On 16 September 2014, the United Nations General Assembly began its 69th session. At the top of the agenda for the session is the consideration of a new set of goals to guide human development efforts, to replace the Millennium Development Goals (MDGs), which will expire in 2015. One of the key questions which member states will debate is the place of equality within the new development framework. This discussion is likely to focus in particular on proposed Goal 10 – Reduce inequality within and among countries – of the draft Sustainable Development Goals (SDGs), adopted by the Open Working Group for Sustainable Development Goals.3

This article will argue that Goal 10 must become part of the final post-2015 SDG framework, if that framework is to be effective in addressing one of the key obstacles to human development. More specifically, it argues in favour of retaining and strengthening Target 10.3, which would require states to:

"[E]nsure equal opportunity and reduce inequalities of outcome, including through eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and actions in this regard."

It is my contention that the SDG framework must reflect an understanding of how inequality and discrimination limit people’s choices and thus frustrate development efforts. Further, I believe that there is a strong case for the application of what I will call an “equal rights approach” – that is, an approach which incorporates the need to enact and enforce equality legislation as a specific development aim – in the framework.
My argument has two pillars. First, that the current MDG framework – that which the SDGs will replace – largely failed to account for equality (with the notable exception of gender equality), with serious negative consequences. This omission is, in my view, both a conceptual aberration, when viewed in the context of the evolution of the concept of human development, and a serious limitation in practice. In part one of the article, I analyse – albeit selectively – a number of different elaborations and applications of the concept of human development, finding that all, with the exception of the MDGs, reflect a strong concern with equality. In the second part, I examine recent literature on the extent to which the omission of equality from the MDG framework has had an impact on human development efforts. Focusing on identity-based inequalities (as opposed to income or spatial inequalities), I conclude that the omission has had a distinct negative impact, both on the marginalised identity groups in question and on the ability of states to make progress towards their MDG targets.

The second pillar of my argument is that – almost irrespective of the limitations of the MDG framework in respect of equality – there is a strong positive case for the new SDG framework to be sensitive to identity-based inequalities. Moreover, I argue, there is a case for the SDGs to adopt an approach which puts the rights to equality and non-discrimination at the centre of development efforts.

In part three, I seek to illustrate how the rights to non-discrimination and equality provide not only a structural framework for analysing and understanding obstacles to development, but also offer a potential means to address development ends. I aim to show how, if properly defined, implemented and enforced, equality law can provide a mechanism for individuals and communities to challenge the discrimination which acts as a brake on their development. Based on this analysis, in the fourth part, I elaborate in more detail how I believe that the SDG development framework should best take the rights to equality and non-discrimination into account. In the final part, I examine the equality implications of various alternative options which have been mooted by member states during negotiation, arguing that even in the worst case, there will remain a strong argument for the application of an “equal rights approach” to development.

1. Equality of What? Equality and the Concept of Human Development

There is a growing consensus that, with the exception of gender inequality, the MDGs – with their focus on relative and absolute measures of progress – largely failed to address inequality. This view is shared by a wide range of actors, from the Institute of Development Studies, which called the omission of equality the “major limitation” of the MDGs to Save the Children, which referred to inequality as a “blind spot” in the framework.

I consider the failure to account for inequality to be not only a practical limitation, but a conceptual aberration. In my view, the evolution of the concept of human development – from the foundational work of Amartya Sen through to the “re-affirmation” of the concept presented in the 2010 Human Development Report – illustrates that equality has consistently been a central concern of those involved in human development efforts. The MDGs are the exception.

While there may be different views on what the concept “human development” entails, the definition provided in the first Human Development Report produced by the United Nation Development Programme (UNDP) in
1990 is well-regarded as a benchmark⁶ – I will take it as such. The 1990 Report states that:

"Human development is a process of enlarging people’s choices. In principle these choices can be infinite and change over time. But at all levels of development, the three essential ones are for people to lead a long and healthy life, to acquire knowledge and to have access to resources needed for a decent standard of living. If these essential choices are not available many other opportunities remain inaccessible.

But human development does not end there. Additional choices, highly valued by many people, range from political, economic and social freedom to opportunities for being creative and productive and enjoying personal self-respect and guaranteed human rights.

Human development has two sides: the formation of human capabilities – such as improved health, knowledge and skills – and the use people make of their acquired capabilities – for leisure, productive purposes or being active in cultural, social and political affairs.”⁷

As these paragraphs illustrate, the definition of human development which is advanced in the Report relies heavily on the work of Amartya Sen on the “capabilities approach”. Indeed, Alkire has argued that the capabilities approach provides the “most visible philosophical foundation for the concept of human development”.⁸ The essence of the capabilities approach was first advanced by Sen in his ground-breaking 1979 lecture, entitled Equality of What? As the title indicates, Sen’s work on the capabilities approach – and his later work on its application to human development – was a direct consequence of his concern with equality. In the lecture, Sen critiqued three different philosophical approaches to what he calls the “equality aspect of morality” – utilitarian equality, total utility equality and Rawlsian equality – and rejected all of them, individually and in combination, as being inadequate to address the full range of human needs and interests.⁹ His central contention was that if we are seeking to achieve a just and relevant equality, it is the distribution of capabilities – rather than utility or social goods – which should be the measure. He concluded that:

“It is arguable that what is missing in all this framework is some notion of ‘basic capabilities’: a person being able to do certain basic things. The ability to move (...) the ability to meet one’s nutritional requirements, the wherewithal to be clothed and sheltered, the power to participate in the social life of the community.”¹⁰

In his 1989 essay Development as Capability Expansion, Sen developed his original thesis, building on work undertaken by himself and others in the intervening decade. He elaborated on the capability approach as a means for assessing quality of life:

 “[T]he ‘capability approach’ sees human life as a set of ‘doings and beings’ – we may call them ‘functionings’ – and it relates the evaluation of the quality of life to the assessment of the capability to function (...) The included items may vary from such elementary functionings as escaping morbidity and mortality, being adequately nourished, undertaking usual movements etc., to many complex functionings such as achieving self-respect, taking part in the life of the community and appearing in public without shame.”¹¹

Particularly worthy of note – given the impact which Sen’s thinking would have on the concept of human development which was adopted in the Human Development Report series – is the sustained focus on equality in
the essay. While the 1979 lecture arrived at the need for a concentration on a capabilities approach through an assessment of different approaches to achieving equality, the 1989 article looks at how different types of inequality – income, class and gender – impact upon the capabilities of different groups. Aside from income inequality, Sen’s explicit focus in the essay is on gender inequalities and how the capabilities model is better equipped to measure these than other approaches; nevertheless, he is clear that this is “only one illustration of the advantages that the capability approach has” in assessing inequalities.

As he states:

“[I]n so far as income and wealth do not give adequate account of quality of life, there is a case for baling [sic] the evaluation of inequality on information more closely related to living standards. Indeed, the two informational bases are not alternatives. Inequality of wealth may tell us things about the generation and persistence of inequalities of other types, even when our ultimate concern may be with inequality of living standard and quality of life (…) [b]ut this recognition does not reduce the importance of bringing in indicators of quality of life to assess the actual inter-class inequalities of well-being and freedom.”

It seems clear then that equality was a key consideration in Sen’s understanding of capabilities and thus of development. Moreover, it is clear that he believed that the capabilities approach provided tools to assess – and therefore to address – both inequalities of income and identity-based inequalities.

In a 2010 paper for the Oxford Poverty & Human Development Initiative, which traces the evolution of the definition of human development through the Human Development Report (HDR), Sabina Alkire finds that equality has been a consistent theme throughout the series. She concludes that “inequality was mentioned in nearly every global HDR since 1990 and has been prominent in the themes of five of them.” She highlights the 2005 report which states that:

“Human development gaps within countries are as stark as the gaps between countries. These gaps reflect unequal opportunity – people held back because of their gender, group identity or location (…) overcoming the structural forces that create and perpetuate extreme inequality is one of the most efficient routes for overcoming extreme poverty.”

However, Alkire is critical of the way in which HDRs in the period between 1990 and 2010 displayed an increasing tendency to focus narrowly on “enlarging people’s choices”, thus losing “a great deal of the richness present in the longer definition from 1990”. One of her central criticisms is that this narrower definition is ill-suited to addressing inequality, creating a framework in which “human freedoms could well be expanded in ways that exacerbate inequality”. Alkire calls for a renewed definition of human development which should include “equity” (not equality) together with efficiency as one of the “key principles” which must inform the ways in which development seeks to expand freedoms.

The 2010 HDR, heavily informed by Alkire’s work, “reaffirms” the definition of development initially provided in the 1990 Report, reflecting inter alia the principles of equity, empowerment and sustainability. In establishing the reaffirmed concept, the report recognises that human development is “about addressing structural disparities” and must be “equitable”. In a major departure which reflects this renewed focus on
equality, the 2010 HDR launched three new indices, including an “Inequality-adjusted Human Development Index” and the “Gender Inequality Index”.23 The conscious move to correct the narrower focus identified by Alkire and to incorporate new indices looking specifically at inequality is, in my view, proof of an interest in equality that is at once long-standing and increasing.

A similar interest in equality can be seen in the UN Millennium Declaration – the catalyst for the development of MDGs. The Declaration first refers to equality as one of the principles which the signatories recognise a “collective responsibility to uphold”.24 In paragraph 6, equality is listed as one of six fundamental values which the framers hold to be “essential to international relations in the twenty-first century”.25 The principle is elaborated as follows:

“No individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured.”

So what of the MDGs themselves? In a number of ways, the MDGs represented a specific – and limited – expression of the concept and aims of human development – what Alkire calls “a particular quantitative articulation of some core human development priorities”.26 I concur with the view expressed by a range of commentators who contend that equality – as it had been expressed by Sen, in the HDRs and in the Millennium Declaration – was one principle which became “lost in translation” between the Millennium Declaration and the MDGs.

A UN Task Team established to investigate options for the post-2015 development agenda, writing in 2012, acknowledged that “despite many of the successes of the MDGs” they have “not managed to integrate all principles outlined in the Millennium Declaration, including equality”.27 Other commentators have been more direct. Human Rights Watch has argued that the MDGs “largely bypassed” the key principles of human rights, equality and non-discrimination contained in the Millennium Declaration.28 Claire Melamed of the Overseas Development Institute has stated that despite the fact that “equality is one of the core values” of the Millennium Declaration, “the focus on average progress measured at the country and global level, have masked the inequalities that lie behind these averages”.29 Naila Kabeer, in a report for the Institute of Development Studies, has gone as far as to state that the “major limitation” of the MDG agenda has been a failure to “incorporate concrete measures on equality and social justice”.30

As these assessments indicate, the lack of recognition given to the principle of equality in the MDGs represents a departure from the approach taken in the Millennium Declaration and that which was always implicit and often explicit in notions of human development as expressed by Sen and in the HDRs. The next section will briefly examine the consequences of this departure and of the effective omission of equality from the MDG framework.

2. Lost in Translation: Equality and the Millennium Development Goals

My criticism of the lack of focus on inequality in the MDGs is not limited to conceptual consistency. I contend that the approach which the MDGs take – using both absolute and relative targets to drive progress in particular areas of development – has resulted in a lack of focus on the impact of discrimination and inequality. This lack of focus has, in turn, had a number of deleterious effects, both on
those communities who are excluded from development efforts and, at the state level, on the success of policy measures designed to make progress towards the MDGs. I also believe that there is growing – though not yet irrefutable – evidence that the very nature of the MDG targets may have driven development approaches which have a tendency to focus on "low hanging fruit". If this is the case – that the MDG framework does not just mask inequality, but misdirects development efforts away from a focus on equality – then the implications are serious, though this conclusion is not critical to my argument.

One consequence of the increasing debate on the new SDG framework, and the discussion of the place of equality in that framework, is that a wealth of data has been presented highlighting the persistence of inequality even in areas where progress towards MDG targets has been rapid at the aggregate level. It is not the purpose of this article to exhaustively review – let alone add to – the research and analysis which has been undertaken by others on this issue. Nevertheless, a review of some recent literature on inequality will, I hope, illustrate the argument that the lack of focus on inequality has had a negative effect on certain groups and on the efficacy of programmes designed to achieve the MDGs at the aggregate level.

I should begin by noting that I focus here on identity-based inequalities alone, omitting consideration of income and spatial inequalities. This is not because addressing these inequalities is not critical to development – I believe that it is and there is extensive evidence to this effect. Nor is it because these inequalities cannot be addressed through equality law. Rather, it is because I believe that the case for the application of an equal rights approach to development can be made most simply through a focus on those "traditional" characteristics – or grounds of discrimination – which are well-recognised.

I should also note that I exclude gender inequality from this assessment. This is for the simple reason that gender inequality it is the only identity-based inequality which is specifically addressed in the MDG framework, in the form of MDG 3: Promote gender equality and empower women. I believe gender is, in a very real sense, the exception which proves the rule – illustrating the progress which can be made where reducing inequality is a specific development objective. This much is illustrated by the 2014 MDG Progress report, which records strong progress in respect of all MDG 3 targets.

Two recent studies illustrate the impact of ethnic and religious inequalities on progress towards MDG outcomes for particular minority groups. In a report produced for the Overseas Development Institute in 2010, Naila Kabeer found that "measuring 'average' progress at the national level tends to conceal major inequalities at the sub-national level". This conclusion was based on a wide-ranging analysis of data on progress towards achieving different MDGs in states in Latin America, Asia and Africa. The findings – many of which are also highlighted in an article for this journal – are stark.

In Latin America, Kabeer’s analysis found that persons of indigenous or African descent are more likely to experience extreme poverty and that in some countries there are significant ethnic disparities in access to education and child mortality, despite strong overall progress in each of these areas. In Asia, she concluded that "[r]apid economic growth and declining poverty levels in the region have not reduced inequalities" and found that in some cases "inequalities between social groups have increased".
an example, she highlights Nepal, where the decline in poverty headcount between 1995-6 and 2003-4 ranged from a 46% reduction amongst high-caste Hindus to just 6% for Muslims; significantly, these variances are essentially “hidden” behind a headline national decrease in excess of 10%. Despite the relative lack of consistent data on ethnic identity and poverty in Africa, Kabeer’s assessment of the available data leads to a similar conclusion to that reached in the other two regions under assessment: that “ethnicity is linked to poverty, health, and education outcomes”. As Claire Melamed puts it succinctly, the data collated by Kabeer indicates that “MDG indicators are consistently worse for disadvantaged groups in every region”.

A more recent study, conducted by Andy Sumner for the Institute of Development Studies, analyses data from the Demographic and Health Survey (DHS) to examine how levels of education poverty, health poverty and nutrition poverty differ according to the “social characteristics” of heads of households in 33 low-income countries (LICs) and lower middle-income countries (LMICs). As the author notes, the DHS is “a standardised, nationally representative household survey”, which allows for comparison of outcomes data over time, in this case between 1998 and 2007. Among the report’s important conclusions is the finding that:

“Two-thirds of the education, health and nutrition poverty in LICs and LMICs (combined) is to be found among those households where the head is the member of an ‘ethnic minority group’ (meaning an ethnic group which is not the largest ethnic group).”

The report finds that the incidence of the three different types of poverty fell for both ethnic minority groups and the largest ethnic group in the period 1998-2007 – and in the case of both education and health poverty fell marginally further among ethnic minorities. Nevertheless, in 2007, ethnic minority groups still constituted 68.5%, 68.9% and 72.3% of all those affected by education, health and nutrition poverty respectively in the countries under examination.

The recent literature is not limited to the examination of ethnic disparities. A 2011 report by the UN Department of Economic and Social Affairs examines strategies for inclusion of disability issues in the MDG framework. The authors begin by expressing concern at the “striking gap” in the framework, in that persons with disabilities are “not mentioned in any of the 8 goals or the attendant 21 Targets or 60 Indicators”. The report provides a secondary review of available global data in an effort to assess the situation of persons with disabilities in respect of each of the Goals, Targets and Indicators in the MDG framework. It cites statistics which show, for example, that while persons with disabilities make up approximately 15% of the global population, they constitute approximately 20% of the world’s poorest citizens and that 90% of all disabled children in developing countries do not attend school. The assessment reveals that persons with disabilities often remain excluded from access to the economy and many basic services and that their outcomes are below average in respect of many MDGs. This is the case both in respect of relative targets, such as Target 4 (Reduce by two thirds, between 1990 and 2015, the under-five mortality rate), and absolute targets such as Target 2 (Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling).

Research by Save the Children and Help Age International illustrates the impact of age inequalities on progress towards the MDGs.
In this report *Born Equal: How reducing inequality could give our children a better future*, Save the Children presents evidence of the impact of caste, religion, gender and spatial inequalities on the development outcomes of children. The report finds both that “children are hardest hit by inequality” because of their particular lifestage and that inequality is higher among children than the general population.\(^{52}\) Using data from 32 low- and middle-income countries, the report finds that children in the richest decile have access to 35 times the income of those in the poorest decile – a gap which is double that among the general population (a factor of 17).\(^{53}\) At the other end of the age spectrum, HelpAge International has presented evidence that “older people disproportionately experience chronic poverty” and concluded that “[f]or the goal of halving extreme poverty to be applied equitably older women and men must be targeted”\(^{54}\).

In addition to the impact which the MDG’s lack of focus on inequality has had on the development outcomes of different ethnic, religious, disability and age groups, there is evidence that failure to reach these groups is an impediment to progress towards MDG targets more broadly. The aforementioned UN Department of Economic and Social Affairs report on disability and the MDGs argues that “unless persons with disabilities are included, none of the MDGs will be met” \(^{55}\) – it will be impossible for states to reach absolute targets, while progress in meeting relative targets will be significantly restricted. HelpAge International draws a similar conclusion, arguing that a failure to take targeted measures – such as social pensions – to reach the 10% of those living on a dollar a day who are over 60 impedes progress towards MDG 1 (Halve, between 1990 and 2015, the proportion of people whose income is less than $1.25 a day).\(^{56}\)

Recent research undertaken by the Equal Rights Trust in Kenya illustrates that a failure to address ethno-regional inequality has affected progress towards development goals, both in respect of relative targets (to reduce child mortality by two thirds (MDG 4), for example) and absolute targets (to ensure that all children receive basic primary education (MDG 2), for example).\(^{57}\) Using data from Kenya, the Equal Rights Trust illustrates how regional inequalities – which equate to ethnic inequalities in Kenya – have been masked by strong progress at a national level. Moreover, the data indicates that failure to address these inequalities may prevent the country from achieving these targets by the 2015 deadline. The Trust presents data from the Demographic and Health Survey in Kenya which illustrates that the rate of progress in reducing child mortality in certain regions of the country is too slow to allow the country to meet the MDG 4 target, despite strong progress at the aggregate level.\(^{58}\) In respect of education, the Equal Rights Trust cites research by the organisation Uwezo Kenya\(^{59}\) in support of its conclusion that:

“Since the introduction of free primary education in 2003, Kenya has made rapid progress towards meeting MDG 2, with net enrolment in primary education rising to over 90%. Yet significant regional disparities indicate that Kenya will not achieve universal primary education by 2015 unless resources are diverted towards marginalised areas.”\(^{60}\)

As this brief review indicates, there is mounting evidence that the lack of clear focus on inequalities in the MDGs has had consequences both for particular disadvantaged groups and for the progress which states have made in achieving MDGs. A number of commentators have gone further than this, putting forward the view that the lack of an equality focus in the MDGs has actively distorted
or misdirected development efforts. The UN Department of Economic and Social Affairs has stated that while tackling inequalities may seem to be implied by the use of goals and targets focused on increasing the capabilities of all, “this implicit inclusion seems to rarely lead to their inclusion in either general or targeted MDG efforts”. A similar view is taken by the UN System Task Team on the Post-2015 Development Agenda, which concluded that:

“Focusing only on the symptoms and manifestations of poverty or exclusion (e.g. lack of income, education or health), rather than their structural causes (e.g. discrimination, lack of access to resources, lack of representation), has often led to narrow, discretionary measures aimed at addressing short-term needs.”

Some commentators have been harsher in their assessment of the failure to reflect an inequality focus in the MDGs. As mentioned above, Save the Children refers to inequality as a “blind spot” in the framework which has resulted in both “a failure to incentivise equitable progress towards common goals” and suggestions that “in some cases the goals have created perverse incentives (…) for example, a tendency only to provide services to the easiest-to-reach”. Kabeer explains the problem thus:

“The failure to retain an explicit commitment to equality, tolerance and solidarity in the formulation of the MDG agenda has led to an uneven pace of progress on achievements, with persisting inequalities between different social groups. Unless the MDGs are adapted to the realities of intersecting inequalities and social exclusion within the different regions, they may not only fail to provide a pathway to a more just society, but may even exacerbate existing inequalities.

Using national averages to measure progress encourages going for the ‘low hanging fruit’ – that is, helping those who find it easiest to graduate out of poverty.”

While there are valid questions to be asked about whether the MDG’s focus on rapid progress towards absolute goals and significant shifts in national averages has indeed misdirected development efforts, I believe that two clear conclusions can be drawn. First, that the MDG framework’s lack of sensitivity to identity-based inequalities (other than gender) has meant that those groups which are marginalised or have pre-existing vulnerabilities have frequently been left behind by development efforts. Second, that failure to address the needs of these groups will, in the long run, frustrate efforts to achieve the Goals themselves.

3. Pathways to Development: Equality, Discrimination and Development

The conclusion that one of the shortcomings of the MDG framework was its failure to properly account for equality has become increasingly widely-accepted in recent years. For proof we need only look at the two main sets of proposals which have been put forward to replace that framework. The report A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development, produced by the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda in 2013 calls for five “transformative shifts” which must underpin any new development framework, one of which is a focus on equality. It states that the new framework must ensure that “no person – regardless of ethnicity, gender, geography, disability, race or other status – is denied universal human rights and basic economic opportunities”.

Similarly, as we have seen in the introduc-
tion to this article, the draft proposals of the Open Working Group for Sustainable Development Goals (the Open Working Group) include a proposed Goal to “reduce inequality within and among countries”.66

What has received less attention is the argument that discrimination – in addition to substantive inequalities between different identity groups – can be an obstacle to development, though the UN High Commissioner for Human Rights67 and human rights organisations including the Equal Rights Trust68 and Human Rights Watch69 have made the argument. The position which I advance here has two key elements: first, that an understanding of the rights to equality and non-discrimination can provide useful tools to understanding the causes of disadvantage and associated obstacles to human development; and second, that the adoption and implementation of comprehensive equality law, complying with international human rights standards, can provide a means to achieve development ends. In an attempt to illustrate this, I will use a case study from my own experience.

In March 2011, as part of a joint Equal Rights Trust – Kenya Human Rights Commission field mission,70 I visited Burat, a village on the outskirts of Isiolo, a town in Central Province, Kenya. Our group was ushered into the community hall, a wood and corrugated iron building surrounded by largely barren land. Inside, community leaders explained that the inhabitants of the village are Turkana, a tribe originating from northwest Kenya. Their ancestors had migrated to Isiolo in 1912 in order to labour for the local population and the colonial administration. Following attempts to forcibly relocate them to the Turkana district in the 1950s, the Turkana of Burat have become increasingly marginalised, largely as a result of their status as a localised ethnic minority. A community representative told us that:

“The local Member of Parliament has discriminated against some areas in his constituency because he perceives these as areas which never voted for him (...) It is based on ethnicity. There are people in one village in this area which voted for him, so he made sure that the village became a sub-location. He has given these people a chief (...) A small village (...) but he has rewarded them.”71

Members of the community went on to explain that the same MP had conspired with the district commissioner to redirect funds allocated by an international donor for a new primary school to a neighbouring village, populated by the Borana ethnic group which is known to support him. At the time of our visit, the existing local primary school was in a visible state of disrepair. Moreover, local children could not attend the secondary school because the nearest one was on the other side of town and there were no medical facilities in the immediate area. Each of these problems, in the view of the community members, was a consequence of their lack of political influence as a numerical minority in the constituency and the district.

The community representative went on to explain that the community could not farm much of the land in the area surrounding the village because some years before, it had been gazetted by the armed forces for new military facilities which, at that time, showed no sign of being under construction. Members of the community spoke of the difficulties they faced in growing enough food on the land left to them. Behind them, acting as rudimentary insulation, the walls were lined with sackcloth bearing the indelible stamp
of the United States Agency for International Development: “USAID – Aid from the American People”. This seemed to me to be an eloquent symbol of the type of “narrow, discretionary measures aimed at addressing short-term needs” which the UN System Task Team on the Post-2015 Development Agenda, has identified as a consequence of the focus on manifestations of poverty, rather than structural causes.\(^{72}\)

In my view, the case of Burat illustrates more than just the fact that discrimination can directly limit people’s capabilities and choices, thus restricting their development. It also shows how equality laws – properly defined, applied and enforced – can provide a route to addressing some of the structural causes of poverty and underdevelopment more broadly. Thanks to progressive legal reforms which the Kenyan government introduced in the first decade of this century, the villagers I met had a number of options to challenge the discrimination against them. These legal options, in addition to offering a means of redress for rights violations, represented a pathway to development.

The Constitution of Kenya, promulgated less than a year before my visit to Kenya, prohibits both direct and indirect discrimination by both state and non-state actors on an extensive list of grounds, which include race and ethnic or social origin.\(^{73}\) In addition, the Constitution contains procedural guarantees which are required to make the right effective in practice: it guarantees the right of all people to institute court proceedings claiming that their rights have been violated; it permits class actions and states that no fees should be charged for the commencement of actions brought under the Bill of Rights.\(^{74}\) The Constitution also contains a number of other provisions which might benefit the residents of Burat and other such communities.

Article 56, for example, requires the state to undertake measures – including positive action measures – to ensure the participation of “minorities and marginalised groups” in a range of areas, including education, employment and access to health services and infrastructure. Article 6(3) creates a duty on the state to ensure reasonable access to public services throughout the country.

Beyond the Constitution, further rights are provided in the National Cohesion and Integration Act, adopted in 2008 following inter-ethnic post-election violence. Section 10 of the Act prohibits discrimination in the provision of services by \textit{inter alia} public authorities. Section 11 makes it unlawful for any officer of the state to allocate public resources in an ethnically inequitable manner. It states that resources will be deemed to have been allocated in an ethnically inequitable manner when \textit{inter alia} specific regions consistently and unjustifiably receive more resources than other regions, or where greater resources are allocated to areas requiring only remedial resources than those provided to areas requiring start-up resources.

It seems clear that the people of Burat could, with appropriate support, bring a claim citing violation of a number of these provisions. Equality law, in their case, could provide a means to challenge the discrimination which played a direct role in causing and perpetuating their poverty and limiting their choices in areas such as education and healthcare. The case also offers a cautionary note, however. To my knowledge, the villagers have not brought a case to challenge the cases of discrimination which they articulated to me. The Kenyan state still has a good deal of work to do to inform citizens of their rights and to establish legal aid schemes and accessible procedures to assist persons interested in bringing a claim of rights violations.
The Equal Rights Trust’s research in Kenya found that other relatively recent changes to the law could provide a means to challenge discrimination in the distribution of public resources and services – and the resulting inequalities in development – in other ways as well. The prohibition of indirect discrimination in the Constitution and the National Cohesion and Integration Act could allow ethnic communities living in the least developed regions of the country (the arid and semi-arid lands in the north, in particular) to challenge development policies and approaches which concentrate on “high productive” areas (…) in provision of infrastructure such as schools, roads, health centres”. The Persons with Disabilities Act and provisions of the Constitution could enable persons with disabilities to challenge discrimination in education and employment which limits their capabilities and choices. The replacement of a Constitutional non-discrimination provision which explicitly excluded personal and family law and decisions made in accordance with customary law from the protection allows women to challenge discrimination in marriage, divorce and succession cases which denies them rights to land – a crucial asset for development in Kenya. Indeed, the Equal Rights Trust, in partnership with the Federation of Women Lawyers – Kenya and over 40 community-based organisations, has established a community legal assistance project with the aim of supporting women to do just that.

4. Equal Rights at the Heart of the Sustainable Development Goals

As the discussion above illustrates, laws providing for the rights to equality and nondiscrimination can – if appropriately defined, implemented and enforced – provide a means for disadvantaged groups to challenge the discrimination which acts as a brake on their development. What then are the implications for the post-2015 development agenda and the proposed Sustainable Development Goals (SDGs)?

The current proposals for the SDGs were published by the Open Working Group in July 2014. These proposals will provide the starting point for negotiations between states as they seek to establish the SDGs as a successor framework to the MDGs. As noted above, the Open Working Group draft includes both a standalone goal on equality – Proposed Goal 10 – and a specific Target 10.3, which would require states to:

“[E]nsure equal opportunity and reduce inequalities of outcome, including through eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and actions in this regard.”

Nor is this the only reference to equality and equal rights in the proposed framework: Target 1.4 is to “ensure that all men and women, particularly the poor and vulnerable, have equal rights to economic resources”; Target 4.5 is to “eliminate gender disparities in education and ensure equal access to all levels of education”; Target 8.5 is to “achieve full and productive employment and decent work for all women, including for young people and persons with disabilities.”

The inclusion of each of these proposed Targets – and proposed Goal 5: Achieve gender equality and empower all women and girls – is a welcome sign of the increasing recognition of the need to address inequalities in the SDG framework. However, as my argument is focused on the application of equality legislation within this framework, I will focus here on Target 10.3. In my view, while this Target lacks some of the precision about the
required elements of an effective system of equality law, it is sufficiently broad to encompass the “equal rights approach”.

As I define it, the equal rights approach has three essential components: first, the enactment, enforcement and implementation of equality legislation, providing comprehensive protection from all forms of discrimination and requiring positive action measures; second, the adoption and implementation of positive action measures targeted at redressing substantive inequalities experienced by particular groups; and third, the collection and analysis of data disaggregated by grounds of discrimination, as part of a framework to ensure that all groups make progress towards development goals. This approach has been elaborated by the Equal Rights Trust, in its paper Equal Rights at the Heart of the Post-2015 Development Agenda, published in response to the 2013 High Level Panel report and its commitment that development should “leave no one behind”. The paper proposes five specific changes to the framework proposed by the Panel. While these recommendations were a specific response to the Panel’s proposed framework, the three central proposals remain entirely valid as an articulation of how the SDGs could and should adopt an equal rights approach.

The Trust’s central recommendation is that any post-2015 development framework should:

“[I]nclude adoption of comprehensive national equality legislation as a specific development goal in and of itself. Such legislation should reflect principles on equality developed on the basis of a unified human rights framework, some of which were formulated in the 2008 Declaration of Principles on Equality.”

Comprehensive equality legislation, as understood in the unified human rights framework on equality, should inter alia provide protection from direct discrimination, indirect discrimination, harassment and failure to make reasonable accommodation, on the basis of all grounds recognised in international law and in all areas of life governed by law. It should require positive action measures (that is, measures “to overcome past disadvantage and to accelerate progress towards equality of particular groups”). It should also contain those procedural guarantees – ranging from the establishment of legal aid systems to provisions for the transfer of the burden of proof – to ensure that the protections which it provides are effective in practice.

The case for including the adoption and enforcement of comprehensive equality legislation as a specific development Goal is a strong one. As the examples given in part three above illustrate, the implementation and enforcement of comprehensive equality legislation will provide opportunities for groups experiencing discrimination which restricts their development to challenge these practices and achieve redress. Moreover, the enactment of comprehensive equality legislation is already an obligation under international human rights treaties to which the vast majority of states are party. Making such a requirement part of the development framework would provide one concrete means to achieve a genuinely “rights-based” approach to development.

Unfortunately, I believe it is now clear that the future SDG framework will not include adoption of equality legislation as a specific development Goal. Nevertheless, I am of the view that Target 10.3 – imprecise as it is – can be read as encompassing the adoption of comprehensive equality legislation. There
is a strong case for the Target to be slightly refined or redefined in order to achieve this, replacing the imprecise language “promoting appropriate legislation” with “enacting and implementing comprehensive national equality legislation”, to make the requirement explicit and ensure consistency between the language in the Target and existing human rights obligations.

The second recommendation made by the Equal Rights Trust is that the framework should create a target requiring states to establish positive action programmes targeted at groups “identified as being most exposed to poverty”.88 This is proposed in response to the Panel’s recommendation that states “cover x% of people who are poor and vulnerable with social protection systems”.89 The Trust’s position paper welcomes the intention behind the Panel’s recommendation and agrees with the Panel’s assessment that social protection systems can be “potential game changer that can directly improve equality”.90 It is clear that the implementation of targeted programmes to improve the participation of those who are “poor and vulnerable” could have a significant positive impact on those subject to discrimination and substantive inequalities resulting from historic discrimination and thus unable to benefit from development to the same extent as other groups. However, as with the enactment of equality legislation, the argument in favour of incorporating a target focused on positive action is that the implementation of such measures – where evidence of substantive inequality is found – is an existing legal obligation on almost all states.91 Thus, the Trust’s argument stems in part from a desire for consistency and harmonisation between the new development framework and existing international law. Most importantly however, the Equal Rights Trust argues that:

“[R]edefining this target in this way would represent a shift in focus from ideas of vulnerability, charity and goodwill to an approach centred on human rights obligations, because positive action is a necessary element of the right to equality.”92

Thus far, the Equal Rights Trust’s recommendation to replace the proposed target on social protection systems with one requiring the establishment of positive action programmes has not been taken up. The Open Working Group’s proposals include a Target which strongly reflects the Panel’s original recommendation. Proposed Target 1.3 would establish a requirement to:

“[I]mplement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.”93

Nevertheless, I believe that there is a strong logic to interpreting Target 10.3 as requiring positive action. Indeed, I would argue that if states are to “ensure equal opportunity and reduce inequalities of outcome through (...) promoting appropriate policies and actions” this entails positive action measures.

The third critical recommendation made in the Equal Rights Trust’s paper concerns the measurement of progress and the question of indicators. This question – how progress will be measured – is a crucial one for human development and for the SDGs. As the discussion in part two above illustrates, indicators drive approaches to development: if only aggregate progress is measured, groups and individuals exposed to discrimination can be lost and persistent inequalities can be masked. Moreover, there may be a tendency, even an imperative, to focus on “low hanging fruit”, either indefinitely, in the case of rela-
tive targets, or until there are no other alternatives, in the case of absolute ones. If any future SDG framework is to be successful in increasing development for all, there must be a move away from these aggregate targets and indicators, towards full disaggregation of data and a requirement that progress is made for all groups. As such, the Equal Rights Trust “wholeheartedly supports” the approach set out in the Panel’s report, which calls for disaggregation of data and a requirement that “[t]argets will only be considered “achieved” if they are met for all relevant income and social groups”.

As with the question of positive action however, the Equal Rights Trust argues that this aspiration can best be achieved through adopting an approach which is already well-recognised in equality law. The Trust’s recommendation has three components: first, that states should be required to disaggregate data on the basis of recognised grounds of discrimination (gender, location, disability, age, race and ethnicity, religion, citizenship status, and sexual orientation) together with other grounds which are recognised as being particularly relevant to the country in question; second, that the position and needs of non-citizens should be specifically monitored; and third, that disaggregated data should be analysed to establish where patterns of multiple discrimination exist.

The proposed SDGs present a mixed picture in respect of the disaggregation of data and measurement of progress. In a welcome move, the Open Working Group has included a proposed Target to enhance the capacity of countries to gather data “disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts”. This is an extensive list of characteristics, reflecting many recognised grounds of discrimination; crucially, the Target also provides an opportunity to require collection of data on other grounds, based on an analysis of local context. However, the Open Working Group’s proposals do not reiterate the requirement that “[t]argets will only be considered “achieved” if they are met for all relevant income and social groups” proposed by the High Level Panel. This may prove to be a critical omission, even if such a requirement can be considered implied, both by Target 10.3 and by a number of Goals targeting outcomes for “all”.

As this brief discussion demonstrates, for the SDG framework to properly address inequality (and therefore address one of the major obstacles to human development itself), it must require three things of states: enactment and implementation of equality legislation providing effective and comprehensive protection from discrimination and requiring positive action measures; implementation of such positive measures on behalf of those groups which experience substantive inequality; and a monitoring framework which ensures that all groups make progress towards all goals and targets. The link between discrimination and poor development outcomes means that each of these measures is “critical to eradicating poverty”. Moreover, requiring states to take these measures as part of a new development framework will ensure consistency between that framework and international human rights law, which already imposes such obligations on almost all states.

The proposals made by the Open Working Group – and Target 10.3 in particular – provide ample scope for the incorporation of the three key elements of the equal rights approach. Indeed, I believe that adopting the more precise terminology used by the
Equal Rights Trust would bring clarity and ensure that states are better able to meet the aspiration expressed in the Target – ensuring equality of opportunity and reducing inequality of outcome.

5. Hope for the Best, Prepare for the Worst

The final question I wish to consider is the extent to which the final SDG framework might reflect an equal rights approach. At present, I consider the retention and improvement of Target 10.3 to be the “best case scenario”. Target 10.3 could – as illustrated above – be improved. However, if reports on the negotiation of the Open Working Group’s final proposals are indicative of what we might expect at the General Assembly, then it is more likely that the position of equality in the framework will be diminished through state negotiations, rather than enhanced. Nevertheless, I believe the equal rights approach will remain highly pertinent to development efforts – including efforts to achieve the SDGs – even if the final Goals place less focus on equality than the current draft.

In this light, I wish to briefly examine the different ways in which the issue of equality might be handled by states in the negotiations of the final SDG framework. In my view, there are at least four options which might be considered in practice. First, states might adopt the approach proposed by the Open Working Group, including a standalone equality Goal and a Target which is focused on tackling discrimination and improving equality of opportunity and equality of outcome. Second, states might abandon this approach, in favour of “equality targets” in respect of a number of different goals – those concerning the reduction of income poverty, access to education and healthcare, for example. A yet weaker alternative would be to abandon explicit references to discrimination and inequality throughout the framework, but incorporate a requirement, as proposed by the High Level Panel, that data is disaggregated and targets are only “considered ‘achieved’ if they are met for all relevant income and social groups”. Finally, those states which argue against the need for the new framework to address inequality might prevail and equality may be omitted in any substantive way.

As discussed above, I am in favour of the first of these four options. However, I also believe that the adoption and implementation of comprehensive equality legislation, the implementation of positive action programmes and the collection and analysis of data disaggregated by grounds of discrimination will remain highly relevant to human development in the event that Target 10.3 does not survive to the final SDG framework. An approach which incorporates “equality targets” in a number of different Goals would, in my view, require states to take all of the three measures required by the equal rights approach, if they are to make progress to the new Goals. Similarly, given the way in which the current MDG indicators have influenced the approach which states have taken to development programming, the disaggregation of data by grounds of discrimination and the imposition of a requirement that all groups must make progress could also exert significant pressure on states to legislate to increase protection for groups exposed to discrimination and to implement positive action programmes. Finally, even if advocates of the equality-sensitive approach are completely overwhelmed and the final framework is purged of all references to equality and non-discrimination, I believe that there is a strong case to be made that equality law will remain an important “means” to achieving human development “ends”.

None of this is intended to undermine the argument that all those interested in promoting equality as a fundamental right and all those interested in ensuring sustainable human development must – together – argue strongly in favour of an explicit focus in the SDGs on addressing discrimination and promoting equality through legal reform. Rather, it is intended to illustrate that equality law will remain relevant to the field of human development, irrespective of the final outcome. Even – especially – if states repeat the mistake of the MDGs and allow equality to become “lost in translation” between the Open Working Group’s proposals and the final framework, equality law will still be an important means to increasing the capabilities of the most marginalised. In essence, just as the people of Burat could litigate to challenge discrimination acting as a barrier to their development under the MDG framework, so could other communities under a new SDG framework, should this entirely omit references to inequality.

In my view, we must hope – and argue – for the best, while preparing for the worst.

Conclusion

The position of state representatives negotiating the SDGs is not an enviable one. Following years of consultation, they must derive a manageable set of global Goals from a menu of 17 proposed Goals and 169 Targets. They will be besieged by advocates from all walks of life, arguing for the inclusion of additional items and they will have to reach a consensus on some deeply contentious and difficult issues.

I believe it is critically important, in this maelstrom, that the case for the SDGs to reflect an equal rights approach is not lost. As I have sought to demonstrate here, the lack of focus on inequality was a major shortcoming of the MDGs, both in conceptual and practical terms. Moreover, there is a strong positive case for the new SDG framework to adopt an equal rights approach. Such an approach would entail the inclusion in the framework of requirements to enact comprehensive equality legislation, implement positive action measures and establish monitoring frameworks to ensure that all groups benefit from development efforts. While, as I indicate above, this approach will remain valid even if Target 10.3 is removed from the framework, inclusion remains the best option.

The case for the adoption of an equal rights approach rests not only on the importance of greater equality as an end in itself, but on the role which an effective and comprehensive system of law can have as a means to achieving development ends. The adoption of an equal rights approach could represent a transformative shift, giving the most marginalised a means to challenge the discriminatory barriers to their development. In so doing, it would provide a decisive means to “enlarge people’s choices” and thus ensure that the final SDG framework is able to deliver on the central promise of human development.

---

1 Jim Fitzgerald is Head of Advocacy at the Equal Rights Trust. This article draws on his experience in this role, notably as principal researcher and drafter of the report In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya and as a member of the team which developed the Trust’s paper Equal Rights at the Heart of the Post-2015 Development Agenda. However, while these experiences have informed his thinking, any views expressed in the article and any errors or omissions are the author’s own.


Kabeer, N., *Can the MDGs provide a pathway to social justice? The challenge of intersecting inequalities*, Institute of Development Studies and the MDG Achievement Fund, 2010, p. 11.


Ibid., p. 218.


Ibid., pp. 51-54.

Ibid., p. 54.

Ibid., p. 52.

See above, note 6.

Ibid., p. 11.


See above, note 15, p. 9.

Ibid., p. 10.

Ibid., p. 24.


Ibid.

Ibid., pp 87-94.


Ibid., Para 6.

See above, note 15, p. 31.


See above, note 4, p. 11.


Millennium Development Goal 3 contains one target: Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015, and four indicators: (1) Ratio of girls to boys in primary, secondary and tertiary education; (2) Ratio of literate women to men, 15-24 years old; (3) Share of women in wage employment in the non-agricultural sector; (4) Proportion of seats held by women in national parliament. (UN Millennium Project, *Goals, targets and indicators*, available at: http://www.unmillenniumproject.org/goals/gti.htm#goal3).


See above, note 4, p. 16.


See above, note 4, pp. 17-20.


*Ibid.*, Figure 3.6, p. 21.


See above, note 29.


The author defines each indicator as follows: *Education poverty* – the proportion of youth aged 15–24 that have not completed primary school, as a percentage of all children aged 15–24 [all households with children aged 15–24]; *Health poverty* – the proportion of children that died below the age of five (within the past five years), as a percentage of all children born within the last ten years [all households with children born within the last ten years to interviewed women 15–49]; *Nutrition poverty* – the proportion of children under five years 2SD or more below WHO standard weight-for-age, as a percentage of all children under five years [all households with children born within the last ten years to interviewed women 15–49]. (*Ibid.*, p. 23).


*Ibid.*, p. 2. It should be noted that the author advises that “this finding should be viewed as tentative due to data constraints”.


Ibid., p. 18 and 20.

See above, note 5. p. 15.

Ibid.

HelpAge International, *MDGs must target poorest say older people*, p. 3.

See above, note 49, p. 3.

See above, note 54, p. 7.


See above, note 57, Para 7 (footnote 6).

See above, note 49, p. 9.

See above, note 27.

See above, note 5, p. 5.

See above, note 4, p. 39.


See above, note 3, p. 13.

See above, note 1.

See above, note 60.

See above, note 28.


Ibid.

See above, note 27.

Constitution of Kenya, Article 27(4).

Ibid., Article 22(1), (2) and (3).


Persons with Disabilities Act, sections 15(1) and 18(1).

Constitution of Kenya 1963 (repealed), Article 82(4): “Subsection (1) shall not apply to any law so far as that law makes provision (...) (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons”.


See above, note 3.

See above, note 57.


For a more detailed elaboration of the principles which should be reflected in comprehensive equality legislation, see: *Declaration of Principles on Equality*, the Equal Rights Trust, London, 2008.


See, for example, International Covenant on Civil and Political Rights, Article 26, the recommendations of the Committee on Economic, Social and Cultural Rights (*General Comment No. 20: Non-discrimination in economic, social and cultural rights*, 2009, Para 37) and the Human Rights Committee (*General Comment No. 18: Non-discrimination*, 1989, Para 12).

167 States are party to the International Covenant on Civil and Political Rights, while 160 States are party to the International Covenant on Economic, Social and Cultural Rights.

See above, note 57, Specific Recommendation 1.

See above, note 65, p. 30.


See, for example: Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, (UN Doc. E/C.12/GC/20) 2009, Para 9, where the Committee states: “states parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination”.

See above, note 57, Para 30.

See above, note 3.

See above, note 57, Para 35.

See above, note 65, p. 29.

See above, note 57, Paras 35-47.

See above, note 3, Target 17.18.

See above, note 65, p. 29.

See above, note 57, Para 53.


See above, note 65, p. 29.