

## Abstract

*The principle of equality encompasses the right not to be discriminated against. It is important to distinguish between discrimination and differentiation when seeking to promote and protect the right to equal treatment of disadvantaged or otherwise vulnerable groups. The achievement of equality not only prohibits abstaining from discrimination, but also entails a positive obligation to rectify inequalities. Differentiation may be an adequate means to remedy disadvantages and to enhance the equal rights of vulnerable groups. Discrimination against disabled people may occur as a result of both differentiation and a lack thereof. The admissibility of differentiating between able-bodied and disabled persons ultimately depends on the relevance of using disability as a criterion to distinguish between individuals or groups. Differentiating is acceptable if the absence or presence of an individual quality or group attribute is of paramount importance, or when an effort is made to rectify inequalities. Differentiation, however, becomes discriminatory when distinctions are made arbitrarily, or when they have the purpose or effect of denying or restricting the equal enjoyment and exercise of human rights.*

*El principio de igualdad incluye el derecho a no ser discriminado. Es importante distinguir entre discriminación y diferenciación cuando se busca el promover y proteger el derecho al tratamiento igualitario de grupos en desventaja o de grupos vulnerables. El alcance de la igualdad no solamente prohíbe al abstenerse de la discriminación sino que también requiere una obligación positiva para rectificar desigualdades. La diferenciación puede ser un medio adecuado para remediar las desventajas y para aumentar los mismos derechos para los grupos vulnerables. La discriminación contra la gente incapacitada puede ocurrir como resultado de ambas la diferenciación y la falta de diferenciación. La admisibilidad de diferenciación entre las personas capaces e incapacitadas depende ultimadamente de la relevancia de usar la incapacidad como un criterio para definir entre individuos o grupos. La diferenciación es aceptable si la ausencia o presencia de una calidad individual o atributo grupal es de capital importancia, o cuando un esfuerzo es hecho para rectificar las desigualdades. Sin embargo, la diferenciación se vuelve discriminatoria cuando las distinciones se hacen arbitrariamente o cuando estas tienen el propósito o efecto de negar o restringir el goce y el ejercicio igualitario de los derechos humanos.*

*Le principe de l'égalité sous-entend le droit de ne pas être victime de discrimination. Il est important de faire la distinction entre la discrimination et la différenciation quand on cherche à promouvoir et à protéger le droit des groupes défavorisés ou vulnérables à être traités sur un pied d'égalité. L'égalité n'interdit pas seulement d'infliger une discrimination, elle comporte aussi une obligation de rectifier les inégalités. La différenciation peut être un moyen adapté lorsque l'on tente de compenser les désavantages et de renforcer l'égalité des droits des groupes vulnérables. On peut pratiquer une discrimination envers les handicapés par suite d'une différenciation ou en raison de son absence. Établir une différence entre personnes valides et celles qui ne le sont pas peut être acceptable, mais cette démarche dépend de la pertinence de cette invalidité en tant que critère servant à établir une distinction entre des individus ou entre des groupes. La différenciation est admissible si l'absence ou la présence d'un trait individuel ou d'un attribut de groupe a une importance capitale, ou si elle sert à corriger des injustices. Cependant, la différenciation devient discriminatoire lorsque les distinctions sont établies de manière arbitraire, ou lorsqu'elles ont pour but ou pour effet de refuser ou de restreindre les droits de l'homme et leur application sur une base d'égalité.*

DISABLED PERSONS AND THEIR RIGHT TO  
EQUAL TREATMENT: ALLOWING  
DIFFERENTIATION WHILE ENDING  
DISCRIMINATION

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The relationship between public health professionals and disabled people<sup>1</sup> is a rather ambivalent matter. While, to become or remain integrated into society, disabled people are often dependent on services of individual care providers and public health institutions, these institutions have often enhanced the segregation of disabled people from mainstream society. Nowadays, persons with disabilities are increasingly turning toward a discipline that has almost systematically neglected their own interests: the law. Only recently have international human rights bodies paid attention to massive violations of disabled people's human rights.<sup>2</sup> In addition, all the past decade's studies indicate that disabled people are disproportionately represented among the poorest segments of society and lack equal opportunities to improve their living conditions.<sup>3</sup> Without an improvement of their basic rights, it seems unlikely that disabled people can break the vicious spiral of dependence, segregation, human rights violations, lack of opportunities, and poverty.

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The silence of human rights scholars about disabled people's rights may be due to reluctance to embark on issues widely believed to pertain to medicine or public health combined with uncertainty about applicability of the basic principles of equality and non-discrimination. One need not be a legal expert to understand that equality cannot be achieved merely by treating disabled and able-bodied persons identically in all situations, since in certain, specific circumstances it is required to treat these two groups of people differently. This raises the question of when differentiation, or a lack thereof, amounts to discrimination.

Disability-based discrimination means denying disabled people equal enjoyment and exercise of their rights. Recognition of the inherent equality of all human beings as well as the entitlement of each individual to all human rights, form the core of human rights law. At the same time, selective denial of human rights to those with a history of disadvantage and vulnerability perpetuates the deep-rooted patterns of discrimination that are at the heart of many human rights violations.

Essentially, discrimination means treating certain people less favorably than others. It usually reflects prejudice and misinformation, a rejection of human variety, and superiority toward those one considers "different." Discrimination typically, although not always, reflects power inequalities. Those who hold power seek to reinforce their position, to the detriment of all others.

When examining the root causes and expressions of discrimination, various forms of less favorable treatment can be distinguished, including direct and indirect discrimination<sup>4</sup> and intentional and unintentional discrimination.<sup>5</sup> There is even reverse discrimination, a term that some commentators reserve for positive (or affirmative) treatment programs.<sup>6</sup>

Disability-based discrimination results from either under- or overestimating the importance of human variation. We commonly perceive people whom we consider members of our own group as "the same" and "normal," whereas we regard all others as "different" and "abnormal." The genesis of disability-based discrimination goes back to the inability (or reluctance) of mainstream society to accommodate "different" people. Whereas disabilities are no longer associated with witchcraft, immorality, possession of the devil or other evil spirits,<sup>7</sup> societal views about disabilities continue to be negative. This may not always be obvious, because laws and policies of the self-proclaimed civilized

societies with respect to disabled persons commonly seek to rehabilitate or, when that is unfeasible, financially to compensate disabled people for their lack of productivity.<sup>8</sup> This approach is in fact inherently paternalistic and fails to represent disabled persons as human beings of equal worth and dignity. Hilary Astor was painfully right when she wrote that “society’s expectations of people with disabilities are that they be dependent, unassuming and the grateful recipients of charitable assistance.”<sup>9</sup>

Exploring the meaning of discrimination and difference in the context of disabled people requires dealing with principles of equality and non-discrimination. Genuine equality implies a redistribution of resources and rights commensurate with the different needs of individuals.<sup>10</sup> To what degree, however, do human variations count as “differences” to the extent that they should be transformed into distinct entitlements? Further questions emerge, including: To what extent are disabilities a relevant criterion for differentiating between people? To what extent are disabled people “the same” as able-bodied persons? What is the legal significance of the overlap between difference and disadvantage? Does equality imply that all differences be duly respected or does it require that certain differences be modified?

In this essay I will make an attempt to answer these questions in light of the internationally recognized and newly emerging human rights standards. It is only during the past two decades that human rights acknowledged the importance of the integration of disabled people into society, notably in the context of work.<sup>11</sup> Recently, the scope of these standards was significantly expanded with adoption of the “Standard Rules on the Equalization of Opportunities for Persons with Disabilities” (Standard Rules)<sup>12</sup> and the “General Comment on people with disabilities” (General Comment).<sup>13</sup> In this essay special attention will be paid to the implications of these new documents for the position of disabled persons under international human rights law.

### **Equality and non-discrimination**

Unfortunately, in common language as well as in scholarly papers and official documents, the terms *equality* and *non-discrimination* are often used interchangeably.<sup>14</sup> This represents a deep-rooted misunderstanding of the meaning of each concept, leading to frequent conceptual confusion.

In ethics, equality is founded upon the idea that all persons are of equal value and importance. An equal society is understood to mean a society in which all are equally able to participate. Pursuant to the ethical principle of equality, each person is entitled to and should be afforded equal respect, concern, and protection.<sup>15</sup> Equalization (or the enhancement of equality) should not be construed to deny human variety. The ethical principle of justice implies that people with different needs are treated differently commensurate with their difference.<sup>16</sup> By way of contrast, equality requires that human varieties that are unnecessary and avoidable, and considered unfair, unjust, and unacceptable, be rectified.<sup>17</sup> These latter differences I will call *inequalities*.

In law, equality entails the entitlement of each individual to all human rights. Furthermore, human rights law assumes that all humans possess equal dignity, irrespective of individual or social variations. Besides that, equality entitles each person to equal membership in society.<sup>18</sup> In international human rights law, equality is founded upon two complementary principles: non-discrimination and dignity.<sup>19</sup>

The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs when some people are treated less favorably than others; it involves arbitrary denial or restriction of equal human rights. In other words, discrimination violates the principle of equality. Under international human rights law, one person may be treated less favorably than another "if the criteria for such differentiation are *reasonable and objective* and if the aim is to achieve a purpose which is *legitimate* (emphasis added)."<sup>20</sup> These criteria were originally developed by the European Court of Human Rights in the so-called Belgian Linguistic case:

The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>21</sup>

Respect for dignity, being the other component through which equality manifests itself, implies respecting humanity in all its variations. As human beings we are all, in the words of the Universal Declaration of Human Rights, “born free and equal in dignity and rights” (Article 1). Individual and group variations should therefore be duly respected in the way society treats its members, unless it concerns unacceptable differences. The latter differences, termed “inequalities,” should be the target of comprehensive anti-discrimination and social justice policies.

### **Formal and material equality**

Both ethics and law can play an important role in ameliorating the individual, social, economic, political, and legal conditions of disadvantaged and vulnerable groups, like disabled people. Equality not only implies preventing discrimination (e.g., the protection of individuals against unfavorable treatment by introducing anti-discrimination laws), but also remedying discrimination against groups suffering discrimination in society (e.g., by introducing social justice programs to alleviate or compensate for disadvantages).<sup>22</sup> Active promotion of equality thus goes further than mere prohibition of less favorable treatment of individuals or groups. The extent to which one expects society—and particularly the state—to undertake positive (affirmative) action to enhance genuine equality very much depends on the notion one holds about equality and the enforceability of social rights.

Legal commentators commonly distinguish between two different forms of equality. First, there is the formal notion of equality. Formal equality means equality in the form of the law. It requires that the law treat persons similarly who are situated alike.<sup>23</sup> The formal equality discourse builds on one of the ideas of the Greek philosopher Aristotle, who said that “things that are alike should be treated alike, whereas things that are unlike should be treated unlike in proportion to their unalikeness.”<sup>24</sup> More recently, this notion of formal equality became associated with classical liberalism. This political philosophy presumes that individuals are free to compete with each other and that all can make their own choices, a view that entails some unrealistic assumptions about individual autonomy and rationality. Individual and social disparities and their impact on free competition are largely neglected. With respect to the role of equality,

the main concern of classical liberals is to ensure that distinctions made between individuals are in proportion to their unalikehood. This implies that the role of equality is confined to prohibiting less favorable treatment of those individuals who are similarly situated as others are, and to bestowing individuals with identical civil and political rights.

Critique of the formal notion of equality was expressed by such diverse theorists as Rousseau,<sup>25</sup> Hegel,<sup>26</sup> and Marx<sup>27</sup> and is also echoed in the work of most feminist legal commentators.<sup>28</sup> Although adversaries of formal equality discourse do not advocate similar alternatives, they all claim that the rules of the market can not be relied upon to enhance justice and equality, that the market players are not necessarily similarly situated, and that formal equality fails to correct structural inequalities. Moreover, these critics assert that the market tends to favor the advantaged, and to oppress those with a history of disadvantage and vulnerability.<sup>29</sup> Therefore, the similarly situated test became—at least in literature—increasingly rejected, because it relies on a notion of comparability that is alien to most real-life situations. In addition, the similarly situated test in combination with the rules defining the burden of proof make it particularly difficult for members of disadvantaged and vulnerable groups to complain about adverse or adverse impact treatment. Women, racial, religious, national or sexual minorities as well as people with disabilities experience social, physical, and legal barriers to societal integration that their counterparts (men, dominant racial, religious, national and sexual groups, and able-bodied persons) may never face. For example, able-bodied persons will never be excluded from the bulk of social activities nor will they ever feel as embarrassed and humiliated by having to perform sheltered labor specially devised for people with disabilities.

The notion of material, or substantial, equality emerged in response to the “sameness of treatment” doctrine. Material equality encompasses both formal equality and economic, social, and cultural equality.<sup>30</sup> As such, the notion of material equality acknowledges the importance of both personal and environmental barriers that inhibit the equal participation of certain members of groups in society.<sup>31</sup> In order to overcome these barriers, mechanisms that directly or indirectly discriminate against people should be prohibited, while respecting other individual or group differences unless these distinctions cause or reflect unaccept-

able differences (“inequalities”). In the material equality perspective, society is obliged to modify those differences that deny or impair the right of each individual to be an equal member of society. The design of positive (affirmative) action programs<sup>32</sup> may be required to achieve real equality in situations where some are less advantaged or more vulnerable than others.

Both in international legal literature and in the case law of the international courts the notion of material equality is gaining support.<sup>33</sup> Recognition of the material equality perspective dates back to jurisprudence of the Permanent Court of International Justice, the predecessor of the International Court of Justice. In the case of the German Settlers in Poland (1923) the Court stated that:

...there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.<sup>34</sup>

In the case of the Minority Schools in Albania (1935) the Court elaborated on this formulation. In this case, by explicitly recognizing the importance of different treatment in order to achieve equality:

It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality.

It finally concluded that:

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.<sup>35</sup>

After World War II, the dichotomy between formal and material equality was further elaborated upon. Within the United Nations (UN), the representative of Ukraine (at that time, the Ukrainian SSR) emphasized the importance of material equality with regard to the non-discrimination provisions enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee in charge of the preparations of this Covenant was, according to the Ukrainian representative, “elaborating principles of *de jure* equality; from those principles



would arise the *de facto* equalization of human rights. It would be wrong to confuse those two concepts ... equality of rights went further than mere non-discrimination; it implied the existence of positive rights in all the spheres dealt with in the draft Covenant [on Economic, Social and Cultural Rights].<sup>36</sup>

Similar concerns were expressed during elaboration of the International Covenant on Civil and Political Rights (ICCPR). For example, when the draft Article 26 of the ICCPR was discussed by the UN General Assembly, there were objections that this clause might be held to mean that the law should be the same for everybody, perhaps precluding introduction of legal provisions protecting such groups as minors and people with learning disabilities. In reply to such concerns, it was explained that this provision was intended to ensure equality, not identical treatment, and would not prohibit reasonable differentiation between individuals or groups of individuals on grounds that were relevant and material.<sup>37</sup>

The importance of different treatment to achieve equality became recognized in more recent human rights documents, notably as a means to combat gender and racial discrimination. Whereas admissibility of positive action programs remained implicit in the International Bill of Rights,<sup>38</sup> subsequently adopted human rights documents delineate temporary special benefits to guarantee "full and equal enjoyment of human rights and fundamental freedoms."<sup>39</sup>

Support for the material equality perspective can also be deduced from statements of the UN Human Rights Committee. In its famous General Comment No. 18 on non-discrimination, the Committee held that:

The enjoyment of rights and freedoms on an equal footing, however, does not mean *identical* treatment in every instance (emphasis added).

And further on:

The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.<sup>40</sup>

Recognition of material equality has steadily gained support in the European region. By 1963, the Court of Justice of the

European Community seemed to opt for the material equality perspective. For example, in the case of *Italy v. Commission*, the Court stated that prohibited discrimination consists not only in treating similar situations differently but also in treating different situations identically.<sup>41</sup> In its further case law, the Court failed, however, to elaborate on this decision.<sup>42</sup> Instead, it focused on the distinction between direct and indirect discrimination.<sup>43</sup> Indirect discrimination essentially refers to situations in which similar treatment has an adverse effect on certain groups of persons. Whereas prohibition of indirect discrimination does not always go as far as the material equality approach, it should be noted that prohibition of indirect discrimination—and thus rejection of the sameness of treatment concept of equality—forms an explicit recognition of the shortcomings of formal equality discourse.<sup>44</sup>

As for the Council of Europe, reference should be made to the case-law of the European Court and the European Commission of Human Rights. Despite the accessory nature of the anti-discrimination provision in the European Convention on Human Rights (ECHR),<sup>45</sup> and notwithstanding the fact that the indirect discrimination does not figure in the jurisprudence of the ECHR, the meaning both bodies attach to Article 14 of the Convention goes slightly further than the promotion of formal equality.<sup>46</sup>

Concerning recognition of the material equality perspective on a national level, reference should be made to the *Andrews v. Law Society of British Columbia* case in Canada.<sup>47</sup> McIntyre deliberated in the case as follows:

To approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to the law, there must be accorded, as nearly as may be possible, an equality of benefits and protection and no more of the restrictions, penalties or burdens imposed upon one than the other.<sup>48</sup>

Also in other Canadian Charter cases, the Supreme Court of Canada adopted the material equality discourse.<sup>49</sup> According to these cases, courts should take into account the history of groups and their respective vulnerability in the face of laws and legal changes.<sup>50</sup>

Recognition of material equality is also firmly rooted in the Australian jurisdiction. The three most prominent federal laws created to protect and promote the rights of disadvantaged and vulnerable groups—the Racial Discrimination Act (1975), the Sex Discrimination Act (1984), and the Disability Discrimination Act (1992)—each explicitly allows governments to enact “special measures” in favor of less advantaged groups in order to attain genuine equality. In a number of cases, members of dominant groups filed complaints asserting that they were being discriminated against by positive action measures. The Australian courts repeatedly held that special and preferential treatment may be justified to achieve equal opportunities for various groups.<sup>51</sup>

### **Equal rights and non-discrimination—toward a right to reasonable accommodation**

The notion of material equality was warmly embraced by the disability rights movement, which emerged during the 1960s. Awareness rose that disabled persons had little to gain from the sameness of treatment concept as long as a range of environmental barriers existed to prevent their societal integration. Frustrated with the social welfare approach, disabled people began claiming the right, instead of the privilege, to full participation and equality with others.

An important first step in global recognition of the equal rights of disabled persons was the World Programme of Action Concerning Disabled Persons (WPA). In this program, adopted without a vote by the UN General Assembly in 1982, the principle of equal rights is described as the following:

The principle of equal rights for the disabled and non-disabled implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.<sup>52</sup>

Referencing ideas underlying the discourse of material equality, the focus in the equality debate herewith shifted from ensuring similar treatment to achieving equal outcomes. This view was reconfirmed in 1987 by the Global Meeting of Experts on disability. This forum reaffirmed the principle that the law should take full account of the needs and rights of all population groups

instead of advocating uniform treatment of all people.<sup>53</sup>

In both the Standard Rules and the General Comment, the adherence of the international community of states to the principle of material equality was—at least vis à vis disabled people—reinforced. In the Introduction to the Standard Rules the principle of “equal rights” is described, implying:

... that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunities for participation.<sup>54</sup>

The General Comment explicitly refers to the wording of the equal rights provision in the WPA.<sup>55</sup> What is new about the General Comment is that it contains an all-embracing definition of discrimination on the grounds of disability that corresponds directly to a material interpretation of the principle of equality:

For the purpose of the Covenant [ICESCR], “disability-based discrimination” may be defined as including any distinction, exclusion, restriction or preference or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.<sup>56</sup>

It is particularly the latter requirement, the duty to make a “reasonable accommodation,”<sup>57</sup> that indicates overall recognition of the fundamental equality of disabled persons as human beings. Modifications or adaptations that ensure societal participation of disabled persons is no longer considered a charitable goal, but a legally enforceable right.

Reasonable accommodation can be defined as “providing or modifying devices, services, or facilities, or changing practices or procedures in order to match a particular person with a particular program or activity.”<sup>58</sup> In short, a reasonable accommodation is a modification or adjustment that allows a person with disabilities to participate in society on an equal footing with a non-disabled person. Examples of “reasonable accommodation” include installation of a wheelchair ramp and elevators for people with mobility impairments; the introduction of part-time work schedules for workers with impaired conditions; availability of

readers for people with visual impairments; and sign translation for people with hearing impairments.

Not surprisingly, conceptualization of the entitlement to reasonable accommodation emerged in those Anglo-Saxon countries with a strong civil rights tradition, including Australia, Canada and the USA.<sup>59</sup> In the USA, it emanated from jurisprudence relating to the anti-discrimination clause of the Rehabilitation Act (1973). The courts interpreted the meaning of section 504<sup>60</sup> broadly, not confined to “abstaining from unequal treatment” but rather giving disabled persons a right to require that action be taken to lift barriers obstructing their societal participation. The courts thereby acknowledged that disabled people need a material interpretation of the principle of equality.

In many respects, recognition of this new right is a breakthrough. Martha McCluskey phrased it like this:

Reasonable accommodation goes beyond a simple equal treatment principle to require changes in some practices and structures to alleviate the disadvantageous effects of physical differences.<sup>61</sup>

Little by little, the duty to provide reasonable accommodation, as embodied in general or specific anti-discrimination provisions, is also gaining momentum in other jurisdictions.<sup>62</sup> After the General Comment on Persons with Disabilities is adopted, it is expected that more countries will give a material interpretation of their equal rights and anti-discrimination provisions.

### **Disabilities and other “differences”**

It follows, then, that “equality” and “discrimination” are essentially relational concepts that make little sense without comparison. The same holds true for the concepts of “disability” and “difference” as well as “sameness”; both are social constructions and presuppose a relationship between people.<sup>63</sup> Since no human being is identical to another, our definition of difference depends on our point of comparison. Commonly, the labeling of people as “normal” or “different” follows the same pattern. It starts with determining what is “normal,” usually the group that we belong to ourselves. Subsequently, we compare the “normal” with a counter-example, which we call “different”—or even “abnormal.”<sup>64</sup> Whom we call “different” thus depends on whom we call “normal.”

Differentiating between groups of people is a delicate issue. While it is true that able-bodied and disabled persons are at least in some respect different from each other, it should be acknowledged that there are other traits that could be used to distinguish people. Classifications based on individual qualities or group attributes may reinforce negative stereotyping that has been used to exclude members of disadvantaged and vulnerable groups from societal participation. In addition, labeling groups as “disabled” or “different” often reflects societal power structures and may exacerbate the societal position of members of less powerful groups.<sup>65</sup> Labeling people as “different” and perceiving oneself as the “norm” forces “others” to shoulder the burdens of their difference. In other words, these “different” persons are expected to adapt to the norms and standards of the “normal” society. In the case of disabled persons, one can wonder to what extent, if at all, it is fair and just that disabled persons should adapt to the norms and standards of the able-bodied mainstream.<sup>66</sup> Wouldn't it be more fair if society sought to accommodate the needs of disabled persons, instead of the other way around? From a perspective of material equality the latter option deserves careful attention.

It follows that distinguishing among people based on disability only can be permitted when the disability is crucially relevant in a given situation. It cannot be denied that some disabilities inhibit societal participation of the persons concerned. The extent to which disabled people are unable to perform or compete on an equal basis with their able-bodied counterparts should, however, neither be under- nor overestimated. Overestimation occurs when other negative criteria are attributed to a disabled person that are irrelevant in a given situation. Distinguishing between people based solely on disability, without objective justification, amounts to discrimination. Discrimination between an able-bodied and a disabled person may also take place when differentiation takes place on another criterion than physical or mental disability, but *de facto* results in the adverse treatment of persons with disabilities. For example, selecting people according to height or mobility may lead to the exclusion of large groups of people with physical disabilities. Similarly, selection of persons on the basis of mental health care consumption may be to the detriment of people with a history of mental disabilities. For situations in which such criteria are imposed without

an objective justification, such as scientific evidence that such distinctions are in the interest of public safety, these criteria would amount to indirect discrimination toward disabled persons.

### **Admissible and inadmissible differentiation**

The next issue we should address concerns the question if—and in the affirmative, to what extent—“differences” between people should be reflected in the way we treat them. In other words, what weight should we attach to the features that show that we are all (slightly or enormously) different? The answer to this question depends on how relevant a feature is in a given situation. According to international human rights law, distinguishing between people with respect to individual and group features—such as race, sex, national or social origin, religion, political or other opinion—is, as a matter of principle, never allowed, unless there is an objective justification to do so. Although disability-based discrimination<sup>67</sup> is as yet less firmly rooted in international human rights law than *inter alia* gender and racial discrimination, there are reasons to believe that we can determine the (in)admissibility of differentiation on the grounds of disability analogous to other forms of prohibited discrimination.<sup>68</sup>

Pursuant to internationally recognized human rights standards, it is permitted to distinguish between people to the extent that such differentiation is commensurate with the degree in which people are different from each other. There are two exceptions to this rule: ‘commensurate differentiation’ amounts to discrimination if:

- 1) the persons involved are not “similarly situated” and the “commensurately different treatment form” would increase—instead of decrease—their inequality;
- 2) the “commensurately different treatment form” would otherwise impair or deny the right to equality.

With respect to the first exception—which is primarily founded on a formal equality theory—it should be noted that the “similarly situated test” is everything but unproblematic. The similarly situated test confines the meaning of equality to requiring that only persons who are in a similar situation need to be treated equally. It has often been asserted by those who are critical of this test that it overlooks social and economic inequalities between (members of) groups. This challenges the overall

legitimacy of this test, since it fails to rectify some of the main causes of societal injustice. In addition, it has been said that this test is too rigid and mechanical to handle the true complexity of equality.<sup>69</sup> New theories on equality evolved in response in which the emphasis was shifted from the starting situation to the very result of the “commensurately different (or similar) treatment form.” It was felt that material equality requires that we should not only focus on the starting situation in which people find themselves (“similarly situated”), but that attention should notably be paid to the actual outcome of different (or identical) forms of treatment. The actual distribution of benefits should parallel the distribution of those attributes that are judged relevant.<sup>70</sup> The similarly situated test not only fails to question the relevance of individual qualities and group attributes, it moreover ignores the outcome of different (or identical) forms of treatment. It is for this reason that the material equality approach uses the enhancement of equal rights as a yardstick against which to measure the (in)admissibility of different (and similar) forms of treatment.

It follows from both the formal and material equality discourse that different treatment is sometimes admissible whereas at other times inadmissible. Differentiation between disabled and able-bodied persons seems justifiable when a disability is crucially important to categorize or distinguish between people. Having two legs, for example, is an absolute requirement for playing certain sports, as is the possession of some musical talent for being admitted to a school of music, and is good visibility necessary for becoming a pilot. Where a disability is either irrelevant or when a physical or mental limitation can easily be compensated by making a reasonable accommodation, it is—in principle—not allowed to be cause to differentiate between disabled and non-disabled persons. In such situations, differentiation, as well as the refusal to provide a reasonable accommodation, would amount to discrimination.

Are there, however, situations in which differentiation between disabled and non-disabled persons is required, even if a disability is as such irrelevant? According to the formal equality discourse this will hardly ever be the case. At best, differentiation can be “permitted” to serve a higher social objective such as the enhancement of equality. The material equality discourse has a slightly different approach. Given the importance this discourse attaches to achieving genuine equality, a differentiation



of treatment between disabled and able-bodied persons can be considered the most suitable manner in which to attain equal rights. This will particularly be the case when:

- differentiation is made between (members of) different groups to achieve equality in the context of a social policy (programs and measures designed to eliminate discrimination and to encourage un[der]represented groups to reach a situation in which they are more likely to compete with others on an equal basis);
- differentiation is made to achieve equality in the context of a preferential treatment program (e.g., measures taken in favor of disadvantaged and vulnerable groups to diminish or eliminate conditions that cause or help perpetuate discrimination against members of the target group).

The latter two policies are commonly referred to as positive action programs, with preferential treatment programs being much more controversial than social policy measures.<sup>71</sup>

### **From fighting differentiation to fighting discrimination: some concluding remarks**

From the above examination of the principles of equality and non-discrimination in the context of disability issues it follows that differentiation is not always necessarily wrong (“discrimination”) and that identical treatment is not always necessarily right (“equal”). The principles of equality and non-discrimination seek to conserve human variety and to enhance the equality of outcomes. Equality and non-discrimination imply that unnecessary and avoidable differences (“inequalities”) should be prevented and, once they have occurred, remedied. The latter can be achieved by a combination of anti-discrimination measures aimed at the prohibition of adverse forms of (similar and different) treatment and positive action measures aimed at the promotion of equal rights of disadvantaged and vulnerable groups. The latter set of measures pertains to a differential (“positive”) treatment policy.

The implication of this analysis for the rights of disabled persons is twofold. First, it seems necessary to bestow disabled people with an enforceable entitlement to protection against direct and indirect forms of discrimination, as well as the denial of reasonable accommodation, by way of anti-discrimination legislation. Anti-discrimination provisions can be enshrined in both

general and specific laws in which disability is explicitly mentioned as a prohibited ground of discrimination. Secondly, positive action programs should be designed to rectify the historical subordination of disabled people to their able-bodied environment. Programs should be developed to fight the real causes of disadvantage and vulnerability and should take away all the environmental barriers (including negative attitudes) that inhibit disabled persons' enjoyment and exercise of equal rights. Differences should be fought to the extent that they reflect inequalities, whereas differences that reflect human variation should be carefully respected.

The enactment of both types of measures is in full conformity with the principles laid down in the Standard Rules and the General Comment. The international community of states no longer expects disabled persons to unconditionally conform to the norms and standards of "mainstream" environments. True respect for human diversity requires respect for mental and physical variation, and intolerance of mechanisms that discriminate against (groups of) persons on the basis of individual or group variations. It is to be hoped that these principles be properly reflected in national policies and legislation.

## References

1. Pursuant to the International Classification of Impairments, Disabilities and Handicaps (ICIDH, 1980) a disability is "a restriction or lack (resulting from an impairment) of ability to perform an activity in the manner within the range considered normal for a human being." Despite widespread criticism against the individual outlook of the ICIDH typology, until today the ICIDH has been the sole authoritative international document to provide a comprehensive definition of disability. See A. Hendriks, Th. Degener, "The evolution of the European perspective on disability legislation: From a public health to a human rights approach," *European Journal of Health Law* 1 (4) (1994): 343-366.
2. L. Despouy, Human Rights and Disability, Final report by the special rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1991/31, 12 July 1991.
3. See, e.g., OECD, Employment policies for people with disabilities, Labour market and social policy, occasional paper No. 8, OECD, Paris, 1992. For an indepth study on the interrelationship between poverty and human rights, see L. Despouy, The realization of economic, social and cultural rights-Human rights and extreme poverty, Interim report by the special rapporteur of the Sub-Commission on prevention of discrimination and the protection of minorities, UN, Doc. E/CN.4/Sub.2/1994/19, 10 June 1994.
4. In the USA, the terms *disparate* (direct) and *adverse impact* (indirect) discrimination are commonly used.
5. Besides these categories, a Canadian judge identified "systemic discrimination, adverse impact discrimination, constructive discrimination and perhaps others." *Toronto (City) Board of Education v. Quereshi* (1991) 14

C.H.R.R. D/243 at D/249.

6 A.H. Goldman, *Justice and Reverse Discrimination* (Princeton: Princeton University Press, 1979).

7. C. Barnes, *Disabled People in Britain and Discrimination*, (London: Hurst & Company, 1991)12-13. Human Rights and Equal Opportunity Commission, Human Rights & Mental Illness. Report of the national inquiry into the human rights of people with mental illness, Australian Government Publishing Service, Canberra, 1993, p. 38-39.

8. S. Klosse, *Menselijke schade: vergoeden of herstellen?* Maklu, Antwerpen/Apeldoorn, 1989.

9. H. Astor, "Anti-discrimination legislation and physical discrimination: The lessons of experience," *Australian Law Journal* 64 (3) (1990): 113-128.

10. R. Wiggins, *Needs, Values, Truth*, (Oxford: Basil Blackwell, 1991).

11. See, e.g., International Labour Organisation (ILO), Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159). Published in *International Labour Conventions and Recommendations 1919-1991*, ILO, Geneva, 1992 (2 Vols.).

12. General Assembly of the UN, Resolution 48/96 (20 December 1993).

13. UN Committee on Economic, Social and Cultural Rights, General Comment on people with disabilities (1994), UN Doc E/C.12/1994/WP.13, 1 December 1994.

14. E.g., in the drafting process of Articles 2 and 26 of the International Covenant on Civil and Political Rights, these concepts were regularly used without distinction. See B.G. Ramcharan, "Equality and nondiscrimination," L. Henkin (ed.), *The International Bill of Rights—the Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981): 251.

15. Cf. R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977): 199.

16. Wiggins, *supra*.

17. Cf. M. Whitehead, *The Concepts and Principles of Equity and Health*, WHO, Regional Office for Europe, Copenhagen, 1990, doc. no. EUR/ICP/RPD 414, p. 9.

18. D.C. Galloway, "Three Models of (In)Equality," *McGill Law Review* 68(1993): 64-90 at 83.

19. Cf. address by the Swiss Head of the Political Department at the opening of the World Conference to Combat Racism and Racial Discrimination on 14 August 1978, Report of the World Conference to Combat Racism and Racial Discrimination, UN Doc. A/CONF.92/40 Annex IC (1979).

20. Human Rights Committee, General Comment No. 18 (37). Non-discrimination, para. 12.

21. Belgian Linguistic case, 23 July 1968, Public. ECHR, Series A, no. 5-6.

22. Cf. Wilson J. on the purpose of subsection 15 (1) of the Canadian Charter of Human Rights and Freedoms in *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1333, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8.

23. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

24. Aristotle, *The Nicomachean Ethics* (Oxford, Oxford University Press, 1980) Book V, III, 113a-113b (translated by D. Ross).

25. J.J. Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes*, (Paris, Pléiade, 1964).

26. G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (Leipzig, G. Lasson, 1921).

27. K. Marx, "Das Kapital," in K. Marx, F. Engels, *Gesamelte Werke*, Vol. 23, Dietz Verlag, Berlin, 1978.

28. J.E. Goldschmidt, R. Holtmaat, *Vrouw en recht—trendrapport DCE/STEO, DCE/STEO*, The Hague, 1993, notably chapter 23 (pp. 441-464).

29. The political philosopher Walzer studied this phenomenon extensively. He proposed a sharp line of distinction between the different spheres

- inherent in society. See M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, (Oxford, Basil Blackwell, 1983).
30. E.W. Vierdag, "The concept of discrimination in international law," Martinus Nijhoff, The Hague, 1973, p. 3.
31. Lepofsky and Bickenbach distinguish the following environmental barriers: tangible structural barriers, intangible structural barriers, and attitudinal barriers. D. Lepofsky and Bickenbach, "Equality, Rights and the Physically Handicapped," in A.F. Bayefsky, M. Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms* (Toronto, Carswell, 1985): 326.
32. Positive action programmes seek to (temporarily) aid disadvantaged and vulnerable groups by giving them special treatment. These programs should facilitate the fair and equal distribution of benefits and burdens. J.E. Goldschmidt, *Staats—en bestuursrechtelijke aspecten van positieve actie*, B.P. Sloot, J.E. Goldschmidt, W.J.P.M. Fase, *Positieve discriminatie*, preadviezen van de NJV, W.E.J. Tjeenk Willink, Zwolle, 1989, p. 57-117.
33. T. Loenen, "Rethinking Sex Equality as a Human Right," *Netherlands Quarterly of Human Rights* 12 (3) 1994: 253-270.
34. Advisory Opinion of 10 September 1923 on German Settlers in Poland, PCIJ, Ser. B, no. 6.
35. Advisory Opinion of 6 April 1935 on the Minority Schools in Albania case, Ser. A/B, no. 64, p. 19.
36. Ukrainian SSR, UN Doc. A/C.3/SR.1183, 1962, para 10.
37. 10 GAOR Annexes, UN Doc. A/2929, 1955, para. 179; Ramcharan, *supra*, p. 254.
38. Ramcharan, *supra*, p. 259-261; See also Vierdag, *supra*, p. 74-78.
39. E.g., Art. 2, para. 2, International Convention on the Elimination of Racial Discrimination and Art. 4, Convention on the Elimination of All Forms of Discrimination against Women.
40. Committee on Human Rights, General Comment No. 18, Non-Discrimination, UN Official Records, Supple. No. 40 (A/45/40), p. 173-175, paras. 8 & 10.
41. Case 13/63 Italy v. Commission [1963] ECR 31.
42. C.W.A. Timmerman, *Verboden discriminatie of (geboden) differentiatie*, SEW 6 (June) (1982): 426-460 at 444 et seq.
43. See, e.g., case 170/84 Bilka-Kaufhaus GmbH v. Weber von Harz [1986] ECR 1607.
44. Goldschmidt and Holtmaat, *supra*, p. 511.
45. Article 14 does not prohibit discrimination in general, but only discrimination in relation to the rights and freedoms guaranteed by the Convention. See Appl. 841078, X v. Federal Republic of Germany, D & R 1980; 18 at 220.
46. See P. van Dijk, G.J.H. van Hoof, *Theory and practice of the European Convention on Human Rights*, Kluwer Law and Taxation Publishers (Boston, Deventer, 1990): 539. See also Loenen, *supra*, p. 262-263.
47. See, e.g., M. Gold, Comment: *Andrews v. Law Society of British Columbia*, *McGill Law Journal* 34(1989):1063-1079, and N.C. Shephard, Recognition of the disadvantaging of women: The premise of *Andrews v. Law Society of British Columbia*, *McGill Law Journal* 35 (1989):207-234. See also K. Mahoney, *The Constitutional law of equality in Canada*, *New York University Journal of International Law and Politics* 24 (1992):759-793.
48. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719.
49. Mahoney, *supra*.
50. See, e.g., *R v. Keegstra*, (1990) 3 S.C.R. 697 and *R v. Huttler*, (1992) 1 S.C.R. 452.
51. *Gerhardy v. Brown*, CLR 1984-1985; 159: 70, *Proudfoot v. Human*

Rights and Equal Opportunity Commission, ALR 1991; 100: 557. See A. Hendriks, "Vormt de AWGB een bedreiging voor vrouwengezondheidszorg?," *NJCM-Bulletin* 18 (8) (1993):879-897.

52. General Assembly of the UN, Resolution 37/52 (3 December 1982), para. 25.

53. UN. Doc. CSDHA/DDP/GMA (1987), para. 31.

54. Standard Rules, *supra*, para. 25.

55. General Comment, *supra*, para. 17.

56. General Comment, *supra*, para. 15.

57. The duty to provide "reasonable accommodation" is balanced by the proviso that such an accommodation is not required if it would cause "unjustifiable" or "undue hardship." See J. Cooper, "Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act," *University of Pennsylvania Law Review* 139 (1991):1423-1436.

58. Ch.G. Bell, R.L. Burgdorf, *Accommodating the spectrum of individual abilities, United States Commission on Civil Rights*, Publication No. 81, Washington, D.C., Clearinghouse, 1983, p. 122.

59. G. Quinn, M. McDonagh, C. Kimber, *Disability Discrimination Law in the United States, Australia and Canada* (Dublin, Oak Tree Press, 1993).

60. Section 504 reads as follows: "No otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." See also the landmark case *Southeastern Community College v. Davis*, 422 U.S. 397(1979), in which the Supreme Court held that educational institutions are obliged to make a reasonable accommodation.

61. M. McCluskey, "Rethinking Equality and Difference: Disability Discrimination in Public Transportation," *Yale Law Journal* 97 (5) (1988):863-880 at 867.

62. For the Netherlands, see, e.g., *Goldsteen v. Roeland*, 13 December 1991, RvdW 1992, 9. Finland and Sweden have introduced special laws bestowing disabled persons with a right to assistance: Service and Assistance for the Disabled Act(3 April 1987/380) and Act concerning the support and service for persons with certain functional impairments(27 May 1993/SFS 1993:307).

63. According to Lisa Waddington, the current disability definitions locate the origins of these constructions in a series of artificial constraints that are imposed on a group of persons who consequently become labeled as disabled. See L. Waddington, "More Disabled than Others. The Employment of Disabled Persons Within the European Community: An Analysis of Existing Measures and Proposals for the Development of an EC policy, Typescript (doctoral thesis), University of Limburg, Maastricht, 1993, p. 12.

64. Minow, *supra*.

65. Cf. S.C. Ainlay, *The Dilemma of Difference: A Multidisciplinary View of Stigma*, (New York, Plenum,1983). See also J. Goldschmidt, *We Need Different Stories*, (Zwolle, W.E.J. Tjeenk Willink, 1993).

66. M. Oliver, *Discrimination, disability and social policy*, in: M. Brenton, C. Jones (eds.), *Yearbook of Social Policy (1984-1985)*, (London, Routledge and Kegan Paul, 1985):74-97.

67. The same holds true with respect to health-related discrimination. See J.M.V. Canada, Human Rights Committee, Com.559 11993, U.N. Doc CCPR/C/50/D/559/1993(April 8, 1994).

68."Article 2 of the Universal Declaration of Human Rights, which provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin,

property, birth or other status, applies also to disabled persons." Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Resolution 1982/1 (7 September 1982). See also Resolution 1991/19 (28 August 1991).

69. C.f. J. McIntyre noted that "the [similarly situated] test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the [Canadian] Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also those whom it excludes from its application." Andrews, *supra*, at 11.

70. A.F. Bayefsky, The orientation of Section 15 of the Canadian Charter of Rights and Freedoms, in: J.M. Weiler, R.M. Elliot (eds.), *Litigating the Values of the Nation: the Canadian Charter of Rights and Freedoms* (Toronto, Carswell, 1986).

71. Hendriks, *supra*, at pp. 888-890.