



The Equal Rights Review

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

In this issue:

- Stateless people – the most vulnerable global victims of discrimination
- European Union: the next step in equality legislation
- Testimony from prison asylum in Nigeria
- The role of equality law in combating poverty
- Affirmative action in Brazil



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Equal Rights for the Stateless

A human right is nothing more than a pure moral aspiration if its protection is no one's responsibility. Human rights responsibilities fall on states. If a person's human right is denied or violated, the state must guarantee, protect and fulfil the right. But which state?

If you thought the answer was, "their own state, the one whose name a person would fill in a form asking about their 'nationality'", you are wrong. Human rights are a matter of international concern and one aspect of their universality is that states have responsibilities to respect, protect, and fulfil the human rights not only of their citizens but of anyone within their territory or subject to their jurisdiction. Non-citizens should enjoy their human rights (with certain exceptions such as voting rights) on an equal basis with citizens.

However, this basic equality principle¹ is not translated into practice in regard to all non-citizens. From the point of view of protection needs, non-citizens are a heterogeneous group: some categories of non-citizens, such as wealthy immigrants, highly paid regular migrants or diplomatic corps personnel may be less exposed to discrimination, while other categories of non-citizens are vulnerable and in need of protection. Within the broad class of non-citizens, the most vulnerable people are those without effective nationality.

A person who does not have effective nationality is a stateless person, whether or not the fact of their statelessness has a legal expression (in which case we are talking about *de jure* stateless persons). Refugees are in effect stateless persons because their well founded fear of

persecution in "their own" state means that their nationality is not effective.

But a person can be without effective nationality for a number of reasons other than those that would render her or him a "refugee" within the narrow 1951 definition of the term. The scenarios that lead to statelessness include failure to obtain citizenship of a new state in cases of disappearance of a state and state succession (the Soviet Union, Yugoslavia); failed states with no government in control (Somalia); massive displacement (the Palestinians); conflicts of law; gender discriminatory rules determining how citizenship is passed on from parents to children (as in a number of states in the Middle East); political manipulation of citizenship, including denationalisation of minorities (Kurds in Syria, Rohingya in Burma, Banyamulenge in the Congo); irregular migration combined with a refusal of the home state to allow emigrants re-entry; stigmatisation of a person as a security threat (as argued, in respect to the Guantanamo inmates, by David Baluarte in this issue), and so on.

Globally, the stateless are a category of people who are likely victims of discrimination and other human rights violations. Therefore they have the strongest protection needs. But they are among the least protected: neither international law, nor national laws around the world measure up to the task to ensure equal rights for the stateless. When the vulnerability arising from statelessness is aggravated by the vulnerability of deprivation of liberty, we are looking at a chasm of uncertainty: the detained stateless person embodies the deepest gap between the core ideal of universal rights and

reality. This is because the detention of a stateless person often is indefinite or lengthy, likely to last as long as it takes for the detaining state to find a country to which it could dispatch the unwanted person.

It is important to understand that strengthening the protection of the stateless persons in detention is not an exotic preoccupation that would benefit only a small number of isolated cases, as one might think, mystified by the near absence of a discourse on statelessness. Immigration detention centres around the world, for example, house thousands without effective nationality. The problem is that their position is not framed from a rights perspective – i.e., from the perspective of their protection needs. When seen from this angle, what matters is their statelessness, rather than a description as “non-citizens”, “irregular migrants”, “smuggled persons”, or “failed asylum seekers” – categories that point away from the unfulfilled need for equal protection. One way to establish a protection-centred approach is to introduce a statelessness determination procedure in states which lack one (i.e. most states across the world).

In order to contribute to positive change in the laws and practices related to statelessness, and in particular to the detention of people without effective nationality, The Equal Rights Trust is carrying out research in several locations around the world and advocates legal reform, including the introduction of a statelessness determination procedure, and the introduction of specific limitations on the detention of stateless persons. Our approach to this prob-

lem is based on the *Declaration of Principles on Equality*, as it is the lack of an enforceable right to equality for the stateless that makes it possible for legislators and policy makers to let them down with impunity. The Special section of this volume of *ERR* is devoted to the problem of statelessness and focuses on the protection needs of stateless persons in any form of detention.

In the Articles section, we present a brief analysis of the recent legislative proposal by the European Commission for a new equality directive, a reflection on xenophobia in Russia, and an advocacy argument on affirmative action in higher education in Brazil. The *ERR* Testimony in this issue comes from a former inmate who was held in a mental asylum while serving a term in a Nigerian prison. His diligent and sorrowful account is a strong reminder that no equality regime is complete without including adequate provision for people with mental disability.

One of the most important issues in the field of equality is the relationship between the established types of status-based discrimination (on grounds of sex, race, religion, disability, sexual orientation, etc.), on one hand, and poverty, socio-economic exclusion and socio-economic status on the other. Could and should equality law play a role in fighting poverty and in advancing socio-economic equality? What are the challenges? As a contribution to this emerging debate, we publish a double interview with two of the most inspiring equality experts in Europe, Sandra Fredman and Margarita Ilieva.

Dimitrina Petrova

¹ See Declaration of Principles on Equality, The Equal Rights Trust, 2008, Principle 10: “States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction.”

ARTICLES

“There is an increasing disjunction between, on the one hand, the array of EU policy initiatives seeking to advance equality via positive action, mainstreaming and data collection, and, on the other hand, the actual content of EU legislation which remains wedded to a traditional complaints-based anti-discrimination model.”

Mark Bell

Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive

Mark Bell¹

1. Introduction

The European Union (EU) reached a turning point with its anti-discrimination legislation in 2000. Initially, its legislation had predominantly focused on discrimination against EU migrant workers, as well as gender discrimination connected to participation in the labour market. Using new competences introduced by the 1999 Treaty of Amsterdam, the Union adopted two Directives which altered the character of EU anti-discrimination law. The Racial Equality Directive² prohibited discrimination on grounds of racial or ethnic origin in a wide range of areas including employment, vocational training, education, social protection, housing and the provision of goods and services. The Employment Equality Directive³ prohibited discrimination on a longer list of grounds (religion or belief, disability, age and sexual orientation), but across a more limited material scope (employment and vocational training).

The 2000 Directives have always carried an aura of unfinished business. No coherent argument of principle was advanced as to why the prohibition of racial discrimination was much more extensive in its application than that which applies to the other grounds. At the time of making the proposal for the Directives, the Commission frankly acknowledged that there was much stronger political will amongst the Member States to take an initiative against racism than other forms of

discrimination and the Commission wanted to capitalise upon that in order to produce as far-reaching a Directive as possible.⁴ Unsurprisingly, it was not long before civil society organisations began campaigning for further legislation to remove the gap in protection between the two Directives.⁵

The political case for additional legislation appeared to have been conceded in 2004 by the incoming Commission President, José Manuel Barroso. Before the European Parliament, he stated: "I also intend to initiate work with a view to a framework directive on the basis of Article 13 of the European Community Treaty, which will replace the directives adopted in 2000 and extend them to all forms of discrimination."⁶ Nevertheless, there followed a lengthy period of studies and consultations, which seemed to risk losing the momentum for a new Directive. Under pressure from the Parliament and civil society to follow through on the commitment given in 2004, the Commission finally published its proposal for an additional Directive in July 2008.⁷ In brief, this seeks to prohibit discrimination on grounds of religion or belief, disability, age and sexual orientation in the fields of social protection, social advantages, education and goods and services, including housing. The main political hurdle to the adoption of the Directive lies in the need for unanimous agreement within the Council

of Ministers from all 27 EU Member States. Negotiations actively commenced in autumn 2008 and are ongoing at the time of writing. This article will provide an overview of the contents of the proposed Directive and an initial evaluation of its potential strengths and weaknesses. It will begin by considering the grounds of discrimination, before progressing to examine: the definition of discrimination; the Directive's material scope; the exceptions to the prohibition of discrimination; and the enforcement mechanisms.

2. The Grounds of Discrimination

As mentioned above, the proposed Directive covers the grounds of religion or belief, disability, age and sexual orientation. Accordingly, the mission of the Directive is confined to addressing some of the perceived shortcomings of the Employment Equality Directive and it does not attempt to make a wider reform of EU anti-discrimination legislation. It also follows the pattern of the existing Directives in not providing any definition of the discrimination grounds.

This choice was particularly contested in relation to disability. The first decision of the European Court of Justice on disability adopted a relatively rigid approach:

"The concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."⁸

The focus here on the individual's impairment seemed to adopt a medicalised model of disability, whereas the general trajectory of disability law reform has been to reduce the emphasis on the individual's impairment and instead to concentrate on the disabling

effects of the surrounding environment, such as building design or social prejudices. The proposed Directive could be regarded as a missed opportunity to give the Court a clearer steer on how it should interpret the concept of disability. This critique has filtered through; the European Parliament⁹ has proposed inserting a definition of disability drawn from the UN Convention on the Rights of Persons with Disabilities¹⁰ and the Council working papers show that such an amendment has also been adopted there.¹¹

In a similar fashion, the proposed Directive does not expressly address the issues of discrimination based on an assumption (e.g. that someone is a Muslim, even if he is actually Hindu), or discrimination based on association (e.g. a non-Romani woman denied entry to a bar because she is accompanied by a Romani man). Shortly after the proposed Directive was published, the Court of Justice decided that the existing Employment Equality Directive should be interpreted in a way which addressed associative discrimination. In *Coleman*,¹² the Court held that the Directive prohibits discrimination on particular *grounds* rather than protecting a particular class of persons. Therefore, discrimination against the primary carer of a disabled child could be discrimination on grounds of disability; it did not matter that the person encountering the discrimination was not personally disabled. The broad language used within the decision suggests that its reasoning will be applied to other discrimination grounds, so it could be argued that the Court has resolved this issue without the need for legislative intervention. Yet the Court's judgment is carefully worded to respond to the facts of the case before it, and in the operative part of the judgment it does not explicitly refer to discrimination by association.¹³ On balance, reasons of transparency and legal certainty suggest that it would be preferable

for the Directive to include an express prohibition of discrimination based on association or assumption.¹⁴

The final issue to be considered in this section is multiple discrimination. One of the oft-cited reasons for adopting additional EU anti-discrimination legislation was multiple discrimination. The lacunae in the existing legal framework frustrated the ability of the law to respond effectively to situations where individuals face discrimination on more than one ground. For example, a gay Asian tenant facing harassment on grounds of ethnic origin and sexual orientation is currently protected under EU law from the harassment he experiences on grounds of his ethnic origin, but not from that based on his sexual orientation. By seeking to 'level up' the legal protection on grounds of religion, disability, age and sexual orientation to that already existing for racial or ethnic origin, the Directive would contribute to combating multiple discrimination insofar as it plugs some of the gaps in the present law. There are, though, notable shortcomings in the way the Directive engages with multiple discrimination. First, intersections between gender and other discrimination grounds are typically the best recognised instances of multiple discrimination.¹⁵ Nonetheless, a side-effect of the current proposal, if adopted, is that gender discrimination would become the least protected of the grounds covered by EU anti-discrimination legislation. Presently, discrimination on grounds of sex is forbidden in employment, vocational training, aspects of social security law and in the provision of goods and services. There is no protection against discrimination in education.¹⁶

The second weakness in the Directive's approach to multiple discrimination is its failure to tackle some of the difficulty in using the legal framework. Even if there were com-

prehensive legislation prohibiting discrimination across all the grounds mentioned, problems can still arise in practice. These issues range from locating an appropriate comparator for a complainant alleging discrimination on multiple grounds, to determining whether the remedy awarded should be adjusted if the discrimination has been on more than one ground.¹⁷ The Commission's explanatory memorandum, which accompanied the proposal for the Directive, rather dismissively states that 'these issues go beyond the scope of this Directive but nothing prevents Member States taking action in these areas.'¹⁸ The legal foundations for this assertion seem tenuous. A Directive dealing simultaneously with four grounds of discrimination seems entirely apt for addressing the question of multiple discrimination and there is no apparent question of legal competence which would restrain the EU from legislating in this direction. In the European Parliament's first reading of the proposal, it endorsed a more penetrating response, notably by the addition of provisions expressly prohibiting multiple discrimination.¹⁹

3. The Definition of Discrimination

In the period between 2000 and 2006, various EU Directives have converged towards a settled definition of discrimination.²⁰ This has four limbs: direct discrimination, indirect discrimination, harassment and instruction to discriminate. Article 2(2) of the proposed Directive largely replicates this structure by adopting equivalent definitions of these four concepts to those already found in the other Directives. Aside from the discussion on how these definitions operate in relation to multiple and associative forms of discrimination, this aspect of the Directive has generated relatively little controversy. A specific issue for the UK arises in relation to the prohibition on harassment. British legis-

lation has chosen not to prohibit harassment on grounds of religion or sexual orientation in relation to the provision of services based on concerns about the impact that this could have on freedom of speech.²¹ Without delving into this complex debate, it is worth noting that few other Member States have felt the need to introduce such a restriction into their domestic legislation. Consequently, it may be difficult for the UK to persuade the rest of the EU to disrupt a settled and largely consistent approach to the definition of discrimination in order to accommodate its domestic agenda.

The genuine novelty in the definition of discrimination is the proposal to create a fifth limb to the concept of discrimination which would be “denial of reasonable accommodation” (Article 2(2)(5)). The Employment Equality Directive already includes a duty on employers to provide reasonable accommodation for disabled persons (Article 5). This is prefaced by the statement “in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities”. Logically, this can be interpreted as meaning that a failure to provide reasonable accommodation is a breach of the principle of equal treatment, but the Directive does not include such a failure within its actual definition of “discrimination” (Article 2). This has resulted in inconsistency within national legislation over whether failure to provide reasonable accommodation amounts to direct or indirect discrimination; whether it is a *sui generis* wrong; or whether it is treated as an aspirational duty with no specific sanction in the event of a breach.²² The proposed Directive clarifies this conundrum by ensuring that denial of reasonable accommodation is a specific form of unlawful discrimination, thereby drawing inspiration from the approach in the UN Convention on the Rights of Persons with Disabilities.²³

Given that denial of reasonable accommodation is to become a form of unlawful discrimination, it is surprising that the proposed Directive remains somewhat elusive on what constitutes reasonable accommodation.²⁴ Article 4(1)(a) would establish an anticipatory duty to provide “effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport”. The Directive does not spell out on whom this duty falls, but it implies that Member States and service-providers have a positive obligation to take measures to ensure equal access for disabled persons; it is not enough to respond on a case-by-case basis to the needs of individual disabled people as they seek to access the service. Article 4(1)(b) states that “notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.” On the one hand, this makes it clear that where, for example, a wheelchair user wishes to enter a large, modern supermarket and it has failed to provide a wheelchair accessible entrance, then the individual could bring a complaint of discrimination due to denial of reasonable accommodation. On the other hand, the Directive remains ambiguous as to whether there should be any other means of enforcing the anticipatory duty save than where an individual complainant is denied access to the service. For example, there is no provision for legal standing for a national equality body to bring proceedings where it finds evidence of service-providers failing to take anticipatory steps to ensure non-discriminatory access. If the anticipatory duty only bites in reaction to an individual complaint, then it adds little to a duty to provide reasonable accommodation.

4. The Material Scope of the Prohibition of Discrimination

The proposed Directive replicates those parts of the material scope of the Racial Equality Directive which were not included in the Employment Equality Directive: social protection, including social security and healthcare; social advantages; education; access to and supply of goods and other services which are available to the public, including housing.²⁵ Given that these are drawn from the Racial Equality Directive, it might be assumed that there should be little controversy over whether, in principle, the EU enjoys the necessary legal competence to legislate in these fields. In retrospect, the limits to the EU's competence were rather glossed over in the rush to adopt the Racial Equality Directive (which became a short-term political response to the entry into the Austrian government of a party from the far-right). When the Commission subsequently sought to legislate on gender equality in areas outside the labour market, much more resistance was encountered and the final Directive was limited to goods and services, with an express exclusion of media, advertising and education.²⁶ Similarly, the documentation from the Council of Ministers' negotiations reveals that many Member States are querying the scope of the Union's powers to legislate on topics such as education, health and social protection.²⁷

The ambiguity surrounding the legal competence of the EU can be traced to two factors. First, the EC Treaty heavily circumscribes the capacity of the EU to legislate on education and health. In education, for example, Article 149(4) EC only provides a power to "adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States". So the Union can create educational programmes, such as the

Erasmus student exchange programme, but it cannot harmonise the organisation of the school system. Against this restrictive view of the Union's role, it must be acknowledged that EU law relating to the free movement rights of EU citizens penetrates deeply into national social policy, including health and education. For instance, the Court of Justice has upheld the right of citizens, in certain situations, to seek healthcare in another Member State and to receive a reimbursement for the costs of this treatment, even within publicly-funded healthcare systems such as the British NHS.²⁸ In practice, such decisions are likely to have some implications for the organisation of the healthcare system, even if the EC Treaty elsewhere deems this to be a responsibility of the Member States.²⁹

The Racial Equality Directive squared this circle by listing the areas to which it applies (including health and education), but prefacing this with the statement: "within the limits of the powers conferred upon the Community, this Directive shall apply ... in relation to ..." On the surface, the Racial Equality Directive appears to apply unreservedly to all aspects of education, but it would be possible in a given case to dispute whether or not that aspect of education is one which actually fell within the limits of the Community's powers. Ultimately, this is a pragmatic response to the reality of fuzzy boundaries between what is a matter of exclusively national competence and what may be a matter of shared competence with the EU. Any attempt to delineate EU legal competence more closely is likely to produce an undesirable difference in the material scope of the Racial Equality Directive and the 2008 proposal. Indeed, this would undermine one of the core benefits of the 2008 proposal, which is to render consistent the prohibition of discrimination across a range of grounds.

In one respect, the Commission has already qualified the material scope of the 2008 proposal in comparison to the Racial Equality Directive. In relation to goods, services and housing, the proposal states that this “shall apply to individuals only insofar as they are performing a professional or commercial activity”.³⁰ The antecedents of this clause can be traced back to the polemics provoked in Germany during the transposition of the Racial Equality Directive. There was a fiery debate over whether or not the Directive violated the freedom of contract and privacy rights. The German federal anti-discrimination law takes a generous view of the private sphere; in principle, if a landlord does not rent out more than 50 flats, then she is not subject to the legislation.³¹ The Commission’s text evidently anticipates a similar debate, but the approach taken threatens to open a loophole.

The European Court of Justice has already recognised, in the context of gender equality legislation, that the principle of equal treatment has to be interpreted in the light of the right to private life.³² Consequently, the Court was willing to accept that there could be *some* forms of employment within the private household where restrictions on the principle of equal treatment could be applied.³³ This should be a sufficient safeguard to ensure that if there is a clash between non-discrimination and private life, then the Court will strike an appropriate balance. In its explanatory memorandum, the Commission suggests the following example: “letting a room in a private house does not need to be treated in the same way as letting rooms in a hotel”.³⁴ Nevertheless, the wording of the proposed Directive goes beyond that found in either the Racial Equality Directive or Directive 2004/113 on gender equality in goods and services. This creates the risk that Mem-

ber States (and the courts) will interpret this as favouring a more extensive concept of private transactions. Indeed, Germany is advocating for the Directive to be limited to transactions which are conducted impersonally and in a standardised fashion (as in its domestic legislation).³⁵

5. The Exceptions to the Prohibition of Discrimination

Some of the most controversial elements of the proposed Directive relate to the exceptions foreseen within the text. Some of these are general in nature, whilst there are others which specifically relate to disability and age. Beginning with the general exceptions, Article 2(8) permits “general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.” The difficulty with this provision is determining what sorts of measures would be regarded as justified. To date, the equivalent exception in the Employment Equality Directive³⁶ does not appear to have provoked significant judicial scrutiny in domestic legal systems and it has not been considered by the Court of Justice. The wording resembles similar provisions within the European Convention on Human Rights, so it seems likely that the proportionality test used by the European Court of Human Rights would also be imported in the interpretation of this provision. Nevertheless, it would be preferable if this was explicitly mentioned within the text.

More detailed exceptions are found in Article 3. This article concerns the material scope of the Directive, so, strictly speaking, these provisions are not exceptions to the prohibition

of discrimination, but simply limitations on the scope of application of the Directive. In summary, paragraphs 2, 3 and 4 state that the Directive is “without prejudice to”:

- national laws on marital or family status and reproductive rights;
- the content of teaching, organisation of the educational system, including special needs education;
- differences in treatment in access to educational institutions based on religion or belief;
- national legislation on the secular nature of the State;
- national legislation on churches and other organisations based on religion or belief;
- national legislation promoting equality between men and women.³⁷

Given the confines of this article, it is not possible to explore the meaning of each of these restrictions in depth. It is obvious, though, that they seek to shelter matters of particular sensitivity for certain Member States. For example, the latent rationale for the reference to the secular State is laid bare in recital 18 in the preamble to the proposal, which states that “Member States may also allow or prohibit the wearing or display of religious symbols at schools”. Unsurprisingly, the French Presidency proposed that this reference to religious symbols should be moved into the main text of the Directive.³⁸ Elsewhere, controversies surrounding same-sex marriage and adoption by lesbian and gay persons seem to underpin the sweeping exclusion of national laws on marital or family status and reproductive rights. The inherent problem in this part of the Directive is that the blanket language used extinguishes any meaningful attempt to balance equality claims with these competing interests. For example, a thorny issue is admission policies for schools with

a religious ethos. Where a religious minority, such as Judaism, wishes to establish schools reflecting a particular religious ethos, it may be necessary for there to be some preference in the admissions process in order to ensure that sufficient places are available for Jewish children wishing to attend that school. In contrast, if most national schools reflect the majority religious community, such as Catholicism, then giving a free reign to preferential treatment based on religion could leave children from minority religions with a very limited choice of schools. It is, therefore, necessary to strike a careful balance between permitting limited and proportionate instances of preferential treatment based on religion whilst not completely emasculating the principle of equal treatment. The proposed Directive, however, makes no attempt to engage with the nuances of this issue; the permission for “differences of treatment in access to educational institutions based on religion or belief” is unqualified.

Exceptions relating to age and disability

There are two further exceptions of relevance to the grounds of age and disability. Article 2(7) authorises “proportionate differences in treatment” in financial services, provided that “age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data”. In the explanatory memorandum, the Commission argues that “the use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product.”³⁹ This perspective can be challenged as not recognising the stereotyping which underpins the use of any discrimination ground as a basis for setting different premiums for financial products. A 72 year old man who is refused travel insurance is suffering from a

stereotype that older men are at greater risk of experiencing ill-health. Although this is factually true, it takes no account of the specific health record of the individual customer. As Baroness Hale observed in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport and another*:

“The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.”⁴⁰

On a more pragmatic level, this exception can also be criticised for not building in the same safeguards which are found in the equivalent exception in the Directive on gender equality in goods and services.⁴¹

The widest exception relates to age discrimination. Article 2(6) states:

“... Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.”

The first sentence of this paragraph echoes Article 6(1) of the Employment Equality Directive.⁴² This permits direct discrimination on grounds of age and opens the door for any form of age discrimination to be potentially capable of justification. The uncertainty generated by this wide scope for

justification is already reflected in the preponderance of preliminary references from national courts under the Employment Equality Directive, many of which have concerned the interpretation of Article 6(1).⁴³ There is relatively little controversy over the fact that there are a range of circumstances where direct age discrimination should be permitted. This ranges from minimum age requirements for access to alcohol, tobacco, pornography or firearms, through to qualification ages for state retirement pensions or other social benefits (such as free/discounted travel on public transport). The difficulty is how to protect and permit schemes which provide benefits for younger and older persons, whilst still ensuring judicial scrutiny of other, less warranted age-based differences in treatment. Both the European Parliament and the Council negotiations are favouring more detail in the legislation. The Parliament has advocated retaining the possibility to justify direct age discrimination, but complementing this with examples in the preamble of permitted differences in treatment, such as driving licences.⁴⁴ In contrast, the Council has discussed inserting a list of measures which are “deemed to be compatible with the principle of non-discrimination”, such as more favourable conditions for access to social protection.⁴⁵ The risk with the latter approach is that a broad swathe of age-based distinctions is placed outside the need for any objective justification.

The discussion above may also have implications for disability. This is another ground where there are numerous instances of preferential treatment which are conducive to the realisation of full equality in practice, even though they collide with formal equal treatment of disabled and non-disabled persons. Most, if not all, Member States will provide a range of social welfare benefits which are limited to disabled persons, such

as mobility and living allowances. It is presumably not the intention of the Commission that such programmes should be vulnerable to challenge as direct discrimination against non-disabled persons. Nevertheless, the proposed Directive does not expressly address the legal foundation for permitting such measures. The Council has debated adding disability into Article 2(6),⁴⁶ however, that would considerably weaken the protection against disability discrimination by allowing the justification of direct discrimination. A more suitable approach would be to recognise an asymmetrical objective for disability discrimination legislation; in other words, that it is concerned with protecting disabled persons against discrimination rather than conferring parallel protection for the non-disabled.⁴⁷

6. Remedies and Enforcement

For the most part, the Commission has eschewed any innovation in how the Directive approaches procedures for enforcement or remedies. Instead, it replicates standard provisions from existing EU anti-discrimination legislation; for example, there is protection from victimisation and provision for a shift in the burden of proof where the complainant establishes facts from which it may be presumed that discrimination has occurred. The principal novelty, compared to the Employment Equality Directive, is the obligation on Member States to designate a body or bodies for the promotion of equal treatment. This duty already exists in EU legislation in respect of discrimination on grounds of sex and racial or ethnic origin. Yet the Commission's proposal timidly refrains from addressing the loophole which is inherited from the Employment Equality Directive. If the text was adopted as it stands, states would be obliged to have a body which assists individuals facing discrimination on grounds

of religion, age, disability and sexual orientation in the relevant areas outside employment, but there would be no requirement for this body's mandate to cover discrimination in the labour market.

The overall direction of the remedies and enforcement chapter of the Directive is to continue the heavy focus in EU legislation on an anti-discrimination model reliant on complaint-based enforcement, primarily brought by individuals. This jars with the announced direction of EU policy. In 2005, the Commission published a "Framework Strategy" on non-discrimination and equal opportunities. This acknowledged the limitations in the complaint-based model:

"It is clear that implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups."⁴⁸

Instead, the "positive and active promotion of non-discrimination and equal opportunities for all" was identified as the core objective of the new strategy.⁴⁹ There is little evidence of this thinking in the 2008 proposal. There is the option for Member States to take positive action measures,⁵⁰ but there are no duties on Member States and/or public authorities to promote equality. Even the modest steps in the EU's gender equality legislation, such as a duty to "actively take into account the objective of equality" when formulating laws and policies,⁵¹ has not been transplanted into this proposal.

7. Conclusion

This Directive would, for the most part, bolster domestic anti-discrimination legislation. A mapping study for the Commission

published in 2006 found that although there was a wide range of legislation in the Member States on discrimination outside employment, this was often variable in its material scope and it was not always consistent in the range of discrimination grounds covered.⁵² In a similar fashion to other EU Directives, this proposal would stimulate a revision of national laws in a generally upward direction. Importantly, it would make a major contribution to diminishing the perceived “equality hierarchy” within EU legislation, levelling-up protection towards that found in the Racial Equality Directive.

The turbulent history of this initiative makes it understandable that the Commission has opted for a cautious proposal. It has focused its energies on ensuring common legislation for all four discrimination grounds, as

well as aiming for a wide-ranging material scope. The trade-off seems to lie in the underpinning model of the legislation. By replicating, as far as possible, provisions within the existing Directives, the Commission has shied away from innovation in areas such as multiple discrimination or the promotion of equality. This might be a strategically sensible choice with a view to limiting the range of contentious issues on the negotiating table. It is, though, a missed opportunity for modernisation. There is an increasing disjunction between, on the one hand, the array of EU policy initiatives seeking to advance equality via positive action, mainstreaming and data collection,⁵³ and, on the other hand, the actual content of EU legislation which remains wedded to a traditional complaints-based anti-discrimination model.

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² Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

³ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁴ European Commission, “Communication on certain Community measures to combat discrimination”, COM (1999) 564, p. 8.

⁵ For example, the European Disability Forum collected over one million signatures in favour of a further Directive on disability discrimination.

⁶ European Parliament Debates, 26 October 2004.

⁷ European Commission, “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”, COM (2008) 426.

⁸ Case C-13/05 *Chacón Navas* [2006] ECR I-6467, para. 43.

⁹ Amendment 17, European Parliament legislative resolution of 2 April 2009 on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

¹⁰ See “Promoting a Paradigm Shift”, *Equal Rights Review*, Vol. 2, 2008, p. 87.

¹¹ Recital 19a, Council, Document 16594/08 ADD 1, 9 December 2008.

¹² Case C-303/06, *Coleman v Attridge Law and Steve Law*, 17 July 2008.

¹³ See Waddington, L., Case Note, *Common Market Law Review*, Vol. 46, 2009, p. 672.

¹⁴ See above, note 9. Amendment 41 adopted by the European Parliament would introduce such a clause.

¹⁵ European Commission, “Tackling multiple discrimination – practices, policies and laws”, Office for the Official Publications of the European Communities, Luxembourg, 2007, p. 47.

¹⁶ Article 3(3), Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

¹⁷ See Uccellari, P., “Multiple Discrimination: How Law Can Reflect Reality”, *Equal Rights Review*, Vol. 1, 2008, pp. 24-49.

¹⁸ See above, note 7, p. 4.

¹⁹ Amendment 37, EP (see above, note 9).

²⁰ In addition to the Racial Equality and Employment Directives, there have been three significant Directives relating to gender equality: 2002/73/EC [2002] OJ L 269/15; 2004/113/EC [2004] OJ L373/37; 2006/54 [2006] OJ L204/23.

²¹ See Uccellari, P., “Banning Religious Harassment: Promoting Mutual Tolerance or Encouraging Mutual Ignorance?” *Equal Rights Review*, Vol. 2, 2008, pp. 7-27.

²² Waddington, L., “Reasonable accommodation” in Schiek, D., Waddington, L., and Bell, M., (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Hart Publishing, Oxford, 2007, pp. 740-745.

²³ Article 5(3). The Convention entered into force on 3 May 2008.

²⁴ The European Parliament supported inserting a definition of reasonable accommodation (Amendment 57, see above, note 9) and this has also been proposed in the Council negotiations (Article 4(1)(a), see above, note 11).

²⁵ Article 3(1).

²⁶ Article 3(3), Council Directive 2004/113/EC.

²⁷ See above, note 11, Council, pp. 15-16.

²⁸ Case C-372/04, *R (on the application of Watts) v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325.

²⁹ Article 152 EC.

³⁰ Article 3(1).

³¹ Para 3.2.9, Mahlmann, M., “Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: Germany”, 2007. Available at: http://www.migpolgroup.org/public/docs/125.Germany_DiscriminationCountryReport_EN_01.07.pdf.

³² Case 165/82, *Commission v UK* [1983] ECR 3431.

³³ *Ibid*, para. 14.

³⁴ See above, note 7, European Commission, p. 8.

³⁵ See above, note 11, Council, p. 16.

³⁶ Article 2(5).

³⁷ Article 3(5) reproduces Article 3(2) from the Racial Equality Directive specifying that the Directive does not cover

differences of treatment based on nationality.

³⁸ See above, note 11, Council, Article 3(3).

³⁹ European Commission (see above, note 7) p. 5.

⁴⁰ [2005] 2 AC 1, para. 74.

⁴¹ Article 5(2) of Directive 2004/113 requires Member States to ensure that the data used in determining actuarial factors are published and regularly updated. In addition, Member States must review this exception after a period of 5 years.

⁴² In contrast to the Employment Equality Directive, the proposed text omits the words "objectively and reasonably" prior to "justified".

⁴³ For example, Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; Case C-388/07 *R (the Incorporated Trustees of the National Council for Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform*, 5 March 2009.

⁴⁴ See above, note 9, amendment 2.

⁴⁵ Article 2(6), (note 11 above). The Council is also discussing a list of detailed examples akin to that recommended by the Parliament (recital 14a).

⁴⁶ See above, note 11.

⁴⁷ This approach would, though, need specific provision to be made for discrimination due to association with a disabled person.

⁴⁸ European Commission, "Non-discrimination and equal opportunities for all – a framework strategy" COM (2005) 224, p. 2.

⁴⁹ *Ibid*, p. 12.

⁵⁰ Article 5.

⁵¹ Article 29, Council Directive 2006/54/EC.

⁵² McColgan, A., Niessen J., and Palmer, F., "Comparative analyses on national measures to combat discrimination outside employment and occupation", Migration Policy Group and Human European Consultancy, Brussels, 2006.

⁵³ For analysis, see Bell, M., *Racism and Equality in the European Union*, Oxford University Press, Oxford, 2008, pp. 82-85.

Xenophobia in Post-Soviet Russia

Anna Sevortian¹

The phenomenon of Post-Soviet xenophobia in its various manifestations has been consistently observed by independent think tanks, especially after 2000 when a report by the Moscow Helsinki Group first posed this pressing problem to the Russian human rights community. Russia has experienced considerable economic and political change over the past decade. However, in terms of xenophobia, racism and nationalism the country has continued to experience trends that were first identified ten years ago. This academically ‘innocent’ phrase has in fact many disturbing consequences, including: growing violence, racial profiling, increasing nationalism and radicalisation, the majority’s silent support of some very unpleasant ideas, civic apathy and emasculation of many democratic mechanisms.

These trends and manifestations are by no means unique and could be compared with the situation in other countries, including Russia’s closest neighbours Ukraine and Kazakhstan. A global outbreak of strong feelings of national identity as well as geopolitical processes has also influenced the situation. Whatever the factors, Russia needs a better understanding of the complexities of its xenophobia in order to establish effective remedies.

1. A Steady Rise

Xenophobia, which has been linked to economic challenges, the intensification of migration flows and new identities and

lifestyles, is becoming increasingly visible around the world and Russia is no exception. Most regions in Russia have observed a rise in the problem which manifests itself in a wide range of ways, from “soft” forms including hate speech and negative behavioural patterns to violence. The deteriorating situation could have been abated with a timely reaction from both the Russian authorities and citizens. In fact the first few years of this “epidemic” were spent unwisely engaging in observations that merely attempted to voice the problem.

In the early 2000s, xenophobia was largely overlooked and perceived as an understandable consequence of Russia’s economic and social transition. The slow but gradual increase of xenophobic sentiments was perceived as a minor problem when compared to other “state emergencies” such as the war in Chechnya and the ongoing economic instability. This attitude, together with the rare public condemnation of ethnic violence, created a favourable climate for the growth of wider manifestations of hostility and hatred.

As scholars attempted to establish a correlation between implicit and explicit xenophobia – or how hate speech and latent xenophobia affect more violent manifestations of hatred – the number of attacks grew steadily. These attacks were most often targeted at “immigrants” who were visually different or, according to law enforcement agencies and the press, “non-Slavic” in appearance. While many “non-Slavs” could have been Russian

citizens due to the heterogeneous nature of the Russian state, the message of xenophobia was clear and targeted “immigrants” from the Caucasus, Central Asia, and China.

Several years of aggravated violence, coupled with internet-based and other activities by overtly far-right groups, eventually raised the status of this issue so that it could no longer be ignored. After several murders of students with Asian features on Nevsky Prospect, the main street in Saint Petersburg, and the unprecedented cruelty of the murder of Hursheda Sultanova, a 9-year old Tajik girl in February 2004, the first official statements on this complex problem were made. Rashid Nurgaliyev, the acting Interior Minister at the time, admitted that “acute manifestations of extremism” existed towards visual minorities in Russia. Nonetheless, it took another year for the government’s approach to change. Racist attacks were framed as “extremist crimes” that constituted a threat to Russia’s security, and in 2005 the then Russian President Vladimir Putin addressed the issue during his internet-conference session with Russian citizens.

2. Trends and Statistics

“Extremist crime” was the term used to express the social concern over xenophobia-related violence in the national report submitted by Russia to the UN Universal Periodic Review in 2009. The report officially recognises the increase of such crimes and provides some statistics relating to the extent of the issue. It demonstrates a steady increase in “extremist crime” in Russia and states that the number of registered extremist acts rose from 130 in 2004 to 152, 263 and 356 in 2005, 2006 and 2007 respectively. In the first half of 2008 alone, 250 extremist crimes were registered.²

The most conservative estimate of “extremist crime” during 2008 has been carried out by the SOVA Center, an independent think tank that has undertaken the most consistent research on this issue. This research suggests that in 2008 there have been no less than 525 victims of racist and xenophobic violence, 97 of whom have died. It also reveals that the majority of the offences were being committed in the Moscow and Saint Petersburg regions.³

The Russian NGO community, not surprisingly, prefer using other terminology: “hate crimes”. Their general analysis of this trend is best summarised in the recent shadow report to the UN Committee on the Elimination of Racial Discrimination.⁴ Supported by 33 NGOs, this document marks out three main facts regarding hate crime and hate speech in Russia:

1. The number of hate crimes has recently been growing by 20% a year. Hate crimes have become increasingly cruel and often involve weapons and explosives. As a rule, the organisations instigating this discrimination and violence, act openly and with impunity.
2. The prosecution of hate crimes is on the rise; however, it falls short of what is necessary in view of the scale of hate crimes and racist propaganda.
3. Some officials cooperate with racist organisations and/or allow statements which are overtly intolerant towards particular ethnic groups. For example, propaganda campaigns against opponents on the international arena have led to hate speech against some ethnic/national minority groups living in Russia.

In a sense, the lag between violent actions and counter-measures is a result of the initial inertia in the response to the “xenophobic

challenge". A recent SOVA report⁵ explains that in 2008, across 19 regions of the country, there had only been 33 successful prosecutions for racist violent crimes where hate was recognised as an aggravating motive of the offence. Any positive changes in the prosecution of cases of violence are however immediately overshadowed by other facts. SOVA documented racist and neo-Nazi motivated attacks in 44 regions of Russia. Aside from organised nationalist groups, such as the Movement Against Illegal Immigration (*Dvizhenie protiv nelegalnoi immigratsii*, DPNI), the estimated number of active informal skinhead movement members is between 10,000 and 20,000, mostly youths painting racist graffiti and organising attacks on minorities.

These figures were first made public by Galina Kozhevnikova, SOVA Deputy Director in February 2009 at the Independent Press Centre in Moscow. It was exactly three weeks after another press gathering had been held there by the well-known Russian human rights lawyer Stanislav Markelov. Following the press conference, while on their way to the underground station, Markelov and Novaya Gazeta reporter Anastasia Baburova were brutally murdered. Ms. Kozhevnikova had also received an e-mail threat herself one day before her press conference.

3. Understanding the Roots of Xenophobia

It is not an easy task to single out the dominating factors feeding xenophobia in Russian society. Being a complex and subjective notion, xenophobia is closely linked to the hardships of economic transition; nationalism in times when the meaning of "nation" is unclear; the challenges of globalisation including unprecedented human mobility; and history.

The historical perspective is preferred as an explanatory tool by some scholars; and it may be true that the deep roots of modern xenophobia can be found in 19th century village communal traditions or within the idea of Soviet collectivism. It is reasonable to recall Soviet concepts such as "internationalism" and "peoples' friendship" as well as the suppression of any manifestation of nationalism when considering the roots of xenophobia in Russia. The tumultuous *glasnost* years and 1989 opened the floor for nationalist discussions and then led to the so called "parade of sovereignties" of the former USSR republics.

From this perspective, the 20 year period in which people have had the freedom to openly express their thoughts for the first time (including nationalistic sentiments) may not have been sufficient for the development of new national identities. This is especially the case in a country whose vast territory contains a great many national identities, such as Tatar or Bashkir, alongside the Russian identity.

To an extent it was predictable that some form of ethnic based nationalism should have replaced the composite Soviet identity. The redefining of identity supposes distinguishing oneself from "others" through simplistic "us" versus "them" judgements (which is typical for emerging identities). Certainly, while Russia was in transition, the consequences of this process had no chance of being thoroughly reflected upon and analysed.

Another common argument in debates about xenophobia in Russia rests on the external challenges the country has faced at the economic, political and security levels. The list of factors which probably added to the spread of xenophobic sentiments usually includes the economic difficulties of the 1990s

and the growing economic divide, disintegration, tensions and geopolitical reconfiguration on Post-Soviet territory, which included a wave of labour migration. In the absence of comprehensive policies, many of the consequences of the rapidly changing life in Russia have been imbued with negative, xenophobic interpretations. For example, labour migrants are blamed for “stealing” local jobs rather than being recognised for the value they contribute to society by taking unwanted, unqualified work. Similarly, proponents of this argument have suggested that unprecedented terrorist acts in the North Caucasus, Moscow and elsewhere, two wars in Chechnya and global counter-terrorism rhetoric have made the growth of xenophobia almost inevitable.

Other analysts have tended to emphasise the influence of the years of Vladimir Putin’s governance and have even charged the authorities with using xenophobia as a tool to unify Russian society. Though such an explanation may be too mechanistic, two facts should be taken into account when exploring this issue further – the comparatively late acknowledgement of xenophobia as a social problem and the recent politicisation of xenophobia.

4. Can Xenophobia Be “Managed”?

The question we should pose here is whether, along with “manageable democracy”⁶, xenophobia in Russia was also considered “manageable”, especially after ethnically motivated violence and incitement of racial hatred has been condemned by top officials? And if so, how has it been “managed” lately?

The strategic solution for dealing with xenophobia and related xenophobic violence was to “re-brand” it as an element of “extremist activities”. Governmental authorities initiated a “counter-extremism” campaign that re-

sulted in an increase of court cases concerning incitement to hatred and of suspensions of radical newspapers for using hate speech.

Russia’s new President Dmitry Medvedev, at the Meeting of the Council for Civil Society Institutions and Human Rights on 15 April 2009, commented on the campaign:

“The last problem brought up here is that of extremism. I feel that we have made advances on the subject, because just 10 years ago, the law enforcement authorities were reluctant to deal with it or even discuss it. Now, they have begun addressing it, and they have been initiating some criminal cases – perhaps not as often as they should, but nevertheless, progress has been made.”⁷

This progress is indeed important, though it is controversial from the civic organisations’ perspective. Anti-extremism legislation, the Law on Combating Extremist Activity, was specially amended to deal with cases of racial hatred and violence; however, it is often regarded as a double-edged sword. It defines “extremist activities” broadly and in some respects it goes further than the provisions of the Criminal Code. It permits selective application and at the same time establishes serious penalties for organisations and media engaging in extremist activities. Human rights monitors have repeatedly expressed their concerns about this legislation’s potential to limit freedom of speech and other human rights. Alexander Verkhovsky and Galina Kozhevnikova of SOVA believe that the concept of “counter-extremism” activities has substantively altered the context of counteracting racism and xenophobia:

“It is defined as ‘counteraction to extremist activities’ and develops exclusively as a fight against ‘extremism’, thus dragging the issue into the political domain, leading

to selective and discretionary application of law and shifting the focus of preventing and eliminating discrimination from the protection of individual rights and dignity to a fight against those whom the state deems its opponents.”⁸

The issues of civic freedoms and xenophobia “management” remain at the top of the political agenda in connection with another resonant topic - non-violent gatherings and the right to hold rallies or demonstrations.

5. Xenophobic Marches

Since 2004 and until very recently, Russian politics has been commonly characterised by a discourse of the growing consolidation of power, the erosion of democratic institutions and Russia’s economic and geo-political resurgence. A general reduction of the space for political discussion and criticism has been one of the obvious features of this period. Many NGOs and political parties have been affected along with other institutions.

The 2004 legislation on public meetings, rallies, demonstrations, marches and picketing⁹ introduced more restrictive regulations. In particular, the majority of activities of this kind now require official permission from the authorities complying with a special procedure, and failure to obtain permission renders them illegal. The legislation also places restrictions on the type of venues in which public events can be organised.

This restrictive legislation, however, has not helped prevent instances of open racism, the most notable of which was the “Russian march”, which took place on 4 November 2005, the Day of National Unity (a new Russian public holiday which replaced the October Revolution Day). That day, over 3,000 people marched along the main Moscow

boulevards in the city centre, some of them chanting “*Heil Hitler*”, “Glory to Russia”, and raising their hands in the Nazi salute.

This unexpected first “legally authorised” far-right mass event demonstrated the ugly side of modern nationalism in Russia. Footage of the march on TV and coverage in the press were a shocking revelation for many people in Russia. Moscow city authorities were also concerned. The “Russian march” was banned in 2006 and unauthorised gatherings and radical actions were blocked by the police. Later marches have been ordered to be held away from the city centre and popular routes and locations. The same tactics are employed by other big Russian cities where such marches have been increasingly common.

Following the ban on the 2006 event in Moscow, the city mayor Yuri Luzhkov commented to a TV channel:

“I made a decision to ban the so-called Russian march. I appreciate that those extremists may try and stage something of the kind somewhere else in the city. However, we shouldn’t allow this sort of activities to do damage to the unity of our society.”

This position, however, is controversial according to human rights organisations. Ludmila Alexeeva, Chair of the Moscow Helsinki Group, the oldest human rights institution in the country, stated that banning a public rally is against the law, and the authorities could only order the organisers to change the venue. She raised this issue at the recent meeting with President Dmitry Medvedev who admitted that “naturally, the authorities never want to allow these kinds of events and their decisions are partially understandable, but in any case, they are not based on the rule of law...”¹⁰

The dilemma faced by the authorities who are acting to preserve “the unity of the society” through restricting freedom of expression and assembly has been reinforced every year since 2006 in connection with another type of march which is related to combating an associate of xenophobia – homophobia. Thus, Moscow authorities have famously been blocking any attempts to organise Gay Pride parades in the city. The justifications put forward for blocking such parades have included the claim that the march will provoke action by skinheads and other far-right groups as has happened in some Eastern European cities; that security can’t be fully guaranteed; that much of the gay community opposes the Gay Pride parades; and that society is not ready for them yet.

6. Perilous Ambiguity

In addition to legislation and law-enforcement, governmental rhetoric is another important source upon which observations about xenophobia in Russia can be based. The most obvious conclusion to draw from observing governmental rhetoric is that the signals sent out by the Presidential Administration and the state-controlled or state-influenced media are ambiguous and – in many cases – controversial.

As the German scholar Andreas Umland has written,

“While primitive hatred of foreigners and ethnic violence are officially stigmatised, the dissemination of national stereotypes and anti-Americanism, in particular, by government-directed information channels and political pundits continues unabated. On the one hand, the political leadership is promoting the integration of Russia into Western organizations such as the G8 and the World Trade Organization. On the other hand, the

discourse among political experts, as well as intellectual life in general, are characterized by the spread of an anti-Western consensus often described as ‘Eurasian’, the essence of which is the assertion that Russia is ‘different’ from, or indeed, by its nature, the opposite of the US.”¹¹

The wording and manner in which these official perceptions are delivered to the public range from subtle and delicate to quite straightforward, depending on the subject. For instance, they can be delivered in a purely theatrical way, such as the purposeful pause which former President Vladimir Putin included in his statement in 2006. When a reporter asked him who the next president of Russia would be Putin’s response was: “The next president would be the one elected by the ‘ethnic’ Russians [*pause*] and other peoples of the Russian Federation.”

A different strategy was followed during the so-called “anti-Georgian campaign” by the Russian media in 2006. After the Georgian Interior Ministry detained four Russian officers and later expelled them on charges of espionage, Russia introduced tough economic sanctions against Georgia. Research conducted by SOVA identified a significant increase in anti-Georgian statements in the press as part of the campaign against Georgia’s actions. Other human rights organisations also noted the role of the media:

“Russian television stations actively supported and justified the government’s singling out of Georgians through daily news programs as well as weekly analytic and political programming and special series. For example, one-sided news coverage in early October on the government-owned Channel One exclusively presented the position of government officials and agencies and regularly connected Georgians to violations of the law, including organized crime.”¹²

The media very rarely talked about attacks on ethnic Georgians or the other kind of incidents that were provoked by this campaign. Nor did they cover the views and actions of the critics of this fanning of xenophobic sentiments. At the same time topics such as “Georgian criminality”, “Georgian terrorism” and “Georgia parasitizing on Russia’s economy” (referring to people of Georgian origin transferring money from Russia to support their families in Georgia) were abundant in the media. As SOVA’s research has ascertained, even expressly political rhetoric is often interpreted as relating to ethnicity. The media coverage was immersed in anti-Georgian political sentiment that rendered the overall situation close to a “public hysteria”. The most shameful episodes of “witch-hunting” during this campaign included orders from at least two Moscow police districts for public schools to produce lists of children with Georgian names, birth dates, addresses and information on their parents’ employment.

Nonetheless, at least in terms of the “management of xenophobia”, the lessons from this episode seem to have been remembered. Instigated by political rhetoric, xenophobic sentiments can quickly run wild and slip out of control. When reporting on the war in South Ossetia in August and September 2008, therefore, the Russian press kept their coverage exclusively political (not ethnic) and the number of xenophobic remarks by government representatives was markedly reduced.¹³

7. Xenophobia’s Disguises

If we were to name the current “campaign” in which the xenophobic banner resides it would probably be “anti-migrant”. In fact, general xenophobia in the public discourse fairly easily transforms from one type to another. Taking into account the general pro-

clivities for xenophobia, the world economic downturn of late 2008 – 2009 has made it more visible.

With an increase in unemployment, social distress and anxiety are easily and naturally channelled into anti-migrant sentiments. Labour migrants, if they lose their jobs, are believed to stay in Russia and turn to crime by many in Russian society. There is also a wide-spread belief that “they steal the jobs”. In some ways such beliefs are also a relic of former Soviet prejudices against *limitchiki* (local “guest workers” – small-town dwellers the state had moved to central big cities as cheap and low-qualified workforce in industry).

According to a 2005 survey by Mikhail Alexeev¹⁴ on the xenophobic proclivities among the Russian youth, around 36% of respondents who were 18 – 25 years old and 43% of those 40 or over completely or partially supported the statement “all migrants, legal or illegal, and their children should be sent back to their places of origin.”¹⁵

In recent years labour migrants, especially visible minorities, have not been fully welcomed in the main Russian regions. Having one’s papers in order is often not a sufficient guarantee against discrimination by law enforcement agencies. In 2006 the Open Society Justice Initiative conducted a study on “Ethnic Profiling in the Moscow Metro”. It examined whether and to what extent the Moscow Metro police disproportionately stopped individuals based on their appearance as “Slavs” or “non-Slavs”. The results were unexpectedly high: non-Slavic appearing passengers were over 20 times more likely to be stopped for an ID check.¹⁶ By comparison, in the US and the UK, it was four to five times more likely for a person who is a visible minority to be stopped.

This is just one example of discriminatory practices considered normal and natural both by society and law-enforcement agencies. Consequently such practices are very rarely questioned or studied as a source of xenophobia. What is more disturbing in the light of the financial crisis, however, is the trend of linking migration to criminality as such. Apart from contributing to the general growth of xenophobia, this logic is the basis for the police to justify the lack of effective responses by casuistic arguments such as the one that “migrants have committed more crimes than were committed against them.”¹⁷ It also strengthens the state’s overall approach to regulating migration.

8. Infantile Disease?

So if the question is whether the state is trying to politicise xenophobia, the answer is definitively yes. At the same time if one asks whether the state is trying to counter-act xenophobia, the answer is again yes. This controversy obviously makes combating discrimination quite complicated.

What is perhaps most problematic, however, is the controversial state of Russian society itself. On the one hand, there is what has been called by President Dmitry Medvedev “deep-rooted public distrust toward institutions of power” and a fairly reserved attitude towards their actions. On the other, there’s a clear lack of public interest in the issues of discrimination and xenophobia and a lack of demand for enforcing existing legal mechanisms.

Civil society institutions have been weakened in the recent past and the Russian social fabric has been fractured. Growing individualism has brought many positive changes, but it has also affected people’s ability to raise

pressing issues, discuss and advocate for their community interests. Even in cases of escalating racist and neo-Nazi violence, Russian society largely ignores discussions about what is permissible and socially acceptable and what is normal and abnormal. Such a dialogue only happens within small audiences such as at universities, NGOs or – as was the case many years ago – in peoples’ kitchens.

During one such occasion – at the conference on the impact of hate speech on politics and society in Moscow, Alexander Auzan, Professor of Political Economy, compared Russian nationalism to a fever. This metaphor was used in a positive sense, as a symptom of an infantile disease. According to Auzan, this “fever of nationalism” could be perceived as an indicator of the current state of the “organism” – a specific moment in the transition from an “ethnic” to a “civic” nation.

9. Conclusion

Concerns that xenophobic sentiments might be politically exploited are getting stronger – recently the issue has been treated as a threat to national security. Despite the recent positive changes in the level of prosecution, state rhetoric reveals an ambiguity in regard to different manifestations of radical nationalism and discrimination. As this phenomenon has not yet been adequately explored and understood, xenophobia in Russia cannot be considered fully “manageable” – neither is it, in this sense, politically controlled or effectively restrained. Much depends on sensible and consistent governmental strategies. However, the issue is unlikely to be resolved without non-state actors’ participation, educational efforts, civilian oversight and introducing good international practices.

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² Materials Prepared by Russian NGOs for the Universal Periodic Review of Russia in the United Nations Human Rights Council. *Russia's National Report for 2008 under the new Universal Process Review procedures*. 04.02.2009, available at: <http://xeno.sova-center.ru/6BA2468/6BB4254/B87D16B>.

³ Kozhevnikova, G., "Radical Nationalism in Russia in 2008, and Efforts to Counteract It", edited by A. Verkhovsky, available at: <http://xeno.sova-center.ru/6BA2468/6BB4208/CCD6D21>.

⁴ *Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination: Russian NGOs' Alternative Report*. 2008, available at: <http://xeno.sova-center.ru/6BA2468/6BB4254/B8954EB>.

⁵ See <http://xeno.sova-center.ru/6BA2468/6BB4208/>.

⁶ I use the term "manageable democracy" in the sense of a Russian model of governance. The term was coined by Vladislav Surkov, one of the Presidential Administration spokesmen, in a public speech in 2004.

⁷ "The Meeting of the Council for Civil Society Institutions and Human Rights under the President of the Russian Federation - An official transcript", 15 April 2009, available at: http://www.kremlin.ru/eng/speeches/2009/04/15/1932_type82913_215131.shtml.

⁸ See above, note 3.

⁹ Federalny zakon Rossiiskoi Federatsii o sobraniiah, mitingah, demonstratsiiah, shestviiah i piketirovaniiah, N 54-F3 (19 June 2004).

¹⁰ See above, note 7.

¹¹ Umland, A., "'Neo-Eurasianism', the Issue of Russian Fascism, and Post-Soviet Political Discourse", *Opednews*, 11 June 2008, available at: <http://www.opednews.com/articles/-Neo-Eurasianism---the-Iss-by-Andreas-Umland-080610-4.html>.

¹² Human Rights Watch, *Singled Out: Russia's Detention and Expulsion of Georgians*, October 2007, pp. 34 – 35, available at: <http://www.hrw.org/reports/2007/russia1007/russia1007web.pdf>.

¹³ See above, note 3.

¹⁴ Alexeev, M. A., "Xenophobia in Russia. Are the Young Driving It?" *PONARS Policy Memo* No. 367, December 2005.

¹⁵ Additionally, approximately 60% of respondents in the age group 18-25 and 57% of respondents 40 and above expressed complete or partial support for the slogan "Russia for the Russians".

¹⁶ Open Society Justice Initiative, *Ethnic Profiling in the Moscow Metro*, New York, 2006, available at: http://www.justiceinitiative.org/activities/ec/ec_russia/metro.

¹⁷ See above, note 2.

The Right to Affirmative Action for Blacks in Brazilian Universities

Daniela Ikawa¹

"[The] adoption of a new principle of distributive justice is likely to create conflicts between claims under the old and new principles."

Michael Rosenfeld²

1. Introduction

There are many ways to construe and interpret rights. In this article, I give a glimpse of my position, defended more fully elsewhere.³ On the one hand, I follow the usual position of grounding rights on the principle of human dignity. On the other hand, I defend the position that rights should be contextualised to the point that general rights, such as the right to education, can be deconstructed into specific rights, such as the right to affirmative action at universities. This deconstruction is required mainly because, embedded in the concept of rights, there is not only an idea of *equal* rights but also one of *universal implementation*. Rights when restricted to a guarantee by a legislative provision do not necessarily lead to equality. Rights are only truly equal when they are *implemented* for all. This universal implementation can only occur by taking into account the different vulnerabilities that each person faces as a result of discrimination. This is exactly what affirmative action does.

I also argue that the right to affirmative action is acknowledged by the Brazilian Constitution, a constitution that has been gener-

ous in recognising social rights and material equality. As a social right, the right to affirmative action is closely related to the idea of distributive justice. In this vein, the right to affirmative action is a right to a public policy, and not a right to be admitted to a particular university.

In part 2 below, I develop a conceptual framework from which I analyse the factual situation of racial discrimination in Brazil. In part 3, I discuss two aspects of that factual situation: (a) the fact that racial discrimination has been based on phenotype; and (b) the fact that it has been moulded into regional disparities.

2. The Right to Affirmative Action in the Brazilian Constitution

Two Starting Points: the Principle of Human Dignity and the Concept of Human Being

The right to affirmative action has two main elements: (a) it is grounded on the principle of human dignity; and (b) its structure var-

ies as the factual situation of discrimination varies. I will discuss in this part some of the implications of the right being grounded on the principle of human dignity, by exploring the content of “human dignity”. The content of human dignity is defined by the concept of the human being, as the human being is the subject of dignity. By studying this concept, it will be easier to understand why rights have to be “contextualised”, that is, why general rights have to be deconstructed into more specific rights that take into account a person’s vulnerabilities as well as the context where those vulnerabilities are produced.

The principle of human dignity is established in article 1 (III) of the Brazilian Constitution: “the Federative Brazilian Republic [...] is founded on [...] human dignity”. This principle implies the existence of a characteristic that all persons have in common by the mere fact of their humanity: dignity. The principle of human dignity encompasses, therefore, the principle of equality in dignity and that all persons are equal in dignity. Equality, therefore, is the foundation for the theory of constitutional rights and the theory of international human rights. If we accept the argument that all persons have equal rights, we do so because we also accept the argument that all persons are equal regarding this one essential, non-homogenising characteristic, whose possession does not override the possibility of human diversity. That essential characteristic is human dignity.

Agreeing that human rights are grounded on the idea of equal dignity does not amount to having those rights implemented for everyone. One question should still be answered: what are the human traits that give a person dignity? In other words, what is the content of dignity? I propose here a normative concept of human being,⁴ which will help

in identifying such traits. From those traits, the interpreter will be in a better position to fully understand the extent of constitutional rights, including the right to education. In order words, the interpreter will be in a better position to see why the general right to education should be deconstructed to form a specific right (the right to affirmative action in universities), which takes into account of a person’s vulnerabilities and the context where those vulnerabilities were moulded. Finally, the interpreter will be better placed to understand that the right to education goes far beyond its textual enunciation to encompass the consideration of factual barriers that impede the implementation of that general right for everyone.

The Principle of Human Dignity from Two Perspectives

The principle of human dignity should be approached from two different perspectives: a procedural perspective and a substantive perspective. From the procedural perspective, we should consider legal issues already agreed upon or made explicit by a democratic constitutional process. From the substantive perspective, we should consider other issues, not necessarily agreed upon or not made explicit by the constitutional process. These latter issues may have either a conventional or a non-conventional moral character.⁵ The consideration of procedural issues (agreed upon by the constitutional process) and substantive issues (of conventional and non-conventional moral character) in the analysis of the principle of human dignity is required by the belief that law’s legitimacy and justice are not merely the result of a pre-established procedure (even if this procedure is democratic); they are also the result of moral reasoning.⁶

The Procedural Perspective and the Constitutional Procedure

Taking into account the procedural perspective, we should start the interpretation of the principle of human dignity by analysing the concept of human being which is implicitly drafted by constitutional norms. Standing as a turning point in the transition to democracy, the Brazilian Constitution of 1988 encompasses both civil and political rights and economic, social and cultural rights; both the principle of liberty and the principle of equality; both formal and material principles.⁷

Those principles and rights imply a complex concept of human being that will serve as the content for the principle of human dignity. This concept will encompass the following elements, explicitly recognised in the Brazilian Constitution: (a) human autonomy (as recognised in the constitutional protection of physical integrity and freedom of thought and religion, article 5); (b) the contextualised character of human beings (as recognised in articles 3, 7, 37, 215 and 216, which embrace affirmative action programmes, the goal to eliminate poverty and the principle of diversity); and (c) the human potential for justice and for taking others into consideration (as recognised in article 3, regarding the Republic's goal to build a just and fraternal society).⁸

The Substantive Perspective and Moral Norms

Substantively, we should consider not only conventional moral norms, found in public debate on affirmative action programmes (analysed elsewhere)⁹ but also non-conventional or critical moral norms, that is, moral norms which are not necessarily accepted by the majority, but which are compatible with the principle of human dignity. According to

non-conventional moral norms, the human traits recognised by the Constitutional text, such as autonomy, diversity, and the potential to take others into consideration are articulated in a formula developed with the support of Charles Taylor's theory of human agency.¹⁰ The consideration of non-conventional moral norms in the analysis of constitutional norms is aimed at reducing the degree of discretion available to the interpreter, as well as to finding an interpretation¹¹ which will better respond to the principle of human dignity. I propose, therefore, the following concept of human being:

The human being is characterised by the potential for individual and inter-subjective moral articulation to follow a concept of "good", to learn about oneself, and to act morally on one's own empirical condition, on one's own identity.

This concept encompasses the notions of autonomy and diversity as well as the potential to take others into consideration, as established in the Brazilian Constitution. More specifically, this concept embraces the apparent dichotomies: (a) between equality (in dignity, characterised by a potential to make moral decisions which is inherent to all persons) and diversity (found in individual authenticity as well as in one's unequal empirical situation)¹²; (b) between autonomy (because no person is completely determined by one's environment; that is, every person has the potential for moral articulation) and context (because no person is completely free to make choices; because all persons are, to a certain extent, restrained by their empirical condition, that is, needing to act upon one's own empirical condition); (c) between instrumental reason (purely focused on the identification of adequate means to specific ends)¹³ and non-instrumental reason (focused on common ends or

even universal ends; that is, focused on inter-subjective moral articulations)¹⁴; and (d) between atomism (characterised by a complete autonomy between the self and the society which surrounds her)¹⁵ and belonging (to this society, the only place where one can develop one's moral potential).

Individual rights are grounded on a contextualised concept of the human being: of a being that is at the same time free and determined by one's environment. For this reason, individual rights should also be perceived as contextualised. More specifically, a contextualised perception of the human being implies a contextualised interpretation of the principle of human dignity, and a contextualised theory of rights.

The Impact on the Theory of Rights

The adoption of a contextualised concept of the human being will also be a basis for more efficient rights, including here the right to education. This is due to the idea that only by considering contextual inequalities among persons, only by considering the specific barriers faced by each group of persons in the implementation of their rights, is it possible to construe rights which can be equally implemented for all. Also only by considering those inequalities is it possible to implement the constitutional principle of human dignity.

As we adopt a contextualised concept of human being and human dignity, we must consider the context in the construction of the general right to education and of the specific right to affirmative action programmes at universities. Each group has specific vulnerabilities, but I will limit this discussion to addressing the right of a particular group, blacks, to affirmative action programmes in Brazilian universities. Although I will not

cover all aspects of this specific and contextualised right in this article, I will approach it, by highlighting some of the challenges faced by those who are discriminated against on the basis of race in Brazil.

3. The Brazilian Notion of Racial Discrimination and Its Implications on the Right to Affirmative Action at Universities¹⁶

There are a few peculiarities of the Brazilian notion of racial discrimination that are worth stating from the outset. It is clear that racial discrimination has persisted under a myth of racial democracy, in spite of the fact that blacks are almost a numerical majority in Brazil. Moreover, racial discrimination has been based on phenotype¹⁷; and has been moulded into regional disparities. I will focus my arguments in this paper on these two latter issues and I will discuss how those issues influence the configuration of the right to affirmative action for blacks in Brazilian universities.

The Meaning of Race in the Brazilian Context and the Identification of Beneficiaries Regarding the Right to Affirmative Action Programmes

A very strong source of continued *de facto* discrimination in Brazil is denial: denial of race and of racism. Denial is made possible, among other reasons, by a conceptual confusion involving the meaning of race. This confusion is related to the belief that there is no sufficiently objective way to define race in a country where so much miscegenation has occurred.¹⁸ The issue of racial identification is complex, and I do not intend to exhaust it here.¹⁹ It is relevant to say, however, that this problem of racial identification is particularly acute in Brazil, because Brazilians often deny the existence of race after assuming that the only valid definition of race is the one adopt-

ed in the United States. Race, some would say in Brazil, can only be precisely defined when legal segregation and the lack of miscegenation have allowed one to establish rigid racial lines based on ancestry. In this vein, the American “one drop of blood” policy would be the only way objective enough to define race. Because Brazilians have practically not been legally segregated since the abolition of slavery, and because Brazilian society is highly miscegenated, one would not be able to identify particular races in Brazil.

This argument is, however, flawed, since it disregards the fact that race, as a social (artificial) construction, will always vary from one society to the other, and will always carry complex definitions and complex processes of identification. In the United States, the Census Bureau started to collect information on colour in 1850.²⁰ Since then, different classifications were adopted, including the consideration of “mullatos” from the 1850 census (when enumerators were instructed to classify a slave as black or “mullato”) to the 1930 census.²¹ As of 1997, six racial categories are identified in the United States for census purposes: American Indian or Alaska Native, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander, Asian, and White.²² In Brazil, where race is based on phenotype and not on ancestry, identification will have to follow patterns different from those adopted in the United States. It does not mean, however, that identification will be impossible in Brazil. Reliable data on race started to be gathered in Brazil in 1872,²³ and it was suspended only between 1900 and 1930.²⁴ In the 1872 census, four terms were used: white, black, brown (*pardo*), and mestizo Indian (*caboclo*).²⁵ Today, the Brazilian census uses five categories: black, white, yellow, brown or *pardo*, and indigenous.

The possibility of racial identification in Brazil is also attested by the fact that blacks are often identified as a target for discrimination. The following numbers highlight the existence of racial identification and racial discrimination, as they make explicit the disparities between the representation of blacks in Brazilian society, on one side, and the representation of blacks in universities, on the other. Although blacks were 45.3% of the Brazilian population in 1999,²⁶ there were 1,140,000 white students 18 years or older enrolled in Brazilian universities in 1991 as compared with 277,000 black students. White students were 78.3% of university students and blacks were 19.7%. In 2000, there were 2,355,000 white students enrolled in Brazilian universities, amounting to 78.8% of Brazilian university students. However, there were only 576,000 black students, amounting to 19.3% of university students. If we consider only university students between 18 and 24 years old, there was an even steeper decrease in the number of blacks in Brazilian universities between 1991 and 2000: from 16.7% to 15.9%.²⁷

Understanding the social and artificial character of race is essential to understanding a particular context of discrimination and to fighting against it. In the case of Brazilian blacks, race is constructed and socially defined by phenotype, and not by ancestry, as is the case in the United States. Remedies should, therefore, target beneficiaries predominantly by phenotype in Brazil, and not ancestry.

This is not, however, a standard practice. At the Federal University of Sao Paulo (UNIFESP), for instance, quota candidates must prove that they or one of their ancestors is black, by presenting documents such as a birth certificate.²⁸ In order to assure

some objectivity, a better alternative would be to restrict identification to the analysis of phenotype, the only criterion which is compatible with the Brazilian notion of racial discrimination.

The identification of beneficiaries of affirmative action programmes in Brazil should start by self-identification, in order first to avoid external identification which could lead to invidious forms of discrimination, and second to strengthen self-recognition as a member of the discriminated group (there is still in Brazil a superficial denial of one's own and the other's race as an unsuccessful means of fleeing from the idea of discrimination).²⁹

Taking into account the degree of miscegenation and the resulting distrust concerning racial identification in Brazil (there is, however, a considerable degree of confluence between self racial identification and identification by third parties at a rate of 79%),³⁰ racial self-identification could be complemented by other means. In order to avoid fraud in obtaining benefits or simply in order to avoid distrust, a few additional identification mechanisms could be used, such as: (1) forms with multiple questions about the candidate's race (which could be used to assess coherence in one's self-identification);³¹ (2) signed statements; (3) interviews; and (4) photos.³² Furthermore, identification committees could be formed *after* the candidate's self-identification.

The specific right to affirmative action programmes for blacks in Brazilian universities encompasses, therefore, a right to affirmative action programmes that identify race by phenotype, as an identification method which better corresponds to the notion of race adopted in Brazil. Also, the specific right to affirmative action programmes should en-

compass an identification policy that would overcome the current distrust regarding self-identification in the country, so that the right is actually implemented for everyone. As mentioned before, in a contextualised theory of rights (grounded on a contextualised principle of human dignity) the universal implementation of a right is part of this right.

Regional Disparities

Another peculiarity of the Brazilian version of racial discrimination is regional disparities. While "the right to education for all" had already been recognised by article 149 of the 1934 Brazilian Constitution, inequality in education persisted in Brazil. Illustratively, illiteracy stood at 51.1% among blacks 25 years old or older in 1999, but was only 10.4% for whites.³³ The number of years of education among young whites increased from 2.9 years in 1960 to 8.3 years in 1999. Among young blacks, it increased from 1.3 years to 6.1 years in the same period. Although relative inequality has decreased, absolute inequality in years of education increased between blacks and whites from 1.6 years to 2.2 years of education.³⁴ Similar inequalities are found in universities, as mentioned above. Targeted, group-based policies are needed, but they might be needed in different ways in different regions in Brazil.

If we are talking about quotas, for instance, as a legitimate tool in affirmative action programmes, some conditions should be established for their application. Quotas should be determined on a level which is high enough to assure participation of blacks in the classroom (in the United States some scholars established this level at 17%)³⁵ and to overcome the idea that certain social positions are reserved for members of certain racial groups. Two specific issues should be con-

sidered in establishing quotas: (a) Brazilian society is ingrained with regional inequalities; and (b) the social positions that we hold are in part the result of our own responsible choices (as we are in part autonomous beings) and in part the result of context (we are in part determined by our context).

I propose, therefore, an initial test for quotas. It is only a test, because we are dealing with a very specific idea of rights: an idea of “contextualised rights” that should be implemented for all. This construction of rights encompasses the issue of implementation, and in order better to implement rights, we need to assess results. The initial test should then embrace quotas which: (a) respect the representation of blacks in each Brazilian region; (b) are sufficient to foster participation in the classroom; and (c) are inferior to the representation of blacks in each region (we are in part autonomous and therefore in part responsible for our positions in society).³⁶ As the average representation of blacks in Brazilian society was 45.3% in 1999, with 15.67% in the Southern region, 35.14% in the Southeast region, 52.95% in the Central region, 70.11% in the Northeast region and 70.87% in the Northern region,³⁷ breaking with stereotypes in each of those regions will require different quotas.

Regional quotas should therefore be calculated as an average between current national representation of blacks in Brazilian universities (19.3%)³⁸ and the representation of blacks in each region. By proposing this average, we seek to achieve a balance between merit and racial equality, as well as between autonomy and determination, which are elements of the concept of human being and, therefore, of the principle of human dignity, adopted in the Brazilian Constitution. Consequently, I propose quotas of approximately 27% (average between 19.3% and 35.14%)

for the Southeast region, of 36% (average between 19.3% and 52.95%) for the Central region, of 45% (average between 19.3% and 70.11%) for the Northeast region; and also of 45% (average between 19.3% and 70.87%) for the Northern region. In the Southern region, where the representation of blacks in society is only 15.67% (close to the representation of blacks in the United States and inferior to the national average representation of blacks in universities), quotas could be established at the minimum estimate sometimes envisioned for American universities in order to assure participation: 17%.

4. Conclusion

There are still a considerable number of issues that should be addressed in the configuration of the right to affirmative action for blacks at universities in Brazil: (a) the principal of meritocracy (which is recognised by the Brazilian Constitution with regard to higher education); (b) the balance between universalist and affirmative action policies; (c) the partial convergence between poverty and racial discrimination; (d) the difference between rights' holders and beneficiaries in a right which is in great part based on the idea of distributive justice; (e) the implicit constitutional principles which further shape the principle of human dignity as applied to education, among others.

My intention in this article was to give a glimpse of a particular way of interpreting rights with a focus on the right to education. I have argued that rights are derived from a contextualised principle of human dignity, and are, therefore, contextualised. It means that a general right, such as the right to education, can be deconstructed into specific rights, such as the right to affirmative action for blacks in universities. This deconstruction will occur in accordance with context.

Among all the aspects that could be addressed here, I chose to analyse two peculiarities of the Brazilian context concerning the right to affirmative action for blacks in universities: the way race is construed in Brazil, and regional disparities. Those peculiarities were

taken into account in the configuration of the specific and contextualised right to affirmative action in order to assure a general right to education is effectively implemented for all. Much more, however, can and should be said on the issue.

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² Rosenfeld, M., "Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal", *Ohio State Law Journal*, No. 46, p. 861.

³ The right to affirmative action in universities is discussed in detail in Ikawa, D., *Ações Afirmativas em Universidades*. Rio de Janeiro: Lumen Iuris, 2008.

⁴ By proposing a concept of human being, I don't intend to define human beings as they are. I intend instead to identify *normative* traits of human beings, which can inspire the principle of human dignity.

⁵ In this paper, I have adopted a concept of law that encompasses both conventional and non-conventional moral norms. By conventional moral norms, I refer to moral norms accepted by the majority and absorbed by individuals without reflection. By non-conventional moral norms, I refer to moral norms that are established by individuals after reflecting on conventional norms. In a just concept of law, both conventional and non-conventional moral norms should be analysed in light of the principle of human dignity.

⁶ As there are no perfect procedures, substantive reasons should also be considered in interpreting a legal document.

⁷ By formal principles, I refer to principles which are complete by their mere textual enunciation, or which focus more on the value in the abstract than on its implementation. By material principles, I refer to principles which are only complete by their actual implementation. Taking the principle of equality, for instance, a principle of formal equality in education will oppose the recognition of differences between groups, even if the recognition of those differences is intended to assure implementation of education for all. On the other hand, a principle of material equality in education will *require* the recognition of differences between groups, if this differentiation is needed to assure equality in education for all.

⁸ The 1988 Brazilian Constitution establishes in its Preamble that the representatives of the Brazilian people will "institute a Democratic State, for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society." In its articles 3 (I, III and IV), 7 and 37, the Constitution recognises formal and material principles of equality. Article 3 establishes the fundamental objectives of the Republic: "to build a free, just and solidary society," "to eradicate poverty and substandard living conditions and to reduce social and regional inequalities" and "to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination." Article 7 recognises the right of rural and urban workers to improve their social condition, including the right to affirmative action programmes in favour of women. Also, article 37, VIII recognises the right to affirmative action programmes in favour of persons with disabilities. In its article 5 (II, IV and VI), the Constitution recognises rights that aim at assuring individual autonomy, such as the right to physical integrity and to freedom of thought, religion and belief. Finally, in its articles 215 and 216, the Brazilian Constitution recognises the relevance of human diversity. Article 215 guarantees "the full exercise of cultural rights and access to the sources of national culture," and the protection of "popular, Indigenous and Afro-Brazilian cultures, as well as those of other groups participating in the national civilising process." Article 216 purports that "Brazilian cultural heritage consists of assets of material and immaterial nature, taken individually or as a whole, which bear reference to the identity, action and memory of the various groups that form the Brazilian society". (Translation available at: <http://www.v-brazil.com/government/laws/constitution.html>).

⁹ See above, note 3.

¹⁰ Although this concept is inspired by Charles Taylor, he himself is against formulas which intend to characterise the self. See Taylor, C., "The Politics of Recognition", in *Multiculturalism: Examining the Politics of Recognition*, ed. Gutmann, A., Princeton: Princeton University Press, 1994, pp. 60, 102.

¹¹ See Taylor, C., *Sources of the Self – The Making of the Modern Identity*, Massachussets: Harvard University Press, 1989, p. 72; Ikawa, D., "Hart, Dworkin e discricionariedade", *Revista Lua Nova*, No. 61, Sao Paulo: Cedec – Centro de Estudos de Cultura Contemporânea, 2004, pp. 97-113.

¹² Diversity should be considered here for at least three reasons. First, there is only room for free choice when there is diversity. Second, recognition of diversity implies recognition of one's uniqueness. Third, only by recognising people's diverse positions in society, is it possible to address material equality.

¹³ Instrumental reason is the ability to identify adequate means to an end. It can be perceived as the only form of practical reason, which might lead to the idea that ends cannot be assessed by reason.

¹⁴ Non-instrumental reason is reason relating to the application of moral principles, as to ends. Non-instrumental reason can be conceived as a contextualised potential, where the other is taken into account in all his or her contextualised being, in order to further promote material equality.

¹⁵ Atomism is a concept used by Charles Taylor to characterise a modern way of defining the self without considering interpersonal relationships, without considering the being in time (with a past and a future), and without considering history.

¹⁶ This section is based on Ikawa, D., *Ações Afirmativas em Universidades*, see above, note 3. See also Ikawa, D. and Mattar, L., "Racial Discrimination in Access to Health: The Brazilian Experience", *Kansas Law Review*, Vol. 57, Issue 4, 2009, *forthcoming*.

¹⁷ By phenotype, I mean appearance.

¹⁸ Although overestimated, miscegenation exists in Brazil in a much higher degree than in the United States. In the United States 99.9% of marriages in 1960 took place between white couples, and 99.15% of marriages took place between black couples. In 1992, the rates were 99.75% among whites and 96.6% among blacks. By comparison the rates in Brazil were significantly less in both 1960 and in 1992. See Telles, E., *Racismo à brasileira – Uma nova perspectiva sociológica*, RJ: Relume Dumará, Fundação Ford, 2003, pp. 138-152 (citing U.S. Census Bureau, Marriages between Whites and Blacks in the United States, 1960 and 1992, tables 1 and 2).

¹⁹ See above, note 3, pp. 101-131.

²⁰ Zaid, A., "Continually Creating Races: The Census in the United States and Brazil", *National Black Law Journal*, Vol. 20, 2006-2007, p. 45.

²¹ *Ibid*, pp. 47, 55.

²² *Ibid*, p. 52.

²³ *Ibid*, p. 57.

²⁴ *Ibid*, p. 58.

²⁵ *Ibid*, p. 62.

²⁶ Martins, R.B., *Desigualdades raciais e políticas de inclusão racial: Um sumário da experiência brasileira recente - Relatório preparado para a Comissão Econômica para a América Latina e o Caribe (CEPAL)*, agosto de 2003, pp. 20-21 (citing IPEA/FJP/PNUD. *Atlas do Desenvolvimento Humano no Brasil*, 2000).

²⁷ *Ibid*.

²⁸ Takahashi, F., "Universidade desconfia de aprovado por cota e barra matrícula", *Folha Online*, 16 February 2005.

²⁹ I understand that external racial identification is contestable not only in Europe and in the United States, but also in Brazil. I discuss this issue in my book (see above, note 3).

³⁰ See above, note 18, pp. 113-116.

³¹ In a survey conducted by the Perceu Abramo Foundation, three different questions were posed with regard to race. See tables published in Santos, G. and Silva, M. P., *Racismo no Brasil – Percepções da discriminação e do preconceito racial no século XXI*, Sao Paulo: Fundação Perceu Abramo, 2005.

³² Besides self-identification, photos and interviews were used, for instance, by the Ford Foundation. See Ford Foundation Dossiê: O negro no Brasil, *Estudos Avançados*, Vol. 18, No. 50, Jan/Abr. 2004, passim.

³³ Henriques, R., *Desigualdades raciais no Brasil*, Working Paper, Table 15, Table 22 (citing IPEA, Illiteracy rates (25 years or older), 1999), available at: <http://www.ipea.gov.br>.

³⁴ Henriques, R., "Desigualdade racial no Brasil: Evolução das condições de vida na década de 90", *Texto para discussão* N° 807, ISSN 1415-4765. RJ: IPEA-Instituto de Pesquisa Econômica Aplicada, July 2001, p. 30.

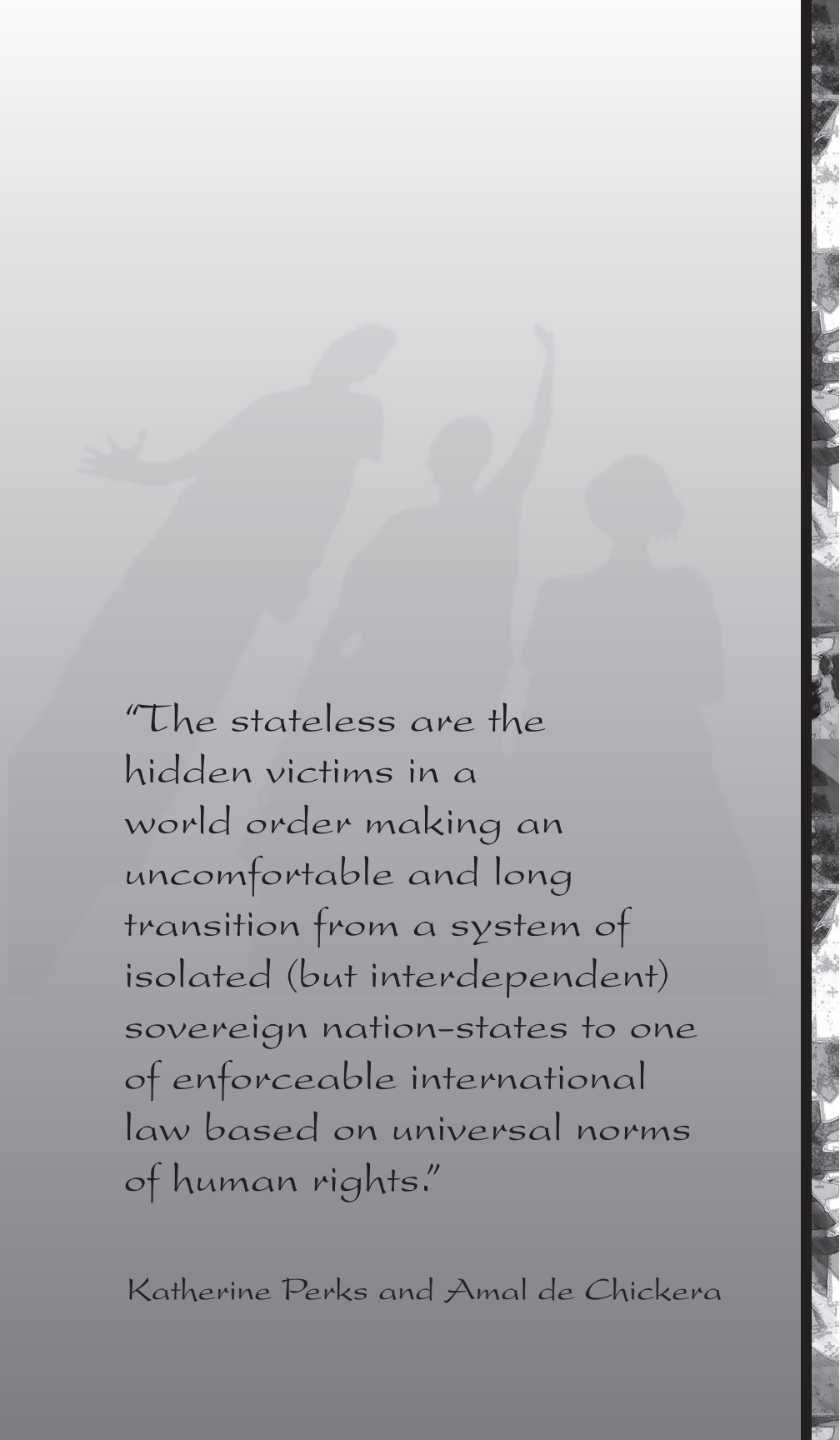
³⁵ Cohen, C. and Sterpa, J. P., *Affirmative Action and Racial Preference – A Debate*, New York: Oxford University Press, 2003, pp. 309, 343.

³⁶ Affirmative action programmes should always be perceived as complementary measures for wider structural social reform. Affirmative action programmes should not be perceived as *the* structural reform, because they have only a modest reform potential, regarding compensation, diversity and role models.

³⁷ See above, note 34 , p. 6.

³⁸ See above, note 26, pp. 20-21 (citing IPEA/FJP/PNUD. *Atlas do Desenvolvimento Humano no Brasil*, 2000).

SPECIAL



"The stateless are the hidden victims in a world order making an uncomfortable and long transition from a system of isolated (but interdependent) sovereign nation-states to one of enforceable international law based on universal norms of human rights."

Katherine Perks and Amal de Chickera

Introduction

Early in its organisational development The Equal Rights Trust (ERT) recognised that the unique situation of stateless people makes them particularly vulnerable to marginalisation, stereotyping, discrimination and inequality by both the state and wider society. In 2007 ERT submitted legal arguments to the European Court of Human Rights explaining why the treatment of the applicants in the case of *Makuc and Others v. Slovenia* constituted a violation of article 14 of the European Convention on Human Rights. In the first volume of the Equal Rights Review, ERT publicised the testimony of an "erased" man from Slovenia who has suffered immeasurably since his unlawful removal from the Slovenian registry of permanent residents. So it is unsurprising that one of the first research and documentation projects undertaken by ERT has focused on statelessness.

Since May 2008, the Stateless Persons in Detention project has been working to document the experiences of stateless people who are or have been held in detention. Through the project, ERT has been analysing the factors which have led to their statelessness and their subsequent detention and has been devising solutions to address the core issues and concerns which have rendered stateless persons vulnerable to human rights violations. This special presents a snapshot of the issues currently being examined by the ERT staff and consultants who are working on the Stateless Persons in Detention project and the inequality and discrimination experienced by stateless persons globally.

One of the main purposes of this section as indicated in the opening article by Katherine Perks and Amal de Chickera is to generate de-

bate around the issue of statelessness. With this object in sight their article sheds light on some of the most difficult aspects of not only the Stateless Persons in Detention project but on the statelessness phenomenon generally. "The Silent Stateless and the Unhearing World: Can Equality Compel Us to Listen?" unpacks, from an equality perspective, many of the issues that have been closely associated with the deficiencies of the international stateless regime and demonstrates how in many ways the right to equality (through its entrenchment in international human rights law) can and should be used to overcome these shortcomings.

The second piece in this section captures the story of a child from the Democratic Republic of Congo who is currently in detention in Egypt. Told from the perspective of his journey through Africa, the testimony reflects the cycles of discrimination often experienced by stateless persons, from the discriminatory mechanisms that rendered him statelessness to the discrimination he faced owing to his statelessness.

In his article "Detention at Guantanamo Bay and the Creation of a New Brand of Statelessness", David Baluarte considers the plight of the detainees in Guantanamo Bay who, as a consequence of their association with the "war on terror" and terrorism, find themselves languishing in a detention limbo unable to return to their countries of habitual residence because of the persecution they are likely to suffer. This "new brand of statelessness" has been fuelled by stereotyping and discriminatory attitudes towards those associated with terrorism.

The Silent Stateless and the Unhearing World: Can Equality Compel Us to Listen?

Katherine Perks and Amal de Chickera¹

Kestutis Zadvydas was born to Lithuanian parents in a displaced persons' camp in Germany in 1948. When he was eight years old, he immigrated to the United States with his family, and acquired residency. When he grew up however, he became engaged in criminal activity, ranging from drug crimes to theft, for which he was imprisoned. When he was released from prison on parole, he was taken into Immigration and Naturalization Service (INS) custody and ordered to be deported to Germany in 1994. However, Germany refused to accept Zadvydas because he was not a German citizen. Shortly thereafter, Lithuania refused to accept him as he was neither a Lithuanian citizen nor a permanent resident. In 1996, the INS asked the Dominican Republic (his wife's country) to accept him, but this effort too proved unsuccessful. In 1998, Lithuania rejected, as inadequately documented, Zadvydas' effort to obtain Lithuanian citizenship based on his parents' citizenship.² With nowhere to remove him to, the INS kept Zadvydas in detention throughout this period, for over three years. In 2001, the US Supreme Court ruled that his indefinite detention "pending deportation" was unlawful.³

The *Zadvydas* case highlights the extreme vulnerability of stateless persons. There are an estimated 15 million stateless persons around the world today,⁴ many of whom do not enjoy equal rights with citizens, live in poverty without social security, any right to work, or access to education and healthcare; significant numbers suffer acute discrimination, violence, persecution and arbitrary detention. The legal protection and treatment of stateless persons can be seen as a litmus test of morality, human rights and the law in today's world. Although there is an international statelessness regime in place,⁵ although international and regional human rights law protects everyone, including the

stateless, and although national human rights laws offer useful tools, these three different strands have not been successfully unified to ensure that protection is effective.

In a just and equal world, the lack of a nationality would not lead to marginalisation, discriminatory treatment and extreme vulnerability. However, the reality is that statelessness and discrimination are intricately linked. De-nationalisation, as experienced by the Rohingya of Myanmar, the Banyamulenge of the Democratic Republic of the Congo and the "erased" persons of Slovenia, remains one of the most egregious forms of discrimination in the world today. Once stateless, the

lack of an effective nationality can render an individual highly vulnerable to discriminatory treatment in many different contexts.

The problem of statelessness lies at the core of the tension between the universality of rights on the one hand and the sovereign state's jurisdiction over its territory on the other. Without citizenship or nationality,⁶ stateless persons fall outside the traditional nation-state framework on which international law and relations rest.

This article seeks to generate debate, by identifying some of the main challenges and barriers to ensuring rights for the stateless. The article begins, in part one, by reviewing the provisions of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) – the primary international instrument adopted to address and respond to the needs of stateless persons. Despite containing important provisions to regularise the status of stateless persons and ensure their basic rights, it suffers significant weaknesses. The article argues that protection of stateless persons under the 1954 Convention, and under general international human rights law, will only become effective if they are interpreted in light of modern equality and non-discrimination standards.

Part two provides an overview of developments in international norms in this regard. It pays particular attention to the manner in which human rights norms apply to all persons, regardless of nationality or lack thereof, an issue of special relevance to stateless persons. It outlines how, although the prohibition of discrimination inherently allows for distinctions based on nationality, special consideration must be given to the unique situation that stateless persons face, when weighing the proportionality between the aim and means of a difference in treatment between nationals and non-nationals.

Parts three and four then address some of the key questions that arise from the 1954 Convention, and ask how the equality and non-discrimination principles that have developed since its adoption can inform our approach to finding solutions to the problems of stateless persons.

Part three focuses on immigration and the manner in which states continue to use national sovereignty arguments to impose limits on the rights of non-citizens, including stateless persons, even where these are unrelated to border control. It considers the “lawful stay” requirement that is attached to many provisions of the 1954 Convention, and the need for states to adopt a recognition procedure that would enable authorities to identify stateless persons and respond to their unique situation in an appropriate and timely manner.

Finally, part four raises definitional and protection issues, by questioning distinctions in protection for *de facto* and *de jure* stateless persons and reviewing the lacuna of protection available for those stateless persons not granted refugee status.

1. The Statelessness Regime

The 1954 Convention is the primary international instrument which defines the legal status of stateless persons. It “attempts to resolve the legal void in which a stateless person often exists by identifying the problem of statelessness, promoting the acquisition of a legal identity, and providing, in appropriate cases, for residence which will serve as a basis for access to basic social and economic rights.”⁷ It contains a number of key provisions to this end, in particular through states’ obligations to extend administrative assistance and issue identity papers (regardless of legal status)⁸ and travel documents.⁹

Importantly, it calls on states to facilitate the naturalisation of stateless persons.¹⁰

Whilst the Preamble to the 1954 Convention recalls the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,¹¹ the sole non-discrimination provision found in Article 3 does not prohibit discrimination on grounds of nationality or statelessness but rather stipulates that the provisions of the Convention apply to stateless persons without discrimination as to race, religion or country of origin.¹² This mirrors Article 3 of the 1951 Convention relating to the Status of Refugees (Refugee Convention), and falls short of the guarantee of non-discrimination found in later, more general treaties such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), or those adopted to address specific human rights issues.¹³

Despite the absence of a strong non-discrimination clause, the 1954 Convention contains a number of important provisions that require treatment of stateless persons to be at least as favourable as that accorded to nationals. Those provisions apply in respect to freedom of religion, artistic rights and industrial property, access to courts, rationing, elementary public education, public relief and assistance, labour legislation and social security (subject to state discretion in the case of non-contribution benefits).¹⁴ However, aside from those enumerated rights, the central point of departure for the 1954 Convention is Article 7(1) which stipulates that, except where the Convention contains more favourable provisions, States “shall accord to stateless persons the same treatment as is accorded to aliens generally.”¹⁵ Indeed, many of its provisions require treatment no more favourable than that of aliens general-

ly.¹⁶ Furthermore, many of the provisions of the Convention, including those that confer no better treatment than that afforded to aliens generally, explicitly require that the individual is lawfully staying in the territory of the state.¹⁷ This problem is further compounded because states differ in approach as to what constitutes “lawful stay” and may for example require the individual to be granted a residence permit before they are considered “lawfully staying”.¹⁸

Critically, the 1954 Convention defines a stateless person as one “who is not considered as a national by any state under the operation of its law”.¹⁹ Thus the Convention requires states to guarantee Convention provisions to *de jure* stateless persons, a group defined in a narrow, strictly legal manner which does not accommodate persons who have become *de facto* stateless, as a result of not enjoying the core minimum state protection linked with nationality. Indeed, it has been argued that this technical definition ignores the power of states to politically manipulate citizenship in both law and practice.²⁰ States are encouraged, but not obliged, by virtue of a recommendation of the Final Act, to extend the Convention provisions to *de facto* stateless persons wherever possible.

In sum, despite containing important provisions to regularise the status of stateless persons and ensure basic rights, the 1954 Convention has significant weaknesses. Many of the protections apply only to stateless persons who are considered to be lawfully staying in a particular country; many provisions require no more preferential treatment to be extended to stateless persons than to “aliens” generally and, fundamentally, it does not contain a comprehensive non-discrimination provision. Perhaps most importantly, it categorises the stateless into two groups, (*de jure* and *de facto* stateless) and affords

protection only to one, thus creating a hierarchy within statelessness, further complicating the (in)equality puzzle.

The body of human rights norms that apply to all persons subject to the jurisdiction of a state, regardless of nationality or legal status, has increased significantly since the adoption of the 1954 Convention, which – of course – predated even the ICCPR. It has thus been asserted that the general obligation found in Article 7 of the 1954 Convention to extend treatment to stateless persons as least as favourable as that enjoyed by aliens generally, encompasses basic notions of human rights which are not dependent on legal status within a given country.²¹

Affirmation therefore of the fundamental right to equality and non-discrimination as a stand-alone right as well as in conjunction with all other internationally protected human rights, is central to understanding and promoting the rights of stateless persons under international law.

2. The Equality of the Stateless: International Norms

Equality is a universal value. Expressed as a right, it is the “right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life”.²² This means that all persons subject to the jurisdiction of any state are in principle equal before the law and have equal protection of the law, regardless of their nationality or statelessness.

International human rights law generally requires the equal treatment of citizens and non-citizens. After his review of international human rights law, the UN Expert on

the Rights of Non-citizens concluded that “all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.”²³

The UN Committee on Economic, Social and Cultural Rights (CESCR) in its most recent interpretation of state obligations under the International Covenant on Economic Social and Cultural Rights (ICESCR) stated that “[t]he ground of nationality should not bar access to Covenant rights [...] the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”²⁴

This obligation to extend on an equal basis Covenant rights between citizens and non-citizens carries considerable weight in light of the fact that non-discrimination is an immediate and cross-cutting obligation in the Covenant,²⁵ and that the CESCR has established that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party”.²⁶ Non-citizens, including refugees, asylum seekers and stateless persons therefore should benefit from the rights enshrined in the ICESCR, particularly in respect of the minimum core content of those rights.

The principle of non-discrimination in the enjoyment of human rights by nationals and non-nationals has also been applied by the Human Rights Committee (HRC) in its interpretation of state obligations under the ICCPR. Whilst nationality is not explicitly enumerated as a prohibited ground of discrimination in Article 2(1) of the ICCPR,²⁷

the Committee in its 1986 General Comment on the position of aliens under the Covenant stated that “[i]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness [...] the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2.”²⁸

Further, the stand-alone non-discrimination provision found in Article 26 of the ICCPR “prohibits any discrimination under the law”,²⁹ thereby extending the guarantee of non-discrimination beyond the immediate scope of the Covenant rights. This general principle of non-discrimination in the enjoyment of rights and of equal protection of the law for nationals and non-nationals is also found in other international and regional treaties and has been elaborated upon by international monitoring and judicial bodies, such as the UN Committee on the Elimination of Racial Discrimination (CERD),³⁰ the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR).³¹

Whilst the right to non-discrimination inherently permits distinctions to be made between different people according to their circumstances, distinctions must be objectively and reasonably justified, pursue a legitimate aim, and be proportionate to that aim. This reasoning, set out by the ECtHR in the landmark *Belgian Linguistics* case, has been followed by the HRC and other international and regional human rights bodies.³²

International courts and tribunals have provided guidance concerning the scope

of distinctions on grounds of nationality. The ECtHR has for example held that very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.³³ In the 2009 case of *Andrejeva v. Latvia* the ECtHR upheld the need for “very weighty reasons” to justify distinctions based on nationality, in relation to the pension rights of a stateless “permanently resident non-citizen” in Latvia.³⁴ The case concerned the transitional provisions of the Latvian State Pensions Act that created an entitlement to a retirement pension in respect of periods of employment conducted prior to 1991 in the territory of the former USSR (“outside Latvia” in the version in force before 1 January 2006). This right was reserved for Latvian citizens and so the applicant, a “permanently resident non-citizen” of Latvia was denied the pension in question solely because she did not have Latvian citizenship.

The court held that a wide margin of appreciation is usually allowed to the state under the ECHR when it comes to general measures of economic or social strategy,³⁵ and that the legislature’s policy choice will generally be respected unless it is “manifestly without reasonable foundation.” Although the court found that the difference in treatment in the present case pursued the legitimate aim of protecting the country’s economic system, there was not a reasonable relationship of proportionality between that aim and the means employed. The court distinguished the applicant in this case from its previous jurisprudence concerning discrimination on grounds of nationality, highlighting that the applicant was a stateless person. Finding that there were not sufficiently weighty reasons to justify the use of nationality as a sole criterion for the difference in treatment, the court gave special regard to the fact that

the applicant had the status of a “permanently resident non-citizen” of Latvia, that Latvia was the only State with which she had any stable legal ties, and thus the only state which, objectively, could assume responsibility for her in terms of social security.³⁶

By paying regard to the specific situation of the applicant not only as a non-citizen, but as a stateless non-citizen, the court acknowledged the unique challenges that stateless persons face in the realisation of their rights – challenges that must be given special consideration when weighing the proportionality between the aim and means of a difference in treatment between citizens and non-citizens, despite the broad margin of appreciation enjoyed by the states in respect of general measures of economic or social strategy (in this case, social security).

3. Equality and Sovereignty: Unhappy Bedfellows

Despite the repeated confirmation of the principle of equal treatment for all by international and regional human rights courts and mechanisms, there remains a large gap between the rights that international human rights law guarantees to non-citizens and the realities that they face.³⁷ Recognition of nationality continues to serve as the key to many human rights, such as education, health care, employment, and equality before the law.³⁸ Fundamentally, although international human rights law demands equality for all, states continue to use national sovereignty arguments to impose limits on the rights of non-citizens even where these are unrelated to border control.

Whilst there are some legitimate justifications for the non-application of specific rights to non-citizens, for example the right to elect political representatives of the state,³⁹ a re-

view of state practice reveals that “[i]n many countries there are institutional and endemic problems confronting non-citizens. The situation [...] has worsened as several countries have detained or otherwise violated the rights of non-citizens in response to fears of terrorism.”⁴⁰

Statelessness is at the core of this tension between universality of rights on the one hand and the sovereign state jurisdiction over territory on the other. Without citizenship or nationality, stateless persons fall outside the traditional nation-state framework which continues to determine international law and relations today.

The Immigration Dilemma

One of the key protection problems arising from the 1954 Convention concerns the requirement that individuals must be “lawfully staying” within the state before they may enjoy a number of their rights. This question must be addressed in light of developments in international human rights and equality law. As has been outlined above, while the norm of non-discrimination inherently allows distinctions between different groups of persons, its proper application precludes distinctions on the ground of a person’s nationality or legal status unless such measures are justified by a valid and legitimate state objective and applied proportionally to that objective.⁴¹

The right to non-discrimination requires that immigration legislation and policy should recognise that non-nationals acquire irregular status for a number of very different reasons and that it is therefore inappropriate to treat all in the same way.⁴² International law has developed over the years to recognise the particular needs and vulnerabilities of various sub-categories of non-nationals.

A recent example includes the increasing recognition of the particular vulnerability of migrant workers,⁴³ which led to the adoption of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICMW). Similarly, there is an emerging consensus that special efforts must be made to identify and protect victims of human trafficking. Many states now have in place procedures for identifying and responding to the needs of victims of trafficking and there are international and regional treaties to address this issue.⁴⁴

The case of Zadvydas illustrates the rights implications of a failure to identify and take into account the specific situation of stateless persons in the immigration context. With no country willing to accept him, Zadvydas was left to languish in detention as diplomatic efforts to deport him were made in vain, until the US Supreme Court finally declared his detention unlawful. The failure of the national immigration system to identify his statelessness, and distinguish him from other irregular migrants, resulted in his arbitrary and indefinite detention.

Identifying and Responding to the Specific Needs of Stateless Persons in the Immigration Context

A survey of state practice in relation to stateless migrants in Europe in 2005 found that many member states of the European Union did not have a “tool or mechanism in place to identify and recognize stateless persons *specifically with regard to their statelessness*” and that without such a mechanism, the “provisions of the [1954] Convention will be available to stateless persons only insofar as they are available to populations generally.”⁴⁵ Although one of the primary aims of the 1954 Convention was to facilitate the identification of stateless persons and it thereby provides a

definition of statelessness, it neither requires States Parties to establish status determination procedures, nor provides guidance on how to do this.

Regardless of whether a state is party to the 1954 Convention, the right to non-discrimination logically requires at minimum a procedure that enables states to respond to the specific needs of stateless persons in a timely manner. A first step would be a formal recognition procedure for stateless persons. This draws upon a basic, central tenet of equality and non-discrimination law: that equal treatment is not equivalent to identical treatment.⁴⁶ To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.⁴⁷ It is this understanding of equality that must be applied by states when responding to statelessness, so as to ensure that their particular vulnerabilities are taken into account when dealing with them and resolving the problems specific to them.

Sadly, the situation that Zadvydas faced, and the failure to pay due regard to his statelessness, is not unique to the United States. In the UK, for example, there has been increasing concern over the indefinite detention of non-nationals pending removal from the UK under immigration regulations,⁴⁸ a practice that has a special impact on stateless persons for whom removal is often impossible for practical and legal reasons. The UK is a party to the 1954 Convention, and has thus undertaken to protect stateless persons. But neither the Immigration Rules nor applicable legislation require the Home Office to consider whether a person is stateless, either where an asylum application is refused, or before starting removal/deportation proceedings. Nor is there any provision in the Immigration Rules un-

der which a stateless person may apply for leave to enter or remain in the UK.

In the UK irregular migrants, including refused asylum seekers and ex-foreign national prisoners, can be subject to immigration detention pending removal. The absence of a procedure to identify and respond to the specific situation of stateless people has led to catastrophic results whereby certain individuals can be detained indefinitely due to an inability to expel them. In June 2009, asylum rights groups reported they were supporting 138 immigration detainees who had been detained for more than a year, sixty per cent of whom were from just five countries (Iran, Somalia, Iraq, Algeria and the Democratic Republic of Congo).⁴⁹ Whilst it is not known how many, if any, of those individuals were legally stateless, it is likely that many could reasonably be considered *de facto* stateless, because they could not obtain documentation enabling them to return to their countries of nationality or to enter another country.

4. The Issue of Definition and the Protection Gaps

De Jure vs. De Facto Statelessness

The 1954 Convention provides for two types of statelessness: *de jure* and *de facto*. The Convention requires states parties to extend protection to *de jure* stateless persons, defined as those who are “not considered as a national by any state under the operation of its law”.⁵⁰ Only in the non-binding Final Act does the 1954 Convention encourage states to extend Convention provisions to *de facto* stateless persons. Although the Final Act does not provide a definition of the latter, the UN High Commissioner for Refugees (UNHCR) has defined a *de facto* stateless person as one who is “unable to demonstrate that he/she is *de jure* stateless, yet he/she has no

effective nationality and does not enjoy national protection”.⁵¹

This has the potential to create a lottery of sorts, where stateless persons may or may not find themselves entitled to certain protections purely based on which side of the definition they are slotted in. In reality, whilst there are clear cases of *de jure* statelessness, most cases fall in a grey area of *de facto* statelessness. The result is that many persons in need of protection because they are in effect stateless, but cannot provide legal proof that they have no nationality, are excluded from protection under the 1954 Convention.

Philosophically, the notion of effective nationality is a useful starting point. When statelessness is linked to effective nationality it captures the obligations of a state towards its people and shows that a state which fails to fulfil such obligations in effect strips its people of the benefits of association to such a state, having a similar effect as stripping a person of their nationality. This line of thinking compels us to develop a more inclusive and comprehensive approach that breaks down the strict distinction between *de jure* and *de facto* statelessness.

However, whilst the concept of “effective nationality” is powerful, it is problematic as there is no common understanding of what this means in practical terms. In the broadest sense, “effective nationality” could be understood to be achieved only when the individual enjoys all human rights on an equal footing with others. Such a broad application of the concept of effective nationality, which could – for example – encompass internally displaced persons (IDPs), may cast the net too wide. It would mean for example that the civilian trapped in conflict in Sri Lanka and the torture victim detained at Guantanamo Bay with no state willing to receive him, could

both claim that their nationality is ineffective nationality in one form or another.⁵²

Individual cases of *de facto* statelessness may be seen to exist along a continuum. Although there is no strict definition of a *de facto* stateless person under international law, an equality-based approach would require that states respond adequately to the particular situation of the individual and focus on the enjoyment of core minimum rights. It is clear, however, that further development of standards is greatly needed in order to define the content of the concept of *de facto* statelessness.

Hierarchy of Inequalities: Refugees vs. Stateless Persons

The “effective nationality” approach to defining statelessness highlights the strong connection between refugees and stateless persons. Indeed, the limited scope of the 1954 Convention definition that applies only to *de jure* stateless persons is the result of an early position which equated *de facto* stateless persons with refugees. It was assumed from the outset that *de facto* stateless persons would qualify for protection under the 1951 Refugee Convention⁵³ and another instrument was needed for those *de jure* stateless persons who did not qualify for refugee status. In fact, the 1954 Convention was initially intended as a Protocol to the 1951 Refugee Convention.⁵⁴

However, the reality today is more complex. Whilst all refugees are indeed either *de facto* or *de jure* stateless persons, not all *de facto* stateless persons qualify for refugee protection. This mistake of history has plotted very different courses for the protection of refugees and stateless persons. Refugees benefit from a stronger, better ratified convention.⁵⁵ Whilst there are numerous similarities in the

two conventions, one example of the greater protection provided by the 1951 Refugee Convention is the absence of a “lawful presence” pre-requisite to enjoy convention rights.⁵⁶ Furthermore, most national systems acknowledge their obligations pertaining to refugees and have procedures in place (however problematic they may be) to process asylum claims and grant refuge to successful claimants. Additionally, there is a large professional network of lawyers, academics, activists and NGOs dedicated to the wellbeing of refugees, compared to a stark lacuna of services aimed at protecting the stateless.

As described above, the narrow construction of *de jure* and *de facto* statelessness has left many persons without the special protection they need. This gap in protection has become increasingly apparent in a number of countries where restrictive trends in refugee determination procedures mean that ever increasing numbers are refused refugee protection but cannot return home because they fear persecution and for their safety. Such trends highlight the acute need for a strong second tier of protection for *de facto* stateless persons who do not fit strict refugee criteria and yet cannot return home, and others who, whilst not at risk if returned, cannot return home for legal and practical reasons.

The right to control the entry and stay of non-nationals is inherent in the state’s sovereign claims over its territory. Consistent with the principle of state sovereignty, there is no general right of non-citizens to enter and reside in a country under international law. But, despite repeated assertions by states to this effect, the HRC has stressed that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for

family life arise.”⁵⁷ Thus, whilst there are not sufficient grounds to claim that non-nationals as a group are disadvantaged and that to exclude them amounts to a continuation of disadvantage which could amount to *de facto* discrimination,⁵⁸ it is essential that states acknowledge that certain categories of non-nationals – in particular stateless persons – are more likely to be in a situation of vulnerability and disadvantage. To fail to identify their particular situation and exclude them on account of a lack of nationality would perpetuate their disadvantage and could amount to discrimination.

The Challenge

The challenge that statelessness imposes on the international human rights regime is the need to affirm the importance of nationality and promote the right of everyone to a nationality, whilst at the same time ensuring that the lack of a nationality does not result in vulnerability, exploitation and the violation of human rights. Despite the fact that human rights apply to all regardless of nationality or statelessness, traditional notions of territoriality, sovereignty and exclusion of the “other” continue to dominate political discourse and international relations, thereby ensuring that in practice, nationality remains the key to securing many fundamental human rights.

The stateless are the hidden victims in a world order making an uncomfortable and long transition from a system of isolated (but interdependent) sovereign nation-states to one of enforceable international law based on universal norms of human rights. Any attempt to address the issue of statelessness which fails radically to evaluate this problem, is destined to achieve little more than a reassertion of the status quo. The 1954 Convention entrenches national sovereignty interests by affording many of its protections only

to stateless persons who are lawfully staying in the country concerned. Despite this, it suffers from limited ratification, which suggests that a more progressive document with a stronger equality basis and better anti-discrimination provisions may have fared even worse in terms of ratification. Whether or not this fear is justified, it captures the difficult relationship between universal equality and state sovereignty, in which the former is too often compromised in favour of the latter.

This article has primarily focused on immigration dilemmas facing stateless persons. Migration law and policy is controversial precisely because it highlights important questions about national identity, global equity, social justice and the universality of human and equality rights.⁵⁹ However, the unique situation and vulnerability of stateless persons as compared to many other non-nationals requires a greater openness to granting more favourable rights to stateless persons than to other migrants who are not so fundamentally disadvantaged.

As the *Zadvydas* case highlights, the inequality that results from arbitrary distinctions made on grounds of nationality and which results in discrimination against non-citizens is further compounded for stateless persons, who cannot rely on the protection of any other state. The compound effects of discrimination experienced by stateless persons, and the solution required, necessitates a unified approach to equality that allows for an understanding of the multiple and interlocking factors that increase vulnerability to rights violations and lead to the unique situation of stateless persons.

Despite its shortcomings, the 1954 Convention contains important provisions to regularise the status of stateless persons and en-

sure their basic rights. Further ratifications must be encouraged. The body of human rights norms that are considered to apply to all persons subject to the jurisdiction of a state, regardless of nationality or legal status has increased significantly since the adoption of the 1954 Convention. International courts and tribunals have given content to the right to non-discrimination asserting the central tenet that to achieve full and effective equality the specific needs and situation of each individual must be taken into account.

In order to guarantee the rights of stateless persons, the provisions of the 1954 Convention and general international human rights law must be interpreted progressively, in light of modern equality and non-discrimination standards. Whilst significant progress in protecting human rights has been made since its adoption, central protection issues for both *de facto* and *de jure* stateless persons remain unresolved, leaving considerable room - and need - for standard development in this area.

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² This summary was obtained from the research of David Baluarte, who was commissioned by ERT to carry out research on stateless persons in detention in the USA; ERT research paper forthcoming.

³ See *Zadvydas v. Davis*, 533 U.S. 678 (2001). In September 1995, Zadvydas filed a petition for a writ of *habeas corpus* challenging his continued detention. In October 1997, a Federal District Court granted that writ and ordered him released under supervision. The Fifth Circuit reversed this decision (*Zadvydas v. Underdown*, 185 F.3d 279 (1999)), but stayed its mandate pending review in the Supreme Court.

⁴ UN High Commissioner for Refugees, *Statelessness: Who is stateless?* Available at: http://www.unhcr.se/en/Protect/stateless_en.html, accessed on 6 January 2009.

⁵ In the form of two UN Conventions, many regional standards and a statelessness mandate of the UNHCR.

⁶ Nationality and citizenship will be used interchangeably in this paper.

⁷ Batchelor, C., "The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation", *Refuge*, Vol. 22, No. 2 (2005).

⁸ Convention Relating to the Status of Stateless Persons (1954 Convention), adopted 28 September 1954, entered into force 6 June 1960, ECOSOC RES/526 A(XVII), Articles 25 and 27 respectively.

⁹ 1954 Convention, Article 28. Although the requirement to issue travel documents applies only to stateless persons lawfully staying within the state territory, states are encouraged to issue travel documents to all stateless persons regardless of status, and to "give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence".

¹⁰ 1954 Convention, Article 32.

¹¹ 1954 Convention, Preamble.

¹² 1954 Convention, Article 3.

¹³ Such as the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (ICERD) and the Convention on the Rights of Persons with Disabilities.

¹⁴ 1954 Convention, Articles 4, 14, 16, 20, 22(1), 23, and 24.

¹⁵ 1954 Convention, Article 7(1).

¹⁶ 1954 Convention, Articles 13 (movable and immovable property), 15 (Right of association), 17 (wage-earning employment), 21 (housing), 22(2) (public education other than elementary education) and 26 (freedom of movement).

¹⁷ 1954 Convention, Articles 15 (Right of Association), 17 (Employment), 21 (Housing), 23 (Public Relief), 24 (Social Security), 26 (Freedom of Movement), 28 (Travel Documents), 30(1) (Non-Expulsion).

¹⁸ See above, note 7. This review of EU state practice led by Carol Batchelor found that “the majority of countries in the EU do not anticipate an automatic right to residence based on recognition as a stateless person.”

¹⁹ 1954 Convention, Article 1(1).

²⁰ Open Society Justice Initiative, *Human Rights and Legal Identity: Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality - Thematic Conference Paper*, 2006, p. 2.

²¹ See above, note 7.

²² *Declaration of Principles on Equality*, The Equal Rights Trust, October 2008, Principle 1: The Right to Equality.

²³ UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, *The rights of non-citizens: Final report of the Special Rapporteur, Mr. David Weissbrodt*, UN Doc E/CN.4/Sub.2/2003/23, 26 May 2003.

²⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), E/C.12/GC/20, 25 May 2009, para. 30. However, note that despite this progressive interpretation the Committee is bound by the text of the Covenant and makes clear that this statement is “without prejudice to the application of article 2(3) of the Covenant, which states: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

²⁵ See *Ibid*, para. 7. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations* (Art. 2, par.1), 1990, para. 1.

²⁶ See above, note 24, para. 10, with respect to “minimum core obligations”.

²⁷ International Convention on Civil and Political Rights (ICCPR), Article 2(1): “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁸ UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986), paras. 1-2. The Human Rights Committee has also confirmed that “the provisions of Article 2 of ICESCR do not detract from the full application of Article 26 ICCPR”, see Communication No. 182/1984, *Zwaarn de Vries v. Netherlands* (1987), para. 12.1.

²⁹ UN Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989), para. 1.

³⁰ The UN Committee on the Elimination of all forms of Racial Discrimination has declared in its General Comment No. 30 on the rights of non-citizens that: “Although some ... rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law...[u]nder the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” See UN Committee on the Elimination of Racial Discrimination, *General Comment No. 30: Discrimination Against Non Citizens* (2004), paras. 3-4.

³¹ Inter-American Court of Human Rights, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, 17 September 2003 Advisory opinion OC-18/03.

³² European Court of Human Rights, *Case «Relating to Certain Aspects of the Laws on the Use of Languages in Educa-*

tion in Belgium» v. Belgium (Belgian Linguistics Case), judgment of 23 July 1968, Series A, No. 6, para. 10. See also UN Human Rights Committee, above, note 29; UN Committee on Economic, Social and Cultural Rights, above, note 24.

³³ European Court of Human Rights, *Gaygusuz v. Austria*, case number 39/1995/545/631, judgment of 16 September 1996 and *Poirrez v. France*, application no. 40892/98, judgment of 30 September 2003.

³⁴ European Court of Human Rights, *Andrejeva v. Latvia*, application no. 55707/00, judgment of 18 February 2009.

³⁵ *Ibid*, para 83.

³⁶ *Ibid*, para 88.

³⁷ See the analysis of the former UN Special Rapporteur on the Rights of Non-citizens, David Weisbrodt, above, note 23.

³⁸ Goris, I., Harrington, J., and Köhn, S., "Statelessness: what it is and why it matters", *Forced Migration Review*, Vol. 32, pp. 4 – 6.

³⁹ See *inter alia*, International Covenant on Civil and Political Rights, Article 25.

⁴⁰ See above, note 23.

⁴¹ Cholewinski, R., "The Human And Labor Rights Of Migrants: Visions Of Equality", *Georgetown Immigration Law Journal*, Winter 2008, 22 Geo. Immigr. L.J. 177.

⁴² This view was put forward in: The Equality Authority (Ireland), *Embedding Equality in Immigration Policy*, 2006, p. 42.

⁴³ See *inter alia*, Inter-American Court of Human Rights, above, note 31; Cholewinski, R., above, note 41.

⁴⁴ *Inter alia*, adoption of the UN Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The UN Convention Against Transnational Organized Crime; Council of Europe Convention on Action against Trafficking in Human Beings (2005).

⁴⁵ See above, note 7.

⁴⁶ See for example ECtHR, *Thlimmenos v. Greece*, application no. 34369/97, judgment of 6 April 2000, para. 44, where the court held that "[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

⁴⁷ *Declaration of Principles on Equality*, The Equal Rights Trust, 2008, Principle 2: Equal Treatment.

⁴⁸ See for example, London Detainee Support Group, *Indefinite detention in the UK*, June 2009.

⁴⁹ *Ibid*.

⁵⁰ 1954 Convention, Article 1(1).

⁵¹ UNHCR-Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians*, Geneva, 2005, p.11.

⁵² See Baluarte, D., "Detention at Guantanamo Bay and the Creation of a New Brand of Statelessness", in this issue of *The Equal Rights Review* (Vol.3, 2009).

⁵³ Convention relating to the Status of Refugees (1951 Refugee Convention), adopted 28 July 1951, entered into force 22 April 1954. See discussion in, Batchelor, C., "Statelessness and the Problem of Resolving Nationality Status", *International Journal of Refugee Law*, 10 Int'l J. Refugee L. 156 1998, p. 172.

⁵⁴ UN High Commissioner for Refugees, *Note on UNHCR and stateless persons*, EC/1995/SCP/CRP.2, 2 June 1995.

⁵⁵ As of February 2008, 63 states had ratified the 1954 Convention, a number greatly boosted by the recent accession drive carried out by the UNHCR. See UN High Commissioner for Refugees, *States Parties to the 1954 Conven-*

tion relating to the Status of Stateless Persons, October 2008, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3bbb0abc7>.

⁵⁶ Article 31 (1) of the 1951 Refugee Convention stipulates that “[s]tates shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.” There is no equivalent provision in the 1954 Convention.

⁵⁷ UN Human Rights Committee, *General Comment No. 15*, above, note 28, para. 5.

⁵⁸ The Equality Authority (Ireland), *Embedding Equality in Immigration Policy*, 2006, p. 25.

⁵⁹ *Ibid*, p. 7.

Testimony of a Stateless Child in Detention in Egypt

Testimony obtained by consultant researchers to ERT,
conducting research on stateless persons in detention in Egypt

John Sebastian¹ is a minor from the Banyamulenge tribe in the Democratic Republic of the Congo (DRC). His father was born in the DRC to Rwandan parents, but was never registered as a Congolese citizen. His mother is Burundian. John has no nationality, no travel document and no identity papers.

The Banyamulenge of the DRC have suffered discrimination for generations, and even though they were granted Congolese nationality through a Presidential Decree of 1972, the government of then Zaire (now DRC) adopted a Nationality Law in 1981 revoking this decree and effectively denationalising them.

Due to their participation in a revolt against former President Mobutu Sese Seko, there is a lot of local resentment towards the Banyamulenge ethnic Tutsis in the DRC. Tutsis were targeted by local Hutu Interahamwe and Mai Mai troops.² Ill-treatment and torture including rape were widespread as the government and its supporters continued persecuting members of the Tutsi ethnic group.³

In 2004 DRC passed a nationality law to correct the statelessness of the Munyamulenge [plural for Banyamulenge] but there

have been no documented cases of Banyamulenge people successfully obtaining nationality, which would suggest that the laws in place are not an effective solution to the problem of statelessness.⁴ A March 2009 report confirms that the situation of nationality for Munyamulenge remains uncertain and that the Munyamulenge remain de facto stateless.⁵

In this testimony, John recalls the events of his life which saw him travel through six countries, in order to escape the systemic persecution his family faced in the DRC.

John's story is an all too common one. It sheds light on the fluid dynamic between statelessness and refugee status. Due to the strong links between the two, it is not surprising that the many vulnerabilities of statelessness can very quickly be exacerbated to the point where the provision of refugee status is necessary. However, the point at which the stateless have a reasonable claim to refugee status is often difficult to identify, and the failure to act at such times can be very costly indeed.⁶

John's story also sheds light on the often artificial nature of the legal distinction between statelessness and refugee status,

and correlated protection entitlements. Many of the practical challenges and insecurities faced by the stateless also demand urgent intervention and protection.

John is presently in detention in Egypt. He has committed no crime. His future is uncertain. He has not had access to the UN or to any statelessness or refugee status determination procedure.

He is seventeen years old and this is his story:

"My name is John Sebastian. I was born in the region of Birere, Goma, DRC on 10 December 1991. I am from the Banyamulenge tribe and I speak Kinyamulenge. My father was a Tutsi from the Banyamulenge tribe, and my mother was a Burundian citizen of Hutu ethnicity. I had a sister who was three years older than me. I am a Christian.

In 1959 my grandfather migrated from Rwanda to DRC. My father was born there, but he never obtained Congolese nationality. I too, never got a birth certificate or a passport.

My father went to university in Burundi and studied to become an engineer. He met my mother there. They came back to DRC to take care of my grandfather. Because he didn't have Congolese nationality, my father couldn't get a work permit, and was not able to get a permanent contract as an engineer. Officially he wasn't allowed to work, but people in town often gave him small engineering jobs. The government said people like us, Banyamulenge people, are not originally Congolese and should go back to our own country. My parents used to have problems with the government in Congo. For

example, when we went to a store or to get water, we had to wait for all the people from other tribes to get served first.

We were not wanted in Congo. The people on the street treated us as if we were not Congolese. They treated us as if we were foreigners. This is because we are Banyamulenge. They knew we were from this tribe by the language we spoke and the way we looked. I do not speak French. All Banyamulenge people in Congo are treated this way. Like my parents, many Banyamulenge were living in Congo without papers.

My sister and I never got Congolese nationality. People were always telling us that we were not real Congolese. My mother taught me at home because I was not allowed to go to a public school. The Congolese government used to tell us that if we wanted to study we should go to where our grandfathers came from in Rwanda. Even if I did go to school, I would have had many problems because people in general did not like those from my tribe. I would have been treated badly.

I did not have friends because my parents always told us to be careful when we went out to play in the street. I was never allowed to go far from the house; my parents were scared we might be killed. I often played in the house.

My Parents Were Killed

Despite these problems, I had a very nice childhood. My parents loved me so much. But after 10 January 2000 everything changed.

It was around 8pm in the evening when my father told me to go to the shop to buy batteries for the TV remote control. I was waiting for my change when I heard a lot of

noise. People were yelling and there was a sound of gunfire. I ran back, and when I was about 200 metres from my home a bomb was thrown at our house. I fell to the ground and people were running, passing by, yelling and tripping over me.

When I regained consciousness someone was lifting me and blood was coming out of a wound in my head. The person who was holding me was Mohammed, a Burundian man who worked as a builder on construction sites with my father. He told me that my parents had died. Other people had also died and some were injured. He decided that he should return to his home country and he took me with him to Burundi.

I was 9 years old.

The people who killed my parents were the Interahamwe, with the help of Congolese soldiers. At that time they were fighting against Rwandan troops. The fight took place in Goma, which is on the Congolese Rwandan border, and that is where my home was. These groups randomly attacked and killed people. Before my parents were killed they were considering leaving DRC because it was not safe for them and they were always harassed.

My Flight to Burundi

Mohammed and I left DRC very late on the same evening my parents were killed. We first took a boat from Goma to Rwanda where we spent one day. We were able to travel through Rwanda because Mohammed explained that he was Burundian and we were heading to Burundi. We did not have any problems.

During our travel, Mohammed asked me to take a Muslim name. He changed my name to Usama Bashir Mohamed.

On the 11th of January 2000, we arrived in Burundi. We found a house to stay in Bujumbura, in an area called Kamenge. The house belonged to Mohammed's family. I lived with Mohammed in the house at Kamenge.

Mohammed used to pray at the mosque in the centre of Bujumbura. It was called Jamai mosque.

Mohammed worked in different places. People knew that his job was to construct houses, so when a person needed someone to assist them, they came to find Mohammed. He mostly worked in Bujumbura, but sometimes he went to work in rural areas.

In Burundi I worked in a barber shop. The barber shop was in the same compound as my house. Mohammed was the owner of the barber shop. Mohammed taught me to shave heads and cut hair. I did not go to school in Burundi, because I had no papers and would not have been allowed.

Many people in Burundi live without papers. It was not a problem because I didn't go out in public except to go to work. Mohammed did not let me go out. I was working all the time and when I was home I had to do many things around the house.

Living in Burundi was better than in Congo, because in Congo people treated me as an enemy. I learnt Kirundi because it is similar to Kinyamulenge and Kinyarwanda. So in Burundi, I could speak the same language as the people. If I did not say where I was from, the Burundians didn't mind. Even when they knew I was a foreigner, people were still kind to me.

After living with Mohammed for three years, he found a woman he liked and they married in 2003.

Her name was Fatuma.

Fatuma did not like me at all. She often told me that I was not their son and that she could easily send me away. In 2004 she gave birth to a baby girl called Asia. Fatuma used to ask me to take care of Asia, because she was busy sewing clothes to make money.

Fatuma did not want me to go to work. She wanted me to stay at home and take care of the baby. When I would tell her that I did not want to stay home, that I wanted to go and work, she would get very angry. Also, Mohammed used to spend time with me at the barber shop and Fatuma would be mad that Mohammed was not at home with her.

I felt that at anytime I could be kicked out of Mohammed's house.

The Attack in Burundi

In Burundi there was no peace.

The Forces Nationales de Liberation (FNL), a rebel group, was fighting the government. After every attack, people would get news from the radio, such as when the government announced that the FNL had attacked Kamenge.

An incident in the beginning of June 2007 changed everything for me once again. It was 4am, we were all sleeping. I heard voices at our gate. The FNL was attacking our house. I heard them breaking down the door. They were shooting into the house. Mohammed and Fatuma's room was close to the living room, so I could not go to see how they were doing. I slept alone in my own room. I escaped through the window. I knew that the attackers were FNL because they had attacked the area before. The FNL often robs civilians.

When I left the house I did not have a plan. I was scared so I ran. When I was leaving the house I heard shotguns, bombs. I did not tell Mohammed I was leaving.

When I left Burundi I brought 80,000 Burundian Francs with me.⁷ I knew that my relationship with Fatuma was difficult and I felt that I might have to leave Mohammed's house at any time so I saved money from my work at the barber shop. At that time this was not considered a lot of money.

My Escape from Burundi

There were many other people on the street when I left. They were all escaping. I found myself heading in the direction of Rwanda.

I did not know where I wanted to go when I left Burundi. I only knew that I wanted to get as far from Congo as possible. I knew that Sudan has a border with Congo and so I did not feel safe in Sudan. I travelled through all these countries alone. I was able to track time by asking people. I did not go to the UN because I did not see, or hear of any UN offices or people. I had one plan during my journey and that was to go to a country that does not share a border with Congo and approach a UN office to tell them about my problems.

I knew about the UN because I had seen it on television when I was in Congo and in Burundi. I saw that there were wars and troubles and people would go to the UN and they would live in camps.

The UN would help them.

I went to Rwanda because I was afraid to go back and be hurt or killed. I rode to the Kanyaru area using public transportation. It was a small microbus. Kanyaru area is along the Kanyaru River, which is the border between Burundi and Rwanda.

Many people go back and forth between Rwanda and Burundi every day. These people make many purchases and porters carry their goods across the border. Since I did not have any papers, I pretended to be a porter, not a traveller. I carried someone's things across and no one stopped me.

I had nothing apart from the clothes I was wearing.

I entered Rwanda on 10 June 2007. I travelled through Rwanda alone. I exchanged the Burundian Francs for Rwandese money when I crossed at the border.

From the border, I went to Kigali. I knew that in Rwanda they usually send people who are Banyamulenge to Congo and I did not want to be sent back to Congo because of the problems my tribe faces there. I spent around 500 Rwandan Francs on food.

I only slept one night, in Kigali, in a small motel. I met other travellers here. They were Rwandese. I did not want to take a room alone, and they asked me if I wanted to share with them because this was less expensive. I stayed with them and paid 500 Rwandan Francs for my share of the motel room with the money I had saved.

When I woke up I went to Nyabugogo bus station. I paid 900 Rwandan Francs for a bus that took six to seven hours from Kigali to the Ugandan border.

I arrived in Uganda on 12 June 2007. Like before, I walked across the border as a porter. There was a bus station near the border. The buses from that station had many different destinations. I got on a bus that could hold maybe 60 people. This bus was going to Kampala. I wanted to go to Kampala because I knew it was a big city and far from Congo.

I travelled on that bus for one day and one night. I bought the bus ticket for the equivalent of ten US Dollars.

When I arrived in Kampala, I saw some Muslims going to pray at a mosque. I went with them and prayed. There were some people who took care of the mosque. I explained my situation to them and they let me stay in the mosque. They also gave me food. I slept in the mosque for four nights.

After the fourth night, someone showed me the bus station where I could take a bus to the Sudanese border. I got on a bus and paid 15,000 Ugandan Shillings. This bus broke down, so I had to get on another bus and pay again. In total, the trip from Kampala to the Sudanese border cost 25,000 Ugandan Shillings and took three days. In the end I arrived at the Uganda-Sudanese border at a place called Nmuule.

I did the same thing I had done at the other border crossings: I pretended I was a local passing through regularly and not a traveller or a foreigner. I arrived in Sudan on 20 June 2007.

When I was in Uganda, people told me how to get service in English so whenever I met people in Sudan I told them my problem and those who had good hearts gave me food so that I could survive. I travelled through Sudan by asking for rides, walking and sleeping in mosques. I had many difficulties eating, sleeping and travelling. I had to walk a lot.

I ran out of money in Sudan.

My arrival in Egypt

In August 2007, I took a bus to the Sudan-Egypt border. I got out of the bus and I walked across the border. I crossed into

Egypt unofficially, some Sudanese people told me the way and I went alone. There were no fences or guards, it was just desert. I did not know exactly which way to go so I just kept walking in a straight line. I was hoping I would find some people or a town. I walked for more than one full day. Later, I saw some people, they were the Egyptian military. I thought if I told them my situation they would help me.

I approached the military men to ask them where and how I can find the UN. I explained to them my situation, they took me to the police station and the police put me in a cell.

When I was in the police station cell, I was questioned but I couldn't understand them and they couldn't understand me. So they started beating me and tried to force me to speak to them. They would get really angry if I didn't answer a question. They would come at night and throw cold water on the place where I was sleeping.

After about ten days in the police cell, I was taken to a place that looked like a court. Many people were talking but I could not understand what they were saying. I did not feel like anyone explained anything to me.

After this I was put in prison. I have been in prison for one year. Most of the people who

are in prison have visitors to bring them food or they have money to buy food. For those who don't have visitors or money they rarely get any food to eat which I feel is not healthy. It is hard in prison but compared to what was happening in the police station, it is a good place.

What My Future Holds

I don't belong in Burundi and if I am sent back I will be a foreigner. I don't have anyone to help me there. I do not even know whether Mohammed is alive. I have no papers to live there normally and I want to live a normal life.

If I am sent to Rwanda, I will be forced to go back to Congo because the Rwandans will believe that I am Congolese. The Rwandans will think that I am Congolese because I have no Rwandan papers and I was born in Congo. Because of the language I speak and the way I look they will automatically know that I am Banyamulenge and I will be sent to Congo.

I don't even want to think about what would happen if I am returned to Congo. I don't even dream about that and if I ever do dream about it, I will burn the bed I'm sleeping on. Because of my tribe, I will face bad treatment and be at risk of being killed. I am very afraid to go back to Congo."



¹ Names and places have been changed to protect the identity of the interviewee.

² UNHCR, Center for Documentation and Research, *Background Paper on Refugees and Asylum Seekers from the Democratic Republic of the Congo*, April 1998, available at: http://www.asylumlaw.org/docs/congodemocraticrepublic/unhcr_bpas98_congo.pdf, accessed on 14 August 2008.

³ Amnesty International, *Amnesty International Report 2000 - Congo (Democratic Republic of the)*, June 2007, available at: <http://www.unhcr.org/refworld/docid/3ae6aa0e34.html>, accessed on 14 August 2008.

⁴ UK Home Office, *Country of Origin Information Report DRC*, see UNHCR Comments, November 2005, available at: <http://www.unhcr.org/refworld/pdfid/483535ce2.pdf>, accessed on 17 June 2009.

⁵ Refugees International, *Nationality Rights for All: A Progress Report and Global Survey on Statelessness*, 11 March 2009. Online UNHCR Refworld, p. 29, available at: <http://www.unhcr.org/refworld/docid/49be193f2.html>, accessed on 7 April 2009.

⁶ See Perks, K. and de Chickera, A., "The Silent Stateless and the Unhearing World: Can 'Equality' Compel Us to Listen?", in this issue of *The Equal Rights Review* (Volume 3, 2009).

⁷ This is equivalent to approximately £75.

Detention at Guantanamo Bay and the Creation of a New Brand of Statelessness

David C. Baluarte¹

In early 2002, U.S. authorities began to transport prisoners in the “war on terror” to the military base at Guantanamo Bay, Cuba. For years, the government committed vast resources to obscuring the public record of these individuals, and the fight over Guantanamo focused on whether U.S. courts had jurisdiction to review the basis for their confinement. Now, after the Supreme Court’s resounding affirmation of federal court jurisdiction over Guantanamo detainees and President Barack Obama’s order to close the facility, U.S. authorities are grappling with a different set of concerns.

One of those concerns is the fate of up to sixty men currently detained at Guantanamo who pose no threat to the United States, but who cannot be released to their countries of nationality because of real threats of persecution and torture. The specific circumstances of these men vary, but in each case, because of the original allegations that led to their detention, and their subsequent branding as Guantanamo detainees, third countries have been very hesitant to step forward to defend their interests.

For all practical purposes, these men are stateless. Moreover, U.S. standard release procedures effectively discriminate against these men, who are detained at this point because of their stateless status rather than a legitimate national security purpose. If third countries are unwilling to provide a safe haven for these men, release into the United

States is the only way for U.S. authorities to begin to mitigate the irreparable harm that they have already caused them and their families.

Overview of Detention at Guantanamo Bay

In response to the terrorist attacks of 11 September 2001, the U.S. Congress authorised the President of the United States to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [...] or harbored such organizations or persons.”² Soon thereafter, the President ordered the U.S. military to invade Afghanistan, with the mission to quell the threat posed by the al Qaeda terrorist organisation and put down the Taliban regime that was known to support it.

In November 2001, former President George W. Bush signed an executive order which authorised the Department of Defense to detain a broad category of non-citizens incident to efforts to combat international terrorism.³ That order granted the President exclusive authority to determine who should be detained and categorically denied such detainees the right to challenge any aspect of their detention.⁴ Pursuant to that order, hundreds of individuals were captured around the world and detained as “enemy combatants”.

U.S. authorities began to transport the first detainees to the facility at Guantanamo Bay Naval Base, Cuba, in January 2002.⁵ While the U.S. government selected Guantanamo specifically because it was considered beyond the reach of U.S. laws, the Supreme Court held in its landmark decision in *Rasul v. Bush*⁶ that federal courts had statutory jurisdiction to consider the petitions for habeas corpus filed by foreign nationals detained as enemy combatants at Guantanamo. In the wake of that decision, more than 200 petitions for habeas corpus were filed on behalf of more than 300 detainees.

The U.S. government adopted the position that *Rasul v. Bush* merely required a status determination, and established its own “enemy combatant” review process for Guantanamo detainees called Combatant Status Review Tribunals (CSRTs), which it intended as a substitute for habeas corpus.⁷ An implementing memorandum described the CSRTs as “non-adversarial proceeding[s] to determine whether each detainee [...] meets the criteria to be designated as an enemy combatant”⁸ defined as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners [...] include[ing] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”⁹

The initial findings of the CSRTs indicated that many of the detainees had not committed hostile acts against the United States, and provided evidence that the U.S. government’s claim that it was only detaining “the worst of the worst” at Guantanamo was inaccurate.¹⁰ In federal court, those representing the detainees in their habeas proceedings argued that the CSRTs did not offer sufficient process, and that many more detainees than

those initially identified by the government were innocent of any wrongdoing.¹¹ However, before courts could resolve that question, the U.S. Congress passed the Detainee Treatment Act (DTA), which purported to strip federal courts of jurisdiction to hear habeas petitions filed on behalf of Guantanamo detainees, and established an alternative review process, granting the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) exclusive jurisdiction to hear appeals from CSRT determinations.¹² Significantly, the DTA limited the scope of the D.C. Circuit’s review, authorising it only to determine whether a CSRT was carried out in accordance with the regulations issued by the Secretary of Defense.¹³

In June 2006, the Supreme Court held that the jurisdiction limiting provisions of the DTA only applied to habeas petitions filed after the statute’s effective date, leaving federal court jurisdiction intact with regard to all of the petitions filed before December 2005.¹⁴ But in October 2006, the U.S. Congress responded with the Military Commissions Act (MCA), unequivocally precluding federal courts from considering habeas petitions or “any other action” filed by any detainee captured after 11 September 2001 who was held anywhere as an enemy combatant.¹⁵ The MCA left the CSRT appeal procedure established by the DTA as the only avenue for Guantanamo detainees to access federal courts.¹⁶

In June 2008, in its watershed decision in *Boumediene v. Bush*,¹⁷ the Supreme Court held that the detainees at Guantanamo have a constitutional right to habeas review of their detention. In so doing, the Court recounted some of the “myriad deficiencies” of the CSRTs, such as the limited opportunities to present evidence, the lack of a right to counsel, and limitations on the access of

detainees to evidence presented against them and their ability to confront witnesses. The Court found that CSRTs “fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review,” and as a consequence, held that the MCA was unconstitutional to the extent that it was intended to strip federal courts of habeas jurisdiction and replace it with the process set forth in the DTA.¹⁸ As a result, seven years after the first habeas petitions were filed on behalf of detainees at Guantanamo Bay, district courts began reviewing the substance of their numerous claims of illegal detention.

On 22 January 2009, two days after entering office, President Obama signed an Executive Order, which stipulated: (1) the closure of detention facilities at Guantanamo; and (2) the immediate review of all Guantanamo detentions.¹⁹ The Order recognised that more than 500 of the approximately 800 detainees held in the facility since its establishment had been transferred to their country of nationality or a third country, and that “a number of the individuals currently detained at Guantanamo are eligible for such transfer or release.”²⁰

Many of these detainees who are eligible for release, however, cannot be returned to their country of nationality because of threats of persecution or torture. The Chinese Uyghurs, perhaps the detainees that have received the most publicity in recent months, are representative of this category of detainees.²¹ The story of their struggle over the past seven years is emblematic of the particularly egregious injustice suffered by those men as Guantanamo detainees whose detention has never been justified, but who continue in detention limbo because they cannot be returned to their countries of nationality.

The Case of the Chinese Uyghurs

Chinese Uyghurs are a Turkic Muslim minority whose members reside largely in the Xinjiang province of far-west China and suffer severe discrimination and persecution by the Chinese government. Twenty-two Uyghurs were detained and transferred to Guantanamo in the wake of the U.S. invasion of Afghanistan.²²

There are many similarities in the Guantanamo Uyghurs’s tales of how they fled China and ended up in expatriate Uyghur communities in Afghanistan.²³ For example, Adel Noori was imprisoned by the Chinese prior to his flight to Afghanistan, and is presently wanted by the Chinese authorities for “political crimes” based on his participation in a political demonstration in Ghulja, China in the 1990s.²⁴ Similarly, Ali Mohammed who left China to escape persecution, travelled through Kazakhstan where he also faced persecution, and ultimately fled to Afghanistan to seek asylum.²⁵ Abdul Sabour also fled China to escape persecution, travelling first to Kyrgyzstan, where the police stole most of his money, then to Pakistan, and finally to Afghanistan, where he was befriended by Uyghurs who helped him get to a Uyghur village where he could live and work.²⁶

In October 2001, U.S. forces bombed the area where these men were seeking refuge, and together they fled.²⁷ Initially, they escaped to the mountains for immediate protection, and then after a few days were able to escape to Pakistan, where they thought they had reached safety. However, they were turned over to the U.S. military by Pakistani villagers at a time when U.S. forces were offering a substantial bounty for terrorist fighters. These men were subsequently sent to Guantanamo and deemed enemy combatants by CSRTs based on allegations

that they are members of the East Turkestan Islamic Movement (ETIM), and that the ETIM receives support from al Qaeda. In the case of Ali Mohammed, an initial CSRT determined that he was not properly classified as an enemy combatant in 2002; however, after the Assistant Secretary of Defense for Detainee Affairs expressed concerns about the appearance of inconsistency of this finding, it was ordered that he undergo a second CSRT, which suspiciously concluded that he was an enemy combatant.²⁸

Five Uyghurs who had been captured by bounty-hunters in Pakistan and sold to U.S. authorities were determined by the CSRTs not to be enemy combatants and released to Albania in May 2006.²⁹ Representatives of the 17 Uyghurs that were not released to Albania insisted that there was nothing that substantially differentiated them from the five men who were transferred, yet they remained in detention.³⁰

In July 2008, in the first case in which the D.C. Circuit followed the procedures established by the DTA to review the CSRT determination, that court overturned the enemy combatant classification of one of the Uyghur detainees, Houzaifa Parhat.³¹ The Court indicated that the CSRT definition of enemy combatant required that the government demonstrate by a preponderance of the evidence that “(1) the petitioner was part of or supporting ‘forces’; (2) those forces were associated with al Qaida or the Taliban; and (3) those forces are engaged in hostilities against the United States or its coalition partners.”³² The court declined to determine whether Parhat was actually part of or supporting the ETIM (the first prong), instead overturning his enemy combatant classification because it found the U.S. government’s allegation that ETIM has links with al Qaeda (the second and third prongs) to be tenuous and unsubstantiated.³³

The Court in turn directed the U.S. government to release Parhat, to transfer him, or to expeditiously convene a new CSRT to make a determination in accordance with the rules of procedure, particularly with regard to the submission and consideration of evidence.³⁴

Following the D.C. Circuit’s rejection of the CSRT’s enemy combatant determination in Parhat’s case, the U.S. government conceded that it would treat the remaining Uyghurs as non-enemy combatants.³⁵ Nonetheless, their detention continued.

In October 2008, in an unexpected turn of events, a federal district court judge presiding over the habeas proceedings of the Uyghurs still in detention ordered that the U.S. government deliver the men from Guantanamo to his court room where he would release them into the care of supporters in the United States.³⁶ However, this order was quickly stayed and appealed to the D.C. Circuit, which overturned it in February 2009.³⁷

In overturning that order, the D.C. Circuit emphasised that it did not have the authority to release a non-citizen in the United States, contrary to the will of the executive and immigration laws, specifically exploring all of the impossibilities for release under immigration law.³⁸ Perhaps the most significant part of the court’s musings is its discussion of the Uyghurs’ ineligibility for asylum. The court indicated that “[t]o qualify as a refugee, an alien must (1) not be firmly resettled in a foreign country, (2) be of ‘special humanitarian concern’ to the United States, and (3) be admissible as an immigrant under the immigration laws,” and that the one ground for inadmissibility that the government could not waive was the “terrorist activity” ground.³⁹ However, whether this ground for inadmissibility would apply is clearly an open question.⁴⁰

The appeal of the D.C. Circuit's decision is currently pending before the U.S. Supreme Court,⁴¹ which will likely decide before its summer 2009 recess whether it will hear the case next term.⁴² Four Uyghurs were released to Bermuda in June 2009, and as of this writing, the 13 remaining Uyghurs are scheduled for release to Palau.⁴³ If the Court decides not to hear their case, or if the Uyghurs are released before a ruling on the matter, the D.C. Circuit's decision finding that federal courts do not have the authority to compel the government to release Guantanamo detainees into the United States will stand. This precedent is of some concern for a number of other detainees still held in Guantanamo.

Statelessness and the Discriminatory Effects of Detention

There are approximately 230 men from some 30 countries currently detained at Guantanamo.⁴⁴ The task force charged with reviewing the detainees filed under President Obama's 22 January order have announced that at least 30 of these men are eligible for release;⁴⁵ however, many cannot be returned to their country of nationality because of a credible threat of persecution or torture. For these men, release will not be possible until a third country accepts them. Moreover, advocates claim that the government has failed to identify a number of individuals for whom release is appropriate, and that when the task force finishes its work, some 60 men will be in this detention limbo.⁴⁶ Because these detainees cannot return to their home, and no other country has thus far been willing to offer them safe-haven, they are effectively stateless, stranded in detention because of their statelessness.

These men, similarly situated to the Chinese Uyghurs, are from Algeria, Azerbaijan, Egypt,

Libya, Palestine, Russia, Syria, Tajikistan, Tunisia, and Uzbekistan.⁴⁷ Admittedly, these men do not fit neatly into the legal definition of a stateless person;⁴⁸ rather, their lack of any effective link to a nationality puts them in the more amorphous category of *de facto* stateless persons. As support for such a classification, the situation of these men can be compared to that of a handful of *de jure*, or legally stateless Palestinian men detained at Guantanamo.

Perhaps the most compelling case of a legally stateless detainee at Guantanamo is that of Maher El Falesteny (Maher Refaat Al-Khawary), who has been held at Guantanamo since June 2002.⁴⁹ Maher was born in Gaza in 1965, moved with his parents to southern Lebanon as a child, and later moved to Jordan as a married man. Maher travelled to Pakistan in 2001 with the hope of obtaining papers from the United Nations that would enable him and his family to immigrate to Europe. While he was in Afghanistan making arrangements to enter Pakistan, the United States began its aerial bombing campaign, and villagers captured him and sold him to the Northern Alliance for a bounty. The record of Maher's CSRT does not suggest that he engaged in combat, knows how to use a weapon, or has received weapons training. Indeed, he has been cleared for release for at least two years. However, Maher has never been issued nationality or legal residency documents from any of the countries in which he has lived, and because no country has volunteered to give him a home, he is stranded in security detention limbo. In this way, Maher's case is indistinguishable from that of the Chinese Uyghurs and dozens of other *de facto* stateless detainees being held at Guantanamo.

Many of these men would not have been at risk of danger (including torture) in their

countries of habitual residence before their detention at Guantanamo, but now due to their association with terrorism, they are subject to such risk. In these cases, it is the Guantanamo experience that has rendered them *de facto* stateless. Others would have been considered stateless (*de jure* or *de facto*) regardless of whether or not they were detained at Guantanamo, but by virtue of their rendition and detention, their statelessness has come to the fore and is a real barrier to them living their normal lives in their countries of habitual residence.

For example, Oybek Jamoldinovich Jabbarov is an Uzbek national who was living in Tajikistan in 1999 when the Tajik government forcibly deported hundreds of Uzbek refugees, including Oybek and his wife, to Afghanistan.⁵⁰ Oybek was apprehended by Northern Alliance soldiers while on a business trip, taken to Bagram Air Base, transferred into U.S. custody, and sent to Guantanamo in 2002. The U.S. has approved Oybek to leave Guantanamo; however, his return to Uzbekistan would likely result in detention and torture, because Oybek was alleged to be affiliated with the Islamic Movement of Uzbekistan (IMU) which is an Islamic militant group in Uzbekistan. Similarly, Ahmed Belbacha, an Algerian who fled to Britain in 1999 after his life was threatened by Islamist extremists, was detained in Pakistan while studying religion and sold to U.S. troops for a bounty.⁵¹ Belbacha was approved for release from Guantanamo in February 2007, but has been fighting in court to block his return because of real fears that he will be tortured and killed. Faced with the apparent hopelessness of his situation, Belbacha attempted suicide in December 2007.

Whether the statelessness of certain Guantanamo detainees was created, or merely exacerbated by the circumstances surround-

ing their detention, the need to provide them with special protection is manifest. Nationality has been described as “the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state.”⁵² Those without a nationality are particularly vulnerable at the international level because they receive no diplomatic protection. It is partially for this reason that international human rights law establishes that the right to nationality is fundamental and the international community promulgated specific conventions for the protection of stateless persons and the reduction of statelessness.⁵³

That the United States is not party to the conventions on statelessness and does not recognise that such persons should be afforded special protections should only heighten concerns about the fate of the stateless detainees at Guantanamo. Indeed, in its brief recently filed with the Supreme Court in the case of the Uyghurs still detained at Guantanamo, the U.S. government took the position that their “continued presence at Guantanamo Bay is not unlawful detention, but rather the consequence of their lawful exclusion from the United States, under the constitutional exercise of authority by the political Branches, coupled with the unavailability of another country willing to accept them.”⁵⁴ This proposed framework has a clear discriminatory effect on the *de jure* and *de facto* stateless detainees at Guantanamo, who can conceivably spend the rest of their days in confinement, while the U.S. government insists they are not actually detained. These men must be treated equally to other men cleared for release at Guantanamo and provided with a satisfactory alternative to their present situation of indefinite detention.

Conclusion

The U.S. government maintains that there is no viable option but to hold the *de jure* and *de facto* stateless men detained at Guantanamo until another country is willing to take responsibility for them. However, this position contravenes well-established principles of international human rights law and effectively discriminates against stateless persons by creating an unjustified exception to their fundamental right to personal liberty, thereby deeming them disposable.⁵⁵ If their detention endures, the only humane course is for the United States to accept these men into its territory under a supervised release programme that takes into account both the public safety concerns of U.S. authorities

and the liberty interests of these individuals being held in unjustified detention. Such a release regime is not unfamiliar in the U.S. immigration context, where indefinite detention has been determined to be unconstitutional in almost every circumstance.⁵⁶

The decision to provide such a solution is long overdue. One of the hopes for the Obama administration was the humane resolution of these national security questions without the need for years of litigation over matters that are so clearly unjust. For the stateless detainees at Guantanamo and their advocates, this hope for change remains an unfulfilled promise.

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² Authorization for Use of Military Force, Public Law 107-40, sections 1 - 2, 115 Stat. 224.

³ Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Federal Register 57833, 13 November 2001, available at: <http://www.law.cornell.edu/background/warpower/fr1665.pdf>.

⁴ *Ibid.* at sections 2(a), 7(b)(2).

⁵ See “Guantanamo Bay Timeline”, *Washington Post*, available at: <http://projects.washingtonpost.com/guantanamo/timeline/>.

⁶ *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004).

⁷ Order Establishing Combatant Status Review Tribunal, 7 July 2004, (DOD Order), available at: <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

⁸ Implementation of Combatant Status Review Tribunal Procedures (29 July 2004), E-1 section B, available at: <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

⁹ *Ibid.*, DOD Order at 1.

¹⁰ A February 2006 report analysing the records of 517 Guantanamo detainees’ CSRT proceedings found that: (1) 55% of the detainees were not determined to have committed any hostile acts against the United States or its coalition allies; (2) only 8% of the detainees were characterised as al Qaeda fighters – and of the remaining detainees, 40% had no definitive connection with al Qaeda at all and 18% had no definitive affiliation with either al Qaeda or the Taliban; (3) many of the detentions were justified by detainee affiliations with groups that were not on the Department of Homeland Security terrorist watch list, and only 8% were detained because they were deemed “fighters for” such organisations, while 30% were considered “members of,” and 60% were detained merely because they were “associated with” groups that the Government asserted were terrorist organisations;

(4) only 5% of the detainees were captured by United States forces, while 86% of the detainees were arrested by either Pakistani forces or the Northern Alliance and turned over to United States custody at a time when it offered large bounties for capture of suspected enemies; and (5) the population of persons deemed not to be enemy combatants were accused of more serious allegations than a great many persons deemed to be enemy combatants, raising questions about the consistency of the CSRT findings. See Denbeaux, M. and Denbeaux, J., "A Profile of 517 Detainees through Analysis of Department of Defense Data," *Seton Hall University School of Law*, February 2006.

¹¹ See *In re Guantanamo Detainee Cases*, 344 F.Supp.2d 174 (D.D.C. 2004).

¹² Detainee Treatment Act of 2005, section 1005(e), 42 U.S.C.A., section 2000dd (2005).

¹³ *Ibid*, at section 1005(e)(2).

¹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006). In *Hamdan*, the Supreme Court struck down the military commissions established by the 2001 military order "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

¹⁵ Military Commissions Act, 10 U.S.C.A., section 7(a)(2) (2006).

¹⁶ *Ibid*, at section 950g.

¹⁷ *Boumediene v. Bush*, 128 S.Ct. 2229, 2269 (2008).

¹⁸ *Ibid*, at 2260, 2274.

¹⁹ Executive Order: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009, sections 3 and 4, available at: http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/.

²⁰ *Ibid*, at section 2(a).

²¹ See "Freed Uighurs Relishing Bermuda's Sun and Sand," *New York Times*, 14 June 2009, available at: <http://www.nytimes.com/aponline/2009/06/14/world/AP-CB-Bermuda-Guantanamo-Refugees.html>.

²² *Kiyemba v. Obama*, --- F.3d ---, 2009 WL 383618, *1 (D.C. Cir. 2009); see also Center for Constitutional Rights, *Abandoned at Guantanamo: Guantanamo Detainees Trapped by Inaction*, November 2008.

²³ Petitioner's Brief in *Kiyemba v. Obama*, 2009 WL 383618.

²⁴ See Center for Constitutional Rights, *Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance*, November 2008, Profile of Adel Noori, available at: http://ccrjustice.org/files/10%20Profiles%20of%20GTMOs%20abandoned%20detainees_FINAL.pdf.

²⁵ *Ibid*, at Profile of Ali Mohammed.

²⁶ *Ibid*, at Profile of Abdul Sabour.

²⁷ See above, note 24.

²⁸ See above, note 25.

²⁹ "Albania Takes Guantanamo Uighurs," *BBC News*, 6 May 2006, available at: <http://news.bbc.co.uk/2/hi/americas/4979466.stm>.

³⁰ See above, note 24.

³¹ *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

³² *Ibid*, at 843.

³³ *Ibid*, at 844-50.

³⁴ *Ibid*, at 851.

³⁵ *Kiyemba v. Bush*, 2008 WL 4898963, *1 (D.C. Cir. 2008) (Judge Rogers dissenting from the decision to stay the district judge's order of release pending appeal).

³⁶ Glaberson, W., “Judge Orders 17 Detainees at Guantanamo Freed,” *New York Times*, 7 October 2008, available at: <http://www.nytimes.com/2008/10/08/washington/08detain.html>.

³⁷ *Kiyemba v. Obama*, --- F.3d ---, 2009 WL 383618, *1 (D.C. Cir. 2009).

³⁸ *Ibid.*

³⁹ *Ibid.* at *6.

⁴⁰ The D.C. Circuit acknowledged that while the government suggests that they are ineligible for a visa to enter the United States because “they allegedly engaged in ‘terrorist activity’ within the meaning of 8 U.S.C. § 1182(a)(3)(B) (i)(I), which would mandate their removal under 8 U.S.C. § 1225(c)(1),” counsel for the detainees “object that the evidence is insufficient to back up the government’s claim,” and the court concluded that “[t]he dispute cannot be resolved at this stage.” See above, note 15.

⁴¹ Mears, B., “Chinese Muslim Detainees Take Case to Supreme Court,” *CNN*, 6 April 2009, available at: <http://edition.cnn.hu/2009/US/04/06/scotus.gitmo/index.html>.

⁴² “U.S. Opposes Uighurs’ Plea,” *SCOTUSBLOG*, 29 May 2009, available at: <http://www.scotusblog.com/wp/us-opposes-uighurs-plea/>.

⁴³ See above, note 21.

⁴⁴ See “Names of the Detained: Results,” *Washington Post*, Database, available at: <http://projects.washingtonpost.com/guantanamo/search/>.

⁴⁵ “Senate Rejects Funding to Close Guantanamo Prison,” *Washington Post*, 20 May 2009, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/20/AR2009052001365.html?hpid=topnews>.

⁴⁶ Human Rights Watch, *Q&A: Resettlement of Guantanamo Bay Detainees*, February 2009, available at: <http://www.hrw.org/en/news/2009/02/23/q-resettlement-guantanamo-bay-detainees>.

⁴⁷ *Ibid.*

⁴⁸ Article 1 of the 1954 Convention relating to the Status of Stateless Persons defines a “stateless person” as “a person who is not considered as a national by any State under the operation of its law”.

⁴⁹ See above, note 24, Profile of Maher El Falesteny.

⁵⁰ *Ibid.*, Profile of Oybek Jamoldinovich Jabbarov.

⁵¹ Human Rights Watch, *Locked Up Alone*, June 2008, Profile of Ahmed Belbacha, available at: <http://www.hrw.org/en/node/62183/section/5>.

⁵² Inter-American Court for Human Rights, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, para. 35, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_04_ing.pdf.

⁵³ See Convention relating to the Status of Stateless Persons, Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and social Council resolution 526 A (XVII) of 26 April 1954, and Convention on the Reduction of Statelessness, Adopted on 30 August 1961 by a conference of plenipotentiaries which met in 1959 and reconvened in 1961 in pursuance of General Assembly resolution 896 (IX) of 4 December 1954.

⁵⁴ See above, note 42.

⁵⁵ See Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-American Commission on Human Rights, March 2008, Principle III, Personal Liberty, available at: <http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>.

⁵⁶ See *Zadvydas v. Davis*, 533 U.S. 678 (2001); see also *Clark v. Martinez*, 543 U.S. 371 (2005).

TESTIMONY

“Nylon binding was also used by wardens for restraint. I was bound so tightly that my body was numb as if paralysed. My arms were tied behind the back and then tied to both legs. The patient is then lifted like a sack and dumped in a corner or left on the spot where he was tied. As the minutes or hours progress, both the pain and the on-setting paralysis is very excruciating. No human being alive will be able to withhold any information or refuse to submit when this is done to him.”

*Uchenna Emenike,
former inmate in prison asylum in Nigeria*

An Invisible Victim –

Testimony from a Man with Mental Disabilities in Nigeria



People with psycho-social and learning disabilities are among the least visible victims of discrimination. They suffer, often systematically, violations of a broad range of human rights. Yet, because of the stigma of these types of disability in practically all societies in the world, they are invisible and their plight is mostly undocumented. Since the 1970s the most severe forms of discrimination suffered by people with psycho-social and learning disabilities have been recorded in some states of North America and Western Europe, giving rise to mental health care reforms and the creation of programmes for their social inclusion. In the past decade, scrutiny by human rights monitors of discrimination experienced by these groups has been focused on some states of Central and Eastern Europe and South America. However, in Africa, little research and advocacy has been conducted to promote greater respect of the basic rights of people with psycho-social and learning disabilities in Africa.¹

In July 2008, a team of ERT researchers visited Nigeria to study discriminatory law enforcement practices that led to deaths in custody. Among the custodial facilities that the team was interested in were asylums, established within prisons, where people with psycho-social and learning disabilities are placed – without proper judicial review or effective legal representation – under the procedure of the Lunacy Law, a vestige of the colonial rule. Their placement is seldom reviewed and their survival in the asylums largely depends on support provided by charitable organisations. However, one local human rights organisation has taken concrete steps to address this, until recently ‘invisible’ problem. Prisoners Rehabilitation

and Welfare Action (PRAWA), based in Enugu, is a non-governmental organisation that has in recent years conducted programmes to affect the release of women and men held in Enugu Prison Asylum, helping them to obtain treatment in the state psychiatric hospital or, where possible, to return to their families. PRAWA activists helped ERT researchers speak to some of those who had been released. Among them was 39-year-old Uchenna Emenike, an eloquent survivor of the Enugu Prison Asylum. Uchenna Emenike went to considerable trouble and expense to post to ERT his handwritten statement accompanied with hand-drawn illustrations, to complement information given in a face to face interview in July 2008.

Uchenna Emenike:

I was 18 years old and in my first year at the polytechnic when I started experiencing mental health problems. Initially, I was treated in a private hospital where I was subjected to electroconvulsive therapy (ECT).² Subsequently I left school as I needed time to recuperate and was permanently on psychotropic medication. Then there was another breakdown and I was subjected to another course of ECT. Over the years I have been hospitalised several times and the treatment administered included six ECT sessions. In 1993, it was administered without anaesthetics with only some people holding down my arms³ – reportedly the psychiatrist involved had been trained in Poland. You cannot imagine how terribly I felt. The last session was in 1995 and then in 1996 the machine broke down.⁴

In 1990, I enrolled in a second polytechnic but could not keep up. I was always sleepy because of my medication. In 1991 and 1992, I completed several courses at a private computer-training school. Then in 1993, I started working in the family company processing food. In the period 1996 – 2000, I worked with a new food technician who had been hired to process starch from cassava. When in 1999 the business started to decline I found work in a bakery as a mixer. After some time I became the chief mixer. But I wanted to educate myself further and in the year 2000, I managed to persuade my father to let me sit for the Enugu State University of Science and Technology entrance exam. The exam was very tough but I passed and enrolled in the Department of Urban Planning. Unfortunately in 2001, during a lecture, I had another breakdown, became very confused and lost control.

I cannot explain how I fell into trouble again. The following spring, on 26 March 2002, I fell from the roof of my house and landed on the concrete on my head. I had no fracture except on the left wrist and shoulder. I was admitted to a psychiatric hospital and discharged eight months later, on 25 November 2002. I went home and then tried to resume my studies but that proved difficult. The university asked for a medical certificate

establishing that I was healthy and so I went to the psychiatric hospital to get such a report.

In July 2003, before I could go back to the university, I had an accident at the family home. After a kerosene burner tipped over while I was preparing breakfast, I was accused that I had tried to burn down the house deliberately. In the evening a female and a male police officer came to my house to arrest me and take me to the police station where I was held for three nights. There were few people in the police cells and the family brought me food. On Monday 14 July 2003, I was taken to the Nkwo Nike Magistrate Court in Enugu. I was in handcuffs, hungry, unshaven and looking a bit unkempt, having stayed in a police detention cell for about two days. I was very confused and upset as I had not had my medication. The hearing was very brief. The magistrate did not ask me any questions. It was my father who did all the talking, complaining that I had been violent and wanted to burn down the house. I had no lawyer representing me. The magistrate decided that I should be sent to the asylum for observation for two months and that a report should be submitted to the court on 28 September 2003.

But in fact, it seems to me that I was actually sent to the asylum for punishment, as I was never subjected to any psychiatric assessment and my case was never reviewed by the magistrate. I ended up spending three years, 10 months and some weeks and days, until I was released on 1 June 2007, during the State Chief Judge release (or Jubilee) into the care of PRAWA (Prisoner Rehabilitation and Welfare Action), who intervened on my behalf. Praise God!

The situation in the asylum was very different from what I had experienced in the police station. The conditions were terrible. When a new person arrived in the asylum, the others would say: “Ka omuta kwueie” (“To learn something new”), to experience a different world, a world of confinement.

Those sent to the Asylum are usually labelled either “civil lunatic” or “criminal lunatic”, even if nothing is wrong with their senses. Only three or

[illegible]

with the same length
ILLUSTRATED BELOW:



from inmates to release them from their chains. Some wardens began to exploit the opportunity as a means of making quick cash when they were broke, looking for the most flimsy excuses to put someone in chains. The wardens – you give them money and they are your friends.

On admission one had no bed and slept on a straw mat which you had to purchase by yourself. In earlier years of my incarceration, a bed, when available, was constructed of very simple wooden planks. We were all infested with lice and constantly bitten by bed bugs.

In my later years in the asylum, people from an Anglican church, who started to visit us, brought us spring mattresses. They would visit us once a week to cook food and provide us with some soap and other toiletries, and some clothes.

Those who appeared sane were given some work such as administration within cells. One of the inmates, designated by wardens to be the man in charge of the cell, was called the provost. The provosts and “cell police” sometimes bribed the cell wardens to be allowed extra privileges. Strong men from the asylum were taken to prison whenever there was a need to suppress a riot. They were called “the task force”. Others were assigned to the “water gang” to bring in a limited quantity of water in dry season from a well in the prison yard. Those who could not bribe the provost for an assignment to a better job would be forced onto the “toilet gang” to take out the buckets used in the cells as toilets.

One was allowed into the asylum yard for two hours a day, Monday to Friday – not on weekends, when there were fewer staff on duty. In 2005 after an attempted escape all inmates were prohibited from going outside for two or three months, unless one had special duties, for example to go to the gate and bring food that was sent by family members or charitable organisations.

Stocking was not the only way to punish someone who the wardens thought had misbehaved. Nylon binding was also used by wardens for restraint. I

was bound so tightly that my body was numb as if paralysed. My arms were tied behind the back and then tied to both legs. The patient is then lifted like a sack and dumped in a corner or left on the spot where he was tied. As the minutes or hours progress, both the pain and the on-setting paralysis is very excruciating. No human being alive will be able to withhold any information or refuse to submit when this is done to him. When the wardens or provost feel the inmate might die or lose consciousness if he is not loosened, he will then be loosened and left alone or maybe have cold water poured over his head. I was tied 3 times in 2004.

Another punishment was referred to as a “general beating”. It was organised by the provost as a punishment. The provost made most decisions although sometimes he received instructions from the warden.

Three or four people would die each year. It seemed to me that people died from poor sanitary conditions. The water we consumed was mostly collected on the roof. The death of some of my fellow inmates and the sufferings and deprivations I experienced at the asylum affected me profoundly creating a sense of emptiness and worthlessness about the whole concept of life itself. Knowing that I would never see the deceased inmate again in this life, memories of times shared together, of love and hate, haunted the soul.

Poor sanitation and lack of appropriate and sufficient quantity of food affected almost all of us and certain body functions and conditions were either altered, or retarded or maybe reversed. For example, skin texture and respiratory functions became poor due to malnourishment, poor ventilation and lack of space.

An account or narration of one’s prison experience would be incomplete without any mention or comment about one’s sexual life while in incarceration. After all, only males are put together with males, and females are confined only with females likewise. One who has never been in prison or similar facility before,

would then wonder: What do you do with your sexual urge when it rises? And of course we know that it is bound to rise sooner or later. I think that generally the psychiatric drugs which are administered to most inmates in the asylum greatly suppress one's libido, as impotence was said to be a long-term side-effect of some of the drugs. Also, stories and rumours of homosexual acts at the main prison occasionally filter into the asylum, but I neither heard of nor witnessed any such thing within the asylum.

Occasionally, "stable inmates" relapsed for a variety of reasons including the over-confined nature of the place, too much fear, worry, anxiety, disillusionment, inadequate and inappropriate nutrition, lack of visitors from the outside world, heat in the cells at certain seasons, no physical exercise and "drug reactions" (side-effects). I encountered different "drug reactions" among inmates such as those affecting the tongue, the fingers, the speech, eyesight, the legs, and movement functions.

Before I conclude this account, I would like to say something about stigma and rejection in general. Naturally no sane or "normal" person may desire any close contact or prolonged direct association with people or persons labelled "mad", or psychologically imbalanced. Even those that have already been discharged from the asylum return to the free society with a sort of tag or identity, as one who has once lived with "mad people". And if he or she is not careful, almost every and any flaw or misjudgement he or she might commit would be directly attributed to the fact that such a person is an ex-asylum inmate. But where such a person

is "the optimistic type" who has confidence in himself and belief in God to succeed, and knows how to forget, or cast behind the obstacles and mistakes of the past, to forge ahead with the drive for greater improvement, achievement and perfection, stigma and rejection would then not be any trouble at all.

Many mentally ill individuals here seem to perceive themselves less worthy than the mentally sound. They see themselves as second class citizens. Having lived in isolation from those of sound mind and health for quite some time, they feel inferior. I remember once, after I had been transferred to the Recovery Cell in 2006 - the last stage before discharge in many cases - when some trainee nurses, who were mostly female, came for excursion, and were peeping into our cell windows, slowly and carefully, to see what we looked like as if we were guinea pigs meant for experiments. I got angry and shouted at them: "Stop looking at us like monkeys in the zoo!"

But to be honest with myself, with you and any person who might be interested to know: asylum experience, at least for me, was not only sorrow and pain. Having been incarcerated for a few years, I can say: for those of us that did their time with faith, I noticed a secret kind of small and incomplete spiritual joy within my soul. In the midst of all the captivity and deprivation in the physical world, this secret foundation of an inexplicable joy or sweetness was always welling up within the soul. Especially when or after one had spent time praying or singing songs of praise to God.

¹ See Amnesty International, *Nigeria: Prisoners' Rights Systematically Flouted*, February 2008.

² Electroconvulsive therapy (ECT) is a treatment whereby a controlled electric current is passed through the brain. ECT is a rapid treatment for severe depressive disorders. Nowadays it is used mainly when doctors consider it is essential to bring about improvement quickly, such as in a high risk of suicide, depressive stupor, or the depressed patient is not drinking enough fluid to maintain kidney function. With modern pharmacology the use of ECT has greatly diminished.

³ The electric current induces a generalised seizure which, if uncontrolled, can lead to fractures, including vertebral ones. The use of muscle relaxants prevents this happening, but the paralyzing effects also stop the functioning of respiratory muscles, so that the patient cannot breathe unaided. For this reason ECT must only be given with a general anaesthetic and a muscle relaxant, under the supervision of an anaesthetist. This is known as “modified ECT”.

⁴ Use of unmodified ECT is in violation of international human rights standards including Principle 14 of the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, and standards for conditions and treatment in psychiatric institutions elaborated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its Eighth Annual Report. Unmodified ECT would amount to cruel, inhuman and degrading treatment in violation of Article 15 of the UN Convention of the Rights of Persons with Disabilities (2006), as well as Article 7 of the International Covenant on Civil and Political Rights (1966), Article 5 of the African Charter on Human and People's Rights (1981), Article 5 of the American Convention on Human Rights (1969), Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

INTERVIEW

I think that because equality law is about protecting dignity, which requires freedom from fear, want and dependence, equality law should tackle poverty because poverty means insecurity and helplessness and hence dependence and liability to abuse.

Margarita Ilieva

Combating Poverty through Equality Law – Possibilities and Pitfalls

The last two years will be remembered for generations to come for the economic turmoil that has gripped the global economy. The world economic recession will inevitably hit the poor in every society and is likely to increase exclusion and, at worst, persecution of the most vulnerable groups within society. In the context of these processes, ERT talked with Sandra Fredman, Professor of Law at Oxford University, and Margarita Ilieva, Legal Director at the Bulgarian Helsinki Committee, about the relationship between poverty, equality and discrimination.

ERT: Recently, the UN Independent Expert on the question on human rights and extreme poverty noted that “there is a wide recognition that discrimination engenders poverty and poverty engenders discrimination”. What, in your view, does this mean in practice and do you think this is an accurate description of the relationship between discrimination and poverty?

Sandra Fredman: Yes, I agree that there is an important link between the two. Discrimination on grounds of race, gender, disability, etc. clearly leads to exclusion from social benefits such as good quality jobs, education, etc., and to social marginalisation, which in turn can lead to poverty. Therefore, it's not surprising that socio-economic disadvantage is concentrated among women, blacks, ethnic minorities, disabled people, etc.

What I think is seldom fully articulated is the converse relationship – what the Independent Expert meant when she said that

"poverty engenders discrimination". Discrimination is partly about socio-economic disadvantage but it also has other dimensions, one of which is stigma or misrecognition. Poverty very often attracts stigma.

Poor people are characterised as scroungers, as lazy, as fraudsters and this gets in the way of poverty alleviation and can worsen poverty, because it might make people in that position reluctant to take up benefits. There is good evidence that stigma can deter people from taking up their entitlements to social security benefits. I recently saw some research which showed that the uptake of free school meals can be reduced significantly when children feel stigmatised by doing so. That's an important dimension of poverty which brings together socio-economic disadvantage and recognition issues. Poverty also leads to discrimination in the sense of exclusion from decision-making processes and from society more generally.

So I think that the connection between discrimination and socio-economic disadvantage needs to be recognised in both directions, i.e. the ways in which discrimination can engender poverty, and poverty can engender discrimination.





Margarita Ilieva: Taking the first part, it means that relative disadvantage results in fewer resources. Not just in terms of money – with all its effects – but also social links, access to recognition and inclusion, to legal and political means

of self defence and channels of influence. Those who are ostracised by discrimination become poorer because they are left out of the socio-economic circle. They are marginalised and they do not partake. As when the authorities subject Roma to discriminatory neglect in housing and fail to integrate them in urban planning and development. As a consequence, they experience dire deprivation in terms of living conditions, security, and social inclusion. Similarly, when employers reject Roma job-seekers, their families suffer economic exclusion, their children drop out of schools, adults may resort to problematic activities to secure subsistence, and the community experiences even further marginalisation. Indirect discrimination can result in poverty and isolation too – one example is when the government introduces fixed time limits for receipt of social assistance the Roma who disproportionately depend on welfare become even poorer.

On poverty engendering discrimination – the poor and isolated are easy targets for disadvantage. When the authorities seek to profit from municipal land they choose land occupied by informal Roma settlements rather than land “unlawfully” occupied by others like entrepreneurs. Authorities forcefully

evict the settlers and make their families homeless; uproot them from their social networks, and down a spiral of poverty they go. The poor are ostracised because they are generally not expected to be able to contribute anything, not just in terms of economy, but in every social way. There is also social competition for resources and the poor are ousted because they are weaker. I think on a primitive, not so conscious level, the poor are associated with want, therefore, they face mistrust by those who have more. There is stigma too as poverty is something that people associate with failure and ruin.

Generally, I think it’s a fair way to describe the relationship between the two. Of course it can obviously also be said that discrimination engenders more discrimination. It’s a cycle! The same I think is true for poverty. Poverty engenders more poverty. When you are in misery you lose your health, life expectancy chances, education chances, everything.

ERT: Should poverty alleviation be one of the primary objectives of the equality agenda? If so, in what way can the right to equality be used to address global poverty?

Margarita Ilieva: If we take poverty in a broader sense, as deprivation of social resources generally, including but not limited to material wealth, then to curb relative poverty is the primary objective of equality law in any case. Equality law is about preventing people getting less – less need satisfaction, less opportunity, less respect, less reward – because of identity reasons that are irrelevant to merit. So combating poverty in that sense should be considered an integral part of combating discrimination where poverty affects people because of their sex or race or health or other protected grounds.

It's another issue whether equality law should focus on combating the effect of poverty in terms of discrimination. That is whether discrimination resulting from poverty, unfair exclusion on grounds of poverty should be counted as analogous to discrimination on other protected grounds. The problem is that unlike other grounds, reasons relating to poverty are often a basis for legitimate or inevitable differentiation or disparate impact. This makes it hard to govern poverty in the same way as other grounds.

It is yet another question whether equality law should target poverty as such in absolute terms. I think that because equality law is about protecting dignity, which requires freedom from fear, want and dependence, equality law should tackle poverty because poverty means insecurity and helplessness and hence dependence and liability to abuse. Poverty makes living a dignified life very difficult and equality law should counter it as much as it can – but I think it is limited in what it can do.

As to how the right to equality should be used, I think equality law should focus on two categories of measures, reasonable accommodation on grounds of poverty and on positive action. I think poverty requires positive structural remedies to enable the poor to develop the capacity to move out of poverty and while poverty lasts for them, social situations and processes should be adapted to their needs. Much like what is done on grounds of disability.

Sandra Fredman: I don't quite see the relationship exactly in those terms – that poverty alleviation is a primary objective of the equality agenda. The way I see it is that poverty alleviation needs to be infused with equality concerns. In other words, equality issues need to be considered closely when poverty programmes are being established and de-

signed. This is because policies aimed at poverty can in fact reinforce discrimination. We know this from the experience of gender discrimination. Many poverty programmes link entitlements to households rather than individuals. Such programmes entirely ignore the imbalances in power between men and women within the household. This can certainly have the effect of reinforcing gender discrimination. This is one of the ways in which poverty measures should to be infused with equality.

This can be applied outside of the gender context. Poverty alleviation measures often regard recipients as passive beneficiaries of largesse, and are stigmatic and stultifying. Infusing such measures with equality means that poverty reduction should be designed so that people are regarded as equal in all respects. Once you do that, once your aim is equality, you can regard people as agents. The aim of both equality and poverty reduction is to facilitate the ability to participate fully, to pursue what Amartya Sen would call those choices which people have reason to value. In that sense, I think that poverty alleviation must be a way to open up a range of feasible options and needs to be infused with these basic equality concerns.

ERT: A number of challenges exist to combating poverty through anti-discrimination law. For some poverty as a ground of discrimination is too amorphous to be treated in an analogous way to race, sex, or disability. Others suggest that it is not “discrimination on grounds of poverty” that is the major concern; rather it is the fact that people are poor that is the heart of the issue. Drawing from such opposition, the first question is: Is poverty too amorphous a concept to be included in the list of prohibited grounds of discrimination covered by equality legislation?

Sandra Fredman: No, I don't think poverty is too amorphous and certainly it is already defined for a lot of purposes. It is defined for social security purposes, for international aid, for development. I don't think it is harder to define than disability or race or age or religion or belief. So defining poverty is not really a major barrier. This issue came up in the US Supreme Court in the case of *San Antonio Independent School District v. Rodriguez* (see box), which was about a challenge by children who lived in poorer local districts. The challenge was based on the fact that local property tax was used to fund local schools, which meant that poorer districts had poorer schools. The U.S. Supreme Court said that this was not a case of discrimination on grounds of poverty. One of the reasons given was that poverty is too amorphous a concept. I think that was an incorrect decision. It was quite clear that it was a case of discrimination on grounds of poverty. You could clearly see who the victims were and who had suffered from this policy and you could also clearly see that the public policy of distributing funds in this way was treating poor people less favourably because they were poor. This case demonstrates how crucial anti-discrimination law which covers the ground of poverty could be in providing solutions: if you have better schools then you begin to take people out of poverty.

Margarita Ilieva: Poverty is relative! It has no absolute meaning because there is no defined threshold below which someone is to

be considered poor. But I don't think that is necessarily a problem. In that sense, I think poverty is no more undefined or amorphous than race, for example. There are so many nuances of racial and ethnic difference and it's the same with religions. It is a matter of difference and diversity. Likewise with poverty it is a matter of comparative degree, of rela-

San Antonio Independent School District v. Rodriguez 411 U.S. 1 (1973)

Demetrio Rodriguez and other parents claimed that education was a fundamental right and that the system of school funding constituted wealth-based discrimination contrary to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Under Texas state law, the state provided funds to afford each child with a minimum education. This provision was complemented by local school districts with funds derived from local property taxes. School districts with wealthier residents were thus able to contribute more per child than poor areas such as Edgewood where the claimants resided. The US Supreme Court overturned the District Court decision, finding that the Constitution did not protect a right to education and that the state of Texas did not deprive a class related to poverty of an education for the reason that no wealth-based class existed. The Supreme Court held that this was evidenced, among other things, by the fact that some school children from poor families who resided in property-rich school districts benefited from the higher contributions to their education available to all children in those districts.

tive difference and in that sense this 'plasticity' is not a bad thing because it makes the ground more amenable to the specifics of a case.

To better reflect this relativity, a neutral term could be used instead of poverty. Like

property status or social status which is even broader and, therefore, more pliant. However, this pliancy/plasticity also has complications attached to it.

ERT: A question related to the previous one: what are the major challenges that law-makers would encounter in integrating poverty as a ground of discrimination and to what extent can/should, anti-discrimination policy alleviate poverty?

Sandra Fredman: I would not argue that poverty should be combated through anti-discrimination law alone. It needs to work in a complementary fashion. So in designing anti-poverty measures, you should consider the anti-discrimination dimension. In the same way, anti-discrimination law should be available to challenge general public policy like the policy in the *San Antonio* case which discriminates on grounds of poverty.

It would be dangerous to think of anti-discrimination law as a substitute for other measures. Anti-discrimination law needs to work together with socio-economic rights, state welfare and international aid, etc. to make sure that these equality issues are factored into anti-poverty measures, as well as the agency issues which I have talked about earlier.

Margarita Ilieva: Much depends on the scope of the prohibition. If the scope were to include goods and services, including healthcare and education and housing, a major challenge would be indirect discrimination. Prices put poor people at a particular disadvantage. If indirect discrimination on grounds of poverty is banned, providers would have to justify prices in court. To have courts analyse whether a particular price is justified for a good or service would be subversive. One other issue is that prices are only

likely to be justified on economic grounds. Accepting such a justification would corrupt the concept of legitimate aim which excludes monetary considerations. Under European Court of Justice case law, for instance, you cannot put women at a disadvantage because of the financial aims you have. And prices are all about economic considerations. To allow the test for a legitimate aim to be diluted by incorporating money as a goal, would be serious regressing of equality from the standpoint of other protected grounds.

One solution could be to have a separate regime for poverty that does not apply to other grounds. But this would mean that the law would be less coherent, more complex and ultimately less effective. It may also be seen as less fair because poverty as a ground of discrimination would be treated differently to other grounds of discrimination.

If we consider the example of prices further, litigants could even use direct discrimination claims to challenge prices for goods or services and one could not hold that inability to pay a price has nothing to do with poverty. In such cases there may be a risk the judges would try to deal with such claims by tarnishing the test for rebuttal of a causal link between treatment and the protected ground. Currently, respondents have to show that the treatment in question was in no way whatsoever on the basis of a protected ground. Furthermore, we also run the risk in situations of direct poverty claims, that courts would resort to a more lenient test and allow respondents to defend allegations by saying that the treatment was not because the person was poor, but because they were unable to pay. Excluding someone for not having paid a particular price is not the same as excluding them on grounds of poverty. Allowing such a formal construction of the concept of 'on grounds of' would again be regressive if it

applied to other grounds. And if it were only allowed to apply to poverty, the law would be inconsistent and hierarchical.

In terms of service provision if cases of direct discrimination were to be heard in courts respondents could argue that their relative neglect of poorer clients was dictated by strict economic considerations. Such an argument may have weight on the basis it was natural to invest in clients with more potential to generate further business – which in a world of scant human and other resources necessarily means less investment in poorer clients who are less likely to produce future demand.

Such arguments of inescapable economic necessity could also be used by service providers like banks, multiplexes, or restaurants for not servicing poorer areas, if residents of such areas were to allege direct discrimination on grounds of poverty. If poor area residents complained of less urban development, worse infrastructure or lower security and took the local authority to court, the local authority could respond, “it’s just economics, we cannot avoid it, resources are scarce, there’s nothing you can do.”

For equality law to deny or defy economic constraints would be rash I think. This makes it difficult to uphold a strict ban on direct poverty discrimination which means that a general justification test would have to be adopted. Again that would treat poverty differently from other grounds like race or sex which are currently absolutely protected under many national laws, with narrow exceptions only. Having such different standards would compromise the integrity of the equality law. Alternatively, the law would have to provide for a general justification test for direct discrimination for all grounds, just to keep the regime consistent. That would be

a huge step backwards for grounds like sex, race or sexual orientation.

Another challenge would be proving the ground of poverty. To avoid narrow or dogmatic construction by judges and equality bodies a specific definition under the law of what would be sufficient to prove in order to prove poverty would be necessary and this leads to the difficulty of pinning poverty down to a particular level.

Apart from this being difficult in itself, any fixed definition of poverty would probably not be satisfactory because many people suffer discrimination not because they are *poor* but because they are *poorer* than somebody else. So it is comparative poverty that matters not some absolute quantity. I think it is better to provide that actual poverty is irrelevant even where it is a fact. For protection under the law, it should be a perception of relative poverty that is sufficient.

ERT: Participation and ensuring that those who are vulnerable to discrimination are consulted and involved in developing laws is a fundamental aspect of implementing the right to equality. For many reasons people living in poverty are less likely to be involved in the development and implementation of equality law and policy. What steps should be taken to ensure that those who are marginalised and vulnerable in society due to poverty have a voice to express their experiences and effectively participate in implementing the right to equality?

Margarita Ilieva: That’s a difficult question! One suggestion might be the introduction of a statutory duty for legislation makers to consult a representative sample of social movement organisations, anti-poverty NGOs, and other organisations prior to adopting or

introducing draft legislation. Consultation obviously requires much more than website consultation. What is needed is outreach, visiting places and holding meetings in the manner in which politicians do during election campaigns.

Furthermore, any piece of secondary legislation that is not consulted in this way should be subject to automatic annulment in court, on the basis that it does not uphold this consultation procedure. Likewise any primary legislation – any draft law introduced in parliament – should not be admissible for voting by parliament if this procedure has not been followed. I think this might be one way that decision makers could be compelled to have contact with the poor and listen to them prior to making policy.

Sandra Fredman: This is one of those things which is either a vicious circle or a virtuous circle. Basic socio-economic rights, such as the right to education, the right to proper nutrition and proper health will give people the tools to participate more in society and become more involved in decision-making processes. That's one aspect. On the other hand, without a voice, poor people may not have the political strength to achieve these rights. Finding a way of facilitating the engagement of poor people is a must. This can be done through very conscious and very deliberate capacity-building initiatives such as training, funding, and forums whereby people are actively drawn into the process.

ERT: Many jurisdictions often make the distinction between fair and unfair discrimination, or lawful and unlawful discrimination. It seems that discrimination against the poor, or people in poverty, is often classified as lawful discrimination as it can be legitimately justified. Does the legal prohibition of discrimination on

grounds of poverty require a fundamental shift in the current social order and is anti-discrimination law and human rights law capable of meeting the challenge that such a shift may entail?

Margarita Ilieva: As I said a strict legal prohibition of poverty differentiation and disparate impact is problematic. I think it would seriously disrupt the socio-economic order. It would mean a wholesale revision of our economic organisation which is governed by scarcity and dictates saving and prioritising investment. It is very difficult to see political or social consensus to this and I'm not sure whether equality law can do this on its own. It's a matter far beyond the technicalities of how to govern such concepts. In addition to this, there are serious issues to tackle within the perimeter of those technicalities, as I mentioned earlier.

Sandra Fredman: I suppose those who oppose the idea of poverty as a ground of discrimination could argue that it challenges the whole capitalist system, requiring equal income regardless of the work you do. I think that we can all have different views about that but that's not necessarily a knock-down argument. For example, two kinds of challenging examples that someone might put forward might be (a) could a low paid worker argue that her low pay discriminated against her on grounds of poverty and (b) could a poor person argue that she was discriminated against because a bank refused to lend her money because she fell under the minimum income limit?

If we take the low pay first, we already have intervened in the field of pay through gender equality laws. We already say that if you are paid less for work of equal value because you are a woman rather than a man, then there is a case for intervention through anti-discrimi-

nation law. An analogy would be that if a poor person were paid less than the value of their work and you could in some way challenge the way that work should be valued then that could be a potential for intervention in the market. We could also challenge differentials which are disproportionately large relative to the difference in the value of the work. We haven't gone so far in equal pay law for men and women as to look at disproportionate differentials but other institutions such as collective bargaining have done this. So I think that if your pay is low because you are poor rather than because of the kind of work you're doing then that should be prohibited as discrimination. But this can't be the only solution. We also need other measures to address poverty, such as minimum pay laws, right to bargaining and so on. That's not to say that you shouldn't intervene but maybe not through discrimination law.

My opinion is the same for the bank loan scenario. You could argue that if the person cannot pay back the loan, that's a good reason for not giving her a loan in the first place and that there wouldn't be a legitimate claim under an anti-discrimination law provision. On the other hand, the discussion shouldn't rest here. Anti-discrimination law is often too bipolar, for example, by considering merely the bank and the person who needs a loan as the affected parties. We already know from poverty alleviation measures that extending credit facilities can effectively alleviate poverty if it is conducted in appropriate kinds of ways. Thus if you were just bringing an individual claim against a bank that might not be successful, but if you challenge public policy which doesn't facilitate credit and lending measures correctly, then anti-discrimination law might well be useful in such a challenge. Interestingly, the new British Equality Bill currently before Parliament includes a clause imposing a positive duty to consider the im-

pact of policies on socio-economic disadvantage. So I don't think that including poverty as a ground of discrimination would challenge the whole capitalist order; but there are certainly useful roles that anti-discrimination law can play in addressing poverty.

ERT: One interesting aspect within the discourse surrounding equality and poverty relates to positive action and the idea that programmes such as affirmative action can actually hurt the poor - through focusing on individual capability rather than social need. Do you have a standpoint on this debate and in your view can affirmative action really hurt the poor?

Sandra Fredman: It is important to consider what the aim of affirmative action is – is it to benefit those who are discriminated on grounds of their race, gender, disability or other status alone, or is it to benefit those who are socio-economically disadvantaged, possibly because of race or other discrimination. This raises the question about the extent to which status (that is race, gender, disability and so on) disadvantage coincides with socio-economic disadvantage. When status does not fully coincide with socio-economic disadvantage, members of the status group who are no longer socio-economically disadvantaged might gain a disproportionate benefit from affirmative action measures. In India where there is a very widespread policy of reservations (quotas), the concept of the “creamy layer” has been introduced to deal with this issue. The Indian system operates two kinds of reservations; some apply to Dalits – members of the so-called untouchable caste - and some measures apply to what the law calls “other backward classes”. For these “other backward classes”, the courts have said that you have to have a “creamy layer exclusion”. That is, those who are above a certain socio-economic threshold cannot benefit

from the reservation. This means that within the beneficiary group status and socio-economic disadvantage will coincide.

In the United States similar measures were introduced after the *Adarand Constructors v. Peña* decision (see box), which required strict scrutiny of all affirmative action measures. Programmes setting aside funding for minority contractors and women also now include a requirement of proof that recipients fall within a certain category of socio-economic disadvantage in addition to their disadvantaged status. So there are measures which you can take to mitigate the negative elements affirmative action programmes may have for the poor.

Adarand Constructors, Inc. v. Peña (93-1841), 515 U.S. 200 (1995)

The petitioners, Adarand Constructors, claimed that the US Federal Government's practice of awarding financial incentives to contractors for sub-contracting to companies that were operated by "socially and economically disadvantaged individuals" on government projects was unconstitutional. In particular, the petitioners complained that the government's use of race-based assumptions for identifying "socially and economically disadvantaged individuals" violated the equal protection provision of the Fifth Amendment's Due Process Clause in the Constitution. The Supreme Court held that such programmes would only be constitutional if they were "narrowly tailored" for a "compelling government issue."

In South Africa, the process of black economic empowerment is often criticised for having massively enriched a few black companies and black people and therefore hav-

ing increased the inequality between rich blacks and poor blacks. This is controversial because clearly the very fact of getting more black people into the business world is important for itself. So you could argue that black economic empowerment is not in itself necessarily a measure aimed at poverty alleviation. On the other hand, there is still justified criticism that it's not reaching the really poor people.

I would argue that there is a further problem with affirmative action programmes, which is that they leave out poor people who are not lower caste, or black, or women. If poverty was a prohibited ground of discrimination then of course you could make sure that those programmes benefitted the poor on the basis that they are poor and not because poverty coincided with gender or race.

In fact in the UK we have lots of access schemes which provide deprived children and deprived school kids with particular courses to give them more opportunities to get to university. Therefore, I don't think that it is out of the realm of possibility to actually have affirmative action in favour of poor people simply because they are poor.

Margarita Ilieva: I wouldn't say they *hurt* the poor. I don't think the poor are worse off because of such programmes. If they are not benefiting enough or at all from these programmes, the reason probably is that the programmes are not sufficiently targeted at the poor as such. So the

problem is not positive action *per se* but the grounds that positive action programmes are based on. If such programmes are on grounds of poverty specifically, i.e. they are

for the poor, taking account of the specific needs and limitations of the poor, then the poor should benefit.

ERT: Coming back to the issue of the amorphous nature of poverty. Some have suggested that it would be more beneficial to substitute poverty for more socially measurable and/or legally certain concepts such as socio-economic status or condition, or economic, educational, health or class status. Do you think that adopting an approach which combats the constituents of poverty rather than poverty itself is a better approach or would this merely disguise the central social problem?

Margarita Ilieva: I don't think that the concepts of social condition or economic status are more defined or more certain. I see them as being far broader than poverty and they could mean anything, and cover any sort of condition both vertically (degree of deprivation) and horizontally (particular version of possession or dispossession). If we substituted poverty for social status it would be possible for affluent people to challenge the treatment they receive because of their relative wealth. People could for example challenge tax laws that demand more from the rich or poverty alleviation measures that benefit the poor. This creates even more complexity for the law. So if one means to specifically protect the poor, rather than any sort of social class, one should define the protected ground accordingly.

On the other hand, for political legitimacy, it might be more advantageous to use a symmetrical approach – as with protecting sex rather than women and race rather than specific ethnic groups. Social status is a broader term, and contains more diverse manifestations. In that sense it could be more suited to respond to the particularities of individual cases.

Again, I have to say that I am not sure that poverty is difficult because it is undefined. If it is seen as a matter of difference, not in absolute terms, but within a particular context, then I would be poor in comparison to a lawyer living in London in one context and a child in rural Bulgaria would be poorer than I am in another context. Absolute quantity, therefore, shouldn't matter! It's a matter of comparison, of relative difference, of degree.

Sandra Fredman: I don't think that poverty is difficult to define so I don't see any particular reason for doing that. Neither do I think that these are mutually exclusive problems. Therefore, I would like to see equality and anti-discrimination law working together with socio-economic rights.

ERT: Beyond prohibiting discrimination on grounds of poverty, what other measures should a good equality law do to alleviate poverty?

Sandra Fredman: As I said, equality should work together with socio-economic rights, such as the right to education. Equality in education should be a major focus because education is such an accelerator. It is not enough just to give a right to education - you have to formulate the right with equality in mind. For example, education for girls needs to be formulated in many countries in a way which makes it genuinely possible for girls to access education. And that is a very important way towards eventually alleviating poverty: by providing opportunities. The same is true for equality in access to housing, to credit or to training, and to equality in access to and involvement in the decision making process. So I think equality should be a central input into poverty measures.

Margarita Ilieva: I have mentioned it already; positive action is essential – positive

action on grounds of poverty specifically! Poverty requires policies which require, above all, structural redress. Poverty and poverty discrimination are unlikely to be dealt with effectively by individual legal means. This is true for all grounds of discrimination, but it is particularly important for poverty. Moreover, positive measures should not be palliative like social assistance or giving money out. They should be structural remedies that create change and build people's capacity to exit poverty; like education and what is necessary in practice for it

(clothes, shoes, electricity within the home, etc.); like jobs (including job training); like information, advice and support on starting and maintaining a business.

Another important factor is reasonable accommodation on grounds of poverty. Service and goods provision should be adapted to the needs of the poor in order to avoid or at least limit the extent to which they are excluded from social exchange. For example, payment by instalments, as small as necessary, should be possible as a rule.

Interviewer on behalf of ERT:
Jarlath Clifford

ACTIVITIES

- **The Equal Rights Trust Advocacy**
- **Update on Current ERT Projects**
- **ERT Work Itinerary: January-June 2009**

Equal Rights Trust Advocacy

Jarlath Clifford¹

In the period since the publication of ERR Volume 2 (December 2008), ERT has been working to expose patterns of discrimination globally and to combat inequality and discrimination both nationally and internationally. A major component of all of ERT's advocacy work has been advocating for the Declaration of Principles on Equality by applying the Principles to real life scenarios in order to solve legal and policy questions which have arisen in this period. Below is a brief account of some of the most important ERT advocacy actions.

ERT Contribution to Improving the UN Committee on Economic, Social and Cultural Rights' Draft General Comment on Non-Discrimination

On 13 December 2008, The Equal Rights Trust (ERT) submitted written comments to the UN Committee on Economic, Social and Cultural Rights (the Committee) expressing concerns regarding the content of a draft General Comment on Non-Discrimination which was being developed by the Committee under Article 2(2) of the International Covenant on Economic Social and Cultural Rights. Article 2(2) states:

"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

ERT's main concerns regarding the draft General Comment included:

1. The draft General Comment mixed up two different sets of concepts, *de jure* and *de facto* discrimination on one hand and formal and substantive equality on the other. ERT explained that it is not the case that *de jure* discrimination overlaps with formal equality and *de facto* discrimination overlaps with substantive equality. *De jure* discrimination can be either formal or substantive, and so can *de facto* discrimination. In the first pair of concepts the question is *where* discrimination and inequality are found - in the law or in practice. In the second pair of concepts the question is different and relates to *how* equality itself is understood: is it understood as requiring identical treatment in identical circumstances (whether by law or in practice), or as requiring treatment of people as equal in their dignity, including differential treatment with a purpose to achieve effective equality of opportunity and participation in practice (substantive equality).

2. The draft General Comment, and para. 7 in particular, was not consistent with the understanding of direct and indirect discrimination in the growing number of jurisdictions where these concepts are defined. In the draft General Comment they were badly confused with the concepts of intentional and unintentional discrimination by identifying direct discrimination with intentional discrimination and indirect discrimination with unintentional discrimination. This was a gross misunderstanding of the concepts of direct and indirect discrimination. In all existing definitions of direct discrimination, it is accepted that it can be either intentional or not intentional, and the same can be said

of indirect discrimination. The concepts of direct and indirect discrimination, therefore, have nothing to do with the presence or absence of intent or purpose.

3. Paras. 8, 9 and 10 of the draft General Comment did not provide a clear interpretation of temporary special measures and differential treatment in the light of the substantive concept of non-discrimination and equality contained in the Covenant.

On the basis of these concerns and a number of others, ERT submitted amendments to the draft General Comment and made a number of recommendations to the Committee.

The UN Committee on Economic, Social and Cultural Rights (the Committee) adopted General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights at its 42nd session, which took place on 4 – 22 May 2009.²

The General Comment reiterates that discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population and that "[n]on-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights."

The General Comment contains many progressive elements, and has incorporated most though not all of ERT's concerns, including:

- An interpretation of the content and scope of the grounds of discrimination which are prohibited by Article 2(2). In addition to the grounds which are explicitly expressed in the text of Article 2(2), the Committee

emphasises that the nature of discrimination varies according to context and evolves over time, and that "a flexible approach to the ground of 'other status' is thus needed to capture other forms" of discrimination. The Committee therefore provides a non-exhaustive list of "other grounds" of discrimination prohibited by Article 2(2), including: disability, age, nationality (covering non-nationals such as refugees, asylum seekers and stateless persons, migrant workers and victims of international trafficking), marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation;

- An affirmation that incitement to discrimination and harassment constitute discrimination under Article 2(2);
- Definitions of direct and indirect discrimination for the purposes of Article 2(2);
- A recognition that multiple/cumulative discrimination has "a unique and specific impact on individuals and merits particular consideration and remedying";
- Confirmation that States Parties "must adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds";
- A reiteration that national legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights;
- An affirmation that States Parties have the obligation "to monitor effectively the

implementation of measures to comply with Article 2(2)” and that “[n]ational strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of prohibited grounds of discrimination”.

Regrettably, it appears that on several occasions, notably regarding the notions of formal and substantive equality, the General Comment uses complex and complicated language to frame concepts which have been well established in simpler and more accurate terms by earlier human rights jurisprudence.

ERT Urges Thai Prime Minister to Rescue 126 Rohingya Pushed Out to Sea by Thai Military

On 23 January 2009, The Equal Rights Trust wrote to Prime Minister Abhisit Vejjajiva of Thailand expressing deep concern over the fate of 126 Rohingya who had been held incommunicado since 16 January 2009 and subsequently forcefully expelled by being put on a boat and cast adrift in international waters.³ The victims of these abuses were stateless persons, members of a minority deprived of their Myanmar citizenship through discriminatory legislation in Myanmar, and did not have the protection of any state.

ERT urged Thailand to comply with its international law obligations, to immediately mount a rescue mission and bring all the Rohingya to safety; treat them humanely and with respect for their dignity; provide them, as a first step, with medical aid, adequate shelter, sustenance and access to immigration and asylum procedures. ERT further stated that Thailand must ensure that UNHCR is given full access to this group as well

as to any other stateless person or irregular migrants arriving in Thailand.

ERT explained that the conduct of the Thai authorities responsible for the incommunicado detention and forced expulsion of the 126 Rohingya, in the face of repeated requests by UNHCR to be given access to visit them, was a blatant and grave violation of the Thai Government’s obligations under international law to protect the right to life and other fundamental rights of all people on its territory without any discrimination.

In December 2008, around 1,000 Rohingya were forcefully expelled onto high seas in dangerously ill-equipped boats. Over 530 of these people are presumed dead or missing. According to survivor accounts, the Rohingya were placed in incommunicado detention by the Thai military for a few days, before being forced out to sea in boats which had no engines. Their hands were tied and they were towed into international waters where they were abandoned with hardly any food or water. As one group was forced onto the boat, four men were reportedly shot dead and a teenage boy was thrown overboard and drowned.

Furthermore, many of the victims may have been refugees fleeing persecution and acute discrimination in Myanmar, their homeland. The actions of the Thai authorities raised grave concerns regarding violations of the right to equality and non-discrimination, the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the right to seek and to enjoy asylum and not be subjected to *refoulement* and the rights to health, food and shelter under international law.

ERT also urged the Thai Prime Minister to establish and implement a new immigration policy which does not discriminate against the Rohingya or any other vulnerable group and which ensures that everyone is provided with effective access to lawful immigration procedures conducted by civilian authorities.

ERT stated that the Thai government's publicly pronounced commitment to investigate the December incidents was compromised by the new expulsions. ERT appealed to the Thai authorities to open an investigation which was prompt, impartial, thorough and independent. Such investigation should particularly focus on the full extent of the role of the Thai military, the alleged extrajudicial execution of five Rohingya and all conduct and instances which amount to torture or cruel, inhuman or degrading treatment or punishment. ERT stated further that the report of this investigation should be made public and anyone found responsible should be brought to justice.

Finally, ERT urged that Thailand accede to the 1951 Refugee Convention and its Protocol and establish a transparent system to process asylum applications in cooperation with the UNHCR.

On 26 January, Thailand promised a transparent investigation into allegations of army abuse of Rohingya boat people, but said the investigation would be led by the military unit at the heart of the scandal. Despite U.N. officials urging Bangkok to let them help with the Rohingya, Foreign Minister Kasit Piromyas said outsiders would not be asked to look into persistent reports of abuse. "It's our internal arrangement and if the military investigation is not satisfactory, we can set up another group to do it," he told reporters after a meeting with U.N. High Commissioner

for Refugees (UNHCR) representative Raymond Hall. "Don't doubt before the investigation is completed," he said. "This is a very transparent government."

ERT is looking forward to the results of the investigation and will continue to intervene as necessary.

ERT Action on World Day of Social Justice

On 20 February 2009, on the inaugural World Day of Social Justice, The Equal Rights Trust (ERT) wrote to Ban Ki-Moon, Secretary-General of the United Nations, welcoming the event as an important step to raise awareness on social inequality, poverty and the widening gap between the most and the least advantaged globally. In the letter ERT appealed to the Secretary-General to promote the *Declaration of Principles on Equality* and to recommend it to relevant UN organisations and agencies.⁴

The World Day of Social Justice was declared by the UN General Assembly through Resolution A/RES/62/10 adopted on 19 November 2007. The resolution invites member states to promote, at the national level, concrete national activities in accordance with the objectives and goals of the World Summit for Social Development (the World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalizing World).

In the letter to the Secretary-General ERT highlighted the unique contribution the *Declaration of Principles on Equality* makes to combating inequality and promoting social justice. The *Declaration* integrates the notion of status-based equality such as gender or race and equality based on factors such as income and socio-economic status.

ERT Appeals to Asian Foreign Ministers to Put the Plight of the Rohingya on the ASEAN Agenda

On 25 February 2009, The Equal Rights Trust and Refugees International wrote to the Foreign Ministers of ASEAN states urging them to address the plight of the Rohingya in the Arakan region of Myanmar.

In the letter ERT and Refugees International (RI) welcomed the important role that ASEAN has played in facilitating international efforts to aid the 2.4 million people of Myanmar affected by Cyclone Nargis. They recognised that this effort was an outstanding example of ASEAN's development into a regional organisation focused on aiding all the people of the region and in upholding humanitarian principles for international assistance.

The letter urged that the resolution of the citizenship of the Rohingya required the intervention of ASEAN. Many Rohingya were fleeing by boat to escape extremely difficult circumstances in their home state of Arakan in Myanmar. Stripped of their nationality in 1982 by the government of Myanmar, the Rohingya since then have been subject to severe governmental restrictions on their rights.

ERT and RI explained that reliable reports document wide ranging discrimination and arbitrary restrictions on Rohingya's rights including freedom of movement and association, confiscatory taxation and fines, arbitrary arrest and detention, extortion, and restrictions on their religious activities. To escape these difficult conditions, many Rohingya had taken dangerous journeys by boat in an attempt to find refuge abroad. While some of the boat people may seek only to better their economic prospects, many Rohingya seek the temporary protection of another state until such time as their

homeland is willing to permit them to enjoy their full human rights as citizens of Myanmar.

ERT and RI stated that the plight of the Rohingya boat people had become a regional problem and called for action by ASEAN Members which could help resolve this issue by urging improved conditions for the Rohingya in Arakan, the institution of fair refugee screening in the countries of arrival to determine if some of the Rohingya should be protected as refugees and agreement on protection from *refoulement*. ERT and RI appealed to Foreign Ministers to ask the government of Myanmar to decriminalise the act of flight.

In addition to this ERT and RI urged:

- ASEAN Members not to consider the repatriation of non-refugee Rohingya until such action has been taken.
- ASEAN to use its good offices in seeking ways to encourage Myanmar to reconsider its policies towards the Rohingya, restore their citizenship, and accept humanitarian assistance if needed to increase the ability of this group of persons within the ASEAN community to live in peace and dignity in their country.
- ASEAN Member states to consider the merit of refugee status for Rohingya and allow the UN Refugee Agency to assist states in this process and provide temporary aid to the asylum seekers.

The Equal Rights Trust Calls for a Unified Approach to Equality at the Durban Review Conference

Between 20 and 24 April 2009, ERT circulated a written statement to the UN and state delegates at the Durban Review Conference

(DRC),⁵ and also addressed the UN and state delegates in an oral statement during the plenary session of the conference.

In the written statement, on which the oral representation was based, ERT called to the attention of states and stakeholders the *Declaration of Principles on Equality* as an instrument of international best practice which formulates comprehensive progressive standards on equality and non-discrimination, from a unified perspective which views racial discrimination in its relatedness to all other forms of discrimination and to the overarching right to equality.

ERT maintained that the *Declaration* establishes a new paradigm on equality, the most important features of which include:

- defining equality as a basic human right, and construing it as autonomous rather than subsidiary to any other right set forth by law, fusing approaches from human rights law and equality law;
- redefining positive action - departing from the concept of formal equality and interpreting positive action (affirmative action) as inherent in substantive equality rather than as an exception or a temporary special measure;
- ensuring consistency in dealing with different types of discrimination, across grounds and areas of activity - facilitating stakeholders in all nations to enshrine the right to equality in a way that eliminates the gaps, inconsistencies and hierarchies of current equality regulations;
- creating a basis, at the level of legal principle, for integrating the two historically segregated notions of equality: identity-based equality (non-discrimination on grounds of sex, race, religion, disability,

sexual orientation, etc.) and equality in terms of social class, economic status, or income.

The DRC process reaffirmed the demand for strong substantive guarantees to equality in national, regional and international law. Despite the positive strides made by the Preparatory Committee, ERT considered that there were a number of limitations to the draft outcome document. In the hope of addressing some of these shortcomings and achieving an outcome which is consistent with the highest standards contained in the *Declaration of Principles on Equality*, ERT urged the adoption of a number of recommendations to the Drafting Committee preparing the DRC outcome document.

In addition, ERT urged the UN High Commissioner for Human Rights:

- In accordance with paragraph 191 (d) of the Durban Programme of Action and paragraph 49 of the “revised version of the draft outcome document” presented by the Chair of the DRC Preparatory Committee on 15 April 2009 the Office of the High Commissioner for Human Rights should support the *Declaration of Principles on Equality* as an instrument of best practice through publicising and disseminating the *Declaration* on the OHCHR website.
 - The High Commissioner for Human Rights should encourage, in her work, the application and implementation of the *Declaration of Principles on Equality*, through her reporting and policy mandate.
- ERT called upon State Delegates to undertake the following:
- All States, in particular those under Universal Periodic Review or reporting to treaty body mechanisms, should acknowledge the *Declaration of Principles*

on *Equality* as a benchmark for equality and accordingly should self-evaluate their laws, policies, procedures and human rights safeguards against the principles contained in the *Declaration* when reporting to UN mechanisms.

- In order to promote the right to equality and combat racism, racial discrimination, xenophobia and related intolerance nationally, States should implement the principles contained in the *Declaration* in national legislation and policy and promote the use of these principles within national court systems.

In relation to civil society, ERT:

- Appealed to international and national NGO's as well as civil society activists to formally endorse the *Declaration of Principles on Equality*.
- Recommended the use of the *Declaration of Principles on Equality* as a reference mechanism to evaluate whether State performance is in accordance with the most progressive equality standards, in particular those in States under Universal Periodic Review or reporting to treaty body mechanisms.
- Called on NGO's to advocate for the principles contained in the *Declaration* to be recognised in national courts and legal policy development, in order to promote the right to equality and combat racism, racial discrimination, xenophobia and related intolerance nationally.

ERT Joins Appeal for Human Rights Council Special Session on Sri Lanka

On 13 May 2009, The Equal Rights Trust joined 129 other NGOs from around the world in calling upon the UN Human Rights

Council (UNHRC) to hold a Special Session on the current human rights catastrophe in Sri Lanka, as a matter of urgent concern.

In the letter ERT along with the other 129 NGO set out their concerns regarding the situation in Sri Lanka. The UN had estimated that more than 6,400 people had been killed since the beginning of 2009 in the fighting between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), and many thousands had been severely injured; at the time of writing the letter 50,000 people remained trapped in the tiny area of land controlled by the LTTE, in danger of death and injury from the ongoing fighting and suffering from a desperate shortage of medical supplies, food and water; 170,000 people who had fled from LTTE controlled areas to camps operated by the Government face dire conditions.⁶

The concerns expressed in the letter regarding the human rights situation in northern Sri Lanka included core problems of discrimination against minorities and impunity for human rights abuses, including by the security forces. On the basis of these concerns and the Human Rights Council's role and responsibility, pursuant to its mandate, to monitor the implementation of human rights in situations of armed conflict, ERT joined 129 other NGOs in strongly urging the Human Rights Council to: (1) uphold its mandate with urgent and concrete actions; (2) hold a special session on Sri Lanka; (3) include the human rights situation of Sri Lanka into its agenda on a regular basis; and (4) immediately send an international mission to assess the needs of those civilians in the conflict affected areas with any unhindered access.

On 26 and 27 May, the UN Human Rights Council held a Special Session on Sri Lanka,

but with very disappointing results. ERT is currently engaged in follow-up advocacy.

ERT Submits Written Comments to the UK Government Calling for Improvements to the Equality Bill

On 24 April 2009 the UK government published the Equality Bill. The Bill is currently in the process of undergoing detailed scrutiny by a Parliamentary Public Bill Committee. The Equality Bill seeks to “simplify the law which, over the last four decades, has become complex and difficult to navigate”, by replacing 9 different acts and 100 other measures with a single act.

Aside from unifying existing legislation, the bill, introduced by Minister for Women and Equality, Harriet Harman, contains a number of progressive measures, including:

- **Socio-economic duty:** a duty on public bodies to consider what action can be taken to reduce socio-economic inequality;
- **Gender pay gap reporting:** a requirement for employers with more than 250 employees to report on the gender pay gap, to be introduced in 2013;
- **Age discrimination ban:** a ban on all forms of age discrimination, extending the ban from discrimination in employment to cover the receipt of goods and services;
- **Positive action:** a provision allowing employers to take positive action to increase opportunities for those from under-represented groups.

ERT has been actively involved in the consultation and evidence gathering stages of the Bill’s amendment and scrutiny processes. On 19 May 2009, ERT responded to the Bill Committee’s request for evidence,

welcoming the Bill’s attempt to establish a unified approach and address inconsistencies, but drawing attention to some key gaps and inconsistencies in the legislation.⁷ Drawing on the *Declaration of Principles on Equality*, ERT focussed on three areas which were viewed to be of primary importance:

1. Unprotected grounds: The failure to protect people who are discriminated against because of characteristics other than those listed in the Bill. ERT proposed the adoption of a “test-based approach” to including new grounds, as used in South Africa and endorsed in the *Declaration*.

2. Multiple discrimination: The failure to protect from indirect discrimination and harassment people who face discrimination because of more than one characteristic. ERT recommended amendments to include adequate protection.

3. Positive action: The decision to make positive action permissible. ERT proposed that positive action, being necessary to address past disadvantage should be required as part of realising equality.

On 5 June 2009, ERT also responded to the government’s consultation on Multiple Discrimination, welcoming the proposals as a positive step, but calling for more to be done. ERT’s response called on the government not to limit protection to cases involving only two grounds, saying that fears of undue burden on employers and other organisations to be bound by the law were unfounded given the current duties under UK law. ERT also called for the provisions to be extended to include protection from indirect discrimination and harassment, citing the number of multiple discrimination cases already brought under UK law which had involved these types of discrimination.⁸

Over the summer of 2009 the government is launching a number of further consultations on age discrimination and on public sector equality duties that will influence the final

scope of the Equality Bill. ERT will continue to work on this agenda to secure the highest possible standards on equality, as contained in the *Declaration of Principles on Equality*.

¹ Jarlath Clifford is Legal Officer at The Equal Rights Trust.

² The text of the UN Committee on Economic, Social and Cultural Rights General Comment No. 20 is available at: <http://www2.ohchr.org/english/bodies/cescr/docs/gc/E.C.12.GC.20.doc>.

³ The text of the ERT letter to Prime Minister Abhisit Vejjajiva is available at: <http://www.equalrightstrust.org/ertdocumentbank/Letter%20to%20Prime%20Minister%20of%20Thailand.pdf>.

⁴ The text of the ERT letter to UN Secretary General Ban Ki-Moon is available at: <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20World%20Social%20Justice%20day%20letter%20JC.pdf>.

⁵ The text of ERT written statement to the Durban Review Conference is available at: <http://www.equalrightstrust.org/newsstory200409/index.htm>.

⁶ The text of the joint letter is available at: <http://www.equalrightstrust.org/ertdocumentbank/Appeal%20Letter-SS%20on%20Sri%20Lanka-090513-FINAL-130%20Signatories.pdf>.

⁷ The text of Memorandum submitted by ERT to the Public Bill Committee for the Equality Bill is available at: <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20Memorandum%20to%20the%20Committee%20on%20the%20Equality%20Bill.pdf>.

⁸ The text of the ERT response to the United Kingdom Government Equalities Office consultation on multiple discrimination is available at: <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20Multiple%20discrimination%20Consultation%20Response.pdf>.

Update on Current ERT Projects

Project “Legal Standards on Non-discrimination and Equality”

Following the launch of the *Declaration of Principles on Equality* on 21 October 2008, ERT continued its efforts to promote the *Declaration* and has undertaken advocacy work on the basis of the *Declaration*. This included:

- Presenting the *Declaration of Principles on Equality* to the British Equality and Diversity Forum.
- Submitting a brief to the members of the UN Committee on Economic, Social and Cultural Rights related to the drafting of a General Comment on discrimination, and making recommendations based on the *Declaration of Principles on Equality*.
- Presenting the *Declaration* to the UN High Commissioner on Human Rights, Navanethem Pillay, and discussing with her the role it might play in the work of her office.
- Promoting the *Declaration* to the UN Secretary-General Ban Ki-Moon and explaining how the new approach enshrined in the *Declaration* makes the connection between social justice and equality.
- Meeting the Council of Europe Commissioner on Human Rights, Thomas Hammarberg, to discuss the *Declaration* with him.
- Promoting the *Declaration* through oral and written statements and to civil society organisations and other stakeholders at the Durban Review Conference in Geneva.
- Lobbying for support of the *Declaration* at the UN Alliance of Civilisations gathering in Istanbul; the European Parliament’s inter-group on secularism and religion in Brussels; and the Annual Conference of the European Foundation Centre in Rome.
- Using the *Declaration* as the principle strategic instrument to promote and lobby the UK parliament to improve the content of the Equality Bill 2009.

Project “Law Enforcement Discrimination and Deaths in Custody”

Launched in December 2007, this project has three main objectives: (i) to systematise the existing pool of knowledge on the relationship between deaths in custody and discriminatory policy or conduct by law enforcement bodies; (ii) to further enhance the global understanding of the nexus between deaths in custody and discrimination; and (iii) to develop and promote new advocacy tools that will complement existing investigatory standards into custodial deaths by adding a distinct anti-discrimination component.

The project consists of four country reports which will be submitted by external consultants to form separate substantive chapters within the final thematic report. In May 2009, ERT engaged a senior research consultant and project manager to guide the work in its final phase. Following a decision to do research in the United States, ERT started US field work in April 2009, focusing on California and Texas. In India field research has been ongoing in the first half of 2009 in two states - Karnataka and Maharashtra. In Nige-

ria, field research has been ongoing in four states – Lagos, Kano, Enugu and Abuja. A report on the subject is expected to be published in December 2009.

Project “Detention of Stateless Persons”

The project “Detention of Stateless Persons” started in May 2008 with the aim of strengthening the protection of stateless persons who are in any kind of detention or imprisonment due at least in part to their being stateless, and to ensure that they can exercise their right to be free from arbitrary detention without discrimination. UNHCR and others have expressed the view that stateless persons should not be detained only because they are stateless. If detention has no alternative, its maximum length should be specified, based on strict and narrowly defined criteria. However, this principle has not been translated into international or national legal standards and into practice. Progress is hampered by a lack of information on cases of detention, including prolonged and indefinite detention of stateless persons.

The project therefore pursues two interrelated objectives: (i) to document the detention, or other forms of physical restriction of stateless persons (*de jure* and *de facto*) around the world; (ii) and to use this information to develop detailed legal analysis as a basis for international and national advocacy against the arbitrary detention of stateless people.

The project has involved the development of global networks for collaboration with other organisations in order to place this issue on the agenda. ERT now participates in the statelessness working group coordinated by Refugees International which has helped ERT to engage and collaborate with a number of key players in the field of statelessness.

In February 2009 the project published two working papers which featured as reading list papers for a short course on statelessness organised by the Refugees Studies Centre at the University of Oxford. Country and region specific documentation has also gained pace from January to June 2009. Research is well underway inside the UK and includes reviews of legislation, contact with relevant UK experts and support groups working with detainees. Contact has also been made with key government bodies and a series of interviews has been conducted. Documentation efforts continue in countries including the USA, selected countries in Central and South America, Thailand, Malaysia, Bangladesh, Kenya, Egypt and Australia.

On the advocacy side of the project an article on the key issues and motivation of the project was published in the March 2009 edition of the *Forced Migration Review* and in January 2009 ERT published an article in *The Guardian* on the issue of statelessness in the context of detention in Guantanamo Bay. In February 2009 ERT published an article in the *Telegraph* concerning forced expulsion of Rohingya in Thailand which follows on from a letter ERT wrote to the Prime Minister of Thailand in January expressing concern over situation of Rohingya in Thailand.

Project “Religious Diversity and Healthcare in Europe”

This project started in June 2008 with the aim of producing a thematic dossier mapping out the problem field on “The State, Religious Diversity and Healthcare in Europe”. The thematic dossier has been completed in February and since then it has been receiving feedback from selected expert readers. Its publication is planned for September 2009.

Project “Promoting Better Implementation of Equality and Non-discrimination Law in India”

This project started in May 2009 with support from the UK Foreign and Commonwealth Office and in partnership with the Human

Rights Law Network (India). The project will run until March 2011 and its purpose is to build the capacity of NGOs and lawyers to implement equality and non-discrimination legislation and policy in India through the promotion of national, regional and international standards and best practice.

ERT Work Itinerary: January - June 2009

January 9, 2009: Met with the UN High Commissioner of Human Rights and members of her office to discuss cooperation on promoting the *Declaration of Principles on Equality*, in Geneva.

January 9 - 11, 2009: Participated in Oxford Refugee Studies Centre Short Course on Statelessness, including conducting a session on *De Facto* Statelessness and contributing course material.

January 23, 2009: Wrote to the Prime Minister of Thailand, expressing grave concern over the discriminatory forced expulsion of stateless Rohingya from Thailand.

January 25, 2009: Published article “Which Country is Theirs Anyway?” on the stateless detainees at Guantanamo, *The Guardian*, UK.

January 29, 2009: Met with representatives of the UK Foreign and Commonwealth Office’s Iran Co-ordination Group to discuss the human rights situation in Iran.

January 29, 2009: Attended launch of “Detained Lives: the Real Cost of Indefinite Immigration Detention”, organised by the London Detainee Support Group, in London.

February 4, 2009: Published two Working Papers presenting work in progress: 1) “Research Working Paper: The Protection of Stateless Persons in Detention”; 2) “Legal Working Paper: The Protection of Stateless Persons in Detention under International Law”.

February 6, 2009: Published article “Thailand Must Stop Dumping Stateless People at Sea”, *The Daily Telegraph*, UK.

February 20, 2009: Wrote to Ban Ki-Moon, Secretary-General of the United Nations, on the inaugural World Day of Social Justice, and appealed to him to promote the *Declaration of Principles on Equality* and to recommend it to relevant UN organisations and agencies.

February 22 - 23, 2009: Participated in consultation meetings organised by Article XIX, resulting in the adoption of the Camden Principles on Freedom of Expression and Equality, in London.

February 25, 2009: Sent joint letter to the ASEAN summit, urging a resolution of the

Rohingya issue from a regional stand point through engaging with Myanmar on the question of citizenship rights for Rohingya in Myanmar.

March 2, 2009: Met with representatives of the UK Charity Commission to discuss the implications of the equality principles for establishing equality and diversity best practices and regulating the charity sector in the UK, in London.

March 14, 2009: Participated as keynote speaker in the Tenth Annual Student Conference on Human Rights, spoke on “The Defamation of Religion”, in Nottingham, UK.

March 25, 2009: Met with a representative of the British Equality and Human Rights Commission to discuss the inclusion of equality aspects in the UK migration and border policies, in London.

March 31, 2009: Participated in Equality and Diversity Forum Roundtable discussion on “Refugees, Migrants and the Equality Agenda”.

April 2009: Published article “The Legal Limbo of Detention” in the Forced Migration Review, Issue 32.

April 6 - 8, 2009: Participated in the UN Alliance of Civilizations Second World Forum, to promote the *Declaration of Principles on Equality* and present the results of the ERT study on religion and healthcare, in Istanbul.

April 14, 2009: Made a presentation at the Religion and Democracy grouping of the European parliament on the ERT study on religion and healthcare, in Brussels.

April 20 - 24, 2009: Participated in the UN Durban Review Conference, made an oral statement and submitted a written statement referring to the *Declaration of Principles on Equality*, in Geneva.

May 13, 2009: Joined other NGOs from around the world in calling upon the UN Human Rights Council (UNHRC) to hold a Special Session on the current human rights catastrophe in Sri Lanka, as a matter of urgent concern.

May 14 - 16, 2009: Participated in conference “Fighting Poverty, Creating Opportunities”, organised by the European Foundation Centre, and moderated one of its sessions, in Rome.

May 2009: Promoted the *Declaration of Principles on Equality* through an interview entitled “A New Equality Paradigm”, published in *Effect*, the journal of the European Foundation Centre.

May 19, 2009: Participated in seminar “The UK Bill of Rights and Social and Economic Rights”, organised by the British Institute of Human Rights, in London.

May 19, 2009: Submitted written comments to the UK Public Bill Committee for the Equality Bill 2009, urging the acceptance of several amendments to its text based on the *Declaration of Principles on Equality*.

May 20, 2009: Met with representatives of UKCAE (the UK Council on Access and Equality) to explore inclusion of ERT in the Council.

June 5, 2009: Submitted a consultation response to the UK Government Equalities Office’s, “Equality Bill: Assessing the Impact of a Multiple Discrimination Provision”, discussion document.

June 15, 2009: Attended launch of “Human Rights Inquiry Report”, organised by the British Equality and Human Rights Commission, in London.



The Equal Rights Trust

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 and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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