



Universiteit
Leiden

The Netherlands

From formal to (more) substantive equality approaches across jurisdictions: a tale of a glass half full

Loenen, M.L.P.

Citation

Loenen, M. L. P. (2024). From formal to (more) substantive equality approaches across jurisdictions: a tale of a glass half full. In . Leiden. Retrieved from <https://hdl.handle.net/1887/4082996>

Version: Publisher's Version

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/4082996>

Note: To cite this publication please use the final published version (if applicable).

prof. dr. M.L.P. (Titia) Loenen

**From formal to (more) substantive equality
approaches across jurisdictions –
a tale of a glass half full**



**Universiteit
Leiden**

Discover the world at Leiden University

From formal to (more) substantive equality
approaches across jurisdictions –
a tale of a glass half full

Valedictory lecture by

prof. dr. M.L.P. (Titia) Loenen

as professor of

Human Rights and diversity

at Leiden University

on Friday 27 September 2024



Universiteit
Leiden

1 Introduction

All through my working life I have remained fascinated by the very subject I started out with as an academic some 40 years ago: equality and non-discrimination as legal concepts and standards. This topic has run as a common thread through my work.¹ So now – at this formal farewell – it is an appropriate time to take stock how these concepts have evolved in this period and what promise they may hold for the future.

Anyone looking around at the world today may be inclined to think that taking stock of developments in terms of equality and non-discrimination can hardly result in a positive evaluation. Everywhere human rights have come under increasing attack, including the right to equality and non-discrimination. For many people in the world this crucial right remains a faraway ideal with little relevance in their everyday realities. We also face considerable backlash and attacks on this ideal itself, particularly from populist parties which deny the equal rights of ethnic or religious minorities and from extremely conservative groups around the world, which promote traditional family values at the expense of the equal rights of women and LGBTIQ+ people.

But there are also much more positive developments worth highlighting and on this occasion I want to tell a tale of a glass half full, rather than a tale of a glass half empty. As Eva Brems and Jasper Krommendijk also emphasized quite recently, particularly in difficult times we need positive stories of human rights achievements, which can continue to provide inspiring rallying points for the many people in the world who strive for a decent and dignified life for all human beings.²

If anything, the legal concepts of equality and non-discrimination have turned out to be very dynamic; over the past 40-50 years they evolved significantly in the wide variety of jurisdictions I have become acquainted with over the years. In addition to the Netherlands and Europe, I have become familiar with legal approaches to equality and non-discrimination in the USA, Canada, South Africa and India, as well as under the Inter-American Convention on Human

Rights and the main global human rights treaties.³

In this lecture I want to share with you in which way these legal approaches have developed in a rather common and – as I see it – quite positive direction. In doing so in the limited time I have here, I will inevitably have to generalize and greatly simplify. For those interested I am happy to refer for further elaboration to my book on the conceptualization of equality as a legal standard, which is to be published soon by Brill and will become freely available on internet.⁴

Looking back at the ways in which the legal notions of equality and non-discrimination developed across jurisdictions, two things stand out. First of all, in terms of content, equality and non-discrimination standards evolved from being approached in terms of mainly formal equality to a much stronger focus on substantive equality. Secondly, in terms of process, the development towards a much more substantive understanding of equality has been driven to a large extent by courts and other judicial bodies, and by an increasing interplay between them. In this process, the input of judicial bodies from the Global South seems to be gaining increasing prominence.

In the following, I will first say a few words on the important difference between a merely formal and a fully substantive approach to equality and non-discrimination. Next, I will discuss several particular manifestations of a more substantive understanding of equality which developed across a wide variety of jurisdictions. These include the notions of indirect discrimination, reasonable accommodation and positive action. I will end with some conclusions.

2 Formal and substantive equality

Firstly, then, I will explain the important difference between a merely formal notion of equality and a substantive reading. Let me do so by giving an example.

When I started my working life as assistant professor of ‘Women and Law’ at this university in the middle of the

eighties, the right to equality and non-discrimination of women was high on the agenda. In legal terms it was largely seen as meaning that women had to be treated the same as men, that is as formal equality: women should receive the same pay, the same protection against dismissal, the same social security benefits et cetera. This is all very important indeed, but it was also becoming increasingly apparent that just treating men and women the same was often not sufficient to realize truly equal rights.⁵

Take equal pay: in many instances it was not just women as such who were paid less than men, but part time workers who received a lower hourly wage than full time workers or were excluded from pension schemes. Though in this situation no difference in treatment between men and women is at stake, in social reality treating part-timers worse will predominantly disadvantage women rather than men. Similarly, as mothers were usually the primary care taker, as they still are, the labour market participation of women was hampered much more than that of men by the lack of proper parental leave and affordable child care facilities. So it was quite clear that realizing a truly 'equal' right to work for men and women requires taking such differences into account and to accommodate the needs of workers who combine paid work and care.⁶ What ultimately counts is a more equal *outcome* for men and women.

This focus on a more equal *outcome* of the treatment provided is the core characteristic of a substantive approach to equality.⁷ Substantive equality calls for looking at the *effects* of any rule, measure or policy for men and women – does it result in a more equal outcome – whereas formal equality is satisfied as soon as men and women are treated the same, regardless its actual impact in practice.

Turning back to the examples given of the difference between formal and substantive equality for women in the employment context: focusing on effects turns attention to the underlying, more structural causes of the unequal impact of all sorts of legal rules and policies for men and women, that is in this case to the structurally unequal division of paid

work and care. So what realizing equal rights for women really requires is a structural change in the traditional breadwinner – homemaker model as the dominant standard of reference in law and society. It may be clear that realizing such profound change goes far beyond a simple demand of treating men and women the same. This idea of the need for structural and systemic change was what all of us involved at the time in 'women and law' were working on, each in our own way – Jenny Goldschmidt, Rikki Holtmaat, Susanne Burri, Marjolein van den Brink, myself, and many more.⁸

Women were of course not the only ones to realize that formally equal treatment is often not sufficient to achieve genuinely equal rights. In fact, all sorts of groups who do not fit the dominant standards of reference in law and society have come to struggle for a much more substantive, fully inclusive notion of equality. These include, among others, ethnic and religious minorities, persons with disabilities and LGBTIQ+ people. Depending on the particular context of any society, other underprivileged, vulnerable groups lacking sufficient power to have a real say in the organisation of law and society may come to similar claims. The Dalits in India or indigenous people in many countries around the world are but two examples.

Over time, across a significant number of jurisdictions around the world, legal understanding of the right to equality and non-discrimination evolved from a largely formal towards a much more substantive, outcome oriented approach.⁹ I consider this to be the most important and positive development in the area of equality and non-discrimination standards I have been a witness to. This development is still ongoing.

Interestingly, the move from formal to more substantive approaches to equality is to a large extent fuelled by judicial bodies which are called upon to interpret and apply the right to equality and non-discrimination in legal proceedings. What also stands out in this development, is the increasing interplay between such bodies across the globe.¹⁰ Due to mutual influence, some sort of shared overarching framework

is evolving, which I regard as a very positive and promising development.¹¹

Of particular importance in this respect is the increasingly prominent role of judicial bodies from the Global South, such as the Inter-American Court of Human Rights and the South African Constitutional Court.¹² They have taken a leading role in elaborating a substantive approach to equality and non-discrimination as legal standards. In doing so, they emphasise time and again that the obligations flowing from these standards are ultimately directed at addressing and undoing structural and systemic inequalities and discrimination.¹³

The most pertinent manifestations of a more substantive approach to the right to equality and non-discrimination are visible in the development of the concepts of indirect discrimination, reasonable accommodation and positive action. I will address each of these important concepts in turn.

3 Manifestations of a (more) substantive equality approach

3.1 Indirect discrimination

In my view, indirect discrimination is the single most important concept shaping a more substantive, outcome oriented approach to equality as a legal standard.¹⁴ It had its origin in US Supreme Court case law on racial discrimination in the seventies of the last century. The landmark case, *Griggs*, concerned an employer who required a high school diploma for certain jobs.¹⁵ Though this requirement does not constitute a distinction on the basis of race as such, given the much poorer educational opportunities for black people in the US, it had a disproportionately negative impact on this group. The Supreme Court famously held that given this disparate impact on black people, the employer had to come forward with very good reasons for this requirement; if he could not show it was really necessary for the performance of the particular job at stake, he would be held liable for racial discrimination.

This example clearly shows the important extension of the notion of discrimination which this approach implies. It is not just a difference in treatment on the basis of race as such which may amount to discrimination. Rather, any rule or measure which has a disproportionately negative *effect* on a racial group can also be challenged as a potential violation of the prohibition of discrimination. It is subsequently up to the person or institution responsible for the rule or measure to show that strong and objective reasons can justify it.

In the next decades, the notion of indirect discrimination spread out like an inkblot. It crossed the legal boundaries between countries and jurisdictions and has now become part and parcel of legal equality and non-discrimination standards in a wide range of jurisdictions across the world.¹⁶ In addition to most European and other countries in the Global North, these include major Global South jurisdictions such as Brazil and other Latin American countries, South Africa and India, and probably many more.

Very importantly, the concept of indirect discrimination is also applied to other discrimination grounds beyond race, such as sex or gender, sexual orientation, religion and disability.¹⁷

Regarding sex or gender discrimination, in European countries it has proven to be a very successful instrument to challenge the disadvantageous treatment of part time workers I mentioned before. In many instances, European and national courts have held that treating part time workers less favourable than full time workers, for instance by excluding them from pension schemes or other types of work related benefits, could not be considered objectively justified. Such exclusions thus constitute – in an indirect way – discrimination on the basis of sex or gender. For European countries, the EU Court of Justice has played an extremely important role in improving the legal status of part time workers through this mechanism.¹⁸

In the context of religion, claims of indirect discrimination have also been used in several jurisdictions to demand accommodation of religious norms and practices which do not fit the dominant standard of reference. A prominent example regards dress codes which prohibit the wearing of any head

covering. Though they are neutral in the sense of applying to everyone regardless religion, they will particularly affect members of some religious groups more than others. Muslim women who wear a headscarf for religious reasons are the prime example.

In some jurisdictions such as the Netherlands, banning headscarves from the workplace is not deemed objectively justified in most contexts, whether you work in a dentist office, in a super market or in a public school.¹⁹ An exception is made for the judiciary and the police. In the UK, even police officers and judges are allowed to wear it at work. In France, on the other hand, considerations of state neutrality have been accepted by courts as a proper justification for headscarf bans in all of the public service and beyond.²⁰

If anything, these different responses show that deciding whether an ‘objective justification’ is present or not in cases regarding indirect discrimination is not a mathematical exercise. It is indeed sensitive to all sorts of normative considerations and perspectives which may differ considerably between countries and jurisdictions.²¹

Notwithstanding this vulnerability of the concept of indirect discrimination to the particular interpretation of what may count as an ‘objective’ justification, courts as diverse as the Canadian and the Indian Supreme Court have expressly held that it can be rightly seen as a potentially far-reaching instrument to address structural and systemic forms of discrimination.²²

In the Netherlands, it was indeed also used in this way by the *College voor de rechten van de mens* – the Dutch national institute for human rights – to address the institutional character of racial discrimination present in the so called *Toeslagenaffaire*.²³ The *College voor de rechten van de mens* concluded on the basis of statistical evidence that people with a foreign background were much more often affected by the harsh approach to fraud by the Tax Authorities (*Belastingdienst*). This meant that the burden of proof shifted: it was now up to the Tax Authorities to provide an objective justification for such negative effects. As they were not able to

provide convincing reasons or explanations, they were held to be guilty of indirect racial discrimination.

The example I gave earlier of the way in which the concept of indirect discrimination was also successfully used to construct a legal duty for an employer to accommodate the wish of a worker to wear a headscarf at work is closely related to the notion of ‘reasonable accommodation’. ‘Reasonable accommodation’ has emerged more recently as a distinct concept in non-discrimination law in relation to the equal rights of disabled people.

Compared to the notion of indirect discrimination it is much less clearly developed so far as a legal concept²⁴, but it is definitely also a manifestation of a turn to a more substantive, outcome oriented understanding of equality.

3.2 Lack of reasonable accommodation as a distinct form of discrimination

The notion of ‘reasonable accommodation’ has come to the fore since the adoption of the Convention on the Rights of Persons with Disabilities in 2006 (the CRPD for short).²⁵ This Convention is exerting a worldwide influence on approaching persons with disabilities as full human beings with equal rights, rather than seeing them just as objects of all sorts of – often highly paternalistic – care.

In terms of the CRPD, a failure to provide disabled persons in a particular case with ‘reasonable accommodation’ constitutes a distinct form of discrimination if the accommodation can be provided without imposing a ‘disproportionate or undue burden’.²⁶ Thus for instance, an employer has to provide an employee in a wheel chair with a desk adjusted to the employee’s particular, individual needs, unless he can convincingly show this constitutes a disproportionate burden.²⁷

In addition to a right to this type of individual accommodation, the CRPD also provides for more collective forms of accommodation by requiring states to take

appropriate measures to ensure persons with disabilities access to important areas of public and private life on an equal basis with others, including access to the physical environment, transportation and information and communication technologies.²⁸ An example of this is adding audio cues to traffic lights to service visually impaired persons. The CRPD-Committee distinguishes this type of obligation from reasonable accommodation in two ways. Contrary to the duty of reasonable accommodation, this ‘accessibility’ obligation is not individualized and it is not of an immediate character. It relates to groups and is subject to gradual implementation.²⁹

Interestingly, in several jurisdictions such duties of accommodation in both their individual and more collective form have been constructed by using the concept of indirect discrimination.³⁰ What’s more, this has also been the case in respect of other grounds of discrimination. I already gave an example of this when I referred to the duty of employers in the Netherlands to adjust their dress codes if this is necessary to accommodate workers who wish to wear a headscarf at work. If employers refuse to do so without an objective justification, they are guilty of indirect discrimination on the basis of religion.

The construction of a duty of accommodation as also flowing from a prohibition of indirect discrimination is of particular importance, as it suggests that this type of duty may be perceived as being part and parcel of legal equality and non-discrimination standards. As such, it would not require express or separate recognition or be limited to the context of disability, as the CRPD seems to suggest.

3.3 Positive action

Positive action is a third concept linked to a more substantive reading of equality as a legal standard. Positive action may encompass all sorts of positive measures to overcome the structural disadvantage faced by women, racial minorities or other vulnerable groups facing discrimination.³¹ It responds

to the recognition that discrimination is often systemic and institutionalized. This cannot be undone by just ignoring differences on the basis of race, sex, gender, disability or religion and the like, as a formal equality approach would regard as sufficient.

Positive action can come in different forms. If it comes in the form of what is often called positive discrimination, affirmative action or preferential treatment, it may result in quota or set asides in employment, education or politics which are directly based on, for example, race, sex or disability to redress the underrepresentation of racial minorities, women, or disabled people in these areas of social life. With its focus on achieving a more equal outcome rather than on the question whether the treatment itself is the same regardless of race, sex or disability, positive discrimination belongs to an approach of equality in terms of substantive equality.³²

Many countries across the world have adopted some forms of positive discrimination or affirmative action. The US was once famous for its affirmative action policies regarding racial minorities, but over the years, the US Supreme Court has increasingly struck down such policies as violating the prohibition of discrimination.³³ In many other countries more space for it exists to tackle structural and systemic inequalities and discrimination against particular, historically disadvantaged groups. Examples are quotas for Dalits in India, for black and coloured groups in South Africa and for women in many countries throughout the world.³⁴

Contrary to the concepts of indirect discrimination and reasonable accommodation, positive action in the form of positive discrimination or affirmative action is often quite contested. Even in jurisdictions where it is expressly legally accepted and frequently used, as it is in India or in South Africa, it may give rise to a lot of controversies.³⁵

Many other, much broader positive action policies exist which do not differentiate on the basis of race, sex or disability as such. Having in this sense a ‘neutral’ character, they are much less controversial. In this context, increasing attention seems to be paid to policies tackling the often socially

and economically disadvantaged position of groups facing structural forms of discrimination.

Indeed, poverty or more generally socio-economic disadvantage has been increasingly recognized as both an underlying, root cause and effect of discrimination on many different grounds.³⁶ In response to this insight, addressing poverty as part of fulfilling equality and non-discrimination standards has gained much more prominence.³⁷ At the global level, for example, poverty reduction is central in the formulation of the United Nations Sustainable Development Goals.³⁸ In the Netherlands it is reflected in the increased emphasis on the need for policies ensuring *bestaanszekerheid* (livelihood security), which is now broadly supported across the political spectrum.³⁹ This can also be regarded as very positive advancement in how we have come to think about promoting equality and eliminating discrimination.

4 Conclusions

In this lecture I sketched what I consider to be truly positive developments in the conceptualization of equality and non-discrimination as legal standards. At the same time, reality is almost never just a rosy picture, and it is no different in this case. So it is indeed a glass half full, meaning there must also be a half empty part....

First of all, it is undeniable that the actual influence and positive effects of the concepts of indirect discrimination, reasonable accommodation and positive action I discussed depends on many factors I did not explore in this lecture. Of course, from a scholarly perspective these are also to be addressed to get a fuller picture, but this part is not for today, not for this lecture – again I gladly refer to my forthcoming book.⁴⁰

Secondly, and more generally, it is crucial to be aware of the limits of law as such in achieving the profound social change which a substantive, outcome oriented approach to equality and non-discrimination ultimately requires. The

undoing of systemic and structural disadvantages which are ingrained in the very fabrics of our society is a long and difficult process, which requires the involvement of society at large. Law simply cannot do the job on its own.

This being said, I am still convinced that law can be an important and meaningful instrument for shaping a better and more equal world for all human beings. For such social change to come about three steps are needed: a change in thinking, a change in speaking and a change in acting. In terms of thinking and speaking I would say that legal thought and speech are really on the way forward. Regarding the most difficult phase of all, of actually acting differently, we may have a much longer way to go, but at least some positive steps are now being taken. That is why for me the glass is indeed half full.

So all in all, I witnessed quite some positive developments during my working life, and I am hopeful they will continue. I can only be very grateful for having been part of it for some 40 years together with so many wonderful and inspiring colleagues and students.

This brings me to some final words of thanks.

5 Words of thanks

Looking back, I can only be profoundly grateful to all those people who contributed to the tremendously satisfying and overall very happy years of my university life.

For my first and formative period, which was spent at this university, I first of all thank Jenny Goldschmidt, who hired me as assistant professor in *Vrouw en Recht*. She turned out to be a wonderful and continuing inspiration over all these 40 years. I was also fortunate to have Rikki Holtmaat as an already experienced team mate. With the Department of Constitutional and Administrative Law providing both a vibrant and fun environment, I could not have wished for a better start of my working life.

Moving to Utrecht University in Jenny's footsteps when

she became the first professor in Women's legal studies, I found a new home. First at the department of social law, and later at the department of legal theory. The research programme on human rights resulted in a very fruitful cooperation with the SIM (the Netherlands Institute for Human Rights). By holding functions as Vice-dean, Research director and Dean of PhD students, I became involved in the larger faculty and university life and had the privilege to collaborate with many more wonderful people. I thank all those Utrecht people for the highly rewarding years I spent there, but most of all I thank two people I came to work with who turned out to become particularly dear to me, Susanne Burri and Marjolein van den Brink. Together with Jenny Goldschmidt, the four of us have developed special and lasting bonds of academic and social friendship which I deeply cherish.

Returning to Leiden university in 2013 ushered in a new and final phase. I am profoundly grateful to Rick Lawson, the then dean of Leiden Law School, for giving me the unique opportunity to develop an advanced master in European and International Human Rights Law, and for being the wonderful colleague he is. Setting up the advanced master was one of the most wonderful projects I have ever done. I am also very grateful to Wim Voermans and all the other members of the Department of constitutional and administrative law for giving me a warm welcome and hosting me in their midst. The support I received from Jan-Peter Loof and Ingrid Leijten in the advanced master project deserves special thanks. Another highlight of this final phase has been the collaboration with so many inspiring colleagues from across the law faculty in the advanced master and in our multidisciplinary research programme on human rights. Thank you all.

During these three periods, enduring inspiration has come from many other people I wish to thank here. In addition to the international community of scholars I became part of, many thanks are due to the students I had the privilege to teach over the years. Engaging with a wide variety of perspectives from around the world has been a great joy and enriched both my teaching and research. The editorial board of the NJCM-

Bulletin of which I was a member for over 30 years should also be mentioned for how we matched passionate discussions on human rights with a strong feeling of companionship and a lot of fun. I particularly cherish our trips to Strasbourg. More generally the larger human rights community, both nationally and internationally, was of enduring influence and inspiration.

My very final words of thanks go to my dear family, and – more than to anyone – to Ruud, my warm, loving and cheerful life companion of the past 40 years. He has been there for me from the very start of my working life. I can only hope we will enjoy many more wonderful years together.

Ik heb gezegd.

Notes

1. From my first publication on the basis of my master thesis, M.L.P. Loenen, Artikel 119 EEG-Verdrag en de gelijke behandeling van mannen en vrouwen in aanvullende pensioenregelingen (Article 119 EEC Treaty and equal treatment of men and women in occupational pension schemes), *Sociaal Maandblad Arbeid*, 1986, p. 390-403 through my dissertation, T. Loenen, *Verschil in Gelijkheid. De conceptualisering van het juridische gelijkheidsbeginsel met betrekking tot vrouwen en mannen in Nederland en de Verenigde Staten* (Difference in Equality. The conceptualisation of the legal principle of equality as regards women and men in the Netherlands and the United States, Dissertation Leiden University), Zwolle 1992 to my forthcoming book T. Loenen, *The conceptualization of equality and non-discrimination as legal standards – from formal to more substantive equality*, Brill, 2024.
2. E. Brems, *The state of human rights: an attempt at optimism*, Peter Baehr lecture, 27 June 2024; J. Krommendijk, *The effectiveness of human rights in a multilevel legal order under threat?* Inaugural lecture, 19 June 2024, Radboud University.
3. Particularly the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.
4. Loenen, The conceptualization of equality, forthcoming 2024, *supra* note 1.
5. For an overview of the many equality and other issues faced by women around that time under Dutch law see R. Holtmaat and T. Loenen (red.), *Vrouw en Recht* (Woman and law), Nijmegen, 1997.
6. See for further elaboration K. Wentholt, *Arbeid en zorg: een verkenning vanuit het gelijkheidsbeginsel van de rechtspositie van werknemers met gezinsverantwoordelijkheid* (Labour and care. An exploration of the legal status of employees with family responsibilities in view of the equality principle, Dissertation University of Amsterdam, 1990.
7. Within this overarching idea many varieties of a substantive approach to equality have been developed. See e.g. for a particularly influential one Fredman's four dimensional concept of substantive equality, S. Fredman, *Discrimination law*, Oxford, Oxford University Press, 2022 (3rd edition), p. 29-45.
8. See a.o. J.E. Goldschmidt, *Staats- en bestuursrechtelijke aspecten van positieve actie* (Constitutional and administrative aspects of positive action), in: W.P. Fase, J.E. Goldschmidt and B. P. Sloot, *Positieve discriminatie* (Positive discrimination), *preadviezen NJV*, 1989, p. 57-117; R. Holtmaat, *Met zorg een recht? Een analyse van het politiek-juridische vertoog over bijstandsrecht* (*To care for a right? The analysis of the political-legal discourse on social assistance*), Dissertation Utrecht University, 1992; S. Burri, *Tijd delen. Deeltijd, gelijkheid en gender in Europees- en nationaalrechtelijk perspectief* (Sharing time. Part-time work, equality and gender in a European and national legal perspective), Dissertation Utrecht University, 2000; M. van den Brink, *Moeders in de Mainstream: een genderanalyse van het werk van het VN-Kinderrechtencomité* (Mothers in the mainstream: a gender analysis of the work of the UN Committee on the Rights of the Child), Dissertation Utrecht University, 2006.
9. See for a fuller elaboration Loenen, The conceptualization of equality, forthcoming, 2024, *supra* note 1.
10. This is part of a much more general development in human rights law, see. e.g. L. Burgorgue-Larsen, 'Decompartmentalization': the key technique for interpreting regional human rights treaties, *International Journal of Constitutional Law (I•CON)*, 2018, p.187-2013; T. Loenen, Interactie tussen (semi) judiciële mensenrechtenorganen: op weg naar een mondiaal coherente juridische praktijk? (Interaction between (semi)judicial human rights bodies: towards a globally coherent legal practice?) In: B. de Vries e.a. (red), *Rechtstheorie en praktijk – Liber amicorum professor A.M.Hol* (Legal theory and practice – Liber Amicorum professor A.M. Hol), Boom, Den Haag 2020, p. 93-100.

11. The only jurisdiction I studied which does not seem to fit in this picture of increasing interplay is the US. See for further elaboration Loenen, The conceptualization of equality, Chapter 9, forthcoming 2024, *supra* note 1.
12. More recently, the Indian Supreme Court seems to be joining them; see for further elaboration Loenen, The conceptualization of equality, Chapter 3, forthcoming 2024, *supra* note 1.
13. As the Inter-American Court put it: '(...) the right to equality entails the obligation to adopt measures that ensure that the equality is real and effective; in other words, to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality. To this end, States must actively combat situations of exclusion and marginalization,' IACtHR, 15 July 2020, *Case of the workers of the fireworks factory in Santo Antônio de Jesus and their families v. Brazil* (preliminary objections, merits, reparations and costs), par. 199.
14. Cf. T. Loenen, Indirect discrimination as a vehicle for change, *Australian Journal of Human Rights*, 2000, p. 77-96.
15. US Supreme Court, *Griggs v. Duke Power Co*, 401 US 424 (1971).
16. See for further elaboration Loenen, The Conceptualization of equality, Chapter 5, forthcoming 2024, *supra* note 1.
17. *Ibid.*
18. See for elaboration of the development of indirect discrimination in the jurisprudence of this court C. Tobler, *Indirect discrimination. A case study into the development of the legal concept of indirect discrimination under EC law*, Antwerpen/Oxford, Intersentia, 2005; for the particular development regarding sex or gender discrimination see E. Ellis and P. Watson, *EU anti-discrimination law* (2nd ed.), Oxford, Oxford University Press, 2012.
19. See for an overview of the space for religious expressions in the workplace in the Netherlands W.A. Zondag, *Religie in de arbeidsverhouding* (Religion in the employment relationship), 2011.
20. For a comparison of approaches in the three countries mentioned see H. van Ooijen, *Religious symbols in public functions. A comparative analysis of Dutch, English and French justifications for limiting the freedom of public officials to display religious symbols*, Dissertation Utrecht University, 2012.
21. For a comparative analysis of approaches under the European Convention on Human Rights and EU law see S. Haverkort-Speekenbrink, *European non-discrimination law: a comparison of EU law and the ECHR in the field of non-discrimination and freedom of religion in public employment with an emphasis on the Islamic headscarf issue*, Dissertation Utrecht University, 2012.
22. For the Canadian Supreme Court see *Fraser v. Canada* [2020] 3 SCR 113, par. 36. As the Indian Supreme Court put it, application of the concept of indirect discrimination leads to a switch 'from looking at the intentions or motive of the discriminator to examining whether a rule, formally or substantively, "contributes to the subordination of a disadvantaged group of individuals"', Supreme Court of India, 25 March 2021, *Lt Col Nitisha v. Union of India*, par. 46.
23. *College voor de rechten van de mens, Oordeel* (opinion) 2023-101. The opinions are of a soft law nature; they are not legally binding.
24. Loenen, The conceptualization of equality, Chapter 6, forthcoming 2024, *supra* note 1.
25. For an extensive analysis of how the concept of reasonable accommodation developed in a variety of jurisdictions and now figures in the case law of the European Court of Human Rights see Š. Dušková, *Who should we accommodate? Opening the grounds for reasonable accommodation under the European Convention on Human Rights*, Dissertation University of Essex, 2023, <https://repository.essex.ac.uk/35695/>.
26. Article 2 CRPD.
27. Of course, what is disproportionate may be up for different perspectives, but the starting point is a duty of accommodation and a concomitant right to it.

28. Article 9(1) CRPD. An even more fundamental type of accommodation the CRPD calls for is ‘universal design’, that is ‘design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design’ (Article 2). An example is to design trains and train platforms in such a way that people in a wheelchair can also access them without ramps or other forms of special assistance.
29. CRPD Committee, General Comment No. 6 on equality and non-discrimination, par. 41 and General Comment No. 2 on accessibility, par. 25-27.
30. Loenen, The conceptualization of equality, Chapter 5 and 6, forthcoming 2024, *supra* note 1.
31. The terminology surrounding this topic is inconsistent across jurisdictions and often very contested in itself. See Loenen, The conceptualization of equality, Chapter 7, forthcoming, 2024, *supra* note 1. I use positive action here as a generic, overarching term which encompasses the wide variety of measures which are included under notions such as affirmative action, positive discrimination and remedial, ameliorative or positive measures.
32. Indeed, positive action in the form of positive discrimination deliberately differentiates on the basis of such criteria to redress the under representation of women or particular racial groups in education, political bodies, employment or other areas.
33. It has turned away from regarding affirmative action as an acceptable instrument to undo structural inequalities faced in particular by the black population. Instead, it emphasizes that law and policies must be colour blind whatever the circumstances. See for an elaboration of this approach in the context of education US Supreme Court, *SFFA v. President and fellows of Harvard College*, 600 US 181 (2023).
34. See for these and other example D. Oppenheimer, *The Ubiquity of positive measures for addressing systemic discrimination and inequality. A comparative global perspective*, Brill Research Perspectives in Comparative Discrimination Law, 2019.
35. This is particularly due to difficulties in demarcating the beneficiary groups. Selection of the target group may be too wide, for example if it also includes the group’s more affluent members who do not actually need it. It may also be too narrow if groups in a very similar position are excluded. Affirmative action becomes even more complicated if it leads to competition between disadvantaged groups. In South Africa, for example, Indian students have suffered from the quota set for black students in higher education, though the former have also been structurally disadvantaged (be it less severely) by the Apartheid system. The underlying dilemma is that resources such as places in higher education are extremely scarce. See for further elaboration Loenen, The conceptualization of equality, Chapter 7, forthcoming, 2024, *supra* note 1.
36. In this respect, attention to poverty reduction is closely linked to the realization of social and economic rights.
37. The UN Special Rapporteur on extreme poverty and human rights suggests to include socioeconomic disadvantage as a distinct ground of discrimination under equality and non-discrimination standards, see Olivier De Schutter, *Banning discrimination on grounds of socioeconomic disadvantage: an essential tool in the fight against poverty*, 15 July 2022.
38. ‘No Poverty’ is the first of the 17 goals formulated as part of the 2030 Agenda for sustainable development.
39. As was visible in the prominent place it occupied in the 2023 national elections, see, for example, the conclusions of a poll on this, <https://www.ipsos.com/nl-nl/peiling-verkiezingsthema-bestaanszekerheid-als-campagnethema-draagvlak-monarchie>.
40. Loenen, The conceptualization of equality, forthcoming 2024, *Supra* note 1.

PROF. DR. M.L.P. (TITIA) LOENEN



1984	Master's degree in History, Leiden University	1998-2001	Dean of PhD students, Faculty of Law, Utrecht University
1985	Master's degree in Law, Leiden University	2001-2004	Director of Research and Vice-Dean of the Faculty of Law, Utrecht University
1985-1995	Assistant professor Women and Law (part time), Leiden University	2002-2007	Professor of Gender and Law, Utrecht University
1986-1989	Assistant professor Constitutional Law (part time), Leiden University	2004-2005	Fullbright New Century Scholar; visiting scholar Columbia University
1989-1995	Assistant professor Women's Legal Studies (part time), Utrecht University	2006-2010	Dean of PhD students, Faculty of Law, Utrecht University
1990	Fulbright visiting scholar, New York University	2007-2013	Professor of Legal Theory, Utrecht University
1992	Doctorate degree, Leiden University (<i>Vershil in gelijkheid. De conceptualisering van het juridische gelijkheidsbeginsel met betrekking tot vrouwen en mannen in Nederland en de Verenigde Staten</i>)	2010-2012	Programme director Legal Research Master, Utrecht University
1994	Visiting lecturer, University of the Western Cape	2013-2024	Professor of Human rights and Diversity, Leiden University (part time since 2019)
1995-2002	Associate professor Women's Legal Studies, Utrecht University	2014-2018	Programme director Advanced master in European and International Human Rights Law, Leiden University
1996-1998	Member of the Faculty Board, Faculty of Law, Utrecht University	2015-2020	Programme coordinator research programme 'Effective protection of fundamental rights in a pluralist world', Leiden University
1997-2002	Professor of Women's Legal Studies (endowed chair, part time), Utrecht University	2017-2019	Member European Network of legal experts in gender equality and non-discrimination
		17-10-2024	Professor emeritus



Universiteit
Leiden