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THE RELATIONSHIP BETWEEN AFFIRMATIVE ACTION AND  
EQUALITY IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM: A  
COMPATIBILITY TEST

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## Abstract

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*Affirmative action, a notion characterized by both potential as well as predicament, is one of the most controversial concepts of equality law. This thesis examines the legal standpoint of affirmative action, its nature as well as its requirements and limitations within the international human rights sphere. The analysis reveals affirmative action as a variable obligation of States to combat discrimination and achieve substantive equality. The paper also presents different aspects of affirmative action in relation to the CEDAW, CRPD, CERD, ICCPR and ICESCR and shows that not all disadvantaged groups can benefit from the same prototype of special State measures.*

*Finally, the thesis explores the relationship between various standards of equality and affirmative action. By using the views of Dworkin and Rawls on equality as input, the paper suggests that international human rights law has yet to contour the legal details that would make affirmative action a legitimate tool for achieving real and sustainable equality, as opposed to a formal equality that disregards the socio-structural and behavioral characteristics of each individual.*

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## Abbreviations

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1. UDHR - Universal Declaration of Human Rights
2. ICCPR - International Covenant on Civil and Political Rights
3. ICESCR - International Covenant on Economic, Social and Cultural Rights
4. CERD - International Convention on the Elimination of All Forms of Racial Discrimination
5. CEDAW - Convention on the Elimination of Discrimination against Women
6. CRPD - Convention on the Rights of Persons with Disabilities
7. HRC - Human Rights Committee
8. ECHR - European Convention on Human Rights
9. ECtHR - European Court of Human Rights
10. UN - United Nations
11. UNDP - United Nations Development Programme
12. US - United States of America
13. CC - Constitutional Court
14. GC - General Comment
15. GR - General Recommendation
16. IHRL - International Human Rights Law
17. LGBT - Lesbian, Gay, Bisexual, and Transgender
18. MDG - United Nations Millennium Development Goals

The main question of the thesis revolves around the relationship and the level of compatibility between affirmative action and equality within the international human rights system. In addition to that, the thesis also questions the terminology surrounding special measures, the normative character of affirmative action, attitudes towards these special State measures and the standpoint of equality in the international human rights system.

The purpose of the thesis is to bridge different understandings of affirmative action and to build a delimitation of the notion in order to establish the level of compatibility between affirmative action and equality. Affirmative action policies are a modern technique used to combat discrimination and to that end, it is necessary to establish the legal foundation of affirmative action as well as the dynamic or possible hierarchy between these policies and equality. The thesis aims to determine the compatibility between these two notions, both at a transnational level as well as a national constitutional level, where they ultimately interact and determine each other's legitimacy and functionality.

Most studies on affirmative action have been limited to assessing whether a certain policy has had any effects on the levels of discrimination in a particular State and isolated one of the many discrimination grounds. For example, there are studies related to racial affirmative action or gender specific policies and their relation with the implementation of a specific human right. There have been studies that questioned public attitudes towards affirmative action and countless regional studies determining the scope and limitations of affirmative action within the European community framework.

This study differentiates itself in the literature by not focusing on a specific area of affirmative action, but taking into account all discrimination fields. Instead of looking at the implementation of a singular affirmative action policy, this study evaluates its normative implications within the international human rights framework. The study questions the characteristics of affirmative action, its legal limitations and implications for a constitutional domestic system. Additionally, different typologies of equality are presented, such as formal, substantive and transformative equality. The relevance of the study

consists thus, in providing the literature with a comprehensive and holistic review of affirmative action. By disregarding specific types of discrimination and establishing a legal theoretical dynamic between special State measures and equality, this study reveals the advantages and disadvantages of affirmative action, its scope and meaning within international law, as well as the degree of enforceability of its elements that derive from different sources of international law.

## Methods and structure

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The thesis employs a combination of methods in order to establish a holistic conceptualization of both affirmative action and equality.

*Chapter I* consists of a literature review and a comparative examination of various notions describing special State measures. It is in that sense an empirical analysis of the historical and terminological implications of affirmative action and public attitudes towards it. In *Chapter II*, a legal dogmatic method has been employed for the analysis of Covenants, General Recommendations or Comments and State reports that deal with affirmative action. A partial doctrinal analysis of the relevant case law for some of the features of affirmative action can be identified in both *Chapters I and II*.

*Chapter III* deals with the analysis of equality, presenting the realities of the international human rights system as *lex lata* and the opinions of Ronald Dworkin and John Rawls concerning equality, welfare and distributive justice as *lex feranda*. *Chapter III* empirically analyses substantive, formal and transformative equality as presented in international treaties and the works of human rights bodies and uses the theories of equality of Dworkin and Rawls to explain broader understandings of equality and how affirmative action could serve a much better purpose if the international human rights system would also employ the notion of equal concern for citizens.

Finally, in *Chapter IV*, I employed a deductive method to draw objective conclusions as to the level of compatibility between different equality typologies and affirmative action.

## Chapter I. The history and conceptualization of Affirmative action

### 1.1 Inception of the concept and historical evolution

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Affirmative action is a notion that refers to a wide number of policies or legislative measures that take into consideration factors such as gender, religion, race or color, with the purpose of correcting certain social imbalances and discriminative conditions by promoting an underrepresented group.<sup>1</sup> As discussed below, affirmative action is one of the most contemporarily debated legal terms and thus, an evolving concept.

Although the political preeminence of affirmative action begins in the United States circa 1960', the term is modestly much younger. The first time affirmative action makes its legal appearance is in 1935, in the Wagner Act (US National Labor Relations Act) where it alludes to an employer's obligations towards union workers and members.<sup>2</sup>

In March 1961, President JFK issues Executive Order 10925 and unknowingly paves the way for what will become one of the most controversial concepts in the history of equality law.<sup>3</sup> The order begins by proclaiming that "discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States" and although innovative, it did not, at that time, imply any quotas or measures to balance the under-representation of any minorities or disadvantaged groups.<sup>4</sup>

With time, affirmative action became part of the larger civil rights movement and a more complex concept with various practical and theoretical assumptions. One of those and maybe the most important is that once these policies were put in motion, society recognized itself as discriminating and chose to perform a legal cleansing ritual that would wash away its past sins.<sup>5</sup> Affirmative action slowly becomes a compensatory action in the 70's that maintains its legal *status quo* until 1978, when in *Regents of the University of California v. Bakke* the US Supreme Court rejects quotas as a legal principle

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<sup>1</sup> Leyla-Denisa Obreja, *Affirmative action: friend or foe?*, April 16th 2014 available at <https://www.opendemocracy.net/leyladenisa-obreja/affirmative-action-friend-or-foe> as consulted on March 2<sup>nd</sup> 2015 at 12:32 pm.

<sup>2</sup> W. E. Block and M. A. Walker, *Discrimination, affirmative action, and equal opportunity: an economic and social perspective*, Fraser Institute, cop. (1981) : Thomas Sowell, pg. 38.

<sup>3</sup> Ibid, 39-40

<sup>4</sup> Ibid, pg. 39-40

<sup>5</sup> Ibid. pg. 149



and deems it unconstitutional, but permits race to be a selection criterion and therefore upholds racial affirmative action.<sup>6</sup>

In the United States, affirmative action begins declining in the early 90's in terms of federal court's approval of racial quotas.<sup>7</sup> At the same time, it moves towards the international sphere, when human rights covenants are entering into force. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) comes into force in 1969, including in its articles 1(4) and 2(2) an obligation to adopt "special and concrete measures" that will ensure the adequate enjoyment and development of all racial groups of their human rights. It is not until 2009 that the Committee on the Elimination on Racial Discrimination decided to clarify the meaning of such special measures, finally concluding that they are the equivalent of affirmative action.<sup>8</sup>

In 1981, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) comes into force. This instrument too contains a clause that refers to affirmative action in the form of "temporary special measures". Unlike other instruments or General Comments, CEDAW alludes to the temporality of the measures within the text of the Convention in its article 4, making the limited duration of such measures thus binding. In its General Recommendation 25, the CEDAW Committee rejects the terminology of "affirmative action" due to its link with historical compensatory and promotional senses and urges States to use the modern term "temporary special measures". In 1989, the Human Rights Committee adopts its General Comment 18 on matters of discrimination in relation to the ICCPR provision, mentioning affirmative action in its paragraph 10 as a mean to "eliminate or diminish discrimination". Finally, the Convention on the Rights of Persons with Disabilities (CRPD), a contemporary human rights instrument also contains an affirmative action clause, specifically article 5(4) that suggests that "specific measures which are necessary to accelerate or achieve de facto equality" should not be deemed as discrimination.

It is thus important to signal at this point that the United Nations has not been consistent throughout history in maintaining a firm position regarding its

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<sup>6</sup> *University of California Regents v. Bakke*, 438 U.S. 265 (1978), Decided June 28, 1978, Davis [438 U.S. 265, 326].

<sup>7</sup> Lipson, D. N., *The Resilience of Affirmative Action in the 1980s: Innovation, Isomorphism, and Institutionalization in University Admissions*, (2011), *Political Research Quarterly*, 64(1), 132-144, p.132-133.

<sup>8</sup> CERD, *General Recommendation 32*, CERD/C/GC/32, 24 September 2009.

terminology. The term “affirmative action” has been highly debated, confused with similar terms, interpreted and speculated within the modern scholarship.

The fight against discrimination has been tackled by the UN with disparate semantics, ranging from “positive action” in General Comment 5 of the CESCR Committee to “special measures”, “temporary special measures” or “special and concrete measures” as mentioned above. Although rarely constructed as such in the UN language, affirmative action has also been used as an equivalent of “positive discrimination”, “reverse discrimination” or “positive action”. At a time where international law is significantly expanding and fragmenting, a terminological confusion that falls upon terms with such high value and importance for social change such as “affirmative action” is eminently unfortunate. For that reason, a following and brief part of this paper will be dedicated to a potential clarification of both affirmative action and positive action, as the main concepts and representatives of State measures that attempt to combat under representation and past and current discriminations.

## 1.2 Delimitation problems within the modern legal definition

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In its General Recommendation 32, the Committee on the Elimination of Racial Discrimination allows for the term “affirmative action” to be used as an equivalent of “special measures” but discourages such usage in the reporting activity. Moreover, it deems “positive discrimination” as an unsuitable term and a *contradictio in terminis*. In fact, in the UN system and documents, affirmative action has never been used under different umbrella terms such as ‘reversed’ or ‘positive discrimination’. Proponents of these terms are mostly found among the civil society, which use it rather to explain and point out a perceived alarming effect of these measures.<sup>9</sup>

As explained rather vaguely in an easily overlooked note of the General Recommendation 25 of the CEDAW Committee, affirmative action is a term predominantly employed in the United States, whereas other States, mostly European, prefer to define these measures as “positive action”. The UN seems to reject the term “positive action”, because I imagine it could potentially be

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<sup>9</sup>See <https://www.opendemocracy.net/ourbeeb/colin-joseph/positive-discrimination-may-have-to-be-introduced-at-bbc> as consulted on May 13<sup>th</sup> 2015 at 10:08am.

confused with another concept of international law, that is, the positive obligations of States, as part of the positive-negative binary referring to State responsibilities. The UN appears to fail to provide a convincing explanation regarding the difference between the terms but luckily a European Commission study points out important aspects for the differentiation.

The 2009 European Commission consortium mandated with the study and elucidation of the legal definition of “positive measures” dedicated a broad part to the clarification of the concept.<sup>10</sup> The research explains that affirmative action has been terminologically predominant in non-European countries, especially in the United States and it is linked with quotas, a practice rather rare and inconsistent within Europe, due to the views of the European Court of Justice in the *Briheche* case.<sup>11</sup> The same study found that quotas as part of positive action are not illegal in Europe but more likely permitted for disability rather than gender due to the broader meaning of positive measures in the context of preferential treatment and integration of people with disabilities. Amongst other findings in the *Briheche* case, the Court (ECJ) notes that equality measures “although discriminatory in appearance” can be allowed under European law if the aim of such measures is to achieve substantive rather than formal equality but rejects the use of quotas disregarding merits within the labor market. The same European consortium also points out that positive measures, a term embraced within its Member States, do not imply an “unconditional preferential treatment” as opposed to affirmative action that appears to be characterized by “strong forms of preferential treatment”.

The judicial practice regarding the implementation of such measures within Europe shows that positive action that “automatically and unconditionally” advantages the under-represented group is unlawful and should be rather deemed as positive discrimination.<sup>12</sup> A trans-national study aimed at verifying the understanding of positive action and positive discrimination within organisations concluded that 19% of the participants confuse the terms and that the most agreed statement equivalent to positive action is “commitment to diversity and equality”.<sup>13</sup> The confusion appeared much higher within European countries as opposed to the US, where organisations did not

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<sup>10</sup> *International perspectives on positive action measures : A comparative analysis in the European Union, Canada, the United States and South Africa*, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, (2009).

<sup>11</sup> *Case C-319/03 Briheche [2004]*, para. 23 and 31.

<sup>12</sup> *Ibid*

<sup>13</sup> Archibong, U; et al., *Positive Action Measures across Different Equality Grounds, Organisations and Sectors in European and Non-European Countries*, *International Journal of Diversity in Organisations, Communities & Nations*. 10, ( 2010), pg. 178-180.

associate affirmative action with discrimination.<sup>14</sup> One of the most important UN documents correlated with affirmative action is the Special Rapporteur's Bossuyt report to the Commission on Human Rights.<sup>15</sup> Although the report explains the necessity of such measures, their relationship with the principle of equality and non-discrimination and provides several cases where the merits were affirmative action related, it fails to provide a definition of the concept. Moreover, the report uses all terms such as "positive State action", "special measures" and "temporary special measures" while failing to distinguish between them.

Severe gaps in the literature and in the working documents of international and regional human rights bodies can be easily identified. The fact that European countries seem to prefer the term positive action while affirmative action seems to be an American conception and preference is also not entirely accurate. For example, I have examined the country reports to the CEDAW Committee and they signal that European States such as Belgium or France use the same terminology (affirmative action) as non-Europeans such as Australia or Kenya when referring to article 4 of the Convention that regulates temporary special measures.<sup>16</sup>

Regardless of the terminology and geographical disparities, it is important to assert if these terms refer to the same State practices. If not, what does affirmative action specifically entail that differs from positive action? Are these two concepts, different sides of the same coin?

The European Commission study that was earlier mentioned noted the absence of a legal working definition of positive action and moved to define it as "proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage".<sup>17</sup> At the same time, I have selected for comparison, one of the most comprehensive and consistent definitions of affirmative action present in the literature. In an occasional paper for the UNDP, Daniel Sabbagh defines affirmative action as "any measure that allocates goods – such as admission into universities, jobs, promotions, public

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<sup>14</sup> Ibid

<sup>15</sup> *Comprehensive examination of thematic issues relating to racial discrimination, The concept and practice of affirmative action*, E/CN.4/Sub.2/2000/11, (2000), Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights.

<sup>16</sup> See Australia CEDAW/C/AUL/3, Belgium CEDAW/C/BEL/3-4, Kenya CEDAW/C/KEN/6, France CEDAW/C/FRA/3.

<sup>17</sup> *Supra*, note 10, pg 6

contracts, business loans, and rights to buy and sell land – on the basis of membership in a designated group, for the purpose of increasing the proportion of members of that group in the relevant labor force, entrepreneurial class, or university student population, where they are currently underrepresented as a result of past or present discrimination”.<sup>18</sup> Although the definition is contoured by referencing Myron Weiner’s views on preferential policies in 1983, it still manages to clearly and realistically portray the elements of affirmative action.<sup>19</sup>

After a careful analysis of both definitions, the following conclusions can be formulated. First of all, affirmative action as an international concept has the tendency to be linked with a proportionality requirement. For that reason, at the time of its implementation within national laws, affirmative action has been at times rejected for being disproportionate. In *Ballantyne, Davidson, McIntyre v. Canada*, a case that discussed the proportionality of advertising measures employed to protect the francophone group of Canada, the Human Rights Committee found that placing a limitation on the English speaking community’s right to freedom of expression by only allowing advertising in French would be disproportionate.<sup>20</sup> Moreover, the question of proportionality has been raised by the Inter-American Commission on Human Rights during an analysis of affirmative action and its compatibility with the principle of equality.<sup>21</sup> The Inter-American Commission stated in that occasion that one of the most important questions when assessing such compatibility is whether these measures are “proportional to the end sought”.

Furthermore, the European Court of Human Rights notes in *D.H. and others v. The Czech Republic*, the importance of special measures for combating racial segregation and when referring to matters of discrimination states that differential treatment is discriminatory if it fails to prove a “reasonable relationship of proportionality”.<sup>22</sup>

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<sup>18</sup> United Nations Development Programme, Human Development Report Office, Occasional Paper, Background paper for HDR (2004), *Affirmative Action Policies: An International Perspective*, Daniel Sabbagh, pg. 1.

<sup>19</sup> See Weiner Myron, *The Political Consequences of Preferential Policies: A Comparative Perspective*, (1983), *Comparative Politics* 16 (1): 35-52.

<sup>20</sup> Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

<sup>21</sup> *Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination*, available at <http://www.cidh.oas.org/women/Chapter6.htm>, as consulted on April 2<sup>nd</sup> 2015 at 10:33 am.

<sup>22</sup> *Case of D.H. and others v. The Czech Republic*, Application no. 57325/00, para. 196.

Secondly, affirmative action measures as well as positive action, as by the above definitions are likely to be linked to issues of under-representation. That usually implies that States use these measures to correct certain representation imbalances in industries such as employment or education where people belonging to a vulnerable group have either less to access or are simply less inclined to partake in. The problem of under-representation is usually solved by using affirmative action, specifically quotas, to obtain a fair and proportional participation of all groups within certain social areas and industries.

In General Recommendation 5, the CEDAW Committee expressively mentions quota systems as a tool for the advancement of women into “into education, the economy, politics and employment”. One example of successful quota systems is reflected by the Nordic countries (Sweden, Denmark, Iceland and Norway) whose political parties promote proportionate voluntarily quotas in their regulations to increase the participation of women in the political sphere.<sup>23</sup> In Sweden, voluntarily neutral quotas have managed to increase the participation of women from 14% in 1971 to an average of 45% in 2002.<sup>24</sup>

A common trait of both affirmative and positive action in the definitions of the scholarship is that these measures target individuals belonging to a vulnerable or discriminated group. The positive action definition used earlier states that these groups are to be “socially or economically disadvantaged” whereas the affirmative action definition notes that an inclusion in these groups bares an unfair allocation of goods. At this point it is important to remember that both positive and affirmative action target individuals belonging to predetermined discriminated groups. That implies that an individual does not need to prove a direct and explicit consequence of discrimination on his life and his socio-economical status in order to become a beneficiary of affirmative action. The laws or policies consistent with affirmative action contain therefore a presumption of prejudice, both collective and individual. Having discussed various aspects of affirmative and positive action, it is possible to conclude that although these terms have been claimed to be associated with different measures, consequences or geographical interpretations they can be used interchangeably, as they are linked by the same core objectives and prerequisites. In my opinion the association of positive and affirmative action

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<sup>23</sup> IDEA, *Sweden: women's representation in Parliament* available at [http://www.idea.int/news/upload/sweden\\_women.pdf](http://www.idea.int/news/upload/sweden_women.pdf) as consulted on April 6<sup>th</sup> 2015 at 11:44 am.

<sup>24</sup> Ibid

with terms such as reversed or positive discrimination should be avoided and deemed as incorrect, since the latter concepts only make reference to potential negative consequences of special measures that generally do not define them. It would be thus correct to say that when affirmative action purports negative consequences on individuals who do not belong to the targeted group, it is disproportional and thus creates a reversed discrimination effect, otherwise allowed as exceptional by the international human rights system.<sup>25</sup>

Affirmative and positive action imply State and non-State actors measures put in motion with the objective of correcting past or present discriminations, social imbalances or industry under-representation for individuals and collectives affected by an unfair distribution of goods or an unfair result of a fair distribution. At the same time, both concepts may or may not imply quota systems and depending on the degree of vulnerability the group faces, may or may not be proportional. Until the use of adjacent concepts of special measures will be unified and coordinated within the scholarship and the States' reporting system, the delimitation of affirmative action will remain difficult and perhaps irrelevant. In reality, what is fundamental when discussing affirmative action is to symbolically reduce the complexity of the term to the idea of special measures and later on identify its characteristics and its compatibility with other legal principles, both of which will be discussed along the lines of this paper.

### 1.3 Characteristics of affirmative action and positive measures

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The most important characteristics of special measures that I have chosen to discuss are temporality, compensation, and the existence of a targeted group. The interaction between these characteristics and the principle of equality and non-discrimination will be discussed at a later point, after clarifying the meaning of the principle of equality and the standpoint of special measures within the international human rights system.

One paramount characteristic of affirmative action is that, generally, it appears to be formulated as temporary and compensatory.<sup>26</sup> Given that a prerequisite of affirmative action is an under-representation or social struggle of a group

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<sup>25</sup> Supra, note 10, pg. 26

<sup>26</sup> Supra, note 15, para. 83

within a community, it is reasonable that the life span of these measures will depend on the subsistence and persistence of discriminatory or unfair treatments of such groups within societies. The limited duration of affirmative action comes established, *inter alia*, in article 4 of the CEDAW and article 2.2 of the CERD (as well as General Recommendation 32 of the Committee) or General Recommendation 20 of the CESCR Committee. The latter Recommendation reveals that special measures “should be discontinued when substantive equality has been sustainably achieved”. However, the same Recommendation states that some measures might need to be of “permanent nature”.<sup>27</sup> Thus, in relation to social, cultural and economical rights and with the goal of achieving substantive and formal equality, special measures can at least in theory be legitimately permanent. In relation to cultural and political rights, the Human Rights Committee establishes in General Recommendation 18 that “such action may involve granting for a time to the part of the population concerned certain preferential treatment”. The temporality of affirmative action is thus broader for economical, cultural and social rights and States enjoy in this sense a larger margin of appreciation as for the duration of the measures.

Measures of permanent nature can also be found in General Recommendation 25 of the CEDAW Committee that explains that all measures that have the goal of achieving de facto equality between men and women are temporary but those measures related to the non-identical treatment of the sexes due to biological differences, and as mentioned in article 4.2 of the Convention, aimed at protecting maternity, can be of permanent nature.

The European Commission study mentioned at earlier stages of this paper also discusses the ambivalent temporality of positive and affirmative action, explaining that these measures are not provisional by default and may need to be extended for long periods of times, especially when the consequences of discrimination are deeply embedded into society. Such indefinite measures are defined as permanent positive action schemes.<sup>28</sup> It is imperative to understand that even when affirmative action is temporary it is constructed with the goal of achieving long-term or permanent equality.<sup>29</sup> Such aims could nevertheless

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<sup>27</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July (2009) E/C.12/GC/20, para. 9.

<sup>28</sup> *Supra*, note 10, pg.26

<sup>29</sup> Miller, Conrad. *The Persistent Effect of Temporary Affirmative Action*, Working paper, Department of Economics, MIT (2014).



burden its potential and backfire into policy failures. As explained by Miller in a recent article, the long-term effects of temporary affirmative action on inequalities will depend on the contextual economical ensemble of a certain State and in some cases it may need to be permanent for “group gains to persist”.<sup>30</sup> International human rights law provides in relation to some rights the possibility of indefinite affirmative action and States enjoy a large margin of appreciation for the determination of the duration of corrective policies. International human rights law temporally delimitates affirmative action in some cases, but fails to identify an ideal period of time for each type of positive measure to be adopted by States. It is thus the responsibility of the State in question to balance the principle of equality with the needs of disadvantaged groups when determining the implementation and duration of special measures.

The second trait of affirmative action is its compensatory nature, expressively mentioned in General Comment 25 of the CEDAW Committee that defines special measures as “corrective, compensatory and promotional”. The working definition proposed by the European Commission study also references compensation as a main constituent of positive action and establishes that it should target those social imbalances that “arose in the past or are still ongoing”.<sup>31</sup>

As explained by Corlett, compensation in this case should not be understood as reparation or as a legal remedy but rather as a method of supporting disadvantaged groups access those goods or industries within which their prevalence has been historically low due to a long-term demonstrated or repetitive discrimination.<sup>32</sup> Thus, compensation is not an unconditional privilege but more of a corrective mechanism employed to combat “conditions that impair the enjoyment of equal rights”.<sup>33</sup>

The philosophical perspective of making amends for discrimination has been recently discussed by Hull that differentiates between compensation and rectification and explains that the former does not provide a sufficient and proportional redress for those harmed by discrimination and that other State

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<sup>30</sup> Ibid, pg. 2-3

<sup>31</sup> Supra, note 10, pg. 24

<sup>32</sup> J. Angelo Corlett, *The whitewashing of Affirmative Action, Race and Human Rights*, Edited by Curtis Stokes, Michigan State University Press, Eurospan East Lansing, Mich., London (2009), First Ed., pg. 257-259.

<sup>33</sup> Supra, note 15, pg.19

measures should complement it.<sup>34</sup> Hull believes that not every individual belonging to a disadvantaged group is likely to be compensated proportionally to the harm done by affirmative action programs.

Attitudes towards the compensatory nature of racial affirmative action in the USA were observed by Lynch and Beer<sup>35</sup> in 1990 when public opinion polls showed that white Americans encouraged preferential and additional training of African Americans in compensation of their historical disadvantage but consistently rejected quotas. Although modern studies have not examined current attitudes towards the compensatory nature of affirmative action, it is still problematic due to Hull's explanation which I also described earlier as a presumption of prejudice.

Affirmative action builds itself over a foundation of historical discrimination and disadvantage of particular groups, be that women, people with disabilities, racial and ethnical minorities or religious groups. Such groups either directly discriminated by the normative construct of a State or *de facto* disadvantaged by a lack of equal opportunity to access goods or industries are compensated individually and collectively by policies that seek to reconstruct the social order. It is hard to determine whether affirmative action can systemically redress the social-economical status of all individuals affected by discrimination and if so to what degree. Although compensation is a form of social equity, in the sense that it seeks a redistribution of goods in society, it does not guarantee by itself a long-term and sustainable equal access to industries for disadvantaged groups. I believe that the degree to which individuals will be materially compensated will depend on the combination of how affirmative action is implemented, the degree of proportionality it entails and its duration.

The third characteristic of affirmative action is represented by the existence of a disadvantaged group. This trait might be the most important one, since in my own view delineates ordinary governmental policies from special measures. As mentioned earlier, affirmative action was born and developed within the US civil rights movement and originated as a measure to achieve racial equality. Once the principle of non-discrimination was crystallized and embedded in the international human rights system, other vulnerable groups who were disadvantaged by portraying a common trait (discrimination ground)

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<sup>34</sup> Hull, George, *Affirmative Action and the Choice of Amends*, *Philosophia* 43, no. 1: 113-134. Humanities International Complete (2015), pg. 124-126.

<sup>35</sup> See Lynch, F. R., & Beer, W. R, *You ain't the right color, pal*, *Policy Review*, (51), 64. (1990).

were targeted by affirmative measures. In Europe, most affirmative action employment policies today target women, people with disabilities and individuals belonging to an ethnic group.<sup>36</sup> In regards to access to goods and services such as housing and education, advantaged groups are retired people, people with disabilities, ethnic groups (such as Roma people who enjoy special education measures in Romania, Hungary, Serbia, Croatia, etc.) or women who enjoy political quotas in most European countries.<sup>37</sup>

The grounds for affirmative action are theoretically possible for any of the grounds for non-discrimination provided by international human rights law. As mentioned in article 2 of the UDHR, such grounds are “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. One individual can belong to more than one vulnerable group and affirmative action policies can target broader or intersectional discrimination. Such is the Multiculturalism Act (1988) of Canada, a law that sets out the possibility for intersectional affirmative action, offering linguistic promotion for the francophone minority and commits the government to “promote policies, programs and practices that enhance the understanding of and respect for the diversity of the members of Canadian society”.<sup>38</sup>

Affirmative action thus, seeks to improve the social condition of “minorities and those who are made minorities by virtue of discrimination”.<sup>39</sup> Nevertheless, without an element of demonstrated societal difficulty, inequality and substantive disadvantage States cannot put in motion positive measures for a particular community or vulnerable group. That is because affirmative action needs to have a legitimate aim but also because not all discrimination grounds imply the same level of international obligations to be combated. As it will be demonstrated below, affirmative action is a variable obligation.

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<sup>36</sup>Report Equinet, The European Network of Equality Bodies available at: <http://www.equineteurope.org/Positive-Action-Measures>, (2014), pg. 29, as consulted on April 15<sup>th</sup> 2015 at 10:33 am.

<sup>37</sup> Ibid, pg. 38-41

<sup>38</sup> The Act is available at : <http://laws-lois.justice.gc.ca/eng/acts/c-18.7/page-1.html> as consulted on April 18<sup>th</sup> 2015 at 14:45 pm.

<sup>39</sup> Romany, C., & Chu, J, *Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions* (2003), Connecticut Law Review, pg.831.

Affirmative action, although an 80 year old concept, is still growing and evolving, both in its legal form and practicalities. I have demonstrated so far that within the international human rights system, both States and international organisations have not agreed on a singular definition of affirmative action and that adjacent terms may appear in both soft and hard law. As mentioned above, analogous terms of affirmative action can be used until the terminological unification has been accomplished internationally as long as the characteristics of affirmative action are identified and their compatibility with other legal principles has been taken into consideration when implemented into domestic systems.

Nevertheless, the current uncertainty that surrounds special measures affects its legality and additionally can influence public attitudes towards affirmative action policies. Affirmative action directly affects discrimination by seeking to build up equal opportunities using preferential treatment as a tool. Indirectly, affirmative action policies influence equality by affecting social stereotypes, creating a beneficial effect or backfiring and consolidating harmful stereotypes.

For example and in relation to gender based affirmative action, a 2013 experimental study upholds the theory that affirmative action produces stereotypes threats.<sup>40</sup> A stereotype threat is, to my understanding, a psychological construct that explains how reminding beneficiaries of special measures of their belonging in a disadvantage category makes them sub-perform and underachieve or simply to conform to a negative stereotype.<sup>41</sup> The same study found that this form of self-stereotyping, did not affect men (in this case the advantaged group), in relation to their task performance as opposed to women. The study is contemporary and one of the first of its kind and it concludes by mentioning that macro-denouements should be formulated with caution.

Aside from self-stereotyping, affirmative action has been portrayed as negatively sedimenting existing stereotypes for disadvantaged groups in certain communities or situations. For example, at the work place, sex

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<sup>40</sup> See Bracha, A., Cohen, A., & Conell-Price, L, *Affirmative Action and Stereotype Threat* (2013), Working Paper Series (Federal Reserve Bank Of Boston), 13(14), pg. 1-27.

<sup>41</sup> Ibid, pg.2

discrimination can be affected by affirmative action programs that “can reaffirm and reinforce sex stereotypes and therefore, paradoxically, sometimes create additional basis for biased judgments and discriminatory actions”.<sup>42</sup> A 1993 study also suggests that at the work place, minorities that enjoy affirmative action and preferential treatment sometimes do not enjoy the hypothesis of these policies aimed at creating “permanent gains”.<sup>43</sup> In fact, the study found that in certain cases affirmative action can worsen negative minorities’ stereotypes. This happens mainly when the employer “patronizes favored workers”, a situation that pushes beneficiaries into not acquiring much needed skills and ultimately towards underperformance.<sup>44</sup>

It is unclear whether the negative effects of affirmative action on stereotypes are caused by a misunderstanding of the causes that led to the adoption of these policies by the general population and how this perception interacts with self-stereotyping individual attitudes. It is also unclear what predicts support for affirmative action policies within the general population, as studies are limited and non-differentiating between the grounds for discrimination targeted.

A 2009 study related to gender-based affirmative action in the US implies that racial based policies receive less support than gender affirmative action and that “interests, gender attitudes, and beliefs about the role of government in limiting economic stratification predict both men’s and women’s support for gender-related affirmative action”.<sup>45</sup> Similarly, Baunach explains that gender is not a predictor for gender related affirmative action and that there is a great amount of difference between gender and racial affirmative action.<sup>46</sup> Baunach’s paper also finds race to indeed act as a predictor for preferential treatment support and explains that “the threat posed by gender-based affirmative action is perceived as less serious than the threat posed by race-based affirmative action”. Although the relationship between affirmative action and discriminating stereotypes falls outside the scope of this paper, it is important to note that these policies can, in some instances, not only fail to combat discrimination but sustain it within some facets of society. As I will

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<sup>42</sup> Heilman, M. E, *Sex Discrimination and the Affirmative Action Remedy: The Role of Sex Stereotypes*, (1997). *Journal Of Business Ethics*, 16(9), 877-889, pg. 883.

<sup>43</sup> Coate, S., & Loury, G. C., *Will Affirmative-Action Policies Eliminate Negative Stereotypes?* (1993), *The American Economic Review*, (5), pg. 1220 and 1239.

<sup>44</sup> Ibid

<sup>45</sup> Kane, E. W., & Whipkey, K J., *Predictors of public support for gender-related affirmative action*, (2009), *Public Opinion Quarterly*, 73(2), pg. 233-254.

<sup>46</sup> Baunach, D. M., *Progress, opportunity, and backlash: explaining attitudes toward gender-based affirmative action*, (2002), *Sociological Focus*, (4). 345, pg. 359-360.

prove below, it is exactly the principle of equality and non-discrimination that originated affirmative action practice and these limited failures prove to be important aspects when considering the compatibility between special measures and equality. The impact of stereotypes on discrimination should not be overlooked and it is thus important to identify what role certain outcomes of affirmative action play in the compatibility assessment.

## Chapter II. The normative character of affirmative action inside the international human rights law system

### 2.1 Introduction

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Due to the fact that affirmative action appears both in international Covenants and General Recommendations, as well as other documents of international human rights bodies, it is important to try to establish the value and strength of these special measures. This determination will eventually allow us to objectively verify the weight of affirmative action in relation to other rights and principles, such as the right to equality and non-discrimination that represents the central analysis of this thesis.

First I will examine those special measures expressively mentioned by international treaties. Secondly, I will analyze special measures as they appear in General Comments and Recommendations and finally determine the extent to which these are binding on States and the margin of appreciation for States to interpret and implement affirmative action policies. Below I have assembled a table that makes it easier to observe the allocation of special measures for each ground of discrimination, within the specific human rights instrument.

Treaty and Article	General Recommendation/Comment
CEDAW (article 4)	GR. 25
CERD (articles 1.4 and 2.2)	GR. 32
ICCPR -	GC. 18
CRPD (article 5.4)	-
ICESCR -	GC 5, GC 20 and GC 16

Note that the only human rights instruments to not mention special measures in their texts are the ICCPR and ICESCR. These Covenants do contain clauses that refer to the right to equality and non-discrimination and both specialized human rights bodies have dictated Comments that discuss special measures. The implications of the treaty void related to affirmative action in the context of civil and political rights as well as economic, social and cultural rights will be discussed below. Another important reminder is that for some disadvantaged groups, more than one Covenant regulates special measures as a potential equality building strategy. For example, for women, we might find applicable and relevant the CEDAW and GR 25 but at the same time the CDESCR GC 16. Similarly, for people with disabilities, both the CRPD and the CDESCR GC 5 are relevant. That is because “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds” and such multi-discrimination “merits particular consideration and remedying”.<sup>47</sup>

## 2.2 Affirmative action in human rights treaties and general comments or recommendations

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In relation to gender equality and affirmative action targeting sex discrimination, the CEDAW article 4 and GR 25 establish that special measures should be temporary “until equality of opportunity and treatment have been achieved”. The CEDAW Committee makes it clear that “the provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures”.<sup>48</sup> This does not come as a surprise, due to the fact that both sets of rights are protected by the ICCPR and ICESCR and both Covenants contain non-discrimination clauses, obligating States to guarantee women with such rights. So what do these special measures imply for States and what is the extent of the obligation to put in motion affirmative action policies when inequality demands them? This will depend on the discrimination ground in question.

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<sup>47</sup> Supra, note 27. para.17

<sup>48</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, (2004).

The CEDAW Committee offered an answer to both questions in GR 25, urging States to regard affirmative action policies as an obligation and explained that the interpretation of the term “measures” should be broad. The Convention establishes direct obligations for States, and it is a legally binding document.<sup>49</sup> These measures can range from “outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems” to “areas of credit and loans, sports, culture and recreation, and legal awareness”.<sup>50</sup> For the purpose of observing State practices in relation to article 4 of the CEDAW, I have chosen to briefly analyze 5 random country reports and determine what the most used set of affirmative action is.

Romania’s Sixth periodic Report mentions affirmative action in the form of “special programs for employment and vocational training” and explains that the legislation is designed to protect maternity and pregnant women at the workplace by providing them with the adequate safety and health conditions.<sup>51</sup>

Belgium’s combined Third and Fourth periodic Reports define affirmative action “as a coherent set of measures intended to bring about de facto equality between men and women in all areas of labor organization and human resource management” and mention the efforts made in both the public and private sector to advance gender equality in the field of work. Moreover, the measures adopted to protect maternity are also predominantly work related.<sup>52</sup>

Japan’s Fifth periodic Report explains that the special measures adopted are related to the inclusion of women in decision-making processes, both at a national and local level and their participation in policy planning. Measures also include the allocation of gender rations for the recruitment in National Advisory Council and Committees, affirmative action in the workplace, support for entrepreneur women and measures to sustain a wider participation of women in education, by promoting them as faculty members.<sup>53</sup>

Mexico’s Sixth periodic Report talks about positive compensatory measures, ranging from strengthening the permanency in education of women to

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<sup>49</sup> United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) Regional Office for Asia and the Pacific, *Women’s rights to equality: The promise of CEDAW* (2014), pg.7.

<sup>50</sup> Supra note 48, para. 37-38

<sup>51</sup> CEDAW/C/ROM/6, 15 December 2003, pg.12-13

<sup>52</sup> CEDAW/C/BEL/3-4, 29 September 1998, pg.23-27

<sup>53</sup> CEDAW/C/JPN/5, 13 September 2002, pg. 33-37



supporting domestic violence victims by creating a shelter network.<sup>54</sup> Mexican measures also target the media and women's portrayal within it, health insurance with a pecuniary advantage for women with low income, a credit line with a 10% participation of single mothers, education and a program for indigenous women.<sup>55</sup>

Nepal's combined Second and Third periodic Reports mention that Nepalese measures include quotas for local bodies participation, civil service and workplace incentives and advantages, like the creation of child daily care centers in establishments with over 50 female workers and inter-sectional affirmative action commitments for disabled and multi-disadvantaged women.<sup>56</sup>

It can be observed that affirmative action in the area of gender discrimination is predominantly related to labor rights, as a method to ensure that women are given the appropriate opportunities and a working context that responds to their biological differences, such as special treatment for pregnant women. In my view, within the CEDAW affirmative action is not contemplated as a right. In fact, as I will try to prove during this paper, special measures are all designed differently than traditional human rights. Although affirmative action implies a direct obligation for States, it is rather an obligation to fulfill other rights. Firstly, affirmative action is a mean to achieve gender equality, fulfilling thus the right to equality and non-discrimination. Secondly, it is a way to achieve such equality in the exercise of other rights, such as the rights contemplated by the CEDAW (the right to political and public life, specific employment right, the right to education, health care...etc). Affirmative action in the sphere of gender discrimination should thus target to fulfill all the rights provided by the CEDAW and be directed for the "allocation and relocation" of services beyond employment. The nature of affirmative action as a catalyst for the fulfillment of other rights will be later discussed in depth, once other types have been examined within other international treaties. Finally, it is important to reiterate that affirmative action in the field of gender discrimination is legally binding as temporary, although the Committee has expressed that in the fields related to maternity, it can be of permanent nature.<sup>57</sup> Given that the permanent nature has been established in a GR and not in the text of the treaty, it will be later assessed if the potential permanent nature has a binding force.

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<sup>54</sup> CEDAW/C/MEX/6, 23 January 2006, pg. 79-82

<sup>55</sup> Ibid

<sup>56</sup> CEDAW/C/NPL/2-3, 7 April 2003, pg. 14-15

<sup>57</sup> Supra, note 48, para. 16

In relation to disabilities, the CRPD contains a brief reference to “specific measures” in article 5.4 and states that “specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention”. The specialized Committee that deals with disabilities has not yet adopted a General Comment related to article 5. In a co-authored handbook by the UN and the Inter-Parliamentary Union that aims at realizing and explaining the content of the rights provided by the Convention and addresses parliamentarians, it is interpreted that article 5.4 contains the legal basis for both temporary special measures and permanent measures.<sup>58</sup> The same handbook notes that “a State party will be obliged to adopt a range of special measures across different areas of social life”.<sup>59</sup> It is unclear and highly unfortunate that the CRPD, a Convention of novelty, effective since only a few years ago (2008) chooses to operate under different terminologies by referring to “specific measures”. Moreover, it is unfortunate that the text of the treaty allows for affirmative action in the area of disabilities but creates a legal void as to what such measures imply, their duration and their scope and purpose. As it will be discussed below, the absence of a General Comment by the CRPD and of a more extensive obligation within this treaty will determine an unclear and low-enforceable obligation for States to take affirmative action in the sphere of disabilities.

In the field of racial discrimination, the CERD contains affirmative action clauses in both the text of the treaty and the GR 32. Article 1.4 establishes that special measures should be taken with the sole purpose of “securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection”. The same article also contains the limits to affirmative action in the racial sphere, which are temporality and the prohibition of “maintenance of separate rights for different racial groups”. As explained by GR 32, “the reference to ‘sole purpose’ limits the scope of acceptable motivations for special measures within the terms of the Convention”. Furthermore, article 2.2 establishes that “states Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”.

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<sup>58</sup> *From Exclusion to Equality: Realizing the rights of persons with disabilities*, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol (2007), pg.66.

<sup>59</sup> *Ibid*, pg. 67

GR 32 provides a great explanation regarding the nature of racial affirmative action by explaining that it should not be confused with permanent rights such as “the rights of indigenous peoples or the rights of persons belonging to minorities”. It also mentions that an individual can at the same time enjoy both special measures and his permanent rights recognized within the international human rights system. The temporary nature of racial affirmative action is established and reiterated in the text of the Convention, making it legally binding, both the implementation of such measures and their limited duration. The same interpretation is made by the CERD Committee when explaining that “the verb *shall* in relation to taking special measures clearly indicates the mandatory nature of the obligation to take such measures [and] the mandatory nature of the obligation is not weakened by the addition of the phrase *when the circumstances so warrant*”.<sup>60</sup> In order to practically comprehend the meaning of “measures” within the racial context I have chosen to examine the Report of the CERD of the Sixtieth and Sixty-first Sessions, where the Committee makes contextual and evidence-based recommendations, depending on the situation of every State.<sup>61</sup>

For Costa Rica, the Committee recommends affirmative action related to the representation of national minorities at judicial and governmental levels.<sup>62</sup> For the UK, the Committee acknowledges the special measures adopted for the Roma people but mentions that for other minorities, affirmative action should be adopted in the field of “employment, education, housing and health”.<sup>63</sup> An extremely important observation is made by the Committee in relation to Madagascar, by stating that “the principle of non-discrimination is not subject to the availability of resources”.<sup>64</sup>

The observation is important because of two problems that arise in regards with racial affirmative action and other types of special measures derived from other discrimination grounds. The first problem relates to the wording of the CERD in this case, which mentions that affirmative action has to be employed in the area of economical, social and cultural rights. Although other areas are

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<sup>60</sup> See Committee on the Elimination of Racial Discrimination Seventy-fifth session, August (2009), *General Comment 32*, para. 30.

<sup>61</sup> General Assembly Official Records, Fifty-seventh Session Supplement (2002).No. 18 (A/57/18).

<sup>62</sup> *Ibid*, para 81

<sup>63</sup> CERD Report of the Sixty-second session and Sixty-third Session, A/58/18 (2003) pg. 88, para. 543.

<sup>64</sup> CERD, Report of the Sixty-fourth Session and Sixty-fifth Session, A/59/18 (2004) pg. 58, para. 319.

allowed, all types of affirmative action are strongly connected to economical, social and cultural rights due to the connection between economical rights and equality itself. This connection will be discussed later, when a detailed examination of the principle of equality will be performed. For now, it is important to acknowledge that affirmative action is generally connected to such rights. Some of these rights are understood to be of delayed or progressive realization by States and are to be fulfilled to the maximum of States' available resources.<sup>65</sup> The right to equality and non-discrimination is nevertheless, in the view of the UN of immediate realization.<sup>66</sup> If affirmative action is not a right, but a temporary or even permanent catalyst for the realization in this case of economical, social and cultural rights, can we conclude that all these rights with no exception are of immediate realization? Formulated more clearly, does affirmative action as an expression of the principle of equality and non-discrimination determines the immediate realization of the right that it tries to guarantee? For the formulation of a competent answer to this question it is necessary to turn to three relevant GC of the CESCR Committee.

GC 5 refers to State obligations regarding economic, social and cultural rights for disabled persons. The Committee discussed the progressive realization of rights for this particular disadvantaged group and concluded that the insurance of economic, cultural and social equality "almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required".<sup>67</sup> Although GC 20 does not discuss affirmative action, it refers to the right to equality and non-discrimination for ESC rights and the Committee explains that "non-discrimination is an immediate and cross-cutting obligation in the Covenant". GC 16 refers to affirmative action by establishing that in the sphere of ESC rights it should be temporary and proportional and also mentions that the right of equality between men and women is of immediate realization.

Special measures and the right to equality hold a central and vital place in the design of the ESC Covenant but, as I mentioned in the beginning of this chapter, neither the ICCPR nor the ICESCR contain special measures provisions within their texts. Affirmative action in the field of ESC rights, as

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<sup>65</sup> Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights Fact Sheet No. 33*, pg.13.

<sup>66</sup> *Ibid*, pg.15

<sup>67</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22, para.9.

an expression of the realization of the principle of equality can demand from all the rights it interacts with immediate realization. The only problem is that States might or might not have an obligation to implement affirmative action policies, depending on the normative rank of General Comments.

As we discussed before, racial affirmative action, as well as gender related affirmative action are mandatory due to their inclusion in treaties. But what happens to affirmative action originating from other grounds, such as language, religion, property, age, sexual orientation or other status? States face increasable demands to prove their non-discrimination functioning apparatus in the field of employment and social rights for young people, LGBT rights or even for people with an apparently controversial health status, such as HIV carriers. Are these vulnerable groups entitled to the preferential element of affirmative action and is such entitlement offered by the international human rights system?

### 2.3 Affirmative action: a variable obligation

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Human rights treaties inherit the nature of international law governed by the *pacta sunt servanda* rule, a simple idea based on the fact that States are obligated by the treaties they ratify.<sup>68</sup> Treaties, including human rights treaties, are governed by the Vienna Convention on the Law of the Treaties of 1969 that in article 26 explains that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. There is a blurred line in contemporary international law between binding and non-binding norms due to an erratic State practice but the presumption that States consciously differentiate between the so called soft law and treaty obligations is still major and so is the difference between a legally binding document and a trend or state practice.<sup>69</sup> Are General Comments and Recommendations thus, legally binding? The answer seems to be both yes and no.

Human rights bodies, as generators of Comments and Recommendations, act as interpreters of human rights and may originate “subsequent practice in the

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<sup>68</sup> Megret, Frederic, *The Nature of International Human Rights Obligations* (September 11, 2009), pg.4, available at SSRN: <http://ssrn.com/abstract=1472196> as consulted on May 2<sup>nd</sup> 2015, 11:09 am.

<sup>69</sup> Shelton, D, *Normative Hierarchy in International Law* [comments](2006), American Journal Of International Law,(2 pp. 291-323), p. 320-321.

sense of article 31.3.b of the Vienna Convention”<sup>70</sup> although this could also be disputed. Is this subsequent practice legally binding? Some believe General Comments and Recommendations are simply guidelines for the implementation of the right in questions while other part of the doctrine agrees that they have “considerable legal weight”.<sup>71</sup> Human rights bodies have been criticized for not following the interpretation doctrine set by the Vienna Convention.<sup>72</sup> Their authority to conduct such interpretation has nevertheless, not been put into question sufficiently. If we take for example the case of the CEDAW, part V of the Convention discusses the establishment of the Committee and its main characteristics. Article 17 declares that “for the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women”. If we accept that international obligations derive from treaties then we can conclude that the only function that States agreed to allow the Committee to possess is a monitoring function of the implementation process. Article 21 does indeed empower the Committee to make “suggestions and general recommendations based on the examination of reports and information received from the States Parties” but are these suggestions equivalent to an interpretation power or are these suggestions legally binding as long as they refer to what the Committee was legally and bindingly mandate to do in article 17, that is, to implement the Convention?

The same authority to make suggestions is attributed to the Committee on the Elimination of Racial Discrimination in article 9 of the CERD, to the Committee on the Rights of Persons with Disabilities in article 39 of the specific Convention. As stressed by the International Law Association in a 2004 Report, “comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body expert in the issues covered by the treaty; they are not in themselves formally binding interpretations of the treaty”.<sup>73</sup> The same paper also establishes that “none of the human rights treaties explicitly confers on the relevant treaty bodies the power to adopt binding interpretations of the treaties, and the practice of at least some States suggest that this power has not

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<sup>70</sup> Mechlem, Kerstin, *Treaty bodies and the interpretation of human rights*, Vand. J. Transnat'l L. 42 (2009): pp 905,pg.920.

<sup>71</sup> Ibid, p.929

<sup>72</sup> Supra note 70, pg. 930, “*Treaty bodies bear a specific responsibility to apply a sound legal methodology when legal questions are concerned, since otherwise no useful interpretations can be achieved*”.

<sup>73</sup> International Law Association: Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, (London: 2004); para 16, pg.5.

been conferred implicitly”.<sup>74</sup> In line with all of the above, we can conclude that affirmative action in the sphere of the rights and guarantees accorded by the ICCPR and ICESCR does not appear as a strong obligation for States but rather a facultative option, a mechanism to otherwise redress inequality and discrimination. In connection with race, gender and disabilities, affirmative action has a much stronger status and its weight originates from its inclusion in the specialized treaties- CEDAW, CRPD and CERD.

Within the international human rights legal design, we observe thus that some groups and discrimination grounds have been regarded as to possess a higher priority of redress than others. Nevertheless, for these specific groups, their relevant Covenant provides a wide range of rights to be enforced with a non-discrimination attachment, correcting thus the legal void created by the non-inclusion of affirmative action in the ICCPR and ICESCR.

Affirmative action is therefore a variable obligation and that implies that a State is obligated to adopt affirmative action policies only in regards to those vulnerabilities contemplated by a human rights instrument and following the limitations and guidelines of those treaties. The extended nature of affirmative action derived from the interpretations of human rights bodies and of the scholarship can help States achieve equality easily by making the implementation of these measures more effective. Nevertheless States enjoy a valid and legitimate margin of appreciation in regards to the characteristics of special measures that are not contemplated in the texts of international human rights instruments.

Below, I have constructed a table that delimitates the obligation and margin of appreciation for each treaty to highlight that States have an obligation to adopt affirmative action policies in limited circumstances and when that happens, the obligation for those to be temporary is predominant. In the field of disabilities, affirmative action can be permanent since the temporality is not discussed by the CRPD. Finally, there is an extensive margin of appreciation to either adopt or not, and if so to what degree and in what fields, in relation to the ICCPR and ICESCR and the rights provided by both instruments.

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<sup>74</sup> Ibid, para 18, pg 5

<b>Treaty</b>	<b>Obligation</b>	<b>Margin of Appreciation</b>
<b>CEDAW</b>	<ul style="list-style-type: none"> <li>• Adoption of measure</li> <li>• Temporary Nature</li> </ul>	<ul style="list-style-type: none"> <li>• Permanent Nature in relation to maternity</li> <li>• Field of implementation and right to equalize</li> </ul>
<b>CERD</b>	<ul style="list-style-type: none"> <li>• Adoption of measure</li> <li>• Temporary Nature</li> <li>• Sole purpose of ensuring equal enjoyment and exercise of human rights</li> </ul>	<ul style="list-style-type: none"> <li>• Field of implementation and rights to equalize</li> <li>• Justification and terminology applied</li> </ul>
<b>CRPD</b>	<ul style="list-style-type: none"> <li>• Adoption of measure</li> <li>• Purpose of substantive equality</li> <li>• No indication of duration</li> </ul>	<ul style="list-style-type: none"> <li>• Temporary or permanent nature</li> <li>• Fields, implementation, terminology, etc.</li> </ul>
<b>ICESCR</b>	<ul style="list-style-type: none"> <li>• No obligation</li> </ul>	<ul style="list-style-type: none"> <li>• Full spectrum</li> <li>• Can trigger immediate realization</li> </ul>
<b>ICCPR</b>	<ul style="list-style-type: none"> <li>• No obligation</li> </ul>	<ul style="list-style-type: none"> <li>• Full spectrum</li> </ul>

### Chapter III. Equality and non-discrimination in international human rights system

#### 3.1 Introduction

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Equality and non-discrimination are fundamental concepts for this paper for two reasons. First of all, the right to equality represents a challenge to the legitimacy of affirmative action when it is possessed by those individuals outside a vulnerable or disadvantaged group as they can claim access to the same resources, industries or goods that are being redistributed in favor of a discriminated group. Such legal claim is performed in virtue of their own right to equality. Secondly, the right to equality is at the same time the origin of affirmative action as it gives States the opportunity to redress and compensate for discrimination in certain sectors or in relation to disadvantaged groups. If the first interaction between the concepts presupposes that those outside the vulnerable group are in a position of enjoyment of their right to equality and a potential conflict originates when they exercise it, the second interaction is based on the hypothesis that equality is for the disadvantaged group yet to be



achieved. The right to equality and the prohibition of discrimination are two separate but strongly interconnected concepts for the international human rights system as they appear in all treaties and their reiteration purports significance as to their extraordinary importance and relation with other human rights. Equality is mentioned in the Charter of the United Nations, both in the preamble and article 1 under the “Purposes of the UN” section, in the UDHR and all Covenants discussed throughout this paper. Equality, within the international law arena is a purpose, a principle, a right and a test in the realization of all other rights. One of the most traditional reflections upon the nature of equality is still Judge Tanaka’s Dissenting Opinion in the South West Africa Cases that distinguishes “the natural law character” of this principle and its philosophical connections to freedom and justice and alludes to Aristotle’s *justitia commutativa and distributiva* to explain that “what is equal is to be treated equally and what is different is to be treated differently”.<sup>75</sup> Judge Tanaka referred thus in 1966 to the possibility of differential treatment as an inherent facet of equality, recognizing that equality is non-mechanical but rather a metaphysical concept.<sup>76</sup>

Just as affirmative action, neither equality nor discrimination are static concepts but they have been rather evolving and a simple look for example at GR 25 of the CEDAW Committee or GC 20 of the CDESCR Committee brings forward the diverse types of equality and discrimination dominating the world of human rights. As I will explain below, formal equality and substantive equality known as *de jure* and *de facto* equality are the main derivatives used by human rights bodies in relation to affirmative action. Discrimination is also contemplated in different forms as systemic, direct or indirect. As Jarlath Clifford summarized it “there are different conceptions of equality that apply in different contexts [and] claiming a violation of the rights to non-discrimination or equality before the law thus often triggers an evaluation of one or more conceptions of equality”.<sup>77</sup>

Moreover, the dynamic between equality and discrimination is not solely limited to legal aspects and “to engage in the most difficult debates regarding the meaning and application of equality means developing principles and doctrines that speak to institutional dynamics of discrimination, the intersection of public and private normativity, the intergenerational

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<sup>75</sup> Available at <http://www.icj-cij.org/docket/files/46/4945.pdf>, as consulted on May 9th 2015, 12:12pm, pg.301.

<sup>76</sup> Ibid, pg.303

<sup>77</sup> The Oxford Handbook of International Human Rights Law, ed. by Dina Shelton, First.Ed (2013), Oxford University Press, see Jarlath Clifford, *Equality*, pg.426.

reproduction of inequality, process values such as democracy, citizenship, participation, transparency, accountability in decision-making, and mechanisms for reinforcing both individual and collective agency and empowerment".<sup>78</sup> In this chapter I will thus proceed to analyze the main types of equality and discrimination used by human rights bodies while also discussing alternatives presented in the literature and the implications of each concept in relation to affirmative action. For example, Clifford talks about an alternative to the traditional formal and substantive equality and discusses fluid un-isolated classifications of the equality spectrum such as (a) equality as consistent treatment, (b) equality of opportunity, (c) equality of outcomes and (d) transformative equality.<sup>79</sup>

Although legal aspects will be preferred, especially those related to affirmative action, philosophical aspects of equality will also be briefly considered in an attempt to approach equality holistically and not diminish the importance of its association with justice and freedom. The egalitarian theory of John Rawls as well as Ronald Dworkin's theory of equality and distributive justice will be analyzed in relation to State measures aimed at combating discrimination.

### 3.2 Formal or de jure equality

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Formal equality is a rigid concept that fails to take into consideration broader patterns and social circumstances or even differences between individuals and is represented by an idea that similarity and identical treatment that should be reflected in both legal premise and factual outcomes surrounding an individual.<sup>80</sup> Formal equality is what Clifford meant to explain when he described equality as consistent treatment, a traditional, basic and narrow idea of equality that deems personal circumstances as irrelevant but has one important advantage: it protects individuals from an arbitrary distribution of goods or resources and ensures equality before the law.<sup>81</sup> Nevertheless, Clifford warns that laws that are morally wrong can by virtue of formal equality be applied repeatedly and equally between individuals, deepening thus societal inequalities.

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<sup>78</sup> Sheppard, Colleen, *Inclusive Equality and New Forms of Social Governance*, (2004), McGill University, Faculty of Law, pg. 69.

<sup>79</sup> Supra note 77, pg.426

<sup>80</sup> Interights, *Non-discrimination in international law, A handbook for practitioners*, (2011 Edition ), pg.17.

<sup>81</sup> Supra note 77, pg. 427-428

Formal equality has been criticized for implying neutrality in the legal system and operating on the idea that if the law is applied equally that will generate social equality.<sup>82</sup> The concept has also been criticized for implying that the State is neutral in its interventions for not becoming involved in for example how employers choose candidates, making it thus an institutionalized concept that disregards the public-private binary.<sup>83</sup>

Formal equality also referred to as *de jure* equality implies certain obligations for States, in particular that their laws “do not discriminate through distinctions, exclusions, restrictions or preferences”.<sup>84</sup>

In relation to affirmative action the concept of preferences or preferential treatment is particularly important, since it is one of its main elements and one that determines an incompatibility between special measures on any ground and formal equality. This restriction of not allowing preferential treatment in the legislative process is what sometimes makes *de jure* equality become *de facto* discrimination.<sup>85</sup> Narrowly interpreted notions of formal equality also reject compensatory forms of affirmative action due to the distinction made by these policies between individuals. The European Commission sees formal equality as a model constructed by a liberal and symmetrical approach that focuses on “equality for individuals, formal neutrality and procedural justice” and that is influenced by a meritocratic approach.<sup>86</sup> Formal equality has been the fundamental emphasis of the European Community’s equality law although throughout the years the concept has evolved into one with substantive equality infiltrates due to the fact that the Commission itself recognized that formal equality does not respond to societal realities.<sup>87</sup>

Today, reconciling the disadvantages of formal equality with the risk of substantive equality that will be discussed in the following pages is a balancing act that gives way to equality of opportunity, “a blend of form and

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<sup>82</sup>Graham Emily, Formal Equality [e-book], Oxford Reference, Oxford University Press; (2009), Available from: Oxford Reference, <http://www.oxfordreference.com.ludwig.lub.lu.se/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-918> as consulted on May 7th 2015 at 12:43am.

<sup>83</sup> Ibid

<sup>84</sup> *Brief of Lawyers’ Rights Watch Canada as Amicus Curiae to the Inter-American Commission on Human Rights* on the merits of the petition of the Hul’qumi’num Treaty group Case No. 12.734, pg.2.

<sup>85</sup> Ibid pg. 10

<sup>86</sup> Marc de Vos, *Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC*, European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities (2007), pg. 9-11.

<sup>87</sup> Ibid, pg. 9-11

substance” that defines the middle ground that the EU has chosen to reflect in its contemporary legislation.<sup>88</sup>

As signaled by Cuenca, most European constitutions such as the Spanish one and most strongly the German one only recognize formal equality by usually containing a clause formulated as “ citizens are equal before the law” and thus, conceiving formal equality as a fundamental right is not problematic.<sup>89</sup> She continues by explaining that it is difficult to conceive *de facto* equality as a fundamental rights due to the clashes of this principle with formal equality that has been dominating constitutional laws and that in the German case the reconciliation of both concepts has been brought to the Constitutional Court that allowed for differential treatment using the socialism principle.<sup>90</sup>

Cuenca also underlines the decision of the Constitutional Court of Italy (215/1987) that declared that formal and substantive equality are interdependent and that formal equality does not prohibit a differentiated normative treatment as long as such preference is based on a reasonable motive and that a different economical and social status of individual is indeed a strong motive.<sup>91</sup> Similarly, the Spanish Constitutional Court also recognized that the Constitution contemplates formal equality but that allows for exceptions as long as such exceptions are a means to achieve substantive equality.<sup>92</sup>

I also believe the practice of Constitutional Courts (CC) to be highly relevant to affirmative action, because CCs are mandated to verify the legality of every policy and norm adopted within domestic laws. Thus, if an affirmative action policy is constructed with the purpose of achieving a different type of equality than the one envisioned by the Constitution, such norm might be declared null despite international pressures, until the Constitutional Court in question declares a potential compatibility.

In 2005 Slovakia’s Constitutional Court rejected as unconstitutional affirmative action clauses of its Anti-discrimination Act related to the preferential treatment of ethnic and racial groups due to the fact that it “it interferes in an unconstitutional manner with legal certainty in legal

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<sup>88</sup> Ibid

<sup>89</sup> Encarna Carmona Cuenca, *El principio de igualdad material en la Constitución Europea, The principle of material equality in the European Constitution*, available at: <http://e-archivo.uc3m.es/bitstream/handle/10016/19182/FCI-2004-8-carmona.pdf?sequence=1>, pg 1-3, translated from Spanish, as consulted on May 7<sup>th</sup> at 8:02 pm.

<sup>90</sup> Ibid, pg.2

<sup>91</sup> Ibid, pg 5

<sup>92</sup> Ibid, pg 6-7

relationships” but also due to the unlimited duration of the measures.<sup>93</sup> The Slovakian CC did so despite its obligations under the CERD.

The United States faced numerous cases where States decided to amend their Constitutions and to ban race or sex affirmative action in their education sector and the US Supreme Court decided in the recent *Schuette v. Coalition to Defend Affirmative Action* (2014) that such amendment is legally permissible.<sup>94</sup> In the concurring judgment, judge Breyer explained that “I agree that, in implementing the Constitution’s equality instruction, government decision-makers may properly distinguish between policies of inclusion and exclusion, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally” upholding thus a preference for formal equality in relation to affirmative action policies.<sup>95</sup> Formal equality is thus a concept that is rarely compatible with affirmative action policies due to the fact that it implies that the law should not accord preferential treatment to any individual, but the same identical treatment and starting point to all. Nevertheless, international human rights law envisioned substantive equality in the form of equality of opportunity and results, two concepts that are likely to correct the disadvantages of formal equality.

### 3.3 Substantive or de facto equality

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Substantive equality, unlike formal equality, operates with the hypothesis that discrimination is embedded in society and that individuals are not in a position of similarity or identical status and allows for preferential treatment in order for equality to be reflected in the realities of a community. Substantive equality encompasses generally two ideas: equality of opportunity and equality of results.<sup>96</sup> Equality of opportunity is understood by Clifford to imply redistributive approaches but not in a utilitarian fashion but simply to allow individuals a similar starting point in their pursuit of accessing goods,

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<sup>93</sup>See <https://euobserver.com/justice/20123> and review of the decision available at <http://www.non-discrimination.net/content/media/LR-3-SK-1.pdf> , both consulted on May 8<sup>th</sup> 2015 at 11:06 am.

<sup>94</sup> *Schuette v. Coalition to Defend Affirmative*, 134 S. Ct. 1623, 572 U.S., 188 L. Ed. 2d 613 (2014).

<sup>95</sup> Concurrence available at <https://supreme.justia.com/cases/federal/us/572/12-682/dissent7.html>, as consulted on May 12<sup>th</sup> 2015 at 13:26pm.

<sup>96</sup> Supra note 80, pg. 17

industries and services.<sup>97</sup> The same author believes that equality of outcome goes beyond offering the same starting point and ensures via affirmative action policies that previously discouraged or disadvantaged individuals factually obtain resources.

The doctrine of equality is slightly inconsistent with categorizing substantive equality and its two subtypes but the practical implications of the concepts appear to be the same. Substantive equality requires State interventions and pro-activity beyond the legislative power, involving all branches of the States, especially the Executive. To my understanding, substantive equality is above all an administration of equality. The shift in the adoption of substantive equality within domestic systems and the abandonment of formal equality within constitutional law has also been signaled to reflect the replacement of classic liberalism with a social welfare governmental design.<sup>98</sup> If formal equality demonstrates a government that conceives discrimination as an “exception and an irrational aberration”, substantive equality believes that discrimination is “systemic” and assumes responsibility for the well-being of individuals by adopting “remedial and preventive” policies.<sup>99</sup> Nevertheless, implementing substantive equality is not an easy balancing act because “to carry substantive equality to its logical conclusion would be to challenge some of the fundamental economic and political pillars of modern society” and if such challenge takes place in the courtroom, as it mostly happens in the common law system, that is something that “judges are not planning to do”.<sup>100</sup>

In civil law, the reconciliation of the two concepts is as difficult. If we take for example the Spanish Constitution and the doctrine of the Spanish CC, they do not recognize that equality is envisioned by the Constitution as “normative singularization” and that there is a constitutional right to be treated differently and favorably in certain circumstances equivalent- and as strong as -the right to be treated equally and to not be discriminated against.<sup>101</sup> The Spanish constitutional doctrine reflects that the responsibility to decide when to apply a different legal and normative treatment to certain groups belongs singularly to the legislative that similarly to the Italian, has indeed given way to substantive equality by allowing affirmative action.<sup>102</sup>

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<sup>97</sup> Supra note 77, pg. 428

<sup>98</sup> Supra note 78, pg. 58

<sup>99</sup> Ibid

<sup>100</sup> Supra note 64, pg. 60

<sup>101</sup> Supra note 89, pg. 8

<sup>102</sup> Ibid, pg 5

The importance of national Constitutions to endorse and promote substantive equality and to amend the traditional formal equality focus has been signaled in the scholarship. A 2013 study that analyses gender constitutionalization in Greece warns that the endorsement of formal or substantive equality is crucial in achieving gender equality at a societal level and that “constitutional and statutory reforms in a number of countries have allowed for the adoption of positive measures”.<sup>103</sup> The same study explains that affirmative action became possible in Italy and France because of constitutional amendments that shifted the notion of equality from formalistic to substantive. The South African Constitution also embraces a more substantive facet of equality, with a specific clause for affirmative action, making it more permissible to implement such policies, although in the South African case such a model has proven to be common ground for legal disputes.<sup>104</sup>

The experience of substantive constitutional pre-commitments to affirmative action has been discussed in the field of gender in a comparative study between Canada, the European Union and the United States where Totten refuted Sunstein’s<sup>105</sup> hypothesis that the introduction of such clauses within a constitution stabilizes the political sphere.<sup>106</sup> In the same paper, Totten proves that in the case of the United States which adopts a more formalistic Constitution, the political debate has been narrowed by such pre-commitments. The work of Totten and Sunstein are equally important because building up a link between affirmative action, constitutionalism and political debates is essential to the realization of equality and the progress of constitutionalizing modern concepts of equality.

The importance of the constitutionalization of a formalistic or substantive equality has been also signaled by O’Cinneide that says that “for many years the US Equal Protection Clause lay largely dormant, with its interpretation by the US Supreme Court depriving it of real substantive content” and that within common law generally, equality has rarely been given a substantive

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<sup>103</sup> Anagnostou, D, *Gender Constitutional Reform and Feminist Mobilization in Greece and the EU: From Formal to Substantive Equality?*. Canadian Journal of Law & Society/Revue Canadienne Droit et Societe (University of Toronto Press). 28, 2, pp 133-150, pg.135.

<sup>104</sup> Dupper, Ocker, *Affirmative Action and Substantive Equality: The South African Experience*, 14 S. Afr. Mercantile L.J. 281 (2002) , pg. 275 and 281.

<sup>105</sup> See Cass R. Sunstein, *The University of Chicago Law Review*, Vol. 58, No. 2, *Approaching Democracy: A New Legal Order for Eastern Europe* (1991), pp. 633-670, pg. 639-640.

<sup>106</sup> Totten C, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, Berkeley Journal Of International Law [serial online]. March 2003;21(1):27, pg. 13, 18 and 34.

produce.<sup>107</sup> Affirmative action and substantive equality interact mildly, as substantive equality requires a position of similarity in either opportunities or results and is a form of “coercive imposition of quotas [...] that bring about greater fulfillment of formal equality of opportunity”.<sup>108</sup> Affirmative action policies can thus not only help individuals at all societal levels to enjoy better opportunities to access resources but also help the realization of formal equality. Nevertheless, the scholarship is predominantly concerned that substantive equality might not be sufficient to account for the various economical and philosophical implications of equality as justice and human dignity. As Sheppard suggested “the concept of substantive equality was essential in taking us beyond a formal equality that looked only to procedural equal treatment and not to equality of substantive outcomes, focusing on effects alone may not provide us with sufficient insight into the institutional and systemic reproduction of inequality”.<sup>109</sup>

Having provided a brief description of both formal and substantive equality, I will now proceed to investigate the predominance of both concepts within the international human rights framework and determine if there is an obligation for States to fulfill a certain typology of equality. After that, I will also examine the concept of discrimination which will allow me to ascertain the relationship between affirmative action and equality in the last chapter.

### 3.4 Substantive and formal equality as human rights standards

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Inside the international human rights system, the concept of equality can be traced back to the Paris Peace Conference of 1919 when Japan proposed that the Covenant of the League of Nations would include a racial equality clause.<sup>110</sup> American president Woodrow Wilson opposed and blocked such recognitions and it is not until 1929 when the Declaration of the International Rights of Man is adopted and equality reemerges and grounds for

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<sup>107</sup> O’Cinneide, Colm, *The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric*, 1 UCL Hum. Rts. Rev. 83 (2008), pg. 83.

<sup>108</sup> Arneson, Richard, *Equality of Opportunity*, *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), Available at <http://plato.stanford.edu/entries/equal-opportunity/> as consulted on May 18<sup>th</sup> 2015 at 15:22 pm.

<sup>109</sup> Supra, note 78, pg. 70

<sup>110</sup> William A. Schabas, *The Universal Declaration of Human Rights, The travaux preparatoires*, Volume I October 1946 to November 1947, Cambridge University Press available at <http://documents.law.yale.edu/sites/default/files/UDHR2013FullText.pdf> as consulted on May 13<sup>th</sup> 2015 at 10:37am, Introductory Essay pg. 72.



discrimination are formulated as a prohibition.<sup>111</sup> The *travaux préparatoires* of the Charter of the UN show that Britain, the Soviet Union and the US were initially pleased to leave out any mention of racial equality, as China suggested.<sup>112</sup> South Africa, Panama, Cuba and other States along with the civil society pressured for the inclusion of human rights in the Charter.<sup>113</sup> As we progress throughout the history of human rights, we step into the *travaux préparatoires* of the UDHR that show that equality was strongly envisioned as formalistic in the sense of “equality before the law”.<sup>114</sup> Article 7 of the UDHR reads “all are equal before the law and are entitled without any discrimination to equal protection of the law” but it has been suggested that the drafters never elucidated the meaning of this clause and whether it implies a positive equality or simply a prohibition of discrimination (negative equality) that goes hand in hand with article 2 of the Declaration.<sup>115</sup>

All international human rights instruments contain a reference to the right to equality, sometimes denominated equality principle, as its positive connotation is derived from the prohibition of discrimination as a negative obligation. The CEDAW mentions equality between men and women throughout its articles although the introduction to the Convention states that the purpose is to achieve full equality. The Convention also obligates States to introduce such principle within Constitutions and to ensure its practical realization. Article 4 that regulates affirmative action provides that such policies should ensure *de facto* equality between men and women which suggests that States have an international obligation to ensure substantive equality. Finally, GR 25 establishes that affirmative action should aim at realizing both *de jure* and *de facto* equality and that “purely formal legal or programmatic approach is not sufficient to achieve women’s *de facto* equality with men”. The scholarship has also put forward the idea that affirmative action in the field of gender,

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<sup>111</sup> Ibid

<sup>112</sup> Ibid, pg.75

<sup>113</sup> Ibid, pg.76

<sup>114</sup> Ibid, see pg. 108 of Introductory Essay and pgs. 17 and 104: A sub-Committee of the third Session of the General Assembly decides to introduce a combined article that will include equality before the law, a concept later seen in the Draft Declaration on Human Rights of the Cuban Delegation to the General Assembly of the United Nations and article 18 of the Draft Declaration of the International Rights and Duties of Man.

<sup>115</sup> Gillian MacNaughton, *Untangling equality and non-discrimination to promote the right to health care for all*, Health and Human Rights Journal, available at <http://www.hhrjournal.org/2013/08/29/untangling-equality-and-non-discrimination-to-promote-the-right-to-health-care-for-all/> as consulted on May 13<sup>th</sup> at 10:54 am.

requires a type of transformative equality in the sense that States are obligated to combat existing stereotypes of societal situations that maintain gender imbalances by transforming private and public institutions.<sup>116</sup>

Nevertheless, transformative equality, as part of substantive equality, requires an assessment of power relations, economic and cultural dynamics and an understanding of the systemic nature of inequalities.<sup>117</sup> If anything, I believe transformative equality is the equivalent of holistic equality in the sense that it manages to take into account all aspects and dynamics at all levels of an individual and its environment in order to combat the obstacles that diminish the fulfillment of human rights. Although such conceptualization exists, it is not yet reflected by the realities of the legal constitutional systems.

For example, a transformative approach in the field of gender requires a normative understanding for women and their biological and social programming and uniqueness.<sup>118</sup> Such an approach would ideally be reflected in an egalitarian economic model. Although economic egalitarianism is a noble aspiration in the field of gender, the current capitalism influenced approach to gender makes it hard for affirmative action to create more opportunities due to meritocracy. Nevertheless, meritocracy and egalitarianism are two competing principles that have been recently proven to hypothetically coexist within a stable society.<sup>119</sup> It is thus the role of the State, required by the promise of substantive equality to intervene and regulate reconciliations between a meritocratic approach and an egalitarian outcome. Nevertheless, affirmative action policies have been criticized for infringing the meritocratic principle and meritocracy seems to remain the preferred rule to economic decisions and models as opposed to the equity principle.<sup>120</sup>

In the field of racial equality, the CERD mentions the aspiration of “equal enjoyment or exercise of human rights” that has been interpreted in the GR 32

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<sup>116</sup> Cusack, Simone, Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, Melb. J. Int'l L. 14 (2013): 54, pg. 64.

<sup>117</sup> Albertyn C, *Substantive Equality and Transformation in South Africa*, South African Journal On Human Rights [serial online] (2007);(2):253, pg.254-255.

<sup>118</sup> Ibid, pg.256

<sup>119</sup> Barberà, S; Bevià, C; Ponsatí, C, *Meritocracy, egalitarianism and the stability of majoritarian organizations*, Barcelona GSE Working Paper Series Working Paper n° 737, February(2015),pg.1-3,available at [http://research.barcelonagse.eu/tmp/working\\_papers/737.pdf](http://research.barcelonagse.eu/tmp/working_papers/737.pdf) as consulted on May 13<sup>th</sup> 2015 on 12:01 pm.

<sup>120</sup> Son Hing L, Bobocel D, Zanna M, *Meritocracy and opposition to affirmative action: Making concessions in the face of discrimination*, Journal Of Personality And Social Psychology, September (2002);83(3):493-509, pg. 493.

to be the equivalent of a combination between formal and substantive equality. The purpose of the CERD is to secure that all racial representations enjoy an adequate advancement of their rights aimed at correcting “*de facto* inequalities resulting from the circumstances of history”.<sup>121</sup> Channelling Castles and Davidson<sup>122</sup>, a rather brutal paper of 2009 affirms that although formal equality is demonstrated within modern States, minorities have yet to become full citizens of States when their inclusion will not only be political but socio-economical and that racial differentiation seems to be one of the dominating principles of Western foundations.<sup>123</sup> The same paper argues that the unfulfillment of racial equality is caused by the defective human rights tradition influenced by mostly “white scholars” from Aristotle to Enlightenment figures such as Voltaire, Kant Hume and “the enlightened liberals in the United States such as Benjamin Franklin, John Hancock, and James Madison”.<sup>124</sup>

Despite its result and prominent racial tensions internationally, a global legal obligation to enact affirmative action policies temporarily until *de facto* equality has been achieved exists and upon investigation, no State has expressed a reservation to such requirements expressed by the Covenant.<sup>125</sup> Although racial affirmative action have been criticized to be seeking over-achievement, it is still a predominant thought that in a globalized world it is much needed because “affirmative action has the potential to catalyze important conversations about national identity and what it means to fit into increasingly diverse, multicultural societies”.<sup>126</sup>

A common reading of both GR 32 and 20 of the CERD Committee suggests that special attention must be paid to women who face racial discrimination. Intersectional special measures have not been proposed by any of the human rights bodies although the complex nature of multiple discriminations has been acknowledged and States have been encourage to report regarding

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<sup>121</sup> CERD/C/GC/32, General Recommendation 32, 24 September 2009, para. 22.

<sup>122</sup> See Castles, Stephen and Alastair Davidson (2000), *Citizenship and Migration: Globalization and the Politics of Belonging*, New York: Routledge.

<sup>123</sup> Bonilla-Silva E, Mayorga S, *Si Me Permiten Hablar: Limitations of the Human Rights Tradition to Address Racial Inequality*, Societies Without Borders, October (2009);4(3):366-382, pg. 370

<sup>124</sup> Ibid, pg. 368-369

<sup>125</sup> Reservation to the CERD available at:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) as consulted on May 13<sup>th</sup> 2015, at 13:38 pm.

<sup>126</sup> Brown G, Langer A, *Does Affirmative Action Work?* Foreign Affairs, March (2015); 94(2):49-56. Available from: Business Source Complete, Ipswich, MA. as consulted on May 13<sup>th</sup> 2015 at 13:49 pm.

intersectionality.<sup>127</sup> Given that States fulfill their obligations in singular patterns established by a specific Convention, it is questionable whether for example a State party to both CEDAW and CERD has an obligation to adopt intersectional affirmative action. The same idea can be applied to cross-cuts between disabilities and gender or disabilities and race. Intersectional measures have been recently demanded and the significance of multi-dimensional discrimination has been understood to “unravel the complex processes that (re)produce interlocking systems of oppression and inequality within specific organization”.<sup>128</sup> A study in the Dutch police force recently showed that “in their attempts to increase their status [individuals] might inadvertently reproduce those same discursive and material structures which perpetuate their own marginalization” and that “meanings and actions of employees feed back into structures of inequality along intersecting identity axes, reproducing rather than challenging them”.<sup>129</sup> The difficulties of intersectional discrimination and marginalization go consequently beyond public or even the private sphere as they affect an individual’s actions, self-identity and transferred energy put into motion to challenge several vulnerabilities at a time.

Although the goal of substantive equality is thus an obligation for States to ensure that an individual is given the same opportunities and/or results, regardless of the good or service in question, the individual’s particular circumstance is highly relevant to the effectiveness of an affirmative action policy. Substantive equality should demand evidence-based and circumstantial policies and social remedies because singular forms of action may not be sufficient to achieve *de facto* equality. The most alarming thing is that in relation to a person facing multiple discriminations, we may never know why such policies fail despite governmental efforts to comply with singular obligations.

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<sup>127</sup> See CERD, General Recommendation No. 25 on gender-related dimensions of racial discrimination, Fifty-sixth session (2000), para.6: “*Noting that reports submitted by States parties often do not contain specific or sufficient information on the implementation of the Convention with respect to women, States parties are requested to describe, as far as possible in quantitative and qualitative terms, factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention*”.

<sup>128</sup> Boogaard B, Roggeband C., *Paradoxes of Intersectionality: Theorizing Inequality in the Dutch Police Force through Structure and Agency*, Organization , January (2010);17(1):53-75, pg.54.

<sup>129</sup> *Ibid*, pg. 71

In relation to the CRPD, article 5.4 that is related to affirmative action establishes that in the field of disabilities, “accelerating or achieving de facto equality” is the dominating operating principle and goal. Article 5 also recognizes formal equality and establishes a principle of “equal protection and benefit” from the law. Moreover, the Convention declares in its article 3(e) and (g) that the governing principles of the treaty are equality and opportunity and equality between men and women. Affirmative action in the field of disabilities is not mandatorily temporary, as the Convention does not mention the duration of these “specific” measures. In relation to formal equality, we also find relevant the CRPD’s Committee GC 1 that is dedicated to explaining the meaning of equality before the law for persons with disabilities.<sup>130</sup>

GC 1 raises the standard of formal equality accorded by article 12 of the Convention by not allowing “discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity”. Legal capacity goes hand in hand with formal equality in the sense that it is an expression of the recognition that the law offers to individuals, deeming them fit to exercise human rights. GC 1 also suggests that “the right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others”.<sup>131</sup>

It is unclear whether affirmative action in the field of disabilities will target assistance in the exercise of legal capacity but article 12 of the CRPD seems definitive in obligating States to take a wide range of measures to insure legal capacity and the highest standard of formal equality for people with disabilities. If such affirmative action plans will be envisioned, they will most likely be legislative and also peculiar due to the nonexistence of a compensation element and a great difficulty in assessing the proportionality of such measures. Unlike gender and race, that are static and rather static concepts, disabilities can take different forms from cognitive to psychological or the most obvious way, a physical disability and determining the best methods of assistance in exercising legal capacity should be circumstantial. The constitutional framework of a State in question is also important for the enactment of such special measures. National Constitutions that have explicitly mentioned equality in the field of disabilities are the Chinese one, the German one, the Constitution of Fiji as well as South African

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<sup>130</sup> Committee on the Rights of Persons with Disabilities, Eleventh session 31 March–11 April (2014), CRPD/C/GC/1.

<sup>131</sup> Ibid, para.9

Constitution.<sup>132</sup> In relation to civil and political rights or economic, social and cultural, we have established that affirmative action is not mentioned in neither the ICCPR nor the ICESCR. Nevertheless, the type of equality promoted by the Covenants is important due to the fact that States might elect to enact affirmative action policies that aim at the realization of one of the rights contained in these treaties. Article 26 of the ICCPR establishes the right to formal equality in the sense of “equality before the law and equal protection of the law”. Nevertheless, the HRC in GC 18 has interpreted that “the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance” and in that sense it mentions the protection conferred to people below the age of 18 and pregnant women in relation to the death penalty.<sup>133</sup> The same GC allows for affirmative action programs but the goal in the field of civil and political rights seems to be to “correct” social imbalances and discriminations. Finally, GC 28 that refers to equality between men and women in the sphere of the rights protected by the ICCPR is also formalistic, referencing the same idea of equality as article 26 of the Covenant.

The ICESCR contains a broader equality to be achieved. In its article 7 related to the right to work, it promotes “equal remuneration and equal opportunity to be promoted in employment”. Article 13 promotes “equally accessible” higher education”. The type of equality promoted by the text of the treaty is visibly more result-oriented and less formal than the one in the ICCPR. General Comment 20 of the CESCR Committee confirms that the Covenant has envisioned a substantive equality and that “requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations”.<sup>134</sup> Therefore, affirmative action is not an obligation under the ICESCR but policies adopted in order to guarantee and realize the rights of this Covenant can target broader inequalities and be more result-oriented than the ones in the area of civil and political rights due to the difference in the conceptualization of equality.

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<sup>132</sup> Supra, note 58, pg. 53

<sup>133</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para.8.

<sup>134</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights*, 2 July 2009, E/C.12/GC/20, para. 8.

### 3.5 Direct, indirect and systemic discrimination

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Direct discrimination is an idea related to the concept of formal equality in the sense that it reflects a differential treatment of an individual or group based on certain characteristics called discrimination grounds.<sup>135</sup> Such discrimination grounds are within the international law system “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>136</sup> Differential treatment can be mirrored in legislation but also refers to the conduct of public authorities or “or by private employers or organisations, such as through differential pay, delayed promotion or the refusal of entry to public amenities”.<sup>137</sup>

Affirmative action measures that target direct discrimination are usually legislative efforts to equalize the legal stand and status of individuals and comply with an immediate international obligation. Direct discrimination requires an element of differentiation with “another person in a similar situation” but can “also include(s) detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation”.<sup>138</sup> In a situation of an affirmative action giving disproportional or unconditional preferential treatment to an individual or a group, direct discrimination is what could be claimed by the opposing group. For instance, if an employment policy accords unconditional preferential treatment to women, and *solely* because they are women they would be favored for a position that a man is equally qualified for, then such man can claim direct discrimination and such policy would have a reversed discrimination effect.

The second form of discrimination is indirect discrimination represented by a broader understanding of discommodity. Direct discrimination, by its strong link with formal equality “does little to address the redistributive and restructuring goals of equality”.<sup>139</sup> Indirect discrimination responds to this issue by acting as a “complement to formal equality, or equality as consistency”.<sup>140</sup> Indirect discrimination provides that even apparently unbiased laws and practices or equal legal treatment can, in reality, generate

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<sup>135</sup> Supra, note 80, pg.18

<sup>136</sup> See common art. 2 ICCPR, article 2 ICESCR, article 2 UDHR.

<sup>137</sup> Supra note 80, pg. 63

<sup>138</sup> Supra note 27, para.10

<sup>139</sup> Fredman, S, *Discrimination and human rights: the case of racism*, Oxford, Oxford University Press (2001), eBook available from: Library catalogue (Lovisa), pg. 23.

<sup>140</sup> Ibid, pg. 24

disadvantages for some groups or individuals.<sup>141</sup> Affirmative action policies that seek to achieve substantive equality and thus combat broader patterns of discrimination have been understood to be part of a wider narrative of States' obligations represented by a positive duty to promote equality.<sup>142</sup> Besides the element of neutrality, indirect discrimination requires an examination of the justification behind a policy that justifies a differential treatment or result.<sup>143</sup>

Affirmative action that aims at combating indirect discrimination goes beyond the legislative and requires administrative intervention, coordination with non-State actors and allocation of budgetary resources. For example, in the field of gender discrimination, direct discrimination could be redressed by modifying a national Constitution and amending the legislative framework as to provide men and women with the same rights. But such efforts might not be sufficient to resolve stereotyping and respond to societal realities. This is resolved by substantive affirmative action that approaches gender inequalities holistically, determines patterns between the individual and its dynamic with public and private institutions and seeks a redistribution and reallocation of opportunities. However, it should not be understood that substantive equality only implies economical interventions and solutions.

A holistic approach requires evidence-based approaches, for example, enacting media laws that seek to empower women and combat media stereotypes and double standards. Another example would be equalizing gender rights legislatively by sanctioning domestic violence but at the same time providing training to government officials that interact with domestic violence victims such as doctors and the police force in order to ensure the best response to such a phenomenon. Indirect discrimination requires thus policies with multiple targets and aims and a complex understanding of discrimination and all the factors that generate and perpetrate it. The last form of discrimination that merits clarification is the so called systemic discrimination. It is defined by the CDESCR Committee as "pervasive and persistent and deeply entrenched in social behaviour".<sup>144</sup>

Systemic discrimination may include but not be limited to indirect discrimination and it is envisioned as a large-scale attitude revealed in "the creation, perpetuation or reinforcement of persistent patterns of inequality

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<sup>141</sup> Ibid

<sup>142</sup> Ibid, pg. 26

<sup>143</sup> Supra, note 72, pg. 70

<sup>144</sup> Supra note 27, para 12



among disadvantaged groups”.<sup>145</sup> Systemic discrimination assumes that there are plural causes to a situation of discrimination and it recognizes the greater involvement of the private sphere in the perpetuity of disadvantages.<sup>146</sup>

To my understanding, there is a great similarity between indirect and systemic discrimination and the practical difference between one and the other is hard to comprehend. In practice systemic discrimination seems to be more related to the employment area.<sup>147</sup> Nevertheless, as the terminology suggests, systemic discrimination is related to the operational values of a system, as a whole. That implies that systemic discrimination is a multi-dimensional concept and should not be limited to the labor sphere. In the US, systemic discrimination has been referred to as “unintentional” and “broad enough to encompass cases of disparate impact involv(ing) a claim that a facially neutral employment practice—such as [...] a criminal background check policy—has an adverse impact on a protected class and cannot be justified by business necessity”.<sup>148</sup> Systemic discrimination remains nevertheless, a legally ambiguous term that will need further clarification in both domestic and transnational legislation.

### 3.6 Philosophical approaches to equality: Rawls and Dworkin

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As mentioned in the beginning of this chapter, equality is not a concept that can or should be limited to legal perceptions. It is a notion that transcends the legal sphere into socio-economical as well as philosophical areas. In order to understand equality and its importance for our society, I have decided to briefly introduce the ideas of two of the most valuable legal and political philosophers whose ideas have inspired debate and progress in the field of

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<sup>145</sup> Canadian Human Rights Maturity Model, Fact Sheet 14, available at <http://www.hrmm-mmdp.ca/eng/fact-sheet-14c-systemic-discrimination> as consulted on May 15<sup>th</sup> 2015 at 11:28 am.

<sup>146</sup> *Tackling Systemic Discrimination*, Human Rights Legal support center available at <http://www.hrlsc.on.ca/en/human-rights-stories/tackling-systemic-discrimination> as consulted on May 15<sup>th</sup> 2015 at 11:53 am.

<sup>147</sup> See the definition of systemic discrimination at <http://www.hrzone.com/hr-glossary/what-is-systemic-discrimination> and the US Equal Employment Opportunities Commission brief on systemic discrimination available at <http://www.eeoc.gov/eeoc/systemic/> both consulted on May 15<sup>th</sup> 2015 at 10:21 am.

<sup>148</sup> Charles B. Baldwin and Susannah P. Mroz, Ogletree Deakins, Association of Corporate Counsel, *Systemic Discrimination in a Nutshell*, available at <http://www.acc.com/legalresources/quickcounsel/SND.cfm> as consulted on May 14<sup>th</sup> 2015 at 14:22 pm.

redistributive approaches to justice. The methodologies of both Rawls and Dworkin, both rigorous and at time difficult to absorb into a legal context will be overlooked and their main substantive ideas will be presented in an attempt to broaden our understanding of equality and formulate an objective conclusion.

For Ronald Dworkin, equality is to be understood if we can identify its forms. He identifies subcategories of equality of welfare and equality of resources to be two important types but admits that these “two abstract conceptions of equality [...] do not exhaust the possible theories of equality, even in combination”.<sup>149</sup> When contemplating equality of welfare, Dworkin suggests that it should go beyond “putting the same figures” into people’s bank accounts but instead make their lives “equally desirable” but also proves that it is a weaker concept that we might have thought due to the variable of walfarism.<sup>150</sup> Dworkin relates the concept of equality to preferences, tastes and human uniqueness and implies that “it is an essential feature of life’s performance that persons define for themselves what gives value to life [...] and it is contrary to this performance for officials to decide an objective list of elements of a good life and distribute resources accordingly”.<sup>151</sup>

The idea of equality of welfare for Dworkin is related to the self-envisioned image of success and the possibility of governments to treat conceptualizations of what it means to be successful equally and it is believed to not be sufficient in order to express the meaning of equality in issues of distribution.<sup>152</sup> Equality of resources is a concept also related to a person’s bigger picture in the sense that a fair distribution for Dworkin means that it takes into account people’s ambitions but at the same time translates into the idea that “people should not have less income simply in consequence of less native talent”.<sup>153</sup> Alexander Brown interprets Dworkin’s idea of equality in a transnational sphere and applies it to a global community level only to realize that the targets of official development assistance and generally achieving the MDG’s are not based on an equal concern for individuals.<sup>154</sup> Equal concern

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<sup>149</sup>Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, Philosophy and Public Affairs, Vol. 10, No. 3. (Summer, 1981), pp. 185-246, Princeton University Press available at <http://strongwindpress.com/pdfs/TuiJian/DworkinEquality.pdf> as consulted on May 17<sup>th</sup> 2015 at 09:31 am, pg. 18.

<sup>150</sup> Ibid, pg.189

<sup>151</sup>Alexander Brown, (2009), *Ronald Dworkin's Theory of Equality*. Retrieved from <http://www.palgraveconnect.com.ludwig.lub.lu.se/pc/doi/finder/10.1057/9780230244467> as consulted on May 16<sup>th</sup> 2015 at 20:11pm, pg. 32.

<sup>152</sup> Ibid, pg. 49

<sup>153</sup> Ibid, pg. 50 and 57

<sup>154</sup> Ibid, pg 132-133

and respect for citizens and their life trajectory has been defined by Dworkin as a right but nevertheless an abstract one because it represents a “virtue” of the sovereign and fundamental to political morality.<sup>155</sup>

Rawls on the other hand discusses equality in a much more confronting way, juggling between idealistic conceptions and obstructing realities. He appears to dismiss the human trajectory that Dworkin embraces and prefers to seek political implications for equality. There are three types of equality for Rawls: fundamental equality, political equality and socio-economic equality.<sup>156</sup>

The first two types are somehow attainable. Fundamental equality implies “a moral claim and equal worth” of individuals and political equality centers on the idea that such claims should be directed towards institutions that bear the responsibility of according equal worth.<sup>157</sup> However, in the sphere of socio-economic equality things get complicated. Rawls advocates for a system that seeks less to redistribute and more to initially fairly distribute.<sup>158</sup> Nevertheless, Rawls is not naïve and does not preach compassionate politics. He admits that if the standard of equality is practically unachievable the question of redistribution should then be *how far should we let it fall away from the standard?*<sup>159</sup> Rawls idea of equality is reduced to a simple and contemporary mind set: “even in a well-ordered society, we are likely to see individuals who are motivated by a “me-first” outlook rather than any deep sense of reciprocity”.<sup>160</sup> Finally, it is important to mention that scholars have been debating whether the Rawlsian theory of equality is compatible with affirmative action and have suggested that because justice means fairness for Rawls, that means that strong types of affirmative action such as quotas might be incompatible with his views, although it is reported that Rawls discussed a potential application of these measures in his lectures, not his writings.<sup>161</sup>

By briefly introducing the ideas of equality of Dworkin and Rawls I wanted to suggest that the main types of equality that the international human rights system is operating with might not be sufficient in order to achieve non-

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<sup>155</sup> Ibid, pg.84-86

<sup>156</sup> Ibid, pg. 82

<sup>157</sup> Ibid

<sup>158</sup> Ibid, pg. 83

<sup>159</sup> Ibid

<sup>160</sup> Ibid, pg.86

<sup>161</sup> Taylor, R. (2009), *Rawlsian Affirmative Action*, Ethics, (3). 476, pg. 1-2 and 32. Also see Samuel Freeman, Rawls (London: Routledge, 2007), pg. 90-91.

discrimination and a fair distribution of resources. The idea of substitutive equality that seems to dominate the discourse in favor of affirmative action is characterized by a movement of redistribution that Rawls rejected in his works. Moreover, it fails to take into account Dworkin's concern for preferences, tastes and self-conceptualization of individual success as well as leave out his idea of equal concern for citizens. As I have discussed earlier, affirmative action might need to employ transformative equality in order to diminish discrimination and under-representation but that requires a readjustment to making macro-economic decisions based on equity rather than meritocracy. As our Western societies are more and more capitalist, the idea of equal concern in an economic sense becomes less and less attainable and as Rawls suggested equality is corrupted when we are aiming for redistribution of resources. Nevertheless, an equitable initial distribution in a capitalistic society seems to represent utopia and if equal concern means more than formal equality, if it means that governments should be interested in how they treat citizens rather than how the effects of the law affects the population, it is hard to believe that equality of welfare will be ever achieved.

International human rights law, when putting forward the legal standards of equality should envision a concept that represents the social journey of an individual and customizes its response for his talents, opportunities, initial condition and potential barriers to his full holistic development. Moreover, it should take into account the difficulties of achieving equality and what that implies for the reordering of the economic model of States, that each have their own circumstances, culture, history and political peculiarities. A substantive concept of equality that will be identically implemented into all States and generate the same levels of opportunities for citizens needs to be micro and macro adjusted to fit the socio-economical context of both the private and public sphere while always operating with the variable of human uniqueness. Today, formal equality seems to disregards differences while substantive equality seems to not give them sufficient reflection and deliberation. International human rights law needs to rethink the concept of substantive equality and create limits, conditions and circumstances for its best implementation. Equality should therefore embrace both the formality of the Rawlsian aspect of equal worth of individuals that ought to be reflected in the laws but also Dworkin's notion of equal concern for all aspects that determine the cultural, social and economic status of an individual.

## Chapter IV: The relationship between equality and affirmative action

### 4.1 Legal issues that arise from the interaction between affirmative action and equality: the compatibility test

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Within the international human rights system, the compatibility between equality and affirmative action remains uncertain. Such uncertainty derives from many themes that have been discussed along the lines of this paper but also national contexts, perceptions and the uniqueness of every legal system.

The first problem that arises, relates to the legal nature of both concepts. At this point, we cannot doubt that in some instances and in regards to certain groups States face an obligation to put in motion affirmative action policies. Nevertheless, the realization of this obligation can interfere with the realization of the substantive right to equality of individuals that do not belong to a disadvantaged group. Which one should be given priority? That has been a long asked question in the literature, formulated under the symbolic compatibility test between affirmative action and the right to equality, a test that justifies the analysis in this paper. Is affirmative action a right or a principle? Is the test of compatibility raising a normative conflict within the international human rights system?

The fact that equality- at least in the sense of equal treatment- is a right, has been discussed by O'Conneide that stated that it is "commonplace for national constitutions and international human rights instruments to recognize the importance of equality as a fundamental right".<sup>162</sup> Within the human rights scholarship and jurisprudence, equality seems to have a defined nature although it can dissatisfy and offer misleading guarantees.<sup>163</sup> Affirmative action on the other hand, has never been regarded as a human right, nor has it been characterized as an international principle. As mentioned earlier, it is an obligation in the form of a catalyst for achieving equality and non-discrimination and can be seen as complementary to these rights, but as it is formulated today, it seems to have no independent stance.

The relationship between the right of the majority (to equality) and the right of the minority (to non-discrimination and implicitly to affirmative action) has

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<sup>162</sup> Supra, note 107, pg. 81

<sup>163</sup> Ibid, pg.83

been vaguely discussed under the idea of temporality of affirmative action and the prohibition of maintaining separate standards in society by Bossuyt.<sup>164</sup> His report on affirmative action reads that “there is no contradiction in aiming simultaneously at the protection of minorities and the prevention of discrimination”.<sup>165</sup> Although ambitious, this statement fails to reveal its simplicity in practice and that is because affirmative action may be permanent and indeed lead to different standards or may be overridden by the force that the right to equality has within the international and national frameworks.

In reality, balancing the nature and demands of both concepts is a burden that falls on a nation’s legislative or judiciary as the international human rights law seems to formulate guidelines rather than properly assist States in understanding how to achieve equal standards by not falling into the trap of reversed discrimination. Such burden could for example relate to the proportionality of affirmative action or the level of compensation provided by the policy in question. The compatibility between equality and affirmative action has been discussed for example by the Inter-American Commission on Human Rights as well as the scholarship.<sup>166</sup> Although the Inter-American Commission has put forward that the two are compatible if affirmative action pursues a legitimate aim and it is proportional, studies seem to overlook and not employ a deep legal analysis of the nature of both concepts and their interaction. This compatibility issue derives from the fragmentation and lack of a normative hierarchy within the international law system as a whole that affects the isolation of one right and consequent obligations of States from others.<sup>167</sup> As Pavel explained “legal conflicts may reflect deeper conflicts of moral values” and the relationship between affirmative action and equality, although not apparently conflictual does represent the ambiguous rhetoric of equality and the struggle of the legal system to gratify all individuals.<sup>168</sup>

The second compatibility problem that arises is related to the type of equality and the meaning of equality within a domestic system. Although international human rights law is an independent body of law with its own rules and principles, the rights that it preaches are still implemented by States within

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<sup>164</sup> Supra, note 15

<sup>165</sup> Ibid, para 81

<sup>166</sup> See for example Cohn, Marjorie, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations*, Virginia Journal of International Law, Vol. 43, p. 249, 2002. Available at SSRN: <http://ssrn.com/abstract=480886> as consulted on May 19<sup>th</sup> 2015 at 21:25 pm and see Supra note 19.

<sup>167</sup> Pavel, C. (2009), *Normative Conflict in International Law*, San Diego Law Review, 46(4), pp 883-907, pg. 885.

<sup>168</sup> Ibid

national jurisdictions and hence the two areas are strongly interconnected. The presence of formal equality in constitutional systems along with a restrictive interpretation of this concept can act as a barrier to affirmative action policies that would cause positive discrimination. In such cases, as De Vos explicates, States are left with the question of the degree that they are ready to agree to affirmative action “by ways of exception” taking the same approach that the ECJ did in the Briheche case when it declared that affirmative action is a “limited derogation to formal equality”.<sup>169</sup> This means that for a State to legitimately and legally enact affirmative action policies they have to first create a constitutional legal framework that allows for deviations from the traditional formal equality principle.

A legitimate constitutional redesign would also imply that States have to determine the disadvantaged groups that are targeted by this exception. The Austrian Constitution seems to illustrate a good example of the differences in regulation towards various disadvantaged groups. Article 7.1 provides that “all nationals are equal before the law, privileges based upon birth, sex, estate, class or religion are excluded and no one shall be discriminated against because of his disability” while article 7.2 reads “ The Federation, Laender and municipalities subscribe to the de-facto equality of men and women, measures to promote factual equality of women and men, particularly by eliminating actually existing inequalities, are admissible”.<sup>170</sup> The Austrian Constitution seems to suggest a formal approach to birth, sex, state, class, religion and disability and a substantive equality goal in relation to gender equality by not only explicitly mentioning *de facto* equality but by providing a legal background for affirmative action measures in the field of gender. Another example would be the French Constitution that in article 1 expresses a formalistic approach towards “origin, race or religion” as prohibited grounds for discrimination are but at the same time declares equal opportunity between men and women.<sup>171</sup> As I explained before, affirmative action is a variable obligation and not all vulnerable or discriminated groups are accorded the same courtesy of being affirmative action beneficiaries. That is because in relation to some groups, such as for example, linguistic minorities, States have not assumed an international obligation to adopt special measures and combat the discriminations that these groups face. The constitutional protection of

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<sup>169</sup> Supra, note 86, pg. 12 and 18 and Supra note 11, para. 25 and 31

<sup>170</sup> See [https://www.constituteproject.org/constitution/Austria\\_2013#s44](https://www.constituteproject.org/constitution/Austria_2013#s44) as consulted on May 19<sup>th</sup> 2015 at 22:34 pm

<sup>171</sup> See [https://www.constituteproject.org/constitution/France\\_2008#s5](https://www.constituteproject.org/constitution/France_2008#s5) as consulted on May 20<sup>th</sup> 2015 at 11:43 am

certain disadvantaged groups via the international human rights system is thus unstable and could create ideological, moral or legal conflicts.

In the event that a State does indeed possess the constitutional background to accommodate affirmative action and provided that substantive equality is a State's goal, the third set of compatibility issues that arise are related to the characteristics and requirements of affirmative action. A State should always justify how the affirmative action program in question pursues a legitimate aim to avoid domestic constitutional challenges and violations of international human rights standards of equality. The requirement of a legitimate aim is linked to the proportionality that affirmative action has to demonstrate, in the sense that it is not arbitrary, unconditional and illegitimate. Before adopting such corrective measures, a State has to observe the levels of under-representation of vulnerable groups within certain sectors. Such sectors can range from political participation to State pensions or grants-in-aid or participation in education. States must prove thus that measures are necessary and the response to the necessity is proportional.

For example, the Spanish Law 1/2004 of Comprehensive Protection Measures against Violence against Women<sup>172</sup> describes in its preamble that it is based on the constitutional mandate to “adopt positive action” and ensure fundamental rights for women. This law establishes new institutions to guarantee its enforcement and enumerates the rights of the victims of domestic violence. Inter alia we identify specific labor rights, free legal assistance, social aid that can reach the equivalent of 6 months of unemployment benefits and priority in the allocation of a spot in protected public residences.

The Spanish law responds to the requirement of legitimate aim by proving in its preamble that violence against women is a reality and that it is no longer an “invisible crime” and that it originates after various recommendations of international human rights bodies such as the CEDAW or Human Rights Commission. The proportionality requirement is also fulfilled by the law expressively mentioning for example that different forms of social aid will be accorded after an examination of the economical situation of the victim, such as age, employment status and history and difficulty to access the job market. The Spanish law also includes amendments to publicity and media laws and

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<sup>172</sup> For the purpose of these paragraphs, specific relevant parts of the Law 1/2004 have been translated when referred to, specifically Chapter II, III and IV. The law can be accessed in Spanish at <http://www.boe.es/buscar/act.php?id=BOE-A-2004-21760> as consulted on May 20<sup>th</sup> 2015 at 18:13 pm.



labor laws, adopting a transformative equality approach by institutionalizing change and promoting gender equality on all social fronts.

Aside from the requirement of proportionality, affirmative action has in some circumstances a compensatory nature but as explained earlier, such compensation has to be made evident by the legal system that it is not a reward or a pecuniary unconditional advantage but rather a mechanism of making amends for the inequalities historically perpetrated. The nature of compensation has the potential to affect public attitudes towards affirmative action and ultimately to influence its efficiency. If the majority perceives the minority to be the beneficiaries of certain advantages within an industry, such perception could backfire and the policy could not only lead to failure but aggravations of discriminatory behaviors and attitudes. Affirmative action has to be thus accompanied by a strong explanatory campaign and when possible avoid the threats of self-stereotyping by fostering a legislation that promotes the development of merits rather than selective or inequitable distributions in relation to majorities.

Finally, a legal problem that might arise in relation to affirmative action is that it might be an initiative very hard to identify. The line between measures that tackle with discrimination and special measures is not simply drawn by the international human rights system. Is a social allowance for a child with disabilities a measure of inclusion and a reflection of the welfare system or is it a special compensatory measure? Is prolonged paid maternal leave a simple measure or can it be considered a permanent special measure in accordance with the interpretation of the CEDAW Committee of article 4.2?

Research on the matter suggests that the easiest way to spot the difference is by looking at the temporal axis of the measure-because affirmative action tends to be temporary- and the social category that it targets.<sup>173</sup> As per the definition and delimitation from Chapter II, affirmative action can cover a broad spectrum of legislative or governmental initiatives. In relation to direct and indirect discrimination, States have via the international human rights system positive and negative obligations to ensure the protection of human rights and their realization equally. The rights recognized in both the ICCPR and ICESCR must be guaranteed equally with no distinction of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” via the common article 2 of both treaties.

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<sup>173</sup> Supra, note 10, pg. 28

In reality, the need for affirmative action comes from the lack of compliance of States with these precepts not necessarily in the present but maybe historically. The lack of historical compliance thus justifies the need for affirmative action in the present and its design as temporary in some cases. But, as we have seen in chapter II, when discrimination is severe and systemic special measures can be permanent. That combined with the fact that a vulnerable group is also the beneficiary of normal measure for the advancement of human rights shows that affirmative action is hard to distinguish within a multitude of State interventions combating discrimination. Although affirmative action has to be proportional, it is the level of advantages conferred by these policies and the making of amends element that could serve, to my belief, as a distinguishing factor. The legal issues that can arise from the interaction between equality and non-discrimination and affirmative action are therefore diverse and can take place in both the domestic and transnational legal sphere. Affirmative action shows a great compatibility with the concept of substantive and transformative equality and with time and an additional reflection on its nature, duration and peculiar elements “it has the power to consolidate development strategies that are more likely to generate economic equity” and generally, real equality.<sup>174</sup>

## Conclusion

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Affirmative action is an international obligation that complements the right to equality and non-discrimination and acts as a channel for its fulfillment, in relation to some present or historically disadvantaged groups such as women, people with disabilities or racial minorities. Affirmative action can present itself under denominations such as “special measures”, “positive action” or “specific measures” although the terminology seems to be irrelevant as both States and human rights bodies, as well as non-State actors use these terms interchangeably. Affirmative action is a variable obligation in relation to the disadvantaged groups it targets, as women, people with disabilities and racial groups are protected by the CEDAW, CRPD and CERD which expressively establish an obligation of taking special measures. Other forms of discrimination are to be combated either via ordinary State measures or by the adoption of voluntary affirmative action policies, upon an exercise of

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<sup>174</sup> Supra, note 1

discretion in relation to the nature of General Comments or Recommendations of the UN Human Rights or CESCR Committees.

The variability of affirmative action is also related to its duration. Although it is believed to be temporary, we have seen that some special measures can be permanent. For example, special measures related to the protection of maternity or translation assistance for linguistic minorities are two examples of exceptional unlimited measures. Due to the controversial binding nature of General Comments or Recommendations that suggest the duration of special measure, I have highlighted that States enjoy a large margin of appreciation to determine the temporality of affirmative action and in fields such as disabilities there is no sequential limitation for special measures. Nevertheless, affirmative action is more likely to be constitutionally upheld when it is temporary. Special measures are characterized by a presumption of prejudice accorded to individuals belonging to a disadvantaged group. Their sole inclusion in these groups makes them beneficiaries of a compensatory mechanism for their potential discrimination. Nevertheless, the compensation affirmative action provides is collective and thus, cannot respond proportionally to singular situations. Affirmative action has to fulfill the requirements of legitimate aim and proportionality in order for it to be legitimately implemented into national systems. At the same time, these special measures have to reconcile within a domestic system the divide between formal and substantive equality. The requirement of legitimate aim is satisfied when a State demonstrates that it is affected by certain social imbalances and discrimination flux, and in that sense, it is a numerical requirement that could be deduced by observing disaggregated data. The requirement of proportionality requires States to respond to those imbalances by redistributing the goods in question in a correlative manner. Proportionality means that affirmative action policies should not be unconditionally advantaging any group and that the principle of merit should still be operative within a certain industry, although such interpretation of proportionality has been used mostly in the labor field. Finally, the relationship between equality and affirmative action can create various legal issues related to the nature of both concepts. Formal equality, a traditional *modus operandi* of most constitutional systems limits affirmative action and implies that preferential treatment is not to be accorded to any individual. Formal equality implies identical legal treatment and that before the law individuals are equal. Substantive equality, on the other hand, represents an ideal of opportunity and results and implies that preferential or differentiating legal treatment is

allowed in order to obtain visible and real equality. For an affirmative action policy to be operating in a domestic system, substantive equality has to be an exception to formal equality.

Although substantive equality is a concept more likely to achieve real equality, its international human rights mandate might not be sufficient to respond to both direct and indirect discrimination as it disregards the peculiar circumstances of every individual. Affirmative action is a collective measure designed to achieve substantive equality. Nevertheless, substantive equality might need to broaden its implications and adopt a concern for human preferences, ambitions and self-envisioned idea of success as Dworkin suggested. Equality needs to mirror an equal concern of governments for individuals and as Rawls explained, that concern has to be present when distributing resources, in order to avoid a potentially controversial and unfair future redistribution. If affirmative action targets systemic discrimination and operates with the goal of achieving real equality, if it responds to inequalities with transformative proportional measures and is mainstreamed as an equitable tool gathering social support and positive attitudes, only then will it have the potential to transform societal dynamics and consolidate long-term non-discriminative public and private institutions.

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