of religion. No balancing act would need to occur. The right to freedom of religion would not cover such a rule and as such, the relevant state would be under a duty to change the discriminatory rule to ensure a woman's equal enjoyment of her human rights. The non distinction norm is not a human right to be balanced alongside another human right but a fundamental norm that determines the content of all human rights and the parameters of accepted limitations to them.

This paper revisits the textual basis of the fundamental duty on states to ensure human rights without distinction, using the ground of sex as a means of illustration[4]. It critically analyses and evaluates the way in which this duty has been judicially interpreted and developed by international and regional judicial bodies and proposes a re-examination of the current interpretative method of determining the scope of human rights and permissible limitations, in relation to non discrimination. It is argued that the primacy given to the non distinction norm in treaty law necessitates the development of a new interpretive method. Specifically, a 'back to basics' approach should be initiated which would resituate the non distinction norm, or in effect equality, at the heart of each human right in both theory and practice. This would mean the replacement of the current judicial balancing approach, in relation to non discrimination and equality, with a textually truer approach that uses the norm of non distinction to determine the content of each human right. This would, in effect, mean that a law, rule or practice must pass the non distinction test in order to come within the protection given by a human right or permitted limitation. The paper will then conclude by focusing on how this re-evaluation can be dealt with, adhered to, and promoted by international and regional judicial bodies. It is hoped that this re-evaluation will thereby deny states, and segments of society, the ability to justify discrimination and deny substantive equality.

2. Textual primacy of the non distinction norm

The fact that respect for human rights and fundamental freedoms without distinction on the enumerated grounds is a fundamental norm of international human rights law can be comprehensively proven by reference to the UN Charter, the main human rights treaties, World Conferences and related jurisprudence[5]. To summarise, the

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[4] The author has picked the non distinction ground of 'sex', in order to best illustrate her thoughts and theories in relation to the non distinction norm as a whole. The analogies and conclusions made in this article, in relation to sex, can easily be applied to any of the other non distinction grounds.

[5] ICCPR - Preamble, articles 2, 3, 4, 14, 23, 24 and 26, the International Covenant on Economic, Cultural and Social Rights (1966) (ICESCR) - articles 2, 3 and 7, African Charter on Human and Peoples' Rights (1981) – articles 2, 3 and 18, American Declaration on the Rights and Duties of Man (1948) – article 2, American Convention on Human Rights (1969) (ACHR) – articles 1, 17 and 24, Convention on the Elimination of Discrimination against Women (1979) (Women Convention), International Covenant on the Elimination of All Forms of Racial Discrimination,

promotion and respect of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion is stated as being one of the purposes of the UN within articles 1 and 55 of the UN Charter. Article 56 states that members have a duty to take joint and separate action, in cooperation with the UN, to achieve that purpose. There is therefore a direct obligation on states to ensure that everyone enjoys their human rights without distinction[6]. The International Court of Justice in its South West Africa Opinion[7] was quite clear that

"the enforcement of distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin ……constitute a denial of fundamental human rights"[8].

They viewed the enforcement of distinctions etc, on the basis of race, as a 'flagrant violation of the purposes and principles of the Charter of the United Nations'[9]. While this opinion was given purely in relation to distinctions made on the basis of race, it is accepted that the court's conclusions on this matter are equally applicable in relation to all of the enumerated grounds[10].

The non distinction norm runs like a thread through the entirety of international human rights law with every human rights treaty and instrument containing an express admonition on states to ensure human rights without distinction. The wording of the duty changed over time, from ensuring 'without distinction' to 'without discrimination', but the purpose and the basic duty remained the same[11]. The reason for this change in terminology can be explained simply by noting that not all distinctions are discriminatory, some actually contribute to the attainment of substantive equality within a society. This point is demonstrated by the inclusion of

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1966 (ICERD) and the United Nations Convention on the Rights of the Child (1989) (CRC). Also see UN, *the Vienna Declaration and Programme of Action* (A/CONF.157/23) (1993), UN, *Beijing Declaration and Platform for Action* (A/CONF.177/20) (1995), UN, *Fourth World Conference on Women* (A/CONF.177/20/Add.1) (1995) and UN *Beijing plus 5 World Conference* (A/S-23/10/Rev.1) (2000).

6 Human rights are considered to be an obligation erga omnes on every state. ICJ 5th February 1970, Case concerning the Barcelona Traction, Light and Power Company, Limited *Belgium v. Spain* (New Application: 1962).

7 ICJ 21st June 1971,*The Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South-West Africa)*, Advisory Opinion**,** Notwithstanding Security Council Resolution 276.

8 *Id*., para. 128-32.

9 The court stated that '(I)t is undisputed that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups. This means the enforcement of distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitutes a denial of fundamental human rights. This the Court views as a flagrant violation of the purposes and principles of the Charter of the United Nations.' The Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South-West Africa) supra note 7, para. 128-32.

10 This contention is supported by the fact that the International Court of Justice's wording in relation to a state's duty to ensure human rights without distinction was not only used as the basis for the definition of discrimination within the International Convention Eliminating Racial Discrimination (ICERD), but also in the other non discrimination instruments, such as the Convention on Elimination of Discrimination Against Women (CEDAW).

11 Whereas article 2, ICCPR talks about the rights recognised within that covenant being ensured without distinction, article 2(2), ICESCR talks about the exercise of rights without discrimination. After 1966, the basic duty became framed in terms of discrimination, as opposed to distinction.

articles promoting special temporary measures in non discrimination Instruments[12]. With the attainment of equality being the purpose behind the non distinction norm, the use of the wording 'non discrimination' is more illustrative of this aim than 'non distinction'.

It is interesting to note that whilst the International Court of Justice interpreted and applied the duty of a state to ensure human rights without distinction, within their South West Africa case, the wording of their interpretation has been used as the basis for the definition of discrimination in the specific non discrimination treaties. This switch in terminology therefore came, to a large extent, out of and is evidenced by this extension and application of the International Court of Justice's interpretation of the duty of non distinction in treaty law. With the drafting and ratification of the various non discrimination Instruments came a shift of perception and a development of the duty not to discriminate into a more substantive positive duty to ensure equality. It can be seen that nowadays the non distinction duty laid upon states is not merely a passive one but a positive duty that entails a state fulfilling their duty of due diligence and ensuring, in practice, that each individual can enjoy their human rights on the basis of equality[13]. States therefore have an obligation to change not just negative laws, but a negative culture, including challenging any discriminatory religious, cultural or societal attitudes in the private, as well as, public sphere[14].

The duty on states to ensure human rights without distinction was given further impetus by the conclusions of recent World Conferences, which place gender equality[15] at the centre of UN deliberations. This duty pervades the Vienna Declaration and Programme of Action[16], as well as the later Beijing and Beijing plus 5 World Conference conclusions[17], with the eradication of all forms of discrimination

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12 For example, article 4, CEDAW.

13 A state owes those within its jurisdiction, a duty of due diligence and must deter and prevent private actors from acting in a way that would negate another's human rights. See Human Rights Committee, General Comment 31, U.N. *Nature of the General Legal Obligation on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004), para. 7 and Inter American Court, (21st July 1989) *Velasquez Rodrigues v Honduras*, (Ser. C) No. 4 for more details.

14 This can be illustrated by reference to article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (African Protocol). This article places an obligation on states to 'modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies …with a view to achieving the elimination of …practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men'. This obligation goes even further than article 5(a), Women's Convention, by clearly specifying how states can fulfil their duty. Article 5(a), Women's Convention, does, however, have a wider number of state parties. See K. E. Mahoney, Canadian Approaches to Equality and Gender Equity in the Courts, in: R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* 437, 439 (Philadelphia: University of Pennsylvania Press, 1994), for more discussion on a state's duty to change a negative culture.

15 The change in legal terminology from the use of 'sex' to 'gender' in relation to women's equality marks a difference in the way that that roles are allocated. 'Gender' refers to the socially constructed roles of men and women that are given to them on the basis of their sex. 'Sex' refers to physical and biological characteristics of men and women. For more discussion on this, please see C. A. Brautigam, International Human Rights Law: The Relevance of Gender, in: W. Benedek, E. M. Kisaakye and G. Oberleitner (eds), *Human Rights of Women, International Instruments and African Experiences* 3 (London: Zed Books Limited, 2002)

16 *The Vienna Declaration and Programme of Action*, *supra* note 5.

17 *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, *supra* note 5.

on grounds of sex and the full enjoyment by women of their human rights being stated as a priority objective of the international community[18].

The combined reach of these treaties and instruments mean that the overwhelming majority of states today have a legal and moral obligation to ensure equality in a woman's enjoyment of her human rights, as well as a connected but separate duty to ensure substantive gender equality[19]. The term 'non distinction norm' will be used throughout this article as shorthand for a state's current obligation to ensure human rights on the basis of equality. It is necessary to distinguish, at this point, between the duty to ensure human rights on the basis of equality and the duty to ensure substantive equality in relation to all of a woman's rights. While the duty to ensure human rights on the basis of equality contributes to substantive gender equality, it is merely a subsection of this wider and more encompassing duty. This article will only be discussing the context and interpretation of the more limited duty to ensure human rights on the basis of equality. It is hoped, however, that the progression of a new interpretative method in relation to this limited duty will play its part in contributing to the attainment of substantive gender equality.

2.1. The current non discrimination test

The duty on the states to ensure human rights without distinction is a stark and simple one. In none of the multiple references to it is there any mention of an allowable limitation to that right. It is a general legal interpretative principle that a right may not be limited otherwise than is provided for within its constituent document. Article 5, ICCPR, expressly incorporates this principle into the terms of the Covenant, explicitly prohibiting the protection of acts aimed at destroying or limiting any of the rights set out in the ICCPR and disallowing any reading in or extension of a limitation not specifically stated. As there are no limitations stated as being applicable to the non distinction norm, specifically set out in the ICCPR, article 5 does not allow any to be read into it. While this interpretative principle may not be expressly stated within some human rights treaties, it is asserted that it is equally, implicitly, applicable. In contrast, and as corroboration, it can be seen that where the international community has seen that it may be necessary, or is acceptable, to limit the application of a human right, they have explicitly allowed for this within that human right's constituent text. This can be illustrated by reference to the right to freedom of religion or belief. Article 18 (3), ICCPR, provides that the

"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or moral or the fundamental rights and freedoms of others."

The state parties therefore accepted, within the text of this negotiated covenant, that while certain rights may be limited, each human right must be ensured categorically without distinction. This stance can also be clearly seen in other human rights

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[18] *Beijing Declaration and Platform for Action*, *supra* note 5, para. 36, 23.

[19] It can be argued that all states have a legal obligation to ensure gender equality due to the development of a customary international law norm of gender equality. For more details, please see D. Cassel and J. Guzman, The Law and the Reality of Discrimination Against Women, in: K. Astin and D. Koenig (eds), *Women and International Human Rights Law*, Vol.1, 287 (Transnational Publishers, US, 1999).

Instruments and demonstrated by reference to the Universal Declaration of Human Rights

Although article 29 of the Universal Declaration provides for the limitation of one's rights and freedoms by reference to the rights and freedoms of another and other societal interests[20], article 2 distinguishes between 'rights and freedoms' and the non distinction norm. It is quite clear that Article 29(2) applies purely to human rights and does not in any way allow for a limitation to the non distinction norm. This assertion is given additional strength by article 29(3), which specifically states that the rights and freedoms referred to in the Declaration cannot be exercised contrary to the purposes of the UN. As ensuring human rights without distinction is a purpose of the UN, this sub section compounds the fact that any limitation to the non distinction norm is invalid. Further, where the wording of a piece of legislation is clear and unambiguous, it is an accepted interpretative rule that a court must simply give effect to that wording without any judicial interpretation or tampering. It is asserted that the wording of the various human rights Instruments clearly and unambiguously shows that the duty on states to ensure human rights without discrimination has no limitations; consequently no limitation to that duty should be created by the judiciary.

This contention gathers further authority from the fact that, not only are there no allowable limitations to the non distinction norm, there are also no derogations or reservations permitted. Although the Vienna Convention on the Law of Treaties does not explicitly disallow reservations to be made which would compromise the non distinction norm, it does prohibit reservations that are incompatible with the object and purpose of the relevant treaty[21]. It is submitted that ensuring the rights in question without distinction is an inherent part of the object and purpose of each human rights treaty. Therefore, reservations which would have the effect of compromising the non distinction rule are impermissible. Additionally, each derogation clause, within a human rights treaty, specifically states that any derogation measures taken 'must not be inconsistent with their other obligations under international law' and 'not involve discrimination solely on the ground of sex'[22].

3. Judicial handling of the non distinction norm

It is quite clear, therefore, that the non distinction norm has no textual limitation and was not designed to be overridden by societal, cultural or religious claims, even if those claims are framed as falling within the remit of a human right. A different stance has however evolved in legal practice. The interpretative texts and case law of human rights bodies and domestic courts have developed in such a way as to allow for certain limitations. Indeed, a general rule has emerged from the European Court of

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20 The reference to the 'rights and freedoms' of others within the Universal Declaration can be seen, through a thorough reading of the Declaration, simply to mean those rights we refer to as 'human rights' today.

21 *The Vienna Convention on the Law of Treaties*, article 19(3) (1969).

22 For example Article 4, ICCPR states: "*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"*

Human Rights' (European Court) jurisprudence that a distinction or differentiation of treatment will not be viewed as discrimination provided the criterion for such differentiation is reasonable and objective[23]. Therefore, the extent to which human rights are ensured to all equally currently depends on how the 'objective and reasonable justification' test is applied and what is actually viewed as an objective and reasonable justification by states and judicial bodies.

3.1. International Jurisprudence on Non Discrimination on the Basis of Sex

As set out above, not every distinction is viewed as discriminatory. A distinction is only discriminatory when there is no objective and reasonable justification for it. The scope of the concept of equality therefore depends on how the 'objective and reasonable justification' criterion is applied and what actually is viewed as an objective and reasonable justification. The Human Rights Committee has looked at the question of limitations to the non discrimination principle in a number of cases. It has however, yet to definitively set the parameters of its 'reasonable and objective justification' criterion, or to spell out its reasons for finding a violation or non violation of the non discrimination principle in any detail. It is therefore difficult to see how it would react to a state's use of the allowable limitations to a human right to justify discrimination in the application of that human right[24]. An analysis of its past decisions in relation to the use of the reasonable and objective justification test does, however, provide some basis for conjecture.

In *S. W. M. Broeks v. The Netherlands*[25] the Human Rights Committee considered that the Dutch Unemployment Benefits Act differentiated on the basis of sex and placed married women at a disadvantage compared with married men. The Act automatically assumed a man was the 'breadwinner' but demanded proof from a woman on this account. The committee decided that such a differentiation was unreasonable and thereby breached article 26, ICCPR. In this case it was, however, accepted by the state that the present societal attitude within the Netherlands did not support the view that the man was automatically the 'breadwinner' within a relationship and therefore the societal attitude the Act was based on was outdated. This unfortunately meant that the committee did not directly address the point of whether a differentiation based on a 'prevailing societal attitude' could be legally deemed a 'reasonable and objective' justification.

While it continued to evade answering this question in the other Dutch social security cases[26], the Human Rights Committee did give some indication of its view in *Dietmar*

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23 ECtHR 9th February 1967, Relating to certain aspects of the laws on the use of languages in education in *Belgium v. Belgium*, Application nos. 1474/62, 1691/62, 1769/63, 1994/63 and 2126/64 (1968), para. 10.

24 Such allowable limitations, in relation to gender, are generally coached in terms of a 'prevailing societal attitude'. A term that is dangerous in the fact that use and acceptance of it appears to legitimise the favouring of status quo discriminatory attitudes over gender equality.

25 HRC 9th April 1987, *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 196 (1990).

26 HRC 7th April 1994 *Mrs. J.A.M.B.-R. v. The Netherlands*, Communication No. 477/1991, U.N. Doc. CPR/C/50/D/477/1991 (1994) and HRC 15th July 1994, *H. J .Pepels v. The Netherlands*, Communication No. 484/1991, U.N. Doc. CPR/C/51/D/484/1991 (1994).

Pauger v Austria[27]. Although it did not go into any detail on the reasoning behind its finding of discrimination in this case, it could be argued that by noting the fact that Austrian family law had, from 1976, imposed equal rights and duties on both spouses in its decision, the committee implicitly rejected the idea that the Austrian authorities could use a 'societal attitude' justification to defend a legislative distinction between the sexes[28]. This rejection was not, however, based on the fact that such a justification could never be valid but simply that the Austrian society was deemed to have accepted sexual equality within the home, in light of its prevailing family law. Though, in the above judgment, the Human Rights Committee does appear to be signalling that it will look behind and question a state's assessment of its people's societal values where there is evidence put forward suggesting a contrary view.

The Human Rights Committee's judgement in the Dietmar Pauger case is encouraging. It appears that the Human Rights Committee would not simply accept a state's claims to be representing the societal view of their people at face value. We can also derive from its attitude in General Comment 28, that prevailing religious or cultural attitudes within a state would not be sufficient *per se* to override the precept of gender equality[29]. The 'prevailing social attitudes' justification does, however, still provide some pause for thought. Where it can be proven that the state's assessment of the majority of its people's societal attitude is correct, it would seem that this attitude might be accepted as a valid justification for a discriminatory practice.

It can be seen from a cursory look at the reservations to the Women's Convention that states constantly refer to the fact that they have a religious society to justify distinctions made solely on the basis of sex[30]. It can also be quite clearly seen from

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27 HRC 30th April 1999, *Dietmar Pauger v Austria*,Communication No 716/1996, U.N. Doc. CCPR/C/65/D/716/1996 (1999).

28 M. Nowak, The Prohibition of Gender-specific Discrimination under the International Covenant on Civil and Political Rights, W. Benedek, E. M. Kisaakye and G. Oberleitner (eds), *Human Rights of Women: International Instruments and African Experiences* 105, 112 (London: Zed Books Limited, 2002)

29 HRC, General Comment 28, *Equality of rights between men and women* (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 13.

30 As the object and purpose of the Women's Convention is the practical implementation of women's equality, no reservations should have been made that were incompatible with this purpose. Unfortunately many reservations, especially to the fundamental article 2 and 16 of the convention, were phrased in terms excluding the operation of those articles insofar as they conflict with Shari'a law or a state's personal/family law code. These can quite plainly be seen as contrary to the object and purpose of the Convention. In fact, the Committee has gone further and stated that as article 2 and article 16 are central to the object and purpose of the convention any reservation to these articles incompatible with article 28(2) should be withdrawn. For example, Egypt reserved its position on article 16, Women's Convention to ensure that Shari'a law would prevail over the Women's Convention in relation to marriage and family relations, thereby preserving the current inequities of Egypt's domestic Shari'a law. Egypt explained that its reservation was made *"out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ….guarantee(s) true equality between the spouses"*.
By this reservation, Egypt was asserting that religious beliefs could override and justify discrimination against women as defined by the Women's Convention, while simultaneously attempting to infer that while Shari'a law did not accord women and men identical treatment, it promoted true equality by a different route. For examples on how Shari'a law discriminates against women, please see S. Sardar Ali, *Gender and Human Rights in Islam and International Law:Equal Before Allah, Unequal Before Man?* (The Hague: Kluwer Law International, 2000);

the Cairo Declaration that states believe gender equality to be secondary to religion[31]. If a state had sufficient evidence to show that it was representing the prevailing social attitude of its people and that they valued a religious practice, which was *prima facie* gender discriminatory, it is difficult to say with any conviction that the Human Rights Committee would reject such a justification, made by the state, out of hand. As we can see from its case law, the European Court has allowed states to use a 'prevailing social attitude' justification to avoid a claim of non discrimination. This is obviously a dangerous premise and one that directly violates the non distinction norm, when used in relation to the enjoyment of human rights.

3.2. Regional Jurisprudence on Non Discrimination on the Basis of Sex

From its initial judgment on this matter, where it established the 'objective and reasonable' justification test[32], to the present day the European Court has clearly considered the 'prevailing societal attitudes' in deciding the outcome of the reasonable and objective justification test in relation to discrimination issues. As seen from its case law, the European Court gives states wide latitude in determining and weighing up the views of society and is reluctant to question a state's decisions in this matter[33]. In fact, only in a few cases has the European Court questioned[34] or rejected a state's legitimate aims[35]. Instead, the court prefers to make a finding of discrimination on the grounds that the measures taken by a state are disproportionate to the aim concerned[36].

The European Court also allows states a certain margin of appreciation in deciding whether the measure taken is proportional or not to their stated legitimate aim. The state therefore gains a second bite at the cherry. The court gives the state latitude in deciding whether there is a societal attitude and again in relation to the proportionality

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M. Afkhami (ed.), *Faith and Freedom. Women's Human Rights in the Muslim World* (London: Tauris Publishers, 1995).

31 The Cairo Declaration on Human Rights in Islam was adopted by the Nineteenth Islamic Conference of Foreign Ministers in August 1990 to 'serve as a general guidance for Member States in the field of human rights'. It blatantly places all rights an individual has within the framework of and subject to Shari'a law. The non discrimination and equal rights of women are specifically stated as being subject to Shari'a. To the extent that there is any clash between women's equality and Shari'a law, Shari'a law will automatically be applied. This stance is directly at odds with the legal obligations that member states have undertaken under various international treaties and is illustrative of the attempt by certain states to redefine and in effect negate their obligations to ensure gender equality.

32 The European Court established this test in the Belgian Linguistics Case - Relating to certain aspects of the laws on the use of languages in education in *Belgium v. Belgium*, *supra* note 23, para. 10.

33 The European Court feels that, 'by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an International Court to evaluate local needs and conditions' ECtHR 26th February 2002, *Frette v France*, Application no. 36515/97, (2002), para. 41.

34 ECtHR 28th May 1985 *Abdulaziz, Cabales and Balkandali v. UK*, Application nos. 9214/80, 9473/81 and 9474/81, (1985); ECtHR 27th September 1999,, *Lustig-Prean and Beckett v. UK*, Applications nos. 31417/96 and 32377/96, (1999).

35 ECtHR 29th June 2006, *Zeman v. Austria*, Application no 23960/02 (2006).

36 ECtHR 13th December 2001, *Case of Metropolitan Church of Bessarabia And Others v. Moldova*, Application no. 45701/99, (2001). In this case, although the European Court criticised all of Moldova's legitimate aims, it still held that the measure was discriminatory because of a lack of proportionality.

of the measure used to protect such a societal attitude. The European Court clarified the margin of appreciation given to states in relation to discrimination within Frette v France[37], where it held that

"Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States"[38]

The European Court found in this case that

"since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State"[39]

This stance of the European Court is unfortunate as most issues that impact on women's equality, or any of the enumerated grounds, tend to be classified as 'delicate' issues, where societal attitudes and the law in a state are in transition. The duty to ensure human rights without distinction is not, however, a progressive right, it is an immediate one. The non distinction norm was intended to prompt and ensure societal change towards substantive equality. The lack of change within a society should not, therefore, be an allowable justification for the non implementation of the non distinction norm. The doctrine of personal bar must surely operate. As stated in the Vienna Convention on the Law of Treaties, domestic law cannot be used as an excuse for the non implementation of a state's international obligations.[40]

The European Court reiterated its 'transitional state of the law' approach in Petrovic v Austria[41] where it acted as a qualification to the dictum that

"the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention"[42]

The European Court found in this case that, at the material time, there was no common European standard regarding parental leave allowances to be paid to fathers. In making this determination, it considered the fact that

"only as society has gradually moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, have the Contracting States introduced measures extending to fathers, like entitlement to parental leave"[43].

Taking this into consideration the European Court allowed the Austrian legislature a certain amount of leeway, finding that its gradual introduction of legislation on the issue reflected the evolution of society in that sphere, and accordingly the difference

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37 *Frette v France*, *supra* note 33
38 *Id.*, para. 40.
39 *Id*., para. 41.
40 *The Vienna Convention on the Law of Treaties*, article 27 (1969).
41 ECtHR 27th March 1998, *Petrovic v. Austria*, Application no. 20458/92 (1998).
42 *Id.*, para. 37.
43 *Id.*, para. 40-41.

in treatment was found not to be discriminatory[44]. It was indisputable that in this case there was a distinction based purely on sex. The European Court did not apply its own test in this case, to examine whether the authorities had an objective and reasonable justification and, specifically, 'weighty reasons' for the difference in treatment, a point picked up in the dissenting opinion of Judges Bernhardt and Spielmann. Their dissenting opinion pointed out that there were no weighty reasons in this case to justify a distinction on the ground of sex. They explained that

"(I)t is in reality the traditional distribution of family responsibilities between mothers and fathers that gave rise to the Austrian legislation under which only mothers were entitled to parental leave allowance. The discrimination against fathers perpetuates this traditional distribution of roles and can also have negative consequences for the mother….. It is correct that States are under no obligation to pay any parental leave allowance, but if they do so, traditional practices and roles in family life alone do not justify a difference in treatment of men and women".[45]

This is the approach that the European Court arguably took in the later case of Wessels-Bergervoet v. The Netherlands[46]. In this case, the Dutch authorities put forward a similar argument to the Austrians but the court implicitly rejected this as a valid justification by finding relevant the fact that, at the material time, the Convention and Protocol 1 had come into force in the Netherlands. This is similar to the Human Rights Committee's reasoning in Dietmar Pauger v Austria[47], as set out above. The European Court, however, expressly avoided rejecting the social attitude justification by finding that in 1989, when the effects in question occurred, societal attitudes had changed and no longer supported this view. It has almost interpreted the duty to ensure human rights without discrimination as a progressive as opposed to an immediate right.

Given the fact that the current societal attitude within Council of Europe member states supports the equality of women, it is difficult to see how this ground could now be used to justify a distinction based on sex. Sexual discrimination is insidious, however, and as such lies beneath many 'neutral' attitudes. It would not, therefore, be surprising if the 'prevailing societal attitude' justification continued to be used by states and accepted by the European Court as a valid limitation to a woman's equal enjoyment of her human rights.

The Inter American Court of Human Rights (Inter American Court) sees the notion of equality as springing directly from the oneness of the human family and being linked to the essential dignity of the individual[48]. As a result of this view it believes that 'not all differences in legal treatment are discriminatory, for not all differences in treatment are in themselves offensive to human dignity'[49]. It has referred to and

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44 The European Court took a similar approach in the recent case of Stec and others v. UK, Application no. 65731/01 (2006). In this case the Court found no violation of the Convention, as it considered that the respondent State's decisions as to the precise timing and means of putting right the inequality in pension age did not exceed the wide margin of appreciation allowed in such a field.

45 *Petrovic v. Austria, supra* note 41, Dissenting Opinion of Judges Bernhardt and Spielmann.

46 ECtHR 4th June 2002, *Wessels-Bergervoet v. The Netherlands*, Application no. 34462/97 (2002).

47 *Dietmar Pauger v Austria, supra* note 27.

48 IACtHR 19th January 1984, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, (Ser. A) No. 4 (1984), para. 55.

49 *Id*., para. 56.

accepted the European Court's test that a difference in treatment is only discriminatory when it has no objective and reasonable justification, as corroboration of this view[50]. In the Inter American Court's view, distinctions will be justified if they achieve justice or protect those in a weak legal position.[51]

Using the notion of the essential oneness and dignity of the human family as the starting point of equality, the court has emphasised that 'it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree' from the standards outlined above. This 'considerations of public welfare' limitation has the potential to be used in the same way as the European Court's 'prevailing social attitude' justification. Like the European Court, the Inter American Court has accepted that the balancing of different values and rights is difficult and is a process where contextual factors are important. It has therefore allowed states a certain margin of appreciation in such a process[52]. This means that the court may allow religious, cultural or societal claims to limit substantive equality but it is difficult to tell without any case law on the subject.

While no case relating to discrimination has been adjudicated on by the Inter American Court, the Inter American Commission on Human Rights (the Inter American Commission) has, however, made a few decisions in this area. In María Eugenia Morales De Sierra v. Guatemala[53], the commission followed the Inter American Court's view and the European stance and applied the 'objective and reasonable justification' criterion[54]. It held that distinctions based on sex should be subjected to strict scrutiny and 'very weighty reasons would have to be put forward to justify a distinction based solely on the ground of sex'[55]. The Guatemalan legislation in question provided that only a husband might legally represent family interests. A wife's duty was to take care of the home and children, and her right to work was conditional upon her husband's consent. The state defended these provisions as necessary for certainty and juridical security, the need to protect the marital home and children, respect for traditional Guatemalan values, and the need to protect women in their capacity as wives and mothers. The Inter American Commission felt that the statutory provisions did not actually accord with its stated aims and looked to the actual effect of the Civil Code, which denied married women legal autonomy[56]. It therefore decided that the distinction was discriminatory and violated article 24, ACHR. The Inter American Commission further held, in respect of article 17, that the provisions

"far from ensuring the "equality of rights and adequate balancing of responsibilities" within marriage …institutionalize imbalances in the rights and duties of the spouses…The fact that the law vests a series of legal capacities exclusively in the husband establishes a situation of de jure dependency for the wife and creates an insurmountable disequilibrium in the spousal authority within the marriage. Moreover, the dispositions of the Civil Code apply stereotyped notions of the roles of

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50 *Ibid.*
51 *Id.*, para. 57.
52 *Id.*, para. 58.
53 IACommHR 9th January 2001, *María Eugenia Morales De Sierra v. Guatemala*, Report no. 4/01, Case 11.625 (2001).
54 *Id.*, para. 31.
55 *Id.*, para. 36.
56 *Id.*, para. 38.

women and men which perpetuate de facto discrimination against women in the family sphere, and which have the further effect of impeding the ability of men to fully develop their roles within the marriage and family.[57]"

The Inter American Commission found the Guatemalan law violated article 17, read with reference to the requirements of Article 16(1) of the Women's Convention. The above case illustrates a blatant case of gender discrimination, however, the Inter American Commission's readiness to question whether these legal measures actually met their stated aims, by looking at their effects and taking provisions of the Women's Convention into account, is encouraging. It suggests that the Inter American Commission takes a holistic view of non-discrimination and would not merely take cultural, societal or religious claims at face value but subject them to rigorous scrutiny based on the definition of equality within the Women's Convention. Given that laws and societal practices that distinguish by sex usually have little rational justification in today's world and generally breach the definition within the Women's Convention, such an approach would usually result in the rejection of such laws and practices[58].

It could be argued that the reasonable and objective justification test evolved not to limit but to ensure substantive equality, the aim behind the non distinction norm; the test is simply a method by which corrective or 'affirmative' action can be taken to remedy systematic or historical discrimination[59]. While the application of the test in such a way would be in line with legislative intent and applauded, sadly it is used to limit as opposed to enhance substantive equality in practice. The objective and reasonable justification test used in relation to non discrimination has in fact developed to mirror the test judicial bodies use to determine the acceptable limits placed on substantive human rights. This is a blinkered and erroneous approach. They have treated the non distinction norm as if it were a human right as opposed to a defining principle. Indeed, they have not just treated the non distinction norm as a human right but analogous to a derogable human right, which clashes with the purpose and wording of each human rights instrument[60]. In their application of the objective and reasonable test, judicial bodies have not merely allowed distinctions that fulfil the greater purpose of equality to be exempt from being classified as 'discriminatory'; they have allowed limitations for much less vaunted reasons. The

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57 *Id.*, para. 44.

58 It should be noted, however, that the decisions of the Inter American Commission are not legally binding and may be appealed to the Inter American Court. If the Inter American Court takes a more conservative view then the commission's approach in the above case may be rejected.

59 The preamble of the Twelfth Protocol (2000) to the ECHR, states that "*the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures*". This would lead one to believe that only measures which were designed to promote full and effective equality would not breach the ban against discrimination.

60 It is curious that although commentators will argue that the non distinction norm must be balanced alongside another human right, the same stance is not taken in relation to the non derogable prohibition against torture. No limitation to this human right is, rightly, ever able to be legally justified. Part of the reasoning why there are no limitations allowed is precisely because none are admitted in the text and also because the prohibition is seen to be a fundamental principle of international law. Exactly the same arguments can be put forward in relation to the non distinction norm.

test has been used as a Trojan horse eroding the non distinction norm from within; it has allowed barriers to be erected on the road to equality.

The introduction of limitations into the test for non discrimination provides a bar to the realisation of substantive equality. Due to the fact that the non distinction norm is a purely derivative right, which operates in relation to a substantive human right, if limitations are allowed to that human right, the non distinction norm can, in reality, be limited. To explain further, using the European human rights system as an example, the European Court considers an alleged article 14 violation alongside the alleged violation of a substantive human right. It usually looks at the alleged violation of a substantive human right and analyses whether there has been an interference/ non fulfilment of that right on the basis of one of the discrimination grounds. The difficulty lies in the fact that some human rights can be limited by reference to public order, health or morals, the rights and freedoms of others etc[61]. Where an individual alleges that they have been discriminated against in relation to such a human right, the European Court considers whether the *prima facie* discriminatory interference can be justified by reference to the accepted limitations to that human right. The respondent state therefore has the opportunity to justify the interference on the grounds that they had a legitimate aim and 'protected' that legitimate aim proportionally. By allowing such justification, the European Court is in reality, importing limitations into the non distinction norm. The court is not asking whether everyone's enjoyment of that human right can and should be limited by reference to a pressing societal need but whether a certain segment of that society's rights can be. While it may be acceptable to limit the whole of a society's human right, the non distinction norm was created to prevent the discriminatory application of such limitations, in relation to the enumerated grounds. The limitations to a substantive human right were not intended to, nor should they, limit the application of the non distinction norm. Judicial bodies need to distinguish between the two distinct tests. The determination that a state has discriminated against an individual on an enumerated ground is separate from the question of whether a limitation to a human right is allowable. There is no justification allowed for a distinction that does not contribute to substantive equality. This means that although the limitations section of a human right can be referred to, it can only be implemented if the relevant interference would affect everyone's potential enjoyment of that human right equally. If the effect of the interference is discriminatory then the limitation section is not applicable and the non distinction norm comes into play. The non distinction norm has no limitation; lack of equal enjoyment of a human right cannot, therefore, be justified, particularly not in relation to religious, cultural or societal considerations[62].

The problem with the current judicial 'objective and reasonable justification' approach lies in the fact that a state can justify discrimination of certain 'limitable' human rights by reference to national security, public order, public health or morals or the rights and freedoms of others[63]. Discriminatory traditional, cultural and religious views can

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61 For examples of these kinds of clauses, please see articles 8, 9 and 10 ECHR.

62 Indeed, the Human Rights Committee, in General Comment 28, explicitly states that "*States parties should ensure that …religious …attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights*" Human Rights Committee, *supra* note 29, para. 5.

63 These justifications are taken from the limitation section, article 12(3), ICCPR, as an example of the general accepted limitations to certain specified human rights.

and do underlie such justifications, as illustrated in the case law set out above. States that feel that their interests are better served by protecting or promoting the interests of a certain segment of their society than by ensuring gender equality, will discriminate against women. This can be demonstrated by reference to the controversy surrounding the outcome of the Shah Bano case. In this case the Indian Supreme Court held that Muslim women could have recourse to the national criminal procedure where the Muslim personal law was insufficient. The ruling was seen to give primacy to the national criminal code as opposed to the Muslim Personal Law on a matter that was ostensibly a 'family' issue. In the furore following the Indian Supreme Court's judgment, Rajiv Gandi, the Indian Prime Minister at that time, sympathised with the stance of women's groups advocating women's equality, but confronted with electoral defeat he submitted to the bullying of the All India Muslim Personal Law Board. He made it plain that unless the women could stop the rioting and violence on the street, religious sentiments would have to be appeased at the expense of women's equality[64]. This is a blatant case of gender equality being sacrificed for the appeasement of a vocal minority. No individual petition was brought on this matter, so the Indian state did not have to defend its actions on the basis of the rights and freedoms of others, social morals, public order etc. If this had gone before a regional or international human rights body, it is debateable whether a justification on these grounds would have been accepted as a legitimate aim protected proportionality. It depends to what extent that judicial body would be willing to probe behind the stated legitimate aim and see whether discriminatory attitudes are in reality behind it. This is a tricky task for a judicial body, and one they are generally reluctant to fulfil. This reluctance can be illustrated, and perhaps explained, by the European Court's stance. It feels that

"by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an International Court to evaluate local needs and conditions"[65]

While this sentiment may be true, it does not, however, negate the need to determine whether, regardless of the fact that the majority, or a certain segment, of a state holds certain views, those views are based on a discriminatory attitude.

Usually the impact of discriminatory traditional, religious or cultural views is more subtle and at the root of a 'neutral' aim, thereby being more difficult to identify and question. While a state can frame the aim behind a discriminatory law in 'neutral' terms such as a child's best interests, as seen in Hoffman v. Austria[66], it is obvious that, once the layers are peeled back, the real reason is a discrimination stereotype or traditional attitude. Although religious, cultural and traditional attitudes are often, if not always, at the heart of a state's true reason for allowing a discriminatory practice, judicial bodies do not tend to subject a state's legitimate aim to a piercing analysis or seek to lift the veil between the stated legitimate aim and the actual reason. In looking at a limitation to the enjoyment of an individual's human right, it is contended that judicial bodies should consider whether that limitation or interference disadvantages a

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64 R. Coomaraswamy, To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights, in: R. J. Cook (ed.), *Human Rights of Women. National and International Perspectives* 54 (Philadelphia: University of Pennsylvania Press, 1994)

65 *Frette v France*, *supra* note 33, para. 41.

66 ECtHR 23rd June 1993, *Hoffmann v.* Austria, Application no. 12875/87 (1993).

certain gender or race. It is submitted, in relation to the reasonable and objective justification test, that judicial bodies must be ready to look behind a state's stated aim to the actual attitudes that lie beneath a certain law, rule or practice. The European Court has started down that road in relation to blatant discrimination on the basis of religion[67] and sexual orientation[68] but seems strangely reluctant to 'lift the veil' in relation to societal attitudes and stereotypes in relation to gender[69]. It is also somewhat interesting that the European Court places this 'lifting of the veil' into the second part of the objective and reasonable justification test, within the proportionality aspect, as opposed to the first, and on the surface more appropriate, part which deals with whether the state actually has a legitimate aim. It is this deference to a state's stated reason that is somewhat discouraging.

The Inter American Commission has taken the more straightforward and transparent path and questioned whether a state's alleged legitimate aims are actually fulfilled by the practice in place. In María Eugenia Morales De Sierra v. Guatemala, they lifted the veil and determined that sexist stereotypes lay behind the impugned measure[70]. While the approach of the Inter American Commission is encouraging, it should be stressed that there should be no allowable justifications for a limitation to a human right that does not contribute to equality in the enjoyment of that right for all. The potential danger posed by the use of a limitation section justification, in relation to claims of non discrimination, lies in the reasoning behind it. The justification gives primacy to the status quo at the expense of an individual's human rights[71]. It could be utilised to support the so-called religious or cultural views of the majority of a group or the community at large within a state and prevent substantive equality.

4. The Non Distinction Norm as a Method of Interpretation

From looking at international and regional jurisprudence in this area, it can be seen that judicial bodies have *de facto* created limitations within the non distinction norm where, textually, there are no such limitations specifically permitted within any of the norm's encapsulations[72]. As stated earlier, where the constituent text of a right or principle does not allow for limitations, judicial bodies cannot create such limitations. In creating limitations, the judicial bodies have violated a cardinal rule of interpretation and the stipulations specifically set out in the relevant treaty texts. The ‘reasonable and objective justification’ test has allowed the non distinction norm to be limited in a way neither envisioned nor sanctioned within the treaties and instruments espousing it. Its purpose of achieving equality has thereby been subverted. The whole legal approach towards the non distinction norm has to be re-thought. The 'reasonable and objective justification' test does not contribute to equality for all and therefore should be rejected as invalid.

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67 *Ibid.*

68 ECtHR 21st December 1999, *Salgueiro Da Silva Mouta v. Portugal*, Application no. 33290/96, (1999).

69 *Petrovic v. Austria, supra* note 41.

70 *María Eugenia Morales De Sierra v. Guatemala*, *supra* note 53.

71 As illustrated in the case of *Petrovic v. Austria*, *supra* note 41, where the European Court took the evolution of society into account in rejecting a sex discrimination claim.

72 Supra 5.

It is contended that the non distinction norm is not a substantive human right but an overriding principle that determines the content of every human right. This can be verified by the wording 'human rights without distinction'[73]. The non distinction norm is explicitly stated as a separate condition to be fulfilled within a state's general obligation to ensure human rights. It is therefore not a value that can be balanced alongside an individual human right but a value that permeates every human right. This means that the content of each human right cannot be discriminatory. It may be acceptable to argue over the precise content of human rights but it is quite clear that regardless of the actual specifics, each human right must be ensured without distinction as to sex. While some human rights can be limited by reference to another human right, public order or moral consideration, the assertion of a human right or any other permitted limitation to a human right cannot legally be used to discriminate against women. No one can therefore assert that their human right would be violated if that human right, or another, was ensured to a woman on an equal basis.

It is asserted that in order to fulfil the duty to ensure human rights without distinction, the content of each human right must not be discriminatory. This derives from the fact that if the content was discriminatory then another's enjoyment of that human right would be impaired and the non distinction norm violated. Following on from this reasoning, in order to ensure that the content of each human right is not discriminatory, all human rights should be interpreted in light of the non distinction norm. As the non distinction norm delineates the content of each human right, it is misleading to talk about there being a clash between the non distinction norm and a substantive human right as if they were human rights of equal weight. They are different entities. The non distinction norm does not fall within the category 'human rights'; it occupies a different dimension from a substantive human right. The outcome is not to be gained by weighing the two but by an interpretation of the human right in light of the non distinction norm. Just as the Vienna Declaration advocates mainstreaming gender equality throughout the UN system[74], so should the concept of non distinction be mainstreamed through the interpretation of each human right.

This view goes further than the balancing or 'practical concordance' approach mostly advocated in this book and other academics that treat the non distinction norm and a substantive human right as human rights, of equal weight, that should be balanced against each other[75]. For example, Sullivan talks of balancing the two 'rights', the substantive right to gender equality and the right to freedom of religion, taking account of the importance the particular practice being protected/interfered with has in relation to the relevant right, the degree of interference, other affected rights, the cumulative effect and the proportionality of the measure involved[76]. It is asserted, however, that recourse to a balancing act is premature; no human right protects attitudes or practices that disadvantage women in their effect. If such discriminatory claims are not sheltered underneath the umbrella of a human right or other accepted

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73 This wording can be found in article 55 of the UN Charter, which states " *universal respect for …. Human rights and fundamental freedoms for all without distinction as to …. sex.*"

74 *Vienna Declaration and Programme of Action*, *supra* note 5, para. 37.

75 See A.E. Mayer, The Dilemmas of Islamic Identity, in: L. Rouner (ed.), *Human Rights and The World's Religions* 94 (Indiana: University of Notre Dame Press, 1988) for a discussion on the idea of 'a balance of harms'; D.J. Sullivan, Gender Equality and Religious Freedom: Towards a Framework For Conflict Resolution, 24 *International Law and Politic*,796 (1992).

76 D.J. Sullivan, *supra* note 75, 821.

limitation, then they cannot be used to prevent equality and check the assertion of another's human rights. If a woman therefore claimed that her right under article 23, ICCPR, was violated on account of her being unable to assert the same rights to divorce as her husband, the state's justification for that rule would first be subjected to the non distinction test. The state may well defend such a discriminatory rule by reference to the religious beliefs held by some in its society, couching its justification in terms of their right to freedom of religion and belief. However, if the state could not demonstrate that the rule contributed to, or at least did not detract from, overall gender equality in relation to a woman's article 23 rights, then no justification, regardless of how it was phrased, should be accepted by the relevant judicial body. Looking at this situation from a different angle, if the 'clash' was phrased in terms of an individual's right to freedom of religion being denied due to the assertion of another's article 23 right, firstly it would have to be considered whether the relevant practices did form part of an individual's right to freedom of religion. Those practises would have to pass the non distinction test before they could be considered as falling within the remit of article 18. If the practices were discriminatory then, there would be no article 18 right to assert. There would not, therefore, be a requirement to balance an article 23 right against an article 18 right in these circumstances. A balancing act between the two human rights would only be required where the religious rule, allegedly clashing with an article 23 right, did not *de facto* discriminate on the basis of sex. It must be borne in mind, however, that the rights within article 18 must also be assured to women on an equal basis to men.

The 'balancing' approach is politically more palatable than the use of the non distinction norm as an aid for interpretation as it allows for subjectivity, cultural weighting and deference to religious, traditional or cultural values. This approach is not, however, supported by a textual interpretation of human rights treaties. As Howland points out ‘where the text provides standards and guidance for resolving conflicts, it is inappropriate to resort prematurely to the balancing approach’[77]. The text of the UN Charter and all subsequent human right treaties make it clear that the non distinction norm is an overriding principle which is applicable to all human rights. It is not merely the founding text of the non distinction norm that supports this view but a continued reiteration and affirmation that equality, and specifically gender equality, is a fundamental purpose of the various human rights systems[78]. The purpose behind the non distinction norm is clear; it is to ensure that everyone has an equal enjoyment of each human right. The non distinction norm only allows distinctions that can be demonstrated as contributing to substantive equality.

When viewing human rights in the light of the gender element of the non distinction norm, the question that should be asked is ‘are these human rights ensured and respected without distinction as to sex?’ It is contended that, if it appears on the face of it or in practice that there is a distinction in relation to the fulfilment of a woman's human right, which does not contribute to substantive equality, the non distinction norm has been violated. The relevant 'discriminatory' measure/act should therefore be amended accordingly. This does not mean that exactly the same measures have to be

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77 C.W. Howland, The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter, 35 *Columbia Journal of Transnational Law* 325 and 326 (1997).

78 This has already been demonstrated earlier in this paper by use of the Vienna Declaration and other World Conferences and various political statements and resolutions etc.

applicable to both men and women, but simply that their potential enjoyment of a particular human right should be equal. If we view the non distinction norm in light of its purpose to ensure equality between men and women, it is obvious that this principle should be interpreted holistically. It is not enough that there is no direct discrimination or even any indirect discrimination; the question is whether there is substantive equality in relation to the enjoyment of human rights. The best way to determine this is to look at the actual effects of a certain measure or practice.

The test that presently best determines this, is the one currently advocated by the Canadian courts in relation to s15 of the Canadian Charter of Rights and Freedoms[79], which focuses on the impact of laws and the context of the individuals concerned[80]. The Canadian test determines discrimination in terms of disadvantage; if it can be shown that a distinction based on the personal characteristics of women continues or worsens the disadvantage suffered by them, then that distinction is discriminatory[81]. It looks further than merely distinctions that blatantly discriminate on the basis of sex, to ones that are actually discriminatory in their effects, taking context into account. The UK now uses a similar 'disadvantage' test in relation to sex discrimination in the field of employment[82]. It is disappointing however that both the Canadian and UK tests still allow the state to justify such a disadvantage[83] and incorporate the use of a comparator[84]. It appears, therefore, that even though some states' domestic law is steadily working towards equality, a fundamental change in attitude is required before the concept of substantive equality is fully embraced.

As argued by Howland, the way in which the duty to ensure human rights without distinction is phrased establishes that the distinctions themselves are of equal importance[85]. Following this rationale to its logical conclusion, this therefore means

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79 S15(1) states that "*every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*".

80 K.E. Mahoney, Canadian Approaches to Equality and Gender Equity in the Courts, in: R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* 445 (Philadelphia: University of Pennsylvania Press, 1994).

81 The Canadian Supreme Court in *Andrews* v. *Law Society of British Columbia* [1989] 1 S.C.R. 143, stated that discrimination was to be defined as "*a distinction, intentional or not, that is based on grounds relating to the personal characteristics of the individual or group concerned, and that has the effect of imposing disadvantages or burdens not imposed on others, or of withholding access to advantages or benefits available to others.*"

82 S 1(2)(b), Sex Discrimination Act 1975, declares that a provision, criterion or practice that applies or would apply equally to a man, which puts women at a particular disadvantage when compared with men, and that actually puts a woman at that disadvantage without it being a proportionate means of achieving a legitimate aim'. This test obviously incorporates a justification that would not be applicable in relation to the proposed non distinction test.

83 In Canada, this is done by reference to art 1 of the Canadian Charter of Rights and Freedoms. In the UK, the Sex Discrimination Act 1975, as amended, allows for justification within s1 (2)(b)(iii). In this section the test is whether the provision, criterion or practice apply equally to women and men but the provision, criterion or practice which puts women, and that particular woman, at a disadvantage as opposed to men is a proportionate means of achieving a legitimate aim.

84 This can be seen in the UK Sex Discrimination 1975, s 1(2) and in Canada within the cases following on from Supreme Court of Canada, 28th October 2004, *Hodge v Canada* (2004) SCC 65.

85 C.W. Howland, *supra* note 77, 331.

that the standard for evaluating whether there is a violation is the same for each distinction ground. This means that the non distinction norm discussed above is as applicable to distinctions on the grounds of race, religion or language, as it is to sex. The scope of each human right is therefore to be determined in relation to the non distinction norm on all its enumerated grounds. In this determination there is no need for a clash between the different non distinction grounds. The different grounds simply add to the whole and prevent discrimination in any of its guises, including multiple discrimination. For example: Plurality of religion does not itself impinge on women's equality. While there is the potential for clashes between competing human rights, it is asserted that there is not the same potential for conflict between the enumerated grounds of the non distinction norm.

5. The Proposed Legal Application of the Non Distinction Norm

While it is relatively easy to discuss the need for and legal basis of the non distinction norm, it is trickier to determine how this principle should be interpreted in the international, regional and domestic law arenas. In the area of gender, rather than looking at the issue of ensuring human rights in relation to the equality of men and women, the legal approach, up until recently, has been to question whether one sex has been discriminated against by reference to the other. As Coomaraswamy argues, due to the difficulty in defining what is meant by the concept of equality, the law has taken the easy way out and used non discrimination, which can be factually ascertained, as its model[86]. This approach is beginning to change, as can be illustrated by the current usage of the 'disadvantage' test in Canadian and UK law. The allowance of limitations to the non distinction norm, through the justification element of the non discrimination criterion, has, however, remained unchanged. It is asserted that this element, more than any other, prevents the enjoyment by all of their human rights on an equal basis.

Judicial bodies developed the reasonable and objective justification test to determine an allowable limitation to a substantive human right. However, this test crept into their determinations in relation to discrimination without, it is asserted, due legal analysis. They, like states, are comfortable with using the objective and reasonable justification to determine discrimination. The use of this test, alongside the margin of appreciation, gives states a certain leeway to ensure equality progressively. While this approach is understandable, it is incorrect and requires revising. International and regional human right bodies and domestic courts have a duty to enforce the implementation of states fundamental duty to ensure gender equality and human rights for all without distinction. In order to fulfil their duty, the judicial bodies should not allow any limitation to the non distinction norm. It is hoped that with the advent of an individual petition system in relation to the Women's Convention, the Committee to the Women's Convention will be proactive in the pursuit of gender equality and use the non distinction norm in the way proposed by this article[87].

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86 *Supra* note 54, p47.

87 The Optional Protocol to the Women's Convention, 1999, which created the right of petition in relation to the Women's Convention, entered into force on 22 December 2000. It currently has 83 state parties. The Committee to the Women' Convention has currently only published five petition decisions and has yet to decide on its approach in relation to gender equality and the so called

It can be argued that without being expressly conscious of it, the European Court has already been interpreting the scope of human rights by reference to the non distinction norm on the ground of religion. In relation to its jurisprudence on the right to freedom of religion and belief, it is clear that the European Court views the plurality of religion, as opposed to the actual manifestations of any religion, as the crucial element. The European Court has used the idea of plurality to determine what manifestations of religion should be protected by article 9, ECHR[88]. Indeed, it has almost interpreted article 9 as a non discrimination clause as opposed to a substantive rights clause. This can be clearly illustrated by reference to Sahin v Turkey[89] where, although the court did place some boundaries on the ability of states to impose limitations on the right to freedom of religion, the boundaries it set were very loose, namely, that

"*'regulations must never entail a breach of the principle of pluralism, conflict with other rights enshrined in the Convention, or entirely negate the freedom to manifest one's religion or belief"*[90].

It seems therefore that only the absolute negation of a person's right to manifest their religion is prohibited, a very weak protection indeed. The pre-eminence of plurality of religion and its almost necessary adjunct, secularism, can be seen running through not only the court's entire case law on article 9 but also in its jurisprudence on other articles, notably article 11[91]. The European Court has used the idea of plurality of religion not only to determine the scope of the margin of appreciation to be given to states, but in determining whether an interference corresponds to a 'pressing social need' and is 'proportionate to the legitimate aim pursued'[92]. In fact, the European Court has made it very clear that 'a distinction based essentially on a difference in religion alone is not acceptable'[93]. This would accord with the new approach, asserted early, of not allowing a state to justify discrimination. It appears that the European Court is stricter in its application of the reasonable and objective justification test in relation to non discrimination on the basis of religion than it is in relation to sex. This approach accords with the primacy it gives to plurality of religion and secularism in the maintenance of democracy. Interestingly, it does not appear to view gender equality as a prerequisite to democracy.

It is not too big a step for the European Court to move from its present stance on plurality of religion to actually explicitly interpreting the right to freedom of religion, or any other human right, in light of the non distinction norm on the ground of religion. If it is able to make that step then, on the basis that all distinctions within the

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competing interests of 'other' human rights. You can read more about the Optional Protocol at http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm, accessed on 27th November 2006.

88 ECtHR 29th June 2004, *Sahin v. Turkey*, Application no. 44774/98 (2004), ECtHR 13th December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, (2001), para. 145, ECtHR 26th September 1996, *Manoussakis and Others v. Greece*, Application No. 18748/91 (1996), para. 43-44, ECtHR 13th February 2003 *Refah Partisi (The Welfare Party) and Others v. Turkey*, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98 (2003).

89 *Sahin v. Turkey*, *supra* note 89.

90 *Id.*, para. 102.

91 See *Refah Partsi v. Turkey*, *supra* note 89, para. 70, ECtHR 26th October 2000, *Hasan and Chaush v. Bulgaria*, Application no. 30985/96 (2000).

92 *Metropolitan Church of Bessarabia And Others v. Moldova*, *supra* note 89, para. 119.

93 *Hoffmann v. Austria*, *supra* note 66, para. 36.

non distinction principle are of equal status, the European Court should also interpret the content of a human right by reference to the gender non distinction norm. The High Court of Tanzania has already qualified customary practice in Tanzania by application of the human rights standard of non discrimination on the basis of sex[94], while the Appeal Court in Botswana has done the same in relation to its national law in the case of Attorney General v. Unity Dow[95]. These cases demonstrate that where there is the requisite domestic political will to ensure equality, a way can be found to change the relevant discriminatory practice or view. Human rights bodies can increase such political will by publicly highlighting a state's discriminatory attitudes and not judicially supporting the continuation of discrimination through the application of an allowed justification. If domestic courts can qualify national law and customary law by the application of a state's non discrimination duty, then international and regional judicial bodies can apply the non distinction norm strictly, in the knowledge that such positive change is possible.

As demonstrated above, it is possible for judicial bodies to determine the scope of a human right by reference to the non distinction norm. One of the easiest ways to do this is to change both the question and the starting point. It is asserted that judicial bodies should start from the premise of equality and, like the Canadian courts, ask whether the relevant rule or practice embodies a distinction based on the personal characteristics of women which continues or worsens the disadvantage suffered by them in relation to a human right. In line with starting from the premise of equality, as opposed to the status quo, these bodies could place the burden of proof on those defending a certain practice, where such practice appears to prima facie disadvantage women[96]. Those defending the 'discriminatory' practice could only argue that it did not continue or worsen a disadvantage suffered by women. If they could not prove beyond the balance of probability that it did not disadvantage women then such a practice would breach the non distinction rule, regardless of any so called justification. This would therefore mean that protection of the practice would not be accepted as a legitimate aim, capable of restricting the enjoyment of an individual's human right. If their domestic legal system was unwilling to follow this approach, the state could be held accountable for the breach of their international obligations in relation to the non distinction norm.

While many will see this non distinction interpretative approach as a destruction or limitation of a particular human right and therefore untenable, it does not damage the essence of each human right. It instead brings states closer to realising their stated aim of ensuring human rights to all without distinction. Due to the current power balance in this world, human rights have been interpreted mainly by reference to masculine thoughts and needs. Interpreting human rights through the prism of the gender non distinction norm would merely allow a widening of the content of a human right to

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94 Ephrahim v. Pastory and Kaingele 87 I.L.R. 106 (1990) as discussed in C. Beyani, Towards a More Effective Guarantee of Women's Rights in the African Human Rights System, in: R.J. Cook (ed.), *Human Rights of Women. National and International Perspectives* 292 (Philadelphia: University of Pennsylvania Press, 1994).

95 C.A. Civil Appeal No. 4/91 (Unreported), Id., 294.

96 An example of where the UK courts already use this 'two prong' test in relation to the burden of proof is found in s63A, Sex Discrimination Act 1975 and the case law surrounding this section e.g. UK Employment Appeal Tribunal 3rd April 2003, *Barton v. Investec Henderson Croswaite Securities Ltd* 2003 IRLR 332.

include women's thoughts and needs. All that would occur is that men's needs would no longer be allowed precedent over women's. Denying protection to those laws, rules and practices that are, in reality, sexist, only challenges patriarchal and unnecessary man made laws and practices that must be abolished to allow for the realisation of substantive equality. Whilst this may appear a simplistic and somewhat harsh approach, it should be borne in mind that the denial of protection for and an abolition of cultural, societal and religious practices that discriminate on the basis of race has been part of international law since the South West Africa opinion[97]. Whereas certain religions and cultures used to accept and even promote slavery and discrimination on the grounds of race, such religious and cultural doctrines have changed as social perceptions have and none, now, justify racial discrimination on the basis of religion and culture. It is therefore possible to invoke internal cultural change to support and ensure the equal enjoyment of human rights for both genders. Judicial bodies are under a duty to apply the relevant treaty and international customary law, with the UN bodies additionally bound by the principles and purposes of the UN Charter. The UN Charter and subsequent human right treaties make it clear that human rights are to be applied without distinction. The bodies should therefore allow no limitation to the non distinction norm and interpret each human right in light of it.

6. Conclusion

Within the main body of this article it has been submitted that judicial bodies should institute a 'back to basics' approach in their interpretation of states' obligations to ensure human rights without distinction. To that end, it revisited the textual basis of the non distinction norm and consequently asserted that the current 'balancing' between equality and a substantive human right or societal interest was incorrect and needed revising. Indeed, it was suggested that the non distinction norm is not a human right to be balanced alongside another human right but a rule by which the content of all human rights should be determined. It was therefore proposed that the judiciary develop a new interpretative method which would disallow justification for discrimination and actually ensure human rights to all, without distinction on the enumerated grounds.

International, regional and domestic judicial bodies are gradually moving towards the position that traditional, cultural and religious justifications are insufficient *per se* to deflect a claim of gender discrimination. The reluctance of judicial bodies to specifically state that no limitation to gender equality, or any other equality ground, is permitted flows partly from their belief that the practices etc, that form the basis for such limitations, fall within the protection of a human right or permitted limitation to a human right. This reluctance can be countered by the application of a new interpretative approach whereby the content of each human right is determined by reference to the non distinction norm. Due to the fact that a discriminatory practice would not form part of any human right or allowable limitation, a practice that is discriminatory in its effect cannot be justified by reference to a limitations section. In the application of the gender non distinction norm it was suggested that the

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[97] *The Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South-West Africa), supra* note 7.

appropriate measure of whether a rule or practice was discriminatory was to look at whether it created or continued a disadvantage for women.

The main obstacle to ensuring that human rights are enjoyed by all without distinction lies in the deference given to the views of the dominant or powerful within a state. Those in power wish to retain it and changing the structure of society to make it more equal can be perceived as a threat to their retention of power. Ultimately, all decisions of judicial and indeed political bodies are made whilst taking into consideration the consequences that their decision will have in relation to societal peace, the perceived internal legitimacy of their decision and the knowledge of how far they can 'push' those they rely on for support, without losing their power base[98]. While this contextual point is important to consider, it does not in any way negate the fundamental duty that a state has to ensure equality. It merely means that this change has to be managed in a sensitive manner.

Although it is asserted that practical concordance is not applicable in relation to the non distinction norm, due to the lack of need for such a balancing act, there are some parallels that can be drawn between the refinement of this principle by Justice Tulkens and Professor De Schutter and the new interpretative stance advocated in this article. As the author understands it, their version of practical concordance relies upon the identification of the root causes of a so called clash of rights and the determination of whether there is indeed, or should be, such a clash. The use of the European case, Ollinger v Austria[99], was seen to be illustrative of this revised version of practical concordance. Whilst delivering the joint paper[100], Professor De Schutter used this case to demonstrate his point that states could and should be persuaded to transform society or use inventive strategies to prevent such a 'conflict' between rights from arising. In relation to the duty on states to ensure human rights without discrimination, it can be seen that although the struggle between the status quo of discriminatory attitudes and substantive equality is often framed as a clash between a human right or legitimate aim and equality, this is not legally correct. To restate a point made by Professor De Schutter, in relation to practical concordance, the state has an obligation to transform society to enable human rights to be ensured without distinction. The failure to fulfil such an obligation cannot be relied upon to create a semblance of a clash, where no clash, in law, should exist. In this sense we go back to the age old adage and legal rule that one is personally barred from relying on and benefiting from one's own failure to fulfil a legal obligation. It is quite clear from article 27, Vienna Convention on the Law of Treaties, that a state cannot justify a breach in its international obligations by virtue of an inconsistent internal law[101]. Surely this is even more relevant when we talk about culture, as opposed to law. For over sixty years states have had a fundamental legal obligation to ensure human rights without

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98 See D. Feldman, Human Rights Treaties, Nation States, and Conflicting Moralities, 1, *Contemporary Issues in Law* 61 (1995).

99 ECtHR 29 June 2006, *Öllinger v. Austria.*

100 Justice Françoise Tulkens (European Court of Human Rights) and Prof. Olivier De Schutter (Université Catholique de Louvain, Belgium) were invited to draft a paper for the International Conference: Conflicts Between Fundamental Rights hosted by Ghent University, Dec 2006. Prof. De Schutter presented the joint authored paper 'Conflicting rights in the case-law of the European Court of Human Rights'.

101 Article 27 states that a "*party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*"

distinction. It has never been stated to be, nor is it, a progressive duty; on membership of the UN it became immediately incumbent on states to change their society to ensure human rights on the basis of equality, on the enumerated grounds. States cannot, therefore, use the fact that their society is not ready, after sixty years, to accept equality as a justification for continued discrimination.

Although such a strict liability approach will invoke a negative reaction from states and those with power within a state, states have obliged themselves to ensure human rights on the basis of racial, gender, religious, etc. equality and must be brought to honour that pledge. Each state has a duty to ensure equality on the enumerated grounds throughout the whole of society. The fact that a discriminatory law or practice is labelled as traditional, cultural, religious, etc. does not change a state's duty to eradicate it. A state's duty goes beyond passing and enforcing laws to actually prohibiting discriminatory traditional cultural and religious laws, stereotypes, and practices. It must educate its people of the need for such change and persuade them of the benefits of equality. It is not enough that the state is convinced of the need for equality, the popular will has to be engaged for the societal change to ensure that human rights on an equal basis for all can become a reality.