

# Gender discrimination: A guide to key concepts and terms

SUMMER 2020

This briefing note defines key concepts and terms relevant to legal standards on gender discrimination and gender equality. These are helpful to understand and interpret (i) general non-discrimination and equality provisions contained in the major international human rights treaties, and (ii) specific provisions regulating sex and/or gender discrimination as defined in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. The terms are also useful for application to reading and understanding important regional instruments and treaties with a focus on gender equality and non-discrimination.<sup>1</sup>

## KEY CONCEPTS

### DISCRIMINATION

Discrimination is generally taken to refer to unjustified differential treatment. The legal prohibition against discrimination prevents less favourable treatment of persons by reason of protected characteristics (eg: sex, race, religion, sexual orientation) and, increasingly, on the failure to take into account differences between people related to these characteristics, where this failure results in unequal outcomes which cannot be justified.

In general international law, a violation of the principle of non-discrimination arises if:

- 1 equal cases are treated in a different manner;
- 2 a difference in treatment does not have an objective and reasonable justification; or
- 3 there is no proportionality between the aim sought and the means employed.

These requirements have been expressly set out by international human rights supervisory bodies, including the Human Rights Committee (HRC);<sup>2</sup> the European Court of Human Rights<sup>3</sup> and the Inter-American Court.<sup>4</sup>

Discrimination is categorised in the following forms:

- + **Direct discrimination** is concerned with different treatment.
- + **Indirect discrimination** occurs when everyone is treated the same in circumstances where this serves unjustifiably to disadvantage certain groups.
- + **Failure to make reasonable accommodation**: obligations of reasonable accommodation apply in relation to disability discrimination.

<sup>1</sup> Key regional treaties in this classification include the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belém do Pará); the African Charter on Human and Peoples' Rights and its 2003 Protocol on the Rights of Women in Africa (the Maputo Protocol); the European Convention on Human Rights, European Social Charter and the Council of Europe Convention on preventing and combating violence against women and domestic violence 2011 (Istanbul Convention)

<sup>2</sup> See HRC General Comment 18, para. 13 and *Jacobs v. Belgium*.

<sup>3</sup> See *Marckx v. Belgium*.

<sup>4</sup> See *Advisory Opinion No. 4*.

## EQUALITY

The distinction between direct discrimination, on the one hand, and indirect discrimination/reasonable accommodation, on the other, is broadly related to the distinction between formal and substantive notions of equality. **Formal equality** corresponds generally to Aristotle's oft-cited prescription that "things that are alike should be treated alike." **Substantive equality** corresponds to Aristotle's less regularly cited statement that "things that are unlike should be treated unlike in proportion to their unlikeness."

**Equality** may be categorised in the following ways:

- + **Equality of opportunity:** the idea that people ought to be able to compete on equal terms, or on a "level playing field" (the avoidance of direct discrimination).
- + **Equality of outcome:** the idea that all individuals should have the same share of material wealth and goods, not merely a chance to obtain them without the hindrance of particular obstacles (equalising where people end up rather than where or how they begin). A legal concern for equality of outcome in the context of sex/gender requires the creation of an enabling social environment by addressing the ideology and cultural constructs that create hierarchies within gender relations. It is unlikely to entail a commitment to absolute equality of outcome, rather to the removal of unfair or unjustifiable differences of outcome (the avoidance of indirect discrimination).
- + **Formal equality** is generally regarded as being achieved when everyone is subject to the same rules (the avoidance of direct discrimination).
- + **Substantive equality** is concerned with outcomes. The concept of substantive equality has special relevance in addressing disadvantage based on sex and gender. Substantive gender equality requires that equality is interpreted according to the broad context or realities of women's disadvantages and the impact of these circumstances in terms of eliminating disadvantage in outcome or result. The scrutiny of gender-neutral formal laws, policies and programmes that treat women and men alike becomes necessary to evaluate whether they will accelerate the achievement of gender equality in practice and eliminate discrimination against women.
- + **Transformative equality:** a concept that seeks to (1) break the cycle of disadvantage; (2) promote respect for dignity and worth; (3) accommodate difference by achieving structural change; (4) promote political and social inclusion. The value of each dimension is further strengthened by their interrelationship:

*"First, breaking the cycle of disadvantage recognises that individuals and groups have suffered because of their personal characteristics, and that specific and positive measures are required to redress this imbalance. Second, the dignity dimension addresses recognition harms such as harassment, prejudice, stereotypes, stigmas, negative cultural attitudes, and humiliation. Third, the need for structural change entails 'a redistribution of power and resources and a change in the institutional structures that perpetuate women's subordination.' Addressing structural disadvantage is not dependent on correcting the actions of individual perpetrators. Fourth, the participation dimension requires the inclusion of women in all public, private, political, and social decision-making processes. One of the strengths of the transformative equality framework is its ability to capture the interaction between dimensions. Placing these four elements together highlights the connections among redistribution, recognition, and exclusion harms." (Sandra Fredman)*

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) embraces the concept of transformative equality by requiring that States Parties take all appropriate measures "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." (Article 5(1)(a))

## DIGNITY

The concept of dignity has been used by courts in a variety of jurisdictions to expand legal notions of equality, determining on which grounds discrimination should be regulated, and/or in deciding when differential or disparately impacting treatment violates a prohibition on discrimination. The constitutional courts of Canada and South Africa have been particularly active in considering the role of dignity in relation to equality and (non)discrimination.

In ***Prinsloo v Van der Linde***,<sup>5</sup> South Africa's Constitutional Court stated that “[w]e are emerging from a period in our history during which the humanity of the majority of our inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.” The court went on to state that the notion of unfair discrimination (which the Constitution prohibited) “principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.” In ***Minister of Home Affairs v Fourie***,<sup>6</sup> where a lesbian couple had challenged the unavailability to them of civil marriage, Sachs J for the majority declared that:

*“A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference.”*

In ***Law v Canada***, a Canadian Supreme Court challenge to age discrimination in survivors' benefits, Iacobucci J stated that:

*“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups.”*<sup>7</sup>

In 2018, in ***Navtej Singh Johar v Union of India***, India's Supreme Court read down India's anti-sodomy laws (section 377 of the Penal Code) and decriminalised consensual sex between adults of the same gender on the grounds of constitutional protection of dignity as well as privacy.<sup>8</sup> The Court ruled, “life without dignity is like a sound that is not heard...dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.”

Similarly, Botswana's High Court based its June 2019 decision in ***Letsweletse Motshidiemang v AG Botswana***, in which it decriminalised consensual same-sex relations between adults by striking down relevant provisions of the country's Penal Code, in part on its impact on human dignity. Among the dicta relied upon by the Court was that of Iacobucci J in *Law v Canada*, that of Sachs J in *Fourie*, and that of Chandrachud J in the *Singh* case. The Court ruled that the provisions discriminated on grounds of sex (which it accepted included sexual orientation) and violated constitutional rights to privacy and liberty.

These decisions demonstrate that concern for the protection of human dignity can be a powerful tool in enabling the judiciary to carve out protection for those discriminated against on grounds including gender orientation and sexual orientation, as well as gender, in circumstances in which domestic laws do not otherwise provide for such protection.

5 1997 3 SA 1012 (CC).

6 2006 1 SA 524 (CC).

7 1999 1 SCR 497, §53.

8 WPC(C) No 76/2016, 6 September 2018, judgment of Dipak Misra C.JI and AM Khanwilkar J.

## KEY TERMS

**Sex** is used to refer to biological categories of male and female. In the context of anti-discrimination/equality law, “sex” is often used to incorporate gender, gender identity and sometimes sexual orientation.

**Gender:** refers to the socially and culturally constructed attributes assigned to individuals on the basis of their assigned sex at birth, male or female.

**Gender Identity:** refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>9</sup>

**Gender Expression:** each person’s presentation of the person’s gender through physical appearance, including dress, hairstyles, cosmetics, and mannerisms, speech, behavioural patterns, names and personal references. Gender expression may or may not conform to a person’s gender identity.<sup>10</sup>

**Gender pronouns:** these refer to how a person chooses to publicly express their gender identity through the use of a pronoun, whether it is a gender-specific or a gender-neutral pronoun.

**Gender reassignment:** a process, which may or may not involve surgery or other medical intervention, by which a person acquires a gender other than that associated with the sex assigned at birth.

**Cisgender:** refers to individuals who self-identify with, or do not object to, the gender that was assigned to them at birth. Cisgender is derived from the Latin word *cis* (“on this side of”).

**Non-binary:** an umbrella term for gender identities that fall outside the gender binary of male or female. This includes individuals whose gender identity is neither exclusively male nor female, a combination of male and female, or between or beyond genders.<sup>11</sup>

**Sexual orientation:** refers to a person’s sexual identity (in relation to the gender to which they are attracted) as lesbian, gay, bisexual or heterosexual.

**LGBTIQA+:** an umbrella term for lesbian, gay, bisexual, transgender, gender diverse, intersex, queer, asexual and questioning people.

**Trans:** the term includes those people who have a gender identity and/or a gender expression that is different from the sex they were assigned at birth. It is an umbrella term that includes, but is not limited to, men and women with trans parts and people who identify as transsexual,<sup>12</sup> trans, transvestite/crossdressing, androgyne, polygender, genderqueer, agender, non-binary, gender variant or with any other gender identity and gender expression which is not standard male or female, and who express their gender through presentation (eg: self-referring language, clothing etc.) or body modifications.

**Intersex persons:** persons who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure.<sup>13</sup>

For more information visit [www.sistersforchange.org.uk](http://www.sistersforchange.org.uk)

Follow us on [@sisters\\_4change](https://twitter.com/sisters_4change)

Registered Company No. 9136425

Registered Charity No. 1165647

Copyright © Sisters For Change 2020

<sup>9</sup> Definition set out in the Introduction to the *Yogyakarta Principles 2007*.

<sup>10</sup> Definition set out in the Preamble to the *Yogyakarta Principles plus 10*.

<sup>11</sup> Definition of the Trans Equality Network Ireland.

<sup>12</sup> The term “transsexual” is often used to refer to individuals who undertake a process of full medical transition, seeking to align their bodily characteristics with their internal sense of gender.

<sup>13</sup> Definition set out by the Commissioner for Human Rights of the Council of Europe in his 2015 report, *Human Rights and Intersex People*.