Promoting equality as a fundamental human right and a basic principle of social justice

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Equal Rights to Marry and Found a Family

International human rights law can be said to be very family-friendly. A basic assumption underlying the entitlement to protection of the family by the state is that “the family is the natural and fundamental group unit of society” – a phrase found in Articles 16 of the Universal Declaration of Human Rights, 23.1 of the International Covenant on Civil and Political Rights and 10.1 of the International Covenant on Economic, Social and Cultural Rights. A slightly expanded wording is found in the 1989 UN Convention on the Rights of the Child, whose Preamble refers to “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children”.

But the family appears to be not just a “unit”, be it natural or otherwise. International human rights law instruments that make up the international bill of rights, in the first sentences of their preambles, refer to “the human family”, meaning all of humankind as one “family”, presumably as opposed to other species. Therefore, apparently, no human person can ever be absolutely orphaned – or is the “human family” here just a metaphor?

So, the question is, unsurprisingly, what is the family? How does it relate to marriage and what type of marriage, if any, has to be recognised as the basis of the family? The notion of the family has changed over time in most contemporary cultures, and this change is far from over. Family laws have been following suit, accordingly. If anything, with the new reproductive technologies, types of adoption, and the evolving forms of marriage, it is almost certain that, in the not too distant future, the “family” will come in even more shapes and sizes than the rich variety of historic units under that name.

Fundamental rights related to marriage and the family in international human rights law include:

(i) The protection from interference with one’s family, analogous to and mentioned together with, the protection from interference with one’s privacy, home or correspondence – the right to be free from “arbitrary interference” with one’s family (Article 12 UDHR); from “arbitrary or unlawful interference” with one’s family (Article 17 ICCPR); or the “right to respect for his (…) family life” (Article 8 ECHR).

(ii) The right to marry and found a family (Article 16.1 UDHR, Article 23.2 ICCPR, and Article 12 ECHR, among others).

(iii) Certain other rights construed with reference to the family – including the protection of the family “by society and the state” (Article 16.3 UDHR, Article 23.1 ICCPR, Article 10.1 ICESCR, etc.).

The rights to equality related to marriage and the family have been interpreted to comprise, inter alia: 
(i) Equality between spouses, i.e. equal rights of spouses “as to marriage, during marriage and at its dissolution” (Article 16.1 UDHR, Article 23.4 ICCPR, as well as the detailed provisions of Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, which is honoured in the breach in many countries that have made reservations on this article in favour of sharia law or custom).

(ii) Non-discrimination in relation to the right to marry and found a family – the equal rights of each person “of full age” (Article 16.1 UDHR, Article 23.2 ICCPR, Article 12 ECHR), having a protected characteristic, such as race, nationality or religion, to marry and found a family, on an equal basis with persons who do not have that characteristic.

It is this second aspect of family rights equality, protected by common Article 2 of ICCPR and ICESCR and Article 26 ICCPR, as well as regional treaties, which is the focus of this issue of The Equal Rights Review. The materials published in these pages tackle some of the key aspects of equality in respect to entering a marriage and founding a family without discrimination. One of the big issues of our time, same sex marriage, is the central topic of two of the articles in the Special section as well as the double Interview. Same sex marriage recognised by law realises the right to equality of each person in the enjoyment and exercise of the right to marry and found a family, without discrimination on the ground of sexual orientation.

At present, many countries around the world are considering the adoption of same sex marriage laws, including the United Kingdom. The Marriage (Same Sex Couples) Bill 2013 opens up access to the institution of marriage to same sex couples through civil ceremonies and allows religious organisations to “opt in” to conducting same sex marriage. The Equal Rights Trust participated in the consultation process, welcoming the Bill but pointing out elements of remaining sexual orientation discrimination in it. In its legal opinion, ERT took issue with the way in which the Bill seeks to balance non-discrimination against lesbian, gay and bisexual persons with religious freedom. In the unique situation of the UK, religious organisations conduct marriages that are recognised and regulated by the state – in contrast to the secular approach of countries like the Netherlands, where religious marriages have no legal value and, as Ian Curry-Sumner points out in this issue, it is a criminal offence to conduct a religious marriage before a civil marriage has taken place. Most British people marry in an Anglican or a Catholic church and this is the only marriage ceremony that takes place for them; no separate civil ceremony is necessary. In our brief to the Parliamentary Committee on the Bill, we argued that when religious organisations conduct marriages which are recognised and regulated by the state they perform a public function and that international human rights law and the UK Equality Act 2010 require such functions to be carried out in a non-discriminatory manner. While religious organisations should be free to conduct religious ceremonies in accordance with their beliefs and tenets, when stepping in to act in lieu of the state in a public function – conducting state-recognised marriages – churches should not be permitted to discriminate against people on the protected ground of their sexual orientation. However, the UK government has pre-empted any debate on this issue by making a very strong promise to the established church and other religious organisations that they will never be required to conduct same sex marriages, and that their exemption from the equal treatment principle will be set in stone.
In addition, ERT highlighted that the Bill contains further problematic distinctions between same sex and opposite sex couples, by preserving concepts such as adultery and consummation as solely heterosexual, indicating a lower value for homosexual fidelity. It is of course not because we are worried about adultery and consummation as such – and frankly, we would prefer to see these obsolete institutes evaporate from the law altogether and be confined to the museum of social control. But as long as adultery and consummation remain in the law, they should be used in a way that would not allow a differentiation on grounds of sexual orientation. On the other hand, the Bill, by making no amendments to the Civil Partnership Act 2004 open only to same sex couples, in effect discriminates against opposite sex couples in that it denies them access to civil partnerships. Thus, full marriage equality, regardless of sexual orientation, will not yet be achieved in the UK when this Bill is adopted, and we will continue to point at other countries, such as South Africa, for best practices where there is maximum choice of options and no sexual orientation discrimination related to marriage.

Marriage and family inequalities based on gender identity or intersex (assuming that the former does not cover the latter) are explored in Wieringa’s article about Indonesia in the Special section, and in the Testimony section where we publish the reflections of Gina Wilson, an Australian intersex advocate; while Ariel Dulitzky’s commentary on the case Artavia Murillo y Otros (Fecundación in vitro) v Costa Rica presents the reasoning of the Inter-American Court of Human Rights on the issue of non-discrimination, and equality in realising the wish (the emerging right?) of raising biological children – both aspects of the right to found a family. In October 2012, ERT and the University of Texas at Austin, where Professor Dulitzky is based, intervened in this case before the Inter-American Court of Human Rights.

We argued that Costa Rica had violated the rights to equality and non-discrimination recognised under Articles 1(1) and 24 of the American Convention on Human Rights. The Inter-American Court found violations of Article 1(1), reflecting arguments on gender-based, disability and other discrimination put forward in our joint brief. This case concerned the decision of the Constitutional Chamber of the Supreme Court of Costa Rica that a presidential decree authorising and regulating in vitro fertilisation (IVF) for married couples was unconstitutional, primarily on grounds that the practice violated the right to life of embryos as a result of the “high embryo loss rate”. The applicants were married couples who were unable to conceive naturally but who were either prevented from accessing IVF due to the declaration of the Constitutional Chamber, or whose IVF treatment was interrupted by it. Some chose to travel abroad to access IVF in other countries. The Court concluded that the absolute prohibition on IVF violated a number of rights contained in the Convention, in particular the right to protection of physical integrity (Article 5(1)), to personal liberty (Article 7), to respect for private and family life (Article 11(2)) and to raise a family (Article 17(2)).

The Court also examined whether the prohibition contravened Article 1(1), which prohibits discrimination in the exercise of the rights contained within the Convention. The Court held that the prohibition on IVF violated Article 1(1) in the enjoyment of the right to respect for one’s private and family life and the right to raise a family on three protected grounds: disability, gender and economic status. Reviewing the definition of “infertility” provided by the World Health
Organisation and the definition of “disability” in the Convention on the Rights of Persons with Disabilities, the Court concluded that infertility was “a functional limitation recognised as a disease”. It found that the prohibition on IVF created barriers for persons with this particular disability in the enjoyment of the rights contained within the CRPD, including the right to access the necessary techniques to solve reproductive health problems. In relation to gender, the Court held that the prohibition on IVF disproportionately affected women, as infertile men might have other options (such as artificial insemination) while for infertile women IVF may be the only option for raising biological children. Further, for those couples who had already started to undergo IVF, women were disproportionately affected as they had received hormone stimulation for ovulation induction. Finally, in relation to economic status, the Court held that the prohibition of IVF had a disproportionate impact on poorer infertile couples who did not have the financial means to undergo IVF in another country.

This issue provides only a narrow glimpse into the vast area of equality rights related to marriage and family life. Many further issues had to be left untouched – polygamy, adoption, non-traditional parenting patterns and a host of other matters around the family. But we are committed to continuing the discussion in the future.

Dimitrina Petrova
“Despite the potential offered by constitutional bills of rights across the Caribbean, the excessive restraint that characterises judicial treatment of their equality-related provisions has resulted not just in an underdeveloped jurisprudence, but in one that is often backward-looking.”

Ariëf Bulkan
The Poverty of Equality Jurisprudence in the Commonwealth Caribbean

Arif Bulkan

1. Introduction

A recent exchange at a United Nations’ Human Rights Day event involving a US Supreme Court judge makes it clear just how universal the difficulties in interpreting and applying equality principles are. The setting was a lecture held at Princeton University on 10 December 2012. At one point, a freshman asked Justice Antonin Scalia whether he had any regret for the “extraordinarily offensive” comparisons he made in his dissents in two landmark gay rights cases, where Scalia likened homosexuality to murder and bestiality. The characteristically pugnacious judge expressed no remorse or shame. He explained: “I don't apologize for the things I raised. I’m not comparing homosexuality to murder. I’m comparing the principle that a society may not adopt moral sanctions, moral views, against certain conduct. I’m comparing that with respect to murder and that with respect to homosexuality.”

These opaque protestations notwithstanding, Scalia’s reasoning in both cases was eminently about making comparisons – or more particularly, identifying categories or classes of people whom it would be permissible to treat differently and (to use Scalia’s word) with animus. Whether or not he chose to acknowledge it, the effect of his approach was to compare homosexual acts with murder and bestiality as examples of conduct which could justifiably be denied equal protection under the fourteenth amendment to the US constitution. Yet Scalia expressed surprise that his intrepid interrogator was not persuaded.

The one value of this fruitless exchange is that it typifies the complexity of equality as a normative principle. Since identical treatment of all persons is neither feasible in practice nor even necessary in theory, the challenge it poses as a justiciable right is identifying the circumstances or reasons for which it would be legitimate to create distinctions among people in order to treat them differently. This may sound simple enough as articulated, but it imposes a prerequisite that has long confounded both theorists and practitioners. Judges sometimes purport to resolve the tensions by seeking a balance between the rights of the individual and the interests of society, but what that sanguine exercise conceals is that neither concept is self-evident or objectively discoverable. At best, what it does is to re-frame the debate whilst still leaving undetermined what counts as enforceable “rights” and overriding “interests”.

These challenges have proved to be particularly acute for countries of the Commonwealth Caribbean. Given the region’s bloody origins and colonialism’s legacy of
factious racial and social cleavages, one might have expected to encounter a robust body of equality law and practice. But aside from perfunctory acknowledgement of the past in the preambles to some constitutions, the documents themselves are surprisingly reticent on the subject of equality, which has been matched in turn by a crippling judicial conservatism in the interpretation and enforcement of equality claims.

In this article I examine these deficiencies in greater detail. I commence in section two with a discussion of the actual text of the constitutions so as to identify exactly what is guaranteed under the law. In the three sections following I explore the judicial treatment of specific aspects of the right, namely sex discrimination in relation to women, sexual minorities and gender non-conformists, as well as on the interpretation of the more general equality right where this appears either in addition to or instead of the more common non-discrimination guarantee. This discussion reveals that despite the potential offered by constitutional bills of rights across the region, the excessive restraint that characterises judicial treatment of their equality-related provisions has resulted not just in an underdeveloped jurisprudence, but in one that is often backward-looking.

2. The Protected Characteristics

Almost all the constitutions of countries making up the Commonwealth Caribbean commence with some introductory commitment to the principle of equality, even if only by implication. The preamble to the Constitution of Antigua and Barbuda, for example, captures this ideal through its acknowledgement of respect for “the dignity and worth of the human person” and the entitlement of “all persons” to fundamental rights and freedoms. It then goes on to espouse the commitment that “there should be opportunity for advancement on the basis of recognition of merit, ability and integrity”. These or similar aspirations are echoed in the preambles of all of the other constitutions, with some even expressing respect for equality in more direct and forceful language. The “newer” constitutions of Belize and Guyana are the best examples of this directness, with robust declarations in their preambles that speak to “equal and inalienable rights”, the “elimination of economic and social privilege”, and policies which ensure gender equality.

It is when one turns to the substantive, enacting provisions, however, that the dearth of references to equality is most noticeable. All but one of the five earliest independence constitutions contain no general right to equality, and guarantee instead protection against discrimination on certain specified grounds. The “newer” models tentatively changed this, but even these confined any mention of the term “equality” to their preambles. Like the “older” model of constitutions, what was actually guaranteed in the bills of rights was simply protection against discrimination on certain specified grounds. Thus of all the territories, it was initially only in the unconventional Trinidad and Tobago bill of rights that a general guarantee of equality was included within the substantive provisions – this being the right of the individual to equality before the law and “equality of treatment from any public authority”. Since then, however, more general guarantees of equality have been included in the constitutions of Belize, Guyana and Jamaica. The significance of this feature is that in the majority of Caribbean constitutions, equal treatment is only guaranteed in the negative (as in protection from discrimination) and then only on very restricted bases. This was an inadequate way
of legislating for equality, and is a key reason for the impoverished jurisprudence which has resulted.

Compounding the problem of the restrictive approach of negative protection against discrimination is that the actual grounds on which distinctions are prohibited are very limited. The "older" model of Bills of Rights specified only five, namely "race, place of origin, political opinions, colour or creed". Conspicuously absent from that list is any mention of categories such as sex, gender, social class, age, religion or disability, each of which (save for social class) embodies immutable personal characteristics or at least attributes which are deeply embedded in a person's psyche and which cannot be easily changed. More importantly, several of the ignored attributes have proved to be grounds on which different treatment frequently occurs, and given the potential for abuse they are standard categories in the equality or anti-discrimination provisions of constitutions in other parts of the world for which unjustified differentiation is forbidden. Because of this, the omission of these grounds from the bills of rights of the early Caribbean constitutions is difficult to explain or rationalise.

This legislative caution was moderated slightly in the post-1973 constitutions, all of which included "sex" as a prohibited ground of discrimination. However, that addition simply brought the list of protected characteristics to six. The Antigua and Barbuda Constitution mentions one additional ground, namely birth out of wedlock, while the recently enacted Charter of Fundamental Rights and Freedoms in the Jamaican Constitution adds two – social class and, pointedly eschewing any reference to sex or gender, that of "being male or female". The only exception to this trend is to be found in the bill of rights in the reformed Guyana Constitution, which in addition to listing a staggering eighteen prohibited grounds of discrimination, also includes a general equality right. The text of Caribbean anti-discrimination provisions is therefore, on the whole, marked by strict economy, which has obvious negative implications for the scope of equality protection in the region.

This textual circumspection is aggravated by how the right has been interpreted. Judges consistently hold that any anti-discrimination analysis must be conducted by reference to one of the grounds listed within the text, and that the list itself is a closed one. The first aspect of this position is defensible, for it would be nonsensical to require identical treatment of all persons irrespective of differentiating circumstances, but the problem is with the second part, namely that the list of grounds specified in anti-discrimination provision must be interpreted as a closed one. This stance was firmly articulated in Nielsen v Barker, where the Guyana Court of Appeal rejected a sex discrimination claim on the basis that sex was not one of the grounds listed in the anti-discrimination claim on the basis that sex was not one of the grounds listed in the anti-discrimination section. Describing article 149(2) as prescribing "tight, definitive compartments", Massiah JA rationalised that:

"[A] judge does not possess, in the area of constitutional adjudication with reference to the protection of fundamental rights and freedoms, the wide, ambulatory and ecumenical powers that he otherwise enjoys (...) A person's fundamental rights and freedoms are set out in [articles 138 to 151], and there can, of course, be no proper judicial expansion of those constitutional provisions to embrace other rights not specifically contained therein, for courts are not super-legislatures permitted to sub-
stitute their own judgment for that of the
elected representatives of the people.”

This result (and reasoning) was followed
by the Privy Council in *Matadeen v Pointu*, and although this was an appeal from the
Supreme Court of Mauritius, the decision is
binding on all those countries of the Com-
monwealth Caribbean where the constit-
tutional provisions are similar and for whom
the Privy Council remains the final appellate
court. Under consideration in *Matadeen* was
the decision of the Ministry of Education to
introduce a fifth, optional paper in Oriental
languages at the primary education examina-
tion. The respondents alleged that since the
decision was taken only eight months before
the examination was to be held, it was dis-
criminatory because it gave students already
studying Oriental languages an unfair advan-
tage. The Privy Council disagreed, holding
that since the inequality of treatment com-
plained of fell outside of the grounds enu-
merated in the non-discrimination section
of the Constitution, no constitutional breach
was established.

Writing for the Board, Lord Hoffman rea-
soned that there was no general principle of
equality in the Mauritius Constitution, and
treating the “protection of the law” clause in
the opening section as such would render the
anti-discrimination section with its carefully
enumerated grounds superfluous. Further,
while Lord Hoffman agreed that equality of
treatment is a general principle of rational
behaviour, this did not mean it should neces-
arily be a justiciable one. In his view, it was
perfectly acceptable to take the approach
whereby a limited number of grounds are
specified in the anti-discrimination section,
while the possibility of any addition is left to
Parliament. The reason for this lay in what
he perceived as the judiciary’s inherent un-
suitability to decide issues of social policy. In
Lord Hoffman’s words:

“The reasons for treating people uni-
formly often involve (...) questions of social
policy on which views may differ. These are
questions which the elected representatives
of the people have some claim to decide for
themselves.”

The problem with this interpretation is that
it ignores the reality that the methodology of
the common law is one whereby judges have
no choice but to engage in policy-making.
In 1991 when the House of Lords decided
that a man could be convicted of the rape or
attempted rape of his wife where she with-
drew her consent to sexual intercourse, this
represented the judicial reversal of
a rule that had existed for more than two
centuries and was a seminal shift in sexual
inequality. In so doing, the House of Lords
relied on nothing but considerations of so-
cial policy, pointing to the changed status of
marriage in modern times (as a partnership
of equals) and the requirement of a “live sys-
tem of law” to have regard to contemporary
social conditions. To take a Caribbean ex-
ample, the Privy Council over the period of
decade succeeded in dismantling the man-
datory death penalty across the entire Com-
monwealth Caribbean, despite its populist
appeal and the reluctance of domestic par-
liamentary majorities to initiate legislative
reform. It was therefore somewhat disingenu-
ous of the Board to pretend that parlia-
ment has a monopoly on deciding questions
of social policy, when they themselves fre-
quently indulge in such matters.

Aside from its historical inaccuracy, Lord
Hoffman’s approach is also problematic be-
cause it concedes too much to parliamen-
tary majorities, particularly in local settings
which are fiercely partisan and lack a culture of robust members of parliament voting independently of the party line. Moreover, leaving decisions of social policy entirely to the popular vote ignores the fact that class distinctions frequently affect members of minority groups, whom majorities may be less inclined to protect. By contrast, a far more principled approach to this dilemma was articulated by the Chief Justice of Zimbabwe, who asserted in *Banana v The State*—albeit dissenting—that the “courts could not be dictated to by public opinion”, which “cannot replace in them the duty to interpret the Constitution and to enforce its mandates”. The issue in *Banana* was whether the common law crime of sodomy was inconsistent with the constitutional guarantee of non-discrimination on the basis of gender. Gubbay’s principled dissent was in stark contrast to the position of the majority, which was that it was not the function of an “undemocratically appointed” court “to seek to modernise the social mores of the state or of society at large”. What *Banana* demonstrates clearly is that automatic deference to the popular will may operate to shield (and even perpetuate) prejudice, which is why the dictates of constitutionality can on occasion legitimately entitle the judiciary to be influenced by considerations of social policy. Indeed, as Stephen Wheatley has pointed out, modern democracies are not populist but constitutional. Thus by declining to interrogate legislative distinctions on the basis that the list of prohibited grounds is closed courts may be failing in their constitutional role.

Finally, it is worth noting that even from a purely technical or doctrinal point of view, the *Nielsen/Matadeen* approach is weak. The austerity of treating the list of prohibited grounds as closed is not necessarily justified by the text, which is not free from ambiguity. For example, while the “older” constitutions omitted “sex” from the list of prohibited grounds in the actual non-discrimination section, those very constitutions repudiated sex discrimination elsewhere—such as in the opening section to the bills of rights. Elsewhere, it has been acknowledged that the grounds themselves are not necessarily rigid, which means that excluded groups have sought (and succeeded) in being characterised under existing categories. In this way, the UN Human Rights Committee has interpreted “sex” as including “sexual orientation”, and the European Court of Justice has held that discrimination against transsexuals constitutes sex discrimination. Most boldly of all, the High Court of Delhi has fashioned out of a seemingly closed list, protection on the basis of grounds analogous to those actually specified. In *Naz Foundation v Government of NCT of Delhi*, the issue was whether section 377 of the 1860 Indian Penal Code violated the right to equality, insofar as the provision criminalised consensual sexual acts between adults in private. In finding a breach, the High Court concluded that sexual orientation is a ground analogous to sex, and that discrimination on the basis of sexual orientation is not permitted by art 15 of the Indian Constitution. This was a remarkable conclusion given the specific terms of article 15(1), which prohibits discrimination “on grounds only of religion, race, caste, sex, place of birth or any of them”. Anchoring the court’s decision in part was the effect it gave to the value promoted by the non-discrimination right, which it identified as the personal autonomy of the individual.
theory or tradition. The continued judicial adherence to this approach thus severely limits the scope of equality protection in the Commonwealth Caribbean.

3. Sex Discrimination

Compounding the stilted language of the constitutional non-discrimination guarantees is a conservative approach that characterises much of the litigation brought on the basis of these provisions. This conservatism has been most pronounced in two substantive areas: rulings on claims of sex discrimination, and the interpretation of the broad equality right that appears in a handful of the region’s constitutions. To a lesser extent, a degree of restraint is also evident in the principles that courts have invoked to guide their interpretation of the equality guarantee in question. The effect of such moderation in relation to both procedural and substantive issues has been to diminish the potential of the right, as evidenced in the discussion below.

(i) Women

One of the earliest cases in this area to have engaged the attention of a Caribbean court was *Nielsen v Barker*, where a Danish fugitive in Guyana, resisting deportation to serve a sentence for rape and murder in Denmark, sought the protection of marriage to a female Guyanese citizen in order to claim the status of “belonging” to Guyana and thus outside the scope of prohibited immigrants. Under the relevant legislation, “belonger” status was conferred on both citizens and their dependants, but “dependant” was narrowly defined using the gendered term “wife”. The applicant argued that pursuant to the power to modify legislation to ensure its conformity with the Constitution, “wife” should be read as “spouse”, since article 29(1) of the Constitution provided unambiguously that:

“[w]omen and men have equal rights and the same legal status in all spheres of political, economic and social life.”

The Court of Appeal rejected this argument and, by way of justification, Massiah JA posited that central to article 29 was “the desire to achieve equality of the sexes; it has nothing to do with the elevation of the man”. Allowing a female citizen to confer the same benefits on her spouse as a male citizen could do in a comparable situation seems to be squarely about achieving equality of the sexes, so what the learned judge meant by this explanation is a mystery. Indeed, the applicant developed this point directly, arguing unsuccessfully that the effect of the Immigration Act was that a Guyanese man could enjoy the “comfort and pleasure of his alien wife’s society”, a benefit denied to a Guyanese woman.

Massiah JA buttressed his conclusion by construing dependency in a purely financial sense, pointing out that while a husband is legally obliged to maintain his wife, there is no corresponding obligation on a wife to maintain her husband, so to interpret the provisions in the manner urged would amount to a “sweeping, radical exercise”. However, this sexist notion of dependency is belied by modern legislation under which a man can claim a share of his wife’s property on divorce, so even if dependency had historically been constructed around financial responsibilities, there was no good reason for clinging to such prejudices. Indeed, the connection between dependency and financial obligation is not a logical imperative of the section, and given the sweeping language of article 29(1), the judge’s resistance to the more generous interpretation indicates the deeply rooted prejudices in this area.
An even clearer instance of unrestrained chauvinism within the judiciary is provided by a case from St. Lucia in 1986, which concerned a challenge to a law providing for the dismissal of unmarried female teachers who became pregnant. The applicants were both dismissed after each became pregnant for the second time. They challenged their dismissal as constituting discrimination on the ground of sex, invoking section 13 of the St. Lucia Constitution which prohibits discriminatory laws and treatment. Under this provision, "discriminatory" is defined as "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed". The trial judge upheld the law in question on the basis that he had heard nothing from the plaintiffs to shift the presumption of constitutionality. In so doing, the trial judge was applying an old approach to constitutional challenges, whereby a statute is presumed to be constitutional and the burden lies on the litigant to lead evidence establishing unconstitutionality. Even worse, having faulted the plaintiffs for their failure to lead evidence the trial judge then relaxed his standards for the defendants, finding in the alternative that even if the provision in question was discriminatory, it was reasonably justifiable and so fell within either or all of the permitted exceptions, rendering it constitutional. Remarkably, the defendants did not specify which exception applied, but the court was not deterred by their omission. The defendants had simply argued that the impugned law was "in the public interest", and the court accepted this justification in the absence of any elaboration or discussion as to what that interest was or any evidence in support. This ruling is the epitome of judicial deference to the state, even in the face of a profoundly discriminatory law with obviously detrimental consequences – not just for single women and their children, but also for society at large.

It is not clear that either of these cases would be followed by another court today – in fact, in 2005 the Belizean Court of Appeal came to the opposite conclusion to Girard on similar facts. But these cases are nonetheless important for several reasons. They are a clear illustration of the historical attitudes towards women, which persisted up until relatively recent times. They embody a resolute outlook against interpreting the non-discrimination guarantee meaningfully, and one of the most restrictive aspects of Nielsen – that the listed grounds are exhaustive – has been repeatedly reaffirmed by subsequent courts. Ultimately, it is entirely a matter of speculation whether these cases represent current judicial attitudes, simply because of the dearth of litigation on the subject. Indeed, the latter fact has itself been held out as possibly underscoring the lack of importance accorded to gender equality issues in the Caribbean.
(ii) Sexual Minorities

If the position in Nielsen or Girard typified a restrictive attitude in relation to women, it should come as no surprise to discover that sexual minorities have fared even worse. In Trinidad and Tobago, equal opportunities legislation was enacted in 2000 to prohibit discrimination in both the private and public spheres and to promote equality between persons of different statuses. The Equal Opportunities Act (EOA) specified “status” as constituted by a variety of personal characteristics including “sex, race, ethnicity, religion and disability”, with “sex” explicitly defined as not including sexual preference or orientation. A challenge to this provision was unanimously upheld by the Trinidad and Tobago Court of Appeal, which found the exclusion to be unjustified and unconstitutional for violating the fundamental rights of persons on a basis analogous to that of “sex”. Buttressing his reasoning, Archie JA made an explicit connection between fundamental rights and the inherent dignity and value of human beings, describing the statutory exclusion as particularly “invidious”.

However, not only did the Privy Council overturn this progressive result, they did so summarily and with contemptuous disregard for the gravity of the issue at stake. Writing for the majority, Baroness Hale cursorily invoked a standard limitations analysis in relation to broadly stated rights, under which a limiting statute may be constitutional if it “pursues a legitimate aim and is proportionate to it”. This enabled the imperious conclusion that “there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution”. Baroness Hale did not explain why this balance was constitutionally sound; in fact, she did not even bother to reveal that her statement applied to the challenge to the sexual orientation exclusion. The only clue in the entire judgment that this challenge was overruled comes from a passing reference in the dissenting opinion of Lord Bingham, who stated tersely that he “would not understand ‘sex’ in section 4 of the Constitution to embrace sexual preference or orientation”.

Baroness Hale’s position was particularly perplexing, for only two years earlier she came to the opposite conclusion in an English case. In Pearce v Mayfield School she agreed that discriminating on the basis of sexual orientation was one species of sex discrimination, pointing out that those “who treat homosexuals of either sex less favourably than they treat heterosexuals do so because of their sex: not because they love men (or women) but because they are men who love men (or women who love women). It is their own sex, rather than the sex of their partners, which is the problem.” Hale’s abrupt volte-face in Suratt thus demanded, at a minimum, some explanation.

Whether “sex” includes “sexual orientation” is, admittedly, a highly contested notion. The United Nations Human Rights Committee was one of the earliest bodies to make this connection, but since they too provided no analysis or explanation in so deciding, the case in question is not a reliable authority. In arriving at the opposite conclusion, the Privy Council in Suratt was at least being consistent with the position taken by the House of Lords in its earlier decision of Macdonald v Advocate General for Scotland, where it held that the dismissal of a serving member of the Royal Air Force because he revealed his homosexuality did not constitute direct sex discrimination under the Sex Discrimination Act 1975. In Macdonald, all five judges rea-
soned that the discrimination was plainly as a result of sexual orientation, not sex. In ascertaining the appropriate comparator they held that like had to be compared with like, which meant that all relevant characteristics – of which sexual orientation was one – had to remain the same. Since homosexual men were liable to be dismissed, as were lesbians, the policy was not discriminatory on the ground of sex.\textsuperscript{59}

Given these sharply divided opinions on whether sex discrimination covers sexual orientation discrimination, the scant treatment accorded by the Privy Council to this issue in \textit{Suratt} was wholly inadequate. Moreover, \textit{Macdonald} is not a model of clarity, nor does it embody the most persuasive stance on the issue. Notably, Robert Wintemute has argued that when making comparisons in a discrimination analysis, it is impermissible to change any of the factors since that would disguise the operative discrimination.\textsuperscript{60} Thus in assessing whether discrimination exists where a man complains of being treated differently because of having a male partner, Wintemute states that only the sex of the comparator must be changed and not the sex of the comparator’s partner.\textsuperscript{61} Thus the comparator of a male complainant is someone of the opposite sex (since the claim is sex discrimination); however, so as not to disguise the sex discrimination, the sex of the partners (both complainant’s and comparator’s) must be kept constant. The mistake of the \textit{Macdonald} approach, Wintemute explains, lies in ignoring that sexual orientation is eminently a “sex-based criterion”,\textsuperscript{62} which is hidden when a gay man is compared with a gay woman.

While the House of Lords agreed in principle with the approach of comparing like with like, they disagreed that the sex of the comparator’s partner is not to be changed. In their view, sexual orientation is a relevant characteristic, which meant that a homosexual man had to be compared to a lesbian and not a heterosexual woman. But the problem with this is precisely, as identified by Wintemute, that treating sexual orientation as a relevant characteristic (and therefore changing the sex of the comparator’s partner as well) disguises the sex discrimination at work. As Baroness Hale herself had recognised in \textit{Pearce}, a person’s sexual orientation cannot be determined without knowledge of and reference to his or her sex. At its most essential core, sexual orientation is intimately connected to sex, and logically it must be a species of sex discrimination.

Ultimately, whatever the merits of these various positions, the debate itself was largely irrelevant to Trinidad and Tobago. In \textit{Macdonald}, the House was determining the meaning of “sex” as contained in an English statute, which does not list “sexual orientation” as a protected characteristic. The Constitution of Trinidad and Tobago, by contrast, does not protect against discrimination on the basis of any specified ground or grounds, but instead provides an expansive guarantee to “equality before the law”. It has long been settled that the introductory clause to the Trinidadian bill of rights is not an independent non-discrimination clause, and courts as well as commentators have accepted that the grounds enumerated therein do not constitute a list – exhaustive or otherwise – of prohibited bases of discrimination. Astonishingly, the Privy Council itself has recognised and approved of this position, with none other than Baroness Hale herself articulating it in clear terms.\textsuperscript{66} This rendered any debate as to whether “sex” includes sexual orientation wholly otiose, and Lord Bingham’s conclusion to this effect was of no relevance.
The better approach in *Suratt* was that taken by the Court of Appeal, which found sexual orientation to be analogous to “sex” as listed in the introductory section. By so doing the Court of Appeal recognised that the Constitution does not provide a closed list of grounds, so there was no need to embark on a discussion of whether or not sexual orientation was covered by “sex”. In this way, sexual orientation was viewed as a ground in its own right, applicable because of its relation to existing enumerated grounds (an argument by analogy). Given their familiarity with this most basic aspect of the Trinidadian bill of rights, demonstrated elsewhere, there is no kind way to explain this aspect of the Privy Council’s decision in *Suratt*.

(iii) Dress Codes

In a case from St. Kitts and Nevis, Kaleel Jones, a four year old boy, was prevented from attending school because of his long hair. The school rules provided a comprehensive code on appearance, stipulating in part that neither boys nor girls could have stylish hairstyles, which meant no “hairdos” for girls or long hair for boys. Kaleel’s parents refused to cut his hair, alleging that doing so would cause him psychological trauma. Because both sides refused to budge, the parents were eventually forced to enrol Kaleel in another school which did not have the same restriction on hair length. Kaleel sued, alleging that the school’s decision to refuse him admission until his hair was cut short was discriminatory on the grounds of sex, given that the rule applied to boys and not girls. The Court of Appeal disagreed, holding that the essence of discrimination is different and less favourable treatment to one person as compared with another, and since the rules in question merely differentiated between the sexes in enforcing a common approach regulating appearance, they were not discriminatory. Writing for the majority, Barrow JA reasoned that the school rule concerning hair length could not be read in isolation, for it was part of a larger code regulating appearance. He continued saying that the rules sought to enforce a conventional appearance on the part of both boys and girls by prohibiting “stylish” haircuts. The rules were therefore even-handed in their application to both sexes and not unconstitutional.

There are several problematic aspects of Barrow’s reasoning, two of which stand out. The first is that the Court of Appeal was only able to come to this conclusion by reading the dress code as a whole – an approach that is not obviously warranted or justifiable. As Robert Wintemute has pointed out, non-discrimination is concerned with individual treatment, not group rights, so there is no rationale for lumping different choices together and examining their net effect. Instead, in keeping with the nature of the right, what must be considered is a specific rule’s effect on the ability of individuals to make each specific choice. Further, even if the rules are to be lumped together, this does not suspend the standard requirement of any non-discrimination analysis that like must be compared with like – which, it is clear, the court abysmally failed to do. By treating the rule regulating the length of boys’ hair as similar to that regulating girls’ hairdos and preventing hair extensions, what the court did was to compare a biological feature (hair length) with artifice (hair style). Under one rule a girl could wear her (long) hair ordinarily at school while remaining free to style it at home, whereas under the rule that applied to boys, the requirement of only short hair in school would necessarily dictate hair length everywhere else. In other words, the rules were not comparable, so there was even less justification for lumping them together.
The second and even more troubling feature of the court’s decision was its conclusion that in regulating the appearance of its students, the school was entitled to require a “conventional appearance”. In so finding the court apparently overlooked that “convention” is often barely disguised prejudice, which acquires legitimacy through familiarity or tradition. This connection was clearly made by the South African Constitutional Court in 2008 in MECA for Education v Pillay, a case that essentially raised the same issue. In Pillay, a student challenged a school rule which prohibited her from wearing a nose stud to school. Although this was a part of South Indian cultural tradition, at first instance the school rule was held to promote “acceptable convention” and thus no unfair discrimination was found. Overturning this ruling, Langa CJ pointed out that:

“[T]he norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them.”

Religion and culture which feature in Pillay are no more important than issues related to sex and gender. Pillay reminds us that conventions can be exclusionary, majoritarian and therefore just as harmful to minorities as other rules – so reliance on them should not automatically legitimise a current rule or practice. By not accommodating these nuances in relation to Kaleel’s situation, the Court of Appeal displayed no appreciation of how decisions like its own help to reinforce stereotypes around masculinity. There is a wealth of sociological literature and ethnographic studies in the Caribbean describing a culture of rampant masculinity and linking this to profound gender inequalities, acute levels of violence against women, homophobic violence (which is not necessarily directed only at homosexuals) and under-performance by boys and men in education. According to Tracy Robinson, violence against women “remains in the Caribbean a pervasive and debilitating condition of women’s lives and the concept of gender is indispensable to understanding why and to whom it happens.” The point here is that social constructions of gender and masculinity, or mainstream expectations of how boys and men should behave, have resulted in negative consequences, and thus should not be reflexively perpetuated.

In this case, the hair length rule was not wholly neutral, for there was testimony to the effect that Kaleel would suffer psychological harm if his hair was cut. One wonders what prejudice would result from allowing a child’s individuality to flourish, especially when traditional social constructions of masculinity have been known to be attended by, even if only tangentially, negative consequences. In this context, the court’s dogged insistence on enforcing convention betrayed a deeply unreflective attitude.

4. Multiple Equality Guarantees: Belize, Guyana and Jamaica

As mentioned above, three Caribbean constitutions – those of Belize, Guyana and most recently Jamaica – contain general equality rights in addition to a specific non-discrimination guarantee. Given that the amendments in the constitutions of Guyana and Jamaica are the most recent, not much of substance has been generated in these countries regarding the meaning and inter-relationship of these multiple guarantees.
Nonetheless, what is common to the little jurisprudence that does exist is the marked absence of a principled approach guiding the interpretation of the sections.

In the Belize Constitution, there are two provisions relating to equality: section 6(1), which provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law”, and, section 16(1), which is the standard non-discrimination right providing protection against discriminatory laws and treatment on certain listed grounds.78 Section 6(1) is unique for a Caribbean constitution not only because it is an addition to the more common non-discrimination right, but also because it is immediately followed in section 6(2) by a long list of procedural protections for the criminally accused, rights that are normally characterised as “due process” or “protection of the law”. However, this placement has proved to be inauspicious, for its proximity to due process rights has cut down the provision’s scope as a general equality right.

The main case to have considered the meaning of these multiple guarantees is Fort Street Tourism Village v AG, where the claimants complained of discriminatory treatment in relation to their ability to access the patronage of tourists coming off of cruise ships.79 The absence of a deep water harbour in the area surrounding Belize City means that cruise ships have to moor at sea, and passengers are then ferried to a boardwalk where they complete the immigration process. The problem arose from the fact that the government designated a private company, Fort Street Tourism Village, as the sole port of entry and exit, whereupon the company erected concrete barriers on the boardwalk. The effect of these structures was to prevent easy access for the tourists to the claimants’ businesses, all of which were located alongside the boardwalk. The claimants sued, alleging, among others, breaches of sections 6(1) and 16.

The most comprehensive treatment of the equality arguments was given at first instance by the Chief Justice. He held that section 6(1) was merely a procedural guarantee80 – that is, a “guarantee of due process to everyone”.81 According to his interpretation, the section requires that any unfairness of treatment alleged had to be measured by reference to section 16, that is, the detailed anti-discrimination section.82 Thus unless the reason for the different treatment corresponded to one of the specific grounds listed in section 16, there could be no violation of section 6(1).83 In this case, because the treatment complained of did not fall within one of those categories, there was no breach of either section.

On appeal, this interpretation was unanimously upheld. The Court of Appeal judges were particularly fixated on the absence of an element of state action, holding that, for this reason, the constitutional right was not applicable in the first place.84 But each went on to find that, in any event, there was no discrimination that would fall within the terms of section 16(1).85 Morrison JA pointedly added that the Chief Justice was “plainly right” in his interpretation of section 6(1).

The most glaring problem with this approach to section 6(1) is that it turns the guarantee into mere surplusage. If a claim alleging a breach of either equality before the law or the equal protection of the law can only succeed where the ground of differentiation is one of those listed in section 16(3), there is nothing to gain by invoking 6(1) and a litigant need only rely on section 16. However, since it is presumed that parliament does not legislate in vain, section 6(1) must have been included
for some reason. One can derive some assistance in discerning that reason by referring to other bills of rights. The most helpful in this regard is the South African one, which also contains a multi-faceted equality right. Under this model there is both a general declaration of equality in section 9(1), as well as specific provision against discrimination on certain listed grounds in section 9(3).

The Constitutional Court of South Africa has established three stages of inquiry to assess a claim of discrimination under section 9, the key result being that the scope of the general equality right in subsection (1) is not fenced in by the subsequent list of prohibited grounds of discrimination in subsection (3). At the first stage, the court scrutinises statutory classifications, and a law can fail at this stage if any differentiation is found not to have a rational connection to a legitimate government purpose. If any differentiation is found to bear a rational connection to a legitimate aim, then the second stage of analysis arises to ascertain whether it might nevertheless amount to discrimination.

At the second stage, the court must ascertain whether the identified differentiation is unfair. This involves two inquiries: first, determining the motivation, and second, the impact, of the different treatment. If the motivation or reason for the differentiation is based on a ground specified in section 9(3), then unfairness is presumed and discrimination is established. This presumption can be rebutted. Alternatively, if the motivation is not based on a specified ground, it may still be unfair (though not presumptively so) if the reason for the differentiation is based on “attributes or characteristics” that have the potential to impair human dignity or affect persons adversely. In other words, the list of grounds specified in section 9(3) is not treated as exhaustive. Next, if the consideration of certain factors leads to a conclusion that the differentiation is not unfair, then there is no violation of 9(3), but if the differentiation is found to be unfair, then the final stage of enquiry arises.

At the third stage, which arises if unfair discrimination is established and only in relation to laws of general application, the court has to examine whether the proved discrimination can be justified under the limitations provision. In undertaking this analysis, the court adopts a proportionality test, balancing the object of the provision against the extent of its infringement of equality.

As is evident from this carefully designed approach, the broad equality right in section 9(1) is not treated as parasitic on 9(3), and each guarantee serves a distinct purpose. Specifically, there are two key consequences to the itemisation of grounds in 9(3): first, treatment motivated by or classifications based on any of the listed factors is presumed to constitute unfair discrimination, and second, the express identification of protected characteristics imposes a higher standard on the state where it seeks to justify unfair discrimination on those bases. But if a ground is not listed in 9(3) this does not mean that a litigant cannot establish inequality of treatment under section 9(1) – all it does is impose a different burden and standard of proof.

Another relevant fact to consider is that both expressions incorporated in Belize’s section 6(1) – equality “before the law” and “equal protection of the law” – are terms laden with meaning. Given their rich antecedents, it asks too much to view their inclusion in the bill of rights as mere coincidence or empty rhetoric. In Matadeen, for instance, where the applicants argued that the guarantee of “protection of the law” in section 3 of the Con-
stitution of Mauritius expressed a general principle of equality, one of the reasons given by the Privy Council for rejecting their argument was the absence of the word “equal” before “protection”. Lord Hoffman attached great significance to this omission, pointing out that section 3

“[I]n fact contains no reference at all to equality. In this respect it is to be distinguished from the Fourteenth Amendment to the Constitution of the United States of America and article 14 of the Indian Constitution.”

By referencing the Fourteenth Amendment to the US Constitution, which prohibits States from denying to any person “the equal protection of the laws”, Lord Hoffman was invoking one of the best known constitutional guarantees of equality. This clause has been invoked to invalidate legislative classifications for more than 100 years, and over time it has evolved into a substantive equality guarantee, not confined to a narrow guarantee of protection against unequal treatment.

American jurisprudence has proved to be hugely influential and nowhere more so than in Canada, where similar language in their bill of rights was interpreted – not as mere procedural protection – but as a substantive guarantee of equality in the content of laws. In what has become one of the best known explanations of this phrase, Canadian Supreme Court Justice Ritchie J has stated:

“[S.] 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under the law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable under the law (...) for him to do something which his fellow Canadians are free to do without having commit-

ted any offence or having been made subject to any penalty”.

Thus by their summary treatment of the general equality right in section 6(1), the Belizean courts have eviscerated the clause of any meaningful content. Their interpretation is inconsistent with the plain meaning of the provision, and it runs counter to a substantial and influential body of learning from other common law jurisdictions regarding the meaning and scope of what are really terms of art.

In Guyana and Jamaica there has not been any substantial treatment of these multiple rights as yet, so it is unclear whether the narrow approach adopted in Belize will prevail. In *Vieira Communications v AG of Guyana* the general equality right was invoked, but since the court found a breach of the right without any analysis, the case provides no guidance on how these multiple rights should be interpreted. Moreover, the little said by the court is not promising. In that case, the applicant company, which operated a television network in Guyana, applied in March 1993 for a broadcast radio licence from the relevant regulatory agency. Not receiving any decision on its application for more than eight years, the company brought a successful constitutional claim, in which it invoked its expression and equality rights (among others). In the Court of Appeal, the latter claim was raised and determined in two sentences:

“[The appellant company] submits that the NFMU has discriminated against it by failing to grant it a radio broadcast licence while it granted licences for the operation of three government controlled radio stations, in contravention of its fundamental rights guaranteed by arts 149D(1) and (2). The respondents have not directly addressed this argument and we have experienced no diffi-
ulty in coming to agreement with the appellant on this submission.”

While this outcome cannot be faulted, the lack of analysis by the court leaves us no closer to the development of a body of principles to guide the interpretation of the Guyana Constitution’s multiple equality provisions. The court clearly identified comparators, which were the three government-controlled radio stations, but this alone is insufficient. It cannot be assumed that if the state obtains a radio broadcast licence every other applicant is automatically entitled to one as well – equality, after all, does not require identical treatment. Thus in addition to identifying a comparator, proof that the differential treatment was motivated by a prohibited ground is also required. Given that the appellant company relied on the general equality right this meant that it was not restricted to invoking one of the grounds listed in the specific non-discrimination right, but that did not absolve it from identifying an impermissible motivation altogether.

Moreover, also missing from the court’s decision was any guidance on how to construe the several rights related to non-discrimination in Guyana’s Constitution: is it entirely the choice of a potential litigant which of these clauses is applicable? If so, what is the relation (if any) between the specific non-discrimination right in 149 and the more general equality right in 149D? Where the general right is invoked (as in this case), does any differentiation result in a finding of breach, or is there a preliminary burden on either party to demonstrate the reason for the differentiation? If so, what is the standard by which any proved differentiation must be assessed and possibly justified? As seen from South African jurisprudence, these are all issues that have been carefully worked out in a series of cases. Given that a breach of article 149D cannot be established merely by proof of different treatment, the same must be done by Guyanese courts too.

5. General Equality Rights: Trinidad and Tobago

Alone amongst all the bills of rights in the Commonwealth Caribbean, the one in Trinidad and Tobago’s Constitution contains a general right to equality without a separate provision prohibiting specific grounds of non-discrimination. Since this constitution is the second oldest of the independence constitutions in the Caribbean there has been enough time to articulate appropriate principles to guide the interpretation of the relevant clauses, but remarkably such guidance has not yet materialised. On the contrary, the interpretation of the two equality clauses in section 4 has consistently bedevilled the judiciary.

One of the earliest cases under section 4(d) was a successful claim brought against the Chief Immigration Officer for his refusal to consider applications for work permits by the applicant company, while doing so for at least one other company. While the Court of Appeal of Trinidad and Tobago held correctly that in order to establish a breach of this right it is not necessary to show that the breach fell within the introductory words of section 4, it appears that the applicant succeeded in this case without establishing any reason at all for the different treatment. This, like the Guyanese case discussed above, suggests that the mere fact of differentiation is unlawful – an unsustainable position since the law cannot guarantee identical treatment to all. LJ Williams was followed by another case where the court simply looked for a similarly circumstanced person, and finding none concluded there was no discrimination.
What is continually misunderstood by these cases (including the Guyanese one) is that merely identifying an appropriate comparator cannot be enough, and a litigant should also be required to establish that the difference in treatment proceeded from some improper motivation. Describing the two Trinidadian cases as “total conceptual disasters”, Margaret DeMerieux, the doyenne of Caribbean human rights law, writes:

“[LJ Williams] makes of section 4(d) something quite different from discriminatory treatment in the other West Indian sections and indeed discriminatory treatment as generally understood in law. This is the conferral of benefits or burdens, or the making of decisions on the basis of unlawful distinctions and criteria of differentiation, which constitute specific wrongful motives for the governmental decision or action.”

Explaining this approach, she continues:

“It is quite inconceivable that section 4(d) could have been designed as a guarantee for the actual equal treatment of persons in Trinidad and Tobago, similarly circumstanced or not, especially where the similar circumstance depends on judicial choice or formulation, not determined by any observable principle, and as so often said here, not determined by the discovery of the basis for different treatment. It could hardly be the case, that all persons who could possibly apply for certain licences (in some cases the class could be the whole population), should be able to get one, once any other person has received one.”

Another conceptual misstep by Trinidadian courts, again stemming from these two early cases, has been the requirement of *mala fides* in establishing a breach of either equality right.

One of the most notable instances of its application occurred in a claim by a female Muslim student that the decision of the school in question to refuse to allow her to wear a modified version of the uniform to accommodate the hijab constituted, among other breaches, a violation of her right to equality of treatment under section 4(d). The trial judge held that in the absence of bad faith or hostile intention on the part of the headmistress and the school board, there was no unequal treatment. This is, of course, plainly incorrect. A finding of discrimination does not depend on bad faith, and there is no shortage of authority to this effect. Yet the Privy Council, despite recognising the error, has declined to address it, making only the limited concession that *mala fides* cannot be in issue where a legislative classification is in issue. This concession was long overdue but still insufficient, for it does not cover all possible instances of unequal treatment under section 4(d).

Although more than two decades have elapsed since DeMerieux identified the errors in the prevailing approach to the equality provisions, the most recent cases in Trinidad and Tobago in the area continue to repeat them. In *Paponette v AG*, a dispute arose between the maxi-taxi association and the state concerning the removal of taxis plying two routes (Nos. 2 and 3) to “City Gate”, a taxi docking area located on land controlled by the Public Transport Service Corporation (PTSC). The association was assured that the management of City Gate would be entrusted to them, but when this failed to materialise they sued. One of the grounds of action invoked section 4(d), the claim being that the owners and operators of routes 2 and 3 were treated differently from the owners and operators of other routes, since they alone were under the control of PTSC and required to pay a fee for docking.
In the Court of Appeal the equality claim was dismissed on the ground that the identified comparators – the operators of other routes – were not similarly circumstanced because they did not operate in Port of Spain. While the ultimate finding may have been correct, the court’s reasoning was flawed. That error was, once again, failing to appreciate that it is not enough to identify a similarly circumstanced person or group, for what is also required is an examination of the bases of the different treatment of the two groups. It is only if the complaining group is treated differently from another for an impermissible reason that the constitutional right is breached.

Although the Privy Council decided the matter on the basis of the property right, they also adverted to the equality claim. Overruling the Court of Appeal, they decided that since the state had led no evidence regarding the reasons for the different treatment, the court was forced to speculate and so found a breach of section 4(d). While the Privy Council may have been nearer to the mark than the Court of Appeal, another case decided by them originating from Trinidad and Tobago only one month before indicates that doctrinal confusion still persists. In that case, Public Service Appeal Board v Maraj, at issue were regulations which laid down different procedures for dealing with disciplinary matters related to public officers. The Privy Council found in favour of the respondent on the basis (once again) that the state had failed to advance any justification for the difference in procedures, curtly stating: “Legislation frequently has to draw distinctions between different classes of people. Such distinctions may well be justified. Some distinctions are easier to justify than others. But at the very least they must serve a legitimate aim and be rationally connected to that aim.”

The weakness of both decisions is that they appear to conflate distinct stages of inquiry, which makes a muddle of what must be proved, when, and by whom. The effect of both Paponette and Maraj is to approach all differences, in law and treatment, as presumptively suspect and requiring justification by the state. This imposes an onerous burden on the state, given that legislation routinely classifies between classes of people for legitimate reasons. Early on in its jurisprudence the South African Constitutional Court demonstrated an awareness of this, and in one case they cautioned that:

“If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s33, or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct (...) The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional im- permissibility and is unequal or discriminatory ‘in the constitutional sense’.”

No doubt, this is why in South Africa equality claims are approached in stages, and proof of mere differentiation does not instantly require justification. At the outset, mere differentiation is only unconstitutional if it does not bear a rational connection to a legitimate government purpose. At this stage the court employs a lower level of scrutiny than when it is assessing the justification for the limi-
tion of a right.\textsuperscript{113} It is only if discrimination (as distinct from mere differentiation) is found to exist that the state is then required to justify the law or action.

None of this analysis occurred in \textit{Paponette} or \textit{Maraj}, where, on a finding of different treatment, both applicants succeeded because the state did not lead evidence in justification. In \textit{Paponette} at least, there was an obvious and compelling reason for the relocation of the taxi stands in Port of Spain, which was to ease the notorious traffic congestion that plagues the city. To have simply found in this case (as in \textit{Maraj}) that there was an unjustifiable breach of equality, the Privy Council elided over several distinct stages which require preliminary determinations of rationality and identification of the motivation for differential treatment, with each being attended by differing levels of proof.

6. Conclusion

Caribbean bills of rights include provisions which are capable of generating protection to minorities and marginalised groups, however guarded the language of such guarantees may be. The larger problem has been a conservative approach to the right, characterised by strict literalism and an inability to situate claims within their larger social context. This conservatism has been compounded by confusion on certain key issues, particularly in relation to the general equality right where the relevant courts, including the Privy Council, have failed to work out answers to some of the most basic questions. For example: where the actual provision does not specify protected characteristics, what constitutes impermissible bases of differentiation? On whom does the burden lie to establish unlawful discrimination? At what stage must proved differentiation be justified, and if so, by what standard? In fact, is proving motivation required at all, given that many of the cases consistently have suggested that merely establishing different treatment of similarly circumstanced persons is sufficient to establish discrimination?

Some of these questions touch on deeply contested issues, such as the nature of discrimination and on whom the responsibility lies for establishing its boundaries. They involve difficult but not abstract inquiries. Central to the need for protection is that equality is linked to human dignity; that it aims to discount irrelevant personal characteristics from influencing certain essential decisions; that it seeks to redress the historical marginalisation of certain minorities; and, that majorities may sometimes be unable (or even unwilling) to provide protection. Unless courts of the Commonwealth Caribbean demonstrate an appreciation of these imperatives, they will continue to be unable to fashion a coherent and meaningful jurisprudence on equality.

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5 Based on similarities in content, the original constitutional bills of rights of the twelve independent countries which make up the Commonwealth Caribbean can be loosely grouped into two categories: the "older" model, comprising those of the first five countries (except Trinidad and Tobago) to gain independence, namely Jamaica (1962), Guyana (1966), Barbados (1966) and the Bahamas (1973), and the "newer" model, comprising all the rest, namely Grenada (1974), Dominica (1978), St. Lucia (1979), St. Vincent and the Grenadines (1979), Antigua and Barbuda (1981), Belize (1981), and St. Christopher & Nevis (1983). The Trinidadian bill of rights diverged significantly as it was patterned after the Canadian bill of rights of 1969 and not the European Convention on Human Rights like the others. Since independence, Guyana's version was extensively amended in 1980 and again between 2001 and 2003, and Jamaica's bill of rights was repealed and replaced in 2011, with the substituted version now bearing a greater resemblance to the Trinidadian model.

6 Tracy Robinson, Commonwealth Caribbean Human Rights Law, Course Materials – Equality, University of the West Indies, 2012, p. 2. This omission was most pronounced in the original Independence Constitution of Jamaica, wherein the word 'equal', including its derivatives, did not appear at any place in the bill of rights.

7 Section 4 of the Trinidad and Tobago Constitution provides: "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely– (b) the right of the individual to equality before the law and the protection of the law; and (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions...”.

8 Constitution of Belize 1981, s. 6(1).
9 Constitution of Guyana 1980, Article 149D.
10 Charter of Fundamental Rights and Freedoms 2011, sections 13(3)(g) and (h).
11 See, for example, Constitution of South Africa, s. 9(3) or Constitution of India, s. 15.
12 See above, note 10, s. 13(3)(i).
13 In addition to the previous five, the grounds added are "age, disability, marital status, sex, gender, language, birth, social class, pregnancy, religion, conscience and belief or culture”.
15 Ibid., p. 282.
16 Ibid., p. 280.
18 Ibid., Para 16.
19 Ibid., Para 9.
21 Ibid., pp. 770-772.
22 For an overview of the main cases of this period see: Burnham, M., "Indigenous Constitutionalism and the Death Penalty", ICon, Vol. 3.4, 2005, p. 582.
25 Ibid., p. 646.
26 See above, note 4.
27 See, for example, Constitution of Barbados, s. 11.
32 Ibid., Para. 104. Note that this was a decision of the High Court of Delhi, not the Indian Supreme Court.
33 Ibid., Para. 112.
34 See above, note 14.
35 Under section 7 of the Constitution of the Co-operative Republic of Guyana Act 1980, existing laws are required to be construed with “such modifications, adaptations, qualifications and exceptions” so as to ensure their conformity with the Constitution.
36 See above, note 14, p. 290.
37 Ibid., p. 290-291.
38 Married Persons (Property) Act, Chapter 45:04, Laws of Guyana.
40 Constitution of St. Lucia 1979, s. 13(3).
41 Hinds v R. [1976] 1 All ER 353 (PC, Jamaica).
43 Section 13 of the St. Lucia Constitution provides a wide array of exceptions to the non-discrimination guarantee. Matthew J relied on “either or all” of sub-sections (4), (5) and (6), which exclude this guarantee from applying to laws made in relation to taxation and non-citizens, as well as treatment under the law in relation to adoption, marriage, divorce, burial, succession, and standards relating to employment.
44 Compare with the approach of the South African Constitutional Court: Moise v Transitional Local Council (CCT 54/00) 2001 (4) SA 491, Para 19.
45 Wade v Roches BZ 2005 CA 5 (Court of Appeal, Belize).
46 Spencer v AG (1998) 2 CHRLD 184 (Court of Appeal, Antigua & Barbuda) and SVG Green Party v AG VC 2005 HC 30 (High Court, St. Vincent).
48 Equal Opportunities Act, No. 69 of 2000.
49 Ibid., s. 3.
50 Ibid.
51 Suratt and Others v AG, Civil Appeal No. 64 of 2004, 26 January 2006, Paras 40-45.
52 Ibid., Paras 43-44.
54 Ibid.
55 Ibid., Para 35.
57 See above, note 29.
59 Ibid., per Lord Nicholls, Paras 5-7; Lord Hope, Paras 70-71 and 73; and Lord Rodger, Paras 153-158.

Ibid., p. 347.

Ibid., p. 346.

See above, note 7.


In Public Service Appeal Board v Maraj (2010) 78 WIR 461, she stated (at Para. 27) that "the rights laid down in s 4 are free-standing rights, which exist irrespective of any discrimination on the enumerated grounds".

See above, note 51, Para 43.


See above, note 60, p. 355.

See above, note 69, Para 25.

Ibid., Para 27.

MEC for Education v Pillay (CCT 51/06) 2008 (1) SA 474.

Ibid., Para 44.


The specified grounds are sex, race, place of origin, political opinions, colour or creed.

(2008) 74 WIR 133.

Ibid., Para 44.

Ibid., Para 49.

Ibid., Para 52.

This is the standard approach to the non-discrimination right made popular by Nielsen v Barker, see text accompanying notes 14 to 16 above.

See above, note 79, per Mottley JA at Para 66 and Carey JA at Para 77.

Ibid.

Section 9 of the South African Constitution provides:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

87 Notably, Harksen v Lane NO 1998 (1) SA 300 (CC) and Hoffman v South African Airways 2001 (1) SA 1 (CC).

88 Hoffman, above note 87, Para 24.

89 See above, note 17.

90 Ibid., Para 16.


92 Ibid., p. 119.

93 Section 1(b) of the Canadian bill of rights guaranteed “the right of the individual to equality before the law and the protection of the law”.


95 (2009) 76 WIR 279.

96 Ibid., p. 295.

97 See above, note 7.

98 See above, note 64.


100 See above, note 65, p. 434.

101 Ibid., p. 432 (emphasis in original).

102 Ibid., pp. 434-435.

103 See, for example, KC Confectionary, above note 99, p. 415.


106 In Bhagwandeep v AG (2004) 64 WIR 402, the court declined to rule on this point without detailed argument, maintaining this stance in Central Broadcasting Services v AG (2006) 68 WIR 459.

107 See above, note 66, at p. 471.


109 Ibid., p. 493.

110 See above, note 66.

111 Ibid., pp. 472-473.

112 Prinsloo v Van der Linde 1997 (3) SA 1012 (CC), Para 17.

Behind Closed Doors: Trafficking into Domestic Servitude in Singapore

Libby Clarke

1. Introduction

In recent years, the problem of human trafficking into Singapore has received increased attention both by international observers – including the Committee on the Elimination of Discrimination against Women (CoEDAW) and the US Department of State – and national stakeholders. The establishment of the Inter-Agency Taskforce on Trafficking in Persons in 2010, the purpose of which is to combat trafficking “more effectively by implementing holistic, co-ordinated strategies”, was a notable development. Identified as a “destination country for men, women and girls subjected to sex trafficking and forced labour”, efforts are now underway in Singapore to address the problem through the launch of a National Plan of Action against Trafficking in Persons 2012-2014 (the NPA) in March 2012, in which the government set out its plans for countering all forms of trafficking. The NPA follows the structure of the primary international law instrument relating to trafficking – the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the UN Trafficking Protocol) – by adopting a “3P” approach of prosecution, prevention and protection, and focussing on a criminal justice response.

This article seeks to analyse the adequacy of the criminal justice response to human trafficking, taking into account that as well as being a transnational crime, it is also, inter alia, a violation of the right to equality and, in some cases, a form of discrimination which is, in addition, contributed to by a range of other inequalities and discriminatory laws, policies and practices relating to a range of prohibited grounds, including sex, nationality and economic status. The article centres its analysis on the results of a study conducted by the Humanitarian Organization for Migration Economics (HOME) during 2012 (the HOME FDW Study) in which the cases of 151 foreign domestic workers (FDWs) in Singapore were examined in order to establish the specific characteristics of trafficking into domestic servitude – a form of gender-based discrimination recognised in CEDAW and in the recommendations of the CoEDAW – in Singapore and to determine whether the approach set out in the UN Trafficking Protocol is sufficient to address such characteristics.

It assesses whether the criminal justice response required by the UN Trafficking Protocol would prove more effective when incorporated as part of a broader approach which has, at its core, the obligation of countries such as Singapore to “take all appropriate measures” to combat trafficking as a violation of the right to equality and a form of discrimination.

Singapore is an interesting specimen for analysis in this regard for a number of reasons.
Firstly, it is better known as a destination country for foreign migrant workers— with over one-fifth of the population made up of non-citizens— than as a destination country for human trafficking and, as stated above, the government is currently in the relatively early stages of developing its response to this complex issue. Secondly, and perhaps more significantly, Singapore has demonstrated a weak commitment to international human rights mechanisms through its poor record on signing and ratifying international human rights treaties. The human rights obligations which it has assumed, however, centre around issues of equality and non-discrimination— having ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995 and having signed the Convention on the Rights of Persons with Disabilities on 30 November 2012. An approach to human trafficking which focuses less on the language of human rights in general and more specifically on the language of equality and non-discrimination may, therefore, gain more traction in this rights-averse city-state.

2. Human Trafficking: A Global Crime of Inequality

International law provides guidance as to both the definition of human trafficking and the steps which must be taken to effectively combat all of its manifestations. Both UN human rights treaties to which Singapore is a party – CEDAW and the Convention on the Rights of the Child (CRC) – impose obligations regarding the enactment of legislation and other measures to suppress and prevent trafficking. It is, however, the UN Trafficking Protocol – to which Singapore is not yet a party – which provides the most comprehensive guidance as to the prevention and prosecution of trafficking in persons and the protection of those who have been trafficked. The UN Trafficking Protocol sets out a framework for states parties to follow in order to address comprehensively the issue of trafficking within their national borders. It requires states to prohibit and prosecute trafficking through the enactment of a criminal offence of trafficking, in all its forms, based upon the following definition set out in Article 3:

"Trafficking in Persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

Whilst the definition set out in Article 3 of the UN Trafficking Protocol is used as the international “standard”, it is notable that there is no explanation within the UN Trafficking Protocol itself of the different concepts upon which the definition is built. A helpful starting point is to identify the three different elements within the definition, all of which must be present for a case to be one of trafficking. These elements are as follows:

a) Action (recruitment, transportation, transfer, harbouring or receipt of persons);

b) Means (force, coercion, deception, fraud, abuse of power, abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); and
c) Purpose of exploitation (including, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

The terminology used to describe the “action” element is self-explanatory, whilst that used to describe the “means” and “purpose” is somewhat opaque. Assistance can be found in the definitions provided in the UNODC Model Law against Trafficking in Persons, the ILO Convention concerning Forced or Compulsory Labour, the Slavery Convention 1926 and the Supplementary Convention on the Abolition of Slavery 1952. In addition, organisations such as the United Nations Office on Drugs and Crime (UNODC) and the International Labour Organisation (ILO) have provided lists of indicators which can be used to assist law enforcement officers, immigration officials, legal practitioners and civil society organisations in identifying trafficked and potentially trafficked persons.

In addition to being recognised as a transnational crime in the UN Trafficking Protocol, trafficking has also widely been recognised as a form of discrimination. Article 6 of CEDAW specifically requires states parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”. The CoEDAW expands on this obligation in General Recommendation 19, in which it categorises trafficking as a form of gender-based violence which is therefore “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”. As such, states parties are recommended to take a range of actions, including taking “appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act”. Further, states parties are recommended to take both “preventive and punitive measures to overcome trafficking” and provide “effective complaints procedures and remedies, including compensation”.

In 2010, the UN High Commissioner on Human Rights called for “a human-rights based approach to trafficking”, which “seeks to both identify and redress the discriminatory practices and the unequal distribution of power that underlie trafficking, which maintain impunity for traffickers and deny justice to their victims”. The Commentary to the Office of the High Commissioner on Human Rights’ Recommended Principles and Guidelines on Human Rights and Human Trafficking reiterates the fact that trafficking of women is a form of sex-based discrimination, and is therefore captured by the obligations of states to protect the fundamental human right to equal treatment and non-discrimination which is “firmly enshrined in all major international and regional instruments”. Such instruments include those entered into by the members of ASEAN, such as the ASEAN Declaration of Human Rights, which includes the principles of equality and non-discrimination as “General Principles”.

Perhaps the most expansive recent assessment of the relationship between inequality, discrimination and human trafficking took place in October 2012 at the Organization for Security and Co-operation in Europe (OSCE)’s 12th High-level Alliance against Trafficking in Persons conference entitled “An Agenda for Prevention of Human Trafficking: Non-Discrimination and Empowerment”. The concept note drafted in advance of the event (the OSCE Concept Note) provides a very enlightening description of the inextricable relationship between the rights to equality and non-discrimination and the
challenges of protecting individuals from human trafficking. It points to the centrality of equality concepts in the OSCE Action Plan to Combat Trafficking in Human Beings, and sets out how

“[T]he conference aims to pave the way to better identify linkages between trafficking in human beings and various aspects of discrimination, and to explore how anti-trafficking and anti-discrimination measures can enhance each other.”

In his opening speech, the OSCE Secretary-General Lamberto Zannier elaborated further on the issue, as follows:

“Discrimination creates social vulnerabilities that can lead to victimisation and trafficking. Let me add that, when trafficking occurs in the course of the migration process, discrimination also hampers the identification and therefore the due assistance, protection and reintegration of trafficking victims in countries of destination, especially when migrants do not have a regular status. We have to admit that discrimination and exploitation of the most vulnerable and the least protected often go hand in hand in our societies. Truly, measures to eradicate human trafficking will be more successful if anti-discriminatory policies are placed higher up in the hierarchy of state priorities.”

Despite wide acknowledgement of these equality-related features of human trafficking, the UN Trafficking Protocol fails to address these features in any meaningful way. Whilst it does require the development of a system of protection for “victims” of trafficking, and it obliges states to take a range of actions in order to prevent trafficking, the focus of the UN Trafficking Protocol is entirely on a criminal justice response to human trafficking. This is evidenced, not least, by the fact that it is a protocol to the UN Convention against Transnational Organized Crime rather than being associated with the corpus of UN human rights treaties. Trafficking is referred to throughout the UN Trafficking Protocol as a “crime”, and the scope of the protocol is limited in Article 4 to:

“[T]he prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.”

The first substantive obligation identified in the UN Trafficking Protocol is that of criminalisation, under Article 5, and the focus of the provision relating to protection of victims relates to their involvement in legal proceedings. Further, the obligation to repatriate victims, under Article 8, is stated to be subject to due regard “for the status of any legal proceedings related to the fact that the person is a victim of trafficking.”

At no point does the UN Trafficking Protocol refer to trafficking as a human rights violation. Buried in Article 9(4) of the UN Trafficking Protocol, however, there is a suggestion that trafficking may involve more than activities masterminded by transnational organised crime syndicates. It requires states parties to:

“Take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, under-development and lack of equal opportunity.”

Further, in Article 14(2), it states that:
“The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

By focussing on lack of equal opportunity and the non-discriminatory application of its provisions, however, the UN Trafficking Protocol fails to acknowledge the perhaps more concerning social inequalities and proactive laws, policies and practices of discrimination which arguably play a role as one of the causes of human trafficking before the need to apply its provisions arises. It is the significance of such factors, and other elements of inequality and discrimination associated with the issue of trafficking, which this article seeks to shed increased light on, examining whether the eradication of these factors should play a key role in anti-trafficking efforts.

**Specific Nature of Trafficking into Domestic Servitude**

This analysis focuses on the specific manifestation of human trafficking within the domestic work sector. Whilst it is recognised that all forms of human trafficking – both the often prioritised sex trafficking and the frequently misunderstood labour trafficking – feature characteristics of inequality and discrimination, trafficking into domestic servitude is of particular interest given that it features the intersectionality of several potential sources of disadvantage, including gender, nationality, immigration status and economic status. A recent report published by the International Labour Organization has commented on the highly feminised nature of the domestic work sector globally, with 83% of all domestic workers being women. It also states that for Asian women, domestic work is one of the most important sources of employment beyond the borders of their countries of origin, and refers to the “genderisation of migration flows”, in accordance with which men migrate to work in the construction sector, whilst women migrate into domestic work. In summary, it suggests that:

“An almost universal feature is that domestic work is predominantly carried out by women, many of whom are migrants or members of historically disadvantaged groups. The nature of their work, which by definition is carried out in private homes, means that they are less visible than other workers and are vulnerable to abusive practices.”

Further, the OSCE Concept Note summarises the intersectionality of the experience of those trafficked into domestic servitude as follows:

“[A]n intersectional approach to trafficking for the purposes of domestic servitude would thus examine the intersection of a worker’s complex identity as female, foreign national, migrant worker, poor and of low social status; and how that particular constellation of vulnerability may relate to a broad spectrum of laws and policies (such as employment, citizenship, and policies relating to gender-based violence).”

Before turning to examine the specific characteristics of trafficking into domestic servitude in Singapore, this section will first elaborate further on what exactly this form of trafficking looks like. The issue of trafficking into domestic servitude has become somewhat controversial, with political will often pitched against the eradication of such
violations of the rights of FDWs due to the implications for voting employers. Irrespective of this, there is a growing consensus internationally on the existence of this particular form of trafficking.

The ILO Convention No. 189 concerning Decent Work for Domestic Workers (ILO Domestic Workers Convention) acknowledges the particular vulnerabilities of domestic workers, noting in its Preamble that:

"[D]omestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights".37

In addition to recognition of the vulnerability of domestic workers to discrimination, there has also been specific acknowledgement of their vulnerability to trafficking into domestic servitude. General Recommendation 19 of CoEDAW states that “the recruitment of domestic labour from developing countries to work in developed countries” is a new form of trafficking,38 and its General Recommendation 26 on Women Migrant Workers analyses in some detail the specific forms of discrimination, often based on “gendered notions of appropriate work for women” and result in women migrant workers being employed in the “informal sector” which includes domestic work and which is often excluded from labour law protections.39

International authorities – including the UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences - Gulnara Shahinian - addressed “the manifestations and causes of domestic servitude”.40 She noted that:

“[T]he specificities of the sector make domestic workers particularly vulnerable to economic exploitation, abuse and, in extreme cases, subjugation to domestic servitude and domestic slavery”.

She proceeded to highlight the specific nature of trafficking into domestic servitude which “usually takes place under the cover of activities that seem legal or enjoy widespread social acceptance”.41 Unlike other manifestations of human trafficking which are commonly perpetrated by organised transnational crime syndicates, trafficking into domestic servitude is (as is confirmed by the results of this study) carried out by seemingly innocent members of society conducting their day-to-day activities as an employment agent, or exercising their right to employ somebody to assist with household tasks as an employer. Such “perpetrators” of trafficking will often not realise that they are complicit in the trafficking process. Gulnara Shahinian helpfully explained that:

“Agents recruiting domestic workers become perpetrators of trafficking if they deliberately deceive their clients about the conditions of work or engage in illegal practices of control (such as the withholding of passports), while knowing that such practices will result in the exploitation of their recruits.”42

Similarly, FDWs themselves will willingly engage in the process, despite potentially deceptive and coercive behaviours on the part of their agents and employers, given their goal of earning money to remit to their families back home.
The Polaris Project, the home of the National Human Trafficking Resource Centre in the United States, has emphasised the role of employers stating that:

"[A] situation becomes trafficking when the employer uses force, fraud and/or coercion to maintain control over the worker and to cause the worker to believe that he or she has no other choice but to continue with the work."

Various human rights reports have sought to describe trafficking into domestic servitude. They generally focus on deception and coercion as the “means” used to carry out the trafficking “action”. When looking at the use of deception, the role of recruitment agents in deceiving migrants in relation to key aspects of their contract and the use of contract substitution as a means of formalising such deception have been emphasised. In describing the manifestation of trafficking into domestic servitude in Lebanon, the UN Special Rapporteur on Trafficking described deception regarding employment conditions at the time of recruitment and contract substitution, often “concluded in a situation characterised by deception and duress”.

The role of different forms of coercion has also received significant coverage. Debt bondage arising from the waiving of an upfront fee by the recruitment agency which then collects repayment through salary deductions is a key example. The UN Special Rapporteur on Contemporary Forms of Slavery describes this as follows:

"‘Neo-bondage’ may also emerge in the context of migration for domestic work. Migrant domestic workers will often assume a considerable debt towards the employer or the agency organising her recruitment and transport to cover the cost of the air ticket and recruitment fees. The domestic worker is then expected to work off this debt (...) They cannot leave their position before they have worked off their recruitment debt. With salaries being often as low as US$100-300 per month, this means that migrant domestic workers become bonded for long periods to a single employer, making them easily exploitable.”

The UN Special Rapporteur on Trafficking refers to other coercive practices which keep FDWs in a situation of exploitation, including confiscation of passport, withholding of salary, isolation and restriction of freedom of movement, lack of access to means of communication and physical and psychological violence. According to Anti-Slavery International, the exploitation faced by FDWs who have been trafficked results from a combination of unacceptable working and living conditions. It has described the relevant working conditions as:

(i) Wide-ranging yet non-defined duties, resulting in the worker essentially being at the employer’s disposal;
(ii) Long working hours, with some women being on duty 24 hours each day;
(iii) Inappropriate work management techniques, including the use of verbal violence and restriction on freedom of movement;
(iv) Non-payment, low payment or withholding of wages.

It has described the relevant living conditions as follows:

(i) Accommodation which lacks both comfort and privacy;
(ii) Inadequate food;
(iii) Limited or no access to health care; and
(iv) Restrictions on social life and cultural habits, often resulting from restrictions on movement which are intended, inter alia, to
prevent the domestic worker from building relationships which may cause problems (e.g. pregnancy) for the employer to resolve.48

One of the main obstacles to the development of effective law and policy to prevent and protect victims of trafficking into domestic servitude is the on-going problem of identification. In a report on the United Arab Emirates, the UN Special Rapporteur on Trafficking in Persons, especially Women and Children, commented on the prevalence of trafficking of women into domestic servitude, noting that “the identification of victims, especially domestic workers trafficked for labour exploitation still remains non-existent and problematic” and urging the UAE government “to expand the definition of trafficking, to explicitly include labour exploitation, domestic servitude as well as other forms of trafficking”.49 Similarly, in recognition that there have been “very few prosecutions and convictions for trafficking in human beings for labour exploitation in most OSCE participating States”, highlighting that:

“[T]he main legal challenge is rooted in the difficulty for law enforcement and the judiciary to differentiate between situations where there is exploitation in violation of the labour law (...) and situations where a person has been trafficked for the purpose of labour exploitation.”50

There have, however, been some recently reported cases in which cases of trafficking for domestic servitude have been prosecuted under anti-trafficking legislation, including in Israel,51 the United States52 and Malaysia.53

 Trafficking into domestic servitude has therefore been acknowledged in the international forum as a form of trafficking which presents unique challenges, due to both its basis in fundamental problems of inequality and discrimination, but also in the difficulty in applying the “standard” criminal justice response as the primary means of combating its existence.

3. Trafficking into Domestic Servitude in Singapore

The domestic work sector in Singapore provides a helpful example upon which to base an assessment of the potential role of an equality and discrimination focussed approach to trafficking due to the multiplicity of disadvantage and vulnerability faced by those working within it. Human trafficking in Singapore affects primarily non-Singaporeans who have travelled to the city-state, whether willingly or not, to seek employment, and this study focusses solely on trafficking of foreign domestic workers in domestic servitude, given that there are very few, if any, Singaporean live-in domestic workers in Singapore. Further, all foreign domestic workers in Singapore are female by virtue of the work permit requirements.54 An assessment of the legally-based inequality and discrimination encountered by foreign domestic workers is elaborated further in Sections 4 and 5 below, but, by way of an introduction to the issue, it is notable that unlike all other migrant workers, foreign domestic workers are excluded from Singapore’s Employment Act, protected only by the less rigorous requirements of the Employment of Foreign Manpower Act and its secondary legislation, and subject to other requirements – particularly in relation to pregnancy – which enhance their vulnerability. The US Department of State has highlighted the particular vulnerability of domestic workers to forced labour situations, due to the long-standing lack of a mandatory day off provided under Singaporean law,55 and the trafficking-like conditions in which many foreign domestic workers live have been referenced in academic literature.56 The results
of the HOME FDW Study add further detail to the picture of trafficking into domestic servitude painted by the US TIP Report.

Between March and July 2012, 151 FDW residents of the HOME shelter (from the Philippines (84.1%), Indonesia (10.6%), Myanmar (4.6%) and India (0.7%)) were interviewed in order to determine the extent to which the ILO Operational Indicators of Trafficking in Human Beings (the ILO Indicators) were present in each case. An overview of the results demonstrates that for 149 of the women interviewed, all three elements of the definition of human trafficking – action, means and purpose – were present. 149 of the 151 women were held in situations of exploitation, with 150 women subjected to coercive practices to keep them in such situations. 54 women were deceived during the recruitment process and the vulnerability of 54 women was abused by their recruiters in order to lure them into situations of exploitation.

3.1 Recruitment

The recruitment of FDWs to travel for employment in Singapore was the key “action” which took place in relation to all of the women interviewed. For the majority, the recruitment was accompanied by transportation from their country of origin to Singapore. Almost all of the women (97.4%) engaged the services of employment agents during the recruitment process. The analysis of the interviews demonstrated prevalent patterns of deception and abuse of vulnerability during the recruitment phase.

Deception

According to the ILO Indicators calculation, 54 (35.8%) of the women interviewed demonstrated sufficient indicators to test positively for deception during the recruitment process. These women were deceived regarding key aspects of their prospective employment and thereby tricked into entering into an arrangement which would ultimately result in their exploitation. The forms of deception experienced related to:

(i) Nature of the job, location or employer (34.4%);
(ii) Conditions of work, including working hours and number of rest days (31.8%);
(iii) Content of work contract (51.7%);
(iv) Housing and living conditions (1.3%); and
(v) Wages and earnings (40.4%).

The main method by which such deception was carried out was through contract substitution. 61.6% of the women interviewed signed a contract in their country of origin which was subsequently substituted with a replacement contract upon arrival in Singapore. Of those substituted contracts, 91.4% were on less favourable terms.

Abuse of Vulnerability

According to the ILO Indicators calculation, 54 (35.8%) of the women interviewed were subject to abuse of vulnerability during the recruitment process. In several cases, such abuse played a role in allowing the deception described above to take place. This is particularly the case where the lack of education of the women, and particularly the lack of understanding of the contracts which they read due to language and/or the complexity of the terms, prevented them from realising that they were being deceived. The
vulnerability of recruits arising from financial difficulty and family problems also impacted on the recruitment process, and their willingness to accept employment arrangements with limited understanding of the terms and conditions.

The interview analysis showed that the following vulnerabilities of the interviewees were abused during the recruitment process:

i) Lack of education, preventing understanding of the language and/or complexity of the employment contract (11.9%);

ii) Lack of information, preventing the woman from being fully aware of the situation she is entering into (88.7%) (examples include being prevented from reading the employment contract prior to signing it and not being given any terms or conditions of employment prior to travel to Singapore);

iii) Financial vulnerability, in which the women faced particular financial difficulties, including being the sole breadwinner for the family, being heavily indebted prior to recruitment and being encumbered with high medical fees for family members, which rendered them vulnerable to abuse on recruitment (66.2%); and

iv) Difficult family situation, including family dependence on their earnings, abusive family set-ups and family ill-health (39%).

The connection between the “abuse of vulnerability” element of the trafficking definition, as found in the cases of the women interviewed, and the underlying factor of systemic inequality between developing and developed countries acting both as a “push” and a “pull” factor in the process of female migration for employment, in the cases of domestic workers travelling from their country to Singapore, may result in trafficking.

Coercion

In a total of 62 cases (41.1%), coercion was present in one or more ways during the recruitment phase. These 62 women were (i) placed in agency accommodation, in which control over their lives was essentially surrendered to the agents responsible for their recruitment (14 women, 22.6%); (ii) subjected to undue pressure at the time of entering into the contractual arrangements which would govern their employment in Singapore (35 women, 56.5%); or (iii) forced to relinquish possession of their identity documents to their employment agent prior to deployment (33 women, 53.2%). Each of these actions diminishes the control which the FDW has over her situation and the ability to make free choices at each stage of the process.

The presence of inequality is again notable in the patterns of coercive recruitment found in the cases of the FDWs interviewed, this time in the relationship between the FDW and her recruiter and/or employment agent. The imbalance of power in this relationship, founded ultimately on the fact that the latter has exactly what the former needs in order to fulfil her aims – i.e. the ability to arrange a job for her.

3.2 Employment

It is upon arrival into Singapore and commencement of employment at the homes of their employers that coercive practices are commonly used in order to keep FDWs in an exploitative situation of forced labour or servitude. The nature of the exploitation which 149 (98.7%) of the women interviewed experienced was varied, yet for many, touched
upon all aspects of their lives including both their working and living conditions. The ILO Convention on Forced or Compulsory Labour defines "forced labour" as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The UNODC Model Law against Trafficking in Persons defines "servitude" as follows: “Servitude’ shall mean the labour conditions or the obligations to work or to render services from which the person in question cannot escape and which he or she cannot change". It is the element of coercion and the resulting lack of choice which turns a situation in which an individual is exploited through violation of their labour rights into one of forced labour or domestic servitude, and therefore these sets of indicators are here examined alongside each other.

**Exploitation**

As stated above, 149 of the women interviewed had been subjected to varying forms of exploitation during their employment in Singapore. The different forms of exploitation are as follows:

i) Excessive working days (96.7%);  

ii) Excessive working hours (96%);  

iii) Very bad working conditions, including being forced to give massages to employer and/or his family and being forced to work illegally in multiple locations (36.4%);

iv) Bad living conditions, including being given insufficient or inadequate food, or being forced to accept inappropriate sleeping arrangements (due to lack of private space or being forced to share with adults and/or children) (47%);

v) Hazardous work, including being forced to clean the outside of windows on high storeys without any safety precautions being taken (20.5%);  

vi) Low or no salary – Given that there is no minimum wage in Singapore, the measure for this indicator was taken to be the minimum wage set out in the Philippines standard form contract for its overseas domestic workers of US$400 per month, of which 98.7% of the women interviewed earned below;  

vii) No respect of contract signed (59.6%).

**Coercion**

According to the ILO Indicators calculation, 150 women were subjected to coercion as a means of keeping them in the situation of exploitation they found themselves in upon deployment in Singapore. Such coercive practices are implemented by employment agents and/or employers, primarily to ensure in the first instances that the repayment of the recruitment debt, through salary deductions, is made in full. In Singapore, market practice dictates that it is the FDW herself who bears the cost of her deployment, including not only the transportation and administration costs involved in bringing her from her country of origin to Singapore, but also the fees of the employment agents (both in the country of origin and in Singapore) who assist in making all the necessary arrangements. Given that many potential FDWs are not in a position to pay such costs upfront, the process is "facilitated" through a practice of salary deductions, whereby the FDW receives no salary for a certain number of months whilst her recruitment debt is repaid. Of the 151 women interviewed, 96.7% reported incurring debt through their recruitment process which resulted in them
being placed in a situation of debt bondage during their deployment in Singapore. The average number of months of debt incurred by these women was 6.9 months of salary, with the largest number incurring seven months of debt.

The imposition of such debt obligations upon FDWs is itself a means of coercion, as they are led to believe that they are not able to leave their employment prior to complete repayment of the debt, but it also results in further coercive behaviours being used by agents and employers in order to ensure that the FDW meets those obligations. The patterns of coercive behaviour identified through the interviews did not all involve the use of physical force in order to "force" women to work, but rather the use of more subtle means of influence in order to create in her the belief that she has no choice but to continue to work despite the exploitative conditions, if only to ensure that she earns money at some point in the future and avoids any negative repercussions for her and her family.

Such patterns include:

i) Physical violence, including sexual abuse: 23.8%;

ii) Verbal abuse: 75.5%;

iii) Confiscation of identity documents, including passport and work permit: 96%;

iv) Isolation, confinement and surveillance, including restrictions on communication with others by phone or in person, restrictions on freedom of movement and being subject to CCTV surveillance at all times: 62.3%;

v) Use of threats, including threatening to report to the police, repatriate and blacklist to prevent future employment: 23.1%; and

vi) Withholding money: 33.1%.

An assessment of the key indicators of trafficking into domestic servitude identified through the HOME FDW Study highlights some of the challenges in adopting a solely criminal justice response to this form of trafficking. Some of the indicators are clearly criminal acts in and of themselves, such as physical and sexual violence\(^62\) and wrongful confinement.\(^63\) Others – such as illegal deployment, withholding salary and hazardous work – are violations of the Work Passes Regulations 2012 which govern the employment conditions of FDWs.\(^64\) So long as individual indicators can be characterised as violations of law in their own right, they tend to be treated as such and the bigger "trafficking" picture is missed. A further problem is that many of the actions referred to would not necessarily be viewed as criminal in nature and as such are very easily missed as indicators of trafficking. Further, many of the indicators – including excessive working hours and working days, contract substitution and confiscation of handphones – are not prohibited by law, and as such are viewed as lawful and acceptable means by which employment agents and employers can manage their relationship with FDWs.

4. The Response of the Singapore Government

In addition to recognising the vulnerability of FDWs in Singapore to forced labour in its 2012 report, the US Department of State also pointed out the inadequacy of the response of the government to such forms of trafficking. It states that during the relevant period, there were four convictions of sex trafficking offenders, but no prosecutions or convictions of labour trafficking offenders.\(^65\) The inadequacy of the government’s response was also reflected in the results of the HOME FDW Study.
Based on the information collected from the women interviewed as part of the HOME FDW Study, the actions being taken by the Singapore government to combat this form of trafficking are not encouraging. The majority of the women (62.9%) sought assistance from HOME, a non-governmental organisation, rather than utilising the avenues of assistance provided by the Ministry of Manpower (MOM). Several women referred to being afraid of approaching the authorities, whilst others said that they were unable to make contact through the helpline due to having had the relevant information confiscated by their employers and/or an inability to make phone calls due to confiscation of their handphones. Of the seven women who did approach MOM for assistance, either via the helpline or in person, three reported being unable to speak to anyone via the helpline as there was no answer and another three women were advised by the MOM officer they spoke to on the phone to discuss their “problem” with their employer. The “problems” in question included illegal deployment, passport confiscation and being locked in the house. Eight women sought the assistance of the police. Four of these had positive experiences in which their complaints were taken seriously and they were referred to the HOME shelter for accommodation. Three women, however, were returned to their agency and one to their employer against their wishes.

Analysis was also conducted of the role played by the authorities in assisting with case resolution and whether any action was taken based on the presence of trafficking indicators in the cases of the individuals in question. In the introduction to its own list of human trafficking indicators, the UN Office on Drugs and Crime states that whilst the presence or absence of any of its indicators will not prove or disprove that trafficking has taken place, their presence will indicate the need for further investigations to be carried out.66 Of the 151 women interviewed, 77 (51%) had their cases referred to the authorities. 59 of them (76.6%) were referred to MOM, 11 (14.3%) were referred to the police and seven were referred to both MOM and the police. None of these women were flagged by the government officials who reviewed their cases as potential trafficked persons. It is notable, however, that the experience of HOME caseworkers demonstrates that the outcomes of MOM and police investigations are, in many cases, not reported to the FDW herself, other than if the outcome affects her directly such as the payment of salary which is owed to her. This lack of transparency prevents the FDW from knowing whether any punishment has been meted out to the employer and prevents civil society organisations like HOME from monitoring the response of the authorities to the cases of trafficked and potentially trafficked persons.

The results of the HOME FDW Study therefore strongly suggest that the accessibility of direct forms of government assistance appears to be lacking for victims and potential victims of trafficking (which is also, according to CEDAW, a form of discrimination). This is a notable failure to comply with international equality standards, which, as confirmed in the Declaration of Principles on Equality, require that “[p]ersons who have been subjected to discrimination have a right to seek legal redress and an effective remedy.”67

This is not, however, for lack of efforts being made by the state to address the issue of trafficking in Singapore. With the launch of its NPA in March 2012, the Taskforce committed itself to a three-year plan based on the UN Trafficking Protocol’s criminal justice model. The lack of subsequent progress in relation
to the protection of FDWs from trafficking is due, in part, to the lack of any notable action having been taken by the Taskforce in compliance with the NPA. It is also, however, indicative of the inherent inadequacy of a focus solely on criminal justice responses to addressing trafficking into domestic servitude.

The main inadequacies of the UN Trafficking Protocol’s criminal justice response to trafficking are summarised as follows. Firstly, whilst setting out a system which includes the different elements of prosecution, protection and prevention, the UN Trafficking Protocol does not actually require that a comprehensive system must be put in place through the enactment of specific anti-trafficking legislation (as can be found in other ASEAN jurisdictions, including Malaysia and the Philippines). Such legislation is arguably a key way to ensure that labour trafficking does not get ignored by legislatures in favour of a focus on sex trafficking which is arguably easier to define, identify and prosecute. In the NPA, the Taskforce does not commit to enacting a single all-encompassing piece of legislation, but rather suggests that it will “define sex and labour trafficking offences, as well as related offences within existing legislation”, and proposes to “review all legislation related to TIP to ensure that the desired legislative framework facilitate the achievement of key TIP objectives”, and “to ensure that Singapore’s legislation adequately addresses the complexity of TIP crimes and that penalties are commensurate with crimes”. Such proposals are far from the preferred “comprehensive anti-trafficking legislation” approach which is favoured.

Secondly, as stated above, the UN Trafficking Protocol provides a definition of trafficking which is, in relation to some of its key terms, opaque and not user-friendly. This is particularly notable when dealing with cases of trafficking into domestic servitude in which some of the less clear terms – such as “deception”, “coercion” and “abuse of vulnerability” – are all-important. Whilst sets of indicators, such as the ILO Operational Indicators used in the analysis undertaken as part of the HOME FDW Study, provide valuable assistance in understanding how the UN Trafficking Protocol definition becomes operationalised, the decision remains with individual states as to what indicators they will adopt to assist in identification. A notable difference can be seen, for example, between the ILO Operational Indicators and the indicators adopted by the US Government which are far narrower in scope and, as such, may not capture all cases that would be caught by the ILO Operational Indicators. As stated above, one of the key challenges in relation to combating trafficking of domestic workers into domestic servitude is the challenge of identification. The lack of guidance provided within the UN Trafficking Protocol is another weakness of this regime which requires supplementation. In a recent speech to the conference held by the OSCE Alliance against Trafficking in Persons, the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Maria Grazia Giammarinaro, described such failure to identify all forms of trafficking as a further example of discrimination:

“We are confronted every day with the fact that, in practice, many cases in which there are clear indications of trafficking – confiscated documents, excessive working hours, no salary and even injuries as a consequence of physical punishment – even these cases very often are not classified as trafficking cases but treated as less serious crimes. One of the reasons behind this shocking situation is that very often the competent authorities fail to grasp the gravity of the exploitation involved. Well, when we dig
and try to better understand and analyse the reasons for this "blindness", we find, among other factors, discrimination. We discover, for example, how influential the cultural construction of the migrant as the "other", and of "otherness" as "inferiority" is, although it mostly works in a subtle and hidden way. The same constructions are reflected in any form of discrimination and racism. The same constructions were once used to validate and justify historical slavery."71

Thirdly, and perhaps most importantly, the criminal justice response to human trafficking is problematic due to the fact that it addresses the problem of trafficking in isolation, without acknowledging the frequently systemic factors that lie behind it, and out-with the criminal responsibility of transnational organised syndicates. It treats the trafficking process as a singular crime, rather than identifying the multifarious elements which contribute to a finding of trafficking, each of which should also be addressed. Jonathan Todres has recently described the fundamental problem in the framing of the UN Trafficking Protocol approach as follows:

"A central failing in international law's response to human trafficking has occurred at the design stage. The Trafficking Protocol grew out of a criminal law framework rooted primarily in concern for combating transnational organised crime syndicates rather than an independent assessment of what is needed to prevent human trafficking. As a result, the international community not only developed a narrow response focused primarily on criminal law measures, but its anchoring of anti-trafficking law in criminal law concepts subsequently served to marginalize other vital perspectives. This failure to draw upon a broad range of perspectives to address the root causes of human trafficking underlies many of the shortcomings in the international community's response to the issue. It also likely means that even if compliance with international human trafficking law continues to improve, human trafficking is unlikely to decline significantly. As a result, we need to rethink our approach to the problem and redesign international law's response."72

Todres proceeds to explain how the "anchoring" phenomenon – through which "an initial step (such as a first offer in negotiations), whatever it may be, significantly influences and shapes the subsequent course of action and final outcomes (for example, the remainder of the negotiation and settlement amount agreed to by the parties)"73 – can be used to explain how the "initial framing of human trafficking as a criminal law issue has limited the range of options considered when seeking to develop anti-trafficking laws and programs".74

It is here that we return to trafficking as a form of discrimination, against which states such as Singapore are obliged to take "all appropriate measures" (not only criminalisation) in order to achieve its eradication. States should, but too often do not, combine the criminal justice response with a broader legislative and policy review which identifies areas of discrimination and deficiency which enable the crime to flourish. The final section of this article endeavours to provide an initial road map for Singapore as to what such a broader legislative and policy review might address.

5. A Broader Approach

The above assessment of the weaknesses of the criminal justice approach to addressing trafficking into domestic servitude demonstrates the need for the Singapore government to take additional steps
5.1 Improve Protection of the Right to Equality and Non-Discrimination for Non-Citizens

Whilst Part IV (Fundamental Liberties) of the Singapore Constitution protects the rights to equality and non-discrimination, such protection is notably limited, particularly for non-citizens. Article 12(1) sets out the right to equality before the law and equal protection of the law for all persons, whilst Article 12(2) prohibits discrimination against only citizens, on a very limited list of prohibited grounds (i.e. religion, race, descent or place of birth). Whilst foreign domestic workers are excluded from the constitutional protection from discrimination due to their nationality, and whilst certain features of their vulnerability – e.g. gender – are not recognised as a prohibited ground of discrimination, it is arguable that efforts to combat human trafficking – a particularly heinous form of discrimination – will be ineffective. Further, as commented upon by the CoEDAW in its latest Concluding Observations on Singapore, Singapore has yet to domesticate its obligations under CEDAW into national legislation. The enactment of comprehensive anti-discrimination legislation which provides protection for all persons within Singapore across a broad range of prohibited grounds, including sex, nationality and economic status, will almost certainly improve the situation for foreign domestic workers and reduce the risk of them becoming subject to human trafficking. It is notable that anti-discrimination legislation in the US – and particularly the Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, colour, religion, sex, or national origin, has been used by the Equal Employment Opportunity Commission to significant effect in trafficking cases. The case setting the precedent was Chellen and EEOC v John Pickle
Company, Inc., in which 52 unskilled Indian labourers received $1.3 million in damages having been employed on terms and conditions far worse than those upon which their US-born colleagues were employed. They earned minimal amounts in salary and were forced to live in appalling conditions. David Lopez, General Counsel of the U.S. Equal Employment Opportunity Commission (EEOC), described this decision as “a key victory for the EEOC in the fight against human trafficking, forced labour, and employment discrimination” which will “serve as precedent for bringing a civil case with civil remedies against employers involved with the trafficking of people”.

5.2 Review and Amend Unequal and Discriminatory Labour Laws

A review of the labour law protections which Singapore provides to FDWs is urgently required. Singapore labour laws do not adequately protect the rights of FDWs. There are significant gaps in the labour laws affecting all workers in Singapore which impact on the lives of FDWs, such as the absence of a minimum wage in all categories of employment. That said, there are protections which are guaranteed to other workers which are denied to domestic workers. All domestic workers, whether migrants or otherwise, are excluded from the Employment Act (Cap 91), along with seamen and certain persons in managerial and executive positions. As a result, FDWs are not able to benefit from a range of protections including those relating to contract termination, salary payment (including overtime), rest days, working hours, annual leave, sick leave and maternity cover.

The employment rights of FDWs in Singapore are governed instead by the Employment of Foreign Manpower Act (EFMA) and, more specifically, the Work Passes Regulations. EFMA establishes the Work Pass regime according to which the employment of foreign employees is governed. Far from being legislation which grants protection of the labour rights of foreign employees, EFMA sets out the rules according to which employment is permitted, the offences associated with breach of such rules and the powers of arrest and enforcement held by the authorities. The Work Passes Regulations – enforced by MOM – provide more concrete protections to FDWs as follows:

i) prohibition of illegal deployment;
ii) no retention of Work Permit and visit pass by employer;
iii) acceptable living conditions, including adequate food, medical treatment and acceptable accommodation;
iv) salary payments (method, rather than amount);
v) prohibition of ill-treatment;
vi) working conditions, including safe working environment, “adequate” daily rest, rest days in accordance with contract;
vii) repatriation to international port of entry affording reasonable access to the employee’s hometown, and reasonable notice of such repatriation; and
viii) prohibition of causing employee to be engaged in illegal, immoral or undesirable conduct or activity.

There are a number of notable exclusions from the list of protections, including a minimum wage and a maximum number of daily working hours. Further, there are no guarantees of freedom of association and collective bargaining for FDWs – in fact such freedom is specifically denied under other legislation – and there are no protections of the right of workers to live in accommodation of their choosing and to have freedom of movement.
There are no social security protections for FDWs who become pregnant; instead they are repatriated given they are not entitled to be Work Permit holders whilst pregnant. Similarly, FDWs who are “certified medically unfit” will have their Work Permit revoked. The ILO Domestic Workers Convention sets out the blueprint for protections which all FDWs should enjoy, and it is when compared against this blueprint that the inadequacies of the current Work Passes Regulations become apparent.

Vague language throughout the Work Passes Regulations serves to reduce the impact of the protections, such as the use of “adequate” in relation to food and daily rest, “acceptable” in relation to accommodation, and “reasonable” in relation to access to the employee’s hometown and the notice of repatriation. Whilst the MOM website provides additional guidelines for employers which do expand on these to a certain extent — such as suggesting that “where possible”, FDWs should be given a separate room of their own - they remain very “soft” provisions, and when it comes to enforcement of such protections, the impact of these vague terms is notable.

The experience of HOME’s caseworkers is that certain provisions of the Work Passes Regulations are not well-enforced. For example, the provisions preventing illegal deployment are essentially waived where such deployment is to the homes of family members, such as the employer’s parents or siblings. The fact of such illegal deployment will have equal impact on the experience of the FDW, irrespective of the relationship between the employer and the person to whom the FDW is illegally deployed and therefore such “bending of the rules” is problematic. A similar lack of enforcement is seen in relation to the confiscation of passports and work permits which is the “norm”, but for which punishment is not often imposed.

In March 2012, Singapore’s Ministry of Manpower announced the introduction of a mandatory weekly rest day for FDWs; a standard labour right which had previously been denied to them. Whilst this was initially viewed by civil society and the domestic worker community as a very positive step forward towards improved labour law protections for FDWs, a closer analysis of the policy detail demonstrates that it may have little impact on the lives of Singapore’s FDWs and also further entrenches the discrimination they regularly suffer. Despite being announced in March, the policy did not come into effect until 1 January 2013 and even then only for new contracts. FDW contracts usually have a duration of two years, which means that some FDWs will actually have to wait until 1 January 2015 before this new protection will apply to them. Further, there is no specification as to the number of hours which comprise a weekly rest day. The ILO Domestic Workers Convention states that a rest day should be 24 consecutive hours, but few FDWs in Singapore enjoy such a luxury, with strict curfews frequently imposed on any off day. Finally, the policy provides that FDWs may be compensated in lieu of a weekly rest day provided she mutually agrees with her employer to this option. The compensation is, however, to be calculated as the equivalent of one day of salary and is, as such, not equal to the compensation which all other workers (including migrant workers who are not domestic workers) receive for overtime under the Employment Act. In addition, the suggestion that an FDW will be in a position to meaningfully negotiate with her employer regarding whether or not she actually takes her mandatory weekly rest day fails to acknowledge the unequal bargaining power...
that exists as a result of the debt bondage which many FDWs find themselves in upon arrival in Singapore.\textsuperscript{88}

The situation in which foreign domestic workers in Singapore, as in many other jurisdictions across the globe, find themselves has recently been referred to by Virginia Mantouvalou as "legislative precariousness",\textsuperscript{89} due to their explicit exclusion from the Employment Act and the far lower level of protection which is provided to them under the Employment of Foreign Manpower Act. She has pointed to the landmark Advisory Opinion of the Inter-American Court of Human Rights on "Juridical Condition and Rights of the Undocumented Migrants"\textsuperscript{90} as having relevance to the situation of foreign domestic workers who, whilst not necessarily undocumented, may benefit from the reasoning provided in the Opinion. As Mantouvalou explains:

"The IACtHR ruled that the exclusion of undocumented migrants from labour rights breached international principles of equality before the law and non-discrimination, which it recognised as norms of jus cogens. The Court emphasised that it would not be lawful to deny labour rights once someone is already employed."\textsuperscript{91}

5.3 Enhance Regulation and Monitoring of Employment Agencies

Principle 11(g) of the Declaration of Principles on Equality requires that states must

\"[t]ake all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation".\textsuperscript{92} As key players in the process which results in the trafficking of foreign domestic workers into domestic servitude, it is submitted that Singapore must take increased action to regulate and monitor the activities of employment agencies. The recruitment of FDWs by recruitment agents in both the source country and in Singapore is inadequately monitored by Singapore's existing legislation – the Employment Agencies Act (the EAA). Given that Singapore's agencies work in partnership with agencies in source countries, it is not sufficient for the EAA only to govern the actions of agencies based in Singapore. The governments of source countries – such as the Philippines – monitor the actions of Singapore-based agencies as part of their prevention mechanisms and Singapore should therefore do the same. Further, the terms of the EAA are inadequate to prevent the errant behaviours of Singapore-based agents – including deception, coercion, and abuse of vulnerability – which lead (and arguably traffic) individuals into labour exploitation.

Whilst all Singapore-based employment agencies and their key personnel must be licensed under the provisions of the EAA, such licences are usually granted for three-year periods\textsuperscript{93} and there is no system for interim monitoring. Whilst employment agency inspectors do have the authority to carry out inspections pursuant to Section 18 of the EAA, there is no system for proactive and regular monitoring of agencies and therefore no real deterrent during the period of the licence for agencies to avoid suspect behaviour.

Following a seemingly positive set of amendments passed in early 2011, the EAA now imposes a limit for the fees which employment agents may charge to applicants,\textsuperscript{94} which was further prescribed in the Employment Agencies Rules 2011 as one month salary per year of the contract,\textsuperscript{95} such limit is subject to notable exclusions including "any fee charged or received by a licensee in respect
of costs incurred by or on behalf of an applicant for employment outside Singapore”.96 This therefore allows employment agents to add on top of the two-month permitted fee any pre-deployment costs, such as transportation, training, medicals etc. with the result that the “cost” incurred by FDWs becomes far higher than the limits imposed by the EAA.

The EAA is silent on the issue of employment contracts and the administration of such contracts – including the issue of contract substitution. The deployment process does require the issue of an In-Principle Approval letter to the employee prior to departure from the country of origin which sets out the key terms of the contract, but this may not be understood by the employee and also does not refer to all relevant terms – particularly salary deductions.

Finally, the EAA provides no “code of conduct” which governs the standard of service which agents must provide to the FDWs who are as much their clients as the employers to whom they are deployed. In fact, one might argue that given that it is the FDW who pays the agent’s fee, they should expect a better service than the employer! There is therefore nothing which governs the timing or nature of responses of agents to problems encountered by employees during deployment, nor the requirements of responding promptly to the wishes of the employee, e.g. when she wishes to terminate her employment and return home. Likewise, there is no responsibility imposed on licensed employment agents to investigate and/or report to the authorities behaviours by employers which are contrary to the Work Passes Regulations.

The inadequate regulation by the Singapore government of private employment agencies in Singapore, and indeed their counterparts in source countries, renders FDWs vulnerable to deception, coercion and exploitation from the moment they are recruited at the very outset of their migration experience.

5.4 Abolish Laws which Create a Fertile Ground for Discriminatory Practices

In addition to the provisions of the EAA, EFMA and the Work Passes Regulations which, whether implemented effectively or not, represent an attempt to protect the labour rights of migrant workers, there are a number of legislative and policy provisions which create a fertile ground in which trafficking indicators flourish. These relate to (i) the financial burdens imposed upon employers of FDWs and (ii) the dependence of the legal immigration status of the FDW upon their employer.

In addition to the salary which employers pay to their FDWs, they are also saddled with two further financial burdens in relation to the employer of said FDW. Firstly, employers are required to post a security bond of $5000 with the government which guarantees the upkeep and maintenance, provision of acceptable accommodation and the repatriation of the FDW upon termination of employment and cancellation of the work permit.97 The potential cost of violating the terms of the security bond is used by employers as justification for refusal to grant rest days to their FDW, for imposing restrictions on their movement and for confiscating documents. The lack of rest days and confinement to the home are both indicators of trafficking and therefore it could be argued that there is a direct link between the requirement of the security bond and such coercive behaviours.
In addition to posting a security bond, employers must pay a monthly levy of up to $265 to the government throughout the period of employment of a FDW. As a percentage of the average monthly salary paid to the FDWs interviewed as part of this study – $409.73 – this levy is a significant additional cost for the employer. It is likely that the imposition of this levy requirement serves to suppress the salary levels of FDWs, especially for employers who are not themselves high-earners.

5.5 Eradicate Sponsorship System which Restricts Access to Justice

The final way in which Singapore’s policies relating to FDWs serve to encourage, albeit unintentionally, patterns which violate the rights of such workers and promote indicators of trafficking is through the tying of the immigration status of the FDW to their the will of the employer. The immigration status of each foreign migrant worker in Singapore is wholly tied to the employment relationship with the employer. In all cases other than where an FDW is transferring from one employer to another within Singapore, the FDW will enter Singapore on an entry visa contained within an In-Principle Approval letter which sets out the name and address of their employer. This letter will then be replaced with the Work Permit which also specifies the same details. It is the Work Permit which grants the employee the right to stay in Singapore. When an employer terminates the employment contract of the FDW, they must cancel the Work Permit and visit pass within seven days. The FDW must then be repatriated within a further seven days unless she enters an employment contract with a new employer within that period. In situations where the provisions of the Work Passes Regulations and/or the Penal Code have been violated and are under investigation by either MOM or the police, the FDW will be granted a Special Pass to enable her to remain in Singapore whilst the issue is resolved.

Neither the knowledge nor consent of the FDW is required in order for the Work Permit to be cancelled, which means that she may become an unlawful over-stayer without realising, the penalty for which is imprisonment and deportation. Further, it is solely the prerogative of the employer as to whether he/she will permit the employee to transfer to another employer at the end of the contract or whether to comply with the obligation to repatriate under the Work Passes Regulations. The impact of this is to add weight to the coercive threats of employers regarding repatriation prior to completion of loan repayment and the fear of FDWs of reporting cases of exploitation. Further, the requirement of prompt repatriation upon cancellation of Work Permit negatively impacts on the ability of the potentially trafficked FDW to seek legal assistance and obtain redress.

This overview of some of the key inadequacies of Singapore’s legislative framework from an equality and non-discrimination perspective demonstrates the urgent need for a thorough review of the laws governing the recruitment, immigration status and employment of FDWs in order to ensure that “all appropriate action” is being taken to combat trafficking into domestic servitude in line with Singapore’s obligations under CEDAW and international equality standards. So long as such inadequacies remain, a criminal justice response will be ineffective because a fertile ground has been created in which otherwise law-abiding citizens become criminals through simply complying with the legislative regime in place.
6. Conclusion

Human trafficking is both a human rights violation and a crime which takes multiple forms and presents very complex challenges for states caught in its clutches, both in sending and receiving countries. As highlighted most recently by the OSCE, factors of inequality and discrimination play a central role in the trafficking process and should therefore be taken fully into consideration by states when devising responses to this transnational crime and human rights violation. This article has outlined some of the characteristics of a particular form of labour trafficking – trafficking into domestic servitude – and the legal framework which arguably contributes to its existence, in order to illustrate the need for an approach which goes beyond the criminal justice response proposed in the Taskforce’s NPA and addresses comprehensively factors relating to the right to equality and non-discrimination. A strong criminal justice response, in relation to which severe punishments should certainly be imposed, is undoubtedly an important feature of the response to all forms of trafficking. However, characterising trafficking of female migrant workers into domestic servitude as a complex form of multiple discrimination on the grounds of sex, nationality, immigration status and economic status expands the extent of the obligations in terms of a response which governments must develop. Indeed, it is envisaged that a similar assessment of other forms of trafficking will highlight a similar need for a broader approach.

Activists have long-called for a human rights approach to trafficking, but this is often viewed as an approach which places the “victim”, her rights and her needs at the centre of any response. Whilst this is crucial, a human rights approach must also involve going beyond a criminal justice response in order to identify all violations of rights, including the right to equality and non-discrimination, which play a role in the trafficking process and seek to eradicate them from society through a thorough legislative review and amendment and a corresponding public education campaign which will, inevitably, be required in order to eliminate the culturally entrenched practices towards FDWs in countries such as Singapore.

1 Libby Clarke is a UK qualified lawyer and former Legal Officer at The Equal Rights Trust. From January 2012 to January 2013, Libby was a Senior Consultant to the Anti-Trafficking Programme at the Humanitarian Organization for Migration Economics (HOME) in Singapore. HOME is a non-governmental organisation and registered charity which is dedicated to serving the needs of the migrant worker community in Singapore. It was established in 2004 and has since provided services to thousands of migrant workers in need through its provision of shelters, legal assistance, training and rehabilitative services. Roughly 60% of those assisted by HOME are foreign domestic workers. Further information about HOME’s work can be found at www.home.org.sg. The author wishes to acknowledge the contributions of Marijke Bohm, Lydia Bowden, Vermili Saucelo and Judy Sotelo as research assistants in the study upon which this article is based.


5 See above, note 3.


10 Singapore has not ratified, for example, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture or the Convention on the Rights of All Migrant Workers and Members of Their Families.

11 See Article 6 of CEDAW and Article 35 of CRC.

12 See above, note 7, Article 3.

13 United Nations Office on Drugs and Crime, Model Law against Trafficking in Persons, Article 5.

14 ILO Convention No. 29 on Forced or Compulsory Labour, 1930.

15 UN Slavery Convention, 1926.

16 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.


19 Ibid., Paras 24(h) and (i).


21 Ibid., p. 40.

22 Association of South East Asian Nations, ASEAN Human Rights Declaration, 2012.

23 Further details about the OSCE’s 12th High-level Alliance against Trafficking in Persons conference are available at: http://www.osce.org/event/alliance12.


26 See above, note 24, p. 2.


28 See above, note 7, Articles 6-8.

29 Ibid., Articles 9-13.


31 See above, note 7, Article 6.
32 Ibid., Article 8(2).


34 Ibid., p. 28.


36 See above, note 24, p. 5.

37 ILO Convention No. 189 concerning Decent Work for Domestic Workers, 2011, Preamble.

38 See above, note 18, Para 14.


41 Ibid., Para 60.

42 Ibid.


46 See above, note 40, Para 33.

47 See above, note 45, Paras 28-36.


51 See US Department of State, Trafficking in Persons Report 2012, above note 3, p. 194, in which a recent case from Israel is described as follows: “In a precedential case in February 2012, the government convicted two individuals for forced labor of a Filipina domestic worker under the trafficking statute. While there was no evidence of physical violence inflicted upon the victim, the court recognized this case as an offense of ‘holding a person under conditions of slavery’ and withholding of a passport; the sentence was pending at the end of the reporting period and the victim had been referred to a trafficking shelter”.

52 US Department of State, “California Woman Sentenced to Five Years Imprisonment For Forced Labor of Domestic Servant”, 15 April 2010; and Metropolitan News Enterprise, “Court Upholds $760,000 Damage Award in Human Trafficking Case”, October 2010.


57 ILO Indicators, above note 17.

58 The ILO Indicators provide a method, or calculation, by which the presence of each dimension of the trafficking definition can be assessed. All of the indicators under each dimension, eg. deception, coercion and exploitation, are identified as either strong, medium or weak indicators of that dimension. The method states that “for each potential victim, each of the dimensions of the trafficking definition is assessed independently from the others. The result of the assessment is positive if the dimension is present for the potential victim, negative if not. In order to be assessed as positive, a dimension must include: (i) two strong indicators; or (ii) one strong indicator and one medium or weak indicator; or (iii) three medium indicators; or (iv) two medium indicators and one weak indicator. After an assessment is done for each dimension, the final analysis involves combining the different elements to identify the victims of trafficking”. See the ILO Indicators, Ibid., p. 3.

59 Given that at the time when the HOME FDW Study was carried out, there was no mandatory weekly rest day for FDWs in Singapore, the assessment of whether each interviewee had been subjected to excessive working days was made in accordance with the ILO Domestic Worker Convention requirement for weekly rest of at least 24 consecutive hours. According to this standard, not only did 146 of the 151 women work an excessive number of days, but 137 women were granted no rest days for certain periods of their employment.

60 Whilst there is no legal provision in Singapore setting out a minimum or maximum number of hours which an FDW should work in any day, week or month, the assessment of whether each interviewee had been subjected to excessive working hours was made in accordance with the working hour provisions set out in Section 38 of the Employment Act (which does not apply to FDWs, but which provides an appropriate comparator) which provides that no employee should work for more than (i) six hours without a period of leisure; (ii) eight hours in a day; and (iii) 44 hours in a week. Further, any employees who do work more than 8 hours in a day should be paid an overtime rate of no less than 1.5 times their hourly rate of pay, and no employee should work more than 72 hours of overtime in any one month. The minimum hours worked by any of the interviewees was 14 hours per day, and the maximum reported was a regular 20 hours per day (worked by six women). The average hours worked was 17.33 hours per day.

61 This issue of window cleaning has recently been proven as a particularly hazardous activity, especially given the number of deaths of FDWs resulting from falls from high-storey apartment windows in 2012 alone and the Ministry of Manpower’s decision to place restrictions on this practice. For further information, see The Jakarta Globe, “Spate of Maid Deaths in Singapore Prompts Indonesia to Call for Ban on Window Cleaning”, 8 May 2012; The Jakarta Globe, “Singapore Curbs Window Cleaning Amid Maid Deaths”, 5 June 2012.

62 Penal Code, sections 319-326 and 375-376.

63 Ibid., sections 340 and 342.

64 Employment of Foreign Manpower (Work Passes) Regulations 2012, Fourth Schedule, Parts I and II.


66 United Nations Office on Drugs and Crime, above note 17.


69 Ibid., Initiative 16.


72 See above, note 30, p. 55.

73 Ibid, p. 67.

74 Ibid.

75 Lenarčič, J., “Opening Address”, at OSCE, Alliance against Trafficking in Human Beings – An Agenda for

76 See above, note 67, Principle 11, p. 10.


80 Case No. 02-CV-0085-CVE-FHM, October 2006.

81 See above, note 79.

82 Employment Act, Section 2.

83 Employment of Foreign Manpower Act [30/2007].

84 See above, note 64.

85 See above, note 83, Part IV, Article 9.

86 Ibid., Part IV, Article 5.


88 For further criticism of the mandatory weekly rest day policy, see Human Rights Watch, “Singapore: Domestic Workers to Get Weekly Day of Rest”, 6 March 2012.


91 See above, note 89, p. 17.

92 See above, note 67.


94 Employment Agencies Act, Section 14.


96 Ibid., Rule 12(2).


Developing Equality Legislation in Divided Societies: the Case of Bosnia and Herzegovina

Adnan Kadribašić

1. Introduction

Bosnia and Herzegovina (BaH) declared independence from the former Yugoslavia in 1991. Unlike other republics of the former Yugoslavia, BaH is a multi-ethnic society and the referendum and the declaration of independence were not hailed positively by all ethnic groups. The declaration of independence led to four years of war (1991–1995) which impacted negatively on the enjoyment of every recognised human right and freedom guaranteed under international law. The war was brought to an end when the international community stepped in and negotiated the General Framework Agreement for Peace in BaH (also known as the Dayton Agreement).

The war’s legacy has influenced efforts to promote equality and eliminate discrimination and placed such efforts in the context of removing obstacles to reconciliation. Although some progress was made, the social gap between ethnic groups in society has never been larger (excluding the war period). According to research conducted by the Open Society Fund of BaH, 86% of the country’s citizens believe that discrimination is a serious problem in society, with ethnicity and religion being perceived as the most common grounds for discrimination.

This article explores current equality and non-discrimination law in BaH and analyses the extent to which structural obstacles to equality exist in a divided society. It also shows how certain measures which aimed to ensure full equality of groups that were on opposing sides during the war have in fact led to more inequality and discrimination. The article also aims to analyse the adoption of the new Law on the Prohibition of Discrimination, its content and the use of this Law to litigate discrimination cases and its potential to support further equality efforts. It also points to the remaining challenges in the area of equality in Bosnia and Herzegovina and explores how the new anti-discrimination legislation might be used to develop further policies in the area of equality, non-discrimination and inclusion.

2. Constitutional Provisions on Equality and Non-discrimination

The Constitution of BaH is an annex to the 1995 Dayton Agreement. Its intention was to provide a legal structure for the functioning of BaH in the days after the Dayton Agreement was signed. The Constitution has established a limited central state that includes two fairly autonomous entities: the Republika Srpska (RS) and the Federation of BaH (FBaH). Almost all of the competences of the central government are devolved to the two entities. The state level government, the Council of Ministers of BaH and the leg-
islature, the Parliamentary Assembly of BaH, have a competency over foreign affairs, defence and the monetary system. In all other areas, however, the state bodies play a coordinating function and the entities are autonomously responsible for regulating rights in all areas apart from those that are the prerogatives of central government.

The Constitution has respect for human rights as one of its central pillars. The preamble of the Constitution declares that BaH will be based on respect for human dignity, liberty, equality, peace, justice, tolerance, and reconciliation and that it was inspired by human rights instruments. The Constitution also proclaims that BaH and both entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms but it does not continue to define the content of human rights that it guarantees. It rather takes a dualistic approach which combines direct application of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR) and an enumeration of a list of human rights.

This list starts with a reference to Article II/2 and the ECHR but continues to paraphrase the titles of rights in an enumeration of rights found in the text of the ECHR:

“[T]he right to life, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude or to perform forced or compulsory labour, the rights to liberty and security of person, the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings, the right to private and family life, home, and correspondence, freedom of thought, conscience, and religion, freedom of expression and freedom of peaceful assembly, and freedom of association with others.” It also paraphrases rights from Protocol I to the ECHR (“the right to property and the right to education”) and Protocol IV (“the right to liberty of movement and residence”).

It is important to note that this list is non-exhaustive because it starts with the words “these include” and the full list of rights guaranteed directly by the Constitution of BaH are the rights and freedoms “set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols” which it states “shall apply directly in Bosnia and Herzegovina.”

The guardian of the Constitution is the Constitutional Court which also has an appellate role, i.e. individuals can file appeals to it. The Constitutional Court has an appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in BaH. This appellate jurisdiction represents a novelty in the system of constitutional law in BaH, and implies the introduction of individual constitutional action, i.e. an opportunity to review legal acts and decisions if they are in violation of the appellant’s rights and freedoms.

The central provision of the Constitution related to non-discrimination is Article II/4. It states:

“The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina 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.”

This provision seems to be largely inspired by Article 14 ECHR. It provides protection from discrimination on “any ground” meaning that, as is the case for Article 14 ECHR, the list then provided is open rather than closed. In defining what is meant by discrimination in Article II/4 and what forms it takes, the BaH Constitutional Court often refers to the jurisprudence of the European Court of Human Rights (ECtHR) in its interpretation of Article 14 ECHR.

However, although it is inspired by Article 14 ECHR, Article II/4 has a wider scope of application. Whilst Article 14 ECHR only provides the right to non-discrimination in relation to the other rights enumerated in the ECHR, Article II/4’s right to non-discrimination relates to the enjoyment of rights and freedoms enumerated both in Article II/3 of the BaH Constitution and the international agreements listed in its Annex I. This has been confirmed by the Constitutional Court in its case law when the Court concluded that “Article II(4) of the Constitution of Bosnia and Herzegovina provides a more extensive protection from discrimination than Article 14 of the European Convention.”

The main aim of the Dayton Agreement and the Constitution of BaH annexed to it was to stop the armed conflict and to ensure peace, therefore it has included provisions to ensure that the representatives of the main groups which were on opposing sides during the conflict have a mechanism to influence decision making. This was ensured by reserving seats in the upper house of the Parliamentary Assembly – the House of Peoples, and for the three-member Presidency of BaH for people from certain ethnic backgrounds.

According to the Article IV/1 of the Constitution, the House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniaks) and one-third from the Republika Srpska (five Serbs); and the Presidency of BaH shall consist of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska. This provision which aimed to ensure political equality of Bosniaks, Croats and Serbs has however excluded all those groups which do not belong to these ethnic groups from participation in these bodies.

This provision was challenged before the ECtHR by two citizens of BaH, Mr. Dervo Sejdic (a member of the Roma minority) and Mr. Jakob Finci (a member of the Jewish minority) who claimed that it was discriminatory and breached a number of their rights under the ECHR. The Grand Chamber of the Court agreed that the provisions were discriminatory. However, to date no consensus has been reached to amend the Constitution and the provisions remain in place.

3. Equality Law Prior to 2009

Protection from discrimination has been guaranteed by numerous laws in BaH since 1993 and even before, at the time when BaH was a Republic within the Socialist Federal Republic of Yugoslavia. Many pieces of legislation which guarantee certain rights had included a general provision prohibiting discrimination. There have been a number of separate pieces of legislation which include provisions aimed at ensuring the equality of particular groups in society, most notably the constituent peoples but also women, minorities, conflict veterans and conflict veteran families, etc.
The Law on Gender Equality in BaH adopted in 2003 was the first piece of legislation which not only prohibited discrimination but also defined different forms of discrimination on the grounds of sex/gender and sexual orientation. Its definitions were generally aligned with the Convention on the Elimination of All Forms of Discrimination against Women and provided protection against discrimination in access to any guaranteed rights. The Law provides a non-exhaustive list of rights. Article 2 provides that full gender equality shall be guaranteed in all spheres of society, including but not limited to education, economic life, employment and labour, social and health protection, sports, culture, public life and media, regardless of marital and family status.

This Law was the first piece of legislation in BaH which has defined both direct and indirect discrimination, as well as other forms of discrimination. The Law also prohibits and defines sexual harassment, harassment on the grounds of sex/gender and gender-based violence as criminal acts. In addition, it creates a number of positive obligations for other institutions at all levels of government and introduces gender mainstreaming as an approach for policy-making.

Although the proclaimed aim of the Law of Gender Equality in BaH was to guarantee gender equality and to prevent discrimination, the Law did not include any procedural provisions to guide victims of discrimination in seeking effective remedy. As a result, the Law has had a limited effect in protecting against discrimination.

Additionally, there have been different views as to how a victim of discrimination could seek remedy. Prior to the adoption of the Law, protection against discrimination was provided only through the Constitutional Court, which considered cases of alleged violations of Article II/4 of the Constitution of BaH. Because the Constitutional Court of BaH has jurisdiction to hear individual cases in an appellate procedure, individuals, in order to approach it, had to have exhausted all other remedies available in the legal system of BaH. As a rule, individuals had to seek protection from lower courts in civil procedures in which it was unclear whether these courts could even hear a discrimination case. That is why in most of these cases victims asked the courts to find violation of rights other than non-discrimination, and made a discrimination claim only when they approached the Constitutional Court. The Constitutional Court has so far reviewed over 100 cases of discrimination, and found discrimination in a small number of provisions related mainly to employment (e.g. dismissal of pregnant women, persons on sick leave or disabled persons).

4. Reform of Anti-discrimination Law

In 2007, inspired by the Europe-wide Starting Line Group’s work to improve anti-discrimination protection, a group of over 100 NGOs from BaH conducted country-wide consultations on the content and scope of the future draft law. Following these consultations, an expert group was formed to draft an Anti-Discrimination Act (the NGO Draft Law). In late 2007 the group’s representatives presented the NGO Draft Law to the Parliamentary Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics. The Joint Committee and the MPs which were members of that Joint Committee at that time declared that it would sponsor the Draft Law. This agreement was an unprecedented case of co-operation between elected members of the Parliamentary Assembly of BaH and NGOs.
However, the Committee was concerned that the NGO Draft Law included obligations of the Council of Ministers (the government composed of ministers of the state level ministries) of BaH and that, in its view, the regular legislative procedure, which requires formal consultation with relevant ministries, had not been followed. Although there were no formal obstacles to putting the NGO Draft Law in the legislative procedure, developments were affected by the fact that the ministries which would be responsible for implementing the Law had not been consulted either formally or informally. The Committee referred the NGO Draft Law to the Ministry for Human Rights and Refugees of BaH (MHRR) for further consultations with other relevant institutions. The MHRR is among other things responsible for the promotion and protection of individual and collective human rights and freedoms in BaH. It is also responsible for implementing and coordinating the implementation of laws which regulate certain human rights in BaH. Following this consultation, the Council of Ministers, in its Program of Work for 2008, obliged the MHRR to prepare a draft law on non-discrimination by October 2008. The Council made no reference to the NGO Draft Law.

4.1 The Process of Drafting the Law

In May 2008 the MHRR established an expert working group for the purpose of preparing a draft anti-discrimination law. The group held its first meeting in June 2008. Before the meeting a comparative analysis which compared ten anti-discrimination acts in Europe and a study on the requirements of BaH according to international standards were conducted. These studies gave the working group an insight into the development of anti-discrimination legislation in other countries of Europe along with the minimal standards any anti-discrimination law would need to meet. In its first meeting, the working group reviewed the findings and concluded there was a need to start to draft a new piece of legislation which would take into account the NGO Draft Law, but that its content needed to be further elaborated and needed to take into account the unique administrative structure of BaH. It determined that it would ensure an inclusive approach in its draft. In July a general public discussion took place in the Parliamentary Assembly of BaH with participation of over 100 representatives of NGOs, the general public and various institutions. The expert working group presented the main aims of the future law and asked the participants to nominate persons to become members of an expert working group which would be responsible for producing the draft. The additional members of the working group included representatives from the Ministry for Labour and Social Welfare, the Ministry of Justice, the OSCE Mission in BaH, the free legal aid NGO Vasa Prava, the trade unions and religious communities.

The new, much wider working group decided that its main approach would be to ensure that the draft was in line with the Race Equality Directive 2000/78/EC, Employment Equal Treatment Directive 2002/73/EC and the Recast Directive as well as other international legal provisions. Although BaH was not a member of the EU, these directives were the main focus of the working group probably because the EU had included the adoption of legislation to ensure effective protection against discrimination as one of the requirements for the Community Visa Facilitation and Readmission Agreements. (This sensitive requirement was a key factor also in the adoption of the draft law by the Parliamentary Assembly.)

The working group faced a number of particular challenges in producing a draft which
met these aims. Since Article II/4 has defined discrimination very widely, the working group had to follow this approach in order to include all obligations enshrined in the international agreements which were annexed to the Constitution or which BaH had ratified.

As the concepts of discrimination on other grounds besides gender (and the forms prohibited in the Law on Gender Equality in BaH) were new to the legal system of BaH, members of the working group also had problems defining the main concepts. The main challenges included deciding on the list of grounds on which discrimination was to be prohibited, the scope of the protection provided by the law and the provisions for the formation and the role of a central institution to combat discrimination.

4.2 The Parliamentary Debate on the Law on the Prohibition of Discrimination

By the end of 2008, having worked through the above challenges, the working group finalised the draft, which it entitled Law on the Prohibition of Discrimination (Draft Law), and submitted it to the Council of Ministers of BaH. On its 74th session held on 19 January 2009 the Council of Ministers decided not to discuss the Draft Law and tasked the Ministry for Human Rights and Refugees to “conduct additional consultations with representatives of the OSCE Mission to BaH, Office of the High Representative, the Institution of the Ombudsman and the governments.” This delayed the process of the adoption of the Draft Law by four months. After consultations with these organisations and institutions, the Council of Ministers accepted the Draft Law and introduced it in the Parliamentary Assembly of BaH.

The parliamentary discussion was largely influenced by debates which were held in the neighbouring countries, in particular in Serbia and Croatia, which were also considering drafts of anti-discrimination laws at that time. In these countries, the opposition to the anti-discrimination laws was much stronger than it in BaH at the same time. The arguments against the draft anti-discrimination laws in Serbia and Croatia, largely as a result of the media coverage they had received, began to be expressed also in BaH media and the Parliamentary Assembly of BaH.

In the Bosnian case, the debate was fuelled by an open letter to the members of the Parliamentary Assembly by the Inter-Religious Council of BaH which stated: “If the law is adopted in both houses of Parliament at the second reading without amendments, it will enable homosexual couples to legally marry and adopt children.”

However, as already noted, as the implementation of an anti-discrimination law was one of the requirements for the visa-free travel regime with the EU, not a single member of parliament opposed the adoption of the Draft Law. Rather, they opposed certain elements of the draft, in particular relating to the prohibited grounds and the scope. These arguments were heard during the parliamentary debate where amendments were proposed. Few delegates in the House of Peoples opposed including “sexual orientation” as a prohibited ground and advocated for a clear exception in the application of the law to family relations (marriage and adoption of children). One delegate stated that:

“I am on the side of all those who may suffer discrimination because of what they are, and who could not choose what they are. However, I fear that this law might be abused by those groups or individuals who choose what they are.”
Another delegate stated:

“[A]nd these grounds which I do not like, this gender expression, sexual orientation, I say it openly. I do not want it in this law. I do not like it, because I think it’s the ‘other status’, and we can subsume it under ‘other status’.”

After the parliamentary debate relating to the Draft Law two sets of amendments were made. The first amendment sought to delete the following grounds of discrimination: “marital and family status, pregnancy or maternity, age, health status, disability, genetic heritage, sex and gender, sexual orientation or expression”. It was obvious that all other grounds were included to camouflage the intent to delete any ground which would relate to sexual orientation or gender identity.

What these delegates and other members of the Parliamentary Assembly of BaH didn’t know was the fact that the ground “sexual orientation” was explicitly a prohibited ground in the BaH legal system since 2003 when the Law on Gender Equality had been adopted and that the criminal codes also covered “sexual orientation” in the offence of “breach of equality of citizens”. This debate was clearly politically motivated. Needless to say that gender (Law on Gender Equality), disability (labour laws, disability rights specific laws), health status (labour laws, health rights specific laws), pregnancy and maternity (Law on Gender Equality) and age (labour laws, education specific laws) were also already recognised as prohibited grounds for discrimination in the legal system of BaH.

The second amendment proposed that the Draft Law should contain an exception so that it does not apply to marriage “as defined by the family codes” and employment and membership in religious institutions “which is regulated by religious doctrines”. This amendment, along with another paragraph which was added to Article 24, was accepted and became part of the Draft Law. Both of these changes will be discussed below in the analysis of the Draft Law.

However, in the version of the law published in the Official Gazette, “sexual orientation” and “sexual expression” were re-introduced into the list of prohibited grounds. To this day, none of the experts who monitored the adoption of the law have been able to learn how this happened; but no one dared to raise the issue for fear of causing a possible revision of the published version.

5. The 2009 Anti-discrimination Law

After many discussions and exhausting parliamentary debate, the Law on the Prohibition of Discrimination was adopted in July 2009 and entered into force in August 2009. Article 1 of the Law stipulates that it “shall provide a framework for implementation of equal rights and opportunities to all persons in BaH and shall define a system of protection from discrimination”. However, only a few of its other provisions relate to this guarantee. In fact the essence of this Law is seen in the very title: this is a law against discrimination and as such establishes a mechanism
for protection against discrimination. This was in line with the aim of the working group who, at the very beginning, had agreed that it would be impossible to draft an overreaching equality law at that time. Thus, the Law is reactive in its aim.

At the same time, the current fragmentation of anti-discrimination protections throughout the legal system of BaH leads to many problems in practice. If we look at this decentralisation approach in the light of the complexity of the legal system, the number of possible problems multiplies. There have already been efforts to ensure that equality provisions throughout the country do exist within certain areas of laws. These related to the Law on Gender Equality, the Law on the Rights of Members of National Minorities, framework laws on education, the Election Law and other pieces of legislation. However, there has been no attempt at harmonisation in relation to the approach to equality in many aspects of life. This is most evident in respect of equality in the exercise of economic and social rights which are decentralised into 14 different legal systems.48 This is evident also in provisions which aim to achieve equality, e.g. maternity leave provisions, provisions relating to the rights of persons with disabilities, protection of the rights of workers, etc.

5.1. A Non-exhaustive List of Prohibited Grounds

The working group had a problem defining the list of prohibited grounds. Because the constitutional provision featured an open-ended and non-exhaustive list of prohibited grounds, the discussion concentrated on grounds which should be explicitly prohibited. As explained above, the list of grounds to be covered by the Law was the most sensitive issue during the adoption process. And although some grounds were excluded from the list in Article 2 of the Law, it is significant that the Law prohibits discrimination with reference to a non-exhaustive list of grounds. There are two safeguards to ensure that the list remains open-ended. The list starts with the word “including” and ends with “and every other circumstance” which both aim to ensure that other grounds are not excluded.

This open-ended list is an indication that the drafters of the Law were inspired by other international standards and not only by those found in the EC directives. The list of prohibited grounds was more comprehensive in the Working Group Draft Law but as the ground of sexual orientation was disputed in the legislative process, a number of other grounds were also deleted. The final version of the Law includes the ground of sexual orientation but other grounds are missing, e.g. age, birth and disability. However, because the list is open-ended, in practice it will be possible to cover these grounds, especially since they are defined as prohibited grounds in other pieces of legislation in BaH. Interestingly, the first judgment made in a case of discrimination after the adoption of the Law concerned discrimination of persons with disabilities.49 Still it would be preferable for future amendments to the Law to recognise the importance of including other prohibited grounds.

Furthermore, perception of characteristics associated with a prohibited ground is also part of this open-ended list. This Law did not introduce a test as to how to define other “circumstances” or other grounds and it might be difficult to define new grounds in practice. One of the possible solutions would be to point to grounds which are already defined in some other pieces of legislation and/ or grounds from international legally bind-
ing documents BaH has ratified. Further, the jurisprudence of the ECtHR on the interpretation of the ECHR could be one of the sources for identifying the protected grounds because, according to the letter of the Constitution, the ECHR applies directly in BaH and has priority over all other law.\textsuperscript{50}

5.2. Prohibited Forms of Discrimination

The Law prohibits direct and indirect discrimination, harassment, sexual harassment, mobbing, segregation, instruction to discriminate and incitement to discriminate. The definitions of direct and indirect discrimination generally follow the definitions which can be found in the Declaration of Principles on Equality and include the need to identify an act and the comparator.\textsuperscript{51} These definitions relate to acts which have occurred, which presently exist and/or might occur in future.

The Law does not define, and the list of grounds does not imply a notion of “multiple discrimination”. This could be seen as one of the problematic features of the Law and could cause problems in proving multiple discrimination in litigation efforts.

While the definitions of direct and indirect discrimination resemble those found in the Declaration of Principles on Equality, the definitions of segregation and incitement to discriminate were inspired by the International Convention on the Elimination of All Forms of Racial Discrimination.

“Mobbing”, also defined as a form of discrimination, appears not to be grounded in any of the international documents BaH has signed. It is defined as repetitive workplace harassment which however is not connected to any of the prohibited grounds, and is only aiming at an effect of “harming the dignity of a person, especially when it creates fearful, hostile, degrading, humiliating or offensive environment”.

Acts of discrimination which would fall under the category of violence against women or gender-based violence are also defined as criminal acts in the Law on Gender Equality in BaH.\textsuperscript{52} Sexual harassment, harassment on the ground of sex/gender and domestic violence are punishable by six months to five years of imprisonment. The focus in the recent years was on prevention and prosecution of domestic violence and special laws were adopted which define the roles of other institutions. Around 600 cases of domestic violence are prosecuted yearly in the country but most of the sentences include probation and rarely imprisonment.\textsuperscript{53} To date, only a few sentences in cases of sexual harassment have been delivered but there has been a gradual increase in the number of cases. One of the most recent judgments included a one year prison sentence for long-term verbal sexual harassment in the workplace. However there are no comprehensive data on the prevalence of sexual harassment or harassment on the ground of sex/gender and there are no statistics on the number of cases.

5.3. The Scope of the Law

The prohibition of discrimination applies to all rights regulated by law. Thus defined, the scope of the Law is wide but is also dependant on the rights which need to already exist in the legal system.\textsuperscript{54} The scope is defined to mirror the general prohibition of discrimination in Protocol No. 12 of the ECHR.\textsuperscript{55}

One of the difficulties faced during the drafting process was in defining the scope of the Law. The main difficulty was the fact that BaH has a complex legal and political struc-
ture with various levels of government competent to determine rights and entitled to define access to rights differently, with the result that some rights are guaranteed in one part of the country but not in other parts. However, the Constitution could be the sole reference for what is meant by “guaranteed rights” under the Law, as it enumerates only a certain number of rights, not the full spectrum. Accordingly, the working group first had discussions to include a list of human rights and freedoms in the very text of the Working Group Draft Law.

This dilemma unfortunately remained unresolved in the Law because in addition to the application of the already mentioned “general prohibition of discrimination” approach, the areas of application of the principle of non-discrimination were also defined. These areas were emphasised in Article 2 in which the grounds were enumerated but they were additionally vaguely defined in Article 6.

5.4. Permitted Unequal Treatment

5.4.1 Justified Discrimination

In an attempt to define the general rule for the justification of different treatment the Law, in the first two paragraphs of Article 5, prescribes a test for when different treatment shall not be considered discriminatory. To meet this test any “unfavourable distinction or different treatment” needs to be based on “objective and reasonable justification” and needs to “realise a legitimate goal” and there must be “a reasonable relation ratio of proportionality between means used and goals to be achieved”. This justification test can be only applied to behaviour which would usually be considered direct or indirect discrimination, because these forms of discrimination result in different treatment as defined by law.

5.4.2 Exemptions from the Law’s Application

The rest of Article 5 goes on to list exceptions to the principle of equal treatment. The list of exceptions does not seem to have an inner logic and includes exceptions of employment in religious institutions; positive measures for marginalised groups; genuine occupational requirements; exceptions in the best interest of the child; reasonable accommodation; and exceptions which arise from family law and citizenship. It is not clear how these exceptions were selected, and thus they are problematic as they cannot be examined in a court.

One of the most problematic exemptions relates to rights which arise from family law. This exception was added during the parliamentary debate and mirrors a similar provision in the Law on the Prevention of Discrimination in Croatia, Article 2 paragraph 10. As noted above, the parliamentary debate in Croatia had a strong influence on the debate in BaH which, combined with the pressure of the Inter-religious Council, led to the adoption of this amendment. Its intention was to deny the application of the principle of non-discrimination to homosexuals in access to rights which arise from family law. It aimed to prevent any litigation under this Law that would challenge the opposite sex clause as a requirement to conclude a marriage, or any discrimination claims in adoption procedures initiated by same sex couples. While there is no consensus on this issue in Europe, the ECtHR has generated some case law in recent years, e.g. the case of E.B. v France, which could at some point bring into question the exception related to family law in BaH. In any case, this exception disables the use of the Law in challenging any provisions of family law as discriminatory in the local courts. The Law puts family law provisions above the principle of non-discrimination.
To date, this exception has not been challenged in the courts; it would be important to do this especially where there is case law available which could be relied upon.

6. Enforcement

The Law has established a new anti-discrimination litigation procedure with new rules to accommodate the specific nature of discrimination proceedings. The Law has relied on the existing civil procedure codes in the legal system of BaH and the discrimination litigation procedure follows the general rules established by these codes. There are however some exemptions from the general rule such as those regarding the burden of proof, collective complaints and the use of statistical data which have aimed to accommodate the special nature of discrimination proceedings. These rules apply only for cases of discrimination heard under civil procedure codes and not in the proceeding in front of the Constitutional Court.

According to the Law, any person who believes that they have been discriminated against can file a lawsuit at the closest municipal court. New procedural rules for discrimination cases follow the guidelines in the EU discrimination directives and enable an easier standard of proof in discrimination cases.

According to Article 15(1) of the Law:

“In cases when a person or group of persons provide facts in proceedings under Article 12 of this Law, corroborating allegations that prohibition of discrimination has been violated, the alleged offender shall have a duty to prove that the principle of equal treatment or prohibition of discrimination has not been breached.”

This provision has shifted the burden of proof from the plaintiff to the respondent to prove that discrimination did not take place. This is a novelty in BaH civil proceedings, in which, according to the general rule, the plaintiff needs to provide facts and to prove every segment of the alleged breach and the respondent can remain passive. If the evidence is simply out of reach of the plaintiff, the courts will find no violation. According to Article 15(2) statistical data can be used to shift the burden of proof and according to Article 15(3), in cases of failure of reasonable accommodation, the burden of proof lies with the respondent.

These provisions also establish a judicial protection from discrimination which provides a direct access of victims to protection mechanisms. This contributes to legal certainty and facilitates access to justice.

According to the available data, the first litigation under the Law was initiated by the anti-discrimination team of Vasa Prava, an NGO providing free legal aid, and the first judgment which found discrimination resulted in litigation started by this NGO. In total, the Vasa Prava anti-discrimination team has initiated over 20 cases. The USAID Parliamentary Support Program published an assessment on the implementation of the Law, based on the litigation efforts of Vasa Prava, which made recommendations to relevant parliamentary committees. This assessment concluded that the Law has the potential to ensure protection for victims of discrimination and that the courts are capacitated to hear cases according to the provisions of this Law.

Even more importantly, some cases had a strategic impact and led to the development of new policy responses. One example is the “two school under one roof” case which lead to a new policy being adopted by the Ministry of Education and
Science of the Federation of BaH introducing guidelines for school integration.

The Law has also proved valuable in challenging practices which had commenced prior to its enforcement. The definitions of discrimination in the Law have helped address, for example, the failure to include children with disabilities in primary education, the refusal to hire a qualified professional as a director in a primary school because she was a Catholic nun, and the segregation of children in primary schools based on their ethnicity.

However, overall, the number of discrimination cases litigated to date remains low. One of the reasons might lie in the scarcity of initiatives to promote the protection provided under this Law. A recent survey has shown that although 86% of interviewees perceived discrimination to be a very pressing social problem, only 36% were aware of the existence of the Law and only 25% had any knowledge of the content of the Law.67 Furthermore, it appears that many human rights NGOs are not aware of the possible changes litigation of discrimination cases could bring.

7. Institutional Responses to Inequality and Discrimination

Although the Law has put an important emphasis on protection from discrimination, its aim was not only to prosecute offenders but to establish a mechanism to detect patterns of discrimination and to identify proactive responses by the central institution of the Ombudsman, and to a certain extent by the MHRR.

The Law has defined the existing Institution of the Ombudsman for Human Rights of BaH (the Institution) as the Central Institution for the Prevention of Discrimination. The Institution was established in 200268 according to the Paris Principles69 and its mandate includes the activities required by the relevant EU equality directives and proposed by the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 2.70

The Human Rights Ombudsman of BaH has, in accordance with the provisions of the Law, the role of the central institution to combat discrimination. It is important to note that the role of the Ombudsman does not include deciding equality and discrimination cases but it includes assisting victims, initiating an investigation and issuing recommendations which are not legally binding.

The Institution was also vested with significant responsibilities in raising awareness on discrimination and combating prejudice and stereotypes. Immediately after the adoption of the Law, the Institution established a department for the elimination of all forms of discrimination. In 2011, the Institution published its first report on the manifestations of discrimination.71 Its aim was to inform the Council of Ministers of BaH and the Parliamentary Assembly of BaH about the allegations of discrimination the Institution had received since the adoption of the Law and recommend legislative amendments. Its aim was also to inform the public about discrimination and inequality in BaH. The Ombudsman concluded that there is a need for a stronger awareness-raising campaign on the existence of the Law, noting the disparity between the perception of discrimination and the low number of appeals the Institution has received. The Ombudsman also concluded that there is a need to establish a mechanism to harmonise other laws with this Law.

This report has however shown that the Institution mainly deals with cases which
have a potential to be litigated. Thus the Ombudsman plays a role of a mediator rather than a role of the human rights institution which would deal with systemic problems in the area of discrimination. It is also not clear whether the Institution informs the plaintiffs about the judicial proceedings which are available.

A report published in October 2012 by a think-tank called “Analitika” tracked obstacles preventing the efficient fulfilment of the role of the Institution in the protection of individuals from discrimination.72 The main obstacles relate to the reactive role the Ombudsman has played to date; therefore the report recommended a proactive approach to the promotion of the Law and its protection mechanisms, and the raising of public awareness of discriminatory practices in the country.

Alongside the Ombudsman, the MHRR has responsibility for monitoring the implementation of this Law as well as managing the central database of discrimination cases. The MHRR was tasked with adopting a Regulation on the methods of collecting data on cases of discrimination, which would define the content and layout of a questionnaire to collect data and regulate other issues related to data collection. At the time of writing, such a Regulation is yet to be issued, although a working group was established in 2010. For this reason, it is almost impossible to assess the implementation of the Law or the changes which it was supposed to bring.

Moreover, the MHRR has failed to play a proactive role in equality and non-discrimination and has not published the annual reports which the Law require it to produce. It has done nothing so far to promote the Law to the public or to professionals. Further, the Ministry has failed to fulfil its role in the development of equality and non-discrimination policies.

It seems also that civil society organisations, although they have certainly done more than the MHRR, have not done enough to promote the Law or use it as a tool for advocacy. One of the few developments was the publishing of the Commentary to the Law by the Human Rights Centre of the University of Sarajevo73 which aimed to explain the Law both to professionals and the public. Today, there are some further initiatives focusing on the implementation of the Law, including The Equal Rights Trust’s project “Developing civil society capacity to combat discrimination and inequality in BaH”, and projects of the Open Society Fund in BaH and the Civil Rights Defenders. The OSCE Mission to BaH has distributed, through its field offices, leaflets containing basic information about the Law to NGOs and citizens’ services. Additionally, the Mission trained 150 judges and prosecutors on application of the Law in 2011 and 2012.

In early 2013, based on the set of recommendations made by the USAID,74 the Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics75 has adopted a new approach to monitoring the implementation of the Law and has tasked the MHRR to take more action to promote the Law and even to initiate the adoption of an action plan. The Joint Committee has also declared itself competent to review all new draft law and to determine if there is a need to harmonise it with laws prohibiting discrimination.

8. Quotas and Preferential Treatment

Some important segments of equality remain unaddressed by the current legal regime. These are particularly crucial for BaH
as a country in transition. In some cases, existing laws fail to comply with international standards on when differential treatment may be permissible. Even more worryingly, they have led to discrimination on different grounds. The next section looks at how quotas and preferential treatment have influenced the principle of equality in BaH.

Quotas have been one of the most popular ways in which BaH legislators attempted to achieve equality. There are quotas for access to public service, decision-making positions, the armed forces, the police and the judiciary. Also, a number of laws provide that "preferential treatment" should be applied in access to employment, health, education and access to resources for different parts of the population solely based on their status rather than their needs. The application of quotas and preferential treatment has, in practice, put individuals who do not belong to these groups in a less favourable position, which might lead to discrimination. The Law on the Prohibition of Discrimination has failed to address the issues created by the omnipresence of quotas in the legal system. The permissible different treatment test is the only new standard the Law has introduced but the implementation of this test on quotas and preferential treatment provisions depends on decision makers at different levels of the government.

The Dayton Agreement, which included the Constitution of BaH as one of its annexes, has introduced mechanisms aimed at ensuring parity between the parties to the armed conflict, along ethnic lines. Hence, elements of the consocial power-sharing theory can be identified in the BaH political system.

Power-sharing and parity mechanisms are found across the political system of the country including in particular the election to the presidency and the legislature and appointments to the executive. The main policy mechanism applied to achieve power-sharing and parity is ethnic quotas or quotas for the "constituent peoples" (Bosniaks, Croats and Serbs) whereas all other groups remain outside these arrangements. Ethnic groups which are recognised as constituent peoples also vary in demographics and the parity applied can be considered to be "over-representation as an additional guarantee of protection", or "disproportionality in favour of minorities".

As noted above, the Grand Chamber of the ECtHR found provisions introducing quotas for the election of the members of the Presidency of BaH and the House of Peoples of the Parliamentary Assembly of BaH discriminatory. The Court agreed that there are no requirements under the Convention to abandon totally the power-sharing mechanisms peculiar to BaH, but that there are other mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of other communities. Although the ECtHR judgment was published in December 2009, there has been no agreement yet on how to tailor future power-sharing mechanisms so that they are compliant with the judgment. It appears at this moment that political parties are more inclined to establish a system which would aim for parity but which would not simply exclude the "non-constituents", without breaching any provisions of the ECHR.

In January 2013, the amendments of the Constitution of the Canton of Sarajevo (one of 10 cantons in the BaH entity Federation of Bosnia and Herzegovina) were welcomed as a step towards the implementation of the decision of the ECtHR. These amendments have established a caucus of "others" along with caucuses of "constituent peoples" in the Ca-
tonal Assembly. The groups of “others” are now able to elect one of three deputy-presidents of the Cantonal Assembly of the Canton of Sarajevo. This decision has the potential to enable the “others” to influence decision making of the Cantonal Assembly of Sarajevo – a significant achievement in so far as this Assembly is competent to adopt cantonal laws, budgets, and policies and to appoint the members of the Cantonal Government.

Quotas are applied not only as a parity policy instrument to ensure power-sharing but also in a number of different areas which are not necessarily elements of democratic systems. The number of such provisions in different laws is hard to estimate but they can be found in most laws governing appointments and employment. In respect to appointments, parity is usually achieved through quotas or preferential treatment and in respect to employment it is usually sought through preferential treatment alone.

The appointment of a member to the Institution of the Ombudsman for Human Rights can be considered as an example of power-sharing which is not a part of the consocial democracy model or theory:

“[T]he Ombudsman shall be appointed from the ranks of the three constituent peoples (Bosniaks, Serbs and Croats), which does not preclude the possibility of appointing an Ombudsman from the ranks of ‘others’.”

Although this provision does not automatically exclude the “non-constituents”, three Ombudsmen currently in office were appointed as members of one of three constituent peoples. Ombudsmen are not in charge of different departments, there is no hierarchy between them and they also need to co-sign all decisions made by the Institution. The Institution is nominally independent, but this power-sharing arrangement nonetheless forces parity of groups in a human rights institution, with the effect of excluding “non-constituents”.

Laws which regulate the employment of civil servants could be seen as an example of how preferential treatment was introduced in a system of employment which is otherwise based on candidates’ qualifications. All these laws contain provisions that relate to the national structure of civil servants, such that the structure of civil servants “shall generally reflect the national structure” of the population in accordance with the most recent census. None of these laws have regulated how this provision would be applied, which has opened a wide space for discretion and different interpretation. Only one law which regulates the employment in a local community provides a test when preference can be allowed. In a case where two candidates have achieved equal scores, preference can be given to the candidate of the under-represented constituent people. This test could be considered to be aligned with the reasoning of the European Court of Justice (ECJ) in the cases of Kalanke, Marschal and Abrahamsson. Any other preferential treatment could be considered discriminatory.

The common agreement on the legitimate aim for these exceptions is that they have attempted to ensure equal participation of constituent peoples and achieve a multiethnic civil service; otherwise the Ombudsmen could hardly find quotas to be proportionate, in particular because they exclude all “non-constituents”.

Unfortunately, similar provisions can be found in other laws, governing, for example, access to employment for families of soldiers who died during the war, access to employment for war veterans and access to educa-
tion for children of soldiers who died during the war, which do not contain any safeguards to ensure that these provisions were used only to achieve equality and that they do not adversely discriminate.

All of these provisions could be challenged at least in private law suits according to the Law but there seems to be no real political will to evaluate the success and the justification for some of these provisions in order to ensure equality for all. The Law on the Prohibition of Discrimination test for justification of different treatment could be used to evaluate these policies, but so far this has not been discussed or considered. Nor have these provisions been tested in litigation. The same problem exists in respect of quotas in other power-sharing mechanisms which follow the same logic of the provisions already found to be discriminatory by the ECtHR.

Equality of all persons and groups in a legal system is an important goal for every society. The experience of BaH shows how hard it is to regulate equality through quotas and preferential treatment, in particular if policy makers, when focusing on group rights, fail to recognise the needs of other minority groups.

9. Conclusions

The Law on the Prohibition of Discrimination has opened a new chapter in the area of equality and non-discrimination in BaH. It has subsumed all of the standards which were developed over the years in comparative law and could been seen as a beacon in the legal system of BaH when it comes to future legislative developments.

One lesson from the law-drafting process is that without a strong conditionality imposed by the European Union to regulate the area of equality and non-discrimination this Law would not have met international standards. Notably, even under the pressure of international organisations and the public, parliamentarians tried to narrow the power and scope of the Law as much as possible. Similarly, as expected, there has been strong resistance to the mainstreaming of equality and non-discrimination in other areas of law.

The Law on the Prohibition of Discrimination has proved to be useful for litigation. Although the number of cases is still low, they have brought the issue of discrimination to the attention of policy makers and led to the development of new policies to address inequalities. More importantly, these first cases have shown the enormous potential of litigation of discrimination cases.

There are many provisions in the legal system of BaH which aim to ensure equality but there seems to be no coordination or consistency between them. As seen in some of the examples in the area of power-sharing, this uncoordinated approach has led to discrimination against certain groups, and BaH is one of the countries in which the Constitution still openly discriminates against minorities.

Much more is needed to achieve equality and to eradicate discrimination. The current approach seems to be more reactive than proactive. There are no institutional initiatives which would assess equality and the prevalence of discriminatory practices in the country and no data is collected and published on cases of discrimination.

One of the possible initiatives would be the adoption of an overall equality and non-discrimination action plan which would address the current challenges and establish a strategic and coordinated approach. There are already some good initiatives in
In this regard such as the Gender Action Plan of Bosnia and Herzegovina\(^7\) and the Action Plans which aim to address the problems faced by the Roma,\(^8\) which have adopted a proactive approach, but an overarching strategic document is still missing. Without such a document, different initiatives might remain uncoordinated and equality and non-discrimination would not be mainstreamed. It will therefore be interesting to monitor the follow-up to the Conclusions made by the Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics relating to the harmonisation of laws with the Law on the Prohibition of Discrimination and the adoption of an anti-discrimination action plan.

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2 In the absence of an official census, according to some estimates, main ethnic groups living in Bosnia and Herzegovina are Bosniaks (48%), Serbs (37.1%), Croats (14.3%) and others 0.6%, including Jews, Roma and Albanians. Source: Central Intelligence Agency, The World Factbook, 17 January 2013.


6 Although there is no definition of what “entity” means, in practice the entities are the two regional governments which are also composed of other sub-levels of local self-government – cantons and municipalities in FBaH and municipalities in RS.

7 The Preamble explicitly refers to the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

8 Constitution of BaH, Article II/2, which states: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”

9 Ibid., Article II/3.

10 Ibid., Article II/2.

11 Ibid. and Constitutional Court of BaH, Appellant Sulejman Tihic, U 4/04, Para 110 et seq.

Convention for the Protection of National Minorities.

13 See, for example, Case AP-1093/07 the Constitutional Court referring to the Belgium linguistic case, 23 July 1968, Series A, No. 6 (1979-1980).

14 Constitutional Court of BaH, Appellant Sejfudin Tokić, U 44/01-1, Para 45.

15 See above, note 8, Article IV/1.


17 *Sejdic and Finci v Bosnia and Herzegovina*, ECHR, Applications Nos 27996/06 and 34836/06. The claimants alleged that the provisions violated their rights under Articles 3, 13 and 14 ECHR, Article 3 of Protocol No. 1 to the ECHR and Article 1 of Protocol No. 12 to the ECHR.


19 Law in place as at 9 January 2013.

20 These could be found in labour laws, criminal codes, public broadcasting laws, etc.

21 Law on Gender Equality in Bosnia and Herzegovina, *Official Gazette of BaH*, No. 16/03 and 102/09.


24 Unified text of the Law on Gender Equality in Bosnia and Herzegovina, Articles 10-21.


26 *Ibid.*, Article 29: “A person who, on grounds of sex, commits violence, harassment or sexual harassment that endanger someone’s wellbeing, mental health or bodily integrity shall be punished with a fine or imprisonment for a term of six months to five years.”

27 Article 19 of the Law mentions judicial protection but it is unclear what procedures would apply.

28 The Starting Line Group was a coalition of more than 400 non-governmental actors, from across the European Union, advocating for the adoption of EU directives in the field of non-discrimination.


30 Draft laws are usually developed by the Council of Ministers and proposed to the Parliamentary Assembly and in most cases ministries of the Council of Ministers are designated to monitor the implementation of laws.

31 The expert working group included members from the Ministry only and the author provided advisory and technical support to the group.

32 The working group decided to entitle the Law “Law on the Prohibition of Discrimination”.


36 This requirement was part of the “Visa Liberalisation with Bosnia and Herzegovina Roadmap” put forward by the EU to the BaH authorities in order to allow visa free travel regime for BaH citizens.

37 Council of Ministers, Minutes from the 74th session held on 19 January 2009.

38 Council of Ministers of BaH, 82nd Session held on 1 April 2009.


40 House of Peoples, Transcript of the 30th Session, 15 June 2009, delegate Mr Bozo Rajic, p. 20.

42 Made by the party “Croatian Democratic Community”.

43 Amendments proposed by the members of the Croatian Democratic Party of BaH (HDZ BaH) to the House of Representatives, The Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics and the Constitutional Committee of the House of Representatives of the Parliamentary Assembly of BaH, 10 June 2009.

44 E.g. the Criminal Code of BaH, Article 145, began in these words: “Who on the ground of differences in race, skin colour, national or ethnic background, religion, political or other belief, sex, sexual orientation, language, education or social status or social origins, denies or restricts the civil rights as provided by the Constitution of Bosnia and Herzegovina, ratified international agreement, law of Bosnia and Herzegovina, some other regulation of Bosnia and Herzegovina or general act of Bosnia and Herzegovina or, whoever on the ground of these differences or background or other status grants unjustified privileges or does unjustified favours to individuals...”

45 The Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, Minutes, 26th Session held on 6 July 2009.

46 House of Representatives, Minutes from the 33rd and 57th sessions of the House of Peoples.

47 Article 5 of the Draft Law, probably referring to the entity laws: Family Law of Federation of BaH and the Family Law of RS.

48 Bosnia and Herzegovina has an extremely decentralised legal system and 14 legislatures are competent to regulate certain rights.

49 The case in question concerned a failure by a primary school in Mostar to include a child with intellectual impairments into regular classes, although all medical examinations showed that this would have a positive impact on his development.

50 See above, note 8.


52 See above, note 24, Article 29.

53 Fourth and Fifth Periodic CEDAW Reports of Bosnia and Herzegovina, May 2011.

54 Law on the Prohibition of Discrimination, Article 2, which defines the scope of discrimination: “with a purpose or effect to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life”.

55 Ibid., Article 1 – General prohibition of discrimination: “The enjoyment of any right set forth by law 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.”

56 A recent Constitutional Court of BaH decision (case U 12/09) found discrimination in respect of differential access to parental leave pay for women from different parts of BaH employed in state institutions, contrary to the Convention on the Elimination of All Forms of Discrimination against Women and the Law on Gender Equality in BaH. This case concerned a new piece of legislation which regulated the right to maternity leave with pay for civil servants employed at state-level institutions which resulted in different treatment for women, depending on the entity in which they resided.

57 See above, note 54, Article 6: “...in all spheres, especially: employment, membership in professional organisations, education, training, housing, health, social protection, goods and services designated for the public, and public places together with performing economic activities and public services.”

58 Ibid., Article 5: “Legal measures and actions shall not be considered discriminatory when reduced to unfavourable distinction or different treatment if they are based on objective and reasonable justification. Following measures shall not be considered discriminatory if they realise a legitimate goal and if there is a reasonable relation ratio of proportionality between means used and goals to be achieved...”

59 Ibid., Para 2:

“a) They come out of implementation or adoption of temporary special measures designed to prevent or compensate damages that persons suffer and on grounds given in Article 2, especially members of vulnerable groups, such as persons with disabilities, members of national minorities, women, pregnant women, children,
youth, elderly and other socially excluded persons, civilian victims of war, victims in criminal proceedings, displaced persons, refugees and asylum seekers; i.e. to enable their full participation in all spheres of life;

b) They are based on features related to grounds given in Article 2 of this Law, when in limited circumstances, due to the nature of concrete professional activities or context in which these are conducted, such features represent a genuine and determining requirement in terms of choice of occupation. This exception shall be subject to occasional examinations;

c) They are based on distinction, exclusion or preference in relation to employment as a staff member of an institution that is made in compliance with doctrines, basic presumptions, dogmas, beliefs or learning of actual confessions or religions, ensuring that every distinction, exclusion or preference is made consciously in order not to hurt religious feelings of members of that confession or religion;

d) They define maximum age as the most appropriate for terminating a working relationship and determine age as a condition for retirement;

e) They are based on citizenship in a way prescribed by law;

f) They are based on the realisation of reasonable accommodation aiming to ensure the principle of equal treatment in relation to persons with disabilities. Employers shall, based on needs in a concrete case, take appropriate measures, in order to enable a person with disability to access, participate or to be promoted, e.g. to participate in training, if such measures do not represent an unreasonable burden for the employer;

g) Putting in a less favourable position while defining rights and obligations in the family provided by law, especially in order to protect the rights and interests of children, which has to be justified with legitimate purpose, protection of public morals, along with favouring marriage in accordance with provisions of family law.

h) When establishing an employment relationship, membership, or taking actions that are in compliance with preaching or operating of registered churches and religious communities in BaH, or other public or private organisations working in accordance with the Constitution and laws, if demanded by religious doctrines, beliefs or goals.”

60 *Ibid.*, Para 2(g).

61 In particular the right to marry, right to adopt and right to inherit.

62 In BaH family law, marriage and cohabitation are defined as a “union between a woman and a man”. Similarly, a child can be adopted only by married couples and couples which cohabitate, and a single parent (regardless of their sexual orientation) can only obtain custody over a child (incomplete adoption).


65 The courts’ capacity improved when the judicial academies included a two-day module on the Law on a yearly basis.

66 This case concerned two schools operating in the same building. One school was attended by ethnic Croats and the other by ethnic Bosniak children. The court found that the schools’ policies to separate children by having them attend different classes as well as manipulating school breaks so as to make it impossible for ethnically different children to ever meet constituted ethnic segregation and ordered the schools to change this practice.

67 See above, note 5.

68 Law on the Ombudsman for Human Rights of Bosnia and Herzegovina, *Official Gazette of BaH*, Nos. 19/02 and 32/06.


70 European Commission against Racism and Intolerance, *General policy recommendation No. 2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level*, adopted on 13 June 1997.


74 See above, note 64.

75 Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, Minutes of the 19th Session held on the 17 January 2013.

76 For example, war veterans and members of their families, the unemployed, members of constituent peoples, etc.

77 See Preamble to the Constitution of BaH which contains the phrase: “Bosniaks, Croats, and Serbs, as constituent peoples (along with others), and citizens of Bosnia and Herzegovina”.

78 A model form of democracy, developed by the Swedish political scientist Arend Lijphart (b. 1936), according to which many nations can coexist peacefully under one state. It is also known as “consociationalism”. Note, however, that “consociationalism” was never recognised as the official model of democracy in Bosnia and Herzegovina.


81 See above, note 17.

82 See above, note 68, Article 8.

83 Law on the Civil Service in the administrative bodies of Brcko District, Article 26.


“Only when both sex and gender are seen as continua (which do not necessarily run parallel to each other), we can hope for the acceptance of people with non-normative bodies, desires, or social roles.”

Saskia E. Wieringa
The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights

Jens M. Scherpe

I. Introduction – It’s Been a Long Road...

The legal regulation of family relationships has long been formulated around a “traditional” notion of the family as a unit comprising a heterosexual married couple who conceive children within wedlock. This has resulted in the protection mechanisms of the law focusing on such family units, with other family forms such as, for example, same-sex couples, unmarried couples, couples who are unable to conceive naturally and single parents failing to have their family relationships adequately recognised and protected in law. This often included, at least initially, not recognising “non-traditional” families’ rights to respect for their family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, in recent decades there has been progress in dispelling the traditional notion of the family and in adapting the law to the modern realities of family life. One example of such progress in motion relates to the legal status of homosexual couples in Europe, which is the focus of this article.

Until the end of the 1980s there was simply no legal recognition of same-sex relationships in the European jurisdictions. That this has changed is, to a large extent, due to the effort and persistence of many organisations and individuals. Today, marriage is open to same-sex couples in an increasing number of jurisdictions, and in others, a form of registered partnership is available or de facto relationships of same-sex couples are recognised. But even in Europe, particularly in Eastern and South-Eastern Europe, there are still many jurisdictions where there is no legal recognition of same-sex relationships. However, in Schalk and Kopf v Austria the European Court of Human Rights (ECtHR) recognised that same-sex couples enjoy the right to “respect for family life” protected by Article 8 of the ECHR, and this article argues that this mandates some form of legal recognition of same-sex relationships by all contracting states of the ECHR and paves the way for equality in the family realm for same-sex couples.

II. Legal Recognition through Legislation and Litigation – Europe and Beyond

Legal recognition of same-sex relationships in Europe began in the Nordic Countries. In 1987, de facto/cohabitation relationships of same-sex couples were given a similar legal status to those of opposite-sex couples in Sweden. However, at the same time, it was not felt that there was a need (or an opportunity) for a formalisation of those relationships.
“tum leap” followed in 1989 with the introduction of the registered partnership for same-sex couples in Denmark. Other jurisdictions gradually followed Denmark’s lead, although the legal rules and technical approach of the registered partnership regimes that were introduced differed (and still differ) significantly from jurisdiction to jurisdiction. The next step in this legal evolution was the opening up of marriage in a number of jurisdictions, of which the Netherlands was the first in 2001, followed by Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Iceland (2010) and Portugal (2010).

However, in many European countries, particularly in Eastern Europe, but also, for example, in Greece and Italy, there is strong opposition to the legal recognition of same-sex relationships. Interestingly, the traditional “dividing lines” of family law no longer seem to apply. It no longer seems possible to distinguish between the progressive North and conservative South as, for example, Spain and Portugal have opened up marriage to same-sex couples. Likewise, a division which is based upon the predominant religious affiliation in a given country, i.e. between somewhat more liberal Protestant and more conservative Catholic countries, does not seem appropriate any more. Apart from Spain and Portugal (as mentioned above), countries like Belgium (which also permits marriage of same-sex couples) and the Republic of Ireland (having recently introduced civil partnership for same-sex couples) invalidate such a division along religious lines. If there is such a thing as a dividing line in Europe then, today, it is really located between East and West, although one should not forget that, for example, Hungary, Slovenia and the Czech Republic have introduced a form of registered partnership for same-sex couples, and in Croatia recognition of a de facto union is possible.

Europe is not unique on this issue. Outside of Europe, there is similar diversity in the recognition of same-sex relationships. In the Americas, for example, Canada (2005), Argentina (2010), several US states and Mexico City (2010) and the Mexican state of Quintana Roo (2011) allow same-sex marriages, and in many other jurisdictions registered partnerships are possible. However, at the same time several jurisdictions have changed their statutes and constitutions to the effect that marriage is only possible between a man and a woman, thus precluding same-sex marriages.

It is interesting to note that in the European jurisdictions the broader legal recognition of same-sex couples was generally brought about through legislation, as a result of the efforts of organisations and political parties. By contrast, outside of Europe, litigation based on constitutional and human rights was, more often than not, the way legal recognition of same-sex couples was effected, as, for example, in many US states and also in Brazil, Canada, Columbia, and South Africa. Here, individual litigants (usually supported by organisations), played a pivotal role. In European jurisdictions where the legislative route has not fostered progress and there is still no or incomplete recognition of same-sex couples, litigation based on national constitutions and the ECHR can, and presumably will, be utilised to bring about legal reform.

III. Different Forms of Recognition

The approach to the legal recognition of same-sex couples taken by the various European jurisdictions that have provided such
recognition can be broadly split into three categories: regimes in which provision for formal recognition of same-sex relationships is “inferior” to marriage; those in which it is more or less “functionally equivalent” to marriage, i.e. marriage by a different name; and those in which marriage is available to same-sex as well as opposite-sex couples.

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<th>Opposite-sex relationship</th>
<th>Same-sex relationship</th>
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</thead>
<tbody>
<tr>
<td>Marriage</td>
<td>Registered partnership</td>
</tr>
<tr>
<td>Informal relationship</td>
<td></td>
</tr>
</tbody>
</table>

The differential treatment is apparent: same-sex couples cannot marry and the legal framework which is open to them is not of the same “quality” as marriage that is available for opposite-sex couples. Moreover, this approach is also vulnerable to challenge from opposite-sex couples who – with a good chance of success – could claim that they are being discriminated against because the alternative to marriage, the “inferior” legal framework, is not open to them. This “problem” was pre-empted, for example, in France and also originally in the Netherlands and Belgium by the new legal regime also being open to opposite-sex couples. The structure then looks as follows:

<table>
<thead>
<tr>
<th>Opposite-sex relationship</th>
<th>Same-sex relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marriage</td>
<td>Registered partnership</td>
</tr>
<tr>
<td>Informal relationship</td>
<td></td>
</tr>
</tbody>
</table>

Here the differential treatment of same-sex couples is still blatantly obvious, as opposite-sex couples can choose between two ways to formalise their relationship whereas same-sex couples have only one option. The Netherlands and Belgium therefore later also opened up marriage to same-sex couples. If registered partnership is designed to be the functional equivalent of marriage, the structure looks like this:

<table>
<thead>
<tr>
<th>Opposite-sex relationship</th>
<th>Same-sex relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marriage</td>
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</tr>
<tr>
<td>Informal relationship</td>
<td></td>
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</tbody>
</table>

1. **“Inferior” Relationship?**

In many jurisdictions same-sex relationships were deemed to be fundamentally different from opposite-sex relationships and in some ways “inferior”. Consequently, when a legal framework for same-sex couples was introduced, the structure looked as follows:

<table>
<thead>
<tr>
<th>Opposite-sex relationship</th>
<th>Same-sex relationship</th>
</tr>
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<td></td>
</tr>
</tbody>
</table>
If (and only if) the legal rules are indeed the same, the only remaining difference is the name of the legal construct. This might appear to be a difference without legal significance and thus fall beyond the law because, at first glance, a name has no legal content as such. But it does have an immense social and cultural content. “Marriage” is much more than a mere legal construct. Societal traditions and expectations are associated with marriage – not all of which are necessarily positive. Thus, for some couples, irrespective of their genders, it would be unthinkable to enter into a marriage, because for them, marriage represents the subjugation of women and male domination. For others, marriage is the ultimate social commitment to another person. In any event, it is apparent that the term “marriage” is much more than a mere name – and that therefore, ultimately, a name is legally relevant after all.

3. To Marriage via Registered Partnership?

In some jurisdictions, for example in Denmark, Iceland, Norway and Sweden, these considerations have led to marriage being opened up to same-sex couples (and, at the same time, registered partnership being abolished), even though a functionally equivalent legal regime was already available to same-sex couples. The view was taken in these jurisdictions that there was simply no longer any legally relevant reason for having two separate legal regimes. Thus, opening up marriage to same-sex couples was the final, logical step. This step is now being contemplated in France and the United Kingdom and debated in Germany.

In many jurisdictions, registered partnerships were already legally “like a marriage”. But the converse was of course also true, as it actually is in all jurisdictions around the world: marriage in the end is nothing but a form of registered partnership. Despite the name, what is being offered by the state through marriage is merely a legal framework. Everything that extends beyond the legal framework is cultural and social and thus also beyond immediate state regulation (although admittedly the state’s legal rules can, and will, have an impact upon the social and cultural perception of the institution).

In any event, the legal framework of marriage has changed significantly over the centuries. Each and every reform of that legal framework has been accompanied by fears that the new law would change (or even destroy) the “nature” of marriage forever, whatever that is deemed to be. But the institution of marriage has survived all these changes.

For example, one of those changes was the introduction of divorce; another, some time later, the right to remarry after divorce. Some religious denominations still do not recognise second marriages or even divorce, and the same applies to other marriage restrictions that no longer apply in the laws of most countries. While the religious denominations of the individuals who wish to marry are of no relevance for the state, they remain of central importance to some faith groups. However, the state does not impose a duty to celebrate the marriages of divorcées or persons of another religious faith upon these religious groups. Similarly, where same-sex marriages have been introduced, it has been left to individual faith groups to decide whether they wish to celebrate same-sex marriages in their congregations or not.

So notwithstanding the legal possibility of divorce and remarriage, there is scope for other concepts and understandings of marriage to be accommodated alongside the state law. It is a fundamental value of modern democracy that faith groups should not be forced
to recognise and celebrate marriages that contradict their religious beliefs. However, the legal framework of marriage provided by the state does not intend to impose a definite view of what is the “right kind of marriage” upon everyone. The marriage framework solely deals with state recognition of relationships and their legal consequences and leaves it to individuals and social groups where they want to make use of it.35

But without such a legal framework it is not only legal recognition which is lacking, but also another fundamental element of freedom: the freedom to choose this framework for oneself and one’s partner – or not to choose it, as the case may be. Allowing everyone this freedom does not, in any way, infringe anyone else’s freedom or understanding of marriage. Hence it should be open to the state to extend the legal framework of marriage to include same-sex couples.

IV. The Role of the European Court of Human Rights in Developing the Legal Recognition of Same-sex Couples

As explained above, where same-sex couples were legally recognised on a broader scale, in Europe this generally happened through legislation rather than litigation, notwithstanding successful litigation regarding specific issues such as the succession to tenancies, etc. Here the litigants often relied on non-discrimination and equality provisions in national constitutions and statutes, but also on Article 14 of the ECHR. Article 14 prohibits discrimination against a person on the ground of a personal characteristic, in their exercise of other Convention rights, including the right to respect for family life under Article 8 ECHR. While Article 14 does not list sexual orientation explicitly as one of the protected grounds, the Court took a strict position on the issue of discrimination on grounds of sexual orientation in its ruling in Dudgeon v United Kingdom,36 in which it required evidence of “particularly serious reasons” to justify differential treatment based on sexual orientation. The Court has continued to apply this strict test in its case-law on the issue since.37 However, whether same-sex couples as such also enjoyed the protection of their right to respect for private and family life under Article 8 for a long time was unclear.

1. Private Life

In Niemietz v Germany the ECtHR expressly refused to define private life, stating that it would be neither possible nor necessary to do so.38 But the Court in a later decision made clear that the right to respect for private life certainly comprises the right to establish and develop relationships with other human beings.39 In Bensaid v United Kingdom, “gender identification, name and sexual orientation and sexual life” were held to be protected by Article 8 of the ECHR as part of “private life”.40 Concerning same-sex relationships, the ECtHR stated in the case of Mata Estevez v Spain:

“With regard to private life, the Court acknowledges that the applicant’s emotional and sexual relationship related to his private life within the meaning of Article 8 § 1 of the Convention.”41

Thus the ECtHR held that a same-sex relationship, whether formalised or “merely” de facto, without any doubt could be protected by the right to respect for private life under Article 8 ECHR. However, with regard to “family life” the Court sent an equally clear message in Mata Estevez:

“As regards establishing whether the decision in question concerns the sphere of
‘family life’ within the meaning of Article 8 § 1 of the Convention, the Court reiterates that, according to the established case-law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention (...). The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation.”

However, it needs to be noted that the case in question concerned a de facto same-sex relationship and not a formalised relationship between persons of the same sex such as a registered partnership or indeed a marriage. Hence the question as to whether formalised same-sex relationships could be considered to have “family life” and thus enjoy this protection under Article 8 ECHR as well was not answered in the case. Furthermore, Mata Estevez was merely a decision on admissibility and therefore this matter had not yet been considered by the Court in full.

2. Family Life

The opportunity to consider whether same-sex couples have “family life” arose in the somewhat unusual case of Burden v United Kingdom. In the case two spinster sisters claimed that they were being discriminated against as they were in a situation analogous to a civil partnership but were precluded from entering into a civil partnership because they were sisters. This prevented them from benefitting from the same inheritance tax bonuses available to civil partners. They therefore argued that they were treated differently from other same-sex relationships without sufficient justification.

The ECtHR did not agree:

“The Grand Chamber commences by remarking that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom’s Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members (...) The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.”

Interestingly, the Court went on to discuss the distinction between formalised family relationships and de facto ones:

“Moreover, the Grand Chamber notes that it has already held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences.

Since the coming into force of the Civil Partnership Act in the United Kingdom, a homosexual couple now also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage.

As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to
incur, set these types of relationship apart from other forms of co-habitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand (...), the absence of such a legally binding agreement between the applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.”

The Court therefore drew a clear dividing line between formalised and de facto relationships and in doing so equated marriage and civil partnership. This position was later confirmed in Courten v United Kingdom:

“The Court would note that while the Grand Chamber equated civil partnerships between homosexual couples with marriage this was on the basis that in both situations the parties had undertaken public and binding obligations towards each other.”

Hence in the eyes of the ECtHR opposite-sex marriage and same-sex civil partnership are to be considered the same type of relationship. Since a married couple undoubtedly enjoy “family life”, equating marriage with civil partnership inevitably had to mean that civil partners do, too. But there was no express statement to that effect in either Burden or Courten.

The question as to whether same-sex couples have “family life” was finally resolved in Schalk and Kopf v Austria. In this case Mr Schalk and Mr Kopf claimed that they were discriminated against because they were denied the opportunity to marry or have their relationship otherwise recognised by law in Austria. When the couple first took their case to the Austrian courts the Eingetragene Partnerschafts-Gesetz (Registered Partnership Act) of 2009 had not been enacted. The Eingetragene Partnerschaft allows same-sex couples to formalise their relationship, but the legal effects of this formalisation were and still are different from those of marriage, in a number of ways. Still, this meant that by the time the ECtHR heard the case, Mr Schalk and Mr Kopf actually could have their relationship formalised in Austria, but “merely” as Eingetragene Partnerschaft and that marriage still was not open to them in Austria.

The first complaint of the applicants was that their right to marry, enshrined in Article 12 ECHR, was violated. They argued that the usage of the terms “men and women” in the Article did not imply that men and women merely have the right to marry someone of the opposite sex, but that the provision could and should be interpreted more widely to comprise the right to marry a person of the same sex. The Austrian government (supported by an intervention of the government of the United Kingdom) argued that “the right to marry was by its very nature limited to different-sex couples”, and while some contracting states had allowed same-sex marriages, there was no European consensus on the matter. The applicants, supported by third-party interventions by the Fédération Internationale des ligues des Droits de l’Homme, the International Commission of Jurists, the AIRE Centre (Advice on Individual Rights in Europe) and ILGA-Europe (European Region of the International Lesbian and Gay Association), argued that:
“[I]n today’s society civil marriage was a union of two persons which encompassed all aspects of their lives, while the procreation and education of children was no longer a decisive element. As the institution of marriage had undergone considerable changes there was no longer any reason to refuse same-sex couples access to marriage. The wording of Article 12 did not necessarily have to be read in the sense that men and women only had the right to marry a person of the opposite sex. Furthermore, the applicants considered that the reference in Article 12 to ‘the relevant national laws’ could not mean that States were given unlimited discretion in regulating the right to marry.”

In its decision the Court conceded that in the light of recent developments the right to marry enshrined in Article 12 cannot “in all circumstances be limited to marriage between two persons of the opposite sex” and it consequently could not “be said that Article 12 is inapplicable to the applicants’ complaint”. But the decision on whether or not to allow same-sex marriage was to be left to the individual contracting states, and the Court therefore unanimously held that there was no violation of Article 12 because the applicants were not allowed to marry. The Court’s central argument was that:

“[M]arriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.”

That the Court found that there was no obligation of the contracting states to allow same-sex marriage was hardly a surprise, as it is perfectly in line with the cautious approach the Court takes in socially and culturally sensitive areas, and particularly family law. Nevertheless it is remarkable that the Court apparently had no doubts about the matter falling within the ambit of Article 12, which, after all, not merely comprises the right to marry, but also the right to found a family.

The second complaint of the applicants was raised under Article 14 taken in conjunction with Article 8 of the Convention, namely that they were discriminated against on account of their sexual orientation. The argument was twofold, namely that unlike opposite-sex couples they could not have had their relationship recognised by law before the introduction of the Eingetragene Partnerschaft, and that, in any event, the remaining differences between marriage and the legal regime now open to them was discriminatory. Interestingly, the Austrian government not only conceded that Article 14 in conjunction with Article 8 applied as the Court had so far ruled that same-sex couples can have “private life”, but also that “there might be good reasons to include a relationship of a same-sex couple living together in the scope for ‘family life’”, with which the United Kingdom government agreed. The non-governmental organisations in their joint comments expressly pleaded that the Court should rule on this issue, and it did with remarkable clarity:

“[T]he Court’s case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes ‘private life’ but has not found that it constitutes ‘family life’, even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the
Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see Mata Estevez v. Spain [...]). In the case of Karner (...), concerning the succession of a same-sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of 'home', the Court explicitly left open the question whether the case also concerned the applicant's 'private and family life'.

The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (...). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family'.

In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.60

Thus the Court – while dismissing the complaints in the following paragraphs61 – expressly departed from its previous position in Mata Estevez and now fully accepted that same-sex couples enjoy the right to respect for their family life.

V. The Way Forward: Step by Step towards Equality

While Mr Schalk and Mr Kopf nominally "lost" their case as their complaints were rejected, they actually won a decisive and fundamentally important victory. The decision undoubtedly is a landmark for the rights of same-sex couples and as such will have significant impact on the future development of European family law. Because same-sex couples are now deemed to have "family life" and thus are protected by Article 8 ECHR, the decision essentially obliges contracting states to provide at least some form of legal framework, some form of legal recognition for same-sex couples and their family life. Crucially, every differential treatment of same-sex and opposite-sex couples is now subject to the Court's scrutiny to a much greater extent. As already mentioned above,62 it has long been established in case law that now all contracting states must have particularly serious reasons for a differential treatment based on sexual orientation. The Court has consistently held that:

"[A] difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."63

Generally the "justification" for treating same-sex and opposite-sex couples differently was the policy aim of protecting the "traditional" family, and the Court accepts that this in principle still is a valid aim. However, the Court has made very clear in Karner that:

"[The] aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on
sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship.64

Consequently the differential treatment of same-sex and opposite-sex couples must be necessary to protect the family in the traditional sense. This is a very high bar indeed, as this means that without the measure in question such protection cannot be achieved. Hence it needs to be proved that allowing same-sex couples the right to enter into a meaningful legal relationship, giving such couples tax benefits and the right to adopt as well as the right of access to artificial reproductive techniques65 and other rights of this nature would endanger the “traditional family”. It is obvious that granting these rights and benefits to another group does not result in the groups who already had those rights and benefits losing them. Nor do such rights and benefits necessarily become “diluted” or less valuable simply because someone else receives them. As Baroness Hale has put it succinctly:

“No one has yet explained how failing to recognise the relationships of people whose sexual orientation means that they are unable or strongly unwilling to marry is necessary for the purpose of protecting or encouraging the marriage of people who are quite capable of marrying if they wish to do so.”66

Therefore it is very likely that we will see many more successful challenges of differential treatment of same-sex couples and opposite-sex couples in the future in national courts and ultimately in the ECtHR. The German experience is an excellent example for this. The German eingetragene Lebenspartnerschaft (a registered partnership exclusively for same-sex couples) was introduced in 2001,67 but originally there were some significant substantial differences in the legal consequences of marriage and the eingetragene Lebenspartnerschaft.68 Many of those were challenged successfully, both politically and in the courts, particularly the German Constitutional Court69 and even the European Court of Justice.70

It is therefore to be expected not only that all contracting states of the ECHR will have to provide a legal framework for same-sex couples, but also that any such framework will for the most part have to be a true and full functional equivalent of marriage. Otherwise the legal provisions may fall foul of the requirements of the ECHR as explained above. The easiest (certainly technically, but perhaps not politically) way to achieve this would be to open up marriage to same-sex couples, as more and more jurisdictions in Europe and beyond do.71

But whatever approach a contracting state chooses to take, it is crystal-clear that after Schalk and Kopf complete non-recognition of same-sex couples is no longer a viable option. That is why this decision will one day be seen as an “historic” one, as truly marking the beginning of the end of discrimination against same-sex couples and as the first step on the final metres on the road towards equality.

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4 See Doppfel, P. and Scherpe, J., “Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder”, in Basedow et al., above note 3, pp. 7-49.


8 See the amended Article 1:30 of the Dutch Civil Code (“A Marriage can be contracted by two people of different or the same sex.”).


13 Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlóg), No. 65 of 2010.

14 Lei N°9/2010 de 31 de Maio - Permite o casamento civil entre pessoas do mesmo sexo.


18 But also, for example, in Argentina, New Zealand and Uruguay, as well as some of the US states (e.g. District of Columbia, New York, Maine, Maryland, New Hampshire, Vermont and Washington).

19 However, partial recognition (for example for succession to tenancies etc.) was often achieved through litigation.

20 Brazilian Supreme Court, ADI 4277/ADPF 132.
21 Davies, C., above note 16.


24 See below, section IV.


26 See above, notes 8 and 9.

27 This term was first used in this context by Kötz, H., Dopffel, P. and Scherpe, J., “Rechtsvergleichende Gesamtwürdigung und Empfehlungen”, in Basedow et al., above note 3, pp. 391-423.

28 In many jurisdictions which have introduced registered partnerships or their equivalent, they are not, thus leaving room for potential challenges based of discrimination because of gender or sexual orientation. See also section IV below.

29 See also the (unsuccessful) challenge in Wilkinson v Kitzinger [2006] EWHC 2022 (Fam).


33 See e.g. the Draft Bill proposed by MPs and the BÜNDNIS 90/DIE GRÜNEN faction, BT-Drs. 17/6343, available at: http://dipbt.bundestag.de/dip21/btd/17/063/1706343.pdf. See also New Zealand’s Marriage (Definition of Marriage) Amendment Bill, available at: http://www.parliament.nz/en-NZ/PB/Legislation/Bills/2/c/4/00DBHOH_BILL11528_1-Marriage-Definition-of-Marriage-Amendment-Bill.htm; the Bill passed its first reading in August 2012, with 80 to 40 votes and one abstention.

34 For Denmark, see above, note 30.

35 For an excellent (and short) exposition of the current (and questionable) position of English law on the places where marriages can be celebrated and some very sound proposals see Eekelaar, J., “Marriage: a modest proposal”, Family Law, 2013, pp. 83-85.


41 Application No. 56501/00, 10 May 2001.

42 In this paragraph the ECtHR referred to the previous Commission decisions regarding admissibility of complaints in X. and Y. v the United Kingdom, Application No. 9369/81, 3 May 1983, (1986) 8 EHR CD298, and S. v the United Kingdom, application No. 11716/85, 14 May 1986. This passage was also referred to by Sir Mark Potter in Wilkinson v Kitzinger [2006] EWHC 2022 (Fam), Para 45.


44 The civil partnership was introduced for same-sex couples by the Civil Partnership Act 2004, and the same prohibited degrees of relationship apply to both marriage and civil partnership.

45 See above, note 43, Para 62.

46 Ibid., Paras 63-65.

47 Application No. 4479/06, 4 November 2008, decision on admissibility.


51 By contrast, Article 9 of the Charter of Fundamental Rights of the European Union, mindful of the issue of same-sex marriages, was drafted as follows: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” (See above, note 2, Paras 24-25, where the commentary to the Charter is reproduced, as well as Para 60.)

52 It is interesting to note that the current government seems to be of a completely different view, cf. the references in note 32 above.

53 See above, note 2, Para 43.

54 Ibid., Para 44.

55 Ibid., Paras 61-64.

56 After all, as Wikely has put it, the ECHR is an international instrument which provides “a floor of rights but not a ceiling”. (See Wikely, N., “Same sex couples, family life and child support”, Law Quarterly Review, 122, 2006, pp. 542-547.) See also Scherpe, J., “Family and private life, ambi ts and pieces”, Child and Family Law Quarterly, 2007, pp. 390-403.

57 But see above, note 2, the concurring opinions by Judge Malinverni, joined by Judge Kovler, who considered Article 12 inapplicable to persons of the same sex.

58 Ibid., Paras 65, 76-78.

59 Ibid., Paras 79 and 81.

60 Ibid., Paras 92-94.

61 But only by four votes to three. It is well worth reading the powerful joint dissenting opinion of Judges Rozakis, Spielmann and Jebens.

62 See above, notes 36 and 39.


64 Ibid., Para 41.

65 On this see the recent case of S.H. and Others v Austria, Application No. 57813/00, Grand Chamber decision 3 November 2011.


67 Lebenspartnerschaftsgesetz (LPartG; Act on life partnerships) which was introduced by the Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften (LPartDisBG) of 16 February 2001, BGBl. I 2001, pp. 266 ff.

See e.g. Bundesverfassungsgericht (BVerfG) 21.7.2010, Entscheidungssammlung des Bundesverfassungsgerichts (BVerfGE) 126, 400 (concerning inheritance tax) and BVerfG 7.7.2009, BVerfGE 124, 199 (concerning social security law/pensions); and most recently BVerfG 19.2.2013, 1 BvL 1/11 and 1 BvR 3247/09 (on step-child adoption).


See above, sections II and III.1.
Introduction

The Indonesian Constitution guarantees that everybody has the right to establish a family. However the Marriage Law of 1974 restricts this right to a man and a woman. Unruly bodies that don’t readily fit the binary division of sex and subversive partners who challenge society’s right to deny them their constitutional right to marry complicate this seemingly universal entitlement. I will present two case studies of people who married legally yet whose right to form a family was contested. The first case concerns a women’s same-sex couple. One of the partners declared she was a male and was initially accepted as such. The second case concerns a couple of which the biological sex of one of the partners was questioned. In both cases the accusation of document fraud was a major issue. Yet not all people committing document fraud for the purpose of marriage are persecuted. In this article I will analyse the legal implications of these cases. Marriage equality for whom?

Constitutional Right?

Article 28b of the Indonesian constitution stipulates that every citizen has the right to form a family and acquire offspring via legal marriage. Although the emphasis on acquiring children already points in the direction of a heterosexual marriage, this is not explicitly spelt out. After all, other means of getting children, such as adoption, would do as well. I know several lesbian couples who have adopted children. However, they cannot marry legally in spite of their desire to do so and the Indonesian Constitution granting them that right. The 1974 Marriage Law restricts marriage to a union of a man and a woman. This law further allows polygyny under certain circumstances and defines the husband as the head of the household and his wife as the manager of that household. No wonder that this law is being debated. However, the opening up of marriage to all Indonesian citizens is not being considered, although the issue has been widely debated of late. The general feeling is that “Indonesian traditional culture” doesn’t allow that.

But who defines “traditional culture”? Elsewhere I have argued that “traditional culture” is being redefined by Islamist hardliners who promote a so called “original” Indonesian tradition of gender harmony and happy family (keluarga sakinah). Below I will give several examples which belie the idea that Indonesian culture was always-already based on the heterosexual binary model of male and female sexes corresponding with masculine and feminine genders.
Lesbian Couple on the Run

In Batam, an Indonesian island close to Singapore, the house of Angga Sucipto, 21 and Ninies Ramiluningtyas, 40, was raided in January 2013. They had gotten married in 2012, at the Sei Beduk Religious Affairs Office, in Riau islands. Angga carried papers stating she was male which the official in charge did not doubt. They had followed an express procedure, for which they paid 2 million rupiah (around US $200) in which it is not necessary to take the long route through the neighbourhood office. The couple settled in Ninies’s house and lived there initially without any problem, keeping to themselves. However, Angga did not socialize with other men as was expected of him and the neighbours felt justified in raiding the house of the couple. There they discovered that Angga was female; she was chased out of the house. Ninies was allowed to stay, but she fled with her partner. At present their whereabouts are unknown.5 The Ministry of Religious Affairs quickly announced that it would annul the marriage and that in order to prevent such things from happening again it would step up its regular pre-marriage counselling sessions.6

Two issues are striking in this case. In the first place the role of the neighbours who feel justified in raiding the couple’s house. In fact they are stimulated to do just that by the 2008 anti-pornography law, which stimulates communities to take the law into their own hands in issues involving sexual morality.

Secondly the ease with which Angga could pass as a man. Butch (male-identified lesbian) women in Indonesia can indeed quite easily pass as men: short hair, masculine clothes and a masculine swagger are generally enough to convince people that they deal with a man. Some butches are tempted to do just as Angga did and marry their partners. The danger is that they are found out and are charged with document fraud, which carries a maximum sentence of seven years, as we will see below. Sadly, Angga and Ninies are on the run now, and it is not clear how they will be able to survive. The Ardhanary Institute, an NGO that defends LBT people, has not been able to find them so far, and thus has not been able to help them.

Alterina Hofan, an Intersex or Transgender Husband?

Under the headline Alterina latest proof of transgender problems, the Jakarta Post of 14 May 2010 carried the story of Alterina Hofan (or Alter), the husband of Jane Hadipoespito, who was imprisoned on the charge of “identity fraud”.7 Other newspapers also reported on the case, with Vivanews of the same date carrying a photograph of the couple in happier days.8 Jane in a fluffy dress and with half-long hair looks up admiringly at her husband Alter, smart in a jacket, shirt and tie, short hair, square shoulders. The article specifies that Alter smokes heavily and has a baritone voice. Alter looks to all appearances a man and that is the assumption under which the pair married, their “truth”. Yet, at birth, Alter was classified a girl and only later diagnosed with Klinefelter syndrome, one of the intersex conditions presently recognised.

After operations for gynaecomastia and for hypospadias Alter was happy with his body, and changed the identity on his documents without going through a lengthy legal procedure.9 When Jane and he fell in love and married nothing seemed to impede their happiness. However Jane’s mother objected to the marriage and filed a case against her son-in-law for “document fraud” as the sex of his birth certificate didn’t match that mentioned on his wedding form. The police
originally detained him in the men’s prison of Cipinang in January 2010. Not trusting the Klinefelter diagnosis that Alter presented, the police carried out their own investigation and decided that Alter was a woman. In spite of his manly appearance, on 30 April 2010 they moved him to a cell of his own in the women’s prison of Rutan Pondok Bambu, awaiting his trial. Jane herself declared that she didn’t care how Alter was classified: “All I want is for my husband to be freed as soon as possible.” And added Alter: “I’m a real man, I can ejaculate. Sperm is getting out, just ask my wife if you don’t believe me.”

So far the discussion was waged in biomedical terms. If Alter was declared intersex, the confusion at birth was understandable. He was a “real man” and he would walk free. But if Alter was diagnosed as female and thus after the operations as a transsexual person, he should have received official permission to change his status. In both cases the sex on his birth certificate would have to be changed. In the Klinefelter case, this shouldn’t have caused many problems, but still a legal process was required. In the case of a “female” Alter undergoing sex change, the procedure would have been much lengthier, involving psychological testing. In that case, Alter would be called a transsexual person.

His defence team pursued a different line and called upon a member of the National Rights Commission to declare that Alter’s rights were violated under the International Covenant on Civil and Political Rights. The court accepted this argument and Alter was provisionally released on 31 May but still had to face trial. In October 2010, the prosecution demanded a sentence of five years in prison on the charge of “document fraud”. The prosecutor mentioned three aggravating circumstances. The accused had come up with all kinds of twisted arguments. Second, he had not shown remorse and third, the accused had denied the fraud. In November, Alter was acquitted from all charges on the ground that he had Klinefelter syndrome and thus, though he had tampered with his birth certificate, this could not be considered a crime in this case.

A number of issues can be gleaned from the newspaper reporting. The first issue is the use of (albeit conflicting) medical “proof” to substantiate the charges against Alter, or conversely to argue for his release. Though Klinefelter is diagnosed as a biological condition, pertaining to one’s sex, reporting focused on Alter as a transgender person. This confusion of terminology opens up a totally different discourse, that of human rights and prevailing notions of “normality”. The Indonesian Human Rights Commission took this a step further and declared that this case was a violation of Alter’s rights and referred to the International Covenant on Civil and Political Rights which was ratified by the Indonesian government in 2005. Josef Adi Prasetyo, the commissioner in charge of the case, declared that Alter “has the right to say he is a man”.

This position provides an excellent opportunity for a revolutionary development in the struggle for intersex, transgender, and transsexual people’s rights. However in the end, this line was not accepted by the court. Alter was seen as a “true man”, and adjusting one’s “wrong” birth certificate would simply mean that a perceived mistake was righted. The biomedical argument was in line with the legal verdict. Earlier, a legal expert from the University of Indonesia had explained this position.

In this whole procedure, multiple contradictory concepts were applied to the same
person. The police initially declared that Alter was a "true woman", so the prosecutor demanded a stiff prison term for document fraud. The intersex team stated he was a man born with an intersex condition, and a school friend declared that Alter always had been a tomboy, although he consented to wearing a school skirt.\(^{17}\) The association of the word "tomboy" with a butch person is very clear in Indonesia, where male-identified female-bodied persons in same-sex relations are often called "tomboi".\(^{18}\) Thus, Alter was variously classified as intersex, transsexual, and homosexual. The marriage between Alter and Jane, depending on which label was applied, would then be either a same-sex marriage, which is illegal, or a heterosexual marriage, which is accepted.

In this case, Alter was ultimately seen as an intersex person, so his birth certificate was wrong, for a Klinefelter person is usually classified as a man. Thus, Alter was not condemned for document fraud even though he didn't follow the required procedure. If, on the other hand, he would have been a biological female, the sex on his marriage paper would be "wrong", as he had not yet completed the whole court procedure to change his sex and he could have faced a hefty jail sentence (up to a maximum of seven years).

Plus, the marriage of Alter and Jane would have been nullified. This is what Jane's parents had wanted. In both cases Alter had to take sides: he could only be "man" or "woman" – classifying as intersex and marrying Jane on that ground was impossible.

The case of Alter then raises fundamental questions on how important it is to classify human beings as intersex, transsexual, transgender, or homosexual. All these terms at present refer to non-normatively gendered and sexed positions that carry various forms of stigma. The biomedical discourse has become dominant in juridical and even in religious circles. Human and sexual rights activists deploy a different set of discursive tools.

The cultural discourse on "sacred gender" which I will outline below produces yet again a different set of truth claims. Below I will focus on what is classified as "Indonesian tradition" on the grounds of which an always-already binary heterosexual normalcy is proclaimed. To illustrate my position I will discuss examples of gender variance in Asia in situations in which "sacred gender" was an established worldview. I will then return to the human/sexual rights discourse, which was deployed successfully to get Alter out of jail. But while Alter was saved by his intersex condition, Angga and Ninies have no such recourse.

**The Cultural Discourse on Gender Variance**

Social stigma has not always been associated with gender variance or intersex. In various Asian countries, pre-colonial people who inhabited a realm of gender and sexual liminality fulfilled certain religious roles. "Gender ambiguity", or "transvestism", depending on which concept was used by observers, has played a major role in rituals throughout Southeast Asia; there were reports of hermaphrodites, eunuchs, or transvestites who played important roles in courts and religious festivals, mediating between the world of gods and humans.\(^{19}\) In some cases "gender switching" only took place in a ritual context; in other cases, it exceeded the sphere of ritual. These people were known as transgendered, such as the *manang bali* of the Iban in Sarawak or the *bissu* among the Bugis in Sulawesi.\(^{20}\) It is difficult to guess in how many cases such stories referred to people with ambiguous genitalia, as the sources are
often unclear and as such a distinction may not always have played a determining role. It appears that gender liminal positions could be inhabited in various ways. Colonialism and the emergence of monotheistic religions have destroyed or eroded the importance of this so called “ritual transvestism”.\(^{21}\) Kathoey in Thailand, hijra in India, bissu in Bugis society, and warok in Ponorogo, East Java are remnants of what used to be a more widespread tradition.\(^{22}\) The religious context of the gender switching in the cases mentioned above has often been lost in the course of the intervening centuries.

This development refers to a process that Blackwood, following Andaya, more broadly calls the decline of “sacred gender”.\(^{23}\) Sacred gender is associated with a worldview in which gender is defined cosmologically in such a way that there is a direct link between sacred powers and (a third) sex/gender.\(^{24}\) Sacred gender more widely refers to cosmologies that “constitute gendered meanings and practices through sacred beliefs about the nature of the cosmos and the origins of humanity”.\(^{25}\) Origin myths frequently stress an original unity (a snake, or an egg) from which diverse beings originate. The Bugis myth about creation, La Galigo, speaks of originally “androgynous” deities that produce various sacred beings, including bissu.\(^{26}\) In a later form of creation the primordial unity is split, and female and male beings are created. These became the ancestors of the Bugis dynasties.\(^{27}\) Thus Bugis cosmology rests upon a primordial oneness, of which the bissu are a manifestation. Later, they are split into opposite genders. The bissu remain necessary to ensure the original oneness, through their participation in regular rituals.

Ardhanarishvari (also called Ardhanari) is another good example of this.\(^{28}\) This half-male, half-female Hindu deity combines male (right side, Siva) and female (left side, Shakti) characteristics and attributes. Originally from India, this god/dess is known in Indonesia as well. The National Museum in Jakarta has three statues of Ardhanarishvari in its central yard.\(^{29}\) In pre-Islamic Javanese epic court poetry, the so-called kakawin, Ardhanarishwari is mentioned in a tantric form of the yoga of love in which the divine union of Siva and Shakti creates the “seed of the world” (windu). This cosmic union provides both sexual gratification and the welfare of the land; it ensures abundance of life in general.\(^{30}\) This fusion of male and female in one form referred both to spiritual prowess and the physical enjoyment of love.

Colonialism with its strongly patriarchal gender division (or communism in the case of Siberia) and monotheistic religions such as Christianity and Islam weakened the sacred origins of gender, resting upon a unity that needed to be periodically reconfirmed. Gender came to rest on individual beings and lost its connection to the sacred world. Sexual bimorphism became fixed and bounded and gender relations divided in a binary and hierarchical way. These binary bodies didn’t allow any space for gender transgression as earlier cosmologies had. These processes have progressed unevenly and in some cases partially. The Sufi tradition which dominated early Islam in Java for instance was able to accommodate the old Javanese goddesses and transgender practices for a long time. The union of Siva with Shakti, his female consort, has led to Siva variously being seen as androgynous, hermaphroditic, bisexual, or ambiguous with respect to sex, gender or both.\(^{31}\) This seems to suggest that there might have reigned a climate of pluralism concerning sex and gender in several South and Southeast Asian societies, as evidenced...
by the many lingga-yoni (phallus rising from a vulva) statues found. Another indication of the importance and the recognition of androgynty is the spread of tantric cults in the region with their emphasis on the reconciliation of opposing forces. The predominantly Hindu island of Bali has remnants of these belief systems, with Siva, the prime deity, being considered a hermaphrodite, or wandu. Interestingly, the Javanese word wandu is still used for an effeminate man who engages in sex with other men. Thus it appears that in several Asian contexts, transgendered ritual specialists symbolized an original unity between heaven and earth and could communicate with the spiritual world in order to ensure the fertility of the land and the prosperity of its people.

**Bissu**

A classic example of gender pluralism which is thriving today in Indonesia is the case of the Bugis. Their gender system is not based on a binary division. Indeed, five genders can be distinguished, male, female, calabai, calalai, and bissu. Calabai are male-bodied persons who dress like women, perform women’s roles, and often have male partners. They are still highly visible in society and perform various functions in marriage ceremonies. Calalai are much rarer and much less visible. They are female-bodied and may live with their woman partners and fulfill male roles. They don’t perform in ceremonies. Although some calabai become bissu, this latter category must be regarded on its own. A bissu has a much more important ritual function. They used to be the keepers of the sacred royal ornaments and in that function were seen to be bisexual, as these ornaments required communion with the other sex, and the sex of the ornament was generally not known. The bissu is thus regarded as the “hermaphroditic partner of the ornament”. The bissu fulfilled various ritual roles, for instance in ceremonies related to marriage and childbirth, often entering into a trance. Indeed, these were the functions also described in the Bugis origin myth, La Galigo. One became a bissu through a supernatural calling. Both high and low placed persons could become bissu. In the spirit world, a bissu had two partners, a woman and a man. In Pelras there is no mention of a physical condition, other than psychosomatic symptoms underlying the calling. Kroef used the terms androgynty, bisexuality, and hermaphroditism indiscriminately without referring to genitalia. He describes bissu being dressed half male and half female for ritual purposes, similar to the Ardhanarishvari concept.

The ambiguous gender and sexual status of the bissu was and still is highly appreciated. As Andaya writes, “...in their ritual roles the bissu assume a symbolic androgynous state that re-establishes primordial conditions(...) Performed by the bissu, such rituals are indispensible in ensuring the well being and prosperity of the ruler and the community.”

The bissu tradition experiences a revival, with the current process of regional autonomy in Indonesia. To justify its claims for autonomy from the national state often local culture is invoked, with the bissu symbolizing Bugis authenticity.

There are more examples of gender variance, variously called androgynty, hermaphroditism, or bisexuality in Indonesia. Schärer for instance uses the term “hermaphroditite” to refer to the basir or balian of the Ngayu Dayak in Kalimantan. These balian are powerful healers and diviners; they are male-bodied and dress like women.

In other parts of Southeast Asia, we find similar stories. In Burma transgendered fe-
male bodied ritual specialists, the nat kadaw, ("wives of the spirits"), played important roles in local ceremonies, and were even reported to assist in the war against the invading British.43

Apart from Bugis society, in Indonesia, ritual transvestism is generally in decline due to political processes and the growing influence of hardliner monotheistic groups who periodically want to purify Indonesian society from pre-Islamic and pre-colonial influences. A major event in this regard was the cleansing of the Indonesian society from all traces of communist and socialist influence, in the political context of the creeping coup of General Suharto in 1965-1966.44 In order to discredit President Sukarno, he wiped out the communist party and all its associations, including the cultural association.45 Transgender practices for instance in reog and kethoprak groups became suspect, their adherents murdered or imprisoned, their practices banned.46 The space for gender pluralism became constricted; people were encouraged to give up the older rituals and beliefs and to conform to a stricter form of Islam based on a binary sex/gender model. If Alter had been born in Bugis society, or elsewhere, where “ritual transvestism” would still be important, he would not have been punished, but lauded and seen as embodying sacred powers.

The Rights Discourse

Even if sacred gender is not revisited in its earlier manifestations, new discourses of gender and sexual multiplicity are being advanced by the many sexual rights groups springing up all over Asia. Their voices are as yet not clearly heard everywhere. In fact, conservative discourses, including those of heteronormative feminists, do not welcome their contribution to the rights discourses. Yet when sexual rights activists manage to link up with human rights activists, there is a higher possibility of the acceptance of gender variance.47

The present wave of sexual rights activism has its roots in the struggles for the legalisation of homosexuality and abortion transnationally. The successful UN international conferences on women (Nairobi 1985; Beijing 1995) and on population (Cairo 1994) provided a major impetus. Major international instruments, going back to the 1948 Universal Declaration of Human Rights, provide a critical framework within which to locate struggles for the acceptance of gender variance. These include the already mentioned International Covenant on Civil and Political Rights (1976), which enabled Alter to achieve his release from jail, pending his trial (although it didn't help lift the charges against him). Similarly, the 1979 Convention for the Elimination of all Forms of Discrimination against Women is an important instrument. Debates on population growth and the HIV epidemics are other factors, which resulted in almost all UN agencies discussing several aspects related to sexuality.48

At an international seminar of many legal experts that took place in Yogyakarta, Indonesia, at Gadjah Mada University, from 6 to 9 November 2006, the so-called Yogyakarta Principles were drafted. These are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity and they affirm binding international legal standards for all states to comply. The Yogyakarta Principles address a broad range of human rights standards and their application to the issues of sexual orientation and gender identity. As each principle is accompanied by detailed recommendations to the states, they are a very useful tool for sexual rights activists.
National human rights institutions, the media, non-governmental organisations, and other parties are called upon to affirm these internationally binding principles. If these principles would be consistently translated into national laws, gender and sexual pluralism would be a legitimate category. However, conservative social and religious groups strongly oppose the implementation of international principles that would guarantee the rights of people living non-normative lives. Basically, those fighting for sexual human rights advocate the right to engage in safe sex between consenting adults, and the rights to information and association.

If the Indonesian judicial system would uphold this right, the marriage of Alter and Jane would never have been criminalised and Alter would not have had to spend many months in jail. Neither would Angga and Ninies have to be on the run at the moment. For although the Yogyakarta Principles do not explicitly call for so called “gay marriage”, the principle of marriage equality for all, as stipulated in the Indonesian Constitution, would imply that no category of people would be excluded.

A related issue is whose fake ID cards are seen to be related to punishable offenses. Men marrying polygynously are known to have false ID cards made. On each of them, one of the wives is stated to be “the” wife. This seems to happen particularly if the first wife is not informed of her husband’s marrying again. Although first wives have to give their consent to their husbands’ request to marry another wife, according to the 1974 Marriage Law, in practice this regulation is often ignored and men marry their following wife or wives in a religious ceremony (so they don’t contract a civil marriage, meaning that the new wife and her offspring have no rights at all), without the knowledge of the first wife. The introduction of electronic IDs complicated the procurement of these fake IDs, but polygamous husbands still tried to have fake e-IDs made at such a large scale (for instance by producing photographs with false beards) that the ministry feared the whole system would collapse. To my knowledge, none of the owners of these fraudulent IDs has ever been charged with document fraud as Alter was and with which Angga is threatened if s/he ever gets caught.

**Discursive Contestations**

At present, the dominance of the bio-medical discourse results in its appropriation of a large discursive space. In discussions on assigning a body and a gender to persons born with atypical genitalia, often the “wellbeing” of the persons concerned takes central stage. This notion of “wellbeing” is rooted in a heteronormative model of society that may ultimately limit the choices of the people concerned.

In societies which made the transition from a model based on sacred gender with an original sacred unity, the ritual specialists who used to enact the ceremonies to restore the communication between gods and humans and embodied this unity have either disappeared or their importance has been undermined. With it, the possibility for acceptance of transgender people and for children born with ambiguous genitalia has been eroded. The *bissu* tradition is going through a revival in Bugis society, but elsewhere in Indonesia and Southeast Asia at large, tolerance for sexual and gender variance is on the decline.

What relevance does this cultural discourse have on discussions on what is called “Indonesian culture”? It is clear that there cannot be a return to the cosmological system of
sacred gender. Yet the historical and mythical possibility of sacred gender, with its emphasis on gender variance including intersex persons, might stir the imagination towards a society in which the present binary forms of heteronormativity will decline in importance and social stigma related to gender pluralism reduced. To achieve this, a critical dialogue with major social actors, including the religious establishment and human rights groups is necessary. In Indonesia, the present climate is unfortunately not very conducive. There are growing currents of conservative Islam in society, which for instance strongly support the Anti-Pornography law victimising women and criminalising traditional customs based on non-binary and non-heteronormative practices. It is reported that Muslim militias such as the FPI (Muslim Defenders' Front) feel emboldened by this law to harass gay men, lesbian women, and transgenders. Recently a religious group, the Forum of Muslim Schools for East Java, prohibited waria (male-bodied transgenders) to cut the hair of women. Another hardliner group, the FPI, dispersed a beauty contest for waria in Makassar, the home town of the Bugis.

The rights discourse seems to offer most scope for acceptance of gender pluralism. However, it is not always clear whose rights are being defended. What if parents insist on their “right” to have a “normal” child? Religious specialists have also joined in the rights choir. The human rights discourse is a strongly contested issue in Indonesia, hardliner Muslim groups providing their own interpretations of these rights. Recently the major Muslim militia, the FPI, has arrogated to themselves the right to declare what is “normal”. In the first months of 2010, several incidents occurred in one of which FPI members forcibly evicted gays and lesbians from a conference and interrupted a human rights training of transgenders (on 30 April 2010). Their discourse is based on the Qur’an and the hadith, the heritage of the Prophet Muhammad. Defending their action to disband a human rights training of transgender people, they declared that: “Islam has a place for people who naturally have double sexual organs but not for those who intentionally exchange their given gender.” So in this interpretation, Alter’s Klinefelter diagnosis would have won him the acceptance of the hardliner Muslim community, but Angga would never be accepted.

Clerics also use biological arguments to strengthen their case that sexual dimorphism is the preferred state of being. The secretary of the conservative Ulama council (MUI), Ahmad Rofiq, judged that the “tool with which one pees” determines in which sexual category a person must be placed. Progressive Muslim scholars in Indonesia, however, such as Prof. Musdah Mulia, use a different argumentation to maintain that there is a place in Islam for transgenders, intersex persons, and for gay men or lesbian women. Islam is not concerned with sexual orientation but only with sexual behaviour, she argues. The major criterion is that this behaviour cannot be violent or irresponsible. Both hetero- and homosexual persons are condemned if they engage in violent or cruel sexual acts. In a humanist interpretation of Islam, based on the central principles of equality, wisdom, and compassion there is no place for discrimination and hatred. Yet even this liberal interpretation of Islam leaves little space for a plurality of gender and sexual positions, though Mulia mentions that the literature on the Muslim fiqh mentions 4 gender variants: women, men, khuns (effeminate men) and mukhannit or mukhannat (manly women). Another feminist Muslim scholar, however,
Dr Suad Joseph, in her contribution to the *Encyclopedia of Women in Islamic Cultures*, translates *khuns* as intersex, and *mukan-nath* as bisexual or effeminate.\textsuperscript{61}

**Conclusion**

Only when both sex and gender are seen as continua (which do not necessarily run parallel to each other), we can hope for the acceptance of people with non-normative bodies, desires, or social roles. The discursive contestations between biomedical and conservative religious and political leaders on the one hand and feminists, gay and lesbian rights activists and human rights defenders on the other, centres around the definition of what is “normal” gender, a “normally” sexed body and “normal” sex. In this process, gender and other forms of pluralism are under threat and a “history” is being created from which references to sacred gender and gender pluralism have been removed. The early modern ritual centrality of goddesses and transgendered people has faded away, surviving only in very small pockets of the world.

The arena in which these contestations are being enacted has changed. It is no longer the spiritual world of pre-modern times; the struggle takes place in the streets with thugs like the FPI, in the mosques with its religious discourses, in which medical arguments flourish beside religious ones, the court rooms, and the media. Alter was the subject of an elaborate TV programme on 23 May 2010, in which the old medical argument, that he was sick, also surfaced. Angga and Ninies received a lot of media attention; nobody protested to their house being raided, their privacy being invaded and to them have been chased out of their house.

Sexual and women’s rights activists, Muslim militias, human rights advocates, religious scholars, and biomedical scholars all engage in this fierce debate on who has the right to define what is “normal” in gender and sexuality. In the process, the broad liminal space in which transpeople moved is carved up into neatly defined categories, each with their own medical codes and legal instruments. Political, cultural, religious, and biomedical developments have led to the gradual closing down of the liminal spaces in which transgender people, intersex persons, or those attracted to people of their own gender or sex could move. The consequences are an urge to define and categorise that which used to be diffuse, liminal, and at times sacred; the medicalisation of those persons with atypical genitalia; and the stigmatisation of those who insist on an in-between space, or who refuse to accept the binary sex-gender model. Intersex persons are singled out for treatment to “normalise” them. People who desire to marry their same-sex partner are denied a right that is constitutionally guaranteed to all Indonesians.

A coalition of human rights defenders, sexual rights activists, and advocates of Asia’s cultural heritage of tolerance for non-normative persons has the potential to stop the advance of conservative bio-medical and hardliner religious thinking that is now sweeping over many parts of Asia and which closes down the liminal spaces that once existed. Progressive medical personnel, who do not want to be “moral guardians” and who don’t advocate surgery when none is needed for health reasons, can help.

In the court and in the hospitals, intersex conditions are separated from transgender or transsexual persons, as intersex is seen to be located in biology. Yet the decision to operate is based on a child’s gender identity. If sex and gender cannot be separated so clearly, they should be seen as overlapping.
Consequently, the clear separation between intersex and transgender/transsexual, which was postulated for Alter’s case, cannot be upheld. There should be more space for the liminal, the in-between, and the non-heteronormative. The issue is not so much the confusion in relation to the diagnosis of Alter, but the constricted space in which he had to move. Alter and Jane love each other, as do Angga and Ninies. Why should it matter to others whether Alter is classified as inter- or as transsexual, or whether Angga sees himself as a man, though being born female? Their bodies may be unruly, or their documents subversive, but their love is genuine. Indonesia’s Constitution is welcome: all (adult) citizens are allowed to form a family. This right should be upheld in other laws as well – the Marriage Law in the first place. This is in line with Indonesia’s tradition of gender pluralism – a heritage Indonesia should be proud of.

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3 See, for instance, the worried insistence of Taufan Eko Nugroho Rotosariko, Chair of the Global Youth Forum held in Bali in December 2012, that he would not allow the discussion of same-sex marriage at that Forum. The other delegates had to respect Indonesian culture, he insisted. (By Rohmat. Okezone news. Ada issue aborsi & perkawinan akan dilegalikan? 06 December 2012.)

4 See Wieringa, S.E., “Gender harmony and women’s rights: the passionate aesthetics of heteronormativity in post-reformasi Indonesia”, Mimeo, University of Amsterdam, 2013.

5 The case got wide media coverage. (See, for instance, AFP, “Lesbians chased from Indonesian home for ‘marrying’”, InSing.com, 17 January 2013.)

6 Taufik Budi, “Kemenag akan ajukan pembatalan pernikahan sejenis”, Okezonenews, 10 January 2013.


8 Maryadie, Lutfi Dwi Putji Astuti, Mutia Nugraheni; and Eko Priliawito, “Alterina with two sexes, a matter of the law or fate?”, VIVAnews, 14 May 2010.

9 This is confirmed in a letter to me by Prof. Dr Sultana Faradz, head of the intersex clinic of the Kariadi hospital in Semarang, dated 12 June 2010. Gynaecomastia means development of breasts in a male; hypospadias means that the opening of the urethra is located on the lower side of the penis, rather than at the tip.

10 The police carried out a DNA investigation, which apparently did not give this information. As Prof. Faradz explained (above note 9), the police laboratory used a buccal smear (so that is not a DNA test), which cannot detect the Y chromosome. Only a chromosome analysis can give the correct diagnosis.

11 See above, note 7.

13 See above, note 7. The article did not specify which Covenant articles were invoked. Articles 26 (freedom from discrimination) might apply.


17 Siswanto, “Semasa SMS Alter Dikenal Cewek Tomboy” (During high school days Alter was known to be a tomboy), VIVAnews, 9 May 2010.


23 See Blackwood, above note 21.

24 See Andaya, L.Y., above note 19, p. 29.

25 See Blackwood, above note 21, p. 857.

26 The term “androgyrous” was often used conflating a terminology for hermaphroditism and homosexuality. (See Boswell quoted in Herdt, G, “Introduction: Third Sexes and Third Genders”, in Herdt G. (ed.), Third Sex Third Gender: Beyond Sexual Dimorphism in Culture and History, Zone Books, 1993.) In this case, it probably referred to hermaphroditism only.


28 See Pande, above note 22.

29 The attraction the symbol of Ardhanarishvara still has for transgender and lesbian persons is demonstrated by the establishment of the Ardhanari Institute in Jakarta.

30 This is evidenced by inscriptions from the 14th century Javanese realm of Majapahit, which was ruled at the time by queen Tribhuvana. (See Creese, H., Women of the Kakawin World: Marriage and Sexuality in the Indic Courts of Java and Bali, Sharpe, 2004, p. 204.)

31 See Peletz, above note 19, p. 24.

32 See also O’Flaherty, W.D., Women, Androgyne and Other Mythical Beasts, University of Chicago Press, 1980.

34 The same goes for the originally Batawi word *banci*. A manly woman also used to be called a *banci* or *wandu*, but both terms are at present hardly used to refer to female-bodied male-identified persons.

35 The Bugis are an ethnic group in South Sulawesi.

36 Other Asian ethnic groups might have even more genders in pre-modern times. The Chukchi of Siberia for instance counted nine genders, according to their ethnographer Bogoras who lived among them in 1890-1908.

37 See Graham, above note 27; and Pelras, *ibid.*

38 See Chabot quoted in Kroef, above note 20.

39 See Pelras, above note 27, p. 97.

40 See Andaya, L.Y., above note 19, p. 36.

41 See Graham, above note 27.

42 See Blackwood, above note 21.

43 See Peletz, above note 19, p. 64 ff.


45 In 2008, I witnessed a Kuda Lumping performance in Malang, East Java. It is a trance dance, in which some dancers cross-dress; it used to be very popular. The group hardly performs any more after their reputation was linked to communism in the heyday of the anti-communist genocide perpetrated by General Suharto. (See Wieringa, S.E., “The Birth of the New Order State in Indonesia: Sexual Politics and Nationalism”, *Journal of Women’s History*, 15 (1): Spring 2003, pp. 70-92.)

46 *Kethoprak* is a drama form developed in Central Java around the beginning of the 20th century. Their repertoire ranges from Javanese folk stories to Indian epics. In East Java, the *ludrug* theatre groups depicted stories from daily life. In both cases, cross-dressing actors participated. Both were discredited after 1965. On *reog*, see Boellstorff, above note 22; and Wilson I., “*Reog Ponorogo: Spirituality, Sexuality and Power in a Javanese Performance Tradition*,” in *Intersections: Gender, History and Culture in the Asian Context*, 1999.


50 Saragih, B.T., “Rampant polygamy leads to fraudulent e-IDs: Minister”, *The Jakarta Post*, 8 January 2013.


52 According to Agustina, Islam approves of operations on people with ambiguous genitalia, as it is done for purposes of healing, while it is not allowed in the case of transsexuals, as those operations are related to sexual desire. (See Agustina, N.N., *Penentuan Jenis Kelamin Penderita Ambiguous Genitalia dengan Androgen Insensitivity Syndrome Menurut Islam*, Faculty of Medical Sciences, Diponegoro University, 2007, Mimeo 37.)

53 See Katjasungkana, above note 2.

54 Author’s conversations with various lesbian and gay activists in Indonesia, members of Ardhanary Institute, Institute Pelangi, and others.
55  Mazaya, H., “Forum Pesantren: waria potong rambut wanita haram” (It is prohibited for waria to cut women’s hair), Arrahmah.com, 24 May 2010.
57  4th Asia meeting of the International Lesbian and Gay Association, scheduled for 26-28 April 2010 in Surabaya, East Java. At the same time the secretariat of the organising group, Gaya Nusantara, was closed down by the FPI, who wrote on its walls that lesbians and gays were “moral terrorists”. (See Jajeli, R., “Office of Gaya Nusantara closed down and called ‘moral terrorist’”, detikSurabaya, 26 March 2010.)
58  This was said by FPI leader Habib Idrus Al Ghodri to the police of Depok, who interrogated the leaders of the FPI after their raid on the transgender group. (See Jakarta Post, “Raid of Transgender workshop necessary: FPI”, 5 May 2010.)
59  Rofiudin, “MUI tolak perkawinan waria” (MUI prohibits waria to marry), Tempo.co Interaktif, 17 May 2010.
In Pursuit of Marriage Equality in Ireland: A Narrative and Theoretical Reflection

Katherine Zappone

1. Kick-starting the Irish Debate on Marriage Equality

With the introduction of a civil union law in 1989, Denmark became the first country in the world to recognise legally same-sex relationships. Nordic countries followed suit with similar laws and a global debate ensued about same-sex relationship recognition. The Netherlands was the first country to make civil marriage available to same-sex couples in April 2001. While the UK extended the Civil Partnership Act 2004 to Northern Ireland in 2005, the Republic of Ireland continued to ignore same-sex relationships in its laws. When my spouse, Dr. Ann Louise Gilligan, and I sought to have our Canadian marriage recognised through the Irish courts we sprung to international attention and kick-started the domestic debate in Ireland on the legal recognition of same-sex relationships.

Ann Louise, an Irish citizen, and I have shared a partnership for the past 30 years. We met in Boston College when we both started a PhD programme together. She came from Dublin and I came from New York City, though I am originally from Seattle. A year after we met, in 1982, we gathered a small group of friends to celebrate with us a life-partnership ceremony. That day we found our voice to proclaim a promise of fidelity and life-long cherishing of each other into the future. We promised to share our dreams, our fears, our financial resources, our accomplishments and our failures. We committed ourselves to each other and we discovered unimaginable joy.

We moved to Ireland in 1983 where Ann Louise re-assumed her teaching position at Dublin City University. In 1995 I had the privilege of becoming an Irish citizen and so now hold dual USA and Irish citizenship. The European and global debate on relationship recognition had not reached Ireland at this stage. This lack of debate was a part of the context within which we later made the decision to take what was to become a landmark legal case for the recognition of our relationship.

2. Ireland and Homosexuality

Ireland is a constitutional democracy based on its 1937 constitution. This constitution was reflective of the conservative Catholic mind-set of its time and has undergone relevantly little reform since it came into force. In 1977, Senator David Norris initiated a case to decriminalise homosexuality. At the time, homosexual relations between men were prohibited by law. Norris argued that his constitutional right to privacy was violated. In 1980 the Irish High Court ruled against him. In 1983, the Supreme Court, by a three-to-two majority, affirmed that the laws did not contravene the Constitution, having regard to the Christian nature of the state, the immorality of the deliberate prac-
tice of homosexuality, the damage that such practices cause to the health of citizens and the potential harm to the institution of marriage.\(^5\) Senator Norris, with the assistance of future Irish President, Mary Robinson (his senior counsel at the time) then took the case to the European Court of Human Rights. Norris won the case in 1988 with a judgment that Irish laws contravened Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (the right to respect for private and family life).\(^6\) It took five years – largely through the campaigning of a national non-governmental organisation called Gay and Lesbian Equality Network (GLEN) – to get the laws changed to decriminalise homosexual behaviour in 1993.\(^7\)

Coming to a more recent context, Ireland prides itself on its robust equality legislation introduced in the late 1990s and early twenty-first century. In light of effective activity within the civic sphere (lobbying and campaigning by a number of equality groups) and various government-sponsored reports, Ireland enacted comprehensive equality legislation. This focused on equal pay; protection in employment and against harassment; and protection for the equal provision of goods, services, accommodation and education across nine grounds: gender, marital status, family status, sexual orientation, religious belief, age, race, disability and membership of the traveller community.\(^8\)

In 1998 the Good Friday Agreement was signed in Belfast. This established the Northern Ireland Assembly with devolved legislative powers and a power-sharing executive. Under the agreement national human rights institutions were established in both Northern Ireland and the Republic.\(^9\) The government in the Republic is obliged to promote and protect human rights as laid out in the Irish Constitution as well as those laid out in international treaties that the Irish state is party to. Under the Agreement the government in the Republic is also obliged to take steps to further strengthen the protection of human rights within its jurisdiction. The Agreement stipulates that any measures brought forward “would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.\(^10\)

When civil unions were first mooted in the UK and Northern Ireland, at the turn of the millennium, the debate had little impact on discourse in the Republic. Few questions were raised around equivalence of rights south of the border in the context of the Good Friday Agreement.

The explicit issue of partnership rights for same-sex couples first came onto the political agenda with the publication of a report by Ireland’s statutory body, the Equality Authority.\(^11\) The Equality Authority gathered a group of civil servants and representatives of NGOs to produce a report which argued that Irish laws should be amended to extend partnership rights to same-sex couples. This was followed by another report of the National Economic and Social Forum (established by statute) of civil servants, NGOs and politicians, which came to similar conclusions and made similar recommendations.\(^12\) However, neither report went as far as to recommend directly any form of legal recognition of partnership between same-sex couples. While the National Economic and Social Forum’s report did argue that extending rights to same-sex couples such as the right to nominate a partner, pension and next of kin rights would have a profound impact on achieving equality, it also said that:

“It was the strong view of the Team that State recognition of these partnerships was not essential for the Government to make
progress in relation to implementing greater equality for LGB people.”

3. Taking a Case for Marriage Equality

This was the context and backdrop, then, against which Ann Louise and I began to contemplate the possibility of taking a legal case to have our relationship recognised. While we were both active within the civic sphere in relation to many human rights issues, especially those related to the poverty and economic inequalities in the lives of Irish people, we had no involvement in LGBT (Lesbian, Gay, Bisexual, Transgender) rights work. The personal origins of our case began late in 2001 – after 19 years of life-partnership – when an impending visit to Chile prompted a visit to our solicitor to update our wills. We jointly owned our home, and we also jointly owned another property together. We thought it would be wise to organise our affairs just in case anything happened to us during our time abroad. What we discovered that day was that, unlike married couples who jointly own property, we could not will half of our property to the other upon death of one of us without major capital acquisition taxation implications. Effectively, the surviving partner would have to sell the property in order to pay the tax; what we thought was financial security was clearly not.

On that day we started on a long road through the valley of fear. One of the primary reasons that we eventually decided to take a case was because of the public silence about partnership recognition between same-sex couples in Ireland. If one were to review the Irish Times newspaper archives today, one would discover that the first time there was any mention of rights for Irish same-sex couples was in December 2002. The editorial commented on the fact that the British government intended to extend to gay couples the property and inheritance rights afforded to married couples and that the Equality Authority’s group had endorsed similar changes in the law.

Over the next two years you could count on one hand the number of articles published in that same newspaper on this topic. With the knowledge we had about the very tenuous relationship between recommendations in policy documents and subsequent, substantive change, we discerned that little was going to happen unless there was a grass-roots mobilisation to bring pressure to bear on lawmakers or some kind of legal challenge within the courts. This is how things had been changed in other jurisdictions and so we assessed that the same would be true for Ireland. In April 2002, we took a decision to find a path to legalise our life-partnership and wrote to the Equality Authority to see if they could help us to discern what might be the best possible route. In the meantime I met a couple of times with members of GLEN who were working on a bill for “domestic partnership” legislation that they hoped the independent senator, David Norris, would bring into our parliament. Unfortunately the bill in question read more like a proposal for a business contract between two people who co-habit, something which did not at all reflect the nature of our life-partnership, nor did there appear to be any mobilisation behind the effort. Further, Norris’ independence as a Senator – as distinct from being a member of government – did not place him in a strong position to get such a bill enacted. Consequently, Ann Louise and I decided to form a legal team in 2002 and in July of 2003 we decided to take a constitutional case. About a week later the miraculous possibility opened up that we could marry in British Columbia, Canada. At the time it was the only place in the world (apart from two other Canadian provinces) where same-sex couples
could marry without being citizens or residents. So in September 2003 we married each other in the presence of our American and Irish families in the great country of Canada with its Charter of Human Rights and Fundamental Freedoms.

Our decision to take a legal case to have our marriage recognised in Ireland was a multifaceted one. We decided to go to court to seek justice for ourselves as is our right to do so within a democracy. The Irish Constitution states that “all the powers of government, legislative, executive, and judicial, derive, under God, from the people”, and proclaims further that “[j]ustice shall be administered in courts established by law by judges appointed”. At a personal level we wanted to ensure that our fundamental rights are protected in the same way as other citizens. The courts structure is there precisely to provide citizens with this way of practicing democracy.

Our senior counsel informed us that the Irish Constitution is not “permafrost” in the period of 1937, when it was written, and that it is a “living document” that requires re-interpretation as society changes and evolves over time. We asked ourselves, how is this foundational document to maintain its life, if “we the people” do not engage with it? We went to court in 2003 because we felt there was a lack of civic and statutory activity and because we believed that the courts played a crucial role in the protection of minorities. We also held an ethical vision that combines a commitment to equality (a substantive, not “incremental” notion), freedom, liberty and love.

Marriage, for us, is not simply about a basket of rights, responsibilities and financial benefits that come in the wake of such a profound life decision. While these are extremely significant, they are not the full sum and substance of marriage. We married each other because we wanted to bind ourselves in law, as well as in love, to receive societal support for our commitment and the generativity that flows from it. We married each other because in that one act we were able to exercise our human freedom for the single most important choice of our lives. A psychic well-being accrues when oppression and prejudice lift. That is why we are taking a court case, for ourselves, as well as for others.

We believed that interplay between the judicial, civic and legislative processes in Ireland would have a significant impact on moving the issue forward. In going to court, the fact of our marriage influenced our legal strategy. Instead of seeking a marriage license, we simply wrote to the Irish Revenue Commissioners to ask for a change in our marital status. When they refused (within a very polite letter that addressed us “dear ladies”!) we sought and were granted a judicial review in November 2004, with public coverage both nationally and internationally. That was when the public debate in Ireland ensued. We went to court in October 2006, and in December we lost the case. We also lost our costs because Justice Dunne deemed there to be no exceptional circumstances to justify an order for costs against the state.

Our primary legal arguments included that homosexual identity is a normal way of being human and that as such we have a human right to marry the person we choose to love. We argued that this right is implicit within the Irish Constitution and that the Constitution, which does not define marriage as between a man and a woman, also guarantees us equality before the law. We were of the view that the Constitution could be re-interpreted to recognise our Canadian marriage, otherwise our human rights are not protect-
ed and we are being discriminated against because of our sexual identity.

The High Court ruled against us, finding that while marriage is not defined within the Constitution it is understood to refer to marriage between people of the opposite sex and that this understanding has been reinforced in recent judgments of the Irish courts. Justice Dunne did not engage with the discrimination argument and expressed her concern for the “welfare of the children”, thereby justifying that the state take a cautious approach on the issue. The Court found insufficient evidence of any “emerging consensus” which would support displacement of the opposite sex rule and it pointed to the limited number of jurisdictions in which the ban on marriage for same-sex couples had been lifted. In particular, Justice Dunne took the definition of marriage contained in Ireland’s Civil Registration Act 2004 (CRA 2004) which defines marriage as being between a man and a woman as an indication of the “prevailing view” as to the definition of marriage.

It was only after we received permission to take our case that the CRA 2004, which defines marriage as being between a man and a woman, was quietly passed by parliament. The effective ban on marriage equality within this piece of legislation was added by way of a last minute amendment that was not debated in either house of parliament nor did it appear to come to the notice of NGOs working in the equality sector.

The High Court judgment in our case established that the Constitution does not require marriage to be opened to same-sex couples and suggests that the appropriate avenue of reform lies with the legislature which had expressed its will in the CRA 2004. The Court never addressed the question of whether the Constitution excludes the possibility of marriage equality through legislative reform.

Irish Constitutional lawyer, Dr. Conor O’Mahony, posits that the High Court, in our case, effectively reversed the established order of constitutional interpretation. Justice Dunne had accepted that the Constitution is a “living” document and that it should evolve in light of societal change. O’Mahony points out that legislation passed by parliament attracts a presumption of constitutionality but that the Constitution must be interpreted first and the legislation assessed against this interpretation. In our case O’Mahony suggests that the Court subverted this supremacy of laws and held that the constitutional definition could not be extended because of how the legislature defined marriage as being between a man and a woman in the CRA 2004. The Minister for Justice of the time, Brian Lenihan, commented to media that the government could not legislate for marriage for same-sex couples as the legal advice they had received from the Attorney General (the government’s legal advisor) was that any such legislation would be unconstitutional. The Minister also stated that, based on this legal advice, a constitutional referendum would be required to provide for marriage equality and further expressed his view that holding such a “divisive” referendum would be unsuccessful. Therefore, the government refused to hold a supposedly necessary referendum and the courts held that the legislature had expressed the will of the people through legislation which had never even entertained the possibility of marriage equality in its drafting due to the supposed ban. In the absence of leadership from the political realm and with undue deference to the legislature from the courts, where did that leave the question of marriage equality? It seems the answer was very firmly: “Catch 22”.
4. Advocacy Activity for Marriage Equality

Enormous activity has taken place in the last seven years, since we started the case. Soon after we received permission to take the case, an advocacy group, the KAL Initiative, was formed to build public support for the right to marriage for same-sex couples. The then Minister for Justice, Michael McDowell, established an expert group to outline to the state the various options to legalise “domestic partnerships”. This expert group explored various forms of legal recognition for opposite-sex, same-sex and non-conjugal relationships. The group examined the question of civil marriage for same-sex couples as well as a limited civil partnership scheme and a full civil partnership scheme that would be equivalent to marriage. The group was of the view that civil marriage may be vulnerable to constitutional challenge and stated that judgment was awaited in our case. However, the group’s report went on to state that:

“The introduction of civil marriage for same-sex couples would achieve equality of status with opposite-sex couples and such recognition that would underpin a wider equality for gay and lesbian people.”

During this same period (after we had pleaded our case and before judgment) one of the opposition parties put forward a limited civil union bill which was rejected by the government. In each case of discussion of options for same-sex couples, the government has argued, on the basis of advice from the Attorney General, that marriage for same-sex couples is unconstitutional, even though this has not been determined by the Supreme Court.

After our loss in the High Court, the KAL Initiative evolved into the advocacy group Marriage Equality, which has been building public awareness and acceptance for civil marriage for same-sex couples. A group of younger citizens formed LGBT Noise, and other civic groups are participating in the civic debate – all advocating that marriage is the “full equality” option, though some hold the view that “incremental steps” towards equality, in the form of a civil partnership scheme, were better than none at all.

5. Civil Partnership in Ireland

Central to incremental change was the introduction of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (CPCROCA 2010). Though the measure rightly attracted criticism from within the LGBT community for being inadequate and segregationist, it became law with cross-party support in the Irish Parliament. The CPCROCA 2010 provides for a civil partnership registration scheme for same-sex couples only, as well as a presumptive scheme for cohabitants which can be for either same-sex or opposite-sex couples. It extends a number of rights and duties to same-sex couples including taxation, succession and immigration. It further provides for a redress scheme for “qualified cohabitants” (those who have lived together for three years) to claim from the estate of the deceased partner or for the economically dependent cohabitant to claim maintenance, accommodation and pension rights when the relationship breaks down. While providing for a number of significant rights, the civil partnership envisaged under the CPCROCA 2010 is not equivalent to civil marriage. An audit conducted by Marriage Equality found that there are over 169 differences between the rights available in civil partnership and those accruing in civil marriage (excluding constitutional rights, caselaw and social welfare legislation).

The CPCROCA 2010 provides for dissolution of a civil partnership but there is a lower
threshold for dissolution than there is for divorce in the case of civil marriage. Married couples are required to wait for four years in order to divorce whereas civil partners must wait for only two years. This distinction is arguably indicative of the greater value the state places on the institution of marriage compared with civil partnership.

The CPCROCA 2010 creates a new designation for same-sex couples’ family homes, calling them “shared homes”. The denial of the term “family home” means that same-sex families are not brought within the protection of the Family Home Protection Act which prevents the sale, mortgage or re-mortgage of a property that is defined as a “family home”.33 The definition of a dependent child extends beyond biological or legally adopted children, and includes non-biological children, “where one spouse has knowingly treated a child as a member of the family”.34 Despite this existing broad definition, dependent children in LGBT families are omitted from such protections under the CPCROCA 2010.35 This differentiation is rooted in the fact that “family” is defined under the Irish Constitution as being based on marriage; therefore a civil partnership is excluded from the constitutional protections afforded to the marital family.36

There is little to no provision for same-sex couples with children under the CPCROCA 2010. Joint adoption is not available to same-sex couples in Ireland and guardianship cannot be extended to a non-biological parent. Although same-sex couples cannot apply to adopt jointly, a single LGBT person may apply to be considered as an adoptive parent. The Minister for Justice, Alan Shatter, recently indicated that his department was working on legislation to address the rights of children and parents in separate legislation.37 While this announcement is welcome, such legislation is not currently on the official legislative programme and it remains to be seen if marriage equality will be in place before its enactment.

6. Civil Partnership and Civil Marriage

In May 2011, I was appointed as an independent Senator to the Irish Senate by An Taoiseach (Prime Minister) Enda Kenny. This immense privilege gave me the opportunity to become, not only a law challenger, but a law maker. This opportunity has allowed me to engage directly in the legislative process and to have an impact on the lives of people and particularly LGBT people.

An opening arose to amend the Irish Nationality and Citizenship Act in order to reduce some of the discriminatory elements between the institutions of civil partnership and civil marriage in July 2011.38 I put forward three successful amendments to the Act. Under the law as it stood, spouses of Irish citizens seeking naturalisation could avail themselves of more favourable eligibility conditions than applied to civil partners of Irish citizens. For example, spouses needed only to reside in Ireland for three years in order to be eligible for citizenship when the requirement for civil partners was five years. This form of discrimination is no longer the case. My amendments also ensure that the death of an Irish citizen or the loss of his or her citizenship does not impact on the citizenship of his or her civil partner or children. The third amendment makes certain that when an Irish citizen enters into a civil partnership with a non-national, they do not lose their Irish citizenship due to the civil partnership even if they acquire the nationality of the non-national. This amendment, as with the previous amendments, simply mirrors the provisions relating to married couples in the Act.
I also effected significant change in the area of taxation. I put forward a number of recommendations on the Finance Bill No. 3 (2011) to the Minister for Finance, Michael Noonan, in order to achieve parity between same-sex and opposite-sex couples in the tax code. The Minister agreed that I had identified a disparity with regard to tax relief on maintenance payments. Tax relief on maintenance for a spouse in marriage attracted tax relief at the time of a deed of separation or a judicial separation, but, in the case of civil partners, tax relief was not a possibility on maintenance payments until a statutory dissolution or an annulment. The Minister undertook for his department, the Revenue Commissioners and the Attorney General to examine my recommendation. Subsequently, the Finance Act 2012 provides that in cases where a civil partnership breaks down and a legally binding agreement between the parties is drawn up, this agreement will be recognised for tax purposes. The Act also places civil partnerships on the same footing as married relationships, whereby it is accepted that following the break-up of a relationship people may continue to live under the same roof but may be considered separately for income tax purposes.

During the debate on the Finance Act 2012 I identified further areas of inequality between civil partnership and civil marriage and the Minister undertook for remaining gaps to be addressed in as far as constitutionally possible. Meetings between my office and the various departments are on-going with a view to the issues being addressed in forthcoming finance bills.

7. A New Case for Marriage Equality

After the High Court ruled against us in December 2006, we waited five long years to be given a date for an appeal to the Supreme Court. Our legal team decided that, in light of the High Court judgment, our strategy should incorporate a direct constitutional challenge to the section of the CRA 2004 that defined marriage as being between a man and a woman. In late 2011, the Supreme Court heard our motion to include this challenge but we were turned down. Justice Liam McKechnie suggested that the best thing to do was to return to the High Court and file new proceedings. In June 2012, we initiated a new case in order to challenge directly section 2.2(e) of the CRA 2004 as well as the corresponding ban in the CPCROCA 2010 that prevents same-sex couples from marrying. We will also challenge section 5 of the CPCROCA 2010 that covers recognition of foreign registered relationships and has the effect of downgrading marriages that take place in other jurisdictions by recognising them as civil partnerships in Ireland. My spouse and I are considered to be civil partners whether we want to be or not. In taking this new case and dropping our appeal to the Supreme Court we no longer risked being pursued by the state for its costs, as well as our own, stemming from the original case.

8. The Current Climate

Significant on-going advocacy work by groups such as Marriage Equality and LGBT Noise, together with grass roots mobilisation of the LGBT community and its allies, has reshaped the social and political landscape in Ireland. Successive polling has shown that the general public are very firmly on the side of equality with significant margins in favour of marriage for same-sex couples. At the end of 2012 the majority of parties in Ireland support marriage equality: the Labour Party, Fianna Fail, Sinn Fein, and the United Left Alliance, leaving only the main government party, Fine Gael, to come to a firm policy posi-
tion. All parties appear to be operating under the assumption that a constitutional amendment would be required to make provision for marriage equality. The two government parties, Fine Gael and the junior coalition partner, Labour, reached agreement in the 2011 Programme for Government that the question of provision for same-sex marriage would be put to the Constitutional Convention (a body of politicians and citizens), that would examine various issues designated for reform. The government has committed to addressing the decision of the Constitutional Convention within four months of it reporting but any subsequent action is dependent on cabinet approval. The government has not committed to holding a referendum on the issue despite the Tanaiste (Deputy Prime Minister) Eamon Gilmore indicating that he is in favour of such a vote. Happily, an increasing number of senior politicians, when asked for a view on marriage equality, are voicing their own personal views (in favour) and this is certainly an advance on the default position of pointing to a supposed constitutional impediment.

9. European Protections?

In the past, Ireland was helped on the progressive path by efforts at a European Union (EU) level. Arguably Ireland would have taken considerably longer to amend its laws in relation to homosexuality and women’s rights if it had not been a member of the EU. However, apart from the areas of employment, health and education there are few binding legal measures at EU level that address discrimination against LGBT people and families. Despite the politically divisive nature of relationship recognition in some member states, the European Court of Human Rights (ECHR) has recognised that there is an “emerging European consensus towards legal recognition of same-sex couples” and that the right to marry in Article 12 is not confined to opposite-sex couples. In Schalk and Kopf v Austria the ECtHR recognised that a same-sex couple in a de facto relationship was entitled to be protected as a family under Article 8. Despite these findings the Court ruled that the ECHR does not oblige member states to provide access to marriage for same-sex couples and that member states have a wide margin of appreciation when it comes to the introduction and nature of other means of relationship recognition.

Currently eight European Economic Area (EEA) countries provide for marriage equality, namely Belgium, Denmark, Iceland, the Netherlands, Norway, Portugal, Spain, and Sweden. A further thirteen countries provide for a form of partnership. While civil marriage rights tend to be relatively uniform from country to country, various forms of partnership laws exist which range from equivalence with marriage to a limited selection of rights and responsibilities, for example, the Pacte Civil de Solidarité (PACS, Civil Solidarity Pact) in France. Currently LGBT couples and families experience a disjointed set of laws across the EU. This veritable patchwork of laws gives rise to significant legal uncertainty regarding mutual recognition of civil status and second parent adoption when same-sex couples exercise their right to freedom of movement. The Freedom of Movement Directive provides for the freedom of movement of EEA citizens and their dependents, specifically a spouse or a registered same-sex partner if the host country treats that registered partnership as equivalent to marriage. According to the Freedom of Movement Directive unmarried or unregistered partners in a “durable relationship” can be included by way of national legislation. It would appear that, at a minimum, member states are obliged to “facilitate entry and residence” for a dependent or “member
of a household” of a citizen, however rights group ILGA Europe believes the meaning of the provision to be unclear and the right to freedom of movement to be curtailed. In a 2009 resolution, the European Parliament expressed concern about the restrictive interpretation used by member states of the definition of “family member” and “partner” particularly in relation to same-sex partners. Given that EU secondary legislation is either silent on the rights of same-sex couples or leaves the determination of recognition to member states, the fundamental right of freedom of movement is rendered largely illusory for such families.

Similar issues arise when LGBT families with children relocate to EU Member States which do not recognise second parent adoption. While a durable relationship may exist between all of the family members, the destination country may not recognise the parental rights of non-biological parents. This can lead to numerous difficulties such as denying a non-biological parent the right to make decisions in relation to a child’s education or health. The Family Reunification Directive does little to address the problems facing LGBT families. This Directive applies when both individuals are third country nationals and neither is a citizen of a member state of the EU. It allows spouses who are third country nationals to be united with third country nationals residing lawfully in the territory of a member state. However, member states retain discretion on whether to extend this right to same-sex registered (or unregistered) partnerships. If same-sex couples do not have the option to enter into a legal partnership that will be recognised by the EU country where they are seeking reunification they are indirectly discriminated against.

In 2010 the European Council agreed the EU’s direction on justice issues for the next five years with the Stockholm Programme. Under this plan the European Commission published a Green Paper on the freedom of movement to open a debate on the mutual recognition of civil status records. Proposals on the recognition of certain civil status documents (e.g. filiation and adoption) so that legal status granted in one member state can be recognised and have the same effect in another are expected in 2013. There is more hope for these proposals than the stalled 2008 Anti-Discrimination Directive which would have extended protection from discrimination on the grounds of religion or belief, disability, age, or sexual orientation in the areas of social protection, social advantages, and access to goods and services.

Such measures are indeed promising but the wheels of the EU legislative process grind slowly and it may be some time before ordinary citizens feel the benefit of the Green Paper proposals. As the Court of Justice of the European Union recently reiterated in Römer v Freie und Hansestadt Hamburg, “the marital status of persons falls within the competences of the Member States”. While it remains the charge of national governments and domestic courts to protect and vindicate the rights of LGBT people and their families, they must not shirk this duty.

It is hoped that the Zappone/Gilligan legal case, Irish advocacy efforts and the growing social consensus emerging as a result will ensure that Ireland fulfils that duty, and in doing so acts as a catalyst for greater protections of LGBT people throughout all of Europe.
Dr. Katherine Zappone currently serves as a Senator in the Irish Senate and is Director of the Centre for Progressive Change, Ltd. She has recently been nominated to the Irish Delegation to the Parliamentary Assembly of the Council of Europe. She was a Commissioner with the Irish Human Rights Commission from 1999 to 2011.


3. Offences against the Person Act 1861; Criminal Law Amendment Act 1885.


5. Norris v Ireland, European Court of Human Rights, Application No. 10581/83.


8. The Good Friday Agreement (also known as the Belfast Agreement), Paragraph 9 of the Rights, Safeguards and Equality of Opportunity.


11. See above, note 17, Article 41.1.


13. See above, note 22.


17. Bunreacht na hÉireann (Constitution of Ireland), Article 6.

18. Ibid., Article 34.1.

19. Ibid., p. 7.


21. Ibid., p. 49.


23. Ibid., p. 50.


25. Ibid., p. 50.


29. Ibid., p. 13.


31. Ibid., p. 49.

32. Ibid., p. 50.

33. Ibid., p. 50.

34. Ibid., p. 50.

35. Ibid., p. 50.

36. Ibid., p. 50.

38 Civil Law (Miscellaneous Provisions) Bill 2011, section 33(c).


40 Ibid., section 134(c).


42 CPCROCA 2010, section 7(2A)(7).

43 67% (Behaviour Attitudes poll, The Irish Times, September 2010); 73% (Red C poll, The Sunday Times, March 2011); 66% (Behaviour and Attitudes poll, The Irish Times, October 2012).


47 Sheahan, F., “Gilmore’s call for gay marriage supported by Labour”, Irish Independent Newspaper, 3 July 2012. There is also a debate emerging that questions the insistence that a constitutional amendment is necessary to provide for marriage equality when the Constitution does not define marriage. (See O’Mahony, C., “Constitution is not an Obstacle to Legalising Gay Marriage”, The Irish Times, 16 July 2012; see also Daly, E., “Same-sex Marriage doesn’t need a Referendum”, Human Rights in Ireland, 15 July 2012.)


50 Ibid.


52 Loi No. 99-944 du 15/11/99 relative au Pacte Civil de Solidarité.


54 Ibid.

55 Ibid., Article 3(2)(b).

56 Ibid., Article 3(2)(a).


59 Ibid., p. 43.


61 See above, note 48, p. 42.


64 See above, note 48, p. 45.


66 Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg, CJEU 10 May 2011.
In December 2012 the Inter-American Court of Human Rights (the Court) published its decision in a case challenging Costa Rica’s 12-year absolute ban on all in vitro fertilisation (IVF) practices. The ban, implemented in 2000, applied to all citizens and prohibited access to IVF techniques within the country. Couples who were in the middle of IVF procedures were forced to stop all treatments or to choose to travel abroad to pursue further treatments. In 2004, ten couples petitioned the Inter-American Commission on Human Rights (the Commission), alleging that the ban violated the right to private and family life, the right to found a family, and the principle of non-discrimination enshrined in the American Convention on Human Rights (the American Convention). The Commission asked Costa Rica to end the ban, but they failed to do so and the Commission referred the matter to the Court. The bulk of the Court’s opinion tackles questions regarding the right to life and at what point an embryo or foetus becomes protected under the American Convention, but it also devotes some analysis to the question of indirect discrimination, thereby making important in-roads into equal access to reproductive health treatments and protecting the autonomy of couples to make decisions regarding when and how to have a child.

1. Case Background

In 2000, the Constitutional Chamber of the Costa Rican Supreme Court ruled that the practice of in vitro fertilisation (IVF) was unconstitutional and imposed an absolute ban on all IVF practices. The Constitutional Chamber’s decision was in response to a Presidential Decree, signed by the then-President J.M. Figueres in 1995, that had authorised IVF for married couples and regulated its practice. In the five years between the decree and the Constitutional Chamber ruling, couples underwent IVF procedures and 15 babies were born in Costa Rica as a result of these procedures.

The decision of the Constitutional Chamber in 2000 halted attempts to create biological offspring for several couples, many of whom were beginning or in the middle of necessary treatments for IVF. The only Latin American state to impose such an absolute ban, Costa Rica’s decision was soon challenged by a group of couples who were undergoing or planning to undergo IVF at the time of the ban. After the imposition of the ban, couples were either unable to pursue the only possible path to procreation or were forced to go abroad to seek treatment. Travelling to undergo IVF is a complicated and costly undertaking, and one that is available only to those couples with sufficient resources to do so. As a result, many couples waiting to undergo IVF at the time of the ban were left with no recourse, and no ability to conceive a biological offspring.
was an arbitrary interference into the right to private and family life, the right to found a family, and the right to equality. Additionally, the Commission found that the ban disproportionately impacted women. In 2010, the Commission issued a series of recommendations to Costa Rica, asking them to end the absolute ban that was violating the above rights. In the absence of real, implemented change, one year later the Commission submitted the case to the Court.

2. Recapitulation of Inter-American Non-discrimination Case Law

The Court examines three primary rights in their decision: the right to life, the right to private and family life, and the right to found a family, as well as the principle of non-discrimination enshrined in the American Convention. Article 1 of the American Convention requires states to respect and ensure the enshrined rights, without discrimination regarding “race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

The Commission and the Court have frequently held that non-discrimination is a fundamental principle of the human rights system. Although the American Convention does not define discrimination, the Court uses the definition contained in the International Convention on the Elimination of All Forms of Racial Discrimination, which defines discrimination as any “distinction, exclusion, restriction or preference,” based on enumerated grounds such as race, sex, religion, or “other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons (...) of all rights and freedoms.” Importantly, this definition, which has been used by the Court in other decisions, does not explicitly include disability or health status as a prohibited ground for discrimination. Thus, the Court was asked to rule if those grounds were covered by the words “all other status”.

According to the Court’s case law, laws and policies can be discriminatory when distinctions among social groups arise and lack “objective and reasonable justification.” Reasonableness is determined on a case-by-case basis, and this involves the consideration of legality, suitability, the existence of a legitimate aim and/or less restrictive means, and a proportional balancing of public and private interests.

Under inter-American jurisprudence, indirect discrimination may arise when a law or policy that appears neutral has a disproportionate impact on certain sectors of the population in exercising their rights under the American Convention, on the basis of prohibited grounds. A law or policy may have a disproportionate and therefore discriminatory effect when its objective or impact disadvantages certain groups in society.

In order to comply with standards of non-discrimination, the Court has held that states are obliged not to:

“[I]ntroduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognise and ensure the effective equality before the law of each individual.”

While the primary inquiry of the Court in the IVF decision related to interferences with the right to private and family life, and the right to life, in relation to discrimination they ultimately concluded that the
absolute ban did have a disproportionate discriminatory impact on infertile individuals, women, infertile men, and couples with limited economic resources.

3. The Decision

The primary argument in the Court’s decision focuses on the question of the right to life. In the Constitutional Chamber judgment, the Chamber reasoned that the right to life was of utmost importance and should be protected above other implied rights, such as the right to found a family and the right to private and family life. In 2000, the Constitutional Chamber held that life begins when the egg is initially fertilised, even prior to implantation in the mother’s uterus. Because IVF necessarily involves the destruction of non-viable fertilised eggs, under the state’s interpretation the embryo’s right to life would be violated by the practice of IVF. By contrast, the Court held that conception occurs only after successful implantation of an embryo, not merely fertilisation, disputing state claims that the right to life protection prevails over protecting a couple’s right to private life or right to found a family. In doing a balancing test the Court found that protection of life at early stages of conception was a legitimate state aim. They then examined the proportionality of the absolute ban, weighing the private and state interests involved. While the Court found protecting the right to life for the earliest stages of life to be a legitimate aim, it held that this protection was gradual and incremental, that personhood did not take effect until implantation and that there were less restrictive measures available to protect life and regulate IVF practices.

Because the right to life does not imply an absolute right to protection for non-implanted embryos, the IVF ban was ultimately found to be an overly broad provision that has a discriminatory, disproportionate impact on women and infertile couples in the exercise of their rights to private and family lives, and to found a family. To determine the proportionality of the ban, the Court balanced the severity of the interference into the right to private and family life and the legality of the disproportionate impact of the ban.

The Commission and the victims alleged that the ban discriminated against women and against people with reproductive disabilities, highlighting the clear distinction that the ban created between married couples who conceive naturally and infertile married couples who rely on assisted reproductive techniques. In response, the state argued that the ban was justified and proportional in pursuing the legitimate aim of protecting embryonic life. While the facially neutral ban impacted infertile couples distinctly, the state claimed that infertility was not a recognised social condition which would merit protection under the American Convention. The state alleged that infertility was not a recognised disability or disease that required the provision of medical treatment in the form of IVF procedures. In order to determine whether the ban constituted a violation of rights, the Court conducted an analysis of the severity of the interference into the right to private and family life and other involved rights as well as an analysis of the disproportionate impact of the ban.

In analysing the severity of the state’s interference into the right to private and family life the Court looked at the impact of the ban on couples’ lives. The Court considered the stress and expense related to travelling out of Costa Rica to obtain services, the effective removal of decisions related to family and reproductive choices from married adults, and the psychological effect of the ban on couples...
and individuals. Ultimately, the Court found that the ban was indeed a severe interference into the exercise of the right to private and family and the right to found a family. Subsequently, an analysis of the disproportionate impact of this severe interference on infertile men and women was conducted.

The Court examined indirect discrimination relating to disability, gender and economic situation, concluding that the ban had an impermissible disproportionate impact on people with disabilities, women, infertile men, and couples with insufficient economic resources. Discrimination, the Court explained, occurs when states create arbitrary differences that undermine human rights and can occur indirectly when an otherwise neutral law has a disproportionate effect on one group of individuals in the exercise of their protected rights.

Relying on the Convention on the Rights of Persons with Disabilities, ratified by Costa Rica in 2008, the Court concluded that infertility is a disability necessitating access to treatment and techniques that can help resolve the resulting reproductive health problems. According to the Court, disability is not simply a physical or psychological deficiency, but rather the interaction between this deficiency and the social barriers that impede the effective exercise of rights by the disabled. Infertility, as defined by the World Health Organization, is a reproductive disorder resulting in the inability to conceive a biological child after twelve months. The Court held that infertility as a medical condition constitutes a functional limitation to those suffering from it, and is a recognised medical infirmity therefore requiring infertile individuals to be protected under rights of disabled individuals, including access to techniques that could help them overcome their condition. Because the Court held that reproductive failure constituted a disability, it allows for the possibility of reproductive disability being considered a “social condition” for the purpose of the enumerated grounds contained in the prohibition against discrimination in the American Convention. The Court explained that societal barriers to infertility, such as the absolute ban on IVF, put infertile individuals in a more vulnerable position, meriting special protections from the state. The Court found that the absolute ban prohibited infertile couples from accessing these treatments and from effectively exercising the right to found a family and the right to private and family life, therefore having a disproportionate effect on those couples and constituting indirect discrimination.

In an interesting analysis of the indirect discrimination relating to gender, the Court examined traditional gender stereotypes and how infertility affects the perception of those afflicted individuals in society. For women, the ban has a disproportionate effect not only because the procedures are invasive to a woman’s body, but also because they often have severe social consequences. As women are seen as the nurturers and mothers in society, it is often shameful to be unable to produce a child and women are often blamed for this inability. Furthermore, the Committee for the Elimination of Discrimination Against Women has held that protecting a foetus at the expense of the mother’s health constitutes discrimination. The Court considered that in the present case, the ban, which protects embryos without consideration for the mother’s disability, appears to constitute this kind of discrimination. The absolute ban on IVF undermines the woman’s mental and emotional health, her societal status, and her place in the family in order to protect an embryo that has yet to be implanted into her uterus. Similarly, the
Court also considered male victims' testimonies regarding the detrimental effect that the infertility had on their identities and conceptions of self-worth.\(^44\) While this argument is based almost entirely in societal stereotypes, the Court ultimately finds that it is precisely because of these stereotypes that the state's interference has a disproportionate impact on women and infertile men.\(^45\)

Finally, the Court looked briefly at indirect discrimination and economic class. Of the nine couples involved in the case, many could not afford to pursue treatment abroad and had no possibility of conceiving biological offspring, while those with sufficient resources could go abroad to obtain IVF.\(^46\) When compared to similarly situated couples with the resources to seek treatment abroad, the affected couples with insufficient economic resources are disproportionately impacted by the absolute ban.\(^47\)

While the analysis of indirect discrimination in the Court's decision is considerably shorter than the analysis of the right to life, the Court did find indirect discrimination through disproportionate impacts on couples suffering from infertility, women, infertile males, and infertile couples with few economic resources. The Court's recognition of infertility as a disability requiring specific protections for disabled persons is an important step in ensuring that individuals with reproductive health problems have access to necessary treatments, allowing them autonomy over decisions about how and when to procreate. Furthermore, recognising the societal impact that infertility has on men broadens protections for men's rights in the areas of reproductive and family rights. Finally, while the Court limits its analysis of economic discrimination to specific circumstances, its opinion strengthens the idea of equal access to medical and other treatments necessary for the disadvantaged to enjoy equal enjoyment of rights.

Reparations included the immediate removal of the ban, implementation of less-restrictive regulations relating to IVF practices, provision of mental health treatment, implementation of educational programs related to assisted reproductive techniques and monetary damages.\(^48\) The Court ordered Costa Rica to implement all necessary measures and regulations in order to ensure that those individuals who desire to undergo IVF can access treatment.\(^49\) Additionally, the Court ordered the Costa Rican Social Security Fund to include the availability of IVF within its programmes, in conformity with the prohibition of discrimination.\(^50\) Included in these orders is a reporting requirement, which mandates that the state must report to the Court every six months regarding measures implemented to ensure available services to those requiring IVF.\(^51\)

### 4. Conclusion

This decision brought inter-American jurisprudence on reproductive rights and the right to private and family life in line with the European Court of Human Rights' jurisprudence on the subject. While the ability to decide when and how to have a child is fundamentally protected under the right to private and family life, the European Court of Human Rights has also found that states do have an interest in protecting life in its earliest stages, including restricting and regulating IVF practices.\(^52\) This state interest, however, does not allow an absolute ban on IVF techniques that prohibit couples from utilising necessary treatments to produce biological offspring. As a result, the Court ordered Costa Rica to immediately remove the ban, create less restrictive regulations relating to the practice of IVF, provide mental health treatment for
the victims involved, promulgate educational programmes regarding reproductive rights and assisted reproductive techniques, and award monetary damages to the victims.

Unfortunately, while this decision will significantly improve access to reproductive health techniques for infertile couples, it still limits access to IVF to adult, married couples only. Following European jurisprudence, the Court indicated that a permissible regulation may be to restrict IVF practices to married couples only, and feasibly to ban third party egg or sperm donations for use in IVF. Arguably, this would still have a disproportionate discriminatory impact on men and women who wish to be third party donors and infertile individuals who are not in a recognised, monogamous relationship. While it remains to be seen how Costa Rica will regulate IVF in the future, the recent decision allows the possibility that independent adults can legally be prohibited from making decisions on whether they want to donate eggs and/or sperm as well as prohibiting single or unmarried individuals from obtaining access to IVF.

1 Ariel Dulitzky is Professor in the Faculty of Law at the University of Texas at Austin, TX.
2 Inter-American Court of Human Rights (IACtHR), Caso Artavia Murillo y Otros (Fecundación IN VITRO) v Costa Rica, (IACtHR, IVF Decision) Preliminary Objections, Merits, Reparations and Costs, Judgment of November 28, 2012, Paras 71-72; Center for Reproductive Rights, Inter-American Court of Human Rights Declares Costa Rica’s Ban on In Vitro Fertilization A Human Rights Violation, 12 December 2012.
3 IACtHR IVF Decision, above note 2, Paras 68-71.
4 Ibid., Para 70.
5 Ibid., Para 67.
6 Ibid., Paras 85-125.
8 Ibid., Para 128.
9 IACtHR IVF Decision, above note 2, Paras 1 and 84.
10 Ibid., Para 1.
12 Ibid., Article 1(1).
14 IACtHR, Case of YATAMA v Nicaragua, Preliminary Objections, Merits, Reparations and Costs, 23 June 2005.

18 See above, note 14, Para 184.

19 IACtHR IVF Decision, above note 2, Paras 163-264.


23 *Ibid.*, Para 314; see also Paras 294-304.


27 *Ibid.*, Paras 270-271; and above note 11, Article 1(1).


33 IACtHR IVF Decision, above note 2, Para 292.


52 European Court of Human Rights, *Pretty v The United Kingdom*, Application 2346/02, 29 April 2002; *Evans v United Kingdom*, Application 6339/05, 1 April 2007; *Dickson v the United Kingdom*, Application 44362/04, 4 December 2007.
“Although legal change to protect intersex people is vital, it is only the first step in what must be broad and deep social change that accepts diversity of every kind.”

Gina Wilson
Equal Rights for Intersex People

Testimony of an Intersex Person

The term intersex describes human beings who have naturally occurring differences of sex anatomy and whose biological sex cannot be classified as clearly male or female. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital; the term is not applicable to situations where individuals deliberately alter their own anatomical characteristics. Intersex people are marginalised both in society and in law. Many human rights instruments fail to identify intersex people as rights holders, rather protecting “men” and “women”. Even where their rights are explicitly protected in law, intersex people are often unable to enforce those rights. They suffer from many forms of discrimination in all aspects of life, including their family life. Gina Wilson is the President of Organisation Intersex International Australia (OII Australia), a national organisation which promotes the human rights of intersex people in Australia, and provides information, education and peer support.

1. My Background

My name is Gina Wilson and I am President of OII Australia and campaign for the equal right of intersex people to have their human rights recognised and enforced. I am intersex. As is often the case, for quite a while I was not aware that I was intersex. I have congenital adrenal hyperplasia (CAH), and although I knew that this involved having anatomical differences of sex, it was not made immediately clear to me that CAH was connected with being intersex. It was only once the internet became available that I found that CAH is one of the most common underlying diagnoses of intersex. When I discovered this, I looked for groups that could provide peer support and came across Organisation Intersex International (OII), which was just starting. Initially, I joined their online forums and then got more and more involved, becoming an outreach worker providing support and information to people who were coming to terms with intersex.

Many of the challenges faced by the intersex community are borne out of a lack of understanding and awareness of what it means...
to be intersex, and the problematic ways in which it has been defined and addressed within the medical field. OII prefers the term “intersex”, a scientific term which was first used in the early 20th century, over other terms which have been used, both historically and more recently. “Hermaphrodite” is scientifically inaccurate as it indicates that a person has fully functioning reproductive organs of both sexes. It also fetishises our sex, encouraging notions that we have two sets of sex organs and can “have sex with ourselves”; “intersexed” implies that something has been “done” to a person; and the recently introduced “disorders of sexual development” is stigmatising and implies that the differences of intersex people constitute an illness or a disease. Use of this kind of language leads society to believe that there is something wrong with being intersex and that it is something that should be altered, or prevented. The term “intersex” does not have these negative connotations; it merely suggests difference, and that we are neither male nor female.

Through my involvement with OII and reflection on my personal experience, I came to realise that viewing intersex through the lens of medicine and “disorder”, as had traditionally been the case, was stigmatising and delivered no benefits to intersex people, but rather shame and secrecy. Surgery, drugs, or a combination of both have often been used to try to “cure” or “normalise” intersex people without their informed consent. Following a change of government in Australia in 2008, the incoming Prime Minister instituted an Australian Human Rights Consultation. I thought that this might provide an opportunity to start to view intersex through the correct lens, namely that of human rights. I decided, with some friends, to establish OII Australia, with the primary
goals of offering support to intersex people and of tackling the lack of rights and protection for intersex people in Australia and around the world, by taking the debate about intersex out of medicine and stigma and into the field of human rights.

2. OII Australia

In the early days of OII Australia, I spent a lot of time developing a network of supporters.

As I started to become involved with political lobbying and human rights activism and to build this network, I found that our strongest allies were LGBT groups and also activists in the area of disability. I believe that this is due to the two most common prejudices that people have about intersex. Firstly, intersex people are discriminated against, marginalised and victimised essentially because of homophobic prejudice. It may not be immediately clear why people with differences of sex anatomy would be subjected to homophobia. But it became apparent to me that the desire to normalise us, and to do away with ambiguity by “invisibilising” our intersex, was to see us as “normal” males and females. The goal was to see us living heterosexual lives, whereas if we engaged in same-sex relationships, this was seen as a failure of our sex assignment. I came to see that we were often seen as either partly or completely homosexual, and were faced with homophobic prejudice. We therefore had a lot of issues in common with those being advocated by LGBT groups. Society’s second prejudice is based on a fear of the “monstrous”. Society often sees differences as negative, or even “monstrous”, and wants to erase them if at all possible. This links to some issues faced by people with disabilities, particularly those born with disabilities. In forming alliances with groups working in the area of disability and of LGBT rights, OII was welcomed with open arms. We were able to learn about activism and to speak to law makers and other activists about issues surrounding intersex, as well as bringing these issues to the attention of society as a whole. Many of the challenges faced by the intersex community arise from a lack of understanding and awareness of what it means to be intersex, and OII Australia seeks to educate people about intersex and issues affecting the intersex community.

Today, OII Australia is thriving as the Australian affiliate of OII. OII is now the world’s largest intersex organisation, with members representing almost all known intersex variations and affiliates in twenty countries, on six continents, speaking ten languages including Mandarin Chinese and Arabic. OII Australia is a not-for-profit company and charitable institution and currently has many members, including intersex individuals and non-intersex supporters. OII have been strong advocates in the fight for marriage equality, espe-
cially since an Australian federal court decision bars intersex people from marriage and
the currently available non-specified birth certificates and passports are not allowed to
be used under current marriage law. We have also engaged with government, lobbying for
the inclusion of intersex as a protected characteristic in anti-discrimination law; for hav-
ing intersex covered in laws related to health and aging; and for providing that sex is not
specified in documentation.

3. Understanding the Issues

As mentioned, many of the key challenges faced by intersex people are the result of a
lack of understanding and awareness of what it means to be intersex. The whole nature
and relevance of sex is framed incorrectly in our society, with the systems by which we
are regulated relying on this incorrect basis. There are a number of key issues.

a) Intersex and the Sex Binary

Society generally views sex as a binary notion, assuming that human beings are either
male or female. Society, including the relationships between these males and females,
is then regulated on the basis of the binary. However, Foucault argued effectively that the
way we categorise on the basis of sex is a social construct. Not all people can be catego-
rised as absolutely male or absolutely female and the key problem is that this inability to
categorise some individuals is that it bothers some people. To be more certain of the
category of those individuals, normalisation through intervention and medicine is often
seen as necessary. Not long ago, homosexuality was seen as a tragedy which could be rec-
tified using medicine and therapy. This is no longer acceptable, as LGBT people have ar-
gued their case through human rights. However, people still abuse the human rights of
intersex people by intervening in our lives to try to make us identifiable by them as male
or female.

In a wider sense, the sex binary is unhelpful given that it disadvantages half the world’s
population. If you are classified as “female”, you are more likely to be disadvantaged than
advantaged. There is something fundamentally flawed about categorising human be-
ings into male and female for the purposes of social standing. Two sexes is one sex too
many. I do not believe in a “third gender” for intersex people, but rather would like to see
no categorisation on the basis of sex or gender; although I am not sure that that will hap-
pen soon.

OII advocates for the right for anyone over the age of 18 to be able to choose to have
an X on their passport, rather than being identified as male or female. New Zealand
has already instituted this. In Australia, you are currently only allowed to have an X on
your passport if you meet certain require-
ments. We want everyone to have the right
to choose an X, which, rather than this being
a third gender designation, is the right to re-
main silent – and hopefully to be judged on
character, rather than sex.

b) Intersex and the Medical Approach

Intersex differences are so confronting to a society which operates on the basis of a sex
binary that such differences have often been consigned to medicine as a problem to fix,
in much the same way that homosexuality used to be pathologised. The problem is the
inability of individual parents and friends to accept intersex persons as they were made.
Their lack of acceptance is perpetuated by doctors who would rather reshape a new-
born’s body, than address a parent’s phobias, and a medical establishment that prefers
to offer “cures” and surgeries than help individual understand that their differences are natural. In third world countries where access to medicine is limited and expensive, societies have to adapt to accept such differences as they are untreatable.

That “cure” offered by the medical establishment takes the form of surgery often followed by more surgery and a lifetime of hormonal reinforcement. Intersex genital mutilation (IGM) is conducted on newborn babies when their external genitals do not look “normal” enough to pass unambiguously as male or female. IGM, like female genital mutilation (FGM), is surgery carried out upon the genitals of newborn babies, infants and children for cultural or religious reasons. Both are forms of infant genital surgery. The surgical procedures conducted can cause irreparable damage to children.

Medicine has come to act as the “normalisation police” where intersex is concerned. The medical establishment has never attempted to argue for the acceptance of intersex. Rather, it argues against the right to anatomical autonomy, and risks physical and psychological damage to intersex persons.

c) Invisibility in Human Rights Law

At the same time as the obsession with a medical approach to intersex, there is still a widespread failure to take a human rights approach to the issue. Currently, worldwide, there is a complete lack of human rights protection for intersex people, and anti-discrimination laws are generally inadequate to protect intersex people from rights violations resulting from their intersex. For intersex people to have rights at all, they are required to submit to the myth that they are wholly male or wholly female. Only in South Africa are intersex people explicitly granted rights. An amendment to the South African Constitution specifically protects intersex people against discrimination, thanks to the efforts of an activist there. In other parts of the world, only males and females are granted rights and we, intersex people, are tenuously included as long as we say that we are truly male or female. When our status as male or female is challenged, we are unprotected by the law.

In some parts of the world intersex babies are routinely left to die, or young people who are discovered to be intersex chased out of the community. This is largely a remnant of historical western, colonialist attitudes. We must have worldwide acknowledgment that definitions of “male” and “female” only are not adequate to protect people’s rights on grounds of sex discrimination. First and foremost, the UN must recognise the existence of intersex people and include their specific protection in the International Bill of Rights and in their treaties. I realise that having a definition of intersex and specific protection for intersex people is “othering” ourselves, but unless we do this, we will remain invisible, unprotected and at the whim of the law.

d) State Regulation of Family Life: Marriage, Children and the Obsession with Biology

Intersex people are at the coalface of the state’s regulation of relationships. This is largely due to the problem of the sex binary and the fact that regulation of bodies is the first step in the regulation of relationships. The aim of normalisation of intersex people is to make us “marriage-ready”. If our bodies are unregulated, it is difficult to classify our relationships and society finds it difficult to see us a properly-married people when we are married.
There have been legal cases in Australia where marriages were dissolved on the basis that one of the parties was intersex, not seen as truly a male or a female, and therefore ineligible to marry. Marriage is defined as being between a man and a woman. Intersex people are only able to marry as long as we agree with the sex that we have been assigned and then, irrespective of our anatomy, find a partner who is notionally of the opposite sex. In order to be accepted in society and by the institution of marriage, we must “invisibilise” our differences, or pretend we have none, effectively living a lie. It is often said that most intersex people live as normal males and females, but, in my opinion, if you have an anatomy that defies notions of normality, and which is different to what is expected of a male or a female, then in order to live a so-called normal life, you must go along with a lie.

Same-sex marriage is currently being debated in Australia, as elsewhere. OII Australia has advocated strongly for marriage to be defined as a consensual relationship between two people, and if we succeed then intersex people will qualify for marriage under that definition. If, however, it is framed in terms of the sex binary, so that marriage needs to be between a man and a woman, or a man and a man, or a woman and a woman, then we would be excluded. OII Australia supports the right of same-sex couples to marry, but we are engaged with the broader fight for full marriage equality, so that intersex people, and indeed all consenting adults, have the right to marry.

Intersex people also face discrimination with regard to their opportunity to be parents. Intersex people are more frequently infertile than others, and the regulation of the “non-traditional” routes to parenthood, i.e. those other than traditional biological parenthood, are particularly important for us. For example, my partner brought children into our family from a previous relationship. The government and society do not make it easy to recognise extended families like this. It is almost impossible to live an intersex life and have a family, because it is only possible for intersex people to have a family life if we accept the erasure of our differences.

Under our current system of family regulation, these inequalities cannot be easily rectified. However, I strongly believe that we need to move away from the centrality of biological connections to the regulation of what is deemed to be a family relationship. The idea of “shared genes” being critical to defining the nature of a family is increasingly unhelpful, given the many other ways that families are constructed in the modern world, and of course this does not just affect intersex people. Society needs to have a broader idea of what makes a family, and I would like to see the legal definition of family widened. For example, I have experienced firsthand the damage that can be done by the state’s failure to adequately recognise the relationship between a carer and the person they are caring for when there is no blood relationship between the two, only a relationship of love, care and friendship. We need to move away from the obsession with blood ties and create an understanding of family which reflects social reality.

4. The Future: Towards Human Rights Protection for Intersex People

We have moved intersex rights more in the last four years than they have moved in the last four hundred. OII Australia continues to lobby and advocate for rights for intersex people.

To speak of just one recent positive example: OII Australia has been heavily involved in
campaigning and advocacy around the proposed Human Rights and Anti-Discrimination Bill 2012 which is currently being reviewed before its introduction into parliament in Australia. Legislators initially did not have a clear understanding of what intersex was, but having given evidence to Senate Committees and spoken with legislators individually we are hopeful that intersex will be a protected attribute under the Bill, with a definition of intersex as an identity different from male or female. The passage of the Bill is currently the gold standard and potentially the most significant advance towards the protection of intersex people in Australia to date.

However, there is more to be done both in terms of cultural change and in terms of legal change. Most discrimination against intersex people is not as a consequence of us identifying as intersex, but on the basis of our physical appearance and difference. It will ultimately be important to get us out of the frame of intersex “identity”. Intersex people have all kinds of identities – the same broad spectrum of identities that the rest of humanity has. Prejudice is not about how we see ourselves, but how others see us – and this is based on a visible physical reality. There is a lot more to be done to eradicate this prejudice. In terms of the vital legal protections, the Human Rights and Anti-Discrimination Bill 2012 offers an excellent development in Australia. However, the ultimate goal would be for intersex to be included in UN treaties as this would pressure on the rest of the world to follow suit.

OII Australia is putting the rights of intersex people on the agenda and is always encouraging others to do the same and to make the call for these rights louder. Once we are seen to be fighting for our rights and are granted rights, people will know that we exist and the community at large will hopefully become more sympathetic to our cause. Although legal change to protect intersex people is vital, it is only the first step in what must be broad and deep social change that accepts diversity of every kind.
“In many ways the trail-blazing countries are just showing that, after the initial furore has died down, equal marriage soon just becomes part of the furniture and means that other discrimination issues affecting people can be more effectively tackled.”

Stephen Gilbert
Developing Law and Policy: Progressing towards Equal Rights to Family Life

We are experiencing a period of significant change in the way that states regulate family relationships. In particular, at the national level, new laws are being introduced across the globe to permit same-sex marriage. These moves mark a significant shift towards achieving an equal right to recognition of family relationships, at least for same-sex couples, and this progress is to be welcomed. In some parts of the globe, notably Europe, progress at the national level is developing in part as a result of regional conversations and jurisprudence in which the notion of “family life” is increasingly recognised as extending beyond “traditional” notions of a man and woman in a marriage raising their own biological children. The path of progress in this area has not always been smooth and, while advances have been made, more remains to be done at the national, regional and international levels to ensure that all people, without discrimination, have a right to recognition of and respect for their family life.

ERT spoke with Dr Ian Curry-Sumner, owner of Voorts Juridische Diensten, former Senior University Lecturer at Utrecht University in the Netherlands and expert on comparative family and private international law, and Mr Stephen Gilbert MP, Member of Parliament for the Liberal Democrat party in the UK and strong proponent of legislating for same-sex marriage.

ERT: Your interest and expertise on matters relating to equal rights to family life are widely recognised. Dr Curry-Sumner, your expertise in international and comparative family law is well-known and Mr Gilbert, your work on the issue of equal rights for same-sex couples in the UK has been well publicised. How did you become involved in these areas?

Ian Curry-Sumner: Having studied family law in my second year at University, I went to the Netherlands on an Erasmus scheme and took an introductory course on Dutch family law. This sparked my interest and I subsequently applied, and was accepted, for a PhD position researching the recognition of established partnerships. Since then, over time I have become increasing-
ly specialised in private international law as well as the comparative law aspects of family law.

Stephen Gilbert: On this issue, like many others, my political campaigning has been shaped by my personal experiences. Coming from a working class background and growing up in rural Cornwall made it hugely difficult for me to be open and upfront with my friends and family about my sexuality and it was only in my early twenties that I finally felt able to tell people that I was gay. It’s simply not right that many thousands of people across the country experience that same level of anxiety about telling people about who they are. It’s also clear that it can be very damaging to individuals and families with people failing to live their lives to the fullest, and being bullied. We don’t accept this level of prejudice in other walks of life, and we shouldn’t accept it based on nothing more than whom people love.

ERT: A debate about equal marriage rights is taking place in a number of countries at the moment. Most recently this debate has been before Parliament in the UK. Could you say a bit about the current situation as regards the right to equal marriage in the UK and, specifically, your view on the Marriage (Same Sex Couples) Bill 2013?

Stephen Gilbert: As the MP who first proposed a policy of equal marriage to the Liberal Democrat Party Conference in September 2010, I am delighted that the Coalition Government has brought forward this legislation that will end a discrimination and send a signal that the House of Commons values everyone in our country equally. Treating people equally is vital if we are going to tackle some of the other problems facing the LGBT community.

Ian Curry-Sumner: I think that the Bill in the UK is slightly disappointing. It is good that the UK is finally addressing the idea of one
institute with the same name open to both same-sex and opposite-sex couples but the distinctions drawn in the Bill with respect to religious organisations is disappointing. Of course, the religious debate is important in the UK, as it is in other countries such as the Netherlands, Sweden and Denmark, but the UK government has pre-empted any debate on this issue by introducing religious exceptions before these have been properly discussed. It would have been better to have an open discussion before these exceptions were included, and it may have become apparent that not all of these exceptions are required. The government had a similar approach with the Civil Partnership Bill, which I felt was problematic, but which has unfortunately been carried on with the Marriage (Same Sex Couples) Bill.

In sharp contrast to the UK, in the Netherlands, there are no religious marriages – it is a criminal offence to conduct a religious marriage before a civil marriage has taken place. There are some exceptions from the obligation to conduct same-sex marriages for individual civil registrars with strong beliefs against same-sex marriage. My view is that registrars are civil servants and should apply the law, with their own beliefs being irrelevant. However, I am pragmatic about this and recognise that the issue of the interplay between same-sex marriage and religion arises all over the world and needs to be debated and discussed. What is disappointing in the context of the UK Bill is that the UK government has sought to pre-empt such discussion by drafting the Bill as they have.

ERT: How does the situation in the UK compare to that of other countries in terms of equal marriage rights, and is there a particular country (or countries) which you believe is a positive example in this respect?

**Ian Curry-Sumner:** The position on the issue of recognition of same-sex couples in most countries has evolved over time and there are a variety of approaches. The Netherlands is not a good example and I strongly recommended that our system should not be replicated elsewhere. We have two formal relationship institutes next to each other – marriage and registered partnership. Anyone can choose to enter into either, and in terms of content they are virtually the same, but the name of the institute is different. This can create huge issues with, for example, the international recognition of a relationship.

In Sweden, Norway and Denmark, there were two institutes (marriage for opposite-sex couples and civil unions for same-sex couples), but over time these were both combined into marriage. These systems are better than that of the Netherlands, but not perfect as they do not give couples the opportunity to choose how to name their relationship. Some people want legal recognition of their relationship but do not want to be married.

I am a strong supporter of the South African system. Essentially, it provides for one institute which any couple can enter into. However, unlike Sweden, Norway and Denmark, in South Africa couples can determine whether they wish to call their partnership a marriage or a civil union. This allows couples to have a say in the naming of their relationship, whilst avoiding problems which arise as a result of having separate institutes such as the inherent possibilities of discrimination where different rights attach to different institutes. Instead, everyone concerned is in an equal position.

**Stephen Gilbert:** It’s great news that many countries are making the move toward equal marriage and, in fact, many other
parts of the world are further ahead than most European countries. We've seen rapid progress in jurisdictions across South America as well as in many North American states, and of course South Africa and Australia. Clearly, it confounds the critics of this progressive move that the end-of-world warnings that have come from opponents just haven’t happened. In many ways the trail-blazing countries are just showing that, after the initial furore has died down, equal marriage soon just becomes part of the furniture and means that other discrimination issues affecting people can be more effectively tackled.

**ERT: Can you say a bit about some of the issues around the regulation of the adoption/custody of children with regards to the sexual orientation of the parents?**

**Ian Curry-Sumner:** From a global perspective, it is very interesting to compare the position in Europe to that in the United States. In Europe, we appear to have less difficulty with granting rights to the couple themselves. We see an evolution in the granting of rights. Countries always begin with rights that are restricted to the parties themselves, e.g. property rights, tax rights, name law, nationality law, i.e. things which have no influence beyond the couple. Normally the last area European countries legislate upon are aspects which relate to children within those relationships. The US is the opposite. In the US many states permit same-sex adoption, or even foster care by same-sex couples, but the couples are not permitted to formalise their relationships. This can be extremely unfair to the children and the law will need to catch up with the reality that children are growing up in same-sex relationships and have been for quite some time.

In most countries in the world it is only possible for two people to have custody of a child. This means that situations where children are raised by other than their biological parents, or where a third party is also involved, as in the case of children raised by a male same-sex couple where the child is born outside of the marriage for example, are very difficult to regulate. Unusually, in the UK, more than two people can share parental responsibility for a child, which arguably provides a more effective way of dealing with the complex situations that can arise when a child is being raised in same-sex families, as well as when relationships break down.

As a child advocate, I believe that the starting point should be the child’s perspective – what does the child need to know, and to have? They should know their biological origins, which can be important for a number of reasons, including medical reasons, and also who is caring for them. The two are not necessarily the same. Social reality needs to be reflected in a more flexible approach in this area, in order to ensure that the interests of the child are protected.

**Stephen Gilbert:** From a policy perspective, the most important thing that children need is love and support and it’s quite clear that same sex-couples are as able to provide that as opposite-sex couples are.

**ERT: What about the issues around assisted reproduction?**

**Stephen Gilbert:** The reality is that much will depend on the individuals concerned and their specific circumstances so it’s difficult to make a generalised statement. Suffice to say that there are, of course, circumstances when it will be appropriate for
same-sex couples to be able to access reproductive services.

**Ian Curry-Sumner:** Some positive measures have been taken at a national level in some jurisdictions in the appropriate regulation of assisted reproduction. However, the issue needs to be discussed at the international level. There are various domestic approaches but assisted reproduction techniques cannot necessarily be limited to national cases – in reality, you may have a sperm donor from one country, an egg donor from another and the child may be born in yet another country. The legal approach is far too nationalistic and people are not aware that the international ramifications can be enormous. This has even led, in some cases, to people being stranded in embassies or consulates, for example because they are in a foreign country which requires them to leave due to visa restrictions, but their surrogacy arrangements are not recognised in their country of origin. This is clearly not in anybody’s best interests and the position needs to change.

**ERT:** Are there other ways in which people are currently excluded from family life, on grounds of sexual orientation (or indeed other grounds), which you would like to draw attention to?

**Ian Curry-Sumner:** Of course, in some parts of the world, some countries still have the death penalty for same-sex relationships. However, within Europe, due in part to the European Convention for the Protection of Human Rights and Fundamental Freedoms and, in the European Union, the Charter of Fundamental Rights of the European Union, certain minimum standards have arisen, which are very proactive towards sexual orientation laws. The discussion is now focussed around relationship laws, rather than issues of criminalisation, which is a drastic improvement. With “family life” as a human rights convention concept, the court in Strasbourg has made enormous steps. From an academic perspective, I can see that overall there is development and positive progress, although I imagine that some activists would disagree with this because there is still work to be done in certain areas.

**Stephen Gilbert:** In the same way that extending the vote to women or ending apartheid wasn’t the end of the issues facing those communities, delivering equal marriage isn’t the end of the road of fighting for equality for LGBT people. There’s still work to do in tackling homophobic bullying, promoting good health and good mental health, encouraging diversity in the work place and delivering media images that reflect the reality. By ending the mantra of separate but equal, which gave a “wink and nod” that gay and lesbian people were somehow different, it does mean that all these other issues can be more easily tackled.

**ERT:** In your view, from a global perspective, which have been the most significant changes in recent years in relation to advancing the equal right to family life?

**Ian Curry-Sumner:** A lot of the most significant changes have come about following judgments from the European Court of Human Rights and, to a lesser extent, the Court of Justice of the European Union. A number of seminal cases have been heard by the European Court of Human Rights, for example Goodwin v United Kingdom. In some ways, it could be said that the courts are making slow progress but they understand that they have to strike a balance between all of the various member states. If they went too far, they might face a political backlash.
Sometimes, to achieve progress, it must be accepted that there will be times when movement appears relatively limited from the point of view of certain jurisdictions, whereas the same developments appear very liberal to other states.

**ERT:** Apart from issues relating to family life, what have been some of the most effective recent strategies for effecting change and advancing the rights of those who have been marginalised on the basis of their sexual orientation?

**Stephen Gilbert:** It’s clear that one of the most significant ways of getting legislative change is to get openly LGBT law-makers into office. There is some great research underway showing a direct correlation between the measures a territory takes to end discrimination and the number of openly gay, lesbian, bisexual or transgendered law makers.

**Ian Curry-Sumner:** A lot of progress has been made through the work of activist groups lobbying parliament. As an academic rather than a lobbyist, I can’t comment on specific strategies of activists when lobbying or of their relative efficacy, but it is certainly clear that lobbying is a useful strategy. I would also say that the internet has been instrumental in connecting marginalised groups from different counties, and this has contributed to effecting change. Activist groups and sexual orientation lawyers have formed vast networks in recent years, which are kept up to date on developments all over the world. For example, when a new law was passed permitting same-sex marriage in Argentina, people elsewhere were informed about it very quickly through such networks. This communication is very powerful and provides more ammunition for making equality arguments.

**ERT:** What would you most like to see in terms of change over the next few years?

**Ian Curry-Sumner:** I think that attention must be paid to cross-border recognition of relationships within the EU. We currently have a number of regulations dealing with cross-border jurisdiction in relation to divorce, and recognition of divorce proceedings, but not the relationships themselves. It needs to be addressed by the EU in relation to both same-sex and opposite-sex relationships. This, for me, is the most important area in which change is necessary in order to avoid discrimination against couples in having their relationships regulated across borders.

**Stephen Gilbert:** I want to see equal marriage delivered in the UK and then the Government to come forward with a comprehensive strategy to tackle the other issues facing the LGBT community. Equal marriage is a step in the right direction, but the battle is far from over.

*Interviewer on behalf of ERT: Richard Wingfield*
The Equal Rights Trust Advocacy

Update on Current ERT Projects

ERT Work Itinerary: July-December 2012
The Equal Rights Trust Advocacy

In the period since the publication of ERR Volume 9 (September 2012), ERT has continued with its work to expose patterns of discrimination globally and to combat inequalities and discrimination both nationally and internationally. ERT advocacy is based on the Declaration of Principles on Equality which is an instrument of best practice reflecting the modern consensus on the major substantive and procedural elements of laws and policies related to equality. Below is a brief summary of some of the most important ERT advocacy actions since September 2012.

International

On 10 December 2012, ERT issued a statement to mark Human Rights Day 2012. The theme of Human Rights Day 2012 was inclusion and the right to participate in public life. Inclusion and participation – guaranteed in particular by the rights to freedom of expression and opinion, freedom of assembly and association and the right to take part in elections, in public life and decision-making – are key themes in ERT’s work.

ERT’s statement highlighted the relationship between equality and public participation in its work, and called on all those working to ensure inclusion and participation in public life to place the rights to equality and non-discrimination at the heart of their efforts. The statement highlighted ERT’s global work to combat statelessness, to ensure that those without a nationality are not deprived of a voice; its work to combat discrimination on grounds of political opinion in countries such as Azerbaijan, Belarus and Sudan; and its work to promote equal participation for LGBTI persons in countries such as Guyana, Jordan, Kenya and Malaysia.

On 20 December 2012, ERT made a submission to the Senate Committee on Legal and Constitutional Affairs of Australia on the Draft Anti-Discrimination and Human Rights Bill 2012. ERT’s submission, while welcoming the Draft Bill in principle, made a number of recommendations to ensure consistency with international law and best practice, as represented by the Declaration of Principles on Equality. ERT’s submission made a number of specific recommendations for amendment to the Bill, including:

- The addition of a number of grounds omitted from, or only partially protected in, the list of explicitly protected grounds, including maternity; civil, family or carer status; health status; language; birth; and economic status.
- The adoption of a conditionally open list of grounds reflecting the approach taken in Principle 5 of the Declaration of Principles on Equality.
- The adoption of the terms direct and indirect discrimination, and their definitions as
provided in the Declaration, rather than the alternative formulations provided.

- Amendments to the provisions on positive action, to ensure that positive action measures are understood as an integral element to the right to equality, and not an exception to it, and to replace the test of “objective necessity” with one of “reasonableness and proportionality”.

- The removal of a number of exceptions considered to be inconsistent with international law and best practice.

- Amendments to the provisions on reasonable accommodation to bring these into line with international standards, in particular by ensuring that the Bill retained a duty to make reasonable accommodation.

On 21 February 2013, the Australian Senate Committee on Legal and Constitutional Affairs published its report on the Draft Anti-Discrimination and Human Rights Bill 2012, marking an important step in Australia’s progress towards enacting comprehensive anti-discrimination law. In its report, the Committee adopted a key recommendation from ERT’s response to its consultation, which was submitted in December 2012.

The Draft Bill contains a significant exception for discrimination by religious bodies or educational institutions. In its report, the Committee acknowledged ERT’s argument that this exception was too broad and would be inconsistent with the right to non-discrimination. The Committee recommended that the exception be narrowed so as not to permit discrimination in the provision of services. While ERT argued for the removal of the exception from the Draft Bill, the Committee’s proposal would still improve the Bill, and ERT therefore urged the Government of Australia to accept the Committee’s recommendation.

However, ERT retained serious concerns that in its current form, the Draft Bill still falls short of the standards required by international law, in respect to several important issues (related to grounds, positive action and reasonable accommodation). ERT urged the Government of Australia to take these recommendations into account when finalising the Draft Bill.

**Bangladesh**

On 9 October 2012, ERT made a stakeholder submission to the Universal Periodic Review of Bangladesh, commenting on the human rights of stateless Rohingya. In this submission, ERT highlighted some of the most significant concerns and challenges with regard to the human rights protection of Rohingya in Bangladesh relating to the populations of Rohingya that arrived since the recent violence in Myanmar in June 2012.

These concerns relate to the *refoulement* of Rohingya fleeing the recent violence in Myanmar since June 2012, and the treatment of Rohingya refugees inside Bangladesh, including lack of access to protection and humanitarian aid for Rohingya. ERT also raised concerns about the treatment of the Rohingya population in Bangladesh including their lack of access to a regularised status, security of the person and their susceptibility to arbitrary detention and labour exploitation.

**Guyana**

At its 52nd session (9-27 July 2012), the UN Committee on the Elimination of Discrimination against Women considered the state report of Guyana. ERT had submitted a parallel report focused on the country’s obliga-
tions to respect, protect and fulfil the right to non-discrimination under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.

The parallel report made recommendations in a number of areas, based on interviews with victims of gender discrimination and their representatives and analysis of Guyanese laws conducted by ERT and its partners at the Society for Sexual Orientation Discrimination (SASOD).

The Committee included a number of recommendations which replicated or echoed ERT's recommendations. Most significantly, the Committee recommended that Guyana enact "comprehensive anti-discrimination legislation that includes the prohibition of all forms of discrimination against [women]", as well as decriminalise same-sex relations. Given that the provisions in Guyanese law have been interpreted as relating to same-sex relations between men only, this is a particularly welcome recommendation, in that it recognises the stigmatising effect of criminalisation on the LGBTI population more generally, a point stressed in ERT's submission.

Other important areas where the Committee reflected ERT's recommendations included calling on Guyana to: harmonise the various provisions on equality and non-discrimination at the constitutional and legislative level; raise awareness of the rights to equality and non-discrimination among rights-holders and duty-bearers; ensure effective access to justice including through the provision of legal aid for this purpose; and ensure the full implementation of the Sexual Offences Act.

**Indonesia**

On 24-25 October 2012, ERT participated in the "EU-Indonesia Civil Society Human Rights Seminar on Non-Discrimination: From Principles to Practice" in Jakarta, Indonesia. At the Seminar, which was attended by a large number of Indonesian stakeholders, including civil society organisations, members of the judiciary and others, and representatives of the EU Delegation to Indonesia, ERT Executive Director Dimitrina Petrova was a keynote speaker, addressing the topic of emerging trends in equality law, advocating for adopting comprehensive equality legislation, and participating in various discussions on improving protection from discrimination in Indonesia. The ERT positions were then reflected in the conference recommendations to the Indonesian government.

**Jamaica**

At its 52nd session (9-27 July 2012), the UN Committee on the Elimination of Discrimination against Women considered the state report of Jamaica. ERT had submitted a parallel report focused on gender equality commenting on the state's compliance with Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. The Committee incorporated all but one of ERT's principal recommendations in its Concluding Observations.

Most significantly, the Committee recommended that Jamaica enact "comprehensive national legislation to ensure the principle of equality between women and men". In its report, ERT had urged the Committee to recommend that Jamaica enact equality legislation in order to comply with the requirements of the Convention, as elaborated in the Committee's General Recommendation 28. ERT insisted that any such legislation should provide protection from direct and indirect discrimination, harassment, discrimination on the basis of perception and discrimination by association, on all usually protected
grounds and in all areas of life regulated by law. ERT also recommended that such legislation should provide measures necessary to ensure adequate access to justice for victims of discrimination; provide effective, proportionate and dissuasive sanctions and remedies; and require the state to take all necessary measures to eliminate discrimination and promote equality, including through the adoption of special measures.

The Committee included a number of other recommendations which replicate or echo recommendations from ERT’s report, including: strengthening the national women’s machinery within the executive branch of the Government and establishing a National Human Rights Institution; urging Jamaica to take measures to improve protection from gender-based violence; and urging Jamaica to take measures to improve enforcement and implementation of the Employment (Equal Pay for Men and Women) Act.

Kenya

At its 105th session (9-27 July 2012), the UN Human Rights Committee considered the state report of the Republic of Kenya. ERT had submitted information to the Committee which urged it to recommend a number of specific legislative and policy actions to increase protection of the rights to equality and non-discrimination. In its Concluding Observations published in late July, the Committee adopted a number of these recommendations.

ERT’s submission was based on its 2011 report In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya. The report is the first ever comprehensive account of discrimination and inequalities on all grounds and in all areas of life in Kenya. The Committee incorporated many of ERT’s recommendations in its Concluding Observations, including those relating to repeal of family laws which discriminate against women, repeal of provisions of the Penal Code which have been widely interpreted as criminalising consensual sexual activity between persons of the same sex, and addressing discrimination against Kenyan-Nubians in relation to citizenship and identity cards. The Committee also made recommendations concerning legal aid and data collection, issues ERT had raised in its submission.

Despite these positive inclusions, however, the Committee did not recommend that Kenya enact comprehensive legislation to prohibit all forms of discrimination, an obligation under Article 26 ICCPR read together with Article 2. ERT and its partners in Kenya, including the Kenya Human Rights Commission, the Federation of Women Lawyers and the Gay and Lesbian Coalition of Kenya, have developed, and advocated for the adoption of, a comprehensive equality bill. This effort has been supported by dozens of other non-governmental organisations in Kenya, and there is currently a growing consensus that adoption of such legislation is necessary for Kenya to meet its obligations under international law and to give effect to the aspirations of its new Constitution.

Malaysia

On 12 November 2012, ERT published Washing the Tigers: Addressing Discrimination and Inequality in Malaysia. The report, in partnership with the Malaysian NGO Tenaganita, is the first ever comprehensive account of discrimination and inequalities on all protected grounds and in all areas of life in Malaysia. It is based on extensive field research and makes a set of detailed recommenda-
tions for reforms to law, policy and practice related to equality and non-discrimination.

The report was published at a moment of great importance for the Malaysian people. On 28 April 2012, thousands of people took to the streets of Kuala Lumpur in Bersih 3.0, the biggest mass opposition rally in Malaysia’s history. The protesters demanded “cleansing” of Malaysia’s electoral system, which favours the coalition that has been in power since Malaysia’s independence in 1957. Although this rally was violently suppressed, as were previous ones in recent years, the desire for reform appears undiminished. Washing the Tigers finds that the problems which the Bersih movement identifies within the political system are symptomatic of deep-rooted inequalities which limit people’s rights and aspirations in this Asian Tiger nation.

The report made a series of recommendations to the Government of Malaysia. Some of the key recommendations include that Malaysia:

- Join international treaties and other instruments which are relevant to the rights to equality and non-discrimination, including the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966).

- Review and repeal discriminatory provisions in current laws and policies, including affirmative action provisions in the Constitution which discriminate against members of non-Bumiputera groups. The report also recommends amendments to criminal law, employment law, education law and family law, among others.

- Amend the Federal Constitution to ensure that it complies fully with Malaysia’s international human rights obligations on the rights to equality and non-discrimination.

- Enact comprehensive equality legislation which should: aim at eliminating direct and indirect discrimination and harassment in all areas of life regulated by law; cover all prohibited grounds listed in Principle 5 of the Declaration of Principles on Equality; and attribute obligations to public and private actors, including in relation to the promotion of substantive equality and the collection of data relevant to equality.

Myanmar

On 2 November 2012 ERT issued an Emergency Report on the violence in Rakhine State, Myanmar, and wrote to the President of Myanmar urging action to end the violence, provide protection and aid for the victims and ensure that perpetrators were brought to justice.

As of November 2012, the Rohingya of Myanmar had been subject to systematic, state sponsored attacks in Rakhine State, for a number of months, beginning in June 2012. ERT had been monitoring the situation and reporting on it since the outset of the violence. In October 2012, a new outbreak of more intense and widespread violence began. The nature and extent of this new violence, together with mass evictions and forced relocation of Muslims by security forces, resulted in claims of ethnic cleansing being made by many advocacy groups.

Consequently, on 2 November 2012, ERT wrote to President Thein Sein of Myanmar, urging him to take immediate action to end the violence, provide protection and aid to all
victims, allow full access to the international community and ensure that all perpetrators are brought to justice. ERT also issued an emergency report drawing attention to the situation and calling on both the government of Myanmar and the international community to respond immediately, to end the violence, protect victims and bring the perpetrators to justice. The report highlighted the role played by the government of Myanmar and state security forces in inciting hatred against Muslims, turning a blind eye to violence perpetrated against them and engaging in the violence. It also raised concern over the independence and effectiveness of the government-appointed commission of inquiry, and recommended that an independent, international inquiry be carried out. ERT appealed to key figures in the international community to act in accordance with the doctrine of responsibility to protect and address the crisis as a matter of urgency.


The discussion was chaired by Stefanie Grant, Senior Advisor to ERT and a Founder and former Director of the Research Department at Amnesty International. Panellists included Phil Rees, Reporter and TV-producer – former foreign correspondent and senior producer at the BBC; Maung Zarni, Visiting Fellow at the London School of Economics; Tun Khin, President of Burmese Rohingya Organization UK; and Amal de Chickera, Head of Statelessness and Nationality Projects at ERT. The panellists looked at the issue in the context of a Burma that is haltingly moving towards democracy but still unable to move beyond the long shadow of its authoritarian regime.

**Solomon Islands**

In June 2012, ERT submitted suggestions for questions relating to equality and non-discrimination to be included in the List of Issues for the Pre-session Working Group of the 54th session (February 2013) of the UN Committee on the Elimination of Discrimination against Women when it considered the state report of the Solomon Islands. On 3 August 2012, the Committee agreed the List of Issues for consideration at the 54th session.

The Committee included a number of questions suggested by ERT, including on the substance of the right to equality and non-discrimination in the draft Constitution, its scope, and the definitions of different forms of discrimination; the steps being taken to ensure all forms of gender-based violence are prohibited under the law; and whether the Solomon Islands was taking steps to establish a National Human Rights Institution in line with the Paris Principles.

**Uganda**

On 11 January 2013, ERT urged Ugandan President Yoweri Museveni to intervene to prevent the Anti-Homosexuality Bill – under debate in the Ugandan Parliament – becoming law. ERT was prompted to resubmit a 2009 legal brief outlining how the Bill contravenes both international and Ugandan law by reports that a vote on the Bill might take place in February 2013.

ERT’s letter urged President Museveni to call on Ugandan parliamentarians to reject
the Bill in its entirety, and, if they failed to do so and the Bill passed, to refuse Presidential assent. The letter reiterated conclusions, expressed in a 2009 ERT legal brief, that the Bill is both unconstitutional and in breach of Uganda’s international obligations. ERT’s brief argued that the right to equality and non-discrimination provided by the Constitution of Uganda provides protection on grounds of sexual orientation and gender identity. The brief provided evidence that the Bill violates Articles 21 (equality and non-discrimination) and 27 (privacy) of the Constitution. The brief also detailed the observations of UN treaty bodies which have concluded that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provide protection from discrimination on grounds of sexual orientation and gender identity.

Ukraine

On 22 February, ERT called upon the Parliament of Ukraine to reject Draft Law 0945 “On the Introduction of Changes to Certain Legislative Acts of Ukraine (regarding protection of children’s rights in the safe information sphere)”, which, if passed, would discriminate against gays, lesbians and bisexual persons.

In December 2012, Draft Law 0945 (formerly Draft Law 8711) was submitted to the Verkhovna Rada (the Ukrainian parliament). The Draft Law would amend a number of existing laws, including the Criminal Code of Ukraine, with the effect of prohibiting the broadly construed “promotion of homosexuality” in different media, and would provide for punishment of up to five years’ imprisonment.

ERT submitted to the Verkhovna Rada a legal opinion on the Draft Law assessing its compatibility with the rights to equality and non-discrimination as protected under international law, and which establishes that adoption of the Draft Law would constitute a violation of: Articles 2(1), 19 and 26 of the International Covenant on Civil and Political Rights; Articles 2(1), 13, 17 and 24 of the Convention on the Rights of the Child; and Articles 10 and 14 of the European Convention on Human Rights. In its letter to the Chairman of the Verkhovna Rada and the parliamentary leaders of the five political parties represented therein accompanying the legal opinion, ERT called for the Draft Law to be rejected in its entirety.

ERT also wrote to Herman Van Rompuy, President of the European Council, and Jose Manuel Barroso, President of the European Commission, as well as to other European Commissioners, calling for the European Union to urge the government of Ukraine to comply with its obligations under international and European human rights law and to object to the adoption of Draft Law 0945.

United Kingdom

On 29 August 2012, ERT made a submission to the European Committee on the Prevention of Torture (CPT) on the issues of indefinite detention of stateless persons in the UK. The purpose of the submission was to draw the attention of the CPT to relevant issues, in advance to its visit to the UK in September 2012.

As a result of having made a formal submission, ERT was invited to attend a civil society briefing for the CPT in London on 25 September 2012. ERT Head of Statelessness and Nationality Projects, Amal De Chickera, spoke at the briefing on the phenomenon of indefinite detention and its impact on stateless persons in the UK. He also presented the delegates with copies of ERT’s Guidelines to Protect Stateless Persons from Arbitrary Detention.
On 25 February 2013, ERT made a submission to the Parliamentary Committee considering the **Marriage (Same Sex Couples) Bill 2013** in the House of Commons in the United Kingdom. The Bill opens up access to the institution of marriage to same sex couples through civil ceremonies and allows religious organisations to “opt in” to conducting same sex marriage.

ERT’s submission to the Committee welcomed the Bill, arguing that it would, if adopted, provide the United Kingdom with some of the strongest and most progressive legislation protecting the rights of lesbian, gay and bisexual people. Notwithstanding that support however, ERT expressed its serious concerns that the Bill contains a number of provisions which would differentiate between different sex and same sex couples and which would amount to unjustifiable discrimination.

ERT’s analysis stressed that when religious organisations conduct marriages which are recognised and regulated by the state, they perform a public function and that international human rights law and the Equality Act 2010 require such functions to be carried out in a non-discriminatory manner. The submission recognised that respect for freedom of religion requires that religious organisations should be free to conduct religious ceremonies in accordance with their beliefs and tenets. However, it noted also that when conducting state-recognised marriage, these institutions are carrying out a public function and therefore argued that those organisations should not be permitted to discriminate against couples based on their sexual orientation, but must carry out that function in a non-discriminatory manner.

In addition, ERT highlighted that the Bill:

- Leaves same sex couples in Northern Ireland unable to marry, solely based on their place of residence;
- Reserves concepts such as adultery and consummation as solely heterosexual, symbolising a segregation of different sex and same sex couples; and
- Makes no amendments to the Civil Partnerships Act 2004 which discriminates against different sex couples in denying them access to civil partnerships.

ERT urged the Committee to remove these remaining areas of discrimination between different sex and same sex couples, thereby ensuring full equality, regardless of sexual orientation.
Update on Current ERT Projects

I. Thematic Projects

Applying Equality and Non-discrimination Law to Advance Socio-Economic Rights

This project started in July 2011 and, through the publication of a report, will contribute to building strategies of better enforcement of economic and social rights through drawing and communicating lessons from a global review of jurisprudence and policies which have used equality and non-discrimination law to advance the realisation of social and economic rights.

During this period, research has continued. Post-graduate students of the University of Cambridge Pro Bono Project have assisted with the research produced a first draft of the case compendium for use as part of the report. Research and drafting of the report by ERT is ongoing. An expert roundtable consultation on a draft of the report will take place on 6 June 2013, co-hosted with UCL in London. The report will be finalised in 2013.

Developing Resources and Civil Society Capacities for Preventing Torture and Cruel, Inhuman and Degrading Treatment of Persons with Disabilities: India and Nigeria

This project commenced in November 2010 with partner organisations in India (Human Rights Law Network - HRLN) and Nigeria (Legal Defence and Assistance Project - LEDAP). Its objectives include the development of legal and policy guidelines on the prevention and remedy of torture and ill-treatment of persons with disabilities, based on documentation of abuses and test
litigation, as well as capacity building related to the intersection of disability rights and non-torture rights.

Since September 2012, the key activities under this project have been:

- Finalising the first drafts of the Resource Packs on Disability and Torture for both India and Nigeria.
- Continued progress of strategic litigation in India and Nigeria.
- Conducting of training for CSO activists and lawyers in Delhi and Lagos.
- Hosting of roundtable stakeholder meetings on the findings of the project in Delhi and Lagos.
- Press conferences in both Delhi and Lagos to announce the findings of the project research and the recommendations agreed by stakeholders at the roundtable meetings in the respective jurisdictions.

ERT has prepared first drafts of the Resource Packs on Disability and Torture for both India and Nigeria, in conjunction with HRLN and LEDAP, for consultation with key stakeholders. These Resource Packs describe patterns of torture and ill-treatment of people with disabilities in the respective country identified in the course of field research, present legal research and analysis, bringing together relevant international, regional and domestic law and jurisprudence on disability and torture, and make recommendations for change. In February 2013, ERT consulted with activists and stakeholders on the findings and will now use the output from these consultations to further develop and finalise the drafts.

The strategic litigation component of the project continues to progress. The project is supporting 10 legal cases which are currently before the courts in India and the development of 13 cases which are due to be filed before Nigerian courts. It is intended that ERT will submit amicus briefs where possible, and a number are being prepared.
The project also involves training to equip CSOs and lawyers in India and Nigeria to tackle problems of ill-treatment of persons with disabilities. ERT has worked in collaboration with two senior advisors and partner CSOs to design and deliver a workshop for CSOs and lawyers working in the fields of equality, disability and/or torture in India and Nigeria. Following up on a first round of workshops held in January 2011, a second round of workshops took place in February 2013 in both India and Nigeria, building the capacity of more than 70 CSO activists and lawyers.

Also in February 2013, stakeholder roundtable meetings were hosted by ERT in both Delhi and Lagos. Each brought together representatives of government departments to discuss the findings of the research. In both cases, recommendations for action that needs to be taken by various branches of the government in each country were agreed. ERT will finalise and circulate the agreed recommendations for use in advocacy and directly by the government representatives in their relevant ministries. The stakeholder roundtable events were followed by press conferences. The result has been good national press coverage of the research findings and the agreed recommendations for policy change.

**Empowering Human Rights Defenders in Central Asia to Combat Discrimination on the Basis of Ethnicity and Religion**

This project started in January 2013 in partnership with two NGOs based in Central Asia, and the participation of further local activists and experts. Its purpose is to address ethnic and religious discrimination in some Central Asian countries, and publicise studies on the subject. In February 2013, ERT travelled to the region to engage in detailed discussions with its partners, interview prospective collaborators, and conclude project agreements. ERT also held an international strategic planning meeting in Bishkek, attended by approximately fifteen human rights defenders from the region.

**Greater Human Rights Protection for Stateless Persons in Detention**

Since the publication of Volume 9 of the ERR (in September 2012) the key activities on this project have been:

- The launch of ERT’s *Guidelines to Protect Stateless Persons from Arbitrary Detention*.
- The use of these *Guidelines* as a training resource around the world.
- The publication of the Special Issue on Statelessness of the *European Journal of Migration and Law*.
- The activities of the European Network of Statelessness (ENS) of which ERT is a founding organisation.
- The formation of a Working Group on Statelessness at the Asia Pacific Refugee Rights Network (APRRN) of which ERT is a founding member.

The *Guidelines to Protect Stateless Persons from Arbitrary Detention* accompanied by a detailed (26,000 word) Commentary to the *Guidelines* authored by Amal de Chickera were launched in mid-July at an event in London. Since their launch, the *Guidelines* have generated a great deal of interest. 200 copies were shipped to the International Detention Coalition headquarters in Australia, 200 copies to Lawyers for Human Rights (South Africa) and 100 copies to the Greek Refugee Network, for training purposes. Consequently, the *Guidelines* have been and will be used to train participants at regional training workshops on immigration detention in Asia, Africa and Europe. In November 2012,
the International Detention Coalition utilised the Guidelines to train the participants of the European regional training workshop on immigration detention which was held in Athens. The Guidelines were also used as a training material at the inaugural statelessness training workshop organised by the European Network on Statelessness in Budapest, also in November 2012.

The Special Issue on Statelessness of the European Journal of Migration and Law was published in late July. The issue, co-edited by Amal de Chickera, contains articles by leading academics, activists and experts on statelessness in Europe, an interview with Thomas Hammarberg and the ERT’s Guidelines to Protect Stateless Persons from Arbitrary Detention. It also contains articles by Claude Cahn, René de Groot and Olivier Vonk, Gabor Gyulai, Mark Manly, and Laura van Waas.

The European Network on Statelessness – of which ERT is a founding member - continued its activities during the reporting period. Amal de Chickera attended many ENS meetings and has contributed to the growth of the network through recruiting new members, developing its law and policy pillar and contributing to policy development, awareness-raising and capacity building activities of the Network. The primary activity in this regard was the hosting of the inaugural ENS Training workshop for European statelessness advocates in Budapest in November 2012. ERT contributed via Skype link.

ENS also issued a statement to mark international human rights day on 10 December 2012. This statement, which called for greater inclusion of stateless persons in Europe, was initiated and drafted by ERT. The statement was widely publicised by ENS member organisations (68 at the time), translated into Danish, French, Italian, Serbian and Slovenian, and was covered by national media in various European countries including Belgium, Denmark and Italy.

The fourth Asia Pacific Conference on Refugee Rights was conducted in South Korea in August 2012. However, a statelessness working group was established at the conference and ERT is a founding member of the working group. This means that ERT has played a key role in establishing the only two regional statelessness networks in the world – ENS and the APRRN Working Group, another example of the leadership role ERT continues to play on the issue of statelessness.

ERT has similarly played an active role in having the International Detention Coalition prioritise statelessness as one of its key focus issues.

**Strengthening Human Rights Protection of the Rohingya**

The period since September 2012 was extremely busy for the team of this project, primarily due to the human rights and humanitarian crisis faced by Rohingya in Rakhine state of Myanmar where they have been subject to discriminatory violence and abuse and have been denied freedom of movement and restricted to camps where they receive little or no humanitarian aid.

During this period, ERT’s research has been carried out and completed by team members working in the six project countries: Bangladesh, Indonesia, Malaysia, Myanmar, Saudi Arabia and Thailand. Bangladeshi senior researcher Ranajit Dastidar conducted a 10 day field visit in Cox’s Bazar and the Chittagong Hill Tracts in September 2012. Saiful Huq Omi, Project photographer and researcher, did research in Malaysia also in September. The Malaysia and Thailand research is being finalised, under the guid-
ance of ERT’s Project partner, the Institute of Human Rights and Peace Studies of the Mahidol University (Bangkok).

In September 2012, ERT participated in a conference on the Plight of the Rohingya organised by the Perdana Global Peace Foundation in Kuala Lumpur. Saiful Huq Omi made a multimedia presentation on the Rohingya issue which was well received by the audience. Additionally, senior research consultant Sriprapha Petcharamesree spoke about the situation faced by Rohingya populations in Malaysia and Thailand, and the ASEAN response to the crisis.

In October, ERT hosted a panel discussion on the Rohingya crisis at the South East Asia Human Rights Network Regional Human Rights Conference in Jakarta. The panel comprised presentations by members of the project research team, including Zam Askandar, Natalie Brinham, Pei Palgrem, Sriprapha Petcharamesree (chair), Yanuar Sumarlan and Veerawit Tianchinin.

During the report period, ERT has also played a lead advocacy role in bringing together different civil society voices and conducting advocacy on the Rohingya issue. In September 2012, ERT attended a roundtable discussion on the issue hosted by the US Embassy in London. Similarly, ERT briefed the European Delegation in Brussels on ERT’s findings, before their visit to Myanmar. ERT has also conducted meetings with the UK FCO and other representatives of the diplomatic and INGO community during the reporting period.

Since 21 October 2012, Muslims in Rakhine state, including stateless Rohingya and Kaman Muslims who are citizens of Myanmar, have been subject to intense, large-scale and sustained violence including killing, burning of homes and property, forced displacement and the denial of humanitarian aid. In response to this most recent spate of violence, in early November ERT wrote to the President of Myanmar and issued an emergency report. ERT urged the President of Myanmar to take immediate action to end the violence, provide protection and aid to all victims, allow full access to the international community and ensure that all perpetrators are brought to justice. ERT also issued an emergency report, drawing attention to the role played by Myanmar and the failure of the international community to respond to the situation in a strong and decisive manner. ERT appealed to key figures in the international community to act in accordance with the doctrine of responsibility to protect and address this crisis as a matter of urgency.

In November 2012, ERT in collaboration with SOAS hosted a panel discussion on the Rohingya crisis chaired by Stefanie Grant. Speakers were Amal de Chickera, Tun Khin, Phil Rees and Maung Zarni. A multimedia presentation by Saiful Huq Omi was also screened. The event was well attended (about 70 people) and well received.

In November 2012, ERT also submitted a memo to the U.S. Department of State prior to President Obama’s visit to Myanmar. The memo called on the USA to exercise more pressure on the Burmese government to address the Rohingya issue, protect Muslims in Rakhine state and end statelessness. In a speech made at Yangon University, President Obama made direct reference to the Rohingya crisis – and became the first public figure to use the word “Rohingya” at a public event in Myanmar.

The project team met at the Mahidol University in Thailand on 16-17 February 2013 for a second research and advocacy workshop. The workshop reviewed progress in the
drafting of a series of reports envisaged to be published under this project, discussed key issues and themes to be addressed the reports, and agreed the publication schedule. With regard to the advocacy and training components of the project, the team identified national, regional and international advocacy opportunities, discussed advocacy strategy, planned training workshops and a project conference, and finalised the advocacy and training schedule.

II. Country Projects

Azerbaijan: Developing Civil Society Capacity for Preventing Discriminatory Torture and Ill-treatment

This project began in November 2011, and is implemented in partnership with the Azerbaijani women’s organisation Tomris. The project seeks to (1) increase the capacity of civil society organisations (CSOs) and other professionals to understand and apply anti-discrimination and human rights law in challenging discriminatory torture and ill-treatment; (2) create an institutional framework for civil society dialogue and advocacy on issues relating to discriminatory torture and ill-treatment through establishing a CSO Forum; and (3) increase awareness and understanding among CSOs and other key stakeholders of the link between discrimination and the occurrence of torture and ill-treatment. The project features training workshops in three major cities in Azerbaijan (Baku, Ganja and Kurdemir), the publication of a report on discriminatory torture and ill-treatment in Azerbaijan, the establishment of a CSO Forum, and an advocacy campaign.

Following the second round of regional CSO forum meetings in Ganja and Guba, the second meeting of the Eastern region CSO forum was held in Baku in August, attended by 12 local CSOs. At the meeting, participants discussed and agreed a number of priority areas for joint action combating discrimination.

In September 2012, ERT conducted training workshops in three cities (Baku, Ganja and Guba). The training focused on familiarising participants with the key concepts related to discriminatory torture and ill-treatment. It included sessions on: (i) basic concepts in equality law; (ii) basic concepts on torture and ill-treatment and associated international law; (iii) Azerbaijan’s international obligations with respect to equality and to torture and ill-treatment; (iv) Azerbaijani law, policy and practice with respect to equality and to torture and ill-treatment; (v) practical exercises in identifying discriminatory torture and ill-treatment; (vi) human rights monitoring and evidence gathering techniques; (vii) submissions to international and national human rights monitoring mechanisms on discriminatory torture and ill-treatment; and (viii) developing advocacy and awareness-raising strategies relating to discriminatory torture and ill-treatment. Feedback from the training was extremely positive, and trainers were pleased both with the level of learning exhibited by training participants and their interest in incorporating an equality perspective into their work.

Following the training workshops, a third round of CSO forum meetings were held in the three host cities. After a brief review of the training workshops and a restatement of the project’s aims and objectives, the meetings focused on identification of issues of joint concern and the formulation of collective responses. Issues discussed included the treatment of political prisoners, and the approach of the authorities to issues of domestic violence. Participants also began the process of identifying potential advocacy opportunities at both the national and interna-
tional levels. The Forums were well attended by a mixture of civil society organisations, media organisations, lawyers, and representatives of local and national authorities.

This project has had a significant positive impact on the capacity of civil society to combat discriminatory torture and ill-treatment and has delivered – or is in the process of delivering – on each of its objectives. The three planned training workshops successfully provided participants with grounding in key concepts relating to torture and ill-treatment, equality and non-discrimination law, and the nexus between the two areas, followed by discussion of effective strategies for combating discriminatory ill-treatment within the context of the CSO Forum. The result is a significant increase in the capacity of these organisations to apply anti-discrimination and human rights law in challenging discriminatory torture and ill-treatment. ERT and Tomris have successfully established three regional CSO Forums, based in Baku, Ganja and Guba, each of which has convened three meetings attended by a number of civil society actors, media and legal representatives, and representatives of the local and national authorities. Participants at these meetings have, as planned, shared their experiences of discriminatory ill-treatment, identified common problems and agreed joint actions to address these problems. The result is that civil society dialogue and cooperative working on discriminatory torture and ill-treatment has been established.

**Belarus 1: Empowering Civil Society in Belarus to Combat Discrimination and Promote Equality**

This project is implemented in an informal partnership with the Belarusian Helsinki Committee (BHC) in Minsk. The project’s objectives are to improve knowledge of anti-discrimination law among NGOs in Belarus to enable them to monitor and report on discrimination and to bring discrimination
cases to courts; and to create a coalition of NGOs with a joint advocacy platform on issues of discrimination.

Since June 2012, ERT’s work under this project has focused on finalising a comprehensive report on addressing discrimination and inequality in Belarus. Materials to be incorporated in the report were produced by BHC in the first half of 2012 and since then ERT has worked to revise, update and expand the report for publication. This has included a thorough review of available literature on discrimination and the situation of different groups exposed to discrimination, a comparative analysis of laws and policies on equality and non-discrimination and consultation with civil society stakeholders.

This project has had a major impact in highlighting the nexus between discrimination and the ongoing political repression in Belarus. Through providing training, expertise and material support, the project enabled Belarusian human rights defenders to challenge state-sponsored abuses through the courts; to resist the victimisation of the political opposition and their supporters, including defence lawyers, following the disputed presidential election in December 2010; and to successfully overturn the imposition of travel bans on prominent dissidents and human rights defenders, including the members of ERT’s partner NGO. As importantly, this project has enabled civil society in Belarus to coalesce around the right to equality, providing a vital space for joint work and activism. In late 2011, ERT and BHC agreed to continue their successful partnership, and in April 2012 launched a second project which aims to build on the achievements of this project.

In January 2013, an independent expert was appointed to carry out an evaluation of the project’s impact. The expert visited Belarus and completed the evaluation in February 2013. The evaluation is very positive and confirms the feeling that the project has achieved its objectives in a cost effective and efficient manner.

**Belarus 2: Empowering Civil Society to Advocate Collaboratively the Adoption of Anti-discrimination Legislation**

This project began in April 2012, in informal partnership with the Belarusian Helsinki Committee (BHC). The project aims to build on the Belarus 1 project by: (i) providing training on the development of advocacy campaigns and engaging in international advocacy on equality issues for civil society organisations; (ii) establishing a National Equality Forum; (iii) developing and implementing a strategic paper and action plan for the National Equality Forum; (iv) creating an online equality forum; (v) supporting international advocacy actions by Forum members; and (vi) generating new evidence of discrimination through documentation and research.

The first Equality Forum meeting under this project was held in September 2012. In advance of the meeting, BHC developed a strategy paper on strengthening cooperation between Belarusian civil society organisations (CSOs). The paper set out a proposal to establish an Equality Forum, defining the goals, objectives and areas of work of such a Forum. It also examined options for further cooperation between CSOs, and made practical proposals on how to schedule and manage meetings. Following this meeting, it was agreed that the paper would be amended to reflect the agreements reached on the values, goals and approaches for the Forum. Participants also agreed to a BHC proposal that a website should be developed to provide a
virtual platform for consultation and interaction between member organisations.

The first training workshop under the project took place in November 2012, and was delivered by the Executive Director of ERT, assisted by the Executive Director of BHC. The workshop focused on developing participants’ capacity to identify and document cases of discrimination, and to advocate for the introduction of comprehensive anti-discrimination law in Belarus. The first day of the workshop focused on ensuring that participants had a strong understanding of the right to non-discrimination, by discussing grounds, forms of prohibited conduct and their definition, material scope and relevant exceptions. The final session of the day included an extended exercise where participants worked in pairs to identify different forms of discrimination in 16 case studies. On the second day, the programme focused on extending participants’ understanding of many of the other key substantive and procedural elements of effective and comprehensive anti-discrimination law, as outlined in the Declaration of Principles on Equality. In so doing, participants were given an understanding of the unified human rights perspective on equality, and the important differences between this approach and the traditional non-discrimination approach with which they were more familiar. Finally, the workshop included a session on techniques for successful advocacy at the national and international levels. Feedback from the training was extremely positive, and 85% of participants reached the pass mark on the post-workshop test designed and administered by ERT.

The primary impact of this project to date has been in increasing the capacity of staff from civil society organisations to understand and apply anti-discrimination law. Representatives of Belarusian civil society have received training in identifying and documenting cases of discrimination, and techniques for advocating for the introduction of comprehensive anti-discrimination law in Belarus. As a result of the training – which provides the foundation for future work under the project – the capacity of civil society organisations to effectively advocate for greater protection from discrimination has been increased.
Bosnia and Herzegovina: Developing Civil Society Capacity to Combat Discrimination and Inequality in Bosnia and Herzegovina

This project began in December 2011 with two partners, the Helsinki Committee for Human Rights in Bosnia and Herzegovina (HCHR) and the Centre for Informational and Legal Aid (CIPP). This project seeks to (1) increase the capacity of civil society organisations (CSOs) and other professionals to understand and apply anti-discrimination and human rights law in challenging discrimination and inequality; (2) create an institutional framework for civil society dialogue and advocacy on issues relating to discrimination and inequality through establishing an Equality Forum; (3) enhance and strengthen the implementation of the new anti-discrimination law in Bosnia and Herzegovina (BaH) through training, advocacy and strategic litigation; and (4) positively influence social attitudes towards minority groups and those vulnerable to discrimination including ethnic and religious minorities, women, LGBT persons, the disabled and returnees.

In July 2012, ERT travelled to BaH to consult with civil society organisations and produce an updated action plan for the project. As part of this visit, ERT conducted an extended focus group with a sample group of CSOs to assess their knowledge of anti-discrimination law. As a result of these activities, a revised Baseline Study was completed in mid-August, which contributed – as intended – to the planning of civil society training workshops and the development of a comprehensive report on discrimination and inequality.

Two civil society training workshops were conducted on 27-28 August 2012 in Sarajevo and 29-31 August 2012 in Banja Luka. The training was delivered by ERT together with a local consultant. In total, 44 persons participated in the two workshops, repre-
senting 42 organisations. Over the course of two days, each workshop covered: (1) introduction to the theory of equality law from an international and national perspective: major ideas and trends; (2) the right to non-discrimination; (3) scope, rights-holders and obligations; and (4) enforcement. In each of these areas, the trainers examined international law and best practice and the legal framework in BiH, followed by a comparative analysis highlighting gaps and inconsistencies between international best practice and the laws and policies in BiH. After each workshop, participants completed a test to assess the impact of the training. The training was highly effective in increasing participants’ knowledge, as evidenced by the fact that 87% of those who completed a post-workshop test devised by ERT reached the pass mark.

Between the two training workshops, on 29 August 2012, HCHR and CIPP held, in Banja Luka, a second meeting of the Equality Forum which had been established in May 2012. In total, 30 organisations attended the Forum meeting, with 5 of these participating as observers. An additional 6 organisations were accepted as members of the Forum, taking the total number of Forum members to 29. Topics discussed included: identification of cases for strategic litigation, research methodology for collecting information towards a country report, and development and finalisation of a draft advocacy plan.

On 30 November 2012, HCHR and CIPP held a third meeting of the Equality Forum. In total, 34 people representing 27 organisations attended this meeting. The meeting included a review of research undertaken by Forum members, which was followed by a discussion on the most important discrimination issues identified by participating organisations in their respective areas of work. Issues raised included the discrimination and disadvantage experienced by the Roma community, issues arising for the country’s different major ethnic groups (Bosniaks, Croats and Serbs), and the lack of support for disabled persons in education.

In preparation for the launch of an advocacy campaign, HCHR and CIPP developed a draft advocacy plan. The draft plan focused on local and national level advocacy and awareness-raising. ERT contributed elements on international advocacy and awareness-raising and the plan was discussed by participants at the second Equality Forum in August, with a view to collecting the input of CSOs in the target group. The action plan was finalised in September 2012.

A stakeholder Roundtable convened by HCHR and CIPP took place on 30 October 2012, in Vogosca. It brought together members of the Equality Forum with representatives from key government departments and agencies. The Roundtable was attended by a total of 30 people, representing civil society organisations, government ministries and institutions – including the Ministry of Justice, the Institution of the Human Rights Ombudsman and the Association of Judges, as well as the media. The keynote presentation was made by Adnan Kadrić, an expert in anti-discrimination law, who spoke about the legal and political framework governing equality and non-discrimination in BiH. He also gave a review of relevant international standards on non-discrimination and equality, the previous practice of CSOs in advocacy and litigation in this area and the work of government institutions in protection from discrimination. Participants then discussed the implementation of the Law on Prevention of Discrimination and considered steps to improve enforcement mechanisms, sharing their own experiences and problems in the
practical application of the law. Participants agreed a number of conclusions in the form of proposals to improve implementation and enforcement of the Law on Prevention of Discrimination. It was agreed that these proposals should form the basis of advocacy efforts in the later months of the project.

Research for a report on discrimination and inequality in BaH began in October 2012, being managed through the framework of the Equality Forum. HCHR and CIPP have asked Forum members with a particular expertise or area of focus (on women, disability or sexual minorities, for example) to form working groups on these areas to undertake research. From October to December, each working group reviewed relevant existing literature, including their own research, and undertook interviews to collect first-hand testimony from victims of discrimination with whom they work. This research was shared with ERT in January 2013, and work towards the production of a draft report is currently ongoing.

In its first year of implementation, this project has had a significant impact in increasing the capacity of civil society organisations in BaH, while ERT, HCHR and CIPP have made good progress towards the achievement of each of the project objectives. The two training workshops provided participants with an understanding of international law and best practice on the rights to equality and non-discrimination, and of the legal framework in BaH, enabling them to undertake comparative analysis of the law in BiH – a critical foundation for successful advocacy. The Equality Forum has enabled the coordination of activities to promote implementation of anti-discrimination law through documentation, litigation and advocacy. Each meeting was attended by between 25 and 30 organisations, including representatives of the core membership and additional organisations based in the host city for the meeting. A good deal of progress has been made towards the objective of strengthening the implementation of the new anti-discrimination law in BaH through training, advocacy and strategic litigation, through activities focussed on developing the foundations for advocacy and litigation.

**Croatia: Empowering Civil Society through Training and Establishing a Croatian Equality Forum**

This project is implemented with two partners, the Croatian Law Centre (CLC) and the Association for Protection of Human Rights and Citizens’ Freedoms (HOMO). The project’s objectives are to: (i) increase the capacity of stakeholders (including civil society organisations and activists) to improve the implementation and application of anti-discrimination law and policy; (ii) create an institutional framework for civil society debate on equality and diversity issues through establishing the Croatian Equality Forum (CEF); and (iii) increase the communication and coordination of work agendas between civil society organisations working on different equality issues and key Croatian decision-makers in the field of anti-discrimination.

ERT, CLC and HOMO have jointly drafted a Toolkit on Anti-discrimination Law which is intended for use by Croatian lawyers wishing to bring cases under the Croatian Equality Act and by civil society actors wishing to advocate for improvements to laws and policies. The finalised toolkit will contain chapters on international standards on anti-discrimination law; Croatian anti-discrimination laws; other legislation providing protection from discrimination in Croatia; litigation techniques and processes; influencing decision-makers through policy work.
on discrimination; and advocacy for progressive change in anti-discrimination standards in Croatia. ERT has contributed sections on international and European standards on equality and non-discrimination.

In November 2012, ERT, CLC and HOMO agreed an action plan for the establishment of the Croatian Equality Forum, which brings together a key group of Croatian CSOs to advocate for improved national policies in support of equality, in particular to lobby the authorities to undertake a comprehensive Regulatory Impact Assessment of existing legislation. Two initial meetings of the Croatian Equality Forum were held. The meetings focussed in particular on the need to lobby the authorities to undertake a comprehensive Regulatory Impact Assessment of existing legislation for its compatibility with relevant laws on discrimination. The outcome of these meetings was a commitment to work within the Regulatory Impact Assessment process to ensure that the right to equality is mainstreamed and taken as a central consideration in all current and future assessments of legislation and policy under this process.

The primary impact of this project to date is that over 25 CSO representatives, lawyers and human rights activists from various regions of Croatia have been trained in applying current international equality law and best practice in their work, greatly increasing their capacity to contribute to the implementation of Croatia’s existing anti-discrimination legislation. The establishment of the Croatian Equality Forum, and the strong working relationship already established between the Forum and relevant national authorities, is a significant positive development in that it provides a platform for joint work and coordination of CSO efforts towards better implementation of equality legislation in the country.

**Guyana 1: Empowering Civil Society to Challenge Homophobic Laws and Discrimination against LGBTI Persons**

This project is implemented in partnership with the Society against Sexual Orientation Discrimination (SASOD), an LGBTI-rights organisation based in Georgetown. The project’s objective is to build the capacity of civil society to challenge discrimination against LGBTI persons, by both increasing the technical skills and capacity of LGBTI organisations and by fostering improved cooperation between LGBTI organisations and other human rights NGOs. The project involves a number of activities, including training for civil society organisations, the establishment of a Guyana Equality Forum and the development of a comprehensive report on discrimination and inequality in Guyana.

Having completed all other project activities, ERT’s focus since June 2012 has been on completing the report on discrimination and inequality in Guyana. Following a well-attended conference in June 2012 to validate a draft of the report, and a series of consultations with stakeholders from government and civil society, ERT and SASOD sought further feedback on the draft report through a formal consultation process between July and September 2012. Since September, ERT has been working on the revision and finalisation of the report.

This project’s principal impacts have been on ERT’s local partner SASOD, and its immediate network of groups working on behalf of communities exposed to serious discrimination, such as LGBTI persons, sex workers, persons living with HIV and AIDS and survivors of domestic violence. This group has benefited from improved networking and increased knowledge of key concepts in equality law which has enabled effective advocacy. SASOD
successfully established a Forum bringing together disadvantaged groups from a broad spectrum, increasing their capacity to challenge discrimination. This group also benefited from training, which provided 35 civil society actors with knowledge of the key concepts in equality law. This increased capacity was further developed through engagement in field research, documenting cases of discrimination on different grounds. In part as a result of the support provided by this project, SASOD has been undertaking increasingly effective advocacy, entering negotiations with senior government figures on the vexed question of decriminalisation of same-sex intimacy between men.

**Guyana 2: Empowering Civil Society to Address Societal Prejudice and Undertake Advocacy on Discrimination against LGBT Persons**

This second project on Guyana commenced in October 2011, overlapping with ERT’s first project in Guyana, and is implemented again in partnership with SASOD. The two projects are closely interconnected: the second, focusing on media, political and international advocacy, builds on the first, which focused on the development of basic capacities and tools for advocacy.

Following successful completion of the project’s first activity, the Advocacy Conference, and the completion of the first of four training workshops in June 2012, ERT and SASOD focussed on the development of an Advocacy Strategy to guide the implementation of an advocacy campaign for the period October 2012 – April 2013. The Advocacy Strategy was finalised in October 2012.

Implementing the Advocacy Strategy, in November 2012 SASOD worked with child rights NGOs to develop a child protection policy, a move which was publically welcomed by the National Child Care and Protection Agency. Aside from the value of this policy itself, SASOD had identified child protection as an important area in which to advocate, in part to counter public perceptions in Guyana which conflate homosexuality with paedophilia. On 8 December, SASOD convened a “Walk for Equality” with other NGOs under the auspices of the Guyana Equality Forum established under the first ERT-SASOD project. The event attracted significant attention in the media and reinforced the public presentation of a unified front on equality issues by bringing together leading women’s and indigenous rights groups with the LGBTI community which SASOD represents.

In respect of raising public awareness, SASOD has developed concepts and content for a series of public advertisements highlighting issues of discrimination – in particular against LGBTI people, but also other groups. The finalisation of these advertisements is pending receipt of the findings from a national opinion poll conducted by the Coalition Advocating for Inclusion of Sexual Orientation which set out to examine public attitudes towards gay, lesbian and transgender people in Guyana. SASOD believes that waiting for the results of this exercise will allow them to ensure that the advertisements tackle the most important areas of misconception and modify their messages to achieve maximum impact.

Following some delays in implementation, this project has made substantial progress towards its ultimate objective. A week of intensive advocacy activities in June 2012 successfully built on SASOD’s work to develop a coalition of organisations interested in advocating improved protection from discrimination. These organisations have then developed a shared advocacy agenda – and then a full advocacy strategy – based on the
recommendations of the report, with repeal of discriminatory laws affecting the LGBTI population, and inclusion of sexual orientation and gender identity as grounds of discrimination, as central concerns. The media has been successfully engaged in support of these advocacy priorities, as evidenced by the favourable coverage received for the “Walk for Equality” While a significant challenge remains in securing the active support of the authorities for reforms, particularly on the protection of persons of different sexual orientation and gender identity, the project has allowed the LGBT community to build strong foundations, in particular through the media, to achieve this.

Guyana 3: Combating Discrimination through Advocacy and Strategic Litigation in Guyana

This third project on Guyana formally started in January 2013, overlapping with ERT’s second Guyana project, which comes to an end in mid-April 2013. It is being implemented in partnership with SASOD and the Justice Institute of Guyana. The project aims to address two major problems identified through ERT’s research in Guyana: (1) a failure of implementation and enforcement of laws which provide protections from discrimination; and (2) the stark difference between the legal rights of LGBTI persons and all other persons. The project’s activities include further advocacy for reform of the Prevention of Discrimination Act, strategic litigation, and a judicial colloquium.

Indonesia: Empowering Civil Society to Use Non-discrimination Law to Combat Religious Discrimination and Promote Religious Freedom

This project aims to build the capacity of Indonesian civil society to use the right to non-discrimination to combat religious discrimination and promote religious freedom. The project is implemented in partnership with two of Indonesia’s leading NGOs, the Indonesian Legal Aid Foundation (YLBHI) and the Institute for Policy Research and Advocacy (ELSAM) and involves a range of activities including training, documentation, production of a country report on discrimination and inequality in Indonesia with a focus on religion-based discrimination, and the development of advocacy strategies.

In the first half of 2012, a draft of the report on religious discrimination in Indonesia was developed by ELSAM, incorporating field research undertaken by YLBHI through its network of local legal aid institutes. ERT and ELSAM cooperated to further develop the draft between July and October, and since October, ERT has worked on this second draft with a view to completing the report for publication.

During September and October 2012, YLBHI developed an Advocacy Strategy paper setting out proposals to take forward advocacy to address discrimination on grounds of religion and belief. The paper examines, among other things, the idea of establishing a Forum on Religious Discrimination bringing together interested NGOs and religious minority groups to develop a coordinated advocacy strategy. At the same time as developing this paper, YLBHI planned and organised the project’s final activity, an Advocacy Conference, which took place on 30-31 October 2012. The conference was attended by 20 of the 25 largest NGOs working in the field of religious freedom in Indonesia and YLBHI’s 14 local legal aid institutes (one on each of Indonesia’s 14 largest islands). During the Conference, YLBHI and ELSAM presented the initial findings of their research for the aforementioned report, and presented the
paper on advocacy to address discrimination on grounds of religion and belief.

The main impact of this project has been to add a level of competence on the application of the right to non-discrimination among a group of civil society actors which is already highly capacitated and engaged in advocacy on other human rights issues. The project has also provided a platform for ERT to engage in advocacy on the protection of religious minorities, urging such concerns to be addressed through effective protection from discrimination, as well as protection of the rights to freedom of religion and other rights. As a result of these interventions, made both in Indonesia and through the UN system, there is an increasing level of awareness of the need to provide protection from discrimination and discriminatory violence on grounds of religion or belief.

**Jordan: Addressing Discrimination and Violence against Women in Jordan**

The objective of this project, which started in January 2011, is to contribute to the protection of women from all forms of discrimination in Jordan at the societal and legal level. ERT is implementing this project in Jordan as a partner to Mizan, an Amman-based organisation which is one of the most prominent and active human rights and legal defence NGOs in the Middle East.

In August 2012, ERT completed two pieces of work to contribute to a report on discrimination and inequality produced by Mizan. The first paper, “Guidelines for the Development of Comprehensive Anti-discrimination Law” sought to provide a best practice guide, based on the Declaration of Principles on Equality, to the content of anti-discrimination legislation. The paper contained sections on each of the following areas: (i) the treatment of grounds; (ii) the different forms of prohibited conduct; (iii) material scope; (iv) exceptions; (v) enforcement; access to justice; (vi) remedies and sanctions; (viii) positive action; and (ix) positive duties. In each of these areas, the paper set out and explained the relevant principle(s) from the Declaration of Principles on Equality and the relevant international obligations and standards. Following the analysis of standards in each section, the document set out draft provisions which might act as a starting point for the drafting of national legislation.

The second paper, “Global Overview of Equality Laws” was also based heavily on the Declaration. The paper provided an introduction to the right to equality in international law, and the status of the obligation to enact anti-discrimination legislation. Based on the Declaration, the paper then set out the requirements of comprehensive equality legislation, in order to provide a benchmark to measure states’ compliance. The paper further defined and elaborated a scale of five different degrees of state compliance with the obligation to enact comprehensive equality law, and provided selected examples of states which fall within each degree group.

**Kenya 4: Improving Access to Justice for Victims of Gender Discrimination**

This project, which is funded by Comic Relief and implemented in partnership with the Federation of Women Lawyers – Kenya (FIDA-Kenya) aims to increase access to justice for women and girls in Kenya. The project’s central activity involves the establishment of community-based legal advice services (referred to as Legal Assistance Scheme Partnerships, or LASPs), situated within existing Community Based Organisations (CBOs). This is pursued through a combination of training, ongoing support and advice and fi-
nancial support to the CBOs and the lawyers with whom they work on the project.

Between July and December 2012, ERT and FIDA-Kenya completed the research phase of activities. The aim of this phase of activities was to collect data in order to allow the partners to: (a) develop project outcomes, based on the views of women in five target regions; (b) assess the capacity of CBOs in each area to participate in the LASPs; (c) develop training materials for use in the latter stages of the project implementation.

On 20-23 August 2012, ERT and FIDA-Kenya conducted test activities for the methodology and assessment tools. The team visited four CBOs in two deprived areas on the outskirts of Nairobi (Kariobangi and Kibera). During each visit, the team met with CBO staff and carried out an assessment of their technical, material and financial capacity to undertake the work of establishing and managing a LASP. In each community, the team also conducted a focus group with women identified by CBOs, in order to assess their views on the challenges facing women in their community, and establish the link to practices of discrimination. Following the test visits, ERT and FIDA-Kenya reviewed the assessment tools and methodology, and made extensive improvements based on the lessons learned.

From September to November 2012, ERT and FIDA-Kenya conducted a survey using a two-step representative sample of 973 people in 50 locations. Simultaneously, teams met with CBOs in over 100 locations, and conducted focus groups with women in the communities which these CBOs serve. On the basis of this extensive data collection, ERT and FIDA-Kenya developed a Baseline Study in December 2012. The Study provided an assessment of the range of issues affecting women in the communities covered by the Study and their relative importance to women. ERT analysed the findings and concluded that the project should focus on providing legal assistance to address the three most important problems identified: (1) All forms of gender-based violence; (2) Economic injustice, including in particular widow disin-
heritance and eviction; and (3) Deprivation of education, in particular resulting from early marriage. At the same time, FIDA-Kenya reviewed the outcomes of the CBO assessment, and shortlisted 55 CBOs according to a pre-agreed scoring system. These CBOs will be invited to participate in the LASP scheme, and will receive training from ERT and FIDA-Kenya. They will be provided with a manual and reporting forms, and will establish and advertise the services in their locality.

**Kenya 5: Promoting Equality Inclusive of Sexual Orientation and Gender Identity**

This project builds on work carried out under the first three projects implemented by ERT in Kenya, which centred on capacitating civil society to advocate for improved legal protection from discrimination, developing proposals for comprehensive equality law, and advocating for the enactment of such a law. As a result of these projects, ERT developed and published *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, the first comprehensive assessment of the rights to non-discrimination and equality in the country.

This project is composed of four activities: (i) continued civil society campaigning for the introduction of comprehensive substantive equality legislation and policies inclusive of sexual orientation and gender identity; (ii) distribution of the ERT report on equality in Kenya to a minimum of 250 Kenyan stakeholders; (iii) convening of a central campaign events featuring a presentation and discussion of the recommendations of the report; (iv) establishment of a pilot legal service for LGBTI persons who complain of discrimination.

Since the beginning of 2013, ERT has focused on planning and organising the central campaign events, which is scheduled to take place in the last week of March 2013. Two events have been planned. The first, a one day conference, will bring together key stakeholders from government agencies and departments, constitutional commissions and civil society to discuss and debate the principal recommendations in the report *In the Spirit of Harambee*. Discussions will focus in particular on the need for comprehensive anti-discrimination law, and the key principles which such legislation must follow to conform to Kenya’s obligations under international law. The ultimate objective of the Conference is to seek a consensus on the need for legal reform on equality to be a major priority for the new parliament. A second, public panel discussion event will provide an opportunity for members of the public and media to discuss the deliberations of the conference, and provide input on the need for the legislation, as well as its content.

Efforts to establish a pilot legal service for LGBTI persons have been hampered by severe organisational difficulties faced by ERT’s partner organization, the Gay and Lesbian Coalition of Kenya. However, in early 2013, ERT reached an agreement with the National Gay and Lesbian Human Rights Commission to establish a service providing legal advice and assistance for LGBTI persons.

**Malaysia: Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation**

Launched in March 2010, this project involved the provision of training to civil society actors, lawyers and the judiciary on equality law, development of a report on discrimination and inequality in Malaysia, and the establishment of a Malaysian Equality Forum. ERT worked with its local partner, the Kuala Lumpur based NGO Tenaganita.
The final activity to be delivered under this project, the publication of a country report on Malaysia, was completed in November 2012. The report, *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia*, is the second in the ERT country report series and provides a comprehensive assessment of discrimination on a range of grounds, together with an analysis of laws and policies on discrimination. The report includes assessment of patterns of discrimination on grounds of race and ethnicity, indigenous status, gender, religion and belief, sexual orientation, gender identity, health status, age, disability, citizenship, and political opinion. It also analyses the legal and policy framework related to equality in Malaysia and makes recommendations in 10 different areas of law and policy. Among its major conclusions is that ethnic Malays and natives in Sabah and Sarawak (the Bumiputera) continue to benefit from decades-old affirmative action policies that have outlived their legitimacy; that discrimination based on religion is very significant; and that LGBTI persons suffer criminalisation and persecution.

Following publication, the report attracted significant interest in the Malaysian media, with stories appearing online, in print and in broadcast media. One of the report’s main recommendations – the repeal of constitutional affirmative action provisions favouring ethnic Malays – was highly controversial, leading to calls for the prosecution of the Director of ERT’s Malay partner organisation and further fuelling interest in the media.

The impact of this project includes the successful establishment of a functioning national Equality Forum which provides an institutional framework for civil society dialogue on equality and discrimination issues in Malaysia; the increased understanding of 35 workshop participants of both international and domestic equality and non-discrimination law, and an increased capacity to develop advocacy strategies through which their improved knowledge can be used to seek improvements in domestic protections of the rights to equality and non-discrimination for all vulnerable groups within Malaysian society; and, through the publication of *Washing the Tigers*, engaging key stakeholders and legal experts in Malaysia with regards to improving the protection and implementation of the rights to equality and non-discrimination.

**Nigeria: Discrimination and Torture**

Under this project, which started in August 2010, ERT supports the work of a Nigerian NGO, the Legal Assistance and Defence Project (LEDAP) with whom it works on another project (*Torture and Disability in Nigeria and India*) to provide direct assistance to victims of discriminatory torture. The funding for the project is provided by the United Nations Voluntary Fund for Victims of Torture (UNVFVT). ERT’s primary responsibilities involve overseeing the case assessment process, advising on the discriminatory elements of the torture and ill-treatment which has occurred and managing the narrative and financial reporting of the project to the donor.

Between July and December 2012, fifteen cases were identified as viable strategic cases under the Torture and Disability project, following some initial investigations and case analyses by Nigerian lawyers.

Through providing support to individual torture victims and enabling them to pursue legal claims for torture against the Nigerian authorities, this project has secured redress for the individual victims, and contributed to
efforts to reduce impunity for discriminatory torture in Nigeria.

**Solomon Islands 2: Empowering Civil Society to Promote Gender Equality and Reduce the Incidence of Gender Discrimination in the Solomon Islands**

In this project, which began in April 2012, ERT works in partnership with the Secretariat of the Pacific Community Solomon Islands Country Office (SPC-SI) and the Secretariat of the Pacific Community Regional Rights Resource Team (RRRT). ERT is responsible for training and report writing activities under this project.

In the final quarter of 2012, ERT began research and preparation for the production of a country report on discrimination and inequality in the Solomon Islands. ERT undertook desk based research and analysis to develop the sections of the report dealing with patterns of discrimination and inequality and the legal and policy framework. In February 2012, ERT provided detailed guidance to SPC-SI on where and how to conduct additional field research and documentation of patterns and incidences of discrimination. Work to develop and draft the report is ongoing.

The key impact and outcome of this project achieved so far is in increasing the capacity of 18 training participants in understanding and applying anti-discrimination law, and undertaking advocacy. CBOs and activists are better prepared to develop advocacy submissions regarding constitutional reform as it relates to equality, and to undertake advocacy at the UN level. Moreover, these 18 persons have been trained to act as focal points within their communities, monitoring and documenting cases of gender-based and other discrimination and advocating for improvements to law and policies.

**Sudan 1: Empowering Civil Society in Sudan to Combat Discrimination**

This project is implemented in partnership with the Sudanese Organisation for Research and Development (SORD). The project aims to build the capacity of Sudanese civil society organisations to advocate for improved protection from discrimination and for the promotion of equality, through training, support with documentation, publication of a country report and support with the development of an advocacy strategy.

The implementation of this project was suspended between June and September 2012, as a result of escalating protests against the regime of President Al-Bashir – and the crackdown on civil society which followed the protests – which made it impossible for SORD to work on the project activities. In the period after Ramadan (which ended on 18 August 2012), many of those arrested during the protests were released, the political situation calmed and security improved. As a result, SORD was able to return to work shortly after the end of the suspension period, and implementation of the project resumed at full strength at the beginning of October 2012.

In November, SORD completed a first set of materials towards the report on discrimination and inequality in Sudan. The materials contain extensive testimony collected through field research in different parts of the country – a significant challenge given the restrictions on civil society activity – and identify discrimination on a wide range of grounds. Since receiving the materials, ERT has focused on developing it for publication.

Following extensive preparations and consultation with the target groups, SORD held consultation meetings on issues of discrimination in Sudan in mid-December. Meetings
were convened with three different stakeholder groups: (1) politicians and government officials; (2) religious leaders; and (3) the media. The outcomes of these meetings were used to develop an outline advocacy strategy paper to guide SORD’s work on equality and non-discrimination following completion of the project. This paper was then the focus of further discussions with civil society partners at an Advocacy Strategy conference convened on 30 December 2012.

In March 2013, ERT travelled to Sudan to explore issues raised by the field research, validate some of its findings, as well as identify next steps that would make possible the publication of a country report on all forms of discrimination and inequalities in Sudan.

Despite the severe challenges which ERT and SORD have faced in implementing this project, it has had an important impact on civil society capacity to combat discrimination. A train-the-trainer workshop delivered in October 2011 and two follow-up workshops delivered in January and February 2012 developed the technical capacity and knowledge of participants in the area of anti-discrimination law, and helped to expand the nascent network of organisations interested in pursuing legal reform on discrimination. Organisations involved in field research benefited in terms of increased capacity to document discrimination, as evidenced by the range of patterns of discrimination identified through the research. The research itself, once published as part of the report on discrimination and inequality in Sudan, is expected to make a significant contribution in terms of raised awareness of discrimination in Sudan. Finally, in an important sense, the project has enabled SORD to continue its work, both in the area of discrimination and other human rights abuses, in the context of an extremely challenging and at times hostile political environment.

**Sudan 2: Equality and Freedom of Opinion, Expression and Association**

This project is implemented in an informal partnership with the Journalists for Human Rights (JHR) network which works through a group of independent journalists and human rights defenders operating both inside Sudan and abroad. The project aims to support this highly vulnerable group of human rights defenders, and at the same time develop their understanding of the importance of the rights to equality and non-discrimination in responsible journalism.

This project, like the first one which ERT is implementing in Sudan, was severely affected by the protests against the Sudanese government and the subsequent backlash by the government in June, July and August 2012. The JHR network and the project staff were closely involved in the protest movement, and were thus particularly exposed to the repressive tactics employed by state agencies and the security services.

Given the involvement of the JHR members in the protest movement and their consequent exposure to the human rights abuses visited upon protestors, the provision of support to the JHR network gained pressing importance during the period. The project team developed and led an advocacy campaign aimed at the release of detained journalists and sought to engage and inform international human rights organisations interested in supporting dissident journalists. As a result of extensive networking and engagement, the project coordinator was able to establish a small committee to coordinate the identification of journalists who had been detained and ill-treated, campaign for their release
and provide them with practical support after their release. The committee raised funds from international funders, colleagues and other allies in order to address the immediate financial, psychological and medical needs of former detainees.

In addition, the project staff, through their human rights monitoring work, sought to raise awareness of the human rights situation in Sudan in the national and international media, through the publication of statements and media briefings containing details of human rights violations.

In December 2012, ERT and the JHR held a strategy development roundtable with 25 leading members of the JHR in attendance. Over the course of four days this group discussed outline proposals for a long-term organisational strategy and advocacy strategy for the JHR which had been developed by the JHR project coordinator together with ERT’s project manager. As a result, the JHR has largely agreed the main components of its organisational strategy for the coming two years.

In January 2013 ERT and the JHR launched a new JHR website, JHR-online.org. The website is intended to provide a platform for the JHR to promote its advocacy and campaigning, and to provide a hub for the dissemination of information on the human rights situation in Sudan. The site contains statements and reports produced by the JHR and its members, together with news and reports produced by international NGOs.

Despite the significant obstacles faced by ERT and the JHR, this project has continued to evidence impact in two critical areas. First, by providing financial, practical and technical support to the JHR, the project has enhanced the ability of journalists to report on human rights violations and provided a mechanism to support and protect those who put themselves at risk in so doing. The impacts of these changes include a modest increase in freedom of the press, greater awareness of the violations of freedom of expression and other human rights perpetrated by the Sudanese authorities, and, in a small number of cases, the release and protection of individuals detained or otherwise mistreated for challenging the regime’s human rights record. Second, through providing training to Sudanese journalists, the project has successfully increased the understanding of the importance of the rights to equality and non-discrimination among the members of this civil society movement. As a result of the training provided by ERT, Sudanese journalists are able to identify and document cases of discrimination and understand the role which the media can play in both combating discrimination and ensuring that speech inciting discrimination and violence is not perpetuated. At this critical juncture in Sudan’s history, and in the context of inflammatory racist and nationalist speech in both Sudan and South Sudan, this is a major achievement.

Sudan 3: Equality and Freedom of Expression in Sudan and South Sudan

This project began in November 2012, in informal partnership with the Journalists for Human Rights (JHR). The project aims to build on the success of ERT’s collaboration with the JHR, expanding the work to involve journalists and human rights defenders from South Sudan as well. In addition to providing ongoing support to journalists working in the repressive media environment in both countries, and providing training on human rights and equality, the project aims to increase collaboration between those working
in Sudan and South Sudan. In so doing, the project aims to make a contribution to tackling one of the most important human rights and security concerns between the two countries: the perpetuation of hate speech by the political leadership and media in Sudan and South Sudan.

Since commencing the project, ERT and the JHR have focused their activities on building contacts with human rights defenders and journalists in South Sudan, and finalising the JHR organisational and advocacy strategy developed under the Sudan 2 project. These activities are conducted in anticipation of the first project event, a roundtable bringing together leading independent journalists and human rights defenders from both Sudan and South Sudan, to discuss cooperation to combat human rights abuses through the media, with a particular focus on tackling hate speech.

**Turkey: Empowering Civil Society to Challenge Discrimination against LGBTI Persons in the Aegean and Marmara Regions of Turkey**

This project began in January 2012 and is implemented in partnership with a Turkish LGBT rights organisation based in Izmir, the Black Pink Triangle (SPU). It seeks to address the lack of capacity among civil society organisations (CSOs) in two of Turkey’s regions to challenge discrimination against LGBT persons and to advocate for improved legal protection from discrimination, including on grounds of sexual orientation and gender identity, through (1) improving documentation of all types of discrimination, including against LGBT persons, from a unified perspective on equality in the form of a published report; (2) increasing knowledge of anti-discrimination law and concepts among CSOs; (3) increasing experience of documenting cases of discrimination among CSOs in the target regions; and (4) increasing cooperation between CSOs in the target regions through the creation of a Regional Equality Forum.

In May 2012, a Baseline Study was produced by ERT’s partners in Turkey, following guidance provided by ERT. The Study provides initial research as a basis for all further project activities.

With support from ERT, SPU organised an initial roundtable event for CSOs in the region, which took place in Izmir on 1 August 2012. At the event, SPU presented the project’s aims and objectives, provided an opportunity for dialogue between stakeholders working on different discrimination issues and problems, promoted the merits of establishing a regional Forum to coordinate work to combat discrimination, and discussed how work to combat discrimination on grounds of sexual orientation and gender identity can be incorporated into the work of other organisations. Feedback from participants suggested enthusiasm for work in this area and that most organisations were open to the possibilities of joint working.

In October 2012, ERT travelled to Izmir and Bursa to deliver two three-day training workshops on anti-discrimination law and policy. Topics covered included: (1) an introduction to international and Turkish law on equality and non-discrimination, including Turkey’s international commitments; (2) practical sessions focussed on issue-spotting, and the identification of different examples of discrimination; and (3) presentations on cases of discrimination experienced by participants. As the focus of this project is on the mainstreaming of LGBT
Members of the women’s organisation Ka-der Bursa at ERT training in Bursa, Turkey, October 2012.

Richard Wingfield, ERT (left) conducting an exercise at training in Izmir, Turkey, October 2012.
rights through the application of the unified perspective on equality, LGBT persons were particularly encouraged to share their experiences, and care was taken to draw parallels with discrimination suffered by other vulnerable groups, including women and ethnic minorities. Feedback was very positive, and a number of groups expressed an interest in being further involved with the project both as researchers and members of the Regional Equality Forum.

The initial meeting of the Regional Equality Forum (REF) was held in November 2012 in Izmir. The meeting brought together over 30 CSO representatives and activists from across the region to discuss areas of common concern, with a focus on mainstreaming LGBTI concerns into the discourse of regional civil society. In particular, attitudes displayed in the media towards minority groups were discussed, with this being identified as a possible area for future advocacy work. A further two meetings of the REF took place in February 2013, with the third meeting being brought forward to coincide with SPU’s annual “March against Hate Crime”. All meetings were well attended by CSO representatives from across the project regions, who have actively engaged in discussion on strategies for joint working and advocacy.

The primary impact of this project to date is that over 30 CSO representatives and human rights activists from the two target regions of Turkey have been trained in applying current international equality law and best practice in their work, greatly increasing their capacity to advocate for the rights of all marginalised groups in society. Through establishing strong links with organisations working on a variety of grounds, this project has made a significant contribution to the efforts of Turkish activists to mainstream LGBTI groups within the national human rights and equality discourses.

Ukraine: Empowering Civil Society to Challenge Discrimination against LGBTI Persons in Ukraine

This project, which commenced in November 2012, is implemented in partnership with an LGBTI organisation, Nash Mir, based in Kiev. The project involves the delivery of training to civil society organisations, support to an existing Coalition on Combating Discrimination, and the development of a report on discrimination and inequality in Ukraine.

ERT travelled to Ukraine on 17-18 January 2012 to meet with Nash Mir for an in-depth discussion on all aspects of the project. In addition, ERT conducted a focus group discussion with representatives of civil society organisations, in order to assess their knowledge and understanding of equality law and their capacity to work on discrimination issues.

United Kingdom: Greater Protection for Stateless Persons in the UK

Under this project, ERT continued to be an active member of the UK Detention Forum. ERT attended quarterly Detention Forum meetings throughout the reporting period and contributed to the Detention Forum advocacy strategy to combat indefinite detention in the UK. In this regard, ERT continues to play a key role in raising the profile of the statelessness issue in the UK. ERT is a member of the Working Group on Indefinite Detention of the Detention Forum, and contributed towards the strategy and theory of change to end indefinite detention that was developed by the Working Group and presented to the Detention Forum in October 2012.
July 2, 2012: Published *Burning Homes, Sinking Lives: A situation report on violence against stateless Rohingya in Myanmar and their refoulement from Bangladesh*.

July 3, 2012: Participated in UNHCR Roundtable Discussion on Statelessness with Civil Society Organisations, in Geneva, Switzerland.

July 4-5, 2012: Participated at UNHCR Annual NGO Consultations and spoke at the special session on statelessness at the NGO Consultations, in Geneva, Switzerland.

July 4-5, 2012: Conducted a series of advocacy meetings on the deteriorating human rights situation for Rohingya in Myanmar and Bangladesh, including joint-NGO briefings for permanent missions and NGOs, in Geneva, Switzerland.

July 16, 2012: Issued a joint NGO statement condemning the abuse and violence carried out by state authorities in Myanmar against the Rohingya community for over one month.


July 26, 2012: Published – as co-editor – the Special Issue on Statelessness of the *European Journal of Migration and Law*.

July 26, 2012: Conducted a focus group with Bosnian civil society organisations involved in work on discrimination, inequality and other human rights concerns, in order to assess the capacity building needs of this group, in Sarajevo, Bosnia and Herzegovina.

August 21-23, 2012: Conducted focus groups with victims of gender discrimination and assessments with community-based organisations in the Kibera and Kariobangi districts of Nairobi, Kenya, in order to assess the feasibility of establishing community legal aid services.

August 27-31, 2012: Provided training on key concepts in equality law to a total of 44 civil society organisations, in Sarajevo and Banja Luka, Bosnia and Herzegovina.


September 17, 2012: Presented papers at a global conference on the plight of the Rohingya organised by the Perdana Global Peace Foundation, in Kuala Lumpur, Malaysia.

September 24, 2012: Met with Dr Abu Saleh Shariff, President of the Centre for Research and Debates on Development Policy in New Delhi, India, who was visiting the UK to research the possibility of establishing a new Equal Opportunities Commission in India, in London, UK.

October 5-10, 2012: Provided training on key concepts in equality law to more than 30 civil society representatives, in Bursa and Izmir, Turkey.

October 9, 2012: Made a stakeholder submission to Bangladesh UPR on the human rights of stateless Rohingya in Bangladesh.


October 18, 2012: Participated in a discussion group convened by the Human Dignity Trust (HDT) in London, UK, to consider advocacy and awareness-raising activities which could complement a case which HDT and the Jamaica Forum of Lesbians, All-Sexuals and Gays are taking to the Inter-American Commission on Human Rights to challenge the criminalisation of same-sex intimacy between men in Jamaica, in London, UK.


November 2, 2012: Sent a Letter of Concern to President Thein Sein of Myanmar and published an Emergency Report in response to new wave of violence against Rohingya in October in Rakhine State, Myanmar.

November 12, 2012: Published Washing the Tigers: Addressing Discrimination and Inequality in Malaysia, the second in ERT’s series of comprehensive country reports which combine an assessment of the lived experience of those exposed to discrimination and inequality and analysis of relevant laws, policies and practices.

November 15, 2012: Submitted a note on the human rights crisis faced by stateless Rohingya in Myanmar to the U.S. Department of State, prior to President Obama’s visit to Myanmar.

November 24-25, 2012: Provided training on key concepts in equality law to 20 human rights defenders and civil society organisations, in Minsk, Belarus.
November 30, 2012: Co-hosted, with the School of African and Oriental Studies, a panel discussion on “Democratisation, securitisation and the human rights of stateless Rohingya in Burma”, in London, UK.

December 10, 2012: Issued a statement on the connection between the right to equality and the right to participate in public life, to mark International Human Rights Day 2012.

December 17-21, 2012: Convened a strategy development roundtable for human rights defenders and journalists from Sudan.

Note to Contributors

The Equal Rights Trust invites original unpublished articles for future issues of *The Equal Rights Review*. We welcome contributions on all aspects of equality law, policy or practice. We encourage articles that examine equality in respect to cross-cutting issues. We also encourage articles that examine equality law policy or practice from international, regional and national perspectives. Authors are particularly welcome to submit articles on the basis of their original current or past research in any discipline related to equality.

Peer Review Process
Each article will be peer reviewed prior to being accepted for publication. We aim to carry out the peer review process and return comments to authors as quickly as possible.

Further Information and Where to Submit
Articles must be submitted by email attachment in a Microsoft Word file to: info@equalrightstrust.org

For further information regarding submissions, please email: Joanna.whiteman@equalrightstrust.org

Submission Guidelines
- Articles should be original, unpublished work.
- Articles must be written in United Kingdom English.
- Articles must contain footnote or endnote referencing.
- Articles should be between 5,000 and 10,000 words in length.
- Articles must adhere to the ERT style guide, which is available at: http://www.equalrightstrust.org/ertdocumentbank/ERR%20STYLE%20GUIDE.pdf
The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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