

Non-Discrimination and Difference: The (Non-) Essence of Human Rights Law

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Abstract

This article questions the status of the principle of non-discrimination as the essence of international human rights law. It describes how the principle has come to be synonymous with the principle of equality and thus understood in practice as the basis on which all human rights are founded. In place of non-discrimination as the overarching principle of human rights, the article advocates a 'non-essence' of human rights - a politics of difference, which recognises equality of rights and of opportunity but not equality of being, thereby avoiding an assimilationist ideal which threatens to disregard the oppression, domination and exploitation suffered by different groups of peoples, by different individuals. The article discusses the ideas of a politics of difference, the principle of equality and the proposal is supported by applying an example from each of the three categories of rights: a civil and political right, an economic social and cultural right, and a group right.

1. Introduction

The belief in equality has been described as a 'deep rooted principle in human thought'.¹ International human rights law reflects this belief; the Universal Declaration of Human Rights (UDHR), what has become the 'sacred text of a worldwide secular religion',² made the revolutionary claim that was to end the supposed pre-Enlightened age of darkness: 'all human beings are born free *and equal* in dignity and rights'.³ Non-discrimination is widely understood as a negative restatement of the principle of equality⁴ and it is consequently fair to say that all human rights, as interpreted today, are essentially about non-discrimination. However, the purpose of this article is to suggest, using critical theories, why human rights should not be interpreted solely on this basis. The article advocates, in place of an overarching principle of non-discrimination, respect for a *politics of difference*. The latter is hoped to provide an improved foundation for human rights discourse, through encouraging positive discrimination and deliberation.

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¹ Berlin, quoted in McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983) at 285.

² Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001) at 53.

³ Article 1 (emphasis added).

⁴ Lerner, *Group Rights and Discrimination in International Law* (The Hague: Martinus Nijhoff, 1991) at 25.

I begin in Part 2 by examining how non-discrimination has wrongly come to be understood as the essence of international human rights law, looking at the law itself and at modern human rights theories. I go on in Part 3 to discuss the concept of equality/difference in order to determine that difference is the preferred ideal, having examined the nature of the principle of 'equality' and the meaning of a 'politics of difference'. With respect to the latter, the advantages and necessity of positive discrimination and of deliberation are considered. The final section applies these suggestions to case studies of the three recognised categories of rights, discussing as an example of a civil and political right 'the right to liberty and security of person',⁵ as an example of an economic, social and cultural right the 'right to education',⁶ and as an example of a group right the 'right to self determination'.⁷

2. Non-discrimination as the Essence of Human Rights

There is much evidence in support of non-discrimination as the essence of international human rights law. I examine here (international) law and modern human rights theories. It is necessary first to establish what is meant by 'human rights'. The general assumption is that human rights constitute moral principles since they are grounded in respect for the inherent autonomy and dignity of the individual.⁸ Free from transcendental claims, human rights have become a 'worldwide secular religion'.⁹ Respect for the equal dignity of individuals, which makes no allowance for discrimination, is thus the foundation of human rights. However, this is a misleading claim, as examining the content of international human rights law and a critical examination of human rights theories, reveal.

A. International Law on Non-Discrimination

International law appears to support the belief that, '[t]he claim to equality before the law is in a substantial sense the most fundamental of the rights of man ... It is the starting point of all other liberties'.¹⁰ International instruments reveal how the principle of non-discrimination has evolved with societal mores. The UN Charter with its progressive goal of equality mentions only race, sex, language and religion (Articles 1 and 55). Contrast this with the Charter of Fundamental Rights of the European Union of 2000, which prohibits discrimination on any ground, including: genetic features, political/any other opinion, membership of a national minority, property, birth, disability, and age (Article 21). The Permanent Court of International Justice (PCIJ) first advocated a principle of non-discrimination as the equivalent of equality in the

⁵ Article 9 International Covenant on Civil and Political Rights 1966 (ICCPR), 999 UNTS 171.

⁶ Article 13 International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), 993 UNTS 3.

⁷ Article 2, ICCPR and ICESCR.

⁸ Shestack, 'The Philosophical Foundations of Human Rights', in Symonides (ed.), *Human Rights: Concepts and Standards* (Aldershot: Ashgate, 2000) 32.

⁹ Perry, *The Idea of Human Rights* (New York: Oxford University Press, 1998) at 11-41 gives an interesting account of the 'ineliminably religious' character of human rights.

¹⁰ Lauterpacht, quoted in Mackean, *supra* n. 1 at 285.

Minority Schools in Albania case;¹¹ it did not, however, define ‘non-discrimination’. The ‘international bill of rights’¹² also avoids a definition. The Human Rights Committee provides some guidance; General Comment No. 18 recognises that ‘non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights.’¹³ The Committee draws attention to the definitions adopted in the Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD)¹⁴ and the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)¹⁵, which both refer to three types of arbitrary treatment that undermine equality: exclusion, restriction and distinction.¹⁶ The latter is significant for the purpose of this article. ‘Without distinction’, as specified also in the UN Charter¹⁷, does not mean ‘without differentiation’.¹⁸ Furthermore, in his influential judgment in the *South West Africa Cases*,¹⁹ Judge Tanaka commented that the principle of equality does not mean absolute equality, but recognises relative equality - namely different treatment proportional to the concrete individual circumstances; his opinion permits and requires special treatment according to different needs, wherein the criterion for justifiable differentiation is reasonableness.²⁰ Discrimination - where it constitutes different treatment - is sometimes necessary to respect human rights, and this challenges non-discrimination as an essential foundation of human rights. The judgment nonetheless does not answer the integral question of what is equal and what is different. I elaborate this in Part 3.

B. Modern Human Rights Theories

Most modern human rights theories focus on liberty and *equality* as overarching principles. For want of space, I look only at Rawls’ *Theory of Justice*, for it illustrates perfectly how the quest for equality may stigmatise difference and so defeat respect for the inherent human dignity of individuals, on which all human rights are based.²¹ Rawls’ theory presents what Young describes as a typical ‘modern ethics’; one that constructs a ‘logic of identity’ that denies/represses difference.²² Modern ethics, she explains, has constructed an ‘ideal of impartiality’²³ that seeks to reduce difference to unity. Rawls advocates an ‘original position’, characterised by the ‘veil of ignorance’,²⁴

¹¹ ‘Equality in law precludes discrimination of any kind’, Advisory Opinion, Permanent Court of International Justice, 1935 Series A/B. 64. See Mackean, *supra* n. 1 at 288.

¹² That is, the UDHR, ICCPR and ICESCR.

¹³ General Comment No.18, Non-Discrimination, 10 November 1989, HRI/GEN/1/Rev.6 at 146 (2003), para. 1.

¹⁴ 660 UNTS 195.

¹⁵ 1249 UNTS 13.

¹⁶ Article 1(1), CERD and Article 1, CEDAW.

¹⁷ Article 1(3) requires Member States to promote human rights ‘without distinction’.

¹⁸ The General Comment does make clear that ‘not every differentiation of treatment will constitute discrimination’, at paragraph 13.

¹⁹ ICJ Reports 1962, 318 (1st phase) and ICJ Reports 1966, 4 (2nd phase). Note that Judge Tanaka’s views on the nature of equality were *obiter dicta*.

²⁰ Mackean, *supra* n. 1 at 263.

²¹ Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999).

²² Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 98.

²³ *Ibid.* at 96-121.

²⁴ Rawls, *supra* n. 21 at 3-22.

in which the principles of justice are chosen. The former is a position of equality, in which the parties are rational and mutually disinterested. The latter is a hypothetical condition whereby parties do not know their conceptions of good, their social status, their abilities, intelligence, strength, etc., nor the particular circumstances of their own society. The idea is to ensure a condition of fairness under which the principles of justice are chosen. The point of contention is that the veil of ignorance removes difference; it is characterised by an absence of relationships or shared attributes. Difference becomes absolute otherness. However, it is possible, as I explain in the next section, for difference to not be understood in the dichotomous, hierarchical oppositions of normal/deviant, good/bad. Rawls' second principle of justice, the 'difference principle' acknowledges inequality and so allows for different treatment of the least advantaged in society. It still, however, wrongly promotes equality/non-discrimination as the preferred, and sole, essence of 'justice'.²⁵

3. Equality/Difference: Which is the Preferred Ideal?

A. The Principle of Equality

International human rights law is essentially flawed if understood as extending the interpretation of the principle of equality beyond equality of human 'rights' to equality of human 'being'. Having as its basis a principle of equality risks an 'ideal of assimilation' that defines liberation as the elimination of (group) difference²⁶ in its quest for a 'community of mankind'.²⁷ Tomaševski argues that the discourse of rights does no such thing: '[H]uman rights norms do not treat people as if they were equal because they are not. They demand that people be recognised as having equal rights ... the main aim of human rights is to accord to everyone equal opportunities for free and full development.'²⁸ Thus the right to liberty and security of person does not assume that all individuals be treated alike; so it is able to allow for detention where the State sees fit to impose it. Similarly the right to education aims to allow equal opportunities for development, and requires different treatment in some circumstances.²⁹ Modern human rights instruments that mainstream the rights of disadvantaged groups, like CEDAW, arguably also in their ample references to equality do not attempt to reduce difference to sameness but claim only equality of rights and of opportunity.³⁰ However, the question of 'equal/different' is still not answered. The fight for equal rights still requires the imposition of a norm that suppresses the identity of whatever is outside that norm. A

²⁵ The author understands that there is no simple definition of 'justice' but this topic remains outside the scope of this piece.

²⁶ Young, *supra* n. 22 at 156-191.

²⁷ Van Dyke, 'Human Rights Without Discrimination', (1973) 67 *The American Political Science Review* 1267 at 1270. See also Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990) at 7.1. Allott's dizzying optimism for the ideal of *Eunomia*, an international society of all-humanity, provides for an interesting, challenging read.

²⁸ Tomaševski, quoted in Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press, 2003) at 242 (emphasis added).

²⁹ See *Belgian Linguistics Case (Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium)* (1968) 1 EHRR 252-9, 269-285.

³⁰ See, however, the Preamble, which refers to reaffirming faith in '... the equal rights of men and women', and later to the hope to 'achieve full equality between men and women' with respect to roles in the family.

postmodern/feminist approach, such as that of Irigaray, would seek to emphasise difference as opposed to access to the norm already created; 'egalitarianism', she contends, is thus sometimes a 'chasing after nothing'.³¹ As Elizabeth Benito commented in 1986, '[t]he equal dignity owed to all seeks respect for the differences in the identity of each person. It is in the absolute respect for the right to be different that we find authentic equality'.³² This statement disputes the most basic form of equality; the Aristotelian notion that likes should be treated alike. Fredman also recognises four sets of problems with this notion today,³³ the most pertinent being its treatment of difference: it is uncompromisingly individualistic, excluding treatment of individuals appropriate to their difference. It should be noted that 'relative equality', as identified by Judge Tanaka in *Western Sahara*,³⁴ requires reasonableness to justify it; thus protection of minorities, of infants, for example, was justified different treatment, whereas the respondents could not argue different treatment as a defense to apartheid. I use this to illustrate that a respect for difference and advocating positive discrimination must be based on a respect for the identity of each individual, for the 'Other'.

B. A Politics of Difference

A politics of difference argues that equality should encompass participation and inclusion of all individuals and groups, and allow for equal treatment where appropriate. Striving to achieve the ideal of 'justice' thus requires special treatment. Two clear examples are gay rights movements and the women's liberation movement. With respect to the latter, feminist jurisprudence has argued vehemently against a standard of equality that supposes sameness. Irigaray argues dramatically for 'difference' and goes as far as to say that in a world of *mankind*, without there being established a *womankind*, the 'other' that is woman is merely an 'other of the same'.³⁵ Furthermore, the aim of a politics of difference is, taking inspiration from Foucault's theory of power/knowledge,³⁶ to expose the socially constructed meaning of difference as an arbitrary exercise of the working of power relations in society. It is far too readily assumed that difference means 'inequality';³⁷ international law must move beyond this archaic Aristotelian notion.

Connolly helps us understand the need for and inevitability of difference. Our identity is established in relation to a series of differences that have become socially recognised; these differences are essential to our being.³⁸ My identity, as an individual or as a member of a group, requires difference in order to be; it 'converts difference into

³¹ Irigaray, 'Equal or Different?', in Whitford (ed.), *The Irigaray Reader* (Oxford: Basil Blackwell, 1991) at 32.

³² Special Rapporteur to the UN Sub-Commission on Human Rights, Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on the Grounds of Religion or Belief, 31 August 1986, E/CN.4/Sub.2/1987/26, para. 17 (emphasis added).

³³ Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002), at 7-11.

³⁴ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 21.

³⁵ Irigaray, *supra* n. 31 at 24. See further MacKinnon, 'Difference and Dominance: On Sex Discrimination', in MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Massachusetts: Harvard University Press, 1987) 34.

³⁶ See Foucault, *Power/Knowledge*, (Harlow: Longman, 1980).

³⁷ Fredman, *supra* n. 33 at 3.

³⁸ Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (Ithaca, New York: Cornell University Press, 1991) at 64.

otherness in order to secure its own self-certainty.³⁹ Therefore, our very being must depend upon an absolute responsibility toward the 'Other'; what human rights law determines as women, homosexuals, and minorities, for example. This idea is not new and echoes the repeated Christian commandment of 'love thy neighbour'.⁴⁰ However, what is not so embedded in human thought is the idea, as proposed by Young, that discrimination is not the greatest wrong that people suffer. It should not thus be the essential, defining feature of human rights. The greatest wrongs suffered are oppression and domination;⁴¹ the arbitrary exercise of power which determines which individuals qualify for which rights. Consider this in relation to the three rights I will be discussing: the right to liberty and security of person - is essentially about the right to be free from the arbitrary exercise of the power to arrest of the State that implies domination and leads to oppression; the right to education - is an imposition of a positive duty on the State to remove conditions of past oppression that deprived those seeking education of the opportunity to secure their future development; and the right to self-determination - is traditionally understood as a right of colonised peoples to be free from imperial rule and thus liberate themselves from oppression and domination. Examined in this way, it is apparent that claims to equality, unity and non-discrimination dilute these definitive characteristics. A politics of difference, however, allows for recognition of the following central elements, thereby respecting difference without denying equal rights: positive discrimination and deliberation.

(i) Positive discrimination

Young⁴² and Parekh⁴³ provide convincing arguments for positive discrimination which support the point being made here, that non-discrimination should not be the very essence of human rights. Young strongly suggests an abandonment of 'the assumption that non-discrimination is a paramount principle of justice',⁴⁴ in order to recognise what Parekh further advocates as a duty of individuals and the state to positively discriminate. This duty has at least three moral sources;⁴⁵ it is, firstly, a moral duty based on a call for compassion – that is, 'the capacity to suffer with others and be moved by their suffering'.⁴⁶ Secondly, it is based on the preservation of a collective morality of humanity; helping disadvantaged groups affects the moral interests of all. To dehumanise others would be to deny ourselves the benefits of their possible contributions and would dehumanise humanity itself, for humanity is indivisible. Respect for the 'Other' is thus vital, for either we develop together or we don't develop. And, thirdly, we have a historically derived moral obligation to repair the damage caused. Our own grisly history can be understood as the main justifying factor for the existence of human rights according to some;⁴⁷ respect for these rights involves recognising and repairing the consequences of past actions. For example, the condition

³⁹ Ibid.

⁴⁰ Exodus 20 verse 16: 'You shall not give false testimony against your neighbour'.

⁴¹ Young, *supra* n. 22 at 9 and 192.

⁴² Ibid.

⁴³ Parekh, 'A Case for Positive Discrimination', in Hepple & Syzszczak (eds), *Discrimination: The Limits of the Law* (London: Mansell, 1992) 261.

⁴⁴ Young, *supra* n. 22 at 192.

⁴⁵ Parekh, *supra* n. 43 at 262-268.

⁴⁶ Ibid. at 263.

⁴⁷ Ignatieff, *supra* n. 2 at 55.

of the untouchables in India as an outcaste group within society is largely the result of what caste Hindus did to them for centuries: creating the category of untouchability, defining its membership and subjecting them to degrading treatment. Thus without positive discrimination, the identity of differing groups and individuals, of women/a woman, of homosexual/a homosexual, of a minority group/minority national is reduced to a societal norm and what Young describes as the 'more profound wrongs of exploitation, marginalisation, powerlessness, cultural imperialism and violence',⁴⁸ risk going on undiscussed and unaddressed.⁴⁹

(ii) Deliberation

The proposed ideal of a politics of difference would promote a communicative ethics⁵⁰ and allow for deliberation. The value of deliberation is to allow for participation and unconstrained, open debate among individuals.⁵¹ There are valid criticisms of the call to deliberation and for want of space I will address only what is perhaps the most obvious, that deliberation assumes both understanding and consensus as the outcomes of open debate. This is impossible and illogical when applied to international human rights law, but does not undermine the point, as made by Ignatieff, that '[t]he fundamental moral commitment entailed by rights is not to respect and certainly not to worship. It is to *deliberation*.'⁵² As he goes on to say, the minimum condition for deliberation is not even necessarily respect but 'merely negative toleration, a willingness to remain in the same room, listening to claims one doesn't like to hear, for the purpose of finding compromises that will keep conflicting claims from ending in irreparable harm to either side.'⁵³ The result is a shared commitment to human rights that respects difference, strives for equality *in rights* and will address the differing forms of injustice suffered by the subjects of human rights law.

3. Case Studies of Categorical Rights

This section reinforces the answer to the two questions echoed throughout this article with reference to a human right from each of the 'three generations'⁵⁴ of rights: firstly, are these rights essentially about non-discrimination, and secondly, *should they be*? The object of the exercise is to illustrate that the essence of human rights should be based on a recognition of oppression and domination; on a politics of difference that emphasises equality in rights and promotes difference of 'the Other' as a positive value. For, to explain more eloquently, '[t]o give language to pain, to experience the pain of the Other inside you, remains the task, always, of human rights narratology.'⁵⁵

⁴⁸ Young, *supra* n. 22 at 197.

⁴⁹ The significance of positive discrimination becomes more apparent in the discussion on the right to education that follows (Part 4 (b)).

⁵⁰ Taken from Habermas' 'Theory of Communicative Action'; see Habermas, *Between Facts and Norms* (Cambridge: Massachusetts: MIT Press, 1996).

⁵¹ *Ibid.*

⁵² Ignatieff, *supra* n. 2 at 84 (emphasis added).

⁵³ *Ibid.*

⁵⁴ The 'three generations' doctrine is considered a useful illustration of the historical development of human rights, see Nowak, 'Civil and Political Rights', in Symonides (ed.), *supra* n. 8 at 69-107.

⁵⁵ Baxi, *The Future of Human Rights*, 1st edn (New Delhi: Oxford University Press, 2002) at 90.

A. 'Everyone has the right to liberty and security of person'

The right to personal or individual liberty, as enshrined in Article 9 of the ICCPR and Article 3, UDHR, refers specifically to freedom of bodily movement in the narrow sense; freedom from arbitrary arrest or detention at a restricted location, such as a prison, police detention center, or a psychiatric hospital.⁵⁶ As one of the oldest human rights, captured in the British Magna Carta of 1215, the human right to 'liberty and security of the person' remains true to an 'origin of revolutionary changes inspired by the political thinking of philosophers and the liberation struggles of oppressed classes and peoples'.⁵⁷

The right is, however, subject to limitations. Arrest or detention of the individual is lawful where the law of the State permits. Detention remains a common aspect of asylum law and practice throughout Europe,⁵⁸ for example, despite comments from the United Nations High Commissioner for Refugees (UNHCR) indicating that it should normally be avoided. Notably, Article 9, ICCPR is to be read in conjunction with Article 10, which guarantees to all persons deprived of their liberty a special right to humane treatment and to certain minimum conditions of pre-trial detention and imprisonment (such as segregating the individual from convicted persons). The European Court of Human Rights has recognised a breach of the right to liberty in Article 5(1) ECHR with respect to refugees held in international zones at airports.⁵⁹ In so doing, it was not in essence recognising that the applicants had been discriminated against, but that they had been subjected to an arbitrary exercise of state power. It follows that the right to liberty should be essentially understood as not about non-discrimination, but about a right to be free from oppression. This explains the existence of entities such as the UN Working Group on Arbitrary Detention (established 1991), which focuses on arbitrary detention as arbitrary oppression.

B. The right of everyone to education

Article 13, ICESCR and Article 26, UDHR refer to a right of everyone to education. Education is thus a basic human right and not simply a 'good thing', as is too often mistakenly thought.⁶⁰ Let us consider then the first question: is the right to education essentially about non-discrimination?

The very title of the first international instrument dealing specifically with education, the 1960 UNESCO Convention on Discrimination in Education, appears to suggest so. Article 1 defines 'discrimination' as 'any distinction, exclusion, limitation or preference, which being based on race, colour, sex, language, religion, political opinion, nationality or social origin, economic condition, or birth, has the purpose or effect of nullifying or impairing the equality of treatment in education ...' It is interesting that part of the debate around the question of 'exclusion, limitation or distinction' revolved

⁵⁶ Nowak, *supra* n. 54 at 81.

⁵⁷ *Ibid.* at 69.

⁵⁸ See Harvey, *Seeking Asylum in the UK: Problems and Prospects* (London: Butterworths, 2000), at 186.

⁵⁹ *Amuur v France* 1996-III 826; (1996) 22 EHRR 533. The European Court of Human Rights held that the act of the French Government constituted a 'deprivation of liberty' contrary to Article 5(1) of the ECHR.

⁶⁰ UNICEF, *The State of the World's Children 2004: Girls. Education and Development*, December 2003, at 8, available at: http://www.unicef.org/sowc04/files/SOWC_O4_eng.pdf.

around the fact that treatment of this nature should not be allowed to continue. This, from the point of view of one arguing for a politics of difference, seems the wrong approach to take. The question should have been examined not from the standpoint of which distinctions are forbidden, but ‘what grounds are there which *justify differential treatment*?’⁶¹ Equal treatment does not lead to equality, as the *Minority Schools in Albania*⁶² decision shows. Albania’s attempt, in 1933, to suppress all private schools in the country, affecting Greek-language and other private schools, was contested by the Greek minority as a violation of the State’s undertakings concerning the rights of minorities. The PCIJ pointed to the need to ensure equality *in fact*, as well as equality *in law*, and held that the plea of the Albanian Government, that the abolition of private schools in Albania constituted a general measure applicable to the majority as well as to the minority, was not well-founded. Far from ensuring equal treatment, the abolition of private schools would deprive the minority of institutions appropriate to their special needs in comparison to the majority, who would continue to have their needs supplied by the State institutions.⁶³ Notably, three decades later in the *Belgian Linguistics Case*,⁶⁴ the European Court of Human Rights highlighted the limits of the right to obtain education in the language of the minority. There is thus arguably still no concrete answer to the questions that may arise when the State and a minority or particular group compete in the educational field.⁶⁵ The sentiment of the PCIJ’s decision in 1935 is echoed in the 1960 UNESCO Convention, which does recognise, in Article 5(c), the ‘right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language ...’. Article 3 of the Convention furthermore imposes on States a number of specific undertakings to be carried out to ‘eliminate and prevent discrimination’; Article 4 deals significantly with equality of opportunity and progressive goals to be achieved – i.e. universal education, equivalent education standards in all institutions at the same level, and the eradication of literacy. Article 2 deals with the huge concern surrounding gender. Of the shocking recent statistics from UNICEF, 121 million children are out of school and of these some 65 million are girls.⁶⁶ ‘Separate but equal’ educational systems for the two sexes were permitted in the 1960 discussions, providing there was ‘equivalent access’. Several women’s organisations objected to the use of the term ‘equivalent’, arguing it left room for discrimination and that it be replaced with ‘equal’ or ‘identical’.⁶⁷ This argument is of course open to the feminist critique mentioned in Part 3 (a).

In addition to the ICESCR and UDHR, there are today a range of instruments reinforcing the need for non-discrimination in education.⁶⁸ Of these, Article 13,

⁶¹ Mackean, *supra* n. 1 at 133 (emphasis added).

⁶² *Supra* n. 11. See for comment, Steiner & Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2000) at 96-103.

⁶³ See, in particular, pages 18-23 of the advisory opinion, *ibid*.

⁶⁴ *Supra* n. 29.

⁶⁵ Lerner, *Group Rights and Self-Determination in International Law* (London: Kluwer Law International, 2003) at 168.

⁶⁶ *Supra* n. 60 at 7.

⁶⁷ Mackean, *supra* n. 1 at 134.

⁶⁸ See CERD: CEDAW: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; the Convention on the Rights of the Child 1989, 1577 UNTS 3; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, UNGA Res. 45/158, 11 IHRR 269 (2004).

ICESCR remains ‘the most wide-ranging and comprehensive’⁶⁹ and together with Article 14 has been the subject of General Comments of the Committee on Economic, Social and Cultural Rights, which focuses on the fact that education should be made available to all *without discrimination*. General Comment No. 13 of the Committee describes education as an ‘empowerment right’, allowing children to ‘participate fully’ in their communities.⁷⁰ This, coupled with the examples of the caselaw given above, supports the proposition that the focus of the right to education should be equality of opportunity and removing structures of oppression, as opposed to solely non-discrimination.

C. ‘All peoples have the right of self-determination’

The right of self-determination supports the thesis of this article most strongly; that human rights should be about a politics of difference, a freedom from oppression and exploitation as opposed to being interpreted solely on the basis of non-discrimination. The paramount nature of the right is reflected through its prized position in Article 1 of both Covenants. It represents a product of Enlightenment philosophy, a *de jure* attempt to move away from the established State-centred international order to one based in the rights of peoples. Yet, self-determination remains an elusive concept, and ‘means different things to different peoples.’⁷¹ Its nature as a goal, an aspiration, a principle or truly a right, remains unclear. UN texts related to self-determination are unhelpful in this regard.⁷² Kirgis provides a useful summary of the ‘many faces’ of self-determination. These include: the established right to be free from colonial domination; a right to remain dependent; the right to dissolve a state; the disputed right to secede; the right of divided states to be united; the right of limited autonomy, short of secession; rights of minority groups; internal self-determination, or the right to choose a form of government.⁷³ I examine some of these.

Beginning with a distinction that Orentlicher makes between the internal and external dimensions of the right,⁷⁴ the internal meaning is what she describes as the preferred new dimension of democratic governance. The external dimension, however, is what interests us. It describes the meaning of self-determination as founded in emancipation from imperial rule. The UN Charter gave prominent place to ‘the principle of self-determination’ as ‘a banner for the decolonisation movement that swept the globe in the early decades of the United Nations life.’⁷⁵ There is further support for this from the International Court of Justice (ICJ). In its important post-war law of decolonisation, the Court defined the principle as ‘the need to pay regard to the expressed will of the peoples’, having first made it clear that the right was in essence one of decolonisation.⁷⁶ It is important to note, however, that in addition to colonial

⁶⁹ Rehman, *International Human Rights Law: A Practical Approach* (Harlow: Longman, 2003) at 119.

⁷⁰ General Comment No.13, The Right to Education (Art. 13), 8 December 1999, E/C.12/1999/10.

⁷¹ Stavenhagen, ‘Self Determination: Right or Demon?’, in Steiner & Alston, *supra* n. 62, 1248.

⁷² In contrast to the Covenants, the UN Charter refers to a ‘principle’ of self-determination in Article 1(2); the 1970 General Assembly Declaration on Friendly Relations does likewise.

⁷³ Kirgis, ‘The Degrees of Self-Determination in the United Nations Era’, (1994) *American Journal of International Law* 304.

⁷⁴ Orentlicher, ‘Separation Anxiety: International Responses to Ethno-Separatist Claims’, (1998) 23 *Yale Journal of International Law* 1, quoted in Steiner & Alston, *supra* n. 62 at 1249-57.

⁷⁵ *Ibid.* at 1256.

⁷⁶ *Supra* n. 34.

domination, the right accrues where 'a people is subjected to alien subjugation, *domination or exploitation* outside a colonial context.'⁷⁷

To understand the relevance of this, it is necessary to focus on the concept of a 'people'. In other words, who is the 'self' that determines? It is arguably the 'colonial other'; it is definitely the 'oppressed and exploited other'. For, 'the whole history of self-determination is ... the story of adaptation to the evolving struggle of peoples variously situated to achieve effective control over their own destinies.'⁷⁸ Consider the examples of the peoples of Croatia, Slovenia and Bosnia-Herzegovina following the dissolution of the Federal Republic of Yugoslavia; of the peoples of East Pakistan, who achieved secession in 1972 from Pakistan to form Bangladesh. The Charter of the UN was adopted in the name of 'we the Peoples', but it failed to define the concept. Of the regional human rights instruments adopted since then, the African Charter on Human and Peoples Rights 1981 is interesting, as it affirms through its very title the nature of peoples' rights, or group rights, as human rights. The significance of peoples' rights as human rights is examined by Kiwanuka. Central to this significance is the identity of the 'group'. The group is 'one of the main characteristics of humanity';⁷⁹ most individuals belong to group units or communities such as the family, the religious community, a trade union, a professional association, the nation, the State. Within these groups, 'there is no really individual affair, for everything has a moral and social reference.'⁸⁰ The effective exercise of collective rights is a precondition of the exercise of other rights, political and civil, economic and cultural, or both.⁸¹ Kiwanuka also presents a fourfold definition of a 'peoples': a) all persons within the geographical limits of an entity yet to achieve political independence or majority rule, b) all groups of people with certain common characteristics living within the limits of the geographical entity referred to above, c) the people as synonymous with the state, and d) all persons within a state.⁸² He is missing the feature we have determined as essential: oppression. The African Charter in Article 20(2) singles out 'colonised and oppressed' peoples as the possessors of the right to self-determination; evidence is provided in the dismantling of majority rule in South Africa, the achievement of independence for Namibia and the resolution of the struggles in the Western Sahara.

4. Conclusion

The principle of non-discrimination in international human rights law has thus far been understood as a negative restatement of the principle of equality. The ideal of equality has enabled human rights discourse to claim universality by asserting that 'everyone' is entitled to the rights defined by the international community, which supposedly stem

⁷⁷ *Reference re Secession of Quebec*, Supreme Court of Canada [1998] 2 SCR 217, in Steiner & Alston, supra n. 62, 1283 (emphasis added).

⁷⁸ Falk, 'The Right of Self-Determination Under International Law: The Coherence of Doctrine versus the Coherence of Experience', in Steiner & Alston, supra n. 62, 1274.

⁷⁹ Kiwanuka, 'The Meaning of People in the African Charter on Human And Peoples Rights', (1988) 82 *American Journal of International Law* 80 at 85.

⁸⁰ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu* (New York: Random House Inc., 1965), 109. This attitude is reflected in the African Charter on Human and Peoples Rights 1981, 1520 UNTS 26, 363 OAU doc. CAB/LEG/67/3 rev. 5 - which has a sense of prioritising duties over rights.

⁸¹ African Charter, *ibid*.

⁸² Kiwanuka, supra n. 79 at 100-1.

from the equal moral worth of persons. However, this assimilationist ideal should not be understood as the essence of human rights for it risks encouraging an ideal of impartiality. It is true that the assimilationist ideal has inspired the active struggle of oppressed groups against exclusion – racial and ethnic groups, women, gay men, lesbians, old people, the disabled. However, this article suggests that the essence of this struggle was and is not so much for equality, as for a recognition of difference and for freedom from oppression, domination and exploitation. This is what human rights should essentially be about: a politics of difference that avoids the impossible question of ‘equal to who or to what?’ but instead allows positive discrimination where it is justified and reasonable, and promotes deliberation. We have seen how the right to liberty and security of person, the right to education and the right of peoples to self-determination support this claim. Thus the nature of the right notwithstanding, it is safe to assume that respect for identity/*difference* should underlie all human rights.