

Principles 22 to 27: Equality and Non-Discrimination in Education¹

Principles 22 to 27 set out States' obligations in relation to equality and non-discrimination in education. Principle 22 sets out the dimensions which should guide states in ensuring the realisation of the right to equality in the enjoyment of education. Principle 23 requires States to eliminate all forms of discrimination in the enjoyment of the right to education and enumerates a non-exhaustive set of grounds. Principle 23 also elaborates on the meaning of discrimination. Principles 24 – 26 set out States' obligations in relation to eliminating and preventing discrimination and advancing equality. Principle 27 sets out the duty of reasonable accommodation.

Principle 22: The Right to Equality

States must ensure the realisation of the right to equality in the enjoyment of the right to education, which includes four dimensions:

- a. a fair redistributive dimension to address socio-economic disadvantages;**
- b. a recognition dimension to combat stigma, stereotyping, prejudice and violence, and to recognise the dignity of human beings and the intersectionality of different grounds of discrimination;**
- c. a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and**
- d. a transformative dimension to accommodate difference as a matter of human dignity and institute systemic change.**

Principle 22 elaborates the dimensions which should guide states in ensuring the realisation of the right to equality in the enjoyment of education. It requires States simultaneously to pay attention to the need to address socio-economic disadvantage, to combat stigma, stereotyping, prejudice and violence, to ensure participation and inclusion, and to accommodate difference and institute systemic change. It is based on the Committee of the Rights of Persons with Disabilities' elaboration of inclusive

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equality, which in turn draws on Sandra Fredman's four-dimensional concept of substantive equality.²

The first dimension recognizes that inequality does not simply inhere in classifying a person on grounds of race, gender, disability, religion or other similar characteristics, but in the disadvantage attached to that classification. It therefore focusses attention on the disadvantaged group, and requires the disadvantage to be redressed. The right to equality cannot therefore be achieved by 'levelling down', or by removing benefits from an advantaged group; nor by treating everyone equally badly. Further, the emphasis on removing disadvantage means that a State will not breach the right to equality if it takes positive action on behalf of the worse-off group in order to bring them up to the level of the better-off group.

The second dimension requires the State to redress stigma, stereotyping, prejudice and violence against members of a group with protected characteristics. For example, where segregated schools perpetuate stigma and stereotyping, they will breach the right to equality even if their material conditions are equivalent. In the US case of *Brown v Board of Education*, the US Supreme Court held that the stigma suffered by African American children who were forced to attend segregated school was itself sufficient harm, even though it was assumed that the facilities were equivalent.³

The third dimension requires the State to facilitate the participation of those who are under-represented in the political and social arenas. Participation in decision-making is a key theme throughout the Principles. For example, persons with disabilities have adopted the motto: 'Nothing about us without us.'

The fourth dimension requires a recognition by the State that individuals should not have to conform to the dominant norm as a precondition to the right to equality. Difference should not be burdened with extra costs. Instead, underlying structures which exclude outgroups need to be changed. It also requires a recognition that discrimination is about more than individual acts of prejudice but inheres in many of the structures of society. The State should therefore take proactive action to promote equality rather than waiting for individual acts of complaint.

These dimensions should all be optimised, rather than being regarded singly. For example, the State should not address disadvantage at the expense of stigmatizing the recipients. Similarly, the participative dimension should take account of disadvantage, and not only give a voice to those who are better off within a disadvantaged group. For example, participation of racialized and other marginalized girls and women, disabled girls and women, and girls and women living in poverty should be facilitated.

² Committee on the Rights of Persons with Disabilities, 'General Comment No 6 on equality and non-discrimination' (2018) UN Doc CRPD/C/GC/6 [11]; Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712; Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011), Chapter One.

³ *Brown v Board of Education* 347 US 483 (1954) (US Supreme Court).

Principle 23: The Right to Non-Discrimination

States must eliminate all forms of discrimination in the enjoyment of the right to education on grounds such as age, birth, caste, colour, descent, disability, documentation, ethnicity, civil, family or career status, gender identity, health status or genetic or other predisposition toward illness, language, maternity, migration status, national or social origin, nationality, political or other opinion, pregnancy, property, race, religion, sex, sexual orientation, socio-economic disadvantage, statelessness, or other status. The duty to prohibit all forms of discrimination includes direct and indirect discrimination, harassment and denial of reasonable accommodation, as well as multiple, intersectional, associative and perceptible discrimination.

Principle 23 states that the State must eliminate discrimination in the enjoyment of the right to education. It sets out a non-exhaustive list of grounds which are protected against discrimination. By using the words 'such as' and 'other status' the list leaves it open to States to include other grounds which are analogous to those enumerated.

The list is drawn from major international and regional human rights instruments.⁴ Race, colour, sex, religion, political or other opinion, and national or social origin and property are found in Article 2(1) International Covenant of Civil and Political Rights (ICCPR). The same list is found in Article 2(2) International Covenant on Economic, Social and Cultural Rights (ICESCR) with the addition of language and birth. Disability is found in Article 2 Convention on the Rights of Persons with Disabilities (CPRD). Descent is found in Article 1(1) International Covenant on the Elimination of Racial Discrimination (ICERD), and caste, although not mentioned expressly, has been accepted as a form of descent-based discrimination. Ethnic origin is also mentioned in ICERD, which is reflected in the reference to ethnicity. Pregnancy and maternity are included in Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Article 11(2). Statelessness is referred to in the Convention relating to the Status of Stateless persons. The European Union Charter of Fundamental Rights additionally refers to genetic features, age, and sexual orientation. Other grounds have been recognized as falling within the category of other status in the international conventions. ICESCR has recognized age, disability, sexual orientation, gender identity, health status, marital and family status, and nationality in its General Comment 20. The Comment also makes it clear that the rights in the Covenant should apply without discrimination to everyone, including non-nationals such as migrant workers and other non-nationals regardless of documentation. For example, the Committee on Economic, Social and Cultural Rights (CESCR) states that all children within a State, including those with undocumented status, have a right to receive education. Similarly, the General Comment states that a person's social and economic situation should not be a ground for discrimination. It recognizes that a person living in poverty may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to unequal access to the same quality of education as

⁴ The Principles as a whole aim to compile existing provisions in international human rights law and to provide guidance on how these cumulative obligations apply to the right to education in the context of privatization.

others. The principles use the term 'socio-economic disadvantage' to make it clear that, consistent with the first dimension of the right to equality in Principle 22, the focus is on disadvantage, and unequal treatment of those who are socio-economically advantaged is not a ground for discrimination.

Principle 23 also elaborates on the duty to prohibit all forms of discrimination. It states that this includes direct and indirect discrimination, harassment and denial of reasonable accommodation, as well as multiple, intersectional, associative, and perceptible discrimination.

Direct discrimination refers to a situation in which a person is treated less favourably on one or more of the protected grounds set out in 23.1 above. Different jurisdictions have different requirements as to whether intention should be proved; whether a comparator is required; and whether the less favourable treatment can be justified, and if so, how strict the standard of justification should be. Importantly, in line with Principle 22, States should make it clear that measures to advance groups who have been subject to past or ongoing discrimination do not breach the direct discrimination provision, but instead advance equality.

Indirect discrimination is based on the recognition that equal treatment regardless of a protected ground can nevertheless have a disproportionately detrimental impact on disadvantaged members of protected groups. For example, selection tests for schools, although equally applied to all applicants, could disproportionately exclude children who have not had access to pre-school education or who come from different cultures, ethnicities or language groups. Indirect discrimination can be justified if the apparently neutral practice, policy, or criterion is necessary for the attainment of an important objective. However, in line with Principle 22, States should take steps to advance those who are unable to qualify and to adjust the learning environments where necessary. For example, if proficiency in a language is a requirement for school entry, the State might be justified in setting language tests. But it should both be sure to provide appropriate language instruction for children who are excluded as a result; and provide language appropriate education. Principle 22 requires that these measures should be taken in ways that address disadvantage without creating or perpetuating stigma and exclusion, and which modify exclusionary structures.

Harassment refers to unwanted conduct in relation to a ground specified in Principle 23 which has the purpose or effect of violating the dignity of another. Harassment also covers a situation in which there is a hostile, degrading or offensive environment due to such conduct. The standard of 'unwanted conduct' should depend on the perception of the recipient, not the perpetrator. Harassment occurs either when this is the purpose of the perpetrator or the effect of the conduct. This also means that employers, schools and other authorities have to put in place proper procedures to address harassment carried out by employees, other learners, etc.

Reasonable accommodation is required to incorporate differences, for example to include learners with disabilities, learners with different cultures, religions or languages. Jurisdictions differ as to how 'reasonableness' is judged in terms of cost to

the provider. Where this is costly, it should be borne in mind that if the provider does not bear the cost, it falls on the excluded learner.

Multiple discrimination occurs when a person suffers discrimination on more than one grounds, either on separate occasions, or on the same occasion but in two different ways. For example, a disabled woman might suffer harassment both because she is a woman and because she is disabled. Such discrimination is additive in that each type of discrimination can be proved independently.

Intersectional discrimination recognizes that the result of discrimination on more than one ground is more than additive but creates a synergy. For example, Black women or girls might experience discrimination in a way which is qualitatively different from either white women or girls, or Black men. Similarly, Roma girls at school might experience discrimination on grounds of their gender and ethnicity in ways which are specific to their identity as Roma girls, which is qualitatively different from non-Roma girls or Roma boys at school.

Associative discrimination occurs when an individual is discriminated against not because of her own protected characteristic but because of that of another. For example, if a parent who is the primary carer of a learner with a disability is discriminated against because of her child's disability, they can claim to have been discriminated against on grounds of disability.

Discrimination by perception occurs when a person is subjected to a detriment because of a protected ground but does not in fact have that protected ground. This might be the case in relation to less visible characteristics, such as sexual orientation, gender identity or religion.

Principle 24: States' Obligations

States must ensure that their laws, policies or practices do not directly or indirectly discriminate in education. They must also address any situation breaching the rights to equality and non-discrimination with regards to the right to education, whether or not such situation result from their acts, such as:

- a. **systemic disparities of educational opportunity or outcomes for some groups in society, including people living in poverty or in rural settings; or**
- b. **segregation in the education system, that is discriminatory on any prohibited ground, in particular socio-economic disadvantage.**

States are under a duty to ensure that their laws, policies or practices do not directly or indirectly discriminate in education. For example, States should carry out an impact assessment on laws, policies and practices to ensure they do not discriminate.

States have the duty to address breaches of the right to equality and non-discrimination in relation to education even when these do not result from their own actions. The Principles enumerate two areas of importance, but these do not exhaust the range of such situations.

The first such situation is where there is systemic discrimination. This refers to discrimination against some groups which is pervasive, persistent, and deeply entrenched. It can refer to practices, rules, and predominant social and cultural attitudes, which are often carried through from generation to generation, especially in relation to education. For example, housing patterns due to racial discrimination might privilege white families in areas with higher property prices which in turn raise higher local taxes to spend on schools. Conversely, Black families in poorer residential areas might be systematically disadvantaged in their access to good schools because of lower property values, lower local taxes and poorer schools. In such situations, States should take action to change policies which make school funding dependent on local property values. Consistently with Principle 22, States should also address the stigma and stereotyping which perpetuate systemic discrimination, for example in the availability of housing finance to disadvantaged groups. They should also address the political and social marginalization accompanying systemic discrimination. Attention should also be paid to rural areas.

In assessing systemic disparities, States should pay attention both to opportunities and outcomes. Consistently with Principle 22, the assessment of outcomes should not be wholly dependent on testing, which might itself perpetuate disadvantage, entrench stigma and stereotyping, and worsen marginalization. Outcomes should be assessed in a qualitative form.

The second illustrative area of importance that States should address concerns segregation in the education system that is discriminatory on any prohibited ground, in particular socio-economic disadvantage. Segregation might be de jure or de facto, such as where children from disadvantaged circumstances are unable to access better quality schools due to where they live, levels of fees, consequential expenses such as books, transport or uniforms, or prejudice and hostility from dominant groups. Consistent with Principle 22, in determining whether segregation leads to discriminatory education, States should take into account not only whether facilities are materially the same, but also whether the segregation is intrinsically stigmatic or prejudicial, for example, because girls and boys are gender stereotyped.

Principle 25: Positive Action

States must take positive action to eliminate and prevent all forms of discrimination and ensure substantive equality in the enjoyment of the right to education, including to correct historic discrimination and inequalities, and systemic and persistent disadvantage through the way in which resources are allocated. Such action must be reasonable, objective and proportional,⁵ and must include measures to:

- a. identify and prevent discriminatory practices;**
- b. protect individuals from discrimination from third parties, including educational institutions;**
- c. ensure that everyone has equal access to quality inclusive education,⁶ without any discrimination on any ground;⁷**
- d. organise their education system, including public and private institutions, so as to prevent discrimination and ensure substantive equality.⁸**

States' duties to ensure non-discrimination in the enjoyment of the right to education include the duty to take positive action both to eliminate and prevent all forms of discrimination and ensure substantive equality.

Positive action by the State is legitimate if it is reasonable, objective and proportional to eliminate and prevent discrimination and ensure substantive equality in the right to education. An example would be positive measures to ensure that all learners are able to procure textbooks or equivalent learning materials in their language of instruction.

Positive action is particularly required to correct historic discrimination and inequalities in the provision of education against those with protected characteristics. For example, where girls are discriminated against or have unequal access to education, the State should take proportionate measures to correct this discrimination.

Positive action is also required to correct systemic and persistent disadvantage through the way in which resources are allocated. For example, in poorer areas or areas where racial or ethnic minorities are congregated due to social discrimination, and fewer educational resources have been committed because funding depends on

⁵ CESCR, 'General Comment 20 on non-discrimination in economic, social and cultural rights' (2009) UN Doc E/C.12/GC/20 [9].

⁶ *ibid* [35].

⁷ Article 2, Universal Declaration of Human Rights.

⁸ CESCR, 'General Comment 20' (n 5).

local taxation, States have a positive obligation to supply more resources to achieve equality.

The Principles set out a list at least four types of measures which States are required to take.

The first is to identify and prevent discriminatory practices. For example, where girls are deterred from going to school because of lack of proper sanitary provision, or because of gender-based violence at school, or because of cultural gender-based expectations, State should identify these obstacles and take measures to correct them.

The second is to protect individuals from discrimination from third parties, including educational institutions. For example, the State should prevent schools or educational institutions from imposing requirements such as birth certificates or other documentation which would exclude learners from migrant families, families in informal settlements or other contexts in which such documentation is difficult to obtain.

The third is to ensure that everyone has equal access to quality inclusive education, without any discrimination on any ground. Inclusive education requires States to provide real learning opportunities for excluded groups, such as children with disabilities, minority language speakers, and migrant children. States must, in accordance with Principle 22, not only redress the disadvantage experienced by excluded groups, but also tackle stigma and stereotyping and enhance the voice and participation of these groups. In particular, structural barriers facing learners with disabilities, girls, minority language speakers, and other excluded groups must be removed.

Fourth, States should organise their education system, including public and private institutions, so as to prevent discrimination and ensure substantive equality. Strategies, policies, and plans of action must be put in place and implemented to address both formal and substantive discrimination by both public and private actors. All the protected grounds should be addressed in these policies, plans and strategies, including, where relevant, positive measures. States should require both private and public institutions to draw up plans and strategies to address discrimination and advance substantive equality. There should be an official government body, whether at national or local level, to oversee the prevention of discrimination and ensure substantive equality. A commitment to proper funding should be put in place for learners subject to discrimination. This should be used, inter alia, to fund school facilities and qualified teachers. Where poor investment in the State public education sector has led to segregation or discriminatory access to education, the State should take measures both to improve the quality of the education and to counter segregation.

Principle 26: Effective Measures

When discrimination in education exists in violation of international human rights law, States must immediately put in place effective measures in education and other related areas⁹ to ensure its elimination as rapidly as possible. This duty applies regardless of whether or not such discrimination has been directly caused by a public authority.

States must act immediately to put in place effective measures in education when discrimination in violation of international human rights law exists.

This applies even when segregation or other discriminatory practices are a result of social forces, such as housing patterns, which are not the direct or indirect product of States' actions or inactions.

Effective measures should also be put in place in other related areas which contribute to perpetuating discrimination and inequality in schools. Examples include improving public transportation to schools, instituting sanitation and running water, providing protection for learners from violence on the way to and from school, and providing mobile libraries or other ways in which learners can access materials.

Principle 27-Reasonable Accommodation

States must ensure there is reasonable accommodation in education, including with regard to the curriculum, the learning environment, in-class communication, pedagogical materials, and evaluations, for different capabilities of individuals related to one or more prohibited grounds. The failure to ensure reasonable accommodation constitutes discrimination and the duty to provide reasonable accommodation is immediately applicable.

The principle of reasonable accommodation in education requires States to ensure that the education environment is inclusive, and adjustments are made to accommodate learners with protected characteristics who might have requirements which differ from the mainstream. This should include adjustments in relation to the curriculum, in-class communication, pedagogical materials, and evaluations.

Reasonable accommodation entails necessary and appropriate adjustments where needed in a particular case, to ensure learners who are disadvantaged by a protected characteristic can exercise their right to education on an equal basis with others. For example, premises should be adapted for wheel-chair users; accommodation should be made for pregnant learners to remain in education before and after their babies are born; and extra language instruction should be provided for learners whose first language is not the language of instruction.

⁹ Such as measures to address housing segregation, to improve public transportation, etc.

Consistent with Principle 22, these adjustments should not be made in ways which are stigmatic to the learner, and every attempt should be made to incorporate the voices of those affected.

Reasonable accommodation should not impose a disproportionate cost or undue burden on the service provider. The State should consider providing support to educational institutions to enable them to undertake reasonable adjustments.

Failure to ensure reasonable accommodation for learners with disabilities and other protected grounds should be included in national legislation as a prohibited form of discrimination.