

## Substantive Equality Revisited: Rejoinder

Professor MacKinnon argues that the single principle of substantive equality is that of social hierarchy. Hierarchy, in the sense of relationships of domination and subordination, is of course central to my conception of the right to substantive equality. Hierarchy is expressly captured by the first dimension (redressing disadvantage), which moves away from an abstract understanding, to one which concentrates on those who are disempowered or disadvantaged. This understanding is asymmetric in that it specifically distinguishes between classifications aiming to redress inequality and those creating or perpetuating inequality. However, to characterise substantive equality solely in terms of hierarchy obscures the multi-faceted ways in which inequality manifests. As a start, power relationships are not only vertical, as hierarchy would suggest. They are also diagonal, horizontal and layered. White women may be subordinate relative to men, but dominant relative to black women. They may be privileged in relation to black men where race matters, but subordinate to black men in patriarchal contexts. Hierarchy on its own cannot capture the interaction between these different directions of power. Power can also manifest in importantly different ways. Gay men might be advantaged in the labour force (first dimension), but be subject to stereotyping, stigma and harassment (second dimension), or be required to cover or assimilate as a condition of such advantage (fourth dimension). Racism can exist as a harm of stigma, stereotyping, prejudice and violence even if it does not manifest in a particular context as socio-economic disadvantage. Religious and ethnic discrimination may manifest as social exclusion or segregation (third dimension) or pressure to assimilate (fourth dimension). The rationale of the four dimensional framework is to provide a sufficiently nuanced tool to detect the complex ways in which inequality of power occurs and thereby to be in a position to address them.

The principle of substantive equality advocated for draws on many of the insights in Professor MacKinnon's own work. It is, however, deliberately framed in terms of dimensions, rather than separate lexical principles, to bring together the strengths and counteract the weaknesses of any one alone. To pick off each separate element and

criticise it as symmetrical, abstract or disguising hierarchy is to misunderstand the multi-dimensional approach: it is the way in which the dimensions buttress one another that is central to this conception. Professor MacKinnon suggests that stereotyping could be flattened out and turned upside down, making it impossible to tell the difference between privileged stereotypes and those which are subordinate. But within the multi-dimensional conception, stereotyping cannot be used in this symmetric or abstract way. Stereotyping is addressed as a compound conception which also includes stigma, prejudice and violence. Moreover, this dimension can only be understood together with the other dimensions, namely, redressing disadvantage, enhancing participation and achieving structural change, including accommodating difference, allowing us to distinguish stereotypes according to their contribution to perpetuating inequality. This dimension is also characterised in relational terms, to capture Fraser's notion of 'recognition harms', rather than the individualist and a-contextual notion of dignity. It is therefore primarily about ways in which unequal power relations are patterned. From a relational perspective, gendered stereotypes of men can be recognised as furthering inequality for women, for example through the provision of parental leave to mothers but not to fathers.

Similarly, Professor MacKinnon isolates the third dimension, participation and voice, arguing that it does not identify whose voices need to be enhanced. However, the conception of substantive equality developed here does not regard participation and voice as determined in abstract but as one of four dimensions. The alliance with the first dimension, redressing disadvantage, and the second, stigma and stereotyping, illuminates the need to facilitate voice for those who are excluded. In this way specific attention is drawn to the need to ensure that those who speak are not those who are already in a position of relative power. It also means that the formal or technical right to speak is not sufficient, unless there is also the potential of being heard and engaging in ongoing interchange.

Again, embedding the fourth dimension (accommodating difference and structural change or transformation) into a multi-dimensional approach means that it is not capable of supporting 'special treatment' which in practice legitimises inequality, as Professor MacKinnon suggests. This is because of its alliance both with the need to redress disadvantage and to prevent stigma and stereotyping. Measures purportedly

‘protecting’ women should not be considered to further substantive equality if they perpetuate stereotyped roles for women (and men), or disadvantage women in the labour market. The need to accommodate difference and bring about structural change should also synchronise with the third dimension, participation and voice. Thus accommodating religious difference would not pass muster if it silenced the voices of women or others within the religious group. Moreover, accommodating difference is deliberately allied with structural change, because deep structural changes may be needed to ensure that difference is not penalised and to avoid pressures for conformity.

Professor MacKinnon argues that all the dimensions can be read as disadvantage. But this makes it difficult to address the conflicting ways in which measures aimed at redressing disadvantage can perpetuate inequality. Redistributive measures might address economic disadvantage; but do so in ways that reinforce stereotypes or stigma. For example, conditional cash transfers to mothers are increasingly advocated as ways of dealing with poverty. But when they are conditional on women performing gendered roles, they may reinforce gendered hierarchies even if addressing distributive inequalities.<sup>1</sup> Similarly affirmative action programmes which bring with them stigma, or do not tackle underlying structures of domination, will not advance substantive equality.

As Professor MacKinnon argues, gender based violence (GBV) is indeed a core manifestation of a breach of substantive equality. But rather than entailing that substantive equality should be reduced to a single principle, namely hierarchy, it demonstrates the importance of sensitivity to the interaction of several dimensions of inequality. Condoning GBV on the grounds that it happens within the family, or refusing to believe women’s accounts of such violence, reflect a deep-seated negation of women as persons, the antithesis of recognition. This in turn both stems from and reinforces gendered power relations in society. This specifically gendered understanding was captured in CEDAW’s watershed General Recommendation No. 19 on violence against women in 1992.<sup>2</sup> Violence against women is characterised as

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<sup>1</sup> SANDRA FREDMAN, *Engendering Social Welfare Rights*, in *WOMEN’S RIGHT TO SOCIAL SECURITY AND SOCIAL PROTECTION* (Beth Goldblatt & Lucie Lamarche eds., 2015).

<sup>2</sup> <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

stemming from stereotyped roles (second dimension) whereby women are regarded as subordinate to men, perpetuating widespread practices such as family violence, forced marriage, acid attacks, and female circumcision. The physical and mental consequences help maintain women in subordinate positions, and contribute to lower levels of education, skills and work opportunities (first dimension). Women's political participation is affected and their access to justice rights are submerged due to unsympathetic procedures (third dimension). To bring about real substantive equality, all these dimensions need to be addressed in an interactive form.

It was because of its appreciation of several different dimensions of inequality that the European Court of Human Rights (ECtHR) was able to make the transition to regarding GBV as a breach of the right to equality. In *Opuz v. Turkey*,<sup>3</sup> the ECtHR held that the State's failure to give women appropriate protection against gender-based violence constituted sex discrimination. Most important was its emphasis on the ways in which stigma, stereotypes and prejudice against women can lead the authorities to refuse to recognise the victims as worthy of State protection. The Court was also sensitive to the interaction between the harms of stigma, stereotyping and violence (second dimension) and economic disadvantage (first dimension). The fact that the women at risk were already some of the most disadvantaged in Turkey aggravated and reinforced the stereotypical view of women as being in a subordinate position to men and therefore worthy of lower protection. Structural change, the fourth dimension, was incorporated by recognising the need to bridge the public private divide, holding that interference with the right to private or family life might be necessary to protect the health and rights of others. Likewise, in addressing the argument that the applicants had withdrawn their complaints, the Court was able to situate choice within the broader context of lack of power. As argued in my paper, the interaction between the participative dimension and the disadvantage dimension means that choices should not automatically be regarded as an exercise of participation or agency. The Court, alive to the likelihood that the complaints were withdrawn under severe pressure, held that 'the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should

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<sup>3</sup> *Opuz v Turkey* (33401/02) European Court of Human Rights, 50 E.H.R.R. 28 (2010).

continue in the public interest, even if victims withdraw their complaints.’<sup>4</sup> This also assists in redressing stereotypical assumptions of how women behave after experiencing gender based violence.

The multi-dimensional approach to substantive equality is not intended to reflect the discrimination law of particular systems, although it grows out of that experience. Its aim is to provide an analytic framework to evaluate laws, policies, practices or social structures. It therefore insists that all four dimensions, and their interaction with each other be considered.<sup>5</sup> For example, LaMarche used this framework to evaluate the International Labour Organisation’s Social Protection Floor Recommendation<sup>6</sup> from a women’s rights perspective.<sup>7</sup> Likewise, the multi-dimensional approach to substantive equality was used by UN Women in its flagship report on the Progress of the World’s Women 2015-16 to formulate a framework for action for substantive equality for women. Drawing directly on the multi-dimensional model,<sup>8</sup> the report proposes a three point framework for action: redressing women’s socio-economic disadvantage; addressing stereotyping, stigma and violence; and strengthening women’s agency voice and participation. Action taken in all these domains is essential to bring about the fourth, namely the transformation of structures and institutions.<sup>9</sup> Similarly, the four dimensional framework can be used to evaluate the global commitment to gender equality in the Millennium Development Goals (MDGs) and point the way to improvement in the Sustainable Development Goals (SDGs).<sup>10</sup> In 2015, the closing report on the MDGs proudly proclaimed: ‘The world

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<sup>4</sup> Ibid. at 139.

<sup>5</sup> See for example Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on extreme inequality and human rights (A/HRC/29/31, 29th session HRC, 2015) footnote 67.

<sup>6</sup> International Labour Organization: Social Protection Floors Recommendation, 2012 (No. 202) [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_INSTRUMENT\\_ID:3065524](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:3065524)

<sup>7</sup> L. LaMarche ‘ILO’s Social Protection Floor Recommendation (2012) from a Women’s Rights Perspective’ <http://www.unrisd.org/UNRISD/website/newsview.nsf/%28httpNews%29/31DAC54759E2780DC1257D540043F205?OpenDocument> (Accessed 5 March 2016)

<sup>8</sup> S. Fredman and B. Goldblatt ‘Gender Equality and Human Rights’ Discussion Paper for Progress of the World’s Women 2015 - 2016 (No. 4, July 2015) pp1 - 11

<sup>9</sup> UN Women Flagship Report ‘Progress of the World’s Women 2015 – 2016: Transforming Economies: Realising Rights’ chapter 1, <http://progress.unwomen.org/en/2015/chapter1/> (accessed 11 April 2016)

<sup>10</sup> M. Campbell, S. Fredman and J. Kuosmanen, ‘Transformative Equality: Making the Sustainable Development Goals Work 2016 for Women’ (Forthcoming, 2016) Ethics & International Affairs

has achieved equality between boys and girls in primary education.’<sup>11</sup> However, on closer inspection, it can be seen that this rested on a thin and formal version of equality, which simply looked at aggregate primary school enrolment data,<sup>12</sup> rather than engaging the four dimensions of substantive equality. By ignoring out-of-school children and drop-outs, it failed to genuinely redress disadvantage. By paying no attention to violence in schools, or gender stereotypes in school curricula, it ignored the recognition dimension. Similarly, it did not take into account the voice of girls; nor require structural changes to be made, such as sanitation provisions for menstruating girls, protection against expulsion for teenage pregnancy and child marriage and equal opportunities for girls leaving school and entering the labour market, including the teaching profession itself. The women’s movement has been able to articulate these obstacles in influencing the new agenda for the SDGs,<sup>13</sup> and monitoring their operationalization. In this sense, this conception of substantive equality is capable too of escaping legal silos and leaping jurisdictional boundaries.

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<sup>11</sup>[http://www.un.org/millenniumgoals/2015\\_MDG\\_Report/img/MDGs\\_Infographics\\_English-MDG3.jpg](http://www.un.org/millenniumgoals/2015_MDG_Report/img/MDGs_Infographics_English-MDG3.jpg)

<sup>12</sup> <http://www.un.org/millenniumgoals/gender.shtml>

<sup>13</sup> See <http://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>