



International Bar Association's Human Rights Institute

Council Resolution on Addressing Discrimination against Women in Law, in Legal Systems and in Legal Practice

Passed on Monday 26 October 2020

The International Bar Association's Human Rights Institute,

Being the human rights entity of the International Bar Association, the global voice of the legal profession,

Working with the global legal community to promote and protect human rights,

Concerned that the historical, economic, social and political subordinate status of women and girls persists around the world in many forms today,

Noting the legal efforts that have been made and continue to be made at domestic, regional and international levels to address the different forms of discrimination that women and girls experience, including: the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Inter-American Convention on the Granting of Civil Rights to Women, and the Convention on Preventing and Combating Violence against Women and Domestic Violence, United Nations Declaration on the Rights of Indigenous Peoples,

Noting that, especially on domestic levels, the law is the primary tool for social cohesion, and reflects prevailing social, economic, political and cultural conditions,

Recognising that over the course of history, the law has been drafted, implemented and enforced in environments that have deliberately excluded women, that these legal processes continue in

environments where women are underrepresented, and that this underrepresentation influences the development of the law and politics,

Concerned that the underrepresentation of women in law-making, adjudicating and enforcement bodies and legal associations hinders necessary challenges the perceived neutrality or reasonableness of the law,

Recognising humanity's enduring struggle away from prejudiced exclusion and inequality, towards a common recognition of the inherent dignity and equal worth of all persons, and the necessity of continuous, collaborative work to end the different forms of discrimination experienced by women and girls today,

Recognising the continued importance of the law to women and girls in addressing the different forms of discrimination they experience, and the crucial role played by the legal profession at the domestic, regional and international levels, in promoting equality and non-discrimination through the interpretation and enforcement of legal norms,

Now resolves

I. Ensuring that national, regional and international law do not perpetuate injustice against women and girls

1. As the law and legal language dictate how issues are framed, argued and understood, the absence of marginalised groups from law-making and adjudication necessarily influences whether and what arguments are considered acceptable or unreasonable;
2. Distributions of power and rights, which have historically excluded women from legislative and judicial functions, impact present-day law reform efforts due to the pervasive underrepresentation of women in decision-making roles and the absence of the lived experience of women in the development of law.
3. Due to the underrepresentation of women, the law and legal practice cannot be viewed as objective truths. Rather, as any other human-engineered phenomena implemented by largely homogenous groups, the law and legal practice are subject to bias in principle or application. Assumptions of objectivity thwart necessary conversations concerning gender bias in these fields;
4. Democracies can only be described as such when they reflect the totality of human experience and adequately represent diversity of interests. Accomplishing this requires empowering historically marginalised groups to exercise proper influence over public social and political life;

5. In order to achieve equality for and empower women, it is necessary to assess frankly the biased origins and established precedents of law. Unwritten norms about gender that dictate legal principles and entrench perspectives that are harmful to women and girls must be identified and reformed;
6. How culture and social tradition influence the application of the law through adherence to stereotypes that hinder women and girls' access to justice should be understood and challenged;
7. The harmful stereotypes about women and girls that exist in law are based not only on womanhood, but intersect with grounds that include race, ethnicity, religion, age, sexual orientation, gender identity, disability, immigration status, education and marital status. Thus, reflections on intersectional discrimination are essential to the eradication of discriminatory norms and practices in law;
8. The context of women and girls' historical, social, economic and political disadvantage is intrinsic to equality and non-discrimination. For this reason, formal equality cannot be considered an effective means of addressing such gender-based disadvantage. Rather, substantive equality must be promoted as it considers the vulnerabilities arising from entrenched inequality;
9. Customs and traditional beliefs that are harmful to women and girls, especially when they carry the force of law, must be challenged through human rights advocacy;
10. The testimony of women should not have less value than that of men;
11. A woman must not be treated as property. Women above the age of 18 must have the right of self-determination and should not require the consent of any family member or guardian in undertaking any aspect of her life or any contractual agreement. Coercion must not be used in securing her consent;
12. The legal profession should advocate for women to occupy influential positions in legal practice, thereby empowering them to lead reform of laws which otherwise entrench the gender-based vulnerabilities;
13. The legal profession must endeavour to bring effect to the above (paragraphs 1-12) on all levels of governance; domestically, regionally and internationally.

Resolves further that the legal profession shall specifically address the discriminatory nature of law as manifested in, but not limited to, the following:

II. Political participation

1. All legislative and policy-related action must engage meaningful consultations with women's representative or special interest groups as a preliminary measure. As women are

disproportionately affected by poverty and domestic austerity measures, it is imperative that they are involved in decision-making processes at the highest level;

Women and girls must be adequately represented in all branches and at all levels of government, including adequate representation on grounds including race, ethnicity, religion, age, sexual orientation, gender identity, and disability. III. Social and economic status

2. Women must be granted equal rights with men to acquire, change or retain their nationality;
3. Women and men must have equal rights pertaining to transmitting citizenship by descent;
4. Meaningful incentives to combat feminisation of poverty need to be taken at international, national, and community levels.

IV. Employment

1. Concerted effort must be made to recruit women at all levels of the legal profession. These efforts to ensure proportionate representation of women must include adequate representation on grounds of race, ethnicity, religion, age, sexual orientation, gender identity, and disability;
2. On all levels of employment, women must be remunerated fairly and equally to men for work of equal value;
3. It is necessary to transition from traditional perceptions of formal employment to accommodate the dual roles of worker and caregiver which are still disproportionately borne by women;
4. The importance of domestic labour performed by women, which is often unpaid and undervalued, must be recognised in the implementation and adjudication of the law. This includes considering the value of domestic work in tort compensation claims where the inability to perform domestic work may not be considered pecuniary loss;
5. Women with family responsibilities must be permitted to work without discrimination, irrespective of working hours or permanency. As more women than men are involved in part-time work,¹ part-time employees must be given equal opportunities for advancement, workloads and work hours that do not exceed the terms of their employment contract unless previously agreed by both parties, as well as fair remuneration and benefits;
6. The undervaluation of labour and other work predominately performed by women contributes to the feminisation of poverty must be recognised;

How the existing discrimination and economic disempowerment of women, especially those belonging to ethnic groups, exposes them to the threat of modern slavery must be acknowledged. Gender analyses across the value chains, more protective government employment regulations and

¹ <https://wbg.org.uk/analysis/2018-wbg-briefing-employment-and-earnings/> ; See also <https://www.familyandchildcaretrust.org/new-research-highlights-impact-part-time-work-gender-pay-gap>.

policies, supply chain audits, and law-imposed responsible business models are a few essential steps that must be taken in order to ensure a dignified and equal work for women.

V. Inheritance

1. Male primogeniture laws which exclude women and girls from inheriting from deceased family members must be abrogated;
2. Laws which dictate unequal distribution of testamentary benefits on the basis of gender must be reformed and reflect the principles of equality and non-discrimination;
3. It is necessary to establish legal norms for the economic and/or property-related protection of widows in order to guard against destitution following the deaths of their spouses;
4. Laws which force widows to remarry against their will must be abrogated.

VI. Sexual and Gender-Based Violence

The legal profession should identify and work to eradicate legal principles that are premised on harmful stereotypes designed to discredit women who allege they have experienced sexual violence.

More specifically:

1. Urgent reform is necessary to criminalise all non-consensual oral, vaginal and anal penetration, whether it is the victim, or the perpetrator being penetrated, regardless of their gender, sexual orientation or age of the parties, the existence of any intimate or marital relationship between them, or the body parts or objects used for penetration. Absence of consent is the central issue; myths and stereotypes about appropriate womanhood have no place in evaluating the evidence.;
2. Rape or sexual assault allegations should never be resolved by payment of compensation to her family or the alleged perpetrator agreeing to marriage with the woman;
3. Criminal complaints of sexual violence must be handled with speed and efficiency by all actors in the criminal justice system. Complainants must not be treated with scepticism or harsh treatment by criminal investigators, prosecuting authorities or judicial officers;
4. Virgidity testing must be abandoned by all actors in the criminal justice system as they are unscientific, highly subjective and, especially in the case of 'two-finger tests', may constitute sexual violence in their own right. Virgidity tests have the sole effect of shaming women suspected of previously engaging in sexual intercourse. They do not establish whether or not rape or sexual assault occurred and must therefore be rejected as evidence in criminal trials;
5. It is necessary to dismantle the perception that sexual violence perpetrated by intimate partners or acquaintances falls outside of the purview of criminal law. This perception leaves actors in the

criminal justice system disinclined to investigate and prosecute, acts of sexual violence and therefore thereby contributing to the shamefully low conviction rates of sexual violence;

6. Victims of sexual violence should not be automatically disqualified from serving as jurors in rape or sexual assault trials. Statistical data shows that in their lifetimes 1 in 3 women have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence, and at least 1 in 6 men have been sexually abused or assaulted. Disqualification on this ground not only disregards the prevalence of sexual and gender-based violence but also perpetuates a harmful belief that victims are incapable of employing reason or drawing distinctions between court proceedings and their own personal experiences;
7. The sexual history of a victim of sexual violence is irrelevant to rape or sexual assault trials and ought not to be used as evidence by prosecuting authorities or defence counsel nor be a deciding element in judicial decisions to convict or acquit accused persons;
8. Legal rules requiring corroboration of sexual violence complaints must be thoroughly assessed in order to abandon principles informed by stereotypes which suggest the mendacity of women or their propensity to fabricate allegations out of malice. Such stereotypes are not only unsupported by statistical data, but also contribute to the secondary victimisation of victims by the criminal justice system;
9. Whether or not a victim was a virgin when sexual violence was perpetrated against her should not be an aggravating or mitigating circumstance in criminal sentencing;
10. The frequency of the use of rape as a weapon of war in situations of conflict must be highlighted. Provisions must be made for special training of investigators working on cases prosecuting this crime, to ensure they are sensitive to the cultural shame associated with this crime that prohibits women from speaking to male investigators, or at all.
11. Female Genital Mutilation is an extreme form of discrimination against women. It is a violation of girls and women's human rights and must be eradicated. Moreover, those who have undergone Female Genital Mutilation must be provided the required physical and mental health support.
12. Sex work should be decriminalised.

VII. Defences in civil and criminal trials

Notwithstanding the present-day gender-neutral language applied to them, it is necessary to acknowledge that, in origin, legal defences and tests in civil and criminal law reflect the philosophies and world views of the predominantly male bodies that established them:

1. It is not enough to alter the identity of the "reasonable man" in tort law to a "reasonable person". We must analyse context and consider the experiences of women when determining whether

their actions were reasonable in specific situations. Similarly, where reliance is placed on judicial precedent which discusses the “reasonable man” standard, it must be reviewed to identify any elements based on principles discriminatory to women;

2. The philosophies underlying mitigatory defences like provocation, which is based on immediate, uncontrollable emotional reactions from a person of equal or greater strength than the deceased must be deconstructed. In order to end discrimination against women and girls in legal practice, such defences must reflect the lived physiological and social realities of women and girls.

VIII. Criminal punishment and its enforcement

1. There must not be any kind of gender discrimination when applying capital punishment.
2. When deciding on whether to proceed with prosecution, the authorities must to give due consideration to whether a woman has been compelled or coerced to commit a criminal offence as a direct consequence of being trafficked.
3. Correctional systems should develop or strengthen, where appropriate, legislation, policies and practices for dealing with gender sensitive matters, including culturally specific problems of female offenders, having full regard to the needs of indigenous women.
4. Criminal justice systems should consider modifying the institution of bail as so it does not disproportionately negatively affect women.
5. Non-custodial sentences and community-based measures for pregnant women and women with dependent children shall be preferred where possible and appropriate having in mind the best interest of the child.
6. Prison authorities and criminal justice agencies involved in the administration of custodial sanctions must consider the specific needs and realities of women as prisoners. Gender-responsive initiatives and approaches must focus on issues such as gender-specific health-care services, meeting women’s specific hygiene needs, importance of mother-child relationship, and ensure that women prisoners’ dignity and respect are protected at all times.

IX. Intimate relationships, including marriage

1. There is a need to reform laws that establish different minimum ages of consent for girls and boys;
2. International standards establishing consent and minimum age requirements for marriage must be upheld;
3. Child marriage must be eradicated;

4. In pursuit of the above, it is essential to counteract the harmful social and cultural perceptions of the rapidity with which girls attain sexual maturity which dictate the suitability for sexual intercourse with, or marriage to, adults even when they are still children;
5. Adultery and crimes of immorality should be removed from the ambit of the criminal law;
6. 'Honour' punishments of family members or 'honour' killing of women, or indeed any family member, must not receive a sympathetic hearing from justice systems.

Terminology

"Discrimination" is taken to 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 and girls of their human rights, or otherwise impairing or nullifying their equality of opportunity or treatment;²

"Feminisation of poverty" refers to the fact that globally, women make up the majority of people living in poverty.

"Victim" refers to persons who have experienced sexual and/or gender-based violence. While the more empowering nature of the term "survivor" is recognised, "victim" is noted as the technical term generally applied to such persons in the context of national and international criminal justice systems.

"Virginity" is a socially, culturally and religiously constructed term applied to people, primarily women and girls, who have not engaged in sexual intercourse. What constitutes sexual intercourse for the purposes of establishing virginity varies widely, but is generally based on cis-heteronormative assumptions. The concept of virginity, which may be accompanied by physical tests to establish it, is often wielded as justification for discrimination against women and girls.

² Combination of definitions of discrimination provided by [Article 1 CEDAW](#) and [Article 1\(1\) ILO Convention No. 111](#).