Inclusion of "sexual orientation" and "gender identity":

Meaning of "sex" within Title VII, Civil Rights Act, 1964

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EXECUTIVE SUMMARY

(a) Introduction

1. OPBP has been asked by Prof. Wendy Murphy, Adjunct Professor of Sexual Violence Law at New England Law, Boston, to prepare a report on the inclusion of "sexual orientation" and "gender identity" as grounds of discrimination under constitutional and civil rights laws, within "sex" as a ground for discrimination.

2. Prof. Wendy Murphy is submitting an amicus curiae brief to the Supreme Court of the United States in a constitutional challenge to Title VII, Civil Rights Act, 1964 which prohibits discrimination in employment practices on grounds of "race, colour, religion, sex and national origin".1 The list of grounds is closed, with no residual clause under which additional grounds can be added. In the context of increasing discriminatory practices in employment on the basis of the sexual orientation and gender identity of employees, it is being argued that the protection under Title VII should extend to sexual orientation and gender identity as well, though they are not listed grounds.

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[1] This list of grounds is found across several provisions in Title VII, Civil Rights Act, 1964. For instance, see Civil Rights Act, 1964, s. 703 (Unlawful Employment Practices):
(a) Employer practices
It shall be an unlawful employment practice for an employer -
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's **race, color, religion, sex, or national origin**; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's **race, color, religion, sex, or national origin**.
(b) Employment agency practices
It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his **race, color, religion, sex, or national origin**, or to classify or refer for employment any individual on the basis of his **race, color, religion, sex, or national origin**.
(c) Labor organization practices
It shall be an unlawful employment practice for a labor organization-
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his **race, color, religion, sex, or national origin**;
(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's **race, color, religion, sex, or national origin**; or
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
(d) Training programs
It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of **his race, color, religion, sex, or national origin** in admission to, or employment in, any program established to provide apprenticeship or other training.
(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

3. The amicus brief argues against creating a hierarchy between acts of discrimination, by treating some grounds as prohibited and others as not. In this context, OPBP was requested to examined whether: (a) "sex" as a ground of discrimination has, in other jurisdictions, been read expansively to include "sexual orientation" and/or "gender identity", and (b) if "sexual orientation" and/or "gender identity" are included as grounds of discrimination, whether a hierarchy has been maintained between these grounds and other grounds such as "sex" or "race".

4. This report covers these two aspects, by looking at the following jurisdictions or sources of law: (a) Canada (b) India (c) European Convention on Human Rights and, (d) International human rights law.

(b) Research Questions

Question 1: Does "sex" as a ground of discrimination in Canada, India, European Convention on Human Rights, or under sources of international human rights law include "sexual orientation" and/or "gender identity?"

5. The position varies across the jurisdictions considered in the report. Some constitutional or statutory provisions set out a list of grounds of discrimination which is exhaustive, or closed, leaving no power to courts to include unenumerated or analogous grounds. Section 15 of the Constitution of India, 1950 and Title VII of the US Civil Rights Act, 1964 are examples. Other provisions consist of a simple equality clause, which does not mention specific grounds. The 14th Amendment of the US constitution is an example of this, as is Section 14 of the Constitution of India, 1950. A third approach is to specify a list of grounds, but to make it clear that the list is non-exhaustive, for example, by including a category labelled "other status", or by stating that the list "includes" a set of grounds. Section 15 of The Canadian Charter of Rights and Freedoms, 1982 is an example of this approach, as are the European Convention of Human Rights, 1953 and the International Covenant on Civil and Political Rights, 1976.

6. Where there is a closed list of grounds, which includes "sex" but does not include "sexual orientation" or "gender identity", it might nevertheless be possible to interpret "sex" expansively to include these grounds. This has been the approach in India.

7. Where there is a non-exhaustive or open list of grounds, "sexual orientation" and "gender identity" could either be included by an expansive interpretation of "sex" or as an analogous ground. For instance, under some sources of international human rights law such as the International Covenant on Civil and Political Rights, 1976, which has an open list of grounds, "sex" has still been interpreted to include "sexual orientation". Similarly, under the Canadian Charter of Rights and Freedoms, 1982, which also has an open list, discrimination on grounds of "gender identity" has been included within discrimination on grounds of "sex".

8. In contrast, in some jurisdictions, the presence of an open list of grounds has meant that "sexual orientation" and/or "gender identity" have been placed within the residual clause, rather than being included within "sex" as a ground of discrimination. The jurisprudence under the European Convention on Human Rights, 1953 and the American Convention on Human Rights, 1978 are examples of this. Further, under the Canadian Charter of Rights and Freedoms, 1982, unlike "gender identity" which is included within "sex", "sexual orientation" has been included as an analogous ground under the residual clause ("other status"). Finally, under some sources of international human rights law, like the International Covenant on Economic, Social and Cultural Rights, 1976, "sexual orientation" and/or "gender identity" has been similarly included under the residual clause, rather than within "sex".

9. Thus, there is a strong trend within comparative law to expand the list of prohibited grounds of discrimination to include "sexual orientation" and/or "gender identity". The manner of incorporation of these additional grounds however differs, with some jurisdictions reading "sex" expansively, and others placing the additional grounds within the residual clause. The mere presence of an open list however does not mean that the additional grounds will be placed within the residual clause, as the examples discussed demonstrate.

Question 2: If so, do Canada, India, the European Convention on Human Rights, and sources of international human rights law maintain a hierarchy between sexual orientation and/or gender identity and other grounds of discrimination?

10. None of the jurisdictions considered maintains a hierarchy between sexual orientation and/or gender identity and listed grounds of discrimination such as "sex" or "race". Some jurisdictions, like India and the European Convention on Human Rights, 1953, maintain a hierarchy between grounds which relate an individual's personal autonomy, or concern

intimate aspects of an individual's private life and other grounds. However, "sexual orientation" and "gender identity" are considered to be closely related to an individual's intimate life and personal autonomy, and hence are subject to a higher standard of scrutiny, like "sex". Thus, though a hierarchy exists between grounds in general, no hierarchy is maintained between "sexual orientation" and/or "gender identity" and listed grounds like "sex".

11. Under some sources of international human rights law, a distinction is maintained between classifications on listed or non-enumerated grounds, and other classifications. However, even within these sources, "sexual orientation" or "gender identity" are not subject to lower standards of scrutiny, since in any case they fall within the listed grounds (by being read into "sex") or are included within the residual clause, and hence are a part of the non-enumerated grounds.

12. Finally, in other jurisdictions like Canada, no distinction appears to be maintained amongst grounds of discrimination in general, implying that "sexual orientation" and/or "gender identity" is subject to the same standard of scrutiny as "sex".

13. Therefore, in all jurisdictions considered, no hierarchy exists between "sex" and "sexual orientation" and/or "gender identity" as grounds of discrimination.

14. The position across the jurisdictions concerned, as regards sexual orientation, is summarised below:

Sexual Orientation	***Jurisdictions/ Statutes/ Treaties***
Sexual orientation included within "sex"	Constitution of India, 1950; International Covenant on Civil and Political Rights, 1976
Sexual orientation included within "other status" or other residual clauses	Canadian Charter of Rights and Freedoms, 1982; American Convention on Human Rights, 1978; European Convention of Human Rights, 1953; International Covenant on Economic, Social and Cultural Rights, 1976
Hierarchy maintained between "sex" and "sexual orientation"	None of the jurisdictions/ statutes/ treaties concerned

15. The position across the jurisdictions concerned, as regards gender identity, is summarised below:

Gender identity	***Jurisdictions / Statutes/ Treaties***
Gender identity included within "sex"	Constitution of India, 1950; Canadian Charter of Rights and Freedoms, 1982; Canadian Human Rights Act, 1985
Gender identity included within "other status" or other residual clauses	International Covenant on Economic, Social and Cultural Rights, 1976; American Convention on Human Rights, 1978; European Convention of Human Rights, 1953
Hierarchy maintained between "sex" and "gender identity"	None of the jurisdictions/ statutes/ treaties concerned

CANADA

I. DOES "SEX" AS A GROUND OF DISCRIMINATION WITHIN THE CONSTITUTION OR CIVIL RIGHTS LAWS IN CANADA INCLUDE SEXUAL ORIENTATION AND/OR GENDER IDENTITY?

(a) Constitution Act, 1982, Part I, Canadian Charter of Rights and Freedoms, Equality Rights

1. Section 15(1) of the *Canadian Charter of Rights and Freedoms* (henceforth the "*Charter*"), establishes that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, sex, age or mental or physical disability." Subsection (2) clarifies that this prohibition does not include affirmative action initiatives to ameliorate the disadvantage experienced by groups who have been subjected to discrimination.

2. In Section 15(1), the *Charter* lists "sex" as a particular ground of potential discrimination. Neither gender identity nor sexual orientation has been similarly enumerated. However, the Supreme Court has inferred "analogous grounds" of discrimination for aspects of identity not included in the list of grounds.[2] In *Corbiere v Canada*, the Court held that an analogous ground is a "personal characteristic that is **immutable or changeable only at unacceptable cost to personal identity** [emphasis added]."[3]

(i) Prohibition of discrimination on the grounds of sexual orientation

3. *Egan v. Canada* established sexual orientation as one of the analogous grounds for discrimination forbidden by the *Charter*.[4] In that case, the Court held that sexual orientation should be considered analogous, holding:

> "The distinction in the Act is based on a personal characteristic, namely sexual orientation. Sexual orientation is analogous to the grounds of discrimination enumerated in s. 15(1). **The historic disadvantage suffered by homosexual persons has been widely recognized and documented**. Sexual orientation is more

[2] For instance, citizenship was held to be an analogous ground in the first such case, Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, 1989 CanLII 2 (SCC) and marital status in Miron v. Trudel, [1995] 2 SCR 418, 1995 CanLII 97 (SCC).
[3] Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 1999 CanLII 687 (SCC) 206.
[4] Egan v. Canada, [1995] 2 SCR 513.

> than simply a "status" that an individual possesses: it is something that is demonstrated in an individual's conduct by the choice of a partner. Just as the *Charter* protects religious beliefs and religious practice as aspects of religious freedom, so too should it be recognized that **sexual orientation encompasses aspects of "status" and "conduct" and that both should receive protection** [emphasis added]."[5]

4. Thus, the centrality of homosexuality—like other grounds such as religion—to individual identity, and the history of discrimination against homosexuals led the Court to accept sexual orientation as an analogous ground.

5. The Court in Egan applied the test set out in Corbiere, in concluding that sexual orientation constituted an analogous ground:

> I have no difficulty accepting the appellants' contention that whether or not **sexual orientation** is based on biological or physiological factors, which may be a matter of some controversy, it **is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs**, and so falls within the ambit of s. 15 protection as being **analogous to the enumerated grounds**. As the courts below observed, this is entirely consistent with a number of cases on the point. Indeed, there is a measure of support for this position in this Court. In *Canada (Attorney General) v. Ward*…speaking for my colleagues as well, I observed that the analogous grounds approach in s. 15 was appropriate to a consideration of the character of "social groups" subject to protection as Convention refugees. These, I continued, encompass groups defined by an innate or unchangeable characteristic which, I added, would include sexual orientation [emphasis added].[6]

6. Since the *Egan v. Canada* decision, the Supreme Court of Canada, as well as lower courts, have upheld sexual orientation as analogous grounds for discrimination in multiple cases.[7]

7. Thus, the Canadian Supreme Court has held that "sex", listed as a prohibited ground of discrimination in section 15 of the Canadian Charter, does not include "sexual orientation". Instead, "sexual orientation" has been treated as an analogous ground.

(ii) Prohibition of discrimination on the grounds of gender identity

8. As is the case with sexual orientation, gender identity is also not listed under the Charter a prohibited ground of discrimination. However, past cases have used section 15(1) to address discrimination against transgender individuals, where such discrimination has been considered

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[5] Ibid 518, 601

[6] Ibid, 528, 529 (La Forest J., writing for the majority

[7] Notably Vriend v. Alberta, [1998] 1 SCR 493, 1998 CanLII 816 (SCC); M. v. H., [1999] 2 SCR 3, 1999 CanLII 686 (SCC); Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 SCR 1120, 2000 SCC 69 (CanLII) ¶ 118. For an example of a lower court see Halpern v. Canada (Attorney General), 2003 CanLII 26403 (ON CA).

discrimination on ground of sex, ability or both. The most notable cases in this regard are *XY v. Ontario*[8] and *CF v. Alberta*.[9]

9. In *XY v. Ontario*, a law that required individuals undergo "transsexual surgery" before allowing them to change the sex listed on their birth certificate was challenged before the Human Rights Tribunal of Ontario.[10] The Tribunal stated that in previous cases "discrimination against transgendered persons has long been regarded as discrimination on the basis of disability, sex or both[.]"[11] The Ontario Code of Human Rights (the "*Code*") forbids such discrimination.[12] The Tribunal further stated that as the *Code* and the *Charter* "share a common objective and should be interpreted in a congruent matter," the discrimination analysis in the *Charter* applies to *Code* challenges to government policy.[13] The Tribunal thus held that the law at issue was discriminatory.

10. In *CF v. Alberta*, plaintiff CF similarly argued that a requirement that she undergo "sex change" surgery in order to change the sex listed on her birth certificate from male to female constituted discrimination under *Charter* s. 15(1).[14] In applying the *Charter*'s discrimination test, Justice Burrows writing for the Court of Queen's Bench of Alberta held that,

> "there can be no doubt that the VSA birth registration system creates a distinction which is based on sex. The system of regulation of birth registration, including the system for the issuance of birth certificates, treats transgendered persons differently than a) non-transgendered persons and b) transgendered persons willing to undergo genital surgery. Persons in either of the latter two groups can obtain a birth certificate which states their sex to be the sex they live. However, persons in the first group, transgendered persons, cannot obtain a birth certificate which states their sex to be the sex they live."[15]

11. He further clarified:

> "**A distinction drawn between a person with male genitalia who lives as a male and a person with male genitalia who lives as a female is beyond question a distinction made on the basis of sex**. Alternatively if "sex" in Charter s. 15(1) is interpreted so narrowly as to exclude the characteristics of transgendered persons that

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[8] XY v. Ontario (Government and Consumer Services), 2012 HRTO 726 (CanLII).
[9] C.F. v. Alberta (Vital Statistics), 2014 ABQB 237 (CanLII).
[10] XY v. Ontario (Government and Consumer Services), 2012 HRTO 726 (CanLII).
[11] Ibid ¶ 88. Cases cited as justification were Hogan v. Ontario (Health and Long-Term Care), 2006 HRTO 32 (CanLII) {gender identity disorder found to be a disability); *Vancouver Rape Relief v. BC Human Rights*, 2000 BCSC 889 (CanLII), at ¶. 59, as cited in *Hayes v. Barker*, [2005] BCHRTD No. 590, at ¶¶. 31-32 (sex); *MacDonald v. Downtown Health Club for Women*, 2009 HRTO 1043 (CanLII) (sex); *Kavanagh v. Canada (Attorney General)*, [2001] C.H.R.D. No. 21, at ¶. 135 (sex and disability); *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, [1999] BCHRTD No. 43, at ¶¶. 97 and 110 (sex and disability).
[12] Ibid ¶ 89.
[13] Ibid ¶ 91.
[14] C.F. v. Alberta (Vital Statistics), 2014 ABQB 237 (CanLII) ¶ 20.
[15] Ibid ¶ 38.

make them transgendered, then, at very least, the distinction is made on a ground analogous to sex."[16]

12. These cases thus interpret the listed ground of "sex" to include gender identity, whereas, as explained above, the Canadian Supreme Court has held that "sex" does not include "sexual orientation", which the Court has considered to be an analogous ground of discrimination.

(b) Canadian Human Rights Act, 1985

13. The Canadian Human Rights Act (the "Act") was enacted in 1985, to provide recourse for individuals facing discrimination in employment by government and private employers.[17] The Act established the Canadian Human Rights Commission as a federal-level Tribunal to deal with instances of potential discrimination.[18] The *Act* enumerates a number of prohibited grounds of discrimination[19], as well as acknowledging that discrimination may take place on "one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds."[20]

(i) Prohibition of discrimination on the grounds of sexual orientation

14. The *Act* states "the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."[21] Sexual orientation is clearly listed in the prohibited grounds, separately from sex.

15. Sexual orientation was added to the *Act* via an amendment in 1996.[22] Prior to that point, the question of sexual orientation discrimination under the *Act* was first addressed in *Haig v Canada*.[23] In *Haig*, the Ontario Supreme Court held that section 3(1) of the *Act* infringed upon the constitutional right to equal protection guaranteed by section 15 of the *Charter*, because the *Act* did not provide recourse to the Human Rights Commission Tribunal for instances of

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[16] ibid ¶ 39.
[17] "Human Rights in Canada" (Canadian Human Rights Commission, n.d.) <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada> accessed 10 June 2019.
[18] Canadian Human Rights Act, RSC 1985, c H-6 s (26, 27, 39-41).
[19] Canadian Human Rights Act, RSC 1985, c H-6 s, 3 (1).
[20] Canadian Human Rights Act, RSC 1985, c H-6 s, 3.1.
[21] Canadian Human Rights Act, RSC 1985, c H-6 s. 3(1).
[22] "Policy on discrimination and harassment because of sexual orientation," (Ontario Human Rights Commission, 25 January 2006), p. 6, available at <http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_discrimination_and_harassment_because_of_sexual_orientation.pdf> accessed 10 June 2019 6.
[23] Haig v. Canada, 1991 CanLII 7348 (ON SC).

potential sexual discrimination. This finding, although at the provincial level, suggests that sexual orientation discrimination was not included in the *Act*'s definition of sex discrimination, elsewise its omission would carry no significance. Given that sexual orientation has been added as a ground, the question no longer arises.

(ii) Prohibition of discrimination on the grounds of gender identity.

16. The *Act*, as stated above, also lists "gender identity" as one of the proscribed grounds for discrimination. The inclusion of "gender identity" in the *Act* occurred quite recently, in 2017.[24] Before that, the Human Rights Commission had held that gender identity discrimination constituted discrimnation either on the basis of sex discrimination or a combination of sex and disability (similar to the jurisprudence under the *Charter* with regard to gender identity).

17. In *Kavanagh v. Canada*, the Commission held that there exists "no dispute that discrimination on the basis of Transsexualism constitutes sex discrimination as well as discrimination on the basis of a disability," citing similar interpretations by lower courts.[25] Similarly, in *Montreuil v. National Bank of Canada*, it was accepted without contestation from the Respondent that "discrimination on the basis of a person's transgendered status constitutes sex discrimination under the *Act*,"[26] on the basis of the *Kavanagh* decision.[27] In *Montreuil v Canadian Forces Grievance Board*, the Commission again interpreted discrimination on the basis of gender identity as a form of sex-based discrimination,[28] while in *Montreuil v Canadian Forces*, the Commission described gender identity discrimination as a combination of discrimination on the grounds of sex and ability.[29]

18. These decisions demonstrate that prior to the inclusion of "gender identity" as an explicitly prohibited ground of discrimination under the *Act*, the category of "sex" was interpreted as inclusive of "gender identity." Why, then, did the law change in 2017? The President of the Canadian Bar Association, René Basque, in a letter to Senator Bob Runciman, Chair of the Standing Senate Committee on Legal and Constitutional Affairs, outlined the justification clearly.[30] Basque recognized that the *Act* already forbade discrimination on the basis of gender identity, but that the inclusion of gender identity would "send an important signal to all that

[24] An Act to amend the Canadian Human Rights Act and the Criminal Code, SC 2017, c 13.
[25] Kavanagh v. Canada (Attorney General), 2001 CanLII 8496 (CHRT) ¶ 135.
[26] 2004 CHRT 7 (CanLII) ¶ 2.
[27] Ibid ¶ 36.
[28] 2007 CHRT 53 (CanLII) ¶ 17.
[29] 2009 CHRT 28 (CanLII) ¶ 44.
[30] René Basque, "Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity or expression)" (The Canadian Bar Association, May 10 2017) <https://www.cba.org/CMSPages/GetFile.aspx?guid=be34d5a4-8850-40a0-beea-432eeb762d7f> accessed June 10 2019.

transgender persons are an integral part of our vision for a more tolerant and inclusive society."[31] Gender identity and expression, then, were included in the *Act* to articulate to the public, rather than legal practitioners, that the law disallows discrimination on the basis of gender identity. While the *Act* as it currently stands separates discrimination on the basis of gender identity from sex discrimination, in the past the Canadian Human Rights Act, treated gender identity discrimination as a subset of sex discrimination.

II. IF SO, DOES CANADA MAINTAIN A HIERARCHY BETWEEN SEXUAL ORIENTATION AND/OR GENDER IDENTITY AND OTHER GROUNDS OF DISCRIMINATION?

(a) Charter of Rights and Freedoms

19. Under the *Charter* s 15(1), there exists a two-part test to establish that an impugned provision is prima facie discriminatory. In *Kahkewistahaw First Nation v Taypotat*, the Supreme Court laid out the version of the test currently in use.[32] The first part of the test asks "whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground".[33] The second part of the test asks, "whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage[.]…The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is prima facie discriminatory."[34]

20. The Court limited this test to "enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination"", in order to screen out those claims "having nothing to do with substantive equality [to help] keep the focus on equality for groups that are disadvantaged in the larger social and economic context".[35] No distinction has been drawn by courts amongst the various enumerated or analogous grounds.

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[31] Ibid.
[32] Kahkewistahaw First Nation v. Taypotat, [2015] 2 SCR 548, 2015 SCC 30 (CanLII).
[33] Ibid ¶ 19.
[34] Ibid ¶ 20.
[35] Ibid ¶ 19. For the history of the test, and its different iterations in case law, up to its most recent use, refer to 'Section 15-Equality Rights', available at https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html (last accessed 13 June 2019).

21. Thus, discrimination on both analogous and enumerated grounds receives the same treatment under the law: if all of the parts of the test are satisfied, the policy is *prima facie* discriminatory.[36] This indicates that at the stage of proving discrimination, there is no hierarchy between sex, and sexual orientation/gender identity.

22. Once prima facie discrimination has been established, then the state has to provide justifications, under s. 1 of the Charter, which states that the rights and freedoms set out in the Charter are subject to "such **reasonable** limits **prescribed by law** as can be **demonstrably justified** in a free and democratic society." The justifications analysis under s. 1 has multiple steps. *First*, the limit on the right or freedom must be prescribed by law. *Second*, the limit must be "reasonable" and "demonstrably justified". This limb has two components: (a) Is the legislative goal pressing and substantial? *i.e.*, is the objective sufficiently important to justify limiting a Charter right? (b) Is there proportionality between the objective and the means used to achieve it? To prove proportionality, the state has to establish that the measure limiting the right is rationally connected to the objective; that it impairs the right no more than is reasonably necessary to accomplish its objective and that there is no less rights-invasive means of achieving the objective; *and* that there is proportionality between the effects of the measure and its objective.[37]

23. This justifications test has to be satisfied once a law is found prima facie discriminatory, irrespective of the ground of discrimination. Thus, sexual orientation and gender identity are not subject to a different justifications test, indicating that they are not treated differently from other listed grounds. In fact, this test has been applied in several cases of discrimination on ground of sexual orientation.[38] With respect to cases of gender identity, in *C.F. v Alberta (Vital Statistics)*[39] the Court found the impugned provision to be violating s. 15(1) of the Charter. However, the Court did not proceed to conduct the section 1 analysis because the respondent stated that if a violation of section 15(1) is found, it does not seek to show that the violation can be justified under section 1.[40] Thus, even in case of gender identity, the test remains the s. 1 test laid out above, though it was not applied to the specific case at hand due to the Respondent's concession.

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[36] Kahkewistahaw First Nation v. Taypotat, [2015] 2 SCR 548, 2015 SCC 30.
[37] For further details on the s.1 justifications analysis and the specific cases establishing each part of the test, see 'Section 1- Reasonable Limits' at < https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html> last accessed on 13 June 2019.
[38] Egan v. Canada, [1995] 2 SCR 513, at 558; Vriend v. Alberta, [1998] 1 SCR 493, at ¶¶ 108-128.
[39] C.F. v. Alberta (Vital Statistics), 2014 ABQB 237 (CanLII).
[40] It should be noted here that the burden of establishing justification is borne by the respondent.

24. Therefore, the test to establish prima facie discrimination, and the test to justify such discrimination is the same for discrimination on grounds of sexual orientation and gender identity, as it is for discrimination on other enumerated and analogous grounds, under s. 15(1). No hierarchy is maintained between sexual orientation/ gender identity and other grounds under the Charter.

(b) Canadian Human Rights Act

25. The test currently in use to determine whether discrimination occurred under the *Canadian Human Rights Act* first arose in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*.[41] The court held that an employer may justify an impugned standard, challenged for being prima facie discriminatory, by establishing on the balance of probabilities:

    (1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
    (2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
    (3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[42]

26. If this test is fulfilled, the standard will be regarded a bona fide occupational requirement. Nothing exists to indicate that this test applies only to some grounds of discrimination and not others. Thus, no hierarchy thus exists, amongst the various grounds of discrimination listed in the *Act*. Sexual orientation/ gender identity are treated the same way as the other grounds.

[41] [1999] 3 SCR 3, 1999 CanLII 652 (SCC).
[42] Ibid ¶ 54.

INDIA

I. DOES "SEX" AS A GROUND OF DISCRIMINATION WITHIN THE CONSTITUTION OR CIVIL RIGHTS LAWS IN INDIA INCLUDE SEXUAL ORIENTATION AND/OR GENDER IDENTITY?

27. The Constitution of India, 1950 contains three key equality clauses—Articles 14, 15 and 16. Under Article 14, the Constitution guarantees the right to "equality before the law and equal protection of the laws": "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[43] This provision contains no grounds and attracts a rationality standard of review, requiring that the classification be rational and not arbitrary. This standard of review requires, "(1) that the classification be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia have a rational relation to the object sought to be achieved by the Act."[44]

28. Under Article 15(1), the Constitution prohibits discrimination "against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."[45] Article 15(2) contains more specific prohibitions on discrimination "on grounds only of religion, race, caste, sex, place of birth or any of them" in relation to "any disability, liability, restriction or condition" imposed with regard to (a) "access to shops, public restaurants, hotels and places of public entertainment" or (b) "the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public". Article 15(3) states that "Nothing in this article shall prevent the State from making any special provision for women and children". It is important to note that Article 15 contains a fixed list of grounds and does not have a residual provision under which analogous grounds can be placed.

29. Under Article 16(1), the Constitution guarantees "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State". Further, Article 16(2) prohibits discrimination "on grounds only of religion, race, caste, sex, descent, place of

[43] Constitution of India, 1950 art. 14
[44] Re: Special Courts Bill, 1978 (1979) 1 SCC 380 at [74(7)]; This test was first laid down in State of West Bengal v Anwar Ali Sarkar, 1952 SCR 284.
[45] Constitution of India, 1950 art. 15

birth, residence or any of them" in respect of "any employment or office under the State". Article 16, like Article 15, has a fixed list of grounds.

(i) Prohibition of discrimination on ground of gender identity

30. Gender identity is not listed as a ground of discrimination under the Indian Constitution. In *NALSA v Union of India and Others*[46] the Supreme Court considered the legal position of transgender people under Articles 14, 15, 16 and 21. The Court first examined the situation of a number of groups that come under the umbrella of being "transgender". It traced back the history of transgender individuals within India as part of a range of groups with a "strong historical presence" in India and in Hindu and Jain texts.[47]

31. The Supreme Court stated that, "[g]ender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or [a] transgender or transsexual person."[48] This refers to a person's "self-identification as a man, woman, transgender [person] or other identified category."[49] In coming to this finding, the Court cited a range of international law materials[50] and canvassed comparative materials from the UK, New Zealand and Australia, Malaysia, the ECHR and EU.[51]

32. With regard to Article 14, the Court noted that the provision reads, "the State shall not deny to *any person*…". Thus, this provision does not make reference to any particular gender identity.[52] Consequently, the Court stated that transgender persons "fall within the expression 'person' and, hence, [are] entitled to legal protection of laws in all spheres of State activity, including employment, healthcare [and] education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country."[53] The Court concluded that discrimination on the grounds of gender identity and sexual orientation amounts to a violation of equality under Article 14: "Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India."[54]

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[46] National Legal Services Authority v Union of India, (2014) 5 SCC 438
[47] ibid, ¶¶ 12-16
[48] ibid, ¶ 19
[49] ibid.
[50] ibid, ¶¶ 21-24
[51] ibid, ¶¶ 25-42
[52] ibid, ¶ 54
[53] ibid.
[54] ibid, ¶ 55

33. The analysis under Articles 15 and 16 engaged directly with the question of whether "all forms of gender bias and gender based discrimination" are included within the meaning of "sex".[55] The Supreme Court reasoned that the prohibition on the ground of "sex" was motivated by the need to "prevent the direct or indirect attitude to treat people differently, for the reason of **not being in conformity with stereotypical generalizations of binary genders** [emphasis added]."[56] The Court stated "sex" includes biological components including one's genitals, chromosomes and secondary sexual features, *and* "gender attributes" such as "one's self image, the deep psychological or emotional sense of sexual identity and character".[57] As a result of this, discrimination on the ground of "sex" also "includes discrimination on the ground of gender identity" and is not limited to people who identify as male or female, but also those who "consider themselves to be neither male or female".[58] Thus, "gender identity" was held to be a component of "sex" as a ground of discrimination.

(ii) Prohibition of discrimination on ground of sexual orientation

34. Sexual orientation, like gender identity, is not expressly listed as an express ground under Article 15(1) or 15(2). However, the courts have interpreted the ground of "sex" broadly so as to encompass sexual orientation. This interpretative exercise has occurred across a series of judgments involving the Delhi High Court and the Supreme Court of India, the highest court of the country. The first judgment in this series was by the **Delhi High Court**, which read "sex" broadly to include "sexual orientation". On this basis, the provision being challenged before the Court was read down. This reading down was reversed by a **two-judge bench of the Supreme Court of India**. However, the two-judge bench did not express an opinion on the inclusion of "sexual orientation" within "sex" and proceeded to reverse the High Court judgement on other grounds. Finally, recently, **a five-judge bench of the Supreme Court** reversed the decision of the two-judge bench of the Supreme Court. It once again read down the impugned provision and endorsed the argument of the High Court that "sex" includes "sexual orientation". This is the current position of the law in India. This report will briefly discuss the decisions of the Delhi High Court and the two-judge bench of the Supreme Court of India to provide context, and an outline of the arguments relied on by the courts, before proceeding to discuss in detail the recent decision of the five-judge bench of the Supreme Court of India, to the extent it is relevant to the question at hand.

[55] ibid, ¶ 56
[56] ibid ¶ 59
[57] ibid.
[58] ibid.

35. In the **Delhi High Court** case of *Naz Foundation v Government of Nct of Delhi* [59] the Court was required to consider the constitutionality of Section 377 of the Indian Penal Code, 1860 (IPC) which *inter alia* criminalises "carnal intercourse against the order of nature", including consensual same-sex acts between adults in private.[60] This colonial era provision imported to India the criminalisation of sodomy from English common law.[61] This law was challenged under Articles 14 and 15.[62]

36. Since Article 15(1) contains a fixed list of grounds, the question was whether "sex" within Article 15(1) could be read to include "sexual orientation". The High Court answered this question in the affirmative: "We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15."[63]

37. The High Court accepted the argument of the petitioner that "sex" did not refer to "gender simpliciter" but was to be read more broadly to differential treatment of people on the basis that they do not act in conformity with stereotypical judgments and generalizations about the conduct of either sex:

> "The argument of the petitioner is that 'sex' in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex- discrimination cannot be read as applying to gender simpliciter. **The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning "normal" or "natural" gender roles**. **Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex** [emphasis added]."[64]

38. The Court also held that the animating principle behind the listed grounds under Article 15(1) is personal autonomy. The Court stated, "Thus personal autonomy is inherent in the grounds mentioned in Article 15. The grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual". [65] On this basis, the Court stated "that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by

[59] Naz Foundation v Government of Nct of Delhi, 160 DLT 277.
[60] ibid ¶ 1.
[61] ibid ¶ 2.
[62] ibid ¶ 9.
[63] Ibid ¶ 104.
[64] ibid ¶ 99.
[65] ibid ¶ 112

Article 15".[66] Section 377 was read down, to exclude from its scope consensual sexual acts between people of the same sex, which were otherwise considered "carnal intercourse against the order of nature".

39. This decision was overturned by a **two-judge bench of the Supreme Court of India** in *Suresh Kumar Koushal and another v NAZ Foundation and others.* [67] However, it is important to note that the Supreme Court did not express an opinion on whether sexual orientation is included within "sex" under Article 15. The Supreme Court instead overruled the High Court decision on the basis that the High Court took the wrong approach in defining the scope of judicial review of pre-Constitutional legislation, such as Section 377 IPC. The Supreme Court held that although the Court is empowered to declare such laws void if they are incompatible with the Constitution, a "presumption of constitutionality" extends even to pre-Constitutional legislation.[68] Thus such laws will not be found unconstitutional if the Court can accept a constitutional interpretation of that law in deference to the democratic mandate of Parliament.[69]

40. The Court also rejected the discrimination argument based on Articles 14 and 15. With regards to Article 14, the Court made reference to the test of intelligible differential and rational nexus, and said,

> "while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned[70]…Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification."[71]

41. Further, the Supreme Court stated that the petitioner had "miserably failed" to provide the particulars of the discriminatory attitude exhibited by state agencies towards sexual minorities and of their consequent denial of basic human rights.[72] The Court termed the details provided "wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to

[66] ibid ¶ 104
[67] Suresh Kumar Koushal and another v NAZ Foundation and others, (2014) 1 SCC 1. It is to be noted that the Supreme Court of India sits in panels, with different number of judges on each panel.
[68] ibid ¶ 26
[69] ibid ¶¶ 30-32
[70] ibid ¶ 41
[71] ibid ¶ 42
[72] ibid ¶ 40

discriminatory treatment".[73] In its reasoning, the Court relied on the fact that LGBTQ persons constitute only a "miniscule minority" of the country's population[74], and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377.[75] The Court therefore concluded that "this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."[76] The reading down of Section 377 was therefore reversed by the two-judge bench of the Supreme Court.

42. However, for the current purposes, the Supreme Court, in Koushal, at no point challenged the conclusion that "sex" can or does include "sexual orientation".

43. Finally, a **five-judge bench of the Supreme Court of India**[77] held in *Navtej Singh Johar and Others v Union of India*[78] that Section 377 be read down, to exclude from its scope consensual sexual activity between same sex adults, and thus overturned *Suresh Kumar Koushal.*. This is the current position of the law in India. The conclusion in *Navtej Johar* was unanimous; however, three concurring judgments were delivered (Nariman J., Chandrachud J., and Malhotra J.), in addition to the majority judgment (Misra CJI. and Khanwilkar J.).

44. Chandrachud J held that discrimination on ground of sexual orientation is founded upon stereotypical understanding of sex roles:

> "A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1)."[79]
>
> 'Section 377 criminalizes behavior that does not conform to the heterosexual expectations of society. In doing so it **perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles**. **The notion that the nature of relationships is fixed and within the 'order of nature' is perpetuated by gender roles, thus excluding homosexuality from the narrative**

[73] ibid ¶ 40
[74] ibid ¶ 43
[75] ibid ¶ 43
[76] ibid ¶ 43
[77] A panel of five or more judges is required to decide any case "involving a substantial question of law as to the interpretation of this Constitution" (Constitution of India, 1950, art. 145(3)).
[78] Navtej Singh Johar v Union of India, (2018) 1 SCC 791
[79] ibid, Chandrachud J (concurring), ¶ 41

[emphasis added]. The effect is described as follows: Cultural homophobia thus discourages social behavior that appears to threaten the stability of heterosexual gender roles. These dual normative standards of social and sexual behavior construct the image of a gay man as abnormal because he deviates from the masculine gender role by subjecting himself in the sexual act to another man."[80]

"**If individuals as well as society hold strong beliefs about gender roles** – that men (to be characteristically reductive) are unemotional, socially dominant, breadwinners that are attracted to women and women are emotional, socially submissive, caretakers that are attracted to men – **it is unlikely that such persons or society at large will accept that the idea that two men or two women could maintain a relationship** [emphasis added]."[81]

"In other words, **one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles** [emphasis added]… Statutes like Section 377 give people ammunition to say "this is what a man is" by giving them a law which says "this is what a man is not." Thus, laws that affect non-heterosexuals rest upon a normative stereotype: "the bald conviction that certain behaviour-for example, sex with women-is appropriate for members of one sex, but not for members of the other sex."[82]

"What this shows us is that LGBT individuals as well as those who do not conform to societal expectations of sexual behavior defy gender stereotypes: "**The construction of gender stereotypes ultimately rests on the assumption that there are two opposite and mutually exclusive biological sexes. The assumption of heterosexuality is central to this gender binary**. In a patriarchal context, some of the most serious transgressors are thus: a woman who renounces a man sexual partner or an individual assigned female at birth who renounces womanhood, thereby rejecting the patriarchal system and all other forms of male supervision and control, and an individual assigned male at birth who embraces womanhood, thereby abandoning privilege in favor of that which is deemed subservient, femininity."[83]

"Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender. The case for gay rights undoubtedly seeks justice for gays. But it goes well beyond the concern for the gay community. **The effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes** [emphasis added]."[84]

"Relationships that tend to undermine the male/female divide are inherently required for the maintenance of a socially imposed gender inequality. Relationships which question the divide are picked up for target and abuse. Section 377 allows this. By attacking these gender roles, members of the affected community, in their move to build communities and relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchical sexual roles in order to function. For members of the community,

[80] ibid ¶ 44
[81] ibid ¶ 44
[82] ibid ¶ 46
[83] ibid ¶ 46
[84] ibid ¶ 46

> hostility and exclusion aimed at them, drive them into hiding, away from public expression and view. It is this discrimination faced by the members of the community, which results in silence, and consequently invisibility, creating barriers, systemic and deliberate, that effect their participation in the work force and thus undermines substantive equality. In the sense that the prohibition of miscegenation was aimed to preserve and perpetuate the polarities of race to protect white supremacy, **the prohibition of homosexuality serves to ensure a larger system of social control based on gender and sex** [emphasis added]."[85]

On this basis, Chandrachud J. held that "sex" includes "sexual orientation".

45. Malhotra J accepted an "expansive interpretation" of the term "sex", adopted by the Supreme Court previously in *NALSA v Union of India*[86], where sex was held to include the "biological characteristics" including "genitals, chromosomes and secondary sexual features", *and* "gender attributes" including "one's self- image, the deep psychological or emotional sense of sexual identity and character".[87] On this basis, Malhotra J held,

> "Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their "sexual identity and character… **The prohibition against discrimination under Article 15 on the ground of 'sex' should therefore encompass instances where such discrimination takes place on the basis of one's sexual orientation** [emphasis added]."[88]

46. Malhotra J also stated:

> "…the underlying commonality between the grounds specified in Article 15 is based on the **ideas of 'immutable status' and 'fundamental choice**… Race, caste, sex, and place of birth are aspects over which a person has no control, *ergo* they are immutable. On the other hand, religion is a fundamental choice of a person. **Discrimination based on any of these grounds would undermine an individual's personal autonomy** [emphasis added]."[89]

47. Referring to decisions of the Canadian Supreme Court in Egan v Canada[90] and Vriend v Alberta[91], Malhotra J held,

> "Section 15(1), of the Canadian Charter like Article 15 of our Constitution, does not include "sexual orientation" as a prohibited ground of discrimination. Notwithstanding that, the Canadian Supreme Court in the aforesaid decisions has held that sexual orientation is a "ground analogous" to the other grounds specified under Section 15(1). Discrimination based on any of these grounds has **adverse impact on an individual's personal autonomy, and is undermining of his**

[85] ibid ¶ 47
[86] National Legal Services Authority v Union of India, (2014) 5 SCC 438
[87] ibid ¶ 66
[88] Navtej Singh Johar v Union of India, (2018) 1 SCC 791, Malhotra J (concurring) ¶ 15.1
[89] ibid ¶ 15.2
[90] [1995] 2 SCR 513
[91] [1998] 1 SCR 493

> **personality**. A similar conclusion can be reached in the Indian context as well in light of the **underlying aspects of immutability and fundamental choice** [emphasis added]."[92]

48. Thus, while Chandrachud J interpreted "sex" to include "sexual orientation" because discrimination on both grounds is based on stereotypes about sex roles, Malhotra J accepted such interpretation because sexual orientation, like sex, is an immutable personal characteristic of an individual, fundamental to an individual's autonomy. However, though based on different reasoning, in *Navtej Johar*, the Supreme Court of India held that "sex" as a ground of discrimination under Article 15(1) includes "sexual orientation".[93] India is a particularly relevant comparator for the United States, because like Title VII, Article 15 has a fixed list of grounds; yet courts have expanded the list by reading into existing grounds new ones which are analogous to them.

II. IF SO, DOES INDIA MAINTAIN A HIERARCHY BETWEEN SEXUAL ORIENTATION AND/OR GENDER IDENTITY AND OTHER GROUNDS OF DISCRIMINATION?

49. The Constitution of India itself contains no express hierarchy of grounds. However, judicial decisions on this point indicate that grounds that are manifestation of personal autonomy of an individual are subject to a higher standard of scrutiny.

50. An important case in this regard is *Anuj Garg v Hotel Association of India*,[94] even though it was a case of discrimination on ground of sex, rather than sexual orientation. In *Anuj Garg*, the constitutional validity of Section 30 of the Punjab Excise Act, 1914 was challenged. The provision prohibited employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public. The legislation in question therefore was a form of protectionist legislation. The Court found that:

> "Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition **do not impinge upon individual autonomy**. **This is the backdrop of deeper judicial scrutiny of such legislations** [emphasis added]."[95]

[92] Navtej Singh Johar v Union of India, (2018) 1 SCC 791, Malhotra J (concurring) ¶ 15.2
[93] The other three judges did not go into the question of whether "sex" included "sexual orientation" and held Section 377 to be unconstitutional on other grounds.
[94] Anuj Garg v Hotel Association of India, (2008) 3 SCC 1
[95] ibid ¶ 39

> "It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. **The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role** [emphasis added]. The perspective thus arrived at is outmoded in content and stifling in means."[96]
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> "No law in its ultimate effect should end up perpetuating the oppression of women. **Personal freedom is a fundamental tenet which cannot be compromised** in the name of expediency until unless there is a compelling state purpose. **Heightened level of scrutiny is the normative threshold for judicial review in such cases** [emphasis added]."[97]

51. The test for this "heightened level of scrutiny" was,

> "whether the **legislative interference to the autonomy** in employment opportunities for women is **justified as a legitimate aim** *and* **proportionate** to the aim pursued[98]… The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al. The bottom-line in this behalf would a functioning modern democratic society which ensures **freedom to pursue varied opportunities and options without discriminating** on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued[99] [emphasis added]."

52. Thus, in *Anuj Garg*, the legislation was held to impinge upon individual autonomy through perpetuation of stereotypical conceptions about women's roles. It was therefore subjected to heighted scrutiny.

53. This analysis in *Anuj Garg* was relied on by the Delhi High Court in *Naz Foundation*, to adopt the same test of heightened scrutiny with respect to sexual orientation. Setting out the standard of scrutiny that applies to laws "reflecting oppressive cultural norms that especially target minorities and vulnerable groups"[100], the Delhi High Court held,

> "**a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny** [101] [emphasis added]… personal autonomy is inherent in the grounds

[96] ibid ¶ 44
[97] ibid ¶ 45
[98] ibid ¶ 47
[99] ibid ¶ 49
[100] Naz Foundation v Government of Nct of Delhi, 160 DLT 277, ¶ 107
[101] ibid ¶ 111

> mentioned in Article 15. The grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual[102] … As held in Anuj Garg, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against "reasonableness" under Article 14 but be subject to "strict scrutiny".[103]

54. This heightened standard of scrutiny requires that, "The state interest "must be legitimate and relevant" for the legislation to be non-arbitrary and [the legislation] must be proportionate towards achieving the state interest.[104]

55. Thus, as per *Anuj Garg* and *Naz Foundation*, a higher standard of scrutiny is applicable to a measure which disadvantages a vulnerable group, defined on the basis of a characteristic relating to personal autonomy. As held in *Naz Foundation, Navtej Johar* and *NALSA*, this would include not just sex, but also sexual orientation and gender identity. Therefore, a distinction is drawn, in the Indian context, between classifications based on grounds that are characteristics relating to one's personal autonomy and other classifications. While the former (which would include sex, sexual orientation and gender identity) would be subject to a higher threshold of scrutiny, the latter would only be subject to a "reasonableness" test under Article 14.[105] Thus, in India, no hierarchy exists between sex/other listed grounds, and sexual orientation and gender identity (though a hierarchy exists between these grounds, and others which do not engage personal autonomy).

[102] ibid ¶ 112
[103] ibid ¶ 113
[104] ibid ¶ 92. The Supreme Court in *Navtej Johar* did not express a ruling on this heightened standard of scrutiny. Thus, the law in India on this remains the Supreme Court decision in *Anuj Garg*, applied to sexual orientation in the Delhi High Court decision in *Naz Foundation*.
[105] Tarunabh Khaitan, 'Reading Swaraj into Article 15: A new deal for all minorities', 2 NUJS Law Review (2009), 424-427

EUROPEAN CONVENTION ON HUMAN RIGHTS

I. DOES "SEX" AS A GROUND OF DISCRIMINATION WITHIN THE ECHR INCLUDE SEXUAL ORIENTATION AND/OR GENDER IDENTITY?

56. According to Article 14 of the European Convention on Human Rights ("ECHR"), "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

57. Article 14 ECHR is a subsidiary provision which only takes effect in relation to the enjoyment of the rights and freedoms set forth in the Convention.[106] Nonetheless, Article 14 ECHR is autonomous to the extent that it does not presuppose a breach of one of the substantive provisions, as long as the facts at issue fall within the ambit of one or more of the latter.[107]

58. The grounds "sexual orientation" and/or "gender identity" are not explicitly listed in Article 14 ECHR. However, as indicated by the words "such as" and "other status", the list in Article 14 is not exhaustive.[108] And indeed, the European Court of Human Rights (hereafter "ECtHR") has applied Article 14 ECHR to discrimination grounds not explicitly mentioned in that provision.[109] In particular, the Court has held "that the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity"[110].

(i) Prohibition of discrimination on grounds of sexual orientation

[106] Abdulaziz, Cabales and Balkandali v The United Kingdom, App no. 9214/80; 9473/81; 9474/81 (ECtHR, 28 May 1985), ¶ 71; Hämäläinen v Finland, App no 37359/09 (ECtHR, 16 July 2014); ¶ 107; see also William A. Schabas, The European Convention on Human Rights: A Commentary (OUP 2017), 562.
[107] Ibid.
[108] William A. Schabas, The European Convention on Human Rights: A Commentary (OUP 2017), 572, 583.
[109] Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000), ¶ 20.
[110] Identoba and Others v Georgia, App no 73235/12 (ECtHR, 12 May 2015), ¶ 96.

59. It is now recognised that Art. 14 ECHR prohibits discrimination on grounds of sexual orientation.[111] The next question that arises is whether discrimination on the basis of sexual orientation constitutes discrimination on the basis of "sex" or discrimination on the basis of "other status" in terms of Article 14 ECHR.

60. In their opinion on the case *Sutherland v The United Kingdom*[112], the European Commission of Human Rights[113] notably stated that

> "In terms of Article 14 (…) of the Convention, it is not clear whether this difference [based on sexual orientation] is a difference based on 'sex' or on 'other status'. The Commission notes that the Human Rights Committee set up under the International Covenant on Civil and Political Rights has considered that sexual orientation is included in the concept of 'sex' within the meaning of Article 26 (…) of that Covenant, and that it did not therefore need to decide whether sexual orientation was included in the concept of 'other status' (Toonen v. Australia, CCPR/C/50/D/488/1992).[114] The Commission for its part considers that it is not required to determine whether a difference based on sexual orientation is a matter which is properly to be considered as a difference on grounds of 'sex' or of 'other status'. In either event, it is a difference in respect of which the Commission is entitled to seek justification.[115]

61. The jurisprudence of the European Court of Human Rights (ECtHR/ Court) suggests that the Court does not consider discrimination on the ground of sexual orientation to be discrimination on the ground of "sex". Rather sexual orientation is treated as a non-enumerated ground under Article 14 ECHR, and brought under "other status".[116] For instance, in the decision *Salgueiro da Silva Mouta v Portugal,* the ECtHR stated that "there was a difference of treatment (…) based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list

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[111] Salgueiro da Silva Mouta v Portugal, App no 33290/96 (ECtHR 21 December 1999), ¶ 28; L. and V. v Austria, App nos 39392/98, 39829/98 (ECtHR, 9 January 2003), ¶ 45; Kozak v Poland, App no 13102/02 (ECtHR, 2 March 2010), ¶ 92; Alekseyev v Russia, App nos 4916/07, 25924/08, 14599/09 (ECtHR, 21 October 2010), ¶ 108; P.V. v Spain, App no 35159/09 (ECtHR, 30 November 2010), ¶ 30; Identoba and Others v Georgia, App no 73235/12 (ECtHR, 12 May 2015), ¶ 96.

[112] Sutherland v The United Kingdom, App no 25186/94 (European Commission of Human Rights, adopted on 1 July 1997), available at <http://www.hrcr.org/safrica/equality/Sutherland_UK.htm>.

[113] The European Commission of Human Rights was set up to consider whether a petition was admissible to the European Court of Human Rights, to ensure that the European Court of Human Rights was not flooded with trivial cases. If found admissible, "the Commission would examine the petition to determine the facts of the case and look for parties that could help settle the case in a friendly manner. If a friendly settlement could not take place, the Commission would issue a report on the established facts with an opinion on whether or not a violation had occurred" (See 'Council of Europe: European Commission of Human Rights' at <https://www.refworld.org/publisher/COECOMMHR.html>). However, the process of routing cases through the Commission resulted in severe delays; as a result, Protocol 11 to the European Convention of Human Rights (available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/155>) removed the Commission; now all cases go directly the European Court of Human Rights.

[114] ibid ¶ 50.

[115] ibid ¶ 51

[116] Cf. William A. Schabas, The European Convention on Human Rights: A Commentary (OUP 2017), 583.

set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as' (in French 'notamment')."[117]

62. Furthermore, the Explanatory Report to Protocol No. 12 clarifies that

> "The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example […] sexual orientation […]), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included."[118]

63. To conclude, the prohibition of discrimination on grounds of sexual orientation is covered by Article 14 ECHR. However, rather than understanding sexual orientation as being part of the ground "sex", the former will be treated as a non-enumerated ground under Article 14 ECHR.

(ii) Prohibition of discrimination on grounds of gender identity

64. In the decision *Identoba and Others v Georgia,* the ECtHR emphasized that the prohibition of discrimination under Article 14 ECHR also covers issues related to gender identity.[119] As with sexual orientation, gender identity is considered a non-enumerated ground or "other status" under Article 14 ECHR.[120]

II. IF SO, DOES THE ECHR MAINTAIN A HIERARCHY BETWEEN SEXUAL ORIENTATION AND/OR GENDER IDENTITY AND OTHER GROUNDS OF DISCRIMINATION?

[117] Salgueiro da Silva Mouta v Portugal, App no 33290/96 (ECtHR 21 December 1999), para. 28; see also Fretté v France, App no 36515/97 (ECtHR, 26 February 2002), ¶ 32; P.V. v Spain, App no 35159/09 (ECtHR, 30 November 2010), ¶ 30.

[118] Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000), ¶ 20.

[119] Identoba and Others v Georgia, App no 73235/12 (ECtHR, 12 May 2015), ¶ 96.

[120] William A. Schabas, The European Convention on Human Rights: A Commentary (OUP 2017), 583; Handbook on European non-discrimination law (2018), 171 <https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf> accessed 06 June 2019.

65. Article 14 ECHR does not expressly establish a hierarchy of grounds of discrimination. However, on occasion, the case law of the ECtHR has referred to "suspect grounds"[121] (such as sex or race) or "suspect categories" "requiring very weighty reasons"[122] (such as sex, sexual orientation, ethnic origin and nationality), suggesting some sort of hierarchy within the grounds prohibited by Article 14 ECHR.[123] Furthermore, even where the Court has not spoken of "suspect grounds", it has held that the standard of review and the margin of appreciation afforded to states can vary depending on the ground in question.[124]

66. In the decision, *Clift v The United Kingdom,* the Court stated that the scope of the margin of appreciation "will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy"[125].

67. By contrast, the ECtHR has repeatedly held that differences that concern a "most intimate aspect of an individual's private life" require "particularly serious reasons by way of justification"[126]. In *Smith v Grady*, for instance, the Court held that "the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required".[127] In *Schalk and Kopf v Austria,* the Court held, "**just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification** [emphasis added]".[128] In *Taddeucci and Mccall v Italy*, the Court held, "**just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification, or as is sometimes said, 'particularly convincing and weighty reasons'** [emphasis added]".[129]

68. Furthermore, in the case *Alekseyev v Russia,* the ECtHR emphasised that

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[121] Clift v The United Kingdom, App no 7205/07 (ECtHR, 13 July 2010), ¶ 72.
[122] Eweida and Others v The United Kingdom, App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013), ¶ 71.
[123] William A. Schabas, The European Convention on Human Rights: A Commentary (OUP 2017), 574.
[124] Ibid.
[125] Clift v The United Kingdom, App no 7205/07 (ECtHR, 13 July 2010), ¶ 73; See also Schalk and Kopf v Austria, App no 30141/04 (ECtHR, 24 June 2010), ¶ 97.
[126] Smith and Grady v The United Kingdom, App nos 33985/96, 33986/96 (ECtHR, 27 September 1999), ¶ 90; Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) Human Rights Law Review, 613, 635.
[127] Smith and Grady v The United Kingdom, App nos 33985/96, 33986/96 (ECtHR, 27 September 1999), ¶ 90
[128] Schalk and Kopf v Austria, App no 30141/04 (ECtHR, 24 June 2010), ¶ 97; The Court has also said the same thing in Karner v Austria, App no 40016/98 (ECtHR, 24 July 2003), ¶ 37;
[129] Taddeucci and Mccall v Italy, App no 51362/09 (ECtHR, 30 June 2016), ¶ 89

> "(…) when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. **Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow**, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances [emphasis added]."[130]

69. Similarly, in the decision, *X and Others v Austria*, the Grand Chamber stated that

> "just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons (…). **Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow** (…). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (…) [emphasis added]."[131]

70. Finally, in *Vejdeland and Others v Sweden,* the Court stressed that, "discrimination based on sexual orientation **is as serious as** discrimination based on 'race, origin or colour or sex' [emphasis added]."[132]

71. Even though the cited cases dealt with distinctions on grounds of sexual orientation, the judgments[133] suggest that the ECtHR would also apply a strict standard of review to distinctions based on gender identity, as an individual's gender identity is a component of the intimate and vulnerable sphere of her private life. In fact, in *Hämäläinen v Finland*, the Court held, "differences based on *gender* or sexual orientation require particularly serious reasons by way of justification",[134] hinting that the weighty justifications would be required for gender identity as well, along with sexual orientation.

72. The jurisprudence of the ECtHR suggests some sort of hierarchy within the grounds prohibited in Article 14 ECHR. However, even if such hierarchy exists, differences based on sex, sexual orientation or gender identity are considered as serious as distinctions based on sex or race and can only be justified by means of particularly convincing and weighty reasons.

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[130] Alekseyev v Russia, App nos 4916/07, 25924/08, 14599/09 (ECtHR, 21 October 2010), ¶ 108.
[131] X and Others v Austria [GC], App no 19010/07 (ECtHR, 19 February 2013), ¶ 99; see also Karner v Austria, App no 40016/98 (ECtHR, 24 July 2003), ¶ 37. Hämäläinen v Finland, App no 37359/09 (ECtHR, 16 July 2014); ¶ 109; Taddeucci and Mccall v Italy, App no 51362/09 (ECtHR, 30 June 2016), ¶ 89
[132] Vejdeland and Others v Sweden, App 1813/07 (ECtHR, 9 February 2012), ¶ 55.
[133] In particular Smith and Grady v The United Kingdom, App nos 33985/96, 33986/96 (ECtHR, 27 September 1999), ¶ 90; Alekseyev v Russia, App nos 4916/07, 25924/08, 14599/09 (ECtHR, 21 October 2010), ¶ 108, which both talk about differences concerning an individual's intimate and private life.
[134] Hämäläinen v Finland, App no 37359/09 (ECtHR, 16 July 2014), ¶ 109.

INTERNATIONAL HUMAN RIGHTS LAW

I. DOES "SEX" AS A GROUND OF DISCRIMINATION WITHIN INTERNATIONAL HUMAN RIGHTS LAW INCLUDE SEXUAL ORIENTATION AND/OR GENDER IDENTITY?:

73. Before moving onto the substantive aspects of international human rights law under the various treaties and conventions, the report will set out the status of General Comments— several of which are relied on below— under international law. The Human Rights Committee has the competence to adopt General Comments under Article 40 (4) of the International Covenant on Civil and Political Rights, 1976.[135] Although the General Comments issued by the Committee are not per se legally binding, they are issued by the treaty body tasked with supervising and monitoring the implementation of the Covenant and should be ascribed 'great weight' with regard to the interpretation of its provisions.[136] Additionally, States Parties to the International Covenant on Civil and Political Rights, 1976 have an obligation of good faith, both in terms of the performance of their obligations under the Covenant[137] and in terms of their interpretation of the provisions of the Covenant.[138] Hence, they have to give due regard and consideration to the General Comments of the Committee, which is the body established to interpret the Covenant as well as supervise its implementation and promote compliance by States Parties. [139] Similar considerations apply with regard to General Comments/Recommendations issued by other human rights treaty bodies.

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[135] Similarly the legal basis for the adoption of General Comments by the Committee on Economic, Social and Cultural Affairs is established by the ECOSOC Resolution 1987/5, UN Doc E/RES/1987/5 (26 May 1987), ¶ 9 and ECOSOC Resolution 1988/4, UN Doc E/RES/1988/4 (24 May 1988), ¶ 13; the adoption of General Recommendations by CEDAW Committee is based on the Convention on Elimination of All Forms of Discrimination Against Women (entered into force on 18 December 1979) A/RES/34/180, art. 21 (1); by the Committee on Child Rights is provided for under the Convention on the Rights of the Child (adopted on 20 September, 1989 and entered into force on 2 September 1990) 1557 UNTS 3, art. 45 (d) CRC.

[136] *Ahmadou Sadio Diallo* (Republic of Guinea v DRC) [Merits] 2010 ICJ Rep 663–64, ¶ 66; also Nisuke Ando, 'General Comments/Recommendations' in Max Planck Encyclopedia of Public International Law, available at opil.ouplaw.com [last accessed 17 June 2019], 41; for the various occasions that national courts have referred to the General Comments or Recommendations see ILA, 'Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals', Committee on International Human Rights Law and Practice (New Dehli 2002) ¶ 32; ILA, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies', Committee on International Human Rights Law and Practice (Berlin 2004) ¶ ¶ 80-100.

[137] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 155 UNTS 331, art. 26

[138] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 155 UNTS 331, art. 31(1)

[139] Helen Keller & Leena Grover, 'General Comments of the Human Rights Committee and their Legitimacy' in Helen Keller & Geir Ulfstein (eds), *Human Right Treaty Bodies: Law and Legitimacy* (CUP 2012) 116, at 129.

(a) International Covenant on Civil and Political Rights, 1976 (ICCPR)[140]

(i) Prohibition on ground of sexual orientation

74. According to Article 2 (1) of the ICCPR, to which the United States of America is a party[141],

> [e]ach State Party … undertakes to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth **or other status** [emphasis added].[142]

75. According to paragraph 2 of the same provision, State Parties to the ICCPR are under an obligation,

> where not already provided for by existing legislative or other measures … to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[143]

76. As per General Comment No 31 on 'The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' of the Human Rights Committee, the treaty body tasked with monitoring and supervising the implementation of the ICCPR,[144] state parties to the Covenant are under an obligation under Article 2 (2) to

> take the necessary steps to give effect to the Covenant rights in the domestic order…unless Covenant rights are already protected by their domestic laws and practices, States Parties are required on ratification to make such changes to domestic laws or practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. [145]

77. Additionally, under Article 26 of the ICCPR

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[140] International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

[141] The US ratified the ICCPR on 8 June 1992. Although the US made a declaration upon ratification that it does not consider Articles 1 to 27 of the ICCPR to be self-executing (available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec, last accessed 13 June 2019), as a matter of international law it has an obligation observe the provisions of the ICCPR which are binding upon it. In the event that the US does not carry out its obligations under the Covenant due to lack of implementing national legislation or otherwise, this constitutes a violation of its international obligations that triggers its international responsibility.

[142] International Covenant on Civil and Political Rights, 1976, art. 2 (1).

[143] International Covenant on Civil and Political Rights, 1976, art. 2 (2).

[144] Art 28 ICCPR. For the four functions of the Human Rights Committee in monitoring the ICCPR see Sarah Joseph and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (3rd edn, OUP 2013) 15.

[145] CCPR, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant', (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, at 5, para 13.

> [a]ll 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 any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[146]

78. In General Comment No 18 on Non-discrimination, the Human Rights Committee proclaimed non-discrimination to "constitute a basic and general principle relating to the protection of human rights" along with "equality before the law and equal protection of the law without any discrimination".[147] According to General Comment No 18, Article 26 of the ICCPR establishes an autonomous right, namely the right of all persons to be "equal before the law and are entitled to equal protection of the law, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds".[148] The autonomous nature of the right under Article 26 was recently confirmed by the Human Rights Committee in its Views[149] on Communication No 2628/2015 (*Delgado Burgoa v Bolivia*), where the Committee stated: "The Committee recalls, however, that article 26 of the Covenant does not merely duplicate the guarantee already provided for in article 2 (1) but establishes an autonomous right".[150]

79. Although the ICCPR does not contain a definition of the term "discrimination" the Human Rights Committee, following the definitions contained in the International Convention on the Elimination of All Forms of Racial Discrimination[151] and the International Convention on the

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[146] International Covenant on Civil and Political Rights, 1976, art. 26.
[147] CCPR, 'General Comment No 18: Non-discrimination' (9 November 1989) UN Doc CCPR/C/Rev.1/Add.1, para 1.
[148] ibid at 1, ¶ 12.
[149] In considering Individual Communications under the Optional Protocol to the International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 302 the Human Rights Committee does not function as a judicial body. However, as highlighted in UNCHR, 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33, at 2, ¶ 11 'the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of the Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions'. According to the Committee:

> The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol. (ibid at 3, ¶ 13).

[150] UNCHR, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 2628/2015' (Rebeca Elvira Delgado Burgoa v Bolivia (Plurinational State of) UN Doc CCPR/C/122/D/2628/2015 (2 May 2018) at 11, ¶ 10.4.
[151] Convention on the Elimination of All Forms of Racial Discrimination (adopted on 7 March 1966, entered into force on 4 January 1969) 660 UNTS 1.

Elimination of All Forms of Discrimination Against Women[152], defined discrimination in General Comment No 18 as

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, 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.[153]

80. Both Articles 2 (1) and 26 of the ICCPR include "sex" as a listed ground on the basis of which discrimination is prohibited. However, the listed grounds under both provisions are non-exhaustive, as evident by the words "or other status". In its seminal decision in *Toonen v Australia*[154], which concerned violations of Article 17 (on the right to privacy) and Article 26 of the ICCPR, the Human Rights Committee observed that "the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation":

> The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. **The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation** [emphasis added].[155]

81. Subsequently, this was confirmed in *Young v Australia*, which concerned a complaint brought solely on the basis of Article 26 of the ICCPR.[156] The complainant alleged that Article 26 had been violated by the State's refusal to grant him a pension benefit due to the fact that he was of the same sex as his partner. He argued that he had been denied equal protection of the law on the basis of his sexual orientation.[157] The Human Rights Committee recalled its decision in *Toonen v Australia* and reiterated that the prohibition of discrimination under Article 26 also comprises discrimination on the basis of sexual orientation.[158] It found that the differentiated treatment that same-sex partners were subjected to under the relevant legislation was not based on reasonable and objective grounds, and found that Australia had violated its obligations

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[152] Convention on the Elimination of All Forms of Discrimination Against Women (adopted on 18 December 1979, entered into force on 3 September 1981) 1249 UNTS 1 ('CEDAW').
[153] CCPR, 'General Comment No 18: Non-discrimination' (9 November 1989) UN Doc CCPR/C/Rev.1/Add.1, at 2, ¶ 7.
[154] UNCHR, 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol concerning communication No. 488/1992' (Nicholas Toonen v Australia) UN Doc CCPR/C/488/1992 (31 March 1994).
[155] ibid ¶ 8.7.
[156] UNCHR, 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol concerning communication No. 941/2000' (Edward Young v Australia) UN Doc CCPR/C/78/D/941/2000 (18 September 2003).
[157] ibid at 4, ¶ 3.1.
[158] ibid at 15, ¶ 10.4.

under Article 26 by denying Young a pension "on the basis of his sex or sexual orientation".[159] Similarly, in *X v Colombia*, which concerned the pension rights of same-sex couples, the Committee relied on its decision in *Young v Australia*, and held that the prohibition of discrimination under Article 26 includes discrimination on the basis of sexual orientation, thus finding a violation of Article 26 by Colombia.[160]

82. In *C v Australia*, which concerned the absence of access to divorce proceedings for same-sex couples that have been validly married abroad under Australian legislation, the Committee recalled its earlier jurisprudence that the prohibition of discrimination under Article 26 includes discrimination on the basis of sexual orientation and reiterated that "not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[161] In the case at hand, the Committee found that Australia had failed to provided "persuasive explanations" as regards the reasonableness, objectivity, and legitimacy of the differentiated treatment and absent "more convincing explanations" found that the differentiated treatment of C on the basis of her sexual orientation constituted prohibited discrimination under Article 26 of the ICCPR.[162]

83. It is notable that in its 2006 Concluding Observations on the report submitted by the United States under Article 40 of the ICCPR, the Human Rights Committee noted "with concern the failure [of the US] to outlaw employment discrimination on the basis of sexual orientation."[163] It then went on the say that the United States,

> "should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation. The State party should ensure that…federal and state employment legislation outlaw discrimination on the basis of sexual orientation."[164]

(ii) Prohibition on ground of gender identity

84. As regards gender identity, in *G v Australia*, the petitioners alleged that "by failing to implement legislation that prohibits discrimination on the basis of marital and transgender status and that

[159] ibid.
[160] UNHRC, 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol concerning communication No. 1361/2005' (X v Colombia) UN Doc CCPR/C/80/D/1361/2005 (14 May 2007) at 10, ¶ 7.2.
[161] UNHRC, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 2216/2012' (C v Australia) UN Doc CCPR/C/119/D/2216/2012 (1 November 2017) at 11, ¶ 8.4.
[162] ibid at 11–12, ¶ 8.6.
[163] UNHRC, Concluding Observations of the Human Rights Committee on the United States of America, UN Doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006) at 8 ¶ 25.
[164] ibid.

guarantees to all persons equal and effective protection against such discrimination" Australia had violated its obligations under Articles 2 (1) and 26 ICCPR.[165] In its determination, the Committee recalled its General Comment No 18 on Non-discrimination and stated that, "the prohibition against discrimination under article 26 encompasses discrimination on the basis of marital status and gender identity, including transgender status".[166] The Committee did not, however, clarify whether gender identity, including transgender status, was encompassed by the listed ground 'sex' in Article 26 of the ICCPR or by that of 'other status'. Joseph and Castan have argued that "other status" has been interpreted by the Committee to encompass "gender identity" and "intersex status".[167]

(b) International Covenant on Economic, Social and Cultural Rights, 1976 (ICESCR)[168]

85. Article 2 (2) of the ICESCR states

> State Parties … undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth **or other status** [emphasis added].[169]

86. It is important to note that the United States is not a party to the ICESCR and hence it is not bound by its provisions as such, unless these have become part of or reflect customary international law, which seems to be the case at least with regard to the prohibition of non-discrimination.[170]

87. Articles 6 and 7 of the ICESCR relate to the right of work and provides that States Parties "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and take appropriate steps to safeguard this right"[171] and "recognize the right of everyone to the enjoyment of just and favorable conditions of work"[172], including "[f]air wages and equal remuneration for work of equal value without distinction of any kind"[173].

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165 UNHRC, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 2172/2012' (G v Australia) UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) at 5, ¶ 3.4.
166 ibid at 16, ¶ 7.12.
167 Joseph/Castan (n5) at 773–74.
168 International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force on 3 January 1976) 993 UNTS 3.
169 International Covenant on Economic, Social and Cultural Rights, 1976, art. 2 (2)
170 Malcolm Shaw, International Law (8th edn, CUP 2017) 222 mentions discrimination on the basis of race, religion, and gender as contrary to customary international law.
171 International Covenant on Economic, Social and Cultural Rights, 1976, art. 6 (1)
172 International Covenant on Economic, Social and Cultural Rights, 1976, art. 7
173 International Covenant on Economic, Social and Cultural Rights, 1976, art. 7 (a) (i)

88. In General Comment No 20 on Non-discrimination in economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights ('CESCR') proclaimed: "Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights."[174] According to the CESCR, "other status" in Article 2 (3) ICESCR encompasses "sexual orientation" and "gender identity".[175] In General Comment No 18 on the Right to Work under Article 6 of the ICESCR the CESCR recognized the fundamental nature of the right to work and its importance in realizing other human rights as well as its inseparable nature from human dignity.[176] The CESCR declared that Article 2 (2) and (3) prohibited discrimination as regards accessibility to the labour market on the basis of, among others, 'sex', 'sexual orientation', or 'other status'.[177] The CESCR made similar determinations regarding the prohibition of discrimination on the basis of 'sexual orientation' and 'gender identity' in its General Comment No 23 on the right to just and favorable conditions of work[178] and proclaimed among the core obligations of the states parties the obligation to

> [g]uarantee through law the exercise of the right without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, sexual orientation, gender identity, intersex status, health, nationality or any other status.[179]

89. General Comments No 14 on the right to the highest attainable standard of health[180] and No 22 on the right to sexual and reproductive health[181] contain similar statements as regards the prohibition of discrimination on the basis of 'sexual orientation' and 'gender identity'.

90. Thus, the ICESCR contains a general prohibition of discrimination as regards the enjoyment of economic, social, and cultural rights in Article 2 (2). In its General Comment No 20 the Committee read the words 'other status' as encompassing both sexual orientation and gender identity. In various other General Comments on specific rights the Committee has asserted

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[174] CESCR, 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, ¶. 2, of the International Covenant on Economic Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC¶ /20, at 1, ¶ 2.
[175] ibid at 10, ¶ 32.
[176] CESCR, 'General Comment No 18: The Right to Work' (24 November 2005) UN Doc E/C.12/GC/18, at 2, ¶ 1.
[177] ibid at 4 ¶ 12 (b) (i).
[178] CESCR, 'General Comment No 23: The Right to Just and Favourable Conditions of Work' (27 April 2016) UN Doc E/C.12/GC/23, at 4 para 11, at 14 ¶ 48.
[179] ibid at 18 ¶ 65 (a).
[180] CESCR, 'General Comment No 14: The Right to Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4 at 6 ¶ 18.
[181] CESCR, 'General Comment No 22: The Right to Sexual and Reproductive Health' (2 May 2016)UN Doc E/C.12/GC/22, at 3 ¶ 9, at 6 ¶ ¶ 22–23.

time and again that the prohibition of discrimination extends to sexual orientation and gender identity.

(c) American Convention on Human Rights, 1978[182]

91. The American Convention on Human Rights in Article 1 provides for the exercise of the rights and freedoms protected under the Convention "without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or **any other social condition** [emphasis added]".[183] Article 24 of the Convention, additionally' provides: 'All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.'[184]

92. The Inter-American Court of Human Rights has consistently interpreted these provisions as encompassing a prohibition to discriminate on the basis of 'sexual orientation' or 'gender identity'. In the case of *Atala Riffo and daughters v Chile* the Court examining a claim on 'discriminatory treatment and arbitrary interference in the private and family life' on the basis of 'sexual orientation',[185] the Court stated that the list included in Article 1 (1) of possible grounds of discrimination is not exhaustive but illustrative.[186] It then referred to resolutions adopted by the General Assembly of the Organization of American States on the protection of persons against discrimination based on sexual orientation,[187] and to the jurisprudence of the European Court of Human Rights,[188] as well as to the decisions and practice of the UN treaty bodies[189] and the UN political bodies[190] to conclude that 'the sexual orientation and gender identity of persons is a category protected under the Convention'.[191] According to the Court

> any regulation, act or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.[192]

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[182] The American Convention on Human Rights has been signed by the United States; however, it has not been ratified.
[183] American Convention on Human Rights "Pact of San José, Costa Rica" (adopted on 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, OAS Treaty Series No 36, Art 1 (1).
[184] Ibid Art 24.
[185] Atala Riffo and daughters v Chile (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 239 (24 February 2012) para 3.
[186] ibid ¶ 85.
[187] ibid ¶ 86.
[188] ibid ¶ 87.
[189] ibid ¶ 88.
[190] ibid ¶ 90.
[191] ibid ¶ 91.
[192] ibid.

93. The Court concluded that Article 24 in conjunction with Article 1 (1) of the American Convention had been violated by the state.[193] However, it is important to note that the Court did not include "sexual orientation" within "sex" but within the residual clause ("any other social condition"), indicated by the Court's reference to the non-exhaustive, or illustrative, nature of the grounds of discrimination under Article 1.

94. In the case *Duque v Colombia*, which concerned access to pension benefits for same-sex couples, the Court confirmed that 'sexual orientation' and 'gender identity' were categories protected by the Convention under Article 1 (1) and Article 24,[194] and found that the state had violated its obligations under the Convention.[195] This was reaffirmed in the case of *Flor Freire v Ecuador*.[196] In both these cases, references were made to the previous case of *Atala Riffo*, indicating that once again, "sexual orientation" and "gender identity" were placed within the residual clause.

95. Finally, in its Advisory Opinion 24/17 of 24 November 2017, which was requested by Costa Rica to clarify the obligations of state parties under the American Convention on Human Rights with regard to gender identity and sexual orientation, the Court proclaimed that states parties to the American Convention are under an obligation to guarantee both "equality in marriage and the right of trans people to the legal recognition of their gender identity".[197] In doing that it reiterated its consistent jurisprudence that sexual orientation and gender identity are categories protected under the Convention and any act, rule or practice of discrimination based on these grounds is prohibited under the Convention.[198]

(d) Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ('CEDAW')[199] & Convention on the Rights of the Child, 1990 ('CRC')[200]

96. 'Discrimination against women' is defined in Article 1 of the CEDAW as follows:

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[193] ibid ¶ ¶ 146, 155.
[194] Duque v Colombia (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 310 (26 February 2016) ¶ ¶ 104–105.
[195] ibid ¶ 138.
[196] Flor Freire v Ecuador (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 315 (31 August 2016) at 36 ¶ 118.
[197] As summarized in ILO, 'Information Paper on Protection against Sexual Orientation, Gender Identity and Expression and Sexual Characteristics (SOGIESC) Discrimination' (13 May 2019), available at https://www.ilo.org/global/standards/WCMS_700554/lang--en/index.htm [accessed 13 June 2019] at 15 ¶ 50. Gender Identity, and Equality and Non-discrimination with regard to Same-sex Couples, Advisory Opinion, OC-24/17, Inter-American Court of Human Rights Series A No 24 (24 November 2017).
[198] Gender Identity, and Equality and Non-discrimination with regard to Same-sex Couples (n66) ¶ 68 et sec, esp 78.
[199] Convention on Elimination of All Forms of Discrimination Against Women (entered into force on 18 December 1979) A/RES/34/180. The United States has not ratified the CEDAW.
[200] Convention on the Rights of the Child (adopted on 20 September 1989 and entered into force on 2 September 1990) 1557 UNTS 3. The United States has not ratified the CRC.

> 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.[201]

97. Under Article 2 states parties to CEDAW:[202]

> condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
>
> …
>
> (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
>
> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women...

98. In General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention, the Committee on the Elimination of Discrimination Against Women stated:

> **The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as** race, ethnicity, religion or belief, health, status, age, class, caste and **sexual orientation and gender identity**. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.[203]

99. Under Article 2 of the Convention on the Rights of the Child:

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[201] Convention on Elimination of All Forms of Discrimination Against Women, 1979, art. Art 1.
[202] Convention on Elimination of All Forms of Discrimination Against Women, 1979, art. 2.
[203] CEDAW, 'General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women' (16 December 2010) UN Doc CEDAW/C/GC/28 at 4 ¶ 18 [emphasis added].

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's … sex … or other status.[204]

100. The Committee on the Rights of the Child in its General Comment No 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, stated that the grounds on which discrimination is prohibited under Article 2 (1) of the CRC include also 'sexual orientation, gender identity and health status, for example HIV status and mental health'.[205]

(e) Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity ('Yogyakarta Principles') [206]

101. The prohibition of discrimination on the basis of sexual orientation and gender identity in the enjoyment of human rights is clearly articulated in the 2006 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. Under Principle 2:

> "Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination."[207]

102. Principle 2 further elaborates on the meaning of "discrimination on the basis of sexual orientation or gender identity"[208] and the specific measures states should take to comply with this principle. These measures include, among others, to:[209]

> a. Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realization of these principles;
>
> …

[204] Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art 2 (1).
[205] CRC, 'General Comment No 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 at II (B).
[206] The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: www.yogyakartaprinciples.org, last accessed 10 June 2019.
[207] Yogyakarta Principles, Principle 2.
[208] ibid.
[209] ibid.

c. Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity.

103. Additionally, Principle 12 restates the right of every person 'to decent and productive work, to just and favorable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity'.[210] In that respect, States have an obligation to:

> "Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration."[211]

104. The Yogyakarta Principles were elaborated by a group of human rights experts and are not legally binding upon states but they seek to "reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity" and "affirm binding international legal standards with which all States must comply".[212] The Principles have been cited by, among others, the Committee on Economic, Social and Cultural Rights,[213] the International Labour Organization,[214] and the Office of the UN High Commissioner for Refugees,[215] which further adds to their authority as reflecting the current status of sexual orientation and gender identity in the enjoyment of human rights and non-discrimination in international human rights law.

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[210] Yogyakarta Principles, Principle 12.
[211] ibid.
[212] Introduction to the Yogyakarta Principles, at 7.
[213] See 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' (2 July 2009) UN Doc E/C.12/GC/20, 10, ¶ 32, where the CESCR referred to the definition of 'sexual orientation' and 'gender identity' provided for in the Yogyakarta Principles in its analysis of the principle of non-discrimination in the enjoyment of the rights under the ICESCR.
[214] ILO, 'Information Paper on Protection against Sexual Orientation, Gender Identity and Expression and Sexual Characteristics (SOGIESC) Discrimination' (13 May 2019), available at https://www.ilo.org/global/standards/WCMS_700554/lang--en/index.htm [accessed 13 June 2019] at 6 ¶ ¶ 20–21, at 25 para 86, at 26 para 90.
[215] UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008), available at https://www.refworld.org/docid/48abd5660.html [accessed 13 June 2019] ¶ 9: 'The Yogyakarta Principles reflect binding international legal standards with regard to sexual orientation which are derived from key human rights instruments.'; UNHCR, 'Guidelines on International Protection No 9', Doc HCR/GIP/12/09 (23 October 2012) at 3 ¶ 7.

105. Recently, in a much celebrated decision,[216] the Inter-American Court of Human Rights in its Advisory Opinion 24/17 of 24 November 2017, was requested by Costa Rica to clarify the states parties obligations under the American Convention on Human Rights with regard to gender identity and sexual orientation. The Court referred approvingly multiple times to the Yogyakarta Principles and YP+10 to support its statements and conclusions with regard to the obligations of the states parties to the American Convention on Human Rights.[217]

106. Additionally, in 2014 the Indian Supreme Court in the case of *National Legal Services Authority (Petitioners) v Union of India and others*[218] stated that the Yogyakarta Principles were elaborated on "to bring greater clarity and coherence to State's human rights obligations" as relating to sexual orientation and gender identity.[219] After examining the relevant provisions of the Constitution of India relating to fundamental rights, and comparing these guarantees to the *de jure* and *de facto* situation of transgender persons in India, as well as India's international obligations under various international conventions and human rights instruments, the Supreme Court observed that

> "[p]rinciples discussed hereinbefore on TGs [Transgenders] and the International Conventions, including [the] Yogyakarta principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognised and followed."[220]

II. IF SO, DOES INTERNATIONAL HUMAN RIGHTS LAW MAINTAIN A HIERARCHY BETWEEN SEXUAL ORIENTATION AND/OR GENDER IDENTITY AND OTHER GROUNDS OF DISCRIMINATION?

(a) International Covenant on Civil and Political Rights ('ICCPR')

107. Neither Article 2 (1) nor Article 26 of the ICCPR, within the text, maintain a hierarchy among the different listed grounds for discrimination, and the grounds covered within "other status". However, in *Muller and Engelhard v Namibia*, the Human Rights Committee made the following statement:

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[216] ISHR, 'LGBTI rights- Inter-American Court relies on Yogyakarta Principles and YP+10 in landmark decision' (11 January 2018), available at https://www.ishr.ch/news/lgbti-rights-inter-american-court-relies-yogyakarta-principles-and-yp10-landmark-decision [accessed 13 June 2019].
[217] ¶ ¶ 32, 104, 112, 129, 138, 148, 155, 196.
[218] (2014) 5 SCC 438.
[219] Ibid, ¶ 21.
[220] Ibid, ¶ 53 [emphasis in original]; The Yogyakarta Principles were also referred to by the Supreme Court of India in its decision in Navtej Johar v Union of India, (2018) 1 SCC 791, ¶¶ 84-88 (Nariman J. concurring)

> "The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. **A different treatment based on one of the specific grounds enumerated in article 26**, clause 2 of the Covenant, however, **places a heavy burden** on the State party to explain the reason for the differentiation [emphasis added]."[221]

108. This suggests that the Committee may consider certain grounds of discrimination "as inherently more suspect and deserving of greater scrutiny".[222] Joseph and Castan argue that "[i]t seems intrinsically more important to guard against discrimination on some 'grounds', such as the enumerated grounds and "other statuses" such as nationality, **sexuality**, age, or disability".[223] This indicates that even if there might be a hierarchy, grounds such as "sexuality" are treated the same way as the listed grounds, including "sex".

(b) International Covenant on Economic Social and Cultural Rights ('ICESCR')

109. Article 2 (2) of the ICESCR does not maintain a formal hierarchy between the different grounds for discrimination listed in the provision, and the list itself is non-exhaustive as evidenced by the words 'or other status'. In General Comment No 20 on Non-discrimination in economic, social and cultural rights, the Committee on Economic Social and Cultural Rights ('CESCR') stated:[224]

> "Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects."

110. Here, the Committee does not draw distinctions based on grounds; differential treatment on *all* prohibited grounds is treated the same way.

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[221] UNCHR, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 919/2000' (Muller and Engelhard v Namibia) UN Doc CCPR/C/74/D/919/2000 (26 March 2002) ¶ 6.7.
[222] Sarah Joseph and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (3rd edn, OUP 2013) 776.
[223] ibid.
[224] CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, ¶. 2, of the International Covenant on Economic Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20, at 5, ¶ 13.

111. Occasionally, however, the CESCR has made certain observations and determinations that seem to imply that a stricter review or closer scrutiny may be applicable with regard to certain grounds. In its Views on Communication No 10/15 (*Trujillo Calero v Ecuador*) the Committee stated that in the circumstances of the particular claimant 'the intersection of alleged gender and age discriminations makes her particularly vulnerable to discrimination in comparison with the general population' and hence 'particularly special or strict scrutiny is required in considering the question of possible discrimination'.[225] However, once again, there is no indication that sexual orientation or gender identity will be treated with a lower degree of scrutiny than other grounds, or combination of grounds.

(c) American Convention on Human Rights, 1978

112. The American Convention on Human Rights in Article 1 (1) does not include an express hierarchy among the different grounds on discrimination. However, in its judgment in the case *Atala Riffo and daughters v Chile* the IACtHR stated:

> As regards the prohibition of discrimination based on sexual orientation, any restriction of a right would need to be based on rigorous and weighty reasons. Furthermore, the burden of proof is inverted, which means that it is up to the authority to prove that its decision does not have a discriminatory purpose or effect.[226]

113. This suggests that in the view of the Court differentiated treatment in the enjoyment of rights and freedoms under the Convention based on certain grounds, including sexual orientation, may require closer scrutiny and more serious reasons in order to not qualify as prohibited discrimination.

[225] CESCR, 'Views adopted by the Committee under the Optional Protocol to the Covenant concerning communication No. 10/2015)' (Marcia Cecilia Trujillo Calero v Ecuador) UN Doc E/C.12/63/D10/2015 (14 November 2018), at 14, ¶ 19.2.

[226] Atala Riffo and daughters v Chile (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 239 (24 February 2012), ¶ 124. See also ibid ¶ 127. See also Duque v Colombia (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 310 (26 February 2016) ¶ ¶ 106–107.