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"Equality" and "non-discrimination" – reflections on interpretation from a Norwegian perspective

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1. Dear colleagues. I am happy to be back here at the delightful Mont Fleur, at the Second Judicial Forum hosted and facilitated by Professor Richard Calland and his fellows at the Democratic Governance and Rights Unit of the University of Cape Town. Thank you all for including us. We – the delegation and the Norwegian Supreme Court – really appreciate being a part of this.

2. Preparing my comment on equality and non-discrimination, I came to think of George Orwell's famous novel "Animal Farm" from 1945: The animals revolt and take over the farm. As the normative foundation of this animal society, they adopt "Seven Commandments of Animalism", the most important of which is, "All animals are equal".

3. However, as things develop, the pigs establish themselves as the governing class on the farm, resembling more and more to the farmer that had been driven away. And the Seven Commandments are ultimately abridged to one single phrase: "All animals are equal, but some animals are more equal than others".

4. This is a thought provoking and frightening tale of equality being abused and perverted. Moreover, it is a strong reminder of the fact that the notions of equality and non-discrimination are conceptually integrated parts of the Rule of law, of which any constitutional democracy is built. They are, moreover, closely connected to the very ideas of justice, fairness and humanity.

5. Thus, Article 1 of the Universal Declaration of Human Rights proclaims (1948): "All human beings are born free and equal in dignity and rights". Accordingly, no human being shall be more equal as to dignity and rights than others.

6. The general principle of equality and non-discrimination is a fundamental element of International Human Rights law, and has been recognised as such in Article 7 of the Universal Declaration of Human Rights: "All are equal before the law and are entitled without any discrimination to equal protection of the law."

7. This is, as you would know, basically the same as is said in Article 9 first paragraph of the South African Constitution, although your Constitution is concerned both with the protection "and the benefit" of the law.

8. The UN Covenant on Civil and Political Rights (1966) Article 26 represents the *most general internationally binding instrument* as to equality and non-discrimination. It is understood to prohibit all legal or factual discrimination on any area governed or protected by public authority.

   "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

9. Norway is a party to the UN Covenant on Civil and Political Rights. So at this point Norway and South Africa shares a common legal ground. Since 1999 the Covenant has as such been incorporated into domestic Norwegian law, with a priority before ordinary legislation.

10. Moreover, according to Article 92 of the Constitution – as amended in 2014 – the Norwegian Supreme Court, being also the Constitutional Court of Norway – is under a constitutional duty to respect and to secure the rights and freedoms stemming from any Human Rights treaty to which Norway is a party. This, of course, encompasses even the UN Covenant, and its clause of equality and non-discrimination.

11. So, it would be unconstitutional for the Supreme Court to apply any law in a manner that is not in accordance with Article 26, even if the Norwegian Parliament intended such an application. And the Supreme Court must set aside any discriminatory law as not applicable in the case before the Court.

12. At regional European level, Optional Protocol No. 12 to The European Convention on Human Rights (2000) has a general clause on equality and non-discrimination, roughly comparable to that of the UN Covenant on Civil and Political Rights. It entered into force in 2005.

13. However, Norway has not ratified Optional Protocol No 12. A governmental-appointed committee discussed the question of ratification in 2009. The majority of that committee concluded that the legal consequences of ratification were too uncertain. No doubt, the reason for this – to my mind rather peculiar approach – is the fear of expanding the repertoire of complaints to the European Court of Human Rights, being afraid that this would limit the Norwegian government's and Parliament's political freedom too much.

14. Several other European States have chosen a similar approach, *inter alia* Denmark, Sweden, France, Germany and The United Kingdom.

15. The European Unions Charter of fundamental rights has provisions on equality and non-discrimination in Article 20 and 21. Although Norway is not a member of the European Union as such, these provisions will have an impact for Norway, due to our status as an associated participant in the internal market of the EU.

16. These are general clauses on equality and non-discrimination. In addition we have, of course, several particular UN conventions on the issue of equality and non-discrimination, e.g. the Convention on the elimination on racial discrimination (1966), the Convention on the elimination on discrimination against women (1979).

17. Moreover, there are in almost every international human rights instrument *accessory* clauses on non-discrimination that prohibits discrimination as to the effective protection of the rights and freedoms prescribed in that particular convention e.g. in the UN Covenant on Social, Economic and Cultural Rights Article 2 and 3 and the European Convention on Human Rights Article 14.

18. Entering this field as a practitioner – e.g. a judge in a concrete case – one has to appreciate the complex normative structure connected to norms of equality and non-discrimination. I think the approach to this complexity should be based on at least the following two interconnected principles.

19. *Firstly:* The wording in each instrument varies slightly; the history, context and framework differ, so do the legal material available as to

determining the proper interpretation and application.

20. Consequently, it would, to my mind, be advisable not to assume that "equality" and "non-discrimination" generally is one coherent legal norm. There are several norms that are only in part overlapping. So, the judge needs to decide for himself which norms on equality and non-discrimination that are relevant and applicable to the actual case before him.

21. *Secondly*: The judge has to interpret the relevant norms as such, within the precise framework in which that particular norm operates, be it international, constitutional, customary or based on ordinary parliamentary legislation. As to the international norms, any case law from international supervisory bodies will be essential.

22. What I just said does not, however, imply that there is no common core. On the contrary – the basic object and purpose is the same. And it does neither imply that there will be no spill-over effect between the different instruments, so as to perspectives and arguments from one not being able to have an impact as to the interpretation and application of the other.

23. Familiar with the pragmatic methods of common law, I expect you will be comfortable with an argumentative, comparative approach to this. A Norwegian judge would, traditionally, perhaps be a bit less open-minded, due to the historically relatively strong impact from civil law on Norwegian legal culture. But I think this is slowly changing, as the European integration brings about the amalgamation of civil law and common law approaches.

24. Looking at the overall case law of the Norwegian Supreme Court on equality and non-discrimination up till now, what strikes me, is that the case law is rather moderate as to the number

of cases, and that the Court only rarely seems prepared to declare that discrimination has taken place. I am not suggesting that the Court does not take these cases seriously. But it goes without saying that there are policy-issues involved as to the intensity of judicial scrutiny. Moreover, Norway is an egalitarian, rather homogenous, yet fairly liberal, society.

25. And the law is actually developing as we speak: This is due to the fact that although equality before the law was a an ideological pillar when the Norwegian Constitution was drafted in 1814, an explicit provision on this did not become a part of the Constitution before in May 2014, along with the transplantation of a set of international human rights provisions into the Constitution that was carried out as part of the bicentennial anniversary of the Constitution.

26. The inspiration from the international instruments is obvious. Article 98, first paragraph now states: "All are equal before the law". It is a very broad approach, with no other qualifications than that this equality is limited to equality "before the law".

27. To say that "everybody is equal" on a more general footing than this – as the animals actually did in George Orwell's novel – would on a descriptive level be a lie, and on a normative level indeed a frightening idea. Equality and non-discrimination is, on the contrary, a vessel for human *diversity* and personal *freedom*: You are not supposed to become equal. But you have the right to be protected by the law – in you own dignity, the way you are and the way you choose to be – on the same footing as your fellows.

28. The Norwegian Constitution Article 98, second paragraph states: "No human being shall be subjected to unjustified or disproportionate differential treatment." This is a general, and potential quite far-reaching, provision on non-

discrimination. Entities with a legal personality – such as churches, schools, organisations and corporations are, however, as such, excluded.

29. Although quite simple and straightforward as a matter of principle on the more intuitive level, "non-discrimination" represents for the judge a real challenge as to the more accurate interpretation and application. In particular this is connected to the fact that the norms of equality and non-discrimination are neither a prohibition of different treatment, nor a demand that everybody should in effect be alike.

30. As stated by the European Court of Human Rights, discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Hence, a line must be drawn as to when different treatment or results amounts to discrimination, and it is the judge in that particular case that has to decide on that matter.

31. Although rules on non-discrimination primarily says what one can not do, the judge might even have to decide whether, and to what extent, the authorities are actually under a duty to take *active* steps in order to achieve non-discrimination as to the factual results.

32. Traditionally, the Norwegian Supreme Court would tend to be very careful, some would say reluctant, at this point – in particular when it comes to matters traditionally perceived as belonging to the arena of politics. Here, I believe Article 9 of the South African Constitution suggests a more outspoken and dynamic approach. And I understand that the case law

from the Constitutional Court of South Africa is in accordance with such an active approach.

33. A particular issue is connected to *affirmative action* ("positive differentiation"). Such schemes must, I believe, be accepted as tools aimed at changing discriminating *structures* – affirmative action schemes might actually even be mandatory to this end (General Comment No. 18 para 10).

34. However, any differentiation being part of such a scheme must be *balanced*. And there is surely a very delicate balancing to be carried out here, in order not to create discriminatory regimes the other way around. In Norway is has *inter alia* been debated whether the ambition of getting more women into the judiciary, has resulted in an unacceptable and systematic discrimination of male applicants to the bench.

35. According to the UN Human Rights Committee (General Comment No. 18 para 7 and 13) the term "discrimination" as used in Article 26 of the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on unjustified grounds, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms … However, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are *reasonable* and *objective* and if the aim is to achieve a purpose which is *legitimate* under the Covenant.

36. I will expect this to be the starting point in Norwegian law as to the interpretation of Article 98 of the Constitution.

37. So the first crucial point will be to identify any relevant negative effects or different treatments as to recognition, enjoyment or exercise of rights and freedoms. Whether these effects are intended

or only consequential is probably not decisive. Even indirect discrimination must be assumed to be incompatible with Article 98 – that is, where a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups or individuals.

38. Secondly, the judge must evaluate whether the negative effects is at all connected to a discrimination ground. In the UN Covenant, and several other international instruments, the most important grounds are enumerated: But these listings are regularly not meant to be exhaustive.

39. In Article 98 of the Norwegian Constitution, it is simply stated that the different treatment must not be *unjustified* – it must pursue a legitimate aim. At this point the judge will have to face two very demanding tasks – partly as to what reasons that could be accepted and which could not, and partly as to evaluate what reasons that were actually – as a matter of fact – operative in the particular case at hand. As to the latter, difficult issues as to the burden of proof or presumptions may arise, in order to make the ban on discrimination effective in practice.

40. The UN Covenant on Civil and Political Rights does not say anything in particular as to whether it can also amount to discrimination that there is a lack of *proportionality* between the grounds for a differential treatment and the effects of it. However, according to the practice of the Human Rights Committee, what Article 26 allows is differentiation through proportionate measures designed to achieve a legitimate objective.

41. This is in its core comparable to the approach chosen by the European Court of Human Rights, which has stated that "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality'

between the means employed and the aim sought to be realised".

42. Article 98 of the Norwegian Constitution says explicitly that no one "shall be subjected to unjustified *or disproportionate* differential treatment". This implies that even if the criteria used and the motivation for differential treatment as to aims pursued, are fully acceptable as such, the pertinent measure may only be carried out in so far as it can be considered *proportionate*.

43. So, there we are again – the core legal issue being a balancing of competing, often incommensurable interests through the magical and mysterious formula of proportionality – one of the most powerful and all-round tools available to a judge. In his wonderful book *The Strange Alchemy of Life and Law,* (at page 203) justice *Albie Sachs* says that, "if I were to be stranded on a desert island and allowed to take only two constitutional elements with me, I would take human dignity and proportionality".

44. Decisions on proportionality are strongly influenced by generalised notions of what would be permissible in an open and democratic society. The judge needs to approach this in a structured and rational manner, as to at least balance out the impact of subjective, emotional or intuitive elements.

45. Moreover, it is decisive that the motivation of the actual written judgments is designed in order to demonstrate as clearly and understandable as possible, how the balancing has been carried out. This is, of course, partly to address the parties' and the public's need for an explanation. Moreover, a thorough reasoning helps the judge to clarify his thoughts, and facilitates a fundament for subsequent scrutiny – by higher domestic courts or by international tribunals.

46. Coupling discrimination to such proportionality-test indeed makes the potential scope of Article 98 of the Norwegian Constitution far-reaching, and the provision might – depending on the circumstances – facilitate an intensive judicial scrutiny with both legislation and other parliamentary and administrative decisions.

47. I expect the Norwegian Supreme Court will need to look into this in the years to come. The primary goal here must be to develop a body of case law that strikes a fair and workable balance between the need for protection against discrimination on the one hand, and the interests of democracy, the rights or others and an effective administration of the society on the other. In this respect the challenge for the Norwegian Supreme Court is, I believe, exactly the same as for any court performing its duties within the framework of a constitutional democracy governed by the Rule of law.