

## AFFIRMATIVE ACTIONS AND PRINCIPLES OF NON DISCRIMINATION

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Received : 6 Mei 2025

Revised : 16 Juni 2025

Accepted : 29 Juni 2025

Published : 13 July 2025

DOI : <https://doi.org/10.54443/ijerlas.v5i4.3477>

Link Publish : <https://radjapublika.com/index.php/IJERLAS>

### Abstract

Due to gender construction in society, women are always placed in a lower position than men. This makes women vulnerable to discrimination and injustice. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) then made provisions in the form of affirmative action to increase de facto equality between men and women. However, the regulation of this affirmative action conceptually seems contradictory to the principle of non-discrimination in the Universal Declaration of Human Rights (UDHR) as the reference norm of CEDAW which basically does not want any difference in treatment for each person. For this reason, this study will examine affirmative action in CEDAW in relation to the conditions of women and will also examine whether the affirmative action deviates from the principle of non-discrimination in the UDHR. In this study, the problem is examined using the Juridical-Normative research method and it is known that the condition of women is closely related to the provision of affirmative action. In addition, it is also known that the regulation regarding affirmative action against women is not a deviation from the principle of non-discrimination and cannot be categorized as a form of discrimination as referred to in Article 2 of the Universal Declaration of Human Rights.

**Keywords:** *Affirmative Action; Women; Discrimination; Human Rights.*

### INTRODUCTION

In 1948, the Universal Declarations of Human Rights (UDHR) was formed by the United Nations. UDHR is an official document that until now has been the basis of every regulation governing Human Rights (HAM). This document basically contains a guarantee of the rights to individual freedom.<sup>1</sup>In the UDHR there are several principles or principles that underlie the formation and implementation of human rights. Among the principles that underlie human rights, there is at least a general principle that is very identical to human rights and is often found in almost all instruments regarding human rights. This principle or principle is the principle of non-discrimination. This principle of non-discrimination requires that every individual is not treated in a discriminatory manner. Discrimination itself according to Black's Law Dictionary is "a term used to deny someone the equal protection of the laws and to treat al [sic!] people the same".<sup>2</sup>Furthermore, according to Article 1 number 3 of Law Number 39 of 1999 concerning Human Rights (HAM Law), discrimination is defined as any cancellation, harassment, or exclusion that is directly or indirectly based on human differentiation on the basis of religion, tribe, race, ethnicity, group, class, social status, economic status, gender, language, political beliefs, which results in the reduction, deviation or elimination of recognition, implementation or use of human rights and basic freedoms in life both individually and collectively in the fields of politics, economy, law, social, culture, and other aspects of life. The difference in treatment in discrimination is usually carried out by a party who feels that he has an advantage over the discriminated party where the difference is often made based on gender, race, skin color, ethnicity, religion, social status, wealth, politics, and so on. In the UDHR itself, the principle of non-discrimination is not explicitly regulated in the articles.

<sup>1</sup> Bambang Sutyoso, "The Conception of Human Rights and Its Implementation in Indonesia", UNISIA Journal, Vol. 25, No. 4, 2002, p. 85.

<sup>2</sup> The Law Dictionary Featuring Black's Law Dictionary Online, "Definition of Discrimination (Black's Law Dictionary)", <<https://thelawdictionary.org/discrimination/>>.

However, the existence of the principle of non-discrimination is implicitly stated in Article 2 of the UDHR. The provisions in Article 2 broadly state that everyone has the right to all the rights and freedoms stated in this declaration, without any distinction based on differences in race, color, gender, language, religion, politics, nationality and so on. Since it was proclaimed by the UN in the UDHR in 1948, human rights have continued to develop. One of these developments is marked by the emergence of international legal instruments that regulate sectoral human rights to regulate specific human rights such as the International Covenant on Civil and Political Rights which regulates civil and political rights; the International Covenant on Economic, Social, and Cultural Rights regarding rights in the economic, social and cultural fields; the Convention on the Rights of the Child regarding children's rights; including The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which specifically regulates women's rights and also regulates the elimination of all forms of discrimination against women which aims to increase equality between men and women.<sup>3</sup> To eliminate gender injustice and inequality, CEDAW regulates a policy that requires each participating country of the convention to create temporary special regulations aimed at accelerating "de facto" equality between men and women. These temporary special actions are then often translated by member countries with various terms, one of which is "affirmative action".<sup>4</sup> Therefore the term affirmative action is starting to be heard more often.

The birth of the concept of affirmative action aims to answer the problems that arise when someone comes from a different position but is treated the same.<sup>5</sup> Affirmative action itself is a temporary measure taken as an effort to accelerate the achievement of opportunities to achieve justice and equality. In CEDAW, the temporary special action is aimed at women as an underrepresented group that can be done by making laws and regulations in all fields, especially in the political, social, economic, and cultural fields to ensure that women can develop and progress fully.<sup>6</sup> All forms of affirmative action against women carried out by CEDAW member countries have a noble goal, namely to increase equality and justice for women's groups. Therefore, Article 4 paragraph (1) of CEDAW states that affirmative action carried out by member countries cannot be considered as an act of discrimination. However, based on the description above, it is known that in every implementation of affirmative action, it is done by limiting other groups that are not the subject of affirmative action to obtain their rights. The restrictions imposed by affirmative action seem very contrary to the principle of non-discrimination in human rights. As previously explained, the principle of non-discrimination in human rights requires that every individual must be treated equally without distinguishing between gender, skin color, race, social status, religion, ethnicity, and so on.

The clear contrast between the implementation of affirmative action against women as regulated in CEDAW and the principle of non-discrimination in human rights, causes the implementation of affirmative action to appear like a double-edged sword. This is because on the one hand, affirmative action aims to fight for the rights of women's groups and strive to eliminate all forms of discrimination against them, but on the other hand, it is this affirmative action that actually creates discrimination against male groups who are said to be more represented. Therefore, this article was created to examine the implementation of affirmative action, viewed from the principle of non-discrimination. In writing this article, the author uses a juridical-normative writing method. By using the juridical-normative research method, the author analyzes several sources of law regarding human rights in the form of principles of human rights, especially the principles of non-discrimination and affirmative action. In this article, the author will answer the following problems:

1. How is the background to affirmative action in CEDAW related to women's conditions?
2. Does affirmative action in CEDAW as a rule deviate from the principle of non-discrimination in human rights?

### **Affirmative Action in CEDAW Linked to the Condition of Women**

CEDAW is an "international bill of rights for women", an international convention that is the main source of international law that regulates women's rights. Therefore, the regulation of affirmative action in CEDAW is certainly very closely related to the condition of women, especially the condition of women before CEDAW was formed. In addition to regulating women's rights, this convention also defines what constitutes discrimination against women

<sup>3</sup> Sri Wiyanti Eddyono, "Women's Human Rights and the CEDAW Convention", <<https://referensi.elsam.or.id/2014/09/hak-asasi-perempuan-dan-konvensi-CEDAW/>>

<sup>4</sup>United Nations, "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", UN CEDAW, 2004, p. 4.

<sup>5</sup> Philip Alston & Franz Magnis-Suseno, Law and Human Rights, Yogyakarta: PUSHAM, 2008, p. 36.

<sup>6</sup>See the Explanatory Section of Article 3 of Law Number 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women ( *Convention the Elimination of all Forms of Discrimination Against Women*).

and also determines what the state party must do in their country to end discrimination against women.<sup>7</sup>The existence of CEDAW provides a basis for realizing equality between women and men by guaranteeing equal access and opportunities for women in all aspects of life, such as in political and public life. The birth of the CEDAW convention was the result of the increasing demands of the world community regarding the issue of gender equality as indicated by the emergence of rebellion movements aimed at fighting for the rights and equality between women and men. The movement began in 1792 when a writer named Mary Wollstonecraft published a work entitled "A Vindication of the Rights of Women" which criticized the views of society that placed women as inferior humans.<sup>8</sup>Then in 1837 the term "feminism" was first coined by activist Charles Fourier, which is still used today to describe movements aimed at fighting for women's rights.<sup>9</sup> This movement also began to experience rapid development since the movement was centered in America and the publication of John Stuart Mill's work entitled "The Subjection of Women" in 1869.<sup>10</sup>The feminist movement in this century is known as the first-wave feminism era, which has a main focus on realizing women's legal rights, especially the right to vote or the right to vote.<sup>11</sup>

Awareness of injustice and women's rights in the international arena has continued to increase over time. This was marked by the emergence of the Women's Liberation Movement in the United States which occurred in the 1960s.<sup>12</sup>This movement was later recognized as part of second-wave feminism. Unlike previous eras of feminism, this movement focused on seeking equal rights and opportunities and individual freedoms that touched every area of women's experience, including politics, career, family, and sexuality.<sup>13</sup> In response to this, finally in 1963, the UN asked the Commission on the Status of Women (CSW) to prepare a declaration that would collect all international standards on equal rights between men and women in one international legal document. CSW then succeeded in forming CEDAW in 1967 and began to be adopted by the UN in 1979.<sup>14</sup> Although in the concept of human rights as previously stated that every human being living in this world is given the same rights and equal status without exception for women, in reality it cannot be denied that in reality the construction of society often differentiates access and opportunities between women and men. This difference in treatment often harms women because it generally places women's position lower than that of men. This distinction is what led to the development of gender equality movements which then triggered the birth of CEDAW as a major international agreement on the rights and equality of women which is expected to be able to resolve the issues of injustice and inequality that are always experienced by women.

The differences in treatment between women and men in society are often associated with the biological differences between women and men, which then gives rise to gender construction, such as the division of labor and the division of roles between women and men in society.<sup>15</sup> The term "gender" can be interpreted as the differentiation of status, rights, obligations, roles and functions between men and women as a result of socio-cultural formations (constructions) that are embedded from one generation to the next through social interaction.<sup>16</sup> One example of the division of roles between women and men due to gender construction in society is the division of roles of "Mother" and "Father". With the special conditions that women have such as the ability to conceive, give birth, and breastfeed, society often identifies the role of women as "mothers" who are only worthy of doing work in the domestic sphere such as educating children, cooking, caring for and managing the cleanliness of the house.<sup>17</sup> Based on her role as a "mother", the benchmark for success as a woman is limited to conceiving and producing healthy and physically perfect offspring, intelligent and high-achieving, and of noble character. One proof of the existence of role differentiation due to gender construction that often harms women is seen in Greek civilization society, where at this time the position of women was considered the same as goods that could be bought and sold while men dominated

<sup>7</sup>UN Women, "Overview of the Convention", <<https://www.un.org/womenwatch/daw/cedaw/>>.

<sup>8</sup>Amnesty International, *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup>Elinor Burkett, "Women's Rights Movement", <<https://www.britannica.com/event/womens-movement>>.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup>Linda Napikoski, "A Brief History of CEDAW", <<https://www.thoughtco.com/brief-history-of-cedaw-3529470>>.

<sup>15</sup> Vina Salvania D. Soedarwo, "Understanding Gender and Gender Socialization", Module I of Sociology of Gender Course, Open University, p. 7.

<sup>16</sup>Amalia Rahmadani, "Gender Construction in the Life of Indonesian Society", <<http://penulis.ukm.um.ac.id/esai-konstruksi-gender-dalam-kehidupan-masyarakat-indonesia/>>.

<sup>17</sup>Fitri Lestari, "Sex, Gender, and Social Construction", <<https://www.jurnalperempuan.org/wacana-feminis/seks-gender-dan-konstruksi-sosial>>.

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ownership of women so that married women were considered as their husband's property and could only play the role of wives and housewives who were only allowed to do domestic work.<sup>18</sup> Then continued in the 18th century in Europe it appeared that women were still not considered as rational human beings who deserved to have equal rights with men. During the French revolution, especially in 1789 for example, a declaration was born called The Declaration of the rights of Man and of the Citizen as one of the pioneering legal products that regulates human rights and civil rights.<sup>19</sup> However, in the declaration it states that human rights are the rights of all men and not as HAM (human rights). From the provisions in the declaration it can be seen that at that time women were not yet recognized as humans who also had human rights.<sup>20</sup>

Not much different from other parts of the world, the construction of Indonesian society regarding the position of women also places women as the weak, especially during the colonial era. The lack of opportunities given by the Dutch to access education for natives, which was exacerbated by the implementation of customs and the culture of polygamy, was the cause of the low position of women at that time.<sup>21</sup> For example, in the Javanese cultural construct, women are depicted as *konco wingking* (maids who serve their husbands in domestic matters) so that women's space and role are limited to the well (cleaning the house or clothes), in the kitchen (cooking), and in bed (serving their husbands).<sup>22</sup> In addition to the influence of local culture and customs, the policies made by the colonial government also seemed to differentiate the positions of men and women. This is evidenced by the existence of regulations in the Civil Code which is a legal product inherited from the Dutch colonial era, in which there are provisions stating that married women are included in the group that is not competent to make an agreement.<sup>23</sup>

The existence of gender construction in society that has been preserved and practiced for generations as described above shows that women are very vulnerable to discrimination, injustice and inequality based on gender. Thus, the presence of CEDAW is expected to be able to standardize the world's perspective on acts of discrimination against women. As the main international agreement that regulates women's human rights, this convention recognizes that discrimination that is carried out continuously against women is a reality that is very detrimental to women. CEDAW has a main objective, namely to strive for the elimination of all forms of discrimination against women. This objective is realized by asking countries participating in the convention to be responsible for discrimination against women that occurs in their territory by urging member countries to take appropriate action and recommended in the provisions of CEDAW. One of the actions that countries participating in CEDAW must take is to implement temporary special measures or affirmative action against women, as mandated in Article 4 paragraph (1) of CEDAW which reads:

"(1) Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

For CEDAW, affirmative action is a positive instrument that plays a very important role in realizing women's rights and ending discrimination against women that has been going on for a long time. Because affirmative action is an important instrument that is also able to bring women towards full equality, this concept was then enshrined in Article 4 paragraph (1) of the CEDAW convention. Based on this article, CEDAW requires participating countries to adopt temporary special measures aimed at accelerating de facto equality between women and men. This affirmative action promotes equal opportunities for women in various aspects of life such as politics, economics, education and careers which are carried out by legalizing the provision of temporary special treatment for women. The provision of this special treatment will help make it easier for women to access areas that were previously difficult for women to access before the implementation of this affirmative action. In addition, equal opportunities for women in various aspects of life that affirmative action seeks to promote can also act as a support system that can reawaken women's self-confidence and enthusiasm to develop themselves and participate in various aspects of life, especially

<sup>18</sup>Asmanidar, "The Position of Women in History (Around 1050-700 BC)", *Jurnal Gender Equality: International Journal of Child and Gender Studies*, Vol. 1 No. 2, 2015, p. 22.

<sup>19</sup>Amnesty International, "Women's Rights and Gender Equality", <<https://www.amnesty.id/hak-perempuan-dan-kesetaraan-gender/>>.

<sup>20</sup> *Ibid.*

<sup>21</sup>Adrian Vickers, *Modern Indonesian History*, Yogyakarta: Insan Madani, 2011, p. 65.

<sup>22</sup>Hildred Geertz, *Javanese Family*, Jakarta: Grafiti Press, 1993, p. 130.

<sup>23</sup> See Article 1330 of the Civil Code.



in strategic areas that were previously dominated by men such as the economic, public and political spheres. With the high level of women's participation in these various spheres, it is hoped that it will be able to break the chain of gender construction that is detrimental to women and replace it with a new perspective that no longer discriminates against women. Therefore, providing affirmative action to women is very important in improving the status, position, and position of women who are very vulnerable to injustice by creating a new culture that will replace the perspective of society that previously looked down on the position of women, with a culture that is more gender-equitable and friendly to women.

### **Affirmative action in CEDAW and the principle of non-discrimination in human rights**

The provisions on affirmative action explicitly regulate an obligation for participating countries of the convention to form a policy containing a special temporary action with the aim of increasing equality between men and women, especially in "de facto" equality. The purpose of "de facto" equality is the equality that occurs in fact between men and women in various fields of life, especially in the political, economic, socio-cultural, and civil fields. By achieving "de facto" equality, it is hoped that it will be able to eliminate the gap in position, status, and role between men and women globally, which is basically the main goal of CEDAW. The regulation regarding the provision of affirmative action for women is very important for the fulfillment of women's human rights, as well as in revitalizing the status, position and position of women who were previously vulnerable to injustice. Although basically the affirmative action regulated by CEDAW has a noble goal, namely to ensure that women's rights as human beings are fulfilled, this affirmative action still causes controversy.

In Indonesia itself, policies on affirmative action often reap opposition from various parties who ultimately file a Judicial Review against the law regulating the provision of affirmative action for women. The submission of a judicial review against the implementation of this affirmative action shows that there is a difference of opinion regarding the implementation of affirmative action against women which is caused by a lack of understanding of the background and objectives of the affirmative action. In the perspective of those who are against affirmative action, they see that the implementation of affirmative action against women seems like a "double-edged sword" because on the one hand, the affirmative action aims to fight for the rights of women and seeks to eliminate all forms of discrimination against them, but on the other hand, it is this affirmative action that actually creates discrimination against men. This is because this affirmative action conceptually seeks to eliminate discrimination against underrepresented groups by applying the discrimination itself to groups that are not the subject of the affirmative action. However, although the behavior of affirmative action is discriminatory, the discriminatory action is basically intended to create equal opportunities for parties who have been discriminated against. Therefore, affirmative action is popularly known as "positive discrimination".

Although affirmative action against women imposes a difference in treatment against men, this affirmative action cannot be directly labeled as an act that is contrary to the principle of non-discrimination in human rights. This is because basically the regulation regarding affirmative action has the same purpose as human rights which is reflected through the principle of non-discrimination, namely to ensure the fulfillment of justice between men and women in accessing their basic rights and freedoms. In order to realize the fulfillment of women's basic rights and freedoms as human beings in all aspects of life, it is certainly not enough to just formally recognize the principle of non-discrimination and universal equality. Of course, this requires further regulation to implement the ideals of human rights in real action. One form of implementation of the principle of non-discrimination in human rights is reflected in the regulation of affirmative action against women in CEDAW. Therefore, the existence of affirmative action is not a deviation from the principle of non-discrimination in human rights, but rather is a positive step used to eliminate the gap in status and position between women and men which has so far caused discrimination against women, so that it will indirectly realize the goal of the principle of non-discrimination in human rights itself.

As a positive step taken in realizing the ideals of human rights as stated in the principle of non-discrimination as emphasized in Article 2 of the UDHR, this affirmative action cannot be considered contrary to the principle of non-discrimination. In addition to having the same goal and a mutually supportive relationship between the two, this principle of non-discrimination actually does not question the existence of a difference that every human being has, but rather relies on the absence of differentiation in treatment between each human being on any basis. Therefore, the difference in treatment guaranteed by this affirmative action cannot necessarily be categorized as a form of discrimination against parties who are not the objects of the affirmative action if the difference in treatment is based on objective standards that are the reason for the implementation of an affirmative action. The objective standard for granting affirmative action to women as regulated in CEDAW is the fact that there are differences between men and women which then create inequality and tend to place women in a lower and more disadvantaged position when compared to the position of men as described in the previous sub-chapter. The existence of inequality, both in terms of position, status, and role between men and women in society, then it can be stated that objectively their position

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cannot be assessed equally. Therefore, this affirmative action is present to equalize the position between women and men so that they are able to enjoy their basic rights and freedoms as human beings fully without being limited by gender differences. Therefore, it can be concluded that the regulation regarding affirmative action against women in CEDAW is not a form of discrimination and does not conflict with or constitute a limitation of the principle of non-discrimination in human rights, because it is precisely this affirmative action that supports and ensures that everyone, especially women, no longer experiences discrimination and is able to enjoy their basic rights and freedoms in their entirety as a human being.

### CLOSING

Affirmative action for women as regulated in the CEDAW convention is related to the condition of women who have often experienced discrimination and injustice due to gender construction in society. This relationship occurs because affirmative action is a solution that can change the condition of women who are vulnerable to discrimination and eliminate injustice based on gender differences. Discrimination and injustice that have been experienced by women are attempted to be eliminated by affirmative action through the provision of temporary special actions for women to increase "de facto" equality between men and women. In addition, affirmative action for women can also act as a support system that will rekindle women's enthusiasm and self-confidence so that they are willing to develop themselves and participate in various aspects of life, especially in strategic areas that were previously dominated by men such as the economic, public and political spheres.

With the high level of women's participation in these various areas, it is hoped that it will be able to break the chain of gender construction that is detrimental to women and replace it with a new perspective that no longer discriminates against women. In addition, the regulation of affirmative action against women in CEDAW which was born from the influence of the Feminist Legal Theory school is not a deviation or limitation that is contrary to the principle of non-discrimination in human rights. This is because between the two there is a mutually supportive relationship, where this affirmative action plays a role as a positive step in realizing the objectives of the principle of non-discrimination in human rights, especially for women's groups. In addition, affirmative action against women cannot be categorized as a form of discrimination against men because even though between the two there is a difference in treatment of a particular group, the difference in treatment in this affirmative action is only temporary, while in discrimination, it can occur without being limited by a certain period of time.

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