

The prohibition of gender discrimination in international law

SUMMER 2020

This briefing note outlines international anti-discrimination and equality standards relating to sex/gender, sexual orientation and gender identity. Whilst protection from discrimination in relation to sex/gender is highly developed at the international level, sexual orientation and, in particular, gender identity have only recently been identified as subjects for protection.

GENERAL NON-DISCRIMINATION PROVISIONS

- 1 The major international human rights treaties contain general non-discrimination and equality provisions. Article 2 of the Universal Declaration on Human Rights prohibits discrimination on the following 10 grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status. The same prohibited grounds are included in Article 2 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is important to note that the grounds enumerated in these provisions are not exhaustive. The term “other status” has an open-ended meaning; some grounds not explicitly mentioned, such as age, gender, disability, nationality and sexual orientation could also be considered prohibited grounds.

Freestanding and parasitic equality rights

- 2 ICCPR Article 26 provides a free-standing equality right:
“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.”
The list of protected grounds in Article 26 includes sex but not sexual orientation or gender identity, but it is an open list which includes “other status” and which can and has been interpreted to extend to sexual orientation.
- 3 By contrast, ICESCR Article 2(2) provides that State parties “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to” the same list of protected grounds as Article 26 ICCPR (emphasis added). Further, ICESCR Article 3 provides, “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” The ICESCR’s non-discrimination and equality provisions are “parasitic” – they only prohibit discrimination in the enjoyment of the rights contained in the Covenant and have no independent existence – as distinct from “free-standing” equality rights like ICCPR Article 26. Parasitic non-discrimination provisions are also contained in a number of regional equality/non-discrimination provisions.

Definition of discrimination

- 4** The ICCPR does not define discrimination but in its General Comment No. 18 (1989), the Human Rights Committee (HRC) stated:

“discrimination’ as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground... 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.”

- 5** The HRC has focused attention over the years not only on direct sex/gender discrimination, including inequality related to marriage and decisions relating to children; freedom of movement for women; sex selective prenatal selection and abortion; women’s vulnerability to rape and abduction during states of emergency; pregnancy and childbirth related deaths including those related to unsafe illegal abortions; female infanticide, dowry killings and bride burnings; forced abortions and sterilisations of women; the denial of full recognition to women as persons under the law and discrimination against women in social security arrangements; but also to issues of indirect sex discrimination such as domestic violence and the trafficking of women and children (of which women are the primary rather than the exclusive victims); the plight of single parents; the poor participation rates of women in the conduct of public affairs; and the disproportionate employment of women in areas of the economy unregulated by labour laws.

SPECIFIC GENDER DISCRIMINATION PROVISIONS

- 6** The following international treaties contain specific provisions regulating sex and/or gender discrimination: ICCPR; ICESCR; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child. Significant in the regional context are 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 (ECHR), European Social Charter and the Council of Europe Convention on preventing and combating violence against women and domestic violence 2011 (the Istanbul Convention).

Prohibition of discrimination against women

- 7** CEDAW imposes specific obligations on States Parties designed to eradicate discrimination against women and promote gender equality. It imposes strong obligations for state action. **CEDAW Article 1** states:

“[T]he term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

- 8** **CEDAW Article 2** requires States Parties not only to “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation” but also to:

- + ensure the practical organisation of this principle, including by:
 - > adopting legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
 - > ensuring that women are effectively protected against any act of discrimination by establishing competent national tribunals;
 - > taking all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- + modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- + eradicate discrimination to ensure the full development and advancement of women;

- + 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;
- + suppress all forms of traffic in women and exploitation of prostitution of women; and
- + eliminate discrimination against women in the fields of employment, health care, and other areas of economic life including the right to benefits and financial services.

9 CEDAW imposes specific obligations on States Parties to eliminate discrimination against women in relation to participation in the political and public life of the country; the right to acquire, change or retain nationality; in all levels of education; in relation to marriage and family relations, legal capacity, freedom of movement and the freedom to choose residence and domicile.

Special measures to remedy historical disadvantage

10 CEDAW Article 4 makes it clear that temporary special measures – or positive discrimination – are permitted in order to secure substantive equality. The legitimacy of positive action is widely recognised by the bodies responsible for administering human rights instruments. In its General Comment No. 18, the HRC stated:

“The enjoyment of rights and freedoms on an equal footing... does not mean identical treatment in every instance... the principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”

11 The CEDAW Committee has found on many occasions that states have breached CEDAW by failing adequately to protect women and girls from gender-based violence.¹ In *Vertido v Philippines* (2008), the Committee found breaches of CEDAW resulting from the operation of rape myths and other gender stereotypes in the criminal justice system which had resulted in the acquittal of the applicant’s rapist.² And in *M W v Denmark* (2012) and *J I v Finland* (2016), it found breaches of CEDAW resulting from child custody decisions which failed to take into account the violent behaviour of women’s former partners.³

12 The HRC has also issued a number of decisions condemnatory of sex and/or gender discrimination including, but not limited to, violence against women. For example, in 2011 it found that Argentina had violated Articles 3, 7, 14(1), 17, 24 and 26 ICCPR by reason of the treatment by the criminal justice system of the applicant, a young indigenous woman who had been orally and anally gang-raped when she was 15 years old. The investigation had centred around her “virtue” and she had been subject to virginity testing and accused of being a prostitute.⁴ The HRC found that the applicant had discriminated against by reason of her sex and ethnicity, and that the right to privacy was breached “when the sexual life of a woman is taken into consideration in deciding the extent of her legal rights and protections, including protection against rape.”

13 In 2005, the HRC found that Peru had violated Articles 2, 7, 17 and 24 ICCPR by denying a 17-year-old girl access to abortion in case of fatal foetal abnormality.⁵ In 2016 it found that Ireland had subjected a woman to inhuman and degrading treatment by denying her access within the state to the termination of her pregnancy in circumstances in which the foetus would die prior to or shortly after birth.⁶ A majority of the Committee stopped short of finding gender discrimination, though it did find a breach of Article 26 by reason of the State’s failure “adequately [to] take into account her medical needs and

¹ See for example *VK v Bulgaria* (2008, No.20), *X & Y v Georgia* (2009, No.34), *X v Timor-Leste* (2015, No.88)

² (2008) No.18.

³ *M W v Denmark* (2012) No.46; *J I v Finland* (2016) No.103.

⁴ *LNP v Argentine Republic* (2007) No.1610.

⁵ *Huaman v Peru* case No. 1153/ 2003.

⁶ *Melett v Ireland* case No. 2324/2016.

socioeconomic circumstances.” A similar approach was taken the following year in *Whelan v Ireland*⁷ in which the applicant complained that the criminalisation within Ireland of abortion on grounds of fatal fetal impairment amounted to sex discrimination in violation of articles 2(1), 3 and 26 ICCPR. In both cases minority views were recorded to the effect that the effective unavailability of abortion to Irish women amounted to sex discrimination including by reason of the prioritisation it entailed of women’s reproductive functions above their physical and mental health and autonomy.

Prohibition of discrimination on the basis of sexual orientation or gender identity

- 14** The *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*,⁸ drawn up in 2006 by international human rights experts and added to in 2017 (*Yogyakarta Principles plus 10*), seek to end discrimination and promote equality on the grounds of sexual orientation and gender identity. The Yogyakarta Principles represent what might be the content of an international instrument equivalent to CEDAW, but they are not an UN instrument and they are not legally binding. Though far from uncontroversial, they have proven influential in the work of UN and regional human rights bodies.
- 15** There have been efforts since the 1990s to move the rights of lesbian, gay, bisexual and transgender (LGBT) persons onto the UN agenda. Since 2003, General Assembly (GA) resolutions on “extrajudicial, summary or arbitrary executions” have referred to international law obligations to investigate killings of persons “because of their sexual orientation or gender identity.”⁹ In 2008 a Joint Statement on the human rights of LGBT persons was supported by 66 states but received a negative formal response from 57 others. More success was achieved at the UN’s Human Rights Council which adopted a Resolution on Human Rights, Sexual Orientation and Gender Identity in June 2011. The Resolution expressed “grave concern” at violence and discrimination based on sexual orientation and gender identity and requested the first official UN report on the issue. In June 2016, the Human Rights Council adopted Resolution 32/2, *Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity*, which established the mandate of an Independent Expert on protection against LGBT-related violence and discrimination.
- 16** The 2012 Report of the Office of the UN High Commissioner for Human Rights identified five core obligations of States in relation to LGBT equality: (1) to protect individuals from homophobic and transphobic violence; (2) to prevent torture and cruel, inhuman and degrading treatment of LGBT persons; (3) to decriminalise homosexuality; (4) to prohibit discrimination based on sexual orientation and gender identity; and (5) to respect freedom of expression, association and peaceful assembly.
- 17** Other UN human rights treaty bodies including the Committee on the ICESCR have proceeded on the basis that “other status” in equality provisions includes sexual orientation. The Committee asserted in General Comments 14 (2000) and 15 (2003) that the Covenant prohibited “any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of” the relevant right.¹⁰ General Comment 20 on *Non-discrimination in economic, social and cultural rights* (2009) stated for the first time:
- “In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”*
- 18** The ICESCR Committee’s General Comment 22 on the right to sexual and reproductive health (2016) makes extensive reference to sexual orientation and gender identity, referring to the “multiple and intersecting forms of discrimination” suffered by lesbian, gay, bisexual, transgender and intersex persons and persons with disabilities:

7 Case 2425/2014.

8 See www.yogyakartaprinciples.org/principles_en.html.

9 See GA Res 69/182, 18 December 2014, A/RES/69/182.

10 The General Comments concerned, respectively, the rights to health and to water.

“Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status. Criminalisation of sex between consenting adults of the same gender or the expression of one’s gender identity is a clear violation of human rights. Likewise, regulations requiring that lesbian, gay, bisexual transgender and intersex persons be treated as mental or psychiatric patients, or requiring that they be “cured” by so-called “treatment”, are a clear violation of their right to sexual and reproductive health. State Parties also have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health.”

- 19** In its General Comment 35 on Article 9 ICCPR (liberty and security of person) in 2014, the HRC made clear that “everyone” included LGBT people and referred to “violence against persons on the basis of their sexual orientation or gender identity.” The Committee’s General Comment on the right to life in 2018 specifically references the duty to protect LGBT persons: “The duty to protect the right to life requires States parties to take special measures of protection towards persons in situation of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence” including, *inter alia*, “victims of domestic and gender-based violence and human trafficking ... [and] LGBTI persons.”
- 20** UN Committees have also dealt with sexual orientation and gender identity in various of their adjudications on individual complaints. *Toonen v Australia* (1994) was the first of these. The HRC interpreted “sex” in Articles 2(1) and 26 of the ICCPR to cover “sexual orientation.” The decision, which was a landmark one, involved a challenge to Tasmania’s sodomy laws, the HRC ruling that the criminalisation of consensual sex between adult males in private violated the right to privacy protected by Article 17 ICCPR. It confirmed that “the reference to ‘sex’ in Articles 2(1) and 26 is to be taken as including sexual orientation.”
- 21** In 2000 and again in 2005, the HRC ruled that differences in treatment in the award of pension benefits to same-sex and other-sex partners violated Article 26.¹¹ And in 2012, the HRC found that the conviction and fining by Russia of the applicant, a lesbian activist, on charges of “Public actions aimed at propaganda of homosexuality” in connection with her activism breached Article 19 ICCPR.¹² The Committee declared that national laws restricting freedom of expression must not only comply with the requirements of Article 19(3) but that they “must also themselves be compatible with the provisions, aims and objectives of the Covenant, including the non-discrimination provisions of the Covenant” and (citing *Toonen*) that “the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.”
- 22** In 2017 the HRC ruled that Article 26 was breached by the unavailability to same-sex couples married outside Australia of divorce within Australia (which did not recognise same-sex marriage).¹³ In the same year the Committee also found that the applicant, a transgender woman, had been discriminated contrary to Article 26 on grounds of marital and transgender status because she could not obtain a birth certificate identifying her as a woman as long as she remained married to her wife.¹⁴

For further information about international and regional anti-discrimination and equality standards relating to sex/gender, sexual orientation and gender identity and models of good practice, please access the SFC-EJA report *Comparative legal review of anti-discrimination & equality legislation across the Commonwealth* available on our website, www.sistersforchange.org.uk/global-law-reform-resource-hub/

For more information visit 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

¹¹ *Young v Australia*, case No. 941/2000, *X v Colombia* case No. 1361/2005.

¹² *Fedotova v Russia* case No.1932/2012.

¹³ *C. v Australia* case No. 1932/2010.

¹⁴ *G. v Australia* case No. 2172/2012.