

# **International Human Rights Law and Gender Equality and Non-Discrimination Legislation**

Requirements and Good Practices

Briefing paper

April 2014



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## **INTRODUCTION**

Across the world women continue to face a wide range of inequalities and discrimination because they are women. Such gender inequality and sex discrimination takes diverse forms and results from the conduct of a variety of actors, across public and private spheres. For example, in a wide range of jurisdictions laws and policies continue to actively discriminate against women in areas such as legal status, nationality, family and marriage, inheritance and property rights. Violence against women is pervasive, while legal and justice sector responses fail to effectively address, prevent and punish it. Discrimination against women and girls in the workplace, and in relation to education and healthcare, remains widespread. Meanwhile a series of barriers continue to impede women's access to legal protection and redress.

Indeed, in as much as the forms of discrimination against women and the factors behind it vary, so too do the measures required to address it. Ensuring the principle of gender equality is enshrined in domestic law and enacting legislation which prohibits discrimination in all aspects of women's lives and provides women with appropriate remedies are just some of the legal measures which international human rights law requires of states to prevent, address and redress gender discrimination and move closer to achieving gender equality. Yet they are vital.

First because such legal provisions provide women with a normative basis and procedural mechanisms on which to seek justice when they face varied forms of discrimination and inequality. Second, because they play a broader social role and constitute a crucial element in preventative and regulatory efforts. They not only send an important signal that gender inequality and discrimination against women are unlawful but also establish standards at the national level against which various actors can measure and improve their conduct.

This briefing paper summarises the basis of these international obligations and outlines a number of the key elements which non-discrimination and gender equality laws must include in order to guarantee compliance. Its focus is on legal provisions, usually found in the areas of civil, administrative or constitutional law, which are designed to offer express and specific equality and non-discrimination protection. It does not address the correlative international obligations on States to enact effective criminal laws to

deal with certain forms of discrimination against women, such as gender-based violence.<sup>1</sup>

## **THE GENERAL INTERNATIONAL OBLIGATION TO ENSURE EQUALITY AND FREEDOM FROM DISCRIMINATION**

The international obligation to guarantee women's enjoyment of their human rights on a basis of equality and without discrimination is enshrined in a range of international human rights treaty provisions.<sup>2</sup>

This obligation requires States to *respect*, *protect* and *fulfil* women's human rights on a basis of equality and non-discrimination.<sup>3</sup> On the one hand this means that States must ensure that officials refrain from conduct that directly or indirectly results in the denial of women's equal enjoyment of their human rights (*respect*). On the other it necessitates that States protect women from discrimination by private actors (*protect*). In addition it requires States to take a wide variety of proactive steps to ensure that women and men enjoy equal rights *de jure* and *de facto* (*fulfil*).<sup>4</sup>

These interrelated obligations mean that among other things, States must:

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<sup>1</sup> Gender based violence is a particular form of discrimination in relation to which international law places requirements on States concerning the enactment of specific criminal laws and ensuring effective criminal law enforcement, through investigation and prosecution. There are a range of sources and materials which address these obligations: See for example: CEDAW, General Recommendation 19, Violence Against Women, U.N. Doc. CEDAW/C/1992/L.1/Add.15, (hereinafter CEDAW General Recommendation 19), Para. 9; Article 4(c), UN Declaration on the Elimination of Violence Against Women, 20 December 1993, General Assembly, Resolution A/RES/48/104; , Communication No. 5/2005, 6 August 2007, Para. 12.1.4; *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, U.N. Doc. E/CN.4/2006/61, 20 January 2006; Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Eliminating Violence against Women, May 2013, A/HRC/23/49; In-depth Study on all forms of violence against women, Report of the Secretary-General, July 2006, A/61/122/Add.1; UN Handbook for Legislation on Violence Against Women, 2010.

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Articles 2,3 & 26 International Covenant on Civil and Political Rights (ICCPR); Articles 2 and 3 International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 2, Convention on the Rights of the Child; Articles 5 and 6, Convention on the Rights of People with Disabilities.

<sup>3</sup> See Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 3 ICESCR; CEDAW, General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW General Recommendation 28), Paras.9 and 37 and in general; CESCR, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4, 11 August 2005, Para. 20 (hereinafter CESCR General Comment No.16), Para. 17; HRC, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) (hereinafter HRC General Comment 28); See also in general CESCR General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) UN. Doc. E/C.12/GC/20, 2 July 2009 (hereinafter CESCR General Comment 20).

<sup>4</sup> CEDAW General Recommendation 28, Paras.9 & 37, and in general. CESCR General Comment 16, Paras. 17-21; See also HRC, General Comment No. 28, Paras. 3 & 4 and in general.

- Eliminate direct and indirect<sup>5</sup> forms of *de jure* discrimination and inequality, which manifest in laws, policies, regulations; and *de facto* inequality and discrimination, which manifest in practice.<sup>6</sup>
- Protect women from these forms of inequality and discrimination wherever they occur, throughout public and private spheres and whether they are perpetrated by public authorities, the judiciary, organizations, enterprises or private individuals.<sup>7</sup>
- Take measures to address: discrimination and inequality which arises due to biological and socially and culturally constructed differences between women and men;<sup>8</sup> gender-based stereotypes, roles and norms;<sup>9</sup> underrepresentation of women in key sectors and professions;<sup>10</sup> and the unequal distribution of resources and power amongst men and women.<sup>11</sup>

## **THE SPECIFIC OBLIGATION TO ESTABLISH EFFECTIVE LEGAL GUARANTEES OF NON-DISCRIMINATION AND EQUALITY**

International human rights treaty monitoring bodies have repeatedly stressed that a key step towards compliance with these obligations involves ensuring that:

- Through constitutional or other legislative means, the principles of gender equality and non-discrimination against women are enshrined in domestic law and given overriding and enforceable status.<sup>12</sup>

<sup>5</sup> CEDAW General Recommendation 28, Para. 16. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Meanwhile indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women.

<sup>6</sup> Articles 2(a)-(g) & 3, CEDAW; CEDAW General Recommendation 28, Paras. 9, 16, 35 & 36 and in general; CEDAW, General Recommendation 25, On article 4, paragraph 1, on temporary special measures, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004) (hereinafter CEDAW General Recommendation 25), Paras. 7 & 8; CESC General Comment 16, Paras. 6-8, 10-14, 17-21. See also in general CESC General Comment No. 20.

<sup>7</sup> Article 2(a)-(g) CEDAW; CEDAW General Recommendation 28, Paras. 10,13 & 17 and in general. CEDAW General Recommendation 25, Para. 7. CESC General Comment 16, Paras. 6-8, 10-14, 17-21.

<sup>8</sup> CEDAW General Recommendation 25, Para. 8. See also in general CESC General Comment No. 20.

<sup>9</sup> Article 5 CEDAW; CEDAW General Recommendation 28, Para. 9; CEDAW General Recommendation 25, Para. 7; HRC General Comment 28, Para. 5; CESC General Comment 16, Para.19.

<sup>10</sup> CEDAW General Recommendation 25, Para. 8; HRC General Comment 28, 29. CESC, General Comment 16, Para. 21.

<sup>11</sup> CEDAW General Recommendation 28, Para. 9; CEDAW General Recommendation 25, Para. 8.

<sup>12</sup> Article 2(a) CEDAW; CEDAW, General Recommendation 28, Para. 31; CESC General Comment 16, Para. 19.

- Legislative provisions are enacted that expressly prohibit discrimination in all aspects of women's lives and throughout their lifespan.<sup>13</sup>

However, international authorities have also underlined that the mere existence of such guarantees is not by itself sufficient. Compliance with international obligations not only requires that laws expressly guaranteeing gender equality and prohibiting discrimination against women be put in place: it also requires that states ensure that they are 'effective' or 'fit for purpose' and continuously monitor their implementation.

To this end international authorities have repeatedly identified a series of specific basic requirements that national legal provisions guaranteeing gender equality and non-discrimination must encompass in order to comply with international human rights law and standards.<sup>14</sup>

## **ENSURING LEGAL GUARANTEES OF EQUALITY AND PROHIBITIONS OF DISCRIMINATION ARE 'FIT FOR PURPOSE'**

The first category of required elements which international authorities have identified can be broadly described as full and appropriate *guarantees* of equality and *prohibitions* of discrimination.

As a minimum they must include the following:

- **A guarantee of equality.**<sup>15</sup> Legislation should include a guarantee of substantive equality. This means that equality provisions must extend beyond guaranteeing equality in and before the law and should also guarantee equality in practice.
- **A clear and comprehensive definition of discrimination.**<sup>16</sup> Including a definition of discrimination which clearly identifies the conduct that constitutes discrimination is a necessity for effective legal provisions. The definition should mirror the elements included in Article 1 of

<sup>13</sup> Article 2(a),(b) CEDAW; CEDAW, General Recommendation 28, Para. 31; CESCR General Comment 16, Paras. 19, 41; CESCR General Comment 20, Para.37.

<sup>14</sup> See for a general discussion and overview of a number of these elements: Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

<sup>15</sup> Article 2(a) CEDAW; CEDAW General Recommendation 28, Para. 31; CESCR General Comment 16, Paras. 19 & 41.

<sup>16</sup> See in general Article 2(a) CEDAW and CEDAW General Recommendation 28, Paras. 31-33. Article 1 of CEDAW defines discrimination against women as: "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."

CEDAW and should include direct and indirect discrimination through conduct and omissions. No exceptions, qualifications or limits should be included.<sup>17</sup> Specifications may be necessary to explain that temporary special measures to advance gender equality, or measures to protect the rights of women in the context of pregnancy and childbirth, do not constitute discrimination.

- ***A full prohibition of discrimination in public and private spheres.***<sup>18</sup> Equality and non-discrimination laws must include a comprehensive prohibition of discrimination against women in all aspects of women's lives and throughout their lifespan. This means that they must prohibit both direct and indirect, *de jure* and *de facto* discrimination in all sectors of society by both public and private actors. For example prohibitions must be applicable in respect of the conduct of public authorities, the judiciary, organizations, enterprises and private individuals.

In addition to these minimum requirements, best practices also indicate that gender equality and non-discrimination legislation should also address the following issues:

- ***Sexual harassment.*** As noted above, international law specifies that gender-based violence constitutes discrimination against women and imposes a range of stringent legal responses by States to such violence.<sup>19</sup> Sexual harassment is one form of gender-based violence.<sup>20</sup> Among other required steps, good practice indicates that including an express prohibition and definition of sexual harassment in gender equality or sex-discrimination laws is an appropriate measure.<sup>21</sup>

<sup>17</sup>Article 1, CEDAW; CEDAW, General Recommendation 28, Paras. 31 & 33.

<sup>18</sup> CEDAW General Recommendation 28, Paras. 13, 17, 31, 32. CESCR General Comment 16, Paras.19 & 41. See also HRC, General Comment 28 Paras.4 & 31

<sup>19</sup> In many instances of sexual harassment the State's international obligations to enact criminal laws prohibiting gender-based violence and ensure effective criminal law enforcement, may apply. CEDAW, General Recommendation 19, Violence Against Women, U.N. Doc. CEDAW/C/1992/L.1/Add.15, (hereinafter CEDAW General Recommendation 19), Para. 9; Article 4(c), UN Declaration on the Elimination of Violence Against Women, 20 December 1993, General Assembly, Resolution A/RES/48/104; , Communication No. 5/2005, 6 August 2007, Para. 12.1.4; *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29.

<sup>20</sup> CEDAW, General Recommendation 19, Para. 18

<sup>21</sup> See for a discussion of including sexual harassment prohibitions in gender equality legislation: Gender Equality Laws, Global Good Practice, UNIFEM, 2009.



- ***Recognition of intersectional discrimination.***<sup>22</sup> Women often face discrimination not only on the basis sex, but also on other grounds, for example race, ethnicity, nationality, religion, language, marital status, social and economic status, age, place of residence, birth, descent, disability, sexual orientation and gender identity. These *intersecting* forms of discrimination often have compounded negative impacts and will often affect women differently than male members of these groups. States are obliged to legally recognize and prohibit these intersectional forms of discrimination. Although there are different legislative mechanisms by which they can do this, good practices indicate that including provisions on intersectional or multiple forms of discrimination within gender equality laws may be the most effective way of doing so.

## **ENSURING REMEDIES, ENFORCEMENT AND MONITORING MECHANISMS ARE 'FIT FOR PURPOSE'**

The second category of required elements are those that are necessary to ensure express legal guarantees of gender equality and prohibitions of discrimination against women are enforceable and enable accountability and redress in practice.

They include: effective implementation and monitoring procedures, accessible and effective legal remedies and dissuasive sanctions.

Minimum requirements include:

- ***Clear assignment of responsibilities and monitoring mechanisms.***<sup>23</sup> Laws that outline gender equality guarantees and define relevant policy commitments for implementation by State actors will have little impact where they fail to delineate which State actors are responsible for these commitments. Legal provisions outlining policy commitments and pledging action need to clearly designate in each case which public body is responsible for ensuring their implementation. Similarly, laws must establish a process by which their implementation can be monitored and evaluated on an ongoing basis and again must explicitly assign responsibility for oversight to a specific public body.

<sup>22</sup> CEDAW, General Recommendation 28, Paras. 18, 26 & 31; CERD, General Recommendation No. 25: Gender related dimensions of racial discrimination, 20 March 2000 (hereinafter CERD General Recommendation 25); CESCR General Comment 16, Para.5; CESCR General Comment 20, Para. 17. See also Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

<sup>23</sup> CESCR General Comment 16, Paras. 21&41. CEDAW General Recommendation 28, Paras. 24 & 39. CESCR General Comment 20, Para.41. See Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

- ***Sanctions and penalties.***<sup>24</sup> Prohibitions of discrimination against women must be accompanied by explicitly delineated sanctions in case of their breach. The efficacy of gender equality laws will be undermined where they do not outline the applicable sanctions that will apply in case of breach. The lack of explicit sanctions provisions restrict the deterrent effect of such laws and fail to provide an incentive for change. States must also ensure that the applicable penalties are effective, proportionate and dissuasive. A range of flexible pecuniary and non-pecuniary measures must be provided for.
- ***Complaint procedures and redress.***<sup>25</sup> Laws prohibiting discrimination and promoting gender equality must provide women who are subjected to discrimination with appropriate remedies. This means that laws must expressly outline effective remedial procedures and must clearly define the forms of redress available.

To be 'effective' remedial procedures or complaints processes must not be theoretical or illusory and must meet a number of criteria:

- (i) They must enable recourse to functional independent and impartial bodies, with the authority to make enforceable decisions, impose sanctions and award remedies.
- (ii) They must involve a right of appeal from any decision of those bodies to a higher, judicial court or tribunal.
- (iii) They must involve a clear and well-defined procedure, in terms provided for by the law, for establishing liability.
- (iv) They must be available in relation to discrimination by public authorities, private institutions and individuals.
- (v) They must be affordable, such that legal aid and free legal assistance should be provided for women without adequate means. In addition in such cases exemptions from procedural costs and court fees should apply.
- (vi) They must be timely.
- (vii) They must be physically accessible.

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<sup>24</sup> Article 2(b) CEDAW; CEDAW General Recommendation 28, Paras. 17 & 37(b); CEDAW General Recommendation 25, Para.7.

<sup>25</sup> Article 2(c) CEDAW; Article 2(3) ICCPR; CEDAW General Recommendation 28, Paras. 17, 32, 34, 36. CESCR General Comment 16, Paras. 21 & 48; CESCR General Comment 21, Para.40; HRC General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, Paras.15-20. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

Ensuring the right to redress also requires that a range of measures may be ordered, including restitution, rehabilitation, satisfaction, guarantees of non-repetition and compensation. The stated needs and wishes of the victim must be taken into account in determining the appropriate forms of redress in a given case.

In addition to these fundamental requirements of international law, best practice indicates that remedial procedures in discrimination cases should encompass the following elements:

- **Burden of proof.**<sup>26</sup> Increasingly in non-criminal claims of discrimination jurisdictions are placing the burden of proof on the alleged perpetrator to show that the discrimination did not occur.<sup>27</sup> This burden is imposed when the complainant has established facts from which it may be presumed that discrimination has occurred i.e. has made a *prima facie* case.<sup>28</sup>
- **Standing.**<sup>29</sup> Best practice indicates that not only should individual women have standing before the established remedial procedure, but that non-governmental organisations and associations should also have the standing to file claims. This is a particularly important measure in steps to address systemic discrimination, or where resource or safety concerns impede victims from seeking justice themselves.

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<sup>26</sup> See for a discussion: Gender Equality Laws, Global Good Practice, UNIFEM, 2009; Comparative Study on Access to Justice in Gender Equality and Anti-Discrimination Law (European Union), Synthesis Report, Milieu, February 2011.

<sup>27</sup> See for example European Union Directive 2006/54/EC, Article 19 which has required all member States of the Union to adopt this approach in their national laws.

<sup>28</sup> This shift should only occur in civil proceedings where otherwise the complainant would bear the onus. It is not appropriate in criminal procedures or in situations where the Court or another State institution bears the responsibility to investigate the facts.

<sup>29</sup> See for a discussion: Gender Equality Laws, Global Good Practice, UNIFEM, 2009; Comparative Study on Access to Justice in Gender Equality and Anti-Discrimination Law (European Union), Synthesis Report, Milieu, February 2011.





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