The Equal Rights Review

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

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Transformative Shift to Equality?

“Transformative” is a word that is found frequently in the stream of texts related to the forthcoming adoption of the Sustainable Development Goals (SDGs) which, from 2016, will supersede the current Millennium Development Goals (MDGs). On 24 September 2014, the first day of the UN debate on the SDGs, the president of the General Assembly, Sam Kutesa, called on member states to work tirelessly over the next 12 months to agree “a truly transformative agenda” in the new set of development goals that are due to be adopted next year, at the 2015 session of the Assembly.

The language of transformation firmly entered the development goals discourse after the 2013 Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda,1 which set the tone for countless consultations in the framework of the UN, as well as related academic research and stakeholders’ advocacy. The Panel calls for the new post-2015 goals to drive five big “transformative shifts”, the first of which, summed up in the slogan “Leave No One Behind”, is about equality. More precisely, it is about shifting from the equality-blind approach of the MDGs to an approach in which equality is central. As the former UN High Commissioner on Human Rights, Navanethem Pillay, stated:

“[T]he imperative of equality must underpin the entire framework. Doing so will require the replacing of now widely-discredited approaches that focus on narrowly-conceived notions of economic growth, with a dedicated focus on remediying the gross disparities that characterise our societies, and that undercut true development.”

The months ahead, with negotiations between governments gaining speed and aimed at adopting the new SDGs in September 2015, will undoubtedly make it clear that the word “transformative” is a false common locus of quite disparate political visions: what will be seen as “transformative” by some will be the opposite of what will be “transformative” for others. And yet, certain trends are clear; for example: a) an increasing consensus about the interconnectedness of development with peace, global finance, environmental justice, climate change, anti-corruption – to name just a few areas – thus driving a more integrated, potentially holistic approach; b) a recognition of the need for universality, in the sense that development is no longer seen just as pertaining to developing countries in the global South receiving aid from the global North, but as relevant to all countries albeit in differing country-specific ways; c) a slowly growing acknowledgement that development should be rights-based, not just in words as it has been for a while, but in practice; d) and – what is of paramount interest to the Equal Rights Trust and is chosen as the theme of this issue – an acceptance that “equality must underpin the entire framework”.

The challenge is that “equality”, like “transformative shift”, means different things to different people. If we look for guidance again from Ms Pillay, she has stated:
“The new framework must advance the three closely-related but distinct concepts of equity (fairness of distribution of benefits and opportunities), equality (that is, substantive equality of both opportunity and result, under the rule of law), and non-discrimination (prohibition of distinctions that are based on impermissible grounds and that have the effect or purpose of impairing the enjoyment of rights).”

I hope it is reasonable to expect that of these three concepts, non-discrimination will be the least problematic and will survive all controversy. I am afraid, however, that the second concept, that of “equality (substantive equality of both opportunity and result, under the rule of law)” may become a more or less explicit sticking point. It will be what the Germans call a kampfbegriff – a conceptual battlefield where different visions will have to clash and be accommodated. No surprises here: the differences will be, as ever, about how much socio-economic equality we want. There will hardly be, unless I am unforgivably naive, any overt and aggressive principled enemies of equality in general among the governments of the world. But even those who are unhappy about growing inequalities will have hard time to reach agreement. Some, in the spirit of Thomas Piketty (and mind you, he is an egalitarian, relative to mainstream economists), will actually not mind inequality of results, as long as it is fair; e.g. based on merit, and will be contented with taming the wilder streaks of inequality. There will be various versions of utilitarian approaches to equality: equality is welcome because it is a means to sustainable development ends, rather than an end in itself. And there will be those who want more equality for the sake of equality – see, for example, the programmatic paper of the Association of Women in Development (AWID) published in this issue and calling for a radical transformation of the current global status quo.

The textual basis of the negotiations which started this month in New York is the so called “zero draft” put together by the Open Working Group and publicised in July 2014. Let us see how this fundamental document reflects the concepts of non-discrimination and equality, and while doing this, let us be attentive to whether the relevant goals and targets formulated in the “zero draft” represent the legal rights to equality and non-discrimination already recognised in international human rights law, or aspirations that go beyond these rights.

Regarding non-discrimination, target 5.1 reads: “end all forms of discrimination against all women and girls everywhere”, and there is a non-discrimination aspect in target 10.3: “ensure 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”. We also have the somewhat vague goal 16.b: “promote and enforce non-discriminatory laws and policies for sustainable development”.

Clearly, target 5.1 lies squarely within existing legal obligations of states under international law. So does target 10.3, provided it is true that reducing inequalities of outcome is a corollary of ensuring equal opportunity (which I take it to be). The pedants will say here that “reduce” is not a target but a direction of movement, but let us recall that these targets are universal, and that it is more realistic – given the 15 year time frame of the SDGs – to have this “target” quantified on a country-specific basis.

“Equality” is used in the following senses and contexts in the zero draft:

(i) Equality within and among countries, found in “Goal 10. Reduce inequality within and among countries”. This is the broad-
the concept of equality is used in the document. As formulated, it documents a potential global consensus in favour of equality and against inequality, whatever these concepts mean. This in itself is very significant, and not only within the development field. A similar broad meaning is implied in target 10.4: “adopt policies especially fiscal, wage, and social protection policies and progressively achieve greater equality”.

(ii) **Equality as empowerment and inclusion**, implied in target 10.2: “by 2030 empower and promote the social, economic and political inclusion of all irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status”.

(iii) **Equality of opportunity**: this is a target specifically in respect to women’s leadership, under goal 5 (gender equality): target 5.5 “ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic, and public life”; as well as broadly, vis à vis all groups, under target 10.3 quoted above: “ensure 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”.

(iv) **Equality of outcome** meant in a general sense, in the same target 10.3.

(v) **Equal rights to economic resources**, a target found under Goal 1 which relates to poverty reduction: target 1.4 “by 2030 ensure that all men and women, particularly the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership, and control over land and other forms of property, inheritance, natural resources, appropriate new technology, and financial services including microfinance”; similarly, the gender related goal 5.a is to “undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance, and natural resources in accordance with national laws”.

(vi) **Equality of access**, a target found under Goal 2 related to hunger and food security. Target 2.3 reads: “equal access to land, other productive resources and inputs, knowledge, financial services, markets, and opportunities for value addition and non-farm employment”; also under goal 4 related to education, target 4.3 reads: “by 2030 ensure equal access for all women and men to affordable quality technical, vocational and tertiary education, including university”; target 4.5 is “by 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples, and children in vulnerable situations”; and finally, under goal 16 related to justice, target 16.3 reads: “promote the rule of law at the national and international levels, and ensure equal access to justice for all”.

(vii) **Gender equality** – Goal 5 and several other mentions, in particular goal 5c: “adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels”.

(viii) **Equal pay**: target 8.5 reads “by 2030 achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value”.

(ix) **Equal employment for all** – but this is only mentioned in the Introduction, Para 11. It probably means an equal right, or equal access, to employment.

A careful conceptual analysis of the above goals and targets would confirm, in my
view, that all aspects and elements of equality referred to in the “zero draft” are already enforceable legal rights under existing international human rights law. I would challenge anyone to point at an element that is not currently a recognised “right”, but something else, perhaps a political or ethical value, like “full equality of income”, for example. Within the recognised rights in the equality area, some may make more actionable targets than others, but none are purely aspirational.

Let me make explicit what is implied above. Equality can be seen as a right and/or as something other than a right. Within international human rights law, it is a right which is fundamental, central and cross-cutting. But imagine a culture in which the very notion of “rights” is missing or underdeveloped. Still, it could perfectly include equality among its basic values or organising principles. Or, imagine a rights-based culture, which recognises the right to equality as central, but which, for reasons of solidarity, humanity, religious love, whatever – aspires for more equality than a rights framework can deliver at present.5

In view of the above, the “zero draft” does nothing more than to confirm a right to equality whose scope and content lie within but are narrower and poorer than the currently recognised right to equality under international human rights law. The draft could have been much better in this regard, i.e. in reflecting the currently recognised right to equality, if it had included a far more robust target of adoption of comprehensive and effective national equality legislation (included in target 10.3 but through the vaguer “promoting adequate legislation”). It might have helpfully spelled out the essential elements of such legislation which the Equal Rights Trust has advocated consistently6 and which, in our view, are not yet well understood.

In this case, do we have a “transformative shift” to equality here?

I think the answer is positive, but in the very limited sense that the development framework is finally trying to break its box and catch up with modern equality, with its evolving aims and frameworks.7 This is a shift in the right direction, but there is some more catch-up to do.

Dimitrina Petrova

3 Ibid.
5 It is not so difficult to imagine the space “beyond rights”, or which is not yet reached by “rights”. Rights have expanded historically and may continue to expand, or not. Aiming at more equality in areas like health, genetics, or natural disasters, can require something more than enforceable rights.
6 See the Trust’s position paper re-published in the Special of this issue.
“We have come a long way from the common sense that told Athenians that the right to vote in the world’s first democracy could not include women or slaves. We now see the irony, which escaped the American founding fathers, of proclaiming the self-evident truth that all men are born equal while owning slaves. We cannot anticipate how a future generation will view the things that we consider beyond contest. All we can do is give people what our generation has come to understand as their right to be treated with respect as individuals and without unwarranted differentiation from others who are not materially different from themselves.”

Stephen Sedley
Constitutional Law and the Right to Equality

Stephen Sedley

On 4 and 5 April 2014, the Equal Rights Trust held a Judicial Colloquium on the rights to equality and non-discrimination, in Georgetown, Guyana, in the framework of one of our projects. The Colloquium was co-hosted by our partners the Justice Institute of Guyana and the Office of the Chancellor of the Judiciary of Guyana. This is the text of the speech given by Sir Stephen Sedley, Trustee of the Equal Rights Trust, addressing the judiciary of Guyana.

Let me start by asking you to reflect on a piece of cultural history. Many of you will know the movie *Carmen Jones*. Bizet’s opera *Carmen*, on which the movie was based, was set in 19th-century Spain but was rewritten during World War II as a musical set in modern America. In 1954 the musical became a celebrated movie, in which – for the first time ever – an all-black cast performed, to Bizet’s score, one of the world’s great tragic stories, the scenario and libretto rewritten for a new time and place.

Was this, as my generation certainly thought it was, a breakthrough in equality, giving black people the same human dignity as whites – and coinciding, as it happened, with the US Supreme Court’s epoch-making desegregation ruling in *Brown v Board of Education*? Or was it just another stage in the long history of racial segregation, with not a single white actor on set, lyrics using stage-African-American speech (“Dere’s a café on de corner”, “Dis flower” and so on) and the vocals being mimed – I’m not kidding – by Dorothy Dandridge and Harry Belafonte to the dubbed voices of white concert singers? Or could it conceivably be both things: a limited and still prejudice-ridden step in the right direction on a long and stony road towards true equality?

Take another example. Two of the most-obj ected-to books logged annually by the American Libraries Association have been *And Tango Makes Three*, a children’s book about an orphaned penguin chick who is cared for by two adult males, and *Huckleberry Finn*. The objection to the first of these is that it normalises same-sex adult relationships. But that is exactly its defence as well: that it is part of a much wider and deeper moral and social argument about the equal treatment of individuals whose sexual choices are, at present at least, unorthodox.

The objection to *Huckleberry Finn* is much simpler and perhaps more troubling. Although the story is profoundly anti-racist, Mark Twain’s dialogue, accurately reproducing the speech of the antebellum South, constantly uses the word “nigger” not as a
term of abuse but as conventional vocabulary. Is it better to suppress authenticity in the interests of decency, or to confront and adjust to the massive cultural change that our sense of propriety has undergone in the intervening years?

Although my own somewhat loaded rhetorical questions will have given you an idea of my own response to these issues, my purpose in raising them is not to invite you to resolve them. It is to illustrate two things that are relevant to the work of this colloquium. One is that equality of treatment can be a highly complex business. The other, which is intertwined with the first, is that what we regard as true and inherent differences and what we regard as unacceptable discrimination shifts with history and events. Yet the distinction is fundamental to the practical working of laws against discrimination: true equality means not eliminating but accommodating individuals’ inherent and unalterable characteristics – at its most elementary, recognising that wheelchair users can’t use stairs; but it also means not pretending or assuming that such characteristics require differentiation when in truth they do not – for example, assuming that men can drive trucks and women can’t. When Anatole France remarked on the majestic impartiality with which the law forbade rich and poor alike to sleep under bridges, to beg in the streets and to steal bread he was satirising the effect of a one-size-fits all law on people who are different sizes. When the UK’s statute law made it a crime for a Gipsy to camp on a highway, as the Highways Acts did until 1980, it was differentiating unjustifiably between people who were not materially different: that is to say, between campers on the highway who were and who were not Gipsies. It’s more than two thousand years since Epicurus pointed out that disparate circumstances mean that justice does not require the same outcomes for everyone. Indeed it has been argued that the very fact that no two people are the same means that unequal treatment should be the rule, not, as we tend to assume, the exception.

There are no abstract answers to these abstract questions. They have to be answered by a conscientious and practical application of principle to the facts of each class of case.

Until the 1970s, the United Kingdom had no effective laws against racial or sexual discrimination. Unlike Guyana, it had no constitutional guarantees of equality or non-discrimination. The fight not only to secure votes for women but to get the judges to recognise them as legal “persons” had taken two full generations of struggle. When I was a student it was still perfectly legal for employers to refuse to employ women or black or ethnic minority workers, or to sack women who married or became pregnant. It was lawful for landlords to refuse to let to black tenants. It is a source of pride to me that my children, now with children of their own, simply cannot believe it. But what has happened in this half-century to make such a difference?

In 1970 the Equal Pay Act gave employers and unions five years to abolish gender-related pay differentials. In 1975 the Sex Discrimination Act for the first time outlawed both direct and indirect discrimination on grounds of gender in most fields of social and economic activity. The following year a greatly strengthened Race Relations Act did the same for direct and indirect racial discrimination. It was not until 1995 that the even more complex issue of disability discrimination was legislated for; but that too now forms part of the comprehensive codification contained in our Equality Act
2010, along with religious belief (except for schools, which are permitted to practise religious discrimination), sexual orientation and age.

What had happened in these years was, however, far more than the creation of a range of written rights with opportunities to litigate them. The enactment of these provisions was the result of many years of pressure by and on behalf of the victims of discrimination; and one of the principal achievements of the equality legislation, in turn, has been the promotion and consolidation of a long-term change in the public sense of what is tolerable and acceptable in the relations of individuals with each other, with corporations and with the state. A changed public sense of propriety, albeit imperfect and easily ridiculed as “political correctness”, has come about. At its most elementary it has to take sides about the language used in *Huckleberry Finn*. At its most complicated it has to grapple with the kind of multi-layered issues thrown up by *Carmen Jones*. But it is a sea-change which has not come from nowhere: it has been driven by the refusal of the historically marginalised – women, black people, the gay, the disabled, the elderly – to accept society’s conventional wisdom about them. If it is not conceivable that desegregation would have made its modern progress in the US without the legitimation of the Supreme Court in *Brown*, it is equally inconceivable that *Brown* would have been decided the way it was but for the presence of a powerful and growing civil rights movement which had got underway before the second world war and been propelled by black GIs’ wartime experience of institutional discrimination and segregation by the state they were fighting to protect. Law is not autonomous: it is part of history.

In saying this I do not intend to say that law is no more than a weathervane showing which way the wind is blowing. On the contrary, law is an active ingredient in the mix. It can accelerate or obstruct social change. This alone places on judges a considerable responsibility: are we to resist change simply because it does not conform to the law as we have learned it? Are we to embrace change simply because others demand it? The answer has to be neither. The judicial task is a complex one of implementing in legally principled form the changes that society has decided it wants.

I have mentioned that the UK lacks any constitutional instrument equivalent to Title 1 of Part II of Guyana’s constitution. What it has is an amalgam of statutory provisions, reaching back eight centuries to Magna Carta and coming down to the Human Rights Act 1998, and common law principles such as the requirement on the state to justify any deprivation of liberty. But the processes by which such a constitution operates are slow and erratic. It can say no to certain things, such as imprisonment without charge (save where this is authorised by statute), but it has been historically slow and often reluctant to keep up with society’s demands. The abolition of slavery was a hot potato which Parliament for decades would not touch. The problem was left to the judges, who finally responded to a huge wave of popular anger by freeing slaves who came within the jurisdiction, but not those held in the colonies.

History has thanked the judges for taking the initiative. Lord Mansfield’s judgment in *James Somersett’s* case is regarded as a landmark in the growth of freedom, not least because it responded to a long-term shift away from the centuries-long European view that black people were something less than hu-
man. History, by contrast, has not thanked the English and Scottish judges who for decades (and in parallel, it has to be said, with the judiciaries of the US, Canada and South Africa) tried to hold back the tide of women’s emancipation, sometimes in the teeth of Parliament’s attempts to move things forward.

The so-called persons cases are not generally taught in our law schools, perhaps because they are an embarrassment to a generally whiggish account of legal history which unblushingly accepts Tennyson’s accolade of freedom slowly broadening down from precedent to precedent. The cases start in 1869 with the appeal to the Scottish Court of Session in which Edinburgh University was allowed by a majority of 7 judges to 5 to renege on a change in its own rules to allow women to attend lectures in medicine, on the ground that the admission of women was beyond the university’s legal powers. By that date Parliament, by the great Reform Act of 1867, had given all householders the vote. Although the Act used the word “man”, Lord Brougham’s Interpretation Act provided that the male was to include the female unless the contrary was expressly provided. This gave the judges no pause. They held that the fact that women at common law had never been allowed to vote was enough to rebut Lord Brougham’s presumption; and insofar as they sought to challenge their exclusion from the electoral roll as “persons aggrieved”, in law women were not persons either.

Two years later Parliament unambiguously legislated to allow women both to vote and to be elected to office in local elections. In 1889 Lady Sandhurst stood for a seat on the London County Council and won by a clear majority. The courts (the chief justice included) held that the right to vote and the right to stand for office were not coextensive, and that women, albeit they could now vote, could not hold office. When, a couple of years later, Miss Cobden was voted into office, she deliberately delayed taking her seat until the time set by law for bringing a challenge had elapsed. But she was then prosecuted under a statute which made it an offence for “any person” to sit as a councillor when unqualified. Ah, she said, women are not persons: the courts have repeatedly said so, and the statute itself says “he”. No, said the Master of the Rolls; this is a clear case for the application of Lord Brougham’s Interpretation Act – “he” means “he or she”.

On it went. The Scottish courts refused to admit a woman as a law agent because no women had ever been admitted. On the same ground Gray’s Inn refused to call Bertha Cave to the English Bar. Then in 1909, on an appeal from Scotland about the continuing refusal of universities to let women graduates exercise the university franchise, the Liberal Lord Chancellor, Lord Loreburn, set about hauling the law backwards. The legal disability of women, he held, was so obvious that “it is incomprehensible (…) that anyone acquainted with our laws (…) can think, if indeed anyone does think, that there is room for argument on such a point”. He was not alone. The revered constitutional lawyer Albert Venn Dicey had warned that if women were given the vote, the next thing would be women in the jury box and – God forbid – on the bench.

It’s one of the happier ironies of history that Dicey was proved right. But the point I am making here is that the commonsensical, the self-evident, the patently obvious, the sort of thing about which no rational being can see any room for argument, can in the space of a single generation turn into its opposite. In 1918 Parliament finally legislated
in judge-proof words of one syllable to give women over 30 the vote, and ten years later to equalise the franchise between women and men. The following year, 1929, an appeal from Canada reached the Privy Council on the question whether the Governor-General had power to nominate women as senators. Lord Sankey’s opinion in Edwards v A-G for Canada, delivering an affirmative answer, is a classic text in human rights jurisprudence. Sankey uses the metaphor of a “living tree” to characterise the Canadian constitution – perhaps a mild exaggeration of what was at the time a largely organisational instrument, the British North America Act 1867, but a tool since adopted by the Canadian Supreme Court in interpreting the 1982 Charter of Rights and Freedoms, and by the European Court of Human Rights in interpreting the European Convention.

Addressing the appeal to custom as an answer to change, Lord Sankey said: “Customs are apt to develop into traditions which are stronger than law, and which remain unchallenged long after the reason for them has disappeared.” He was addressing the ghost of Lord Loreburn; but he was also speaking to future generations, ours included. Law has to be continuously on the watch for habits of thought which have come to encrust it but which no longer have life. The health of a living tree depends on periodically shedding its dead wood.

Professor Sir Bob Hepple, one of the UK’s most distinguished authorities on discrimination and the law (and Chair of the Equal Rights Trust), recently wrote this:

“Equality law is a socially important and intellectually challenging subject. It is important because it seeks to use law as a means of changing entrenched attitudes, behaviour and institutions in order to secure the fundamental human right to equality. The subject is a challenging one because it involves the construction and development of novel legal concepts and procedures. It is necessary to understand these concepts and the technical structure of the law in order to appreciate their social significance, and to use them effectively in the struggles for equal rights. One cannot simply skirt round the hard professional core of the law and procedure. But equality law is not an intellectual game played in courts by clever barristers or in universities by philosophers and academic lawyers. It is shaped by and has a vital impact on people in their everyday lives. One has to understand the historical and social contexts and the values on which the law is based.”

Such vigilance is commonly denounced as judicial activism. I have never been able to understand what judicial activism is. Deciding a case one way, as we all have to do daily, is as active a step as deciding it the other. A judge is either activist or asleep. To describe the five Scottish judges who would have found in favour of the women who sought admission to the Edinburgh medical school as somehow activist and the seven who outvoted them as something else (the critics of judicial activism have not vouchsafed a name for its opposite – perhaps judicial somnambulism) is perverse. If anything, the activists were the majority who allowed the university to renege on its own regulations.

Activism aside, equality is not a simple legal concept. As the Guyanese constitution recognises, banning discrimination is not necessarily the same thing as treating people equally: both things have had to be separately spelt out in your Bill of Rights. The fact is that all laws discriminate: they discriminate between the virtuous and the
wicked, between the permitted and the prohibited, between the duty-free and the taxable. These are grounds of discrimination which are tolerable, indeed necessary, in an ordered society.

We have come a long way from the common sense that told Athenians that the right to vote in the world’s first democracy could not include women or slaves. We now see the irony, which escaped the American founding fathers, of proclaiming the self-evident truth that all men are born equal while owning slaves. We cannot anticipate how a future generation will view the things that we consider beyond contest. All we can do is give people what our generation has come to understand as their right to be treated with respect as individuals and without unwarranted differentiation from others who are not materially different from themselves.

You will be looking in the course of the colloquium at a number of practical applications of equality law. Perhaps therefore I can use what time I have left to give an anecdotal account of a few of the discrimination and equality cases which I either argued at the bar or decided on the bench, and which may help to illustrate the practical side of equality litigation, even if they also reveal an old soldier reliving his battles from the comfort of an armchair.

Oxford University, where I now lecture, advertised a specialised scientific post as a post-doctoral research assistant. There were two qualified candidates, one black and one white. The university failed to follow its own procedures: it did not take up references on the candidates, and it only drew up a person specification minutes before the job interviews took place. The interviewing panel saw both candidates and appointed the white one, Dr Lawrence. The black candidate, Dr Anya, believed that racial prejudice had played a part in the decision, and brought discrimination proceedings against the university. An employment tribunal accepted that his supervisor, who was a member of the panel, had already formed the view that he was unsuitable for the job, and had told the chairman; but they accepted that racial bias had played no part in this. My court held that this was not good enough. We said this:

“The present case is a textbook example of a race discrimination claim...Here we have a shortlist of two candidates, one black, one white, both by definition qualified by training and experience for a specialised post. Whichever is to be chosen, good administration requires that he be chosen fairly; and to this the law has now added for a quarter of a century that the choice must not be affected in any way by his race (...) This was as true for Dr Lawrence as it was for Dr Anya. Very little discrimination today is overt or even deliberate. What [the decided cases] tell tribunals and courts to look for, in order to give effect to the legislation, are indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias.”

What the tribunal had done, however, was stop at the point where they accepted the supervisor’s evidence that his view had been based on merit alone. They had accordingly found that the undoubted act of discrimination – that is to say choosing the other candidate – was not racially motivated. What the tribunal had failed to do was consider Dr Anya’s evidence of longstanding hostility towards him (a question of pure fact) and, if it was established, to decide what was the reason for it. They had not only failed to go this
distance - they had closed it off by directing themselves that:

"[I]f an employer behaves unreasonably towards a black employee, it is not to be inferred without more that the reason for this is attributable to the employee’s colour; the employer might very well behave in a similarly unreasonable fashion to a white employee."9

We firmly disagreed with this. If such behaviour towards a black employee is not to found an inference of racial hostility, it has to be shown by evidence that the employer behaves equally badly to staff of all races: the fact-finding tribunal cannot simply shrug it off as an equal possibility.

We allowed Dr Anya’s appeal because the tribunal had simply not made the necessary findings about a series of hostile acts alleged by Dr Anya against his supervisor; nor therefore had it been in a position to decide on their motivation if in fact they had occurred. Finding his supervisor credible was not enough: a witness, we pointed out, can be credible, honest and mistaken, especially about his own motivation. We remitted the case to a fresh tribunal to make the necessary findings and evaluate them according to law.

Many years before I took part in deciding Dr Anya’s case, I had argued a very different case at the bar. Eley were a munitions manufacturer in the West Midlands. Their workforce included full-time workers both male and female, and a further body of part-timers who were all women: a very typical employment pattern in the UK. By agreement with the trade unions, when work fell off and redundancies were called for, the part-timers were dismissed first; after that, the accepted principle of “last in, first out” would apply. A group of them read a booklet issued by the organisation now known as Liberty which suggested that this could be unlawful indirect sex discrimination. They came to see Liberty’s legal officer, who asked me to advise, and we issued proceedings for both sex discrimination and unfair dismissal.

We won one of the claimants’ cases before the industrial tribunal, and both of them on appeal.10 The reasoning was this. To amount to indirect sex discrimination, a condition or requirement had to have been applied which considerably fewer women than men, among those affected by it, could comply with. Here the condition was that, to avoid ranking for redundancy on the accepted principle of “last in, first out”, a worker at Eley had to be employed full-time. Part-timers could by definition not comply with this, and since they were all women, it followed that women were disproportionately disadvantaged by it.

This was the first time that the impact of traditional industrial arrangements on women in the workforce had been examined for its indirectly discriminatory effects and found wanting. But there was a telling sequel. The tribunal recommended reinstatement, but the employers had no posts to offer, except in the factory’s fire brigade. Brenda Clarke, who was one of the successful claimants, said she would take the job. Sorry, said Eley’s management, we don’t have women in the .... and then they realised that they were about to commit a new act of, this time, direct sex discrimination. So they took Brenda back and she became a firefighter. You could say that she had killed two birds with one stone.

Carole Webb got a clerical job with a small import-export company, replacing an employee who had gone on maternity leave; but
within a few weeks she found that she too was pregnant. The company dismissed her. She brought a claim for direct sex discrimination, based on the simple fact that although men can do a great many things, they can't get pregnant, and pregnancy was the reason for her dismissal.

As you can imagine, this was not an attractive claim. The industrial tribunal, the Employment Appeal Tribunal, the Court of Appeal and the House of Lords all held that the reason for Carole Webb's dismissal was not her pregnancy but her impending unavailability for work. It was irrelevant, they held, that the reason for her unavailability was her pregnancy. But the bar on sex discrimination in employment had a constitutional element: it was contained in the law of the European Union. So the House of Lords referred the question to the European Court of Justice in Luxembourg, and back came the answer: if the reason for the woman's unavailability is pregnancy, then to dismiss her on that ground is to discriminate against her because of her sex.11

My junior, Laura Cox (now Cox J) and I had known from the start that we were going to lose at home but would eventually win in Europe. What made the difference was the English courts' focus on conventional wisdom and pragmatism, and the European court's focus on principle and underlying purpose - a form of choice with which courts with constitutional underpinnings are perhaps more familiar than the English courts are, or at least were until the Human Rights Act 1998 came into force.

John Alexander was a prisoner, serving a substantial sentence for an attempted bank robbery in a high security prison on the Isle of Wight. He had applied several times to work in the prison kitchen, and had repeatedly been turned down. Since he was black and all the prisoners working in the kitchen were white, he suspected that his race had something to do with it. So we brought proceedings under the Race Relations Act against the Home Office, whose principal line of defence was that the Act did not apply to them. Their second line was that it was anyway perfectly legitimate to keep John Alexander away from sharp implements, since he had been convicted of a crime of violence (he had in fact been the driver or lookout man). When we obtained the list of prisoners who were allowed to work in the kitchen, they included a murderer and an arsonist.

We won the case, and the Home Office agreed to retrain its prison staff in race relations. A member of the Commission for Racial Equality sat in on one of the retraining sessions and heard a senior prison officer explain that black prisoners should be respected because some of them knew how to put an evil eye on people who disrespected them. It was what you might call a Pyrrhic victory.

What, if anything, is the moral of these old soldiers' tales?

It is, I would suggest to you, first, that because identifying and challenging discrimination often involves unravelling and examining people's motives, it is risky to take events at face value: inherited assumptions, both on the part of witnesses and on the part of judges, have to be recognised, examined and evaluated against the constitutional and legal principles which our society has adopted. The line between alertness to real discrimination and readiness to see discrimination where there is none is a thin and tricky one which judges have to tread with care. It is made no easier by aggressive claimants or
evasive defendants; but these are characters that judges get to know and allow for.

Secondly, I suggest, it is that winning a legal argument is not always the same as winning the case. Dr Anya lost again when an employment tribunal reheard his claim in accordance with the court’s directions. Brenda Clarke, by contrast, succeeded – just – in getting re-employed; she went on, incidentally, to become a city councillor and to chair some of Birmingham’s most important council committees. Carole Webb’s child will have been almost eight years old by the time the House of Lords finally gave judgment in her favour; but perhaps the compensation she finally recovered will have paid for a family holiday. John Alexander, so far as I know, was finally allowed to work in the prison kitchen; but whether the conduct of prison staff towards black and ethnic minority prisoners improved as a result of the case is doubtful. One of the things courts need to keep an eye on is that their decisions should have some effect.

Thirdly, non-discrimination and equality law is today fundamental to all democratic societies. Guyana, with its constitutional guarantees and its statutes, is privileged in this respect. But laws are no good if they are not made to work, and making them work is what our colloquium is about.

3 Twain, M., Adventures of Huckleberry Finn, Charles Webster, 1885.
4 Somerset v Stewart (1772) 98 ER 499.
5 Nairn v University of St. Andrews [1909] AC 147.
10 Mrs B Clarke v Eley (IMI) Kynoch Ltd EAT, 1982, IRLR 482.
11 Webb v EMO Air Cargo (UK) Ltd (14 July 1994) EOR57A.
Legal Gender Recognition and (Lack of) Equality in the European Court of Human Rights

Iina Sofia Korkiamäki

1. Introduction

According to the European Union Fundamental Rights Agency, 32% of transgender people in European Union (EU) countries feel the need to avoid expressing their preferred gender due to fear of being assaulted or threatened. An average of 50% reported having been personally discriminated or harassed on the ground of being perceived as transgender during the last year, and 30% of the respondents had felt discriminated against because of their gender identity when looking for a job.\(^2\) The high level of discrimination experienced in EU countries illustrates the problems faced by transgender people in the continent, and calls for a closer look at equality and non-discrimination from a legal perspective.

This article systematises the rights of transgender people under the European Convention of Human Rights (ECHR, “the Convention”), and examines the European Court of Human Rights (“the Court”) case law on protection of private and family life, emphasising the principles of equality and non-discrimination.\(^3\) It illustrates the change in the Court’s take on legal gender recognition, transgender marriage and the consequent breaches of private and family life, and acknowledges the shortcomings of this progress. It challenges the Court’s view of equality and non-discrimination in gender identity cases by criticising the lack of thorough application of Article 14 in the judgments, and argues that the current margin of appreciation doctrine is interpreted in a way that can override equality considerations, rendering Article 14 a rather powerless tool to call differential treatment into question.

2. Conceptual Framework

2.1. Equality and Non-Discrimination

Equality is one of the main liberal aspirations and a fundamental assumption of a democratic society. It is included in all human rights documents in one form or another, and these provisions attempt to give it a legal meaning. However, equality as a concept is neither definite nor clear and its contents can be debated.\(^4\) The meaning of equality has shifted over time and new groups have been included under the concept’s protective umbrella.\(^5\) Differing views exist on whether equality should be addressed as formal or substantive and if certain affirmative action is required or even desired to advance the position of disadvantaged groups.

Non-discrimination is inherent in the concept of equality, and the two can be seen as complementary sides of one coin; there exists a corollary between equality and non-discrimina-
tion. However, non-discrimination is usually seen as referring to the negative aspect of the right: the obligation of a state to refrain from doing something rather than taking positive action to create circumstances that promote full or substantial equality.

In the legal sense, the term "discrimination" generally refers to differential treatment of an individual or a group of individuals, which is based on their characteristics, and results in a disadvantage. Human rights treaties themselves do not define the notion of discrimination. However, General Comment No. 18 by the UN Human Rights Committee refers to the text of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women and concludes that discrimination is "any distinction, exclusion, restriction or preference based on the forbidden grounds "and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms". The "effect" refers to indirect discrimination, in which a situation amounts to discrimination even without the authorities’ intent to do so.

For the purpose of this article, the concept of non-discrimination refers to an obligation to refrain from interfering with a person’s human rights on the basis that he or she belongs to a group holding protected characteristics. Equality in this context is understood to be the positive side of the right, which may impose positive obligations on states.

2.2. Gender and Gender Identity

In order to grasp the notion of gender identity, we must first elaborate on the differences between the traditional concept of "sex" and the more recently adopted term “gender”. The World Health Organization (WHO) defines sex as the biological characteristics of men and women while gender refers to “the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.”

In international human rights law, gender and sex are sometimes used interchangeably. The texts of the international conventions traditionally talk about sex, but later interpretations have incorporated the term gender to better reflect the wider issues arising from gender-based discrimination. For the purposes of non-discrimination law this makes sense, as the disadvantage experienced by women is often due to the expectations of women’s role in society rather than based on merely their biological characteristics. For example, pregnancy discrimination is surely based on the biological fact that women carry children and men do not, but the subsequent disadvantage in the employment market is largely created by the expectation that the mother will be the main caretaker of the child.

While “gender” as such is often seen as largely socially constructed, in connection with the notion of “gender identity”, it refers to the deep and intimate sense of an individual of their maleness or femaleness, of who they are and with whom they identify with, including the personal sense of the body. Advocates for transgender equality describe “gender identity” as one’s personal “experience of gender, which may or may not correspond with the sex assigned at birth.” In the case of transgender people, this experience is not completely in conformity with the sex assigned at them at birth.

Gender identity was linked to medical conditions years before it became a human
rights issue. The WHO still classifies gender identity in terms of mental disorder, referring to conditions such as “transsexualism” and “dual-role transvestism”. The medical approach has generated controversy with scholars and activists who advocate on behalf of equality for transgender people. The critics of the medical model have proposed a “self-determinative model” that “rejects the pathologisation and instead adopts a flexible, inclusive, and non-binary view of gender identity.” Even though a human rights approach has become more widespread over the years, the medical model is still present in the considerations of the Court.

Gender identity is not clearly defined as a legal term. The only explicit mentioning of gender identity in a convention text is to be found in Article 4(3) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. The Council of Europe’s explanatory report on this convention states the following:

“Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to ‘male’ or ‘female’ categories.”

In the legal sphere, it can be seen as more convenient to limit the discussion to the rights of post-operative transsexuals as in their case certain reassigned biological characteristics have supported counting them in the category of the “opposite sex”. While the self-determinative model can be seen as an ideal way of recognising gender as it respects a person’s own internal experience of their gender, legally such an approach may be problematic. Certain aspects of legal gender recognition remain problematic as long as domestic laws continue to differentiate between sexes in areas of family law, tax law and social benefits. This may explain the approach taken by the Court, which only addresses post-operative transsexuals in its case law, linking gender identity to the traditional differences of biological sex. Also, the Court of Justice of the European Union (CJEU) has addressed gender identity in the case *P. v S. and Cornwall County Council*, in which it affirmed that gender reassignment is included within the scope of the ground of “sex” in EU anti-discrimination law.

“Transgender”, however, does not equal “transsexual”, but is a wider umbrella term encompassing everyone whose gender identity or gender expression is not entirely in conformity with his or her biological characteristics of sex. Not all these people wish to have surgical operations to achieve the biological characteristics of the “opposite sex”, but feel comfortable somewhere between or outside the dichotomy of male and female (gender queer or gender variant), or merely wish to express their feminine or masculine side from time to time (such as cross-dressing). Some countries provide legal measures to recognise a so-called “third gender” to cater for the needs of people who do not identify clearly as female or male.

It is also noteworthy that within many jurisdictions, while posing a list of other requirements, the law does not expect transgender people to undergo a full gender reassignment surgery in order to obtain legal recognition of the gender they are more comfort-
able with. This means a person identifying as a female can be legally recognised as a female even though she may have certain biological characteristics of the male sex, as long as she fulfils the other criteria. Still, the Court, as mentioned, has mainly dealt with applications from (fully) post-operative transsexuals.

For the purpose of this study, “gender identity” is used to mean the intimate sense of a transgender person’s maleness or femaleness. “Transgender” is used as an umbrella term to encompass all persons who do not identify fully with the sex they were assigned at birth, and transsexual is used to refer to transgender people who have undergone gender reassignment surgery.

2.3. Private and Family Life

Article 8(1) of the ECHR states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” The provision has been used to cover a growing number of issues that would not be easily accommodated under other provisions of the Convention, and it could be argued that Article 8 is the most open-ended of all the Convention rights as it can adapt to the changing circumstances in society. For instance, the concept of private life has been applied to a variety of situations, including bearing a name, the protection of one’s image or reputation, awareness of family origins, physical and moral integrity, gender identity, sexual activity and orientation, a healthy environment, self-determination and personal autonomy, and privacy of telephone conversations.

Article 8(2) provides for a broad restriction of the right, stating that interference can be acceptable if it is in accordance with law, necessary in a democratic society and in the interests of either national security, public safety, economic well-being of the country or for prevention of disorder or crime, protection of health or morals or the rights and freedoms of others.

In addition to private life, Article 8 protects established family life from interference by the state. The Court has stated that the notion of family life is an “autonomous concept.” What constitutes family life will depend on the factual relations and real existence of close personal ties. In the absence of legal recognition, the Court has relied on the existing de facto family ties, such as applicants living together, length of the relationship and children born within it.

With regard to the definition of family, the Court has rejected the idea that a lawful marriage is an essential prerequisite to a family deserving protection under Article 8. It is noteworthy that the protection granted for family life under Article 8 is not the same in content as the right to marry provided for in Article 12. A couple may not have a right to marry under Article 12 but do still deserve the protection for their family within Article 8, despite being “illegitimate.”

3. Prohibition of Discrimination on the Basis of Gender Identity

3.1. Non-Discrimination under the European Convention of Human Rights

The non-discrimination clause of the ECHR, Article 14, stipulates the following:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,
religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The provision is not autonomous as it can only be invoked in conjunction with an individual right protected under the ECHR. Nonetheless, discrimination under Article 14 can be found even when the provision it is combined with in a case is not violated. Thus, Article 14 applies when the discrimination is on a ground which corresponds to the exercise of a right under the Covenant, i.e. “within the ambit” of a right protected under ECHR.27

As the principal provision for non-discrimination is “accessory” and not an independent right, its application is limited and the interest in elaborating it has been lacking in both academic literature and in the Court’s jurisprudence. Article 14 has been referred to as unclear and conflicting.28 To remedy this situation, on the 50th anniversary of the Convention, a general, independent non-discrimination provision was included in the Additional Protocol 12, which was opened for signatures in 2000.29 So far, the Protocol has only been ratified by 18 of the 47 member states of the Council of Europe. Hence, the focus of this research remains on the interpretation of Article 14.

Gender identity as a ground protected from discrimination is not explicitly mentioned in the Convention text. However, it is interpreted to be included under the “or other status” clause under Article 14 of ECHR.30 The Court has affirmed the view in its case law. In PV v Spain, decided in 2010, the Court explicitly emphasised that, although no issue of sexual orientation arose in the current case, “transsexualism” was a notion covered by Article 14, which contained a non-exhaustive list of prohibited grounds for discrimination.31 The Court included gender identity, in the form of “transsexualism”, in the list of protected ground even though it did not find a violation of Article 14 in the circumstances of the case in question.32

3.2. Justified Distinction or Prohibited Discrimination?

According to the case law of the Court, the first step in establishing whether discrimination has taken place is to examine whether the treatment has been different, and whether the person who had been treated differently, was in a relevantly similar situation. Under Article 14 of the ECHR, equal situations prescribe equal treatment and different situations different treatment.33 Even though it may be easy to agree on this Aristotelian approach, also referred to as “equality of consistency”, it is not free from problems. Assessing when people are sufficiently alike, or when their situation is relevantly similar, is a complex task. Treating similar people alike calls for finding a comparator, a similarly situated person of a different sex, race, religion or other status, who has been treated more favourably. This assumes a “universal individual”, which hardly exists beyond a certain norm one should comply with.34

In deciding when two persons are relevantly alike, the law requires a judge to disregard the impugned characteristics, for instance the race, sex or gender identity, of the parties. This assumes that individuals can be considered in the abstract, apart from their inherent characteristics, which still heavily determine their social, economic and political situation. The comparator, on the other hand, is not an abstract person, but a white male, Christian, able-bodied and heterosexual. It has been argued in feminist literature that unless the applicant conforms to this
“male norm”, she or he cannot overcome the threshold to demonstrate being similarly situated to the comparator.  

The Aristotelian equality requires an answer to the question: equal to whom? In light of the male norm comparator theory, the answer is “equal to a man”. For example, in the area of equal pay, women who are paid less are unlikely to find a male comparator doing equivalent work in the same establishment. This is due to segregation in the employment market: few men work in secretarial positions or in a nursery. Thus, it is often extremely difficult for an applicant to demonstrate being treated differently in a relevantly similar situation and consequently have a chance of succeeding with their claim of discrimination.  

If the above-mentioned condition is strictly applied, it can impose a wide-reaching limitation on discrimination claims. Placing the burden of proof on the applicant on the similarity of situations also requires him or her to justify why similar treatment in the case would be required. It can be rather troublesome to establish the similarity to the comparator group, and the arguments related to the issue actually engage with the heart of the justification for the treatment. However, the Court has not always been consistent in applying the test of comparable situations. It has also issued judgements, such as Dudgeon v the United Kingdom, which suggest that the applicant does not actually bear the whole burden of proof in establishing the similarity. In these cases, the Court merged the consideration of similarity with the objective justification scrutiny. Therefore, the Court does not always place such a heavy burden on the applicant before embarking on the analysis of objective justification, for which the respondent state must provide proof.

On the other hand, the Court has held that certain differences that are inherent in otherwise similar situations may justify difference in treatment. In Rasmussen v Denmark the Court pointed out that states enjoy a certain margin of appreciation in assessing whether and to what extent differences in similar situations justified different treatment in domestic law.

After establishing a difference in treatment in similar situations, the second step is to consider whether objective and reasonable justification exists. In other words, the treatment will be deemed discriminatory unless it is a proportionate means of achieving a legitimate aim. Despite the seemingly straightforward and well-established test, without further elaboration on the content of legitimate aim and proportionality, the Court is left rather free to rule on a case-to-case basis.

Almost any action can be claimed to pursue a legitimate aim, and states often invoke this when they are accused of violations under Article 14. Governments can claim good intentions and noble aims even when they are making harsh divisions based on, for example, gender stereotypes. For example, limiting immigration of foreign men over foreign women has been argued to “protect public tranquillity and order”. Hence, as discriminatory intent can very rarely be proven, the legitimacy test is satisfied in most cases. Some scholars have addressed this challenge by suggesting that an aim should only be declared legitimate if it is in accordance with
the Convention values. Thus, an aim that contradicts the objectives of the Convention should not be held legitimate.46

The second part of the test, analysis of proportionality, is the one that, given the problems relating to the legitimacy test, determines the outcome of the case.47 Although the principle of proportionality is not explicitly stated anywhere in the Convention, it is very much present in the Court’s case law throughout the provisions, and can be identified in essence in the second paragraphs of Articles 8-11, which allow limitations on rights if they are “necessary in a democratic society”.48 The principle has been associated with the “fair balance” that is to be struck between the public interest and the interest of the individual in his or her enjoyment of the Convention rights. In applying the proportionality test, the Court has balanced the consideration of whether the measures chosen by a state are disproportionate against the consideration of the margin of appreciation.49

The margin of appreciation doctrine entails that the Court should not assess the legitimacy of state policies as such, but only their conformity in effect with the Convention requirements.50 The approach originated in the Belgian Linguistics case, in which the Court stipulated that it cannot assume the role of the national authorities as it would lose the sight of the subsidiary nature of the Convention.51 The national authorities were said to be free to choose measures they consider appropriate in applying the Convention rights, and the review of the Court was to be limited to scrutinising their conformity.52 Since the 1960s, this principle has developed into the doctrine of margin of appreciation. The case Handyside v United Kingdom is the main precedent on the approach, but it has been further elaborated in theory and practice in subsequent case law.53

The margin of appreciation affects how strictly an individual case is reviewed. This “strictness of review” is adjusted based on the circumstances of each case.54 The margin is considered to be wider when there exists a lack of “European consensus” on the matter in question.55 However, due to the absolute nature of non-discrimination, the margin should generally be narrow in considerations under Article 14. The very essence of the provision is to protect minorities from arbitrary treatment endorsed by the majority. If states are granted wide discretion based on the views of the majority, the core idea of the non-discrimination clause can be compromised.56 The Court has not always applied the same margin of appreciation to all Article 14 cases. For example, in Rasmussen v Denmark, where the court found discrimination on the basis of difference in otherwise similar situations, rather than on the basis of a specific ground of discrimination, the Court gave Denmark a wide margin of appreciation.57

However, the Court has identified certain classes of cases in which scrutiny is strict and a difference in treatment requires “very weighty reasons”. These categories are sex (including sexual orientation), illegitimacy and nationality. Strict scrutiny is also required in relation to race and religion, but without reference to “very weighty reasons” by the Court.58 Moreover, the Court has stated that the margin of appreciation shall be narrow when a particularly important facet of an individual’s existence or identity is at stake or there exists a consensus among the Council of Europe member states with regard to the relative importance of such interest.59 The last example illustrates the
self-restraint of the Court as margin of appreciation plays a key role even in cases concerning particularly intimate aspects, such as one's identity.

Following the Vienna Convention on Law of Treaties (Articles 31 and 32), the interpretation of the Convention is guided by the object and purpose of it as an instrument of effective protection for human rights. Based on this starting point, the Court has adopted “evolutionary interpretation” as one of its principal interpretative methods. While accepting these principles per se, some commentators have raised concerns over so-called judicial activism of the Court when it interprets the Convention in a way that requires changes in domestic law. This counterbalance concern has been linked to margin of appreciation and sees the doctrine as an expression of judicial restraint. However, emphasising the requirement to restrain neglects the other side of the coin: the Court still has the overall power to ensure that national measures meet the Convention requirements, for instance in relation to non-discrimination.

The Court has held that the Convention is “an instrument designed to maintain and promote the ideals and values of a democratic society”. Further, it has elaborated that such values include pluralism, tolerance and broadmindedness. On this note it has been argued that as democratically elected bodies are the ones responsible for enacting law and deciding on policy, adherence to democratic governance requires that the Court has a limited discretion on law-making. In addition, the cultural diversity among contracting states has served as a legitimate concern under the Convention entailing that the Court should not try to impose uniform solutions for the culturally and ideologically varied states. Still, a balance will always need to be struck between the cultural differences and the universal standards of the Convention.

As we have seen, a distinction, exclusion, or restriction of preference may be justified if it is based on reasonable and objective criteria, it has a legitimate aim and it is proportional between the means and the aim. This goes for all the grounds, even the most sensitive ones. What is reasonable is often debatable and depends on specific circumstances: the situation in the country in question, its cultural and religious background, and specific social traditions and customs. The changing social and moral values in modern societies can result in controversial cases, such as those relating to gender identity issues. At the same time, the Court has repeatedly affirmed the “living instrument” nature of the ECHR, emphasising the need for progressive interpretation. Hence, there exists a need for a careful balance of progressive interpretation and the reasonability and proportionality of certain restriction. Margin of appreciation based on cultural differences and values should not override the universality of equality and non-discrimination.

4. Protecting Private and Family Life of Transgender People

4.1. Legal Gender Recognition as a Private and Family Life Issue

Legal recognition of gender identity is an issue that arises when individuals seek to change their gender marker on identity documents such as birth certificates, passports and national identity cards. Problems arising from any contradiction in identity documents are often accumulated in other secondary documents like diplomas, driving licences, national health insurance cards and other certifications. Legal recognition cases
may also arise when an individual seeks to change his or her name to reflect their preferred gender.  

As proving one’s identity is required constantly in everyday life, the issue is of great importance to the people concerned. Without correct documents, enrolling in school, finding a job, opening a bank account, renting an apartment or travelling across borders becomes a greatly burdensome task. The ability to change the gender marker in identity documents protects transgender people’s privacy as otherwise an individual’s personal history is exposed every time he or she has to present identification. A 20-year-old transgender man explains how the discrepancy between identity documents and gender identity affects his everyday life:

“I still have a female name and identity number, and I have had problems with my ID. For instance, almost every time I try to collect a parcel from the post office, they question whether the passport is mine. Also, the travel card has my identity number on it and when I try to get on a bus, the driver often claims it is not my card as it says female.”

Thus, recognising people’s preferred gender can help prevent discrimination and stigma on the basis of gender identity or gender re-assignment. Generally, the right to be recognised according to one’s gender identity could be seen to flow from the right to recognition before the law, the right to be equal before the law and the right to enjoy protection of private and family life.

The process of legal gender recognition varies across Europe. While some countries lack legal frameworks altogether, in others individuals are required to undergo a cumbersome process including surgical procedures, providing proof of infertility and possibly divorcing their current partner. Such requirements have recently been criticised by the UN Special Rapporteur on Torture and the Council of Europe Commissioner for Human Rights. Due to these statements and other recent developments, there has been a trend towards a greater respect for self-determination in the process as a growing number of Council of Europe member states have given up such prerequisites in their domestic legislations, or are currently reviewing them.

The debate and subsequent legislative amendments in European countries illustrate a change in the discourse regarding transgenderism – traditionally seen as a medical issue, it has gradually resonated more in the human rights field, awakening concerns over the right to be free from inhuman and degrading treatment, discrimination and invasions of private life. The case law presented in the next chapter concentrates on the two latter aspects, which have been debated in the Court since the 1980s.

Lack of legal gender recognition is not only an issue relating to private life as such, but bears added consequences for other rights such as the right to health, the right to education, and civil and political rights. As mentioned above, a transgender person whose identity documents do not match his or her appearance will experience difficulties in applying for education or employment, when registering to vote and when seeing a doctor. Even when such difficulties can be overcome by explaining the situation, the humiliation experienced by transgender people can limit their behaviour as it will be easier to simply avoid voting or applying for a job or place in education. Elsa, a transgender woman whose
legal gender remains male, describes the difficulties she has experienced:

“I used to apply for jobs with my female name. I knew I would have to tell my future employers that I was a transgender person at some point, but I feared being judged. Even in interviews where the issue was not discussed I still felt pressured because I knew I would have to produce my identity card and my health insurance card [should I be offered the job].”75

Additionally, even though this study does not concern hate crime and other bias motivated violence against transgender people per se, it is important to note that if legal gender recognition is denied, the risk of exposing one’s personal details of reassigned gender is high. When a person’s appearance and gender marker on their identity documents do not match, his or her history is revealed, which opens up a possibility of violence and discrimination based on gender identity.

As we will see in chapter 4.3, the Court has clearly established the right to legal gender recognition under Article 8 of the ECHR. A certain level of recognition is thus required, but as to how the contracting states wish to fulfil this obligation, a wide margin of appreciation is granted. Although the interpretation of the Court has developed over time to become more supporting of the rights of transgender people, the specific circumstances of each case will determine whether a violation arose or not.

4.2. Transgender Marriage

“Transgender marriage” refers to a situation when the preferred gender identity of one of the spouses is judicially recognised. Thus, it is an issue closely related to legal gender recognition. In the context of marriage, there are two different scenarios in which the legal rights of an individual have had to be, or still need to be, clarified. First, there is a question of a transgender person’s “sex” for the purposes marriage. The crux of the issue is whether a person is to be regarded as belonging to their preferred sex according to their gender identity, or if the inability to gain certain biological characteristics of the other sex denies the possibility to marry according to the reassigned gender. The Court has dealt with this aspect with a growing understanding towards transgender people over time, and concluded in the Grand Chamber judgment of Christine Goodwin v United Kingdom in 2002 that gender cannot be regarded as a solely biological construction and a transgender person shall be allowed to marry according to their reassigned sex.76

The second aspect of transgender marriage is more contested. The legal problem occurs when a person has previously married and later wishes to have his or her gender identity legally recognised. In some jurisdictions it is a prerequisite for legal gender recognition that one is single. In practice, a married person is required to divorce their spouse or, depending on the national legislation, to convert the marriage into a civil partnership available for same-sex couples.77 By imposing such requirements the state intervenes with an existing marital relationship, an aspect of private and family life protected under Article 8 of the ECHR.78 The task of the Court in such cases is to strike a fair balance between the interests of the married transgender individual and the interests of society. The Court has previously dealt with the issue in the admissibility decisions of the cases Parry v United Kingdom and R and F v United Kingdom.79 Both applications were declared inadmissible as manifestly ill-founded.
as same-sex marriage was not permitted under English law at the time. Later, the issue was reconsidered in a case against Finland, when a transgender woman disputed the divorce requirement. In July 2014, the Grand Chamber in *Hämäläinen v Finland* held, in accordance with an earlier Chamber judgment (*H v Finland*),\(^8\) that the requirement to be unmarried as a precondition to legal gender recognition did not violate the applicant’s right to private life, right to marry or right to non-discrimination.\(^8\)

Both aspects of transgender marriage have been under scrutiny specifically as the majority of jurisdictions continue to define marriage exclusively in terms of opposite-sex partners, and a right to enter a same-sex marriage is not currently protected under international human rights law, but left to the discretion of nation states to regulate.\(^8\)

However, it can be argued that the issue of transgender marriage should not be understood in terms of same-sex marriage in general. Although both spouses in this form of transgender marriage will be legally of the same sex, the difference, in relation to couples one of whom is transgender, is that they are already married, whereas a gay couple would wish to get married. This was a distinction adopted by the Chamber in *H v Finland*, which ruled that Article 12 concerned the right to marry rather than to remain married. Accordingly, the Court held, it was not at stake in the case, which instead related to the consequence of a person’s change of gender for their existing marriage.

The Court has previously regarded marriage as a fundamental institution which is afforded special protection under the Convention. Even though other forms of family have been afforded recognition over time, marriage continues to enjoy the highest level of protection.\(^8\) Thus, living in an existing marriage and a desire to enter a marriage, in general, should not be seen as comparable situations. Allowing transgender people to continue their marriages would therefore not mean that a state loses its discretion to regulate the terms of same-sex relationships. Following the principle of legal certainty, the state could provide for continuing the relatively small number of existing marriages and still restrict the right to marry to different-sex couples in general if it so wishes.\(^8\)

4.3. Legal Gender Recognition in the European Court of Human Rights

4.3.1. Non-Recognition of Gender Identity – a Breach of Private Life?

The first ever case concerning legal gender recognition brought to the Court was *Rees v United Kingdom*, decided in 1986.\(^5\) The applicant was a post-operative female-to-male transsexual, who claimed violations of the right to respect for private and family life (Article 8) and the right to marry (Article 12). He complained that the government had failed to provide measures that would legally recognise him as male, especially with regard to obtaining a birth certificate that would state his real gender identity. Although he had been issued a new passport with a male gender marker, his birth certificate was still required in certain instances and the contradiction between the gender marker in his birth certificate and his appearance resulted in difficult and distressing social encounters.\(^6\) In accordance with the domestic legislation in place at the time, the applicant was still regarded as a woman for the purposes of marriage, pension rights and certain employment benefits.\(^7\) Despite the possible discriminatory nature of the actions, Article
14 (non-discrimination) was not invoked in the present case.

In assessing such a situation for the first time, the Court held that the state’s refusal to alter birth certificates did not amount to interference. It recalled that although Article 8 mainly requires states to refrain from arbitrary interference in people’s private and family life, it may pose certain positive obligations as well. However, these positive obligations will vary considerably from case to case, as the notion of “respect” is not clear-cut. The Court noted that at the time, in 1986, the laws regulating legal recognition of transsexuals’ gender varied widely throughout member states and the law was in a “transitional stage”. Thus, a wide margin of appreciation was to be granted to contracting parties on the matter.

Drawing from the wide margin of appreciation, the Court ruled that the UK was free to decide on the measures by which it would recognise gender of transsexuals. While the fair balance requirement called for certain adjustments to the existing system, it did not give rise to an obligation on the UK to change its system of registering births and population. Therefore, the positive obligations of the state to make adjustments did not extend so far as to alter the present system altogether. Thus, no violation of Article 8 had arisen.

The Court also noted that a possible annotation in the birth register could not mean the acquisition of all biological characteristics of the other sex, illustrating the highly biological understanding of sex and gender adopted by it. The view was further confirmed in the Court’s analysis of Article 12, in which it held that there had been no violation by the applicant’s inability to marry a woman, as he was not seen biologically as male despite the fact that he had undergone gender reassignment surgery.

Regardless of the fact that the Court did not find any violations, it accepted that in accordance with the living nature of the Convention there existed a constant need to review the scientific and societal developments with regard to the rights of transsexuals. This can be seen as a prediction of the future developments of the law, and has been reflected in the subsequent jurisprudence.

However, the change did not come about in the next judgement on gender identity issued four years later, in 1990. In the case of Cossey v United Kingdom, the Court came to a very similar conclusion to the Rees case presented above. It ruled that there had been no violation of Articles 8 or 12, as “gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex”. Additionally, it decided that attachment to the traditional concept of marriage provided “sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage”, and that the state enjoys a wide margin of appreciation in relation to regulation of the right to marry in national law.

Finally, in 1992, the Court found a violation of Article 8 with regard to concerning the recognition of transsexuals for the first time, in the case B v France. The applicant, Miss B, was a male-to-female transsexual, who had undergone hormonal and surgical treatment to make her physical appearance comply with her gender identity. She invoked Article 8 of the Convention as, in her opinion, the French authorities’ refusal to update her gender marker to female in the civil status register interfered with her right to respect for private and family life. She explained that the contra-
diction between her appearance and her identity documents forced her to disclose intimate personal information to third parties and created great difficulties in her professional life.\(^94\) In addition, Miss B wished to marry her male partner, with whom she cohabited. As this was impossible due to her male gender marker, she subsequently claimed a violation of her right to marry under Article 12.

As with *Rees*, the Court recalled the requirement of striking a fair balance between the competing interests.\(^95\) However, it considered that there had been a change since the cases of *Rees* and *Cossey*, as it was undeniable that attitudes towards transsexuals had changed, science had progressed in making the gender reassignment surgery more accurate, and increasing importance had been attached to the problems faced by trans people.\(^96\) Still, these developments remained inconsistent among member states and were not the main reason for the Court to depart from its analysis in the *Rees* and *Cossey* judgements. In the end, the Court did find a violation of Article 8, but the crux of the reasoning was the differences between the English and the French systems of registering births and population. In France, birth certificates are designed to be updated throughout life, so there was no reason why the civil status of Miss B could not be updated. Additionally, the fact that a (wrong) gender marker was included in an increasing number of official documents, and that Miss B was unable to change her forenames, differentiated the situation from that of the British one to the extent that the severe difficulties experienced in her everyday life, taken as a whole, amounted to a violation of the respect of Miss B’s private life.\(^97\)

Despite finding a violation of Article 8 in the French context, the Court did not see a reason to depart from its analysis in *Rees* and *Cossey* when a new case from the United Kingdom was brought before it in 1998. In *Sheffield and Horsham v United Kingdom*, transgender women Ms Sheffield and Ms Horsham invoked Articles 8, 12 and 14 of the Convention but no violation was found.\(^98\) However, the Court affirmed that the “area needs to be kept under permanent review by the Contracting States” in the context of “increased social acceptance of the phenomenon and increased recognition of the problems which post-operative transsexuals encounter”.\(^99\)

This was the first transgender case in which the Court was asked to consider the aspect of equality and non-discrimination in addition to the substantial right. With regard to the claim under Article 14, the applicants argued that as the law continued to treat them as male, they were victims of sex discrimination, which they suffered through having to disclose their pre-operative gender. They stated that their disadvantaged position in law concerned intimate aspects of their private lives, and that their private life was interfered with in a disproportionate manner, which could not be justified by an appeal to the respondent State’s margin of appreciation. As the Court had not at this point established that gender identity was a protected ground, the applicants claimed that they were treated differently than men based on sex. The government submitted that the applicants received the same treatment in law as any other person who has undergone gender reassignment surgery, hence claiming that the applicants were not treated less favourably than the comparator group. It further submitted that in any case a difference in treatment could be justified with reference to the same reasons as presented under Article 8.

The Court referred to its reasoning in relation to the claim under Article 8 by stating that it had already concluded that the re-
spondent state did not overstep its margin of appreciation in not legally recognising a transsexual’s post-operative gender. It was satisfied that a fair balance was struck between the need to safeguard the interests of transsexuals and the interests of the state. This was due to the conclusion that the situations in which the applicants were required to disclose their pre-operative gender did not occur so frequently that it would disproportionately affect their right to respect for their private lives. The Court went on to conclude that this argumentation would be sufficient for the consideration under Article 14 as well:

"Those considerations, which are equally encompassed in the notion of 'reasonable and objective justification' for the purposes of Article 14 of the Convention, must also be seen as justifying the difference in treatment which the applicants experience irrespective of the reference group relied on. The Court concludes therefore that no violation has been established under this head of complaint."100

By this statement, the Court treated the discrimination claim in essence as same as the substantial claim under Article 8, assuming that Article 14 did not provide any added value. It can be argued that such conclusion deprives Article 14 of its relevance.

Despite the fact that gender identity was not yet established as a protected ground, the Court should have addressed the discrimination claim brought before it. The applicants did encounter interference with their private life, and this interference was due to the fact that they had undergone gender reassignment. The difference in treatment was therefore based on the personal characteristics closely linked to the applicants’ gender, which raises a question under Article 14 of the Convention.

The government had incorrectly compared the situation of Ms Sheffield and Ms Horsham to that of other transgender people who have gone through gender reassignment concluding that these two groups were treated the same. However, in this case the applicants’ situation should have been compared to that of non-transgender people, who are not required to continuously disclose their personal details in everyday life. The Court did note the question of reference group but further stated that it does not matter to whom the applicants are compared, as there was “reasonable and objective justification” for the interference with their private life. This statement presumes that whatever is deemed as reasonable justification for the interference per se, will be reasonable in terms of different treatment and equality as well.

Given the nature of Article 14 as a safeguard to equal enjoyment of the Convention rights, its relevance cannot be reduced by treating it in essence as the same as a claim under a substantive right. For the purposes of equality, the Court should have addressed the discrimination claim as separate, and not only refer to argumentation under the substantive right.

The long anticipated change in the interpretation of transgender cases was to come in the landmark judgement of Christine Goodwin v United Kingdom, decided by the Grand Chamber in 2002. In this case, the Court found a violation of private life and the right to marry for the first time regarding the legal gender recognition procedures in the UK.101 The applicant was a male-to-female transsexual, who had faced harassment and humiliation in her everyday work during and
following her gender reassignment process, and continued to have problems with her national insurance payments as she was still in that regard considered a man. Consequently, in her application, she complained in particular about her treatment in employment, social security and her inability to marry according to her female gender (Articles 8 and 12). In addition, she relied on the prohibition of discrimination (Article 14) as she claimed to have been treated less favourably on the basis of her gender identity.\textsuperscript{102}

In relation to the main part of the claim, Article 8, the Court held that as the applicant lived entirely as a female but was still considered as a male for several legal purposes, the situation resulted in a conflict between social reality and law, which amounted to a serious interference with her private life. This conflict was emphasised by the anxiety, vulnerability and humiliation experienced in her everyday life. In its reasoning, the Court placed weight on the respect for human dignity and freedom as the very essence of the Convention, and the continuing international trend towards increasing social acceptance of transgender people and legal recognition of preferred gender identity. Despite calling for constant review of the legal measures in relation to scientific and societal developments in its earlier decisions, nothing had effectively been done by the respondent government. As the UK failed to demonstrate significant factors of public interest to weigh against the interests of the individual in obtaining legal recognition, the Court concluded that the fair balance tilted decisively in favour of the applicant, and the government could no longer argue that the matter fell within its margin of appreciation.\textsuperscript{103} By this ruling, the Court acknowledged that the increased "European consensus" had resulted in narrowing down the UK's margin of appreciation on legal recognition of transgender people.

It is noteworthy that the Court considered that society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with their gender identity. In addition, the Court put emphasis on the notion of personal autonomy, including the protection of the personal sphere of each individual, which was seen as an important underlying principle when interpreting the guarantees provided by Article 8.

Also with regard to the right to marry, the Court departed from its earlier jurisprudence by finding a breach of Article 12 for the first time, as Ms Goodwin was denied the ability to marry her male partner. While the state was left to determine the conditions and formalities of transgender marriage, there was no justification for denying transgender people from enjoying the right to marry under any circumstances.\textsuperscript{104} It was notable that the Court decided to abandon a purely biological understanding of gender for the first time in its jurisprudence. It held that owing to the major social changes in the institution of marriage since the adoption of the Convention, as well as great developments in medicine and science, there was no reason why, for the purposes of Article 12, the determination of gender should be based on purely biological criteria.\textsuperscript{105} Though fewer countries at the time provided for a transgender marriage in the reassigned gender than recognised the reassignment of gender itself, the Court did not consider this as a supporting argument for leaving the matter under contracting states' margin of appreciation. The discretion of states did not extend so far as to effectively bar transgender people from enjoying the right to marry altogether.\textsuperscript{106}
When addressing the complaint under the non-discrimination clause, the Court did acknowledge the link to it, but as it had already found violations of the substantive Articles 8 and 12, it held that there was no need to consider separately the issue under Article 14.\textsuperscript{107}

While the Goodwin case was a progressive step in jurisprudence on recognising gender identity, the Court unfortunately omitted any analysis of the non-discrimination aspect of the claim. As Ms Goodwin faced interference with her private life and her right to marry, the Court was correct in finding violations of Articles 8 and 12. However, the Court did not acknowledge the fact that Ms Goodwin faced this interference for being a transgender person, in other words on the basis of her gender identity. She faced similar difficulties in her everyday life as any transgender person would have under the domestic law in place at that time. On the other hand, non-transgender people would not face such interference. Therefore, the Court should have addressed the possible discrimination by analysing the similarity of situations and a possible justification for the differential treatment.

The approach taken by the Court can be seen as a practical one as the needs of the applicant had already been met in the present case. However, leaving out the analysis of possible discrimination fails to highlight and address any structural problems perpetuating such discrimination. By ignoring a discriminatory intent or effect, the Court did not take the opportunity to emphasise the universal nature of human rights and the equal enjoyment of the Convention rights by everyone.

A proper analysis of equality in Ms Goodwin’s case would not have necessarily made a great difference to the applicant herself, as her situation was remedied through Articles 8 and 12. Still, an analysis under Article 14 would have been important for acknowledging the situation of the disadvantaged group as a whole. The Court’s dismissal of the discrimination claim undermines the possibility of any structural problems behind the differential treatment, and therefore the case fails to have a more profound impact on the equality discourse with regard to transgender people.

Furthermore, the Court refused to consider Article 14 merely on the basis that a violation was found under another provision. The omission on non-discrimination implies that Article 14 would not add anything to the substantive right in question. Such an approach renders the provision rather toothless to address claims of discrimination.

Goodwin v UK was a landmark judgement in many regards as it clearly stated that denying legal gender recognition and the possibility to marry in the reassigned gender are violations of Articles 8 and 12, respectively. However, the judgement’s potential in terms of equality and non-discrimination was not fulfilled. Had the Court set a strong precedent under Article 14, it would likely have affected subsequent case law in a way that places more emphasis on equality and non-discrimination – possibly even to the point of finding violations under Article 14.

On the same day, the Grand Chamber issued a similar judgment in the case I v the United Kingdom, finding breaches of Articles 8 and 12. A similar conclusion was drawn later in 2006 in the case of Grant v the United Kingdom, in which the Court held that following the landmark judgement on Goodwin, there was no longer any justification for failing to recognise the “change of gender of post-operative transsexuals”.\textsuperscript{108}
By the time the *L v Lithuania* judgment was issued in 2007, the disadvantage suffered by transgender people due to the contradiction between their identity documents and gender identity was more or less presumed. At this point, the Court simply stated that the applicant found himself in the “intermediate position of a pre-operative transsexual, having undergone partial surgery, with some important civil status documents having been changed”. The facts left the applicant in a situation of distressing uncertainty with regard to his private life and the recognition of his true identity. The government argued that budgetary constraints on public health services had prevented them from providing for the process, but the Court rejected this argument. It held that a delay in regulating the issue had extended for over four years, which could not be seen as proportionate. Also, as the number of people involved would have been rather small, the burden on the government to provide for their needs was not unduly high. Hence, the fair balance shifted in favour of the applicant and the Court found a violation of Article 8.

In the case of *P.V. v Spain*, the Court examined, for the first time, the possible discriminatory aspect of the state’s conduct based explicitly on “transsexualism” and gender identity. The applicant, a male-to-female transsexual, had had a child prior to her reassignment surgery. After the reassignment, the state had restricted the applicant’s contact with her six-year-old son arguing that her emotional instability after the procedure risked affecting him. While the Court established clearly that her status as a transsexual came under the protective umbrella of Article 14, it did not find a violation in this regard. The applicant had invoked the non-discrimination clause in conjunction with Article 8 protecting her right private and family life, but no breach was found due to the Court’s reasoning that the restrictions based on meeting her son had not been on the grounds of her gender identity. Instead, they were imposed having the child’s well-being in mind, giving him time to adjust progressively to his father’s re-assigned gender.

However, it could be argued that the Court’s interpretation of Article 14 was not sufficient in terms of equality. Had the Court taken into consideration the applicant’s equal right to enjoy family life regardless of her gender identity, it might have arrived to a different conclusion and found a violation of Article 14 in conjunction with Article 8. In the present judgement, the Court *de facto* restricted the applicant’s access to her child based on her gender identity, even if the aim of doing so was to protect the child’s well-being. It can be questioned whether there was actual evidence or indication of the harmful effect of the gender reassignment to the child, and whether this was carefully balanced against the right to family – the Court did not discuss this in detail.

It is clear from the above-presented jurisprudence that the Court has addressed the rights of transgender people with a growing understanding, and extended the protection afforded to their private and family life over the years. In doing so, the Court has repeatedly recalled the living instrument nature of the ECHR, interpreting it in evolutive manner, and expanding the protection in line with societal changes. However, the analysis of the Court has concentrated greatly on the possible violation of the substantive Article 8 at the expense of equality and non-discrimination considerations.
4.3.2. Debate on the Divorce Requirement

As explained above, some aspects of transgender marriage remain contested. In particular, the requirement to be single, or divorce one’s current partner in order to obtain legal gender recognition, continues to raise controversy. To this end, the case of Hämäläinen v Finland, initially adjudicated in Chamber on 13 November 2012 and then referred to the Grand Chamber, whose judgment was published in July 2014, was important in determining which direction the Court’s jurisprudence would turn. Despite the possibility to review the issue in light of the growing support for transgender rights globally, the Grand Chamber, like the Chamber before it, maintained that a fair balance was struck between the interests of the applicant wishing to stay married to her partner, and the general interests of society in the case. The Grand Chamber relied on the margin of appreciation doctrine granting member states a wide discretion to regulate on matters linking to gender recognition and same-sex marriage. The Court voted 14-3 that no violation had taken place.114

The applicant of the case was a male-to-female transsexual, who has been married since 1996 and had a child born in the marriage in 2002. According to the Finnish Trans Act (2003), in order to obtain full recognition of her gender, she should be single (sections 1 and 2 of the Act). The provision was interpreted so that she needed to either get a divorce, or with the consent of her wife, convert the relationship into a civil partnership, a form of recognition available to same-sex couples. The Grand Chamber was asked to consider Articles 8 and 12 both taken alone and in conjunction with Article 14, to determine whether the applicant’s private and family life, and her right to marry, had been interfered on the grounds of her gender identity. As the applicant and her partner did not want to divorce or to make any other changes in their marital status, the applicant was forced to live with a continuous contradiction between her gender identity and gender marker.115

The applicant’s main claim was that her right to private and family life had been violated when the full recognition of her gender identity was made conditional on divorce or transformation of her marriage into a civil partnership. According to the domestic law, the applicant’s reassigned gender could not be introduced into the population register as long as she remained married. The applicant argued that transgenderism was a medical condition and her gender identity was a private matter, which fell within the scope of her private life. She contended that the state was violating her privacy every time the male gender marker revealed her to be transgender. Also, the couple stated that a divorce would be against their religious convictions, and a civil partnership would not provide the same protection to their child as marriage. As a consequence, the applicant argued she was forced to choose between legal gender recognition and preserving her marriage.116

The government argued that as Finland provided the couple with a viable option – turning the marriage into a registered civil partnership – the case was not about forced divorce and the current requirements for legal gender recognition were proportionate. The Grand Chamber agreed and noted that a civil partnership entailed almost the same rights and obligations as marriage, and hence the couple would not “lose any rights”.117 The Grand Chamber decided to approach the issue not as interference of private and family life, but as a question of
whether the government had a positive obligation to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married. It came to the conclusion that such a positive obligation did not exist, and ruled that in the absence of a European consensus on regulating transgender marriages, Finland was to be granted a wide margin of appreciation on regulating legal gender recognition and in balancing the public and private interests involved.\footnote{118}

Additionally, the Court noted that according to relevant case law, Article 12 does not impose an obligation on states to grant same-sex couples access to marriage.\footnote{119} Moreover, the Court held that no separate issue arose under Article 12. The issue at stake was rather the consequences of the applicant’s change of gender for the existing marriage between her and her spouse, and this question was already examined under Article 8.\footnote{120} This conclusion is noteworthy in differentiating between an existing transgender marriage and the right to marry as such. In essence it contradicts the Court’s reasoning in not finding a violation, which was heavily based on the margin of appreciation granted to states in whether they wish to apply the right to marry to same-sex couples or not.

Under Article 14, the applicant raised a claim that she was discriminated against on two counts: first, as she had to comply with an additional requirement of terminating her marriage in order to obtain legal gender recognition, she had been discriminated against compared to non-transsexuals, who obtained legal gender recognition automatically at birth. As a consequence, the fact that she had been denied a female identity number revealed the confidential information of her being transgender because, unlike a non-transgender person, she had to explain this difference on every occasion when her identity number was required. Second, the applicant argued that she and her family had received less protection than persons in heterosexual marriages owing to stereotypical views associated with the applicant’s gender identity. As gender identity was now commonly recognised as a ground protected for the purposes of non-discrimination, a concern under Article 14 was evident.\footnote{121}

The government argued that although Article 14 may be applicable, the applicant was not in a similar situation compared to non-transgender persons, as the latter would not be applying for “a change of their gender”.\footnote{122} This view illustrates the lack of sensitivity and understanding of the reality of transgender persons. Obviously non-transgender people would not be applying for gender reassignment as their appearance and identification documents already correspond to their identity. The differentiating factor therefore is being transgender, and the possibility to live in dignity according to one’s innermost experience of oneself.

The Grand Chamber drew from earlier case law by recalling that if there is a difference in treatment of persons in relevantly similar situations, such a difference has to have objective and reasonable justification. In assessing whether the differences in similar situations justify a differential treatment, the state enjoys a wide margin of appreciation.\footnote{123} At the same time the Grand Chamber noted that where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted, and if a difference is based on gender or sexual orientation, particularly serious reasons are required by way of justification.\footnote{124} In the present case, the Grand
Chamber found that the applicant’s situation was not sufficiently similar to the comparator group. Accordingly, no violation of Article 14 taken in conjunction with Article 8 took place. The Grand Chamber did not provide any explanation for why the situation between transgender and non-transgender people was not seen as relevantly similar.

Subsequently, the Grand Chamber, in accordance with the previous ruling by the Chamber, held that there had not been a violation of Article 8 in conjunction with Article 14, and that there was no need to examine the case under Article 12. However, as opposed to the unanimous judgement of the Chamber in 2012, this time three Grand Chamber judges joined in a dissenting opinion.

The Grand Chamber’s statement that the applicant failed to establish the “similarity of situations” places a heavy burden of proof on the applicant. Although it has been held in previous case law that the applicant should bear this burden, the Court’s jurisprudence is not clear-cut in this regard. As the concepts of establishing similarity and justifying differential treatment are intertwined, it may be difficult to completely separate the analysis of one from the other.

In establishing the similarity of situations, one could ask did the applicant not end up in her current situation due to her gender identity? Can one find other differentiating factors than the applicant’s status as a transgender woman? If the protected ground of gender identity is the only differentiating factor, should the situations not be treated the same? Article 14 is in place to guarantee equal enjoyment of the Convention rights – a difference based solely on a protected ground should therefore be interpreted as a violation, unless it is justified. On this basis, the Court should have analysed the possible legitimate aim and proportionality of the state’s interference.

As the Court did not provide any explanation for its conclusion, it is unclear if any situation faced by a transgender person would amount to “relevantly similar” in the eyes of the Court. The “male norm” comparator theory suggests that it would be practically impossible for a transgender person to establish the “similarity of situations” because they are transgender, and therefore deviate from the norm in the first place. Stereotypical views on gender or gender roles may amount to discrimination if they result in differential treatment nullifying or impairing the enjoyment of rights. The essence of Article 14 is to provide a safeguard to people who may not be able to equally enjoy their rights due to the fact that they are not white, able-bodied, Christian, heterosexual males. To this end, it would have been crucial for the Court to back up its conclusions – otherwise the relevance of Article 14 can be questioned altogether.

The Court has continuously omitted analysis on equality of transgender people and focused on the substantive claims of interference with private and family life. The Hämäläinen judgment followed suit. Had the landmark case of Goodwin v UK been decided under Article 14, it would probably have set a different view for subsequent jurisprudence, including the present case. Still, it may be argued that since Goodwin v UK there has been a growing global focus on transgender rights, also in terms of equality, which should have affected the majority’s reasoning in Hämäläinen v Finland by placing more emphasis on Article 14.

The dissenting judges held that the Court should have found a violation of Article 8,
and that it should have approached Articles 12 and 14 differently. Firstly, they argued that the lack of European consensus should not have been the only factor in determining the width of the margin of appreciation. As the Court had established before, that same margin should be restricted when “a particularly important facet of an individual’s existence or identity is at stake”. Accordingly, gender identity should have been considered to be of such importance to the applicant’s very identity, that it would render the margin narrower. Also, the Court should have, in the dissenting judges’ view, approached the issue as a potential breach of a negative obligation, not as a possible positive obligation resting on the state, as the majority did. Secondly, the judges criticised the majority’s take on same-sex marriage, and the fact that they seemed to address sexual orientation and gender identity as one and the same. With regard to the right to marry, homosexual couples and transgender couples were treated the same by the majority despite their relevantly different situations. Lastly, they argued that the Court did not pay sufficient attention to Article 14, and should have analysed the possible discrimination more in depth.

The dissenting judges made an interesting point in terms of equality under the right to marry by stating that the majority treated transgender couples and homosexual couples the same despite their different situations. Although gender identity and sexual orientation are closely linked, they are different concepts, and gender reassignment of one spouse does not automatically render a transgender relationship homosexual. By concluding that there exists no obligation to provide for same-sex marriage under Article 12, and neither could such an obligation be derived from Article 8, the majority failed to understand the difference explained above. While Article 14 taken in conjunction with Articles 8 or 12 does not currently require states to provide for equal marriage as such, it may require a non-stereotypical view of the institution when it comes to the small number of pre-existing transgender marriages facing involuntary dissolution. The Court should have given its view on this specific matter rather than resorting to the analysis of same-sex marriage in general.

As pointed out by the minority of the Grand Chamber, the above-mentioned approach does not lack legal basis – constitutional courts in Austria, Germany and Italy have recently overturned decisions requiring the dissolution of pre-existing marriages as a precondition for legal gender recognition without imposing same-sex marriage.

The Court’s decision confirmed a wide margin of appreciation for states in sensitive issues, and took a stand for a rather stereotypical and normative view on marriage. The ruling is disappointing for advocates of transgender equality, as the case is likely to have a chilling effect on how Council of Europe member states review their legislation on legal gender recognition – at least it will not push them to amend current laws on transgender marriage. States may, however, be affected by the growing support for transgender rights outside the legal sphere, and following this policy trend changes in legislation may occur. Accordingly, when a high enough number of Council of Europe member states amend their laws, the European consensus will grow, and the Court will be required to rethink its position – possibly along the lines presented by the dissenting judges, and following the example set by national courts in Austria, Germany and Italy.
4.3.3. The (Lack of) Equality and Non-Discrimination Analysis

A remarkable weakness in the Court’s reasoning, common to the majority of the summarised cases, is the considerable lack of analysis of non-discrimination. The requirement of non-discrimination has not been properly addressed in the cases it was invoked in, apart from a short account in Sheffield and Horsham v the United Kingdom. In Christine Goodwin v the United Kingdom the Court contended that no separate need to consider the claim under Article 14 arose, and in Hämäläinen v Finland, the Court stated briefly that the applicant was not in a relevantly similar situation with the comparator group, without giving any further explanation for this conclusion.

In the cases discussed above, the Court did not aim to establish whether a distinction based on a person’s gender identity (gender reassignment) was justified in terms of non-discrimination, it only addressed the interference’s rightfulness within the ambit of private and family life, balancing this right against the interests of the society as a whole. In order to be more convincing, the Court should widen its argumentation and establish why in these cases the situation did not amount to discrimination. This is not fulfilled merely by referring to the margin of appreciation based on the exact same terms as in the Court’s analysis under Article 8.

By contending that the margin of appreciation analysis under Article 8 is also enough to cover any claim of discrimination, the Court seems to be treating Article 14 and Article 8 in essence as the same, not placing any added relevance on the non-discrimination clause. Considering the importance of non-discrimination as a general principle of law, and the separate provision of ECHR under Article 14, such an approach cannot be seen as tenable.

Grouping the two provisions’ content together also compromises the very idea of prohibition of discrimination based on certain characteristics by implying that if these characteristics divide the view of the majority, the state has the right to treat them differently. Justifying a difference in treatment based on the fact that gender identity is a debated issue amongst European countries goes against the very idea of the non-discrimination clause, especially when the Court has already clearly established it as a protected ground under Article 14.135 Moreover, the Court has itself emphasised in its 1999 judgment of Lustig-Prean and Beckett v the United Kingdom that negative attitudes on the part of the majority against a minority cannot amount to sufficient justification for discrimination.136

On the other hand, a rather inconsistent approach can be found when analysing a series of cases invoking the non-discrimination clause. While the Court has often been reluctant to apply Article 14 altogether, in certain cases in which the differentiating treatment was based on sex the Court found a violation by emphasising the aspect of equality. For example, in case of Eremia v the Republic of Moldova, the Court ruled that a domestic violence victim had been subjected to inhuman and degrading treatment contrary to Article 3 of the ECHR, and as domestic violence disproportionately affects women, she had also been discriminated against under Article 14.137 Also, in the case of Abdulaziz, Cabales and Balkandali v the United Kingdom, the Court found a violation of Article 8 in conjunction with Article 14 in a situation that treated male spouses of British residents less favourably than female spouses when apply-
The noteworthy aspect is that the Court did not find a violation of Article 8 on its own, but only when tied into the aspect of equal treatment on the grounds of sex.

Therefore, it seems to depend, at least to some extent, on which grounds the discrimination claim is brought before the Court. In cases relating to gender discrimination the Court has been more eager to analyse aspects of discrimination than in cases regarding differential treatment based on gender identity. This may be an illustration of the fact that gender identity is a newcomer to the list of protected grounds, and, as discussed above, raises controversy in some member states. However, in the light of the high level of discrimination and harassment experienced by transgender people throughout Europe, the requirement of non-discrimination should be thoroughly addressed by the Court in cases relating to gender identity.

In some of the gender identity cases decided by the Court, a comprehensive non-discrimination analysis might have resulted in a different ruling. Let us look at the case Hämäläinen v Finland, and the “divorce requirement” imposed on the applicant by the Finnish state: if the Court had accepted that the applicant was indeed in a similar situation to non-transgender married people, the claim would have had a chance of succeeding. Had the Court been mindful of the criticism based on the “male norm” comparator, it could have concluded that the burden of proof placed on the applicant was unduly heavy. The Grand Chamber could also have acknowledged that transgender couples were actually treated similarly to homosexual couples despite being in different situations, as was suggested in the dissenting opinion.

Moreover, as the Court has itself established, it should apply strict scrutiny in cases that concern race or sex, including sexual orientation. If sexual orientation is read into “sex”, it would be logical to include gender identity, a concept more related to sex than sexual orientation, as well. However, the Court holds that member states enjoy a wide margin of appreciation if there is no European consensus in a certain matter, such as same-sex marriage or the requirements of legal gender recognition. Consequently, the margin of appreciation renders the first statement void in practice.

### 4.3.4. Is Protection Limited to Post-Operative Transsexuals?

Although recent recommendations by universal and regional bodies discuss transgender, gender identity and expression in a general manner, including transsexuals, transvestites and gender queer people, the developments under the ECHR have only applied to post-operative transsexuals. It remains to be seen whether the European legal framework will extend to all transgender people based on their self-identification, rather than reconstructed biological characteristics. Will the Court depart from a strictly binary view on gender to encompass rights of people who do not identify clearly as male or female? Will it acknowledge the concept of ‘third gender’ as Courts in India and Australia, for example, have done?

The previous case law, and the Court’s highly biological understanding of gender, suggests that such a development is not likely in the near future. The Court uses binary dichotomy of men and women, and transgender people are seen as changing from one of these two categories. Furthermore, the Court refers to a ‘change’ of gender rather than reassignment.
and recognition of the (true) gender of a person, which further illustrates the view based on biological changes rather than self-identification. For trans people, their gender does not “change”, but their bodily characteristics can be brought more into conformity with their gender identity by medical treatment.

However, if European countries take on the recommendations to tackle discrimination of transgender people and consequently develop their legislation to cater for the needs of everyone falling under the umbrella term of transgender, this is unlikely to go unnoticed by the Court. If a European consensus on issues such as the “third gender” is reached, it will sooner or later lead the Court to adjust its views as well. Still, in light of the Court’s jurisprudence so far, it looks like the slow improvement in acknowledging transgender rights will concentrate on post-operative transsexuals.

5. Conclusion

The protection of transgender people under the European human rights law framework has developed greatly over the last few decades. While the Court in the 1980-1990s had not yet accepted gender identity as an analogous protected ground, and found that non-recognition of reassigned gender did not breach the Convention, since the early 2000s it has ruled in favour of the applicant in several cases regarding a transgender person’s right to be fully recognised before the law, and the right to marry a person of the "new opposite sex". In the light of these developments, transgender people have been able to enjoy their right to private and family life on a more equal basis than before. However, the change has taken place through the progressive interpretation of Article 8, rather than considerations on equality and non-discrimination.

The right to legal gender recognition has arisen due to social changes in European countries, which have triggered the Court to depart from its earlier case law and interpret the Convention as a living instrument, adapting to the social and medical developments in society. This being said, the Court has continuously emphasised how each case shall still be decided based on its special circumstances, and that the ‘fair balance’ will shift accordingly. Thus, even though the Court has increasingly found states have unlawfully interfered with transgender people’s private and family life, some aspects of legal gender recognition continue to fall within the margin of appreciation granted to the contracting parties.

According to the current interpretation of European human rights law, the contracting states are obliged to provide recognition for the reassigned gender of trans individuals. As to how they should do it, they enjoy a wide margin of appreciation. Within this margin, the states can impose requirements on transgender persons, such as being single, in order to obtain full legal recognition. The “single requirement” may in practice mean that already married couples are forced to divorce, or convert their marriage into a civil partnership. This has been argued to be mainly due to the lack of European consensus on same-sex marriage, upon which states are free to regulate themselves, regardless of the differences between an existing transgender marriage and a marriage between two persons of the same sex.

The margin of appreciation doctrine is often applied also to claims regarding equality and non-discrimination under Article 14. This, together with the Court’s view that transgender people cannot compare themselves to non-transgender people with
regard to marriage, has meant that differential treatment did not amount to discrimination under the Convention.

Nevertheless, it can be argued that the Court has neglected equality considerations in its pertinent case law to a great extent. In some cases Article 14 was not invoked, but in the cases that it was, the Court stated that there was either no need to separately address Article 14, or that no discrimination had occurred without applying the equality and non-discrimination framework and consequently explaining how it arrived at such a conclusion.

Even if the analysis on equality and non-discrimination would not render a different conclusion by the Court, Article 14 is still a binding, and a separate, obligation calling to be addressed appropriately. This is especially vital looking at statistics about discrimination against transgender people in Europe; by leaving out the non-discrimination aspect the Court fails to see structural problems. The Court does not live in a vacuum separate from social reality, in which it could overlook systemic issues of disadvantage affecting minorities.

It can also be stated that the Court has been inconsistent in applying Article 14. While in some cases it has analysed the equality and non-discrimination framework, in others it mentions that no separate consideration is needed and in others briefly disregards the claim without further explanation. The former has applied especially to cases regarding gender discrimination, while the latter has been true in transgender judgements.

It could be argued that a thorough non-discrimination analysis would have rendered a different outcome in some of the transgender cases – if the Court would have been willing to apply the “male norm” comparator theory in assessing the similarity of situations, and emphasise equal enjoyment of the right to respect for private and family life.

As we have seen above, a wide margin of appreciation has been the main reasoning of the Court when it has not found a violation of a transgender person’s private and family life. The Court seems to treat the substantial claim under Article 8 and the non-discrimination claim under Article 14 as one and the same – as they are both rejected based on nation states’ wide discretion. This view is not convincing as Article 14, albeit “accessory”, is still a separate right under the Convention. If it bears no relevance to the Court’s argumentation, what is the purpose of it altogether?

An increased level of protection for transgender people’s rights has been called for in recent policy developments within the Council of Europe, general soft law and the recommendations of UN treaty bodies. While the Court has not yet accepted the continuation of transgender marriage as a protected right, it may, in the light of these developments and changes in domestic laws, be an emerging right in the region. The change in the Court’s interpretation did not yet come about in the recent judgement on Hämäläinen v Finland, as the Court held that the issue continued to fall under national discretion. However, unlike the Chamber, the Grand Chamber was divided on the question. The dissenting judges drew attention to the weaknesses in the majority’s argumentation on lack of European consensus, global developments and non-discrimination, laying a basis for updated views when future claims are brought before the Court.

The progress that has happened so far in relation to the rights of transgender people
has happened through development in interpretation of Article 8, not of Article 14. The inconsistent and incomprehensive approach of the Court on equality has meant that the non-discrimination framework under the ECHR has not proven to be a very useful tool to address discrimination claims in cases relating to gender identity.

While breaches of non-discrimination are not always as obvious as infringements of substantial rights, they are nonetheless far-reaching and hold a certain added gravity as they threaten to undermine the universality of human rights. Hence, the principle of non-discrimination should be granted more emphasis in the analysis of the Court.

1 Iina Sofia Korkiamäki holds an LLM in International Human Rights Law from Lund University, Sweden. The article is based on her LLM thesis. The author wishes to thank Göran Melander for supervision of the original thesis, and Joanna Whiteman for her helpful comments on this article.


5 Ibid., p. 5.


9 See UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 10 November 1989.


14 Ibid.


17 See the analysis of the Court’s case law in chapter 4.3.

19


See, for example, a recent decision by the Supreme Court of India on *National Legal Services Authority v Union of India and Others*, judgment of 15 April 2014 and the German Civil Statutes Act from 5.11.2013. A similar decision was taken by the High Court of Australia in *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.


Ibid., p. 12.

European Court of Human Rights (ECtHR), *Marckx v Belgium* (Application No. 6833/74), 1979.

ECtHR, *Lebbink v Netherlands* (Unreported, June 1, 2004).


Ibid., *Johnston and Others v Ireland*.

See e.g. ECtHR, *Inze v Austria* (Application no. 8695/79), 1987; ECtHR, *Karlheinz Schmidt v Germany* (Application no. 13580/88), 1994.


Protocol No. 12 to the Convention of Human Rights and Fundamental Freedoms (entered into force 1 April 2005) ETS No. 177.


Ibid.

Ibid., Paras. 15, 37. In addition to being interpreted into the “any other status” clause, gender identity has been read into the provisions of the CEDAW by the CEDAW Committee in *General recommendation No. 27 on older women and the protection of their human rights, 2010*; *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010. Gender identity has been explicitly mentioned for the first time in the text of an international treaty in the Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence (entered into force August 2013), CETS No. 210. It expressly refers to the grounds of gender identity in Article 4(3), which stipulates non-discrimination.

See Arnardóttir, above note 28, p. 41.

See Fredman, above note 4, p. 9.

Ibid.

Ibid., pp. 9-10.

See Arnardóttir, above note 28, p. 42.

Ibid., p. 85.

ECtHR, *Dudgeon v the United Kingdom* (Application No. 7525/76), 1981.


ECtHR, *Rasmussen v Denmark* (Application no. 8777/79), 1984; see Arnardóttir, above note 28 p. 42, 52. The test has been subsequently applied in latter case law such as ECtHR, *James and Others v the United Kingdom* (Application No. 8793/79), 1986; see *Inze v Austria*, above note 27; ECtHR, *Larkos v Cyprus* (Application No. 29515/95), 1999.

The test was established for the first time in the *Case “Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium” v Belgium* (Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), 1968 (*Belgian Linguistics Case*), Para. 10.
See Arnardóttir, above note 28, p. 42.

Ibid., p. 44.

See e.g. Abdulaziz, Cabales and Balkandani v the United Kingdom, above note 40, in which the Court held that advancing public tranquility and protecting domestic employment market constituted a legitimate aim with regard to immigration rules that treated foreign wives more favourably than foreign men, but that the measures chosen were not proportionate to the aim.


See, for example, ECtHR, Camp and Bourini v the Netherlands (Application No. 28369/95), 2000; Salgueiro da Silva Mouta v Portugal (Application No. 33290/96), 1999; ECtHR, Hoffman v Austria (Application no. 12875/87), 1993.


Ibid., pp. 131-140 and 145.

See Arnardóttir, above note 28, p. 44.

See Belgian Linguistics Case, above note 42.

Ibid., Para 10; see Arnardóttir, above note 28, p. 58.

See ECtHR, Handyside v the United Kingdom (Application no. 5493/72), 1976, Paras. 47-49. The margin of appreciation doctrine in its current form is further elaborated in the case law discussed in chapter 4.3.

In Rasmussen v Denmark, above note 41, Para 40., the Court stated: "The scope of margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."

See, for example, ECtHR, Lustig-Prean and Beckett v the United Kingdom (Application No. 31417/96), 1999, in which the Court established that negative attitudes on the part of the majority against a minority cannot amount to sufficient justification for discrimination.

See Rasmussen v Denmark, above note 41; see Arnardóttir, above note 28, pp. 42, 52.

Ibid., Arnardóttir, Chapter 5.2.4. and p. 66.

ECtHR, S.H. and Others v Austria (Application no. 57813/00), 2011, Para 94.


Ibid., pp. 67-68 and 78.

ECtHR, Kjeldsen, Busk, Madsen and Pedersen v Denmark (Application no. 5095/71; 5920/72; 5926/72), 1976, Para 53.

See, for example, Handyside v the United Kingdom above note 53, Young, James and Webster v the United Kingdom (Application no. 7601/76; 7806/77), 1981.


Ibid., "Marvellous Richness of Diversity or Invidious Cultural Relativism?".

See Arnardóttir, above note 28, p. 60.

UN Human Rights Committee, General Comment No. 18, Non-Discrimination, 1989; ECtHR, Gaygusuz v Austria (Application no. 17371/90), 1996.

See the case law discussed in chapter 4.3.


See for instance Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (entered into force 23 March 1976) 993 *UNTS* 3; Articles 8 and 14 of the ECHR.


See Amnesty International, above note 70, p. 53.

*Christine Goodwin v the United Kingdom* (Application no. 28957/95), 2002. See also the earlier case of *Rees v the United Kingdom* (Application no. 9532/81), 1986.

For a compilation of the European countries’ legislation on LGBT issues, including legal gender recognition, see ILGA-Europe, "Rainbow Map Index", above note 74.

In *Dadouch v Malta*, (Application no. 38816/07), 2010 a case concerning the authorities’ failure to register a marriage contracted abroad by a Maltese national, the Court stated that “registration of a marriage, being a recognition of an individual’s legal civil status, which undoubtedly concerns both private and family life, comes within the scope of Article 8(1). See also Interights, "In the European Court of Human Rights Case of H. v Finland (Application No. 37359/09) Request for Referral to the Grand Chamber on behalf of the Applicant", 13 February 2013, pp. 6-7 (unpublished).

*Parry v the United Kingdom* (Application no. 42971/05), 2006; *R and F v the United Kingdom* (Application no. 35748/05), 2006.

See *H. v Finland*, above note 80. The case name changed to *Hämäläinen v Finland* in 2013 when the anonymity was lifted.


For European context, see the landmark case of ECtHR, *Schalk and Kopf v Austria* (Application no. 30141/04), 2010.

See Interights, above note 78; ECtHR, *Burden v the United Kingdom* (Application no. 13378/05), 2008.

The same view was taken by three dissenting judges in *Hämäläinen v Finland*.

*Rees v the United Kingdom* (Application no. 9532/81), 1986.

*Rees v the United Kingdom*, 1986, Para 34.


*Cossey v the United Kingdom*, 1990, Para 40.


*Ibid.*, Para 44.

97  Ibid, Para 63.
98  Sheffield and Horsham v the United Kingdom (Application no. 22985/93; 23390/94), 1998.
99  Sheffield and Horsham v the United Kingdom, 1998, Para 60.
100 Ibid, Para 76.
101 See Christine Goodwin v the United Kingdom, above note 76.
102 Ibid.
103 Ibid, Para 93.
104 Ibid, Para 103.
105 Ibid, Para 100.
106 Ibid, Para 103.
108 ECTHR, Grant v the United Kingdom (Application No. 32570/03), 2006, Paras 43-44.
109 See Interights, above note 78, p. 17.
110 ECTHR, L v Lithuania (Application No. 27527/03), 2007, Para 59.
111 Ibid, Para 59.
112 See P.V. v Spain, above note 30, Para 36.
113 See more on the lack of equality and non-discrimination analysis in chapter 4.3.3.
114 See Hämäläinen v Finland, above note 81, Paras 74-75 and 87-89.
115 For the facts, See H v Finland, above note 80; Hämäläinen v Finland, above note 81.
117 Ibid, Para 84.
118 Ibid, Para 74.
119 Ibid, Para 96; see Schalk and Kopf v Austria, above note 82, Para 101.
120 Ibid, Hämäläinen v Finland, Para 97.
121 Ibid, Paras 98, 103-105.
122 Ibid, Para 106.
123 Ibid, Para 108; see Burden v the United Kingdom, above note 84.
125 Ibid, Paras 112-113.
126 This issue is discussed above in chapter 3.2.
127 Ibid.
128 See Hämäläinen v Finland, above note 81, Para 54 (referring to the third party intervention by Amnesty International).
130 Ibid, Para 5; see S.H. and Others v Austria, above note 59.
132 Ibid, Paras 17 and 20.
133 Ibid, Para 21.
134 Austrian Constitutional Court Case V 4/06-7 Judgement of 8 June 2006, German Constitutional Court Case 1BvL 10/05 judgment of 27 May 2008, and Constitutional Court of Italy, no. 170/2014 Judgment of 11

135 See *P.V v Spain*, above note 30.

136 See *Lustig-Prean and Beckett v the United Kingdom*, above note 56.

137 ECtHR, *Eremia v the Republic of Moldova* (Application no. 3564/11), 2013, Paras 84, 90. This conclusion was reached following a third party intervention by the Equal Rights Trust emphasising the discriminatory nature of violence against women.

138 See *Abdulaziz, Cabales and Balkandani v the United Kingdom*, above note 40.


141 See *Eremia v the Republic of Moldov*, above note 138; *Abdulaziz, Cabales and Balkandani v the United Kingdom*, above note 40.
“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.”

Jim Fitzgerald
Equal Rights at the Heart of the Post-2015 Development Agenda


The Equal Rights Trust

The Equal Rights Trust published this position paper in September 2013, as a response to one of the key documents that mark the pathway to adopting, in September 2015, the post-2015 Sustainable Development Goals (SDGs) which will supersede the current Millennium Development Goals. Since then, the process of formulating the SDGs has moved on, through a thicket of complex operational modalities at many levels. In July 2014, another key document on this pathway was agreed by the UN Open Working Group – a proposal known as the “zero draft”, which serves as the basis of negotiations that started in September 2014. We are pleased to note that our central recommendation has materialised in this document: the formulation of a specific goal envisaging government action of the adoption of equality and non-discrimination legislation. But we believe that our position contains analysis and further recommendations which remain valid at present (in September 2014). For this reason, we found it important to reiterate our principled position, which is reproduced here.

Introduction

1. Equal Rights Trust 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. It is the only international human rights organisation which focuses exclusively on the rights to equality and non-discrimination as such. Established as an advocacy organisation, resource centre, and think tank, it focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

2. The Equal Rights Trust welcomes the publication of “A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development:
The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda”. We particularly welcome the Panel’s recognition of the importance of ensuring that “no person – regardless of ethnicity, gender, geography, disability, race or other status – is denied universal human rights and basic economic opportunities”.\(^1\) We endorse the Panel’s conclusion that a commitment to “leave no one behind” is a critical transformative shift towards greater equality which is required to ensure the success of any post-2015 development agenda.

3. We believe that, if this commitment is to be made effective, the post-2015 framework must be adapted to take account of the role which the denial of equal rights plays in creating and perpetuating cycles of poverty and disadvantage. Such an approach necessitates a shift of focus away from aspirations and towards obligations to prevent discrimination and ensure substantive equality. We consequently echo the position of the UN High Commissioner for Human Rights, who recently stated that:

”[T]he imperative of equality must underpin the entire framework. Doing so will require the replacing of now widely-discredited approaches that focus on narrowly-conceived notions of economic growth, with a dedicated focus onremedying the gross disparities that characterise our societies, and that undercut true development.”\(^2\)

4. The Equal Rights Trust’s central recommendation is that the post-2015 framework should include 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.

5. This central recommendation is further concretised through four specific recommendations for improving the framework recommended by the High Level Panel to ensure that the specific goal of adopting comprehensive national equality legislation can be effectively met:

(i) The replacement of Illustrative Target 1(c) (“Cover x% of people who are poor and vulnerable with social protection systems”) with a new target to “Establish positive action programmes to accelerate progress towards equality of a minimum of x% of the population, comprised of particular groups identified as being most exposed to poverty”;

(ii) The inclusion of a specific target to “Ensure effective and comprehensive protection from discrimination” in the five goals associated with income poverty, education, health-care, employment and participation in public life (Illustrative Goals 1, 3, 4, 8 and 10);

(iii) The strengthening of the commitment to ensure that “Targets will only be considered ‘achieved’ if they are met for relevant income and social groups”, by improving the disaggregation of data; and

(iv) The expansion of Illustrative Target 10(a) (“Provide free and universal legal identity, such as birth registrations”) to include the words “and eliminate statelessness”.

The Development Agenda and the Rights to Equality and Non-Discrimination

6. As noted by a wide range of researchers and development actors, failure to address inequality has been one of the undeniable shortcomings of the Millennium Develop-
ment Goals (MDG) agenda. For example, in a paper prepared for the Institute of Development Studies and the MDG Achievement Fund, Professor Naila Kabeer points out that the MDG's focus on average and aggregate targets, without a commitment to addressing inequalities, has led to uneven progress and in some cases distorting effects. She concludes:

"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."3

7. The Equal Rights Trust has undertaken research and analysis in many countries which confirms the above conclusion. Our research in Kenya, for example, has found that MDG targets which focus on aggregate or average outcomes have tended to obscure failures to change the lives of the most marginalised. Our analysis of data produced by the Kenyan Government indicates that despite good progress at a national level towards reducing child mortality by two-thirds (MDG 4),4 outcomes for certain regions – which in Kenya also means certain ethnic groups – are poor.5 Our analysis also indicates that even where MDG targets are absolute – for example, ensuring that all children receive basic primary education (MDG 2) – regional disparities mean that despite being classed as "on track", Kenya is likely to miss its goal.6

8. Importantly, our research and analysis has demonstrated both that status-based discrimination can lead directly to income poverty, and that status-based discrimination can prevent or limit enjoyment of social and economic rights, such as the rights to education, healthcare and employment.

9. Testimony gathered by the Equal Rights Trust in Kenya identified diverse examples of direct and indirect discrimination with direct consequences in terms of income poverty. Widows, daughters and sisters are deprived of land ownership by discriminatory application of customary succession laws, with poverty being an immediate consequence.7 Discriminatory development policies divert public resources away from regions occupied by ethnic minority communities, resulting in lower levels of education, fewer jobs and poorer infrastructure, which in turn contribute to higher levels of absolute poverty in these areas.8 Inadequate supply of assistive devices and failure to make reasonable accommodation prevent disabled persons from accessing education and employment, with a direct consequence for their ability to generate an income.9

10. That status-based discrimination can also lead to a lack of enjoyment of social and economic rights is also well-established. In Case of the Yean and Bosico Children v the Dominican Republic,10 for example, the two complainants were unable to enrol in school, as, though they were born in the Dominican Republic, their mothers had emigrated from Haiti and as such, they were denied birth certificates. Discrimination on the basis of nationality was preventing the two girls (and others in the same situation) from accessing education. In deciding the case, the Inter-American Court of Human Rights held that the State had, by refusing to issue birth certificates, violated the children's rights to
protective measures, equality and non-discrimination, nationality, legal status and a name. The court required the State to adopt measures to address the historical discrimination caused by the birth record and education system, and to guarantee access to free education for all children regardless of background or origin. A range of other cases identified by the Equal Rights Trust illustrates the causal link between discrimination and the enjoyment of access to education, health-care and housing.

11. Our research and analysis has also identified that discrimination in respect to social and economic rights – such as the denial of access to education for children from marginalized ethnic groups, for example – in many cases has direct consequences on their income poverty. Thus, our analysis supports the overarching approach of the development agenda – that access to education, healthcare and other social and economic rights is key to human development – while also underlining the critical role which discrimination plays in creating and perpetuating both income poverty and deprivation in its wider sense.

12. This link between different forms of status-based discrimination, poverty and deprivation in areas such as education and healthcare has also been identified by, for example, the UN Independent Expert on the question of extreme poverty and human rights, and the UN Committee on Economic, Social and Cultural Rights. More recently, the UN High Commissioner for Human Rights, in an open letter, stressed the need for the post-2015 framework to address three distinct concepts:

"The new framework must advance the three closely-related but distinct concepts of equity (fairness of distribution of benefits and opportunities), equality (that is, substantive equality of both opportunity and result, under the rule of law), and non-discrimination (prohibition of distinctions that are based on impermissible grounds and that have the effect or purpose of impairing the enjoyment of rights)."

13. We welcome the Panel’s Report position that “[t]he new agenda must tackle the causes of poverty, exclusion and inequality”. However, we believe that if the commitment to tackling the causes of inequality is to be effective, it must strongly recognise and address the role which discrimination plays in creating and perpetuating structural inequalities. It ought to be recognised that legal protections from discrimination – as in the cases identified above – can provide an important mechanism to alleviating poverty and its consequences.

Central Recommendation: The Post-2015 framework should include 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.

14. In our view, a State’s obligation to enact comprehensive national equality legislation must be a specific development goal in and of itself in the post-2015 framework. Such legislation – which may take the form of either an individual law or a system of laws – must require that states take positive action measures to accelerate progress towards equality for particular groups, and provide comprehensive and effective protection from discrimination. We believe that the adoption of such legislation is essential if the new framework is genuinely to “leave no one behind”.

15. Such legislation should reflect principles on equality developed on the ba-
sis of a unified human rights framework. The Declaration of Principles on Equality\textsuperscript{18} developed and launched in 2008 by 128 prominent human rights and equality advocates and experts convened by The Equal Rights Trust sets out the essential elements of a comprehensive and effective system of equality law. The Declaration is a document of international best practice on equality, which has been described as “the current international understanding of Principles on Equality”\textsuperscript{19} and has been endorsed by the Parliamentary Assembly of the Council of Europe.\textsuperscript{20} Principle 1 of the Declaration states that:

"The right to equality 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. All human beings are equal before the law and have the right to equal protection and benefit of the law."

16. The Declaration recommends inter alia that States adopt and implement positive action measures, and that they enact legislation to prohibit direct discrimination, indirect discrimination, harassment and failure to make reasonable accommodation. It states that discrimination should be prohibited on an extensive list of grounds and in all areas of life regulated by law.

17. In our opinion, in order to ensure that the new development framework leaves no one behind, States must establish \textit{legislation}, such legislation must be \textit{comprehensive} and it must be \textit{effective}. We therefore recommend the inclusion in the post-2015 Development framework of a standalone development goal requiring the adoption of comprehensive and effective national equality legislation.

\textbf{The requirement to adopt national equality legislation}

18. States are already required to respect, protect and fulfil the right to non-discrimination as part of their existing legal obligations. Most States are party to one or more instruments providing a right to non-discrimination on a number of grounds.\textsuperscript{21} Similarly, many States have constitutional guarantees to equality or non-discrimination which, if properly interpreted in the spirit of international human rights law and enforced, could provide extensive protection from discrimination.

19. Participation in international treaties containing equality provisions and constitutional protections of equality are necessary, but not sufficient. The Equal Rights Trust believes that effective protection of equal rights is best achieved through the adoption of comprehensive national equality legislation. Without legislation which provides legal definitions of key terms (such as “right to equality”, “equal treatment”, “positive action” and “discrimination”), sets out rights and obligations, establishes mechanisms to ensure access to justice and provides remedies and sanctions, those subject to discrimination will be unable to bring their rights to bear. The enactment of legislation protecting the right to non-discrimination is an established requirement in international law, as interpreted by the United Nations treaty bodies. The Committee on Economic, Social and Cultural Rights has said, in relation to the right to non-discrimination in Article 2(2), that: "Adoption of legislation to address discrimination is \textit{indispensable} in complying with article 2, paragraph 2" (emphasis added).\textsuperscript{22} The Human Rights Committee, in relation to Article 2(1) and 26, frequently recommends the adoption of comprehensive equality legislation in order
to ensure compliance with those provisions, recently recommending to Iceland, for example, that “[t]he State party should take steps to adopt comprehensive anti-discrimination legislation, addressing all spheres of life and providing effective remedies in judicial and administrative proceedings”.23

**The requirement that national equality legislation be comprehensive**

20. While recognising the established international legal obligations of States to adopt legislation prohibiting discrimination, the Declaration of Principles on Equality goes further, requiring the establishment of a comprehensive system of equality law. Comprehensiveness means that such a system should be aimed at substantive equality through positive action, and that it should prohibit discrimination on a number of grounds and in all areas of activity regulated by law.

21. The Declaration of Principles on Equality, in unison with the growing international expert consensus, regards positive action as a necessary condition for the realisation of the right to equality, not as an exception, or exemption from complying with the right to non-discrimination:

"To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality."24

22. To ensure comprehensiveness, equality legislation should further define and prohibit the most important forms of discrimination, including direct and indirect discrimination, as well as harassment and the denial of reasonable accommodation. A similar requirement is contained in the General Comment made by the Committee on Economic, Social and Cultural Rights in 2009.25 In respect to reasonable accommodation, the Declaration of Principles on Equality indicates that “it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds”26 This position is consonant with the view of the Committee on Economic, Social and Cultural Rights, which requires that “the denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability”,27 but, reflecting best practice, extends to other protected characteristics the obligation of reasonable accommodation articulated in the Convention on the Rights of Persons with Disabilities.28

23. In terms of personal scope, the Declaration recommends that the prohibition on discrimination covers a range of characteristics.29 In addition, the Declaration recommends that States prohibit discrimination on any other ground which meets one of the following three criteria:

(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.30

24. In addition, discrimination should be prohibited where it is on the basis of an association with a particular protected ground, or on the basis of a perception – accurate
or not – that an individual possesses a particular protected ground or characteristic.\textsuperscript{31} This approach has also been adopted by the Committee on Economic, Social and Cultural Rights in its interpretation of the right to non-discrimination.\textsuperscript{32} Finally, States should prohibit multiple discrimination (that is, discrimination arising on a combination of two or more grounds), something which has been recognised in a wide range of international instruments and recommendations by UN treaty bodies.\textsuperscript{33}

25. Comprehensive protection from discrimination also requires that the material scope of any anti-discrimination law be broad. The Declaration states that “[t]he right to equality applies in all areas of activity regulated by law” and calls for both States and non-state actors to respect the right to equality.\textsuperscript{34} The obligation on States to prohibit discrimination by private actors is well-established in international law: the Human Rights Committee has interpreted Article 26 of the International Covenant on Civil and Political Rights as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities”,\textsuperscript{35} while a number of other UN treaty bodies have recognised that the obligation not to discriminate applies to both state and non-state actors.\textsuperscript{36}

26. Thus, in order to provide a comprehensive system of equality law in line with international law and best practice, States must provide for positive action measures to be compulsory in cases where it is necessary to accelerate progress towards equality for particular groups. Further, such a system must prohibit direct discrimination, indirect discrimination, harassment and failure to make reasonable accommodation. Discrimination must be prohibited on all grounds recognised by international law, and the law should also provide the opportunity for new grounds of discrimination to be recognised. The law should prohibit discrimination on the basis of association and perception, and multiple discrimination. The prohibition on discrimination should apply to both state and non-state actors, in all areas of life regulated by law.

\textbf{The requirement that national equality legislation be effective}

27. The system of equality law must be effective, in that the requirement to take positive action is complied with in practice and discrimination victims are empowered to access justice, and to challenge discrimination in anticipation of remedy and sanction. International law requires States to provide effective access to justice for victims of human rights violations, including discrimination.\textsuperscript{37} Thus, laws should ensure that victims of discrimination can access justice through, \textit{inter alia}, setting out rules of access to judicial or administrative procedures, establishing legal aid systems, removing obstacles, including financial hurdles, and ensuring that investigating bodies are impartial and independent. The Declaration also recommends that victims of discrimination be protected from victimisation,\textsuperscript{38} that legal standing in discrimination cases be extended to “associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality”,\textsuperscript{39} and that “[t]he rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress”.\textsuperscript{40} Finally, the legal system should provide effective sanctions and remedies. Principle 22 states:

"Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to
equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality."

28. A comprehensive and effective system of protection from discrimination is an important means by which those in poverty can challenge the discrimination which has created or contributed to their poverty. Working effectively, such protections can also ensure that resources are directed to those most in need, by requiring state actors to consider the discriminatory effect of resource allocation decisions. Thus, establishing a specific development goal requiring the adoption of comprehensive national equality legislation would provide a key tool to tackling poverty and ensuring sustainable development. Such a goal would also translate commitments entered into voluntarily by States into legal actionable rights, and would ensure that poverty alleviation efforts are aligned to existing international law obligations held by States.

**Specific Recommendation 1:** Illustrative Target 1(c) ("Cover x% of people who are poor and vulnerable with social protection systems") should be replaced with a new target to “Establish positive action programmes to accelerate progress towards equality of a minimum of x% of the population, comprised of particular groups identified as being most exposed to poverty”

29. Illustrative Target 1(c) represents a laudable aim on the part of the Panel, and reflects the depth of the commitment to “leave no one behind”. As the Panel notes, social assistance programmes are a “potential game changer that can directly improve equality”. However, as the Report itself recognises, through classifying it as one of the targets which “require[s] further technical work to find appropriate indicators”, this target lacks precision.

30. This target could be improved by adapting it to reflect approaches which have developed and become well-established in international human rights law on the rights to non-discrimination and equality. Our proposal is that States be required to identify those groups which are most disadvantaged, including through exposure to systemic discrimination, to adopt as quantitative target a percentage of the population comprised of such groups, and to institute effective positive action programmes to accelerate their progress towards equality. By redefining this target as an obligation to establish positive action programmes, States will have greater clarity about the nature of the target and there will be greater potential to measure outcomes and monitor progress. In addition, redefining 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.

31. In practical terms, such a target will require steps to identify those who are disproportionately exposed to deprivation in any particular area of life. Thus, the implementation of this target would need to work in conjunction with the obligation to collect, disaggregate and analyse data on multiple grounds, as discussed below in respect of our specific recommendations 3(1), 3(2) and 3(3).

32. Positive action can take a variety of forms, including legislative, administrative and policy measures, but these measures
should meet certain criteria, including that they are legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and are time limited.\textsuperscript{41}

**Specific Recommendation 2: the framework should incorporate a new target to “Ensure comprehensive and effective protection from discrimination” in the five goals associated with income poverty, education, healthcare, employment and participation in public life (Illustrative Goals 1, 3, 4, 8 and 10)**

33. As noted above, The Equal Rights Trust believes that the commitment to “leave no one behind” can only be realised if States provide effective protection from discrimination on all grounds and in all areas of life. This would reflect the cross-cutting nature of the equality element of the entire framework. However, ensuring effective protection from discrimination also requires detailed legislation and policies in respect of some of the proposed goals, notably those concerned with income poverty, education, healthcare, employment and participation in public life (Illustrative Goals 1, 3, 4, 8 and 10). Indeed, as the evidence presented above indicates, without taking steps to ensure effective protection from discrimination in these areas of life, it will not be possible for States to make progress towards these goals at the aggregate level, far less at the level of “all relevant social and income groups”.

34. The Equal Rights Trust therefore recommends that a new target be set under each of these five goals, requiring States to provide effective and comprehensive protection from discrimination in the respective area of life: resource allocation for alleviating poverty, education, healthcare, employment and participation in public life.

**Specific Recommendation 3: The commitment to ensure that “Targets will only be considered ‘achieved’ if they are met for relevant income and social groups” should be strengthened by improving the disaggregation of data**

Specific Recommendation 3(1): States should be required to disaggregate data on the basis of income, gender, location, disability, age, race and ethnicity, religion, citizenship status, and sexual orientation, together with such further grounds as are identified as particularly relevant to experiences of discrimination and deprivation in the country context.

35. As the research cited above indicates, one of the most important ways in which the MDGs failed to account for inequality was through the use of average or aggregate targets which at best provide little insight into impact on the lives of the most marginalised, and at worst can exacerbate inequalities. The Equal Rights Trust is therefore pleased to note that the High Level Panel has recognised the need to monitor progress towards goals and targets for different social and identity groups, through disaggregation of data. The Report recommends that:

"To ensure equality of opportunity, relevant indicators should be disaggregated with respect to income (especially for the bottom 20%), gender, location, age, people living with disabilities, and relevant social groups. Targets will only be considered “achieved” if they are met for all relevant income and social groups.”\textsuperscript{42}

36. The Equal Rights Trust wholeheartedly supports this approach, and in particular the proposal to consider targets achieved only if they are met for all “relevant” groups. Disaggregation of the data based on indicators related to various impermissible grounds of discrimination would enable States to identify
groups which are not benefitting from previous or current policies and take appropriate corrective measures. Further, the identification of groups vulnerable to discrimination is a necessary pre-requisite to the adoption of comprehensive national equality legislation, as – in addition to certain groups which require protection under international law due to their universal vulnerability to discrimination – each State may have its own unique groups of persons vulnerable to discrimination and whose status will therefore require inclusion in any equality legislation.

37. The Equal Rights Trust notes that the Panel has identified six grounds on which data must be disaggregated: income (especially for the bottom 20%), gender, location, age, disability, and “relevant social group”. However, while we welcome the commitment to disaggregation of data, and to measuring progress for different groups rather than only at the aggregate level, we are concerned that the selection of groups which are listed in the Panel’s Report may be interpreted too narrowly to ensure that all those at risk of discrimination and associated poverty are included. We are also concerned that the expression “relevant social group” is too vague. The Equal Rights Trust supports the Panel’s recommendation that data must be disaggregated on all of the five of the specific grounds, given the extensive evidence of poverty connected to discrimination on these grounds. However, it is well established that there are several other grounds of discrimination which are closely connected to poverty.

38. In our view, the best way to ensure that any new framework leaves no one behind would be to require States to disaggregate data on all grounds of discrimination from amongst those that are recognised in international human rights law which are relevant to the country context, as well as in respect to further country-specific groups that are not covered by international non-discrimination provisions. The Declaration of Principles on Equality includes the following list of grounds of discrimination: “race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness”. This list in turn reflects the grounds incorporated by international treaties or by the treaty bodies with responsibility for interpreting them.

39. In each country, a selection of the above grounds, as well as others, potentially, would be specific to the country context and would require desegregated data in order to allow related patterns of discrimination to be properly addressed. In order to identify the country-specific groups that are most at risk of poverty resulting from discrimination, governments should identify the major discrimination and inequality patterns affecting the population, as reflected in objective research; or commission such research where it does not exist. The Equal Rights Trust recommends that, in addition to the grounds recognised by the Panel, most States should be required to disaggregate data on the basis of race and ethnicity, religion, citizenship status and sexual orientation.

Specific Recommendation 3(2): States should be required to ensure that non-citizens benefit from the realisation of the post-2015 framework, through collecting and analysing data on their situation, and targeting development resources at them.

40. Non-citizens, be they asylum seekers, refugees, stateless persons, irregular mi-
grants or migrant workers, are most frequently excluded from development processes in comparison with other sections of the population, and are vulnerable to human rights abuse. It has been observed that:

The special vulnerability of migrants stems from the fact that they are not citizens of the country in which they live. (...) This dissociation between nationality and physical presence has many consequences. As strangers to a society, migrants may be unfamiliar with the national language, laws and practice, and so less able than others to know and assert their rights. They may face discrimination, and be subjected to unequal treatment and unequal opportunities at work, and in their daily lives. They may also face racism and xenophobia. At times of political tension, they may be the first to be suspected – or scapegoated – as security risks.43

41. In an increasingly globalised world, migration of all types continues to change and shape national demographics. The MDGs did not adequately address the development needs and rights of non-citizen populations, and this has led to an approach in which, contrary to principles of international law, States have largely excluded vulnerable migrant communities from development processes. Discriminatory attitudes towards non-citizens – in addition to entrenching poverty for this group – are expressed in the failure of a number of States to tackle the development needs of communities with large migrant populations. One example was the refusal in 2011 of Bangladesh to accept a US $33 million grant to alleviate poverty in the Cox’s Bazar district of the country. While the grant would have also benefitted Bangladeshi citizens, the government rejected it on the grounds that “the actual aim of the UN initiative is to rehabilitate (Rohingya) refugees in Cox’s Bazar district under the pretext of poverty reduction for locals”.44

42. The UN High Commissioner for Human Rights, in her recent open letter on the post-2015 development agenda, stated that “marginalized, disempowered and excluded groups, previously locked out of development, must have a place in the new agenda. This includes (...) migrants”. The Equal Rights Trust strongly agrees with this position and emphasises that among non-citizens, stateless persons are particularly vulnerable to discrimination, exclusion and poverty. The Equal Rights Trust’s research on statelessness has confirmed that life as a stateless person is often characterised by poverty, insecurity, uncertainty and vulnerability.45

43. The lack of a legal status and documentation that are integrally linked to statelessness create massive barriers which prevent stateless persons from enjoying their human rights, including those relevant to poverty alleviation. For example, stateless persons without personal documents have difficulties accessing education (Illustrative Goal 3), healthcare (Goal 4) and work (Goal 8); are consequently at higher risk of income poverty (Goal 1) with limited access to food and nutrition (Goal 5) and water and sanitation (Goal 6). They are also more likely to be excluded from political processes and to face barriers in access to justice (Goals 10 and 11). While all stateless persons are vulnerable, those in protracted situations of statelessness which impact large communities over many generations, such as the Rohingya of Myanmar, Kuwaiti Bidoon, and the Hill tribes of Thailand, are most likely to be excluded from development processes. The impact of such exclusion over many generations is that such groups are at the very bottom of development indices.

Specific Recommendation 3(3): States should be required to analyse data disaggregated on different grounds in order to identify those
groups of persons who are at higher risk of
discrimination due to a combination of two
or more grounds.

44. In addition to disaggregating data on
a list of grounds, and taking account of the
particular needs of non-citizens, the commit-
ment to measuring progress for “all relevant
social and income groups” can only be effec-
tive if data is analysed to assess the impact
of multiple discrimination (that is, discrimi-
nation on more than one ground) on poverty
and deprivation. We therefore recommend
that, in addition to disaggregating data on
the grounds listed above, this data should be
analysed to identify whether groups of per-
sons who share two or more of the protect-
ed characteristics are at greater risk of not
achieving a given target.

45. The provision of effective protection
from multiple discrimination is an emerging
obligation in international human rights law.
The UN Committee on Economic, Social and
Cultural Rights has stated in its General Com-
ment No. 20 that:

"Some individuals or groups of indi-
viduals face discrimination on more than one
of the prohibited grounds, for example women
belonging to an ethnic or religious minority.
Such cumulative discrimination has a unique
and specific impact on individuals and merits
particular consideration and remedying."46

46. Both the UN Committee on the Elimina-
tion of Racial Discrimination47 and the UN
Committee on the Elimination of Discrimina-
tion against Women48 have also highlighted
the particular problem of multiple discrimi-
nation, and stressed that states parties to
the relevant Conventions have obligations
to provide protection for groups exposed to
multiple discrimination.

47. The link between multiple discrimina-
tion and poverty is also well evidenced, with
numerous examples of groups or individu-
als exposed to poverty because of a combi-
nation of two or more characteristics which
increase their marginalisation. For example,
there is extensive evidence that women from
ethnic minorities49 and indigenous commu-
nities50 experience greater deprivation com-
pared to both their male counterparts and
women from other ethnic groups. Similarly,
a review of poverty and disability in low- and
middle-income countries found that disa-
bled women experience greater difficulties
in accessing employment and services.51

**Specific Recommendation 4: Illustrative
Target 10(a) ("Provide free and univer-
sal legal identity, such as birth registra-
tions") should be expanded to include the
words "and eradicate statelessness"

48. The Equal Rights Trust welcomes the in-
clusion of Illustrative Target 10(a): “provide
free and universal identity, such as birth
registration”. We believe that this target is
a necessary pre-requisite for the upholding
of the commitment to leave no one behind.
Persons who do not have a legal identity
(including birth registration), are all too of-
ten excluded from society and nation-build-
ning processes and denied access to, and
enjoyment of, human rights. Furthermore,
the difficulties that undocumented persons
face in securing documentation and access
to human rights for their children is widely
recognised as a significant barrier to devel-
opment. Thus, the universal provision of le-
gal identity will increase the sustainability
of the post-2015 goals beyond their imple-
mentation period and will serve to arrest
the inter-generational inequalities that are
so destructive to poverty-stricken and mar-
ginalised communities.
49. There exists a strong link between "legal identity" and "legal status". Those without a legal identity are often denied legal status, and this in itself at times results in statelessness. Similarly, those born into statelessness are often denied both a legal identity and a legal status. The impact that statelessness has on the individual in development terms is similar (but more exacerbated) than that of the lack of a legal identity. Stateless persons – who lack a legal status in most contexts – are disproportionately vulnerable to discrimination, exclusion and poverty. As mentioned above, stateless persons face significant barriers in accessing, among other things, education, health and work. Those in protracted situations of statelessness are most vulnerable in this regard.

50. Consequently, it is evident that Illustrative Goal 10(a) would have a greater impact, if it were extended beyond the provision of universal legal identity such as birth registrations, to also include a commitment to eradicate statelessness. Such an approach would bring the post-2015 agenda in line with the position of the UN High Commissioner for Refugees, within whose mandate the identification and protection of stateless persons and the prevention and reduction of statelessness falls. Recently, the High Commissioner on Refugees has stated that there should be a concerted effort to eradicate statelessness within the next decade. The Equal Rights Trust welcomes this statement and urges those responsible for developing the post-2015 agenda to not lose sight of the stateless: they are among the most vulnerable persons in the world. While our specific recommendation 2(2) emphasised the need to ensure that no stateless person (or other non-citizen) is left behind, there is a need for an explicit commitment to eradicating statelessness.

Conclusion

51. The recognition by the High Level Panel that the post-2015 development agenda must reflect a commitment to “leave no one behind”, and that such a commitment would represent a transformative shift from the equality-blind approach of the MDGs is particularly welcome.

52. However, we are concerned that this commitment is not sufficiently substantive, does not reflect the current expert understanding of accepted principles on equality, and that it could be better expressed in the framework in Illustrative Goals and Targets. If the commitment to leave no one behind is to be effective in practice, it must rely on the rights to equality and non-discrimination, the violation of which plays a significant role in creating and maintaining cycles of poverty and deprivation. To be effective, the framework must place approaches grounded in the rights to equality and non-discrimination at its centre. In our opinion, this necessitates the adoption of comprehensive national equality legislation, which reflects principles on equality developed on the basis of a unified human rights framework. The four specific recommendations made in this paper pursue this ultimate goal.

53. Our recommendations to adjust the Panel’s framework – the enactment of comprehensive national equality legislation, the grounding of such legislation on positive action, the collection and analysis of data on groups exposed to discrimination, and the eradication of statelessness – are all critical to eradicating poverty. These recommendations are motivated by our desire to see the post-2015 framework reflecting the needs of the most marginalised in society.
54. Furthermore, our recommendations reflect the hope of many stakeholders, including the participants in the Rio+20 process, the UN System Task Team on the Post-2015 Agenda, and many of those engaged through the thematic consultation process which preceded the Panel’s Report, that the post-2015 agenda would have human rights at its centre. In her recent response to the Report, the UN High Commissioner for Human Rights stressed that:

"[T]he Post-2015 Agenda must be built on a human rights-based approach, in both process and substance. This means (...) a focus on non-discrimination, equality and equity in the distribution of costs and benefits (...) The imperative of equality must underpin the entire framework."52

55. The approach which we advocate would place existing international human rights obligations related to equality at the heart of the new development agenda. If adopted, it would take the post-2015 development agenda to a new level and bring realities closer to the ideals embraced by the peoples of the United Nations.


Ibid., pp. 134–139.

*Case of the Yean and Bosico Children v the Dominican Republic*, Inter-American Court of Human Rights, Judgment of September 8, 2005, (Ser. C) No. 150 (2005).


See above, note 2.

See above, note 1, p. 7.


*Naz Foundation v Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.


In total, 167 States are party to the International Covenant on Civil and Political Rights, which provides a free-standing right to non-discrimination at Article 26, while 160 States are party to the International Covenant on Economic, Social and Cultural Rights, Article 2(2) of which requires States to guarantee that all of the economic, social and cultural rights contained therein can be exercised without discrimination.

See above, note 15, Para 37.


See above, note 18, Principle 3, p. 5.
25 See above, note 15, Paras 10 and 7.

26 See above, note 18, Principle 5, p. 6.


29 See above, note 18, Principle 5, p. 6, which states: "Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds."

30 Ibid., Principle 5. The Declaration of Principles on Equality contains a closed list of prohibited grounds complemented by a set of criteria for determining whether a characteristic should be regarded as a prohibited ground. Although many international human rights instruments provide open lists, in that they include "any other status" as a protected ground, they do not specify what the criteria are for further grounds to be considered as protected under this heading. The approach of the Declaration instead reflects that of the principal anti-discrimination legislation in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act, section 1.

31 Ibid.

32 See above, note 15, Para 16.

33 See above, note 18, Principles 5 and 12. Multiple discrimination is explicitly prohibited under Article 6(1) of the Convention on the Rights of Persons with Disabilities. The UN Committee on Economic, Social and Cultural Rights has stated, in its General Comment No. 20: Non-discrimination in economic, social and cultural rights, that multiple discrimination may be considered as a prohibited ground falling within "other status" in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. The Committee on the Elimination of Racial Discrimination referred to the need to prohibit intersectional discrimination in its General Recommendation No. 25: Gender Related Dimensions of Racial Discrimination and General Recommendation No. 27: Discrimination against Roma. The Committee on the Elimination of Discrimination against Women stressed the need to provide effective protection from intersectional discrimination in its General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.

34 See above, note 18, Principles 8 and 10.

35 Human Rights Committee, General Comment No. 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para 12.


38 See above, note 18, Principle 19, p. 12.


40 Ibid., Principle 21, p. 13.

41 See, for example, Committee for the Elimination of Racial Discrimination, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination, UN Doc. CERD/C/GC/32, 2009, Para 16. It should be noted that the Committee, in this General Recommendation, is dealing with the concept of special measures under the Convention on the Elimination of all forms of Racial Discrimination, rather than the broader concept of positive action established in the Decl-
ration of Principles on Equality. Nevertheless, many of the same considerations apply.

42 See above, note 1, p. 29.


46 See above, note 15, Para 17.


48 Committee on the Elimination of Discrimination against Women, General recommendation No. 25: On article 4, paragraph 1, on temporary special measures, UN Doc. HRI/GEN/1/Rev.7 at 282, 2004, Para 12.


52 See above, note 2.
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 benchmark – 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.”

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”. 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. 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.”

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.”

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 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 bailing [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”. 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”. 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”. 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”. 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”. 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. Claire Malm 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”. 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”.

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”.

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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 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 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 non-discrimination 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 1.3 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]Include 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.

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.

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.”

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.


See above, note 6.


See above, note 15, p. 9.


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”.


51, Ibid., p. 18 and 20.

52 See above, note 5, p. 15.

53 Ibid.

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

55 See above, note 49, p. 3.

56 See above, note 54, p. 7.


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

61 See above, note 49, p. 9.

62 See above, note 27.

63 See above, note 5, p. 5.

64 See above, note 4, p. 39.


66 See above, note 3, p. 13.

67 See above, note 1.

68 See above, note 60.

69 See above, note 28.


71 Ibid.

72 See above, note 27.

73 Constitution of Kenya, Article 27(4).

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


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

77 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.
Social Justice and the Millennium Development Goals: the Challenge of Intersecting Inequalities

Naila Kabeer

1. Introduction: The Fundamental Values of the Millennium Declaration

At a UN summit held at the dawn of the new millennium, 189 of the world’s leaders came together to sign what has been described as “the world’s biggest promise - a global agreement to reduce poverty and human deprivation at historically unprecedented rates through collaborative action”. The fundamental values embodied in the Millennium Declaration (Declaration), including freedom, equality, tolerance and solidarity, together spelt out a firm commitment to social justice as the guiding spirit of the Declaration.

“Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice (...) The equal rights and opportunities of women and men must be assured (...) Those who suffer or who benefit least deserve help from those who benefit most (...) Human beings must respect one another, in all their diversity of belief, culture and language. Differences within and between societies should neither be feared nor repressed, but cherished as a precious asset of humanity”.

Unfortunately, the commitment to social justice was not carried over into the Millennium Development Goals (MDGs), which were intended to translate the Declaration into a set of concrete measures on which the world’s nations could act. The eight goals finally adopted, along with 18 targets and 48 indicators to monitor progress on the goals, represented a highly selective interpretation of the various commitments made in the Declaration. Furthermore, the fact that the targets and indicators were couched in terms of national “averages” and “proportions” meant that they could capture overall progress within a region or country, but could not assess whether this progress had been equitably distributed across the population.

For instance, one of the targets to monitor progress on MDG 1; the overarching goal of eradicating extreme poverty and hunger, was to halve - between 1990 and 2015 - the proportion of the world’s population below the international poverty line of a dollar a day. It is perfectly possible to achieve this target by lifting out of poverty those living close to the poverty line without ever impacting on the lives of the very poor. Only one measure under MDG 1 touched explicitly on inequality: the share of the national income that went to poorest income quintile in a given country. However, this was also the measure that has featured least frequently in MDG reports.

This paper is concerned with inequality. Its point of departure is the growing body of evidence that inequalities matter for the well-being and prosperity of a society. Inequalities matter at the macro-economic level because
they slow down the pace at which a given rate of economic growth translates into poverty reduction. Inequalities also matter at the macro-social level because of their negative impacts in terms of tensions, crime, violence and conflict and the knock-on effects of these on investments in the human, social and material capital of a society. These latter impacts are, of course, some of the manifestations of inequality as they play out in everyday life. And finally, in relation to the MDGs, they matter because they make sections of the world’s poor population harder to reach than the rest of the poor. The result, as this paper will argue, is that certain sections of the world’s poor have been systematically bypassed by the “average” rates of progress reported on the MDGs, thus betraying the promise of social justice held out by the Declaration.

2. Intersecting Inequalities and Social Exclusion: a Conceptual Framework

There are two broad approaches to inequality within the development studies literature. The first revolves around understandings of poverty in terms of resource deficits at the individual (or individual household) level. Early studies envisaged these deficits primarily in income terms. This has been gradually replaced by a more multi-dimensional understanding of poverty, extending the analysis of deficits to assets as well as human capabilities (health and education), but poverty continues to be measured at the level of individuals. This has given rise to what has been described as a “vertical” model of inequality based on the ranking of individuals or households by their income, assets or human resource deficits. The share of the national income that goes to the poorest income quintile that was noted earlier as an indicator of MDG 1 derives from such an understanding of inequality.

The second revolves around the analysis of social discrimination. It takes identity-based disadvantage as its entry point into the analysis of inequality where the disadvantage in question operates at the level of groups rather than individuals. This gives rise to what has been described as a “horizontal” model of inequality that cuts across the different strata that make up the vertical model. The inequalities at work here are the product of social hierarchies which define certain groups as inferior to others on the basis of devalued aspects of their identity. These may be inherited aspects of identity (such as race, ethnicity, gender and caste) or they may reflect the cultural meanings associated with aspects of the life course (such as childhood or old age) or with deviations from what is considered the norm in different societies (such as disability or sexual orientation or minority religion). Social hierarchies are created between groups through norms, values and practices which serve to routinely disparage, stereotype, exclude, ridicule and demean certain groups relative to others, denying them full personhood and the right to participate in the economic, social and political life of their society on equal terms with others.

The two approaches thus focus on quite distinct axes of disadvantage: resources (“what you have”) and identity (“who you are”). It is possible to be economically deprived, to lack the means to meet basic needs, without necessarily being despised for it. For instance, the distinction made between the “deserving” and “undeserving” poor in many parts of the world reflects a distinction between those who are believed to be poor through no fault of their own, and hence deserving of respect, and those who are thought to have brought it on themselves through their feckless behaviour.
Similarly, it is possible to face discrimination on the basis of social identity without necessarily facing material deprivation. Gender, for instance, cuts across economic strata so that women tend to occupy a subordinate status relative to men within these different strata. However, since they are fairly evenly distributed across the economic hierarchy, gender is generally a marker of disadvantage, but not necessarily of poverty.

The concept of social exclusion can be used to analyse groups who are defined by the intersection of these distinct axes of disadvantage - economic deprivation and identity-based discrimination. While, as noted earlier, the identities in question can take many different forms, the most enduring forms of disadvantage in most societies are associated with identities that are socially ascribed from birth, such as gender, race, caste and ethnicity. By their very nature, these disadvantages tend to be passed on over generations. So while we noted that gender on its own may be associated with discrimination rather than poverty, the intersection of gender with poverty and other forms of inequality generally means that women and girls tend to be disproportionately represented among the most disadvantaged sections of society.

There are other dimensions to social exclusion that are not fully captured by the interplay between economic deprivation and identity-based discrimination. For instance, social exclusion frequently entails a spatial dimension. In rural areas, it may relate to the remoteness of a location or the nature of the terrain which makes it physically difficult for its inhabitants to participate in broader socio-economic processes. In urban areas, it is likely to be associated with slum neighbourhoods which are poorly served by infrastructure and social services and characterised by high levels of violence, criminality, drug dependence and squalor.

The spatial dimension of exclusion is not entirely divorced from its identity and resource-based dimensions since it is often culturally devalued and economically impoverished groups that inhabit adverse physical locations. Consequently, in certain contexts, it may be possible to capture the causes and consequences of social exclusion through an analysis of the intersection of deprivation and discrimination. In others, however, location may exercise an independent effect, over and above, those associated with economic or cultural disadvantage.

The language of “vertical” and “horizontal” inequalities is not always helpful in capturing what is at issue here because of the “grid-like” symmetry evoked by these terms. Instead, the intersection, rather than addition, of different forms of inequality, economic, social, spatial and political, the fact that they reinforce and exacerbate each other, is better captured by the language of “sharp discontinuities” and “intensifications” which have been found to distinguish the poor from the poorest in many regions of the world.

The analysis of social exclusion can benefit from the insights of different disciplines because different disciplines have focused on different aspects of the phenomenon. Insights from the literature on group-based disadvantage can enrich the analysis of poverty because they help to show, among other things, that the chronic or extreme poor in most countries are not “just like” the rest of the poor, only poorer or poor for longer, but that they are set apart by their group-based identities. They bring an appreciation of the multiple and intersecting casual path-
ways that underlie poverty to the growing literature on its multiple manifestations.\textsuperscript{13}

Equally, insights from the literature on material deprivation can help to bring a class perspective to the analysis of social discrimination.\textsuperscript{14} It is worth noting, for instance, that despite the focus on poverty reduction as the overarching MDG, there is no recognition in the choice of indicators adopted to monitor progress on MDG 3, the goal relating to gender equality and women’s empowerment, that women may not experience progress on the MDGs in uniform ways. Increasing women’s share of parliamentary seats, one of the indicators measuring progress on MDG 3, may have little or no bearing on the needs and interests of poorer women just as increasing women’s share of non-agricultural employment (another indicator) fails to distinguish between the quality of non-agricultural jobs that are likely to be available to women from different class backgrounds.

3. Intersecting Inequalities and the MDGs: Empirical Findings

The MDGs spell out a multi-dimensional understanding of poverty, rather than the earlier uni-dimensional, money-metric understandings that had dominated the literature. And while the MDGs themselves have not been particularly attuned to the challenges of social exclusion, the massive efforts to document progress on the different goals across different countries have not only highlighted the uneven progress across countries and in relation to the different MDGs but also the presence of certain groups that have been systematically left behind on almost all measures of progress. In other words, the multiple deficits of poverty are clustered around these groups.

While the specificities of the disadvantages faced by these groups may vary across the world, it is clear that their disadvantaged position persists because of its deep roots in their region’s history. This tends to be tied up with past experiences of colonisation, frequently accompanied by the genocide of indigenous populations, with slavery, war and conflict, with long-established hierarchies, such as caste, as well as the continued practice of discrimination into the present day.

We use evidence from different regions of the world to illustrate the clustering of the MDG deficits around socially excluded groups. However, because the focus of the MDGs is on extreme poverty, rather than inequality or social exclusion, this evidence is largely available on the developing regions of the world: Latin America, Asia and Africa. It is from these regions therefore that our evidence is drawn.

3.1 Latin America

In the Latin American context, race and ethnicity are the key markers of social exclusion. There are more than 50 million indigenous people and more than 120 million individuals of African descent (Afro-descendants) in Latin America and the Caribbean, making up around 33% of the population, but with greater concentrations in some countries than others.\textsuperscript{15} The spatial dimension to social exclusion within these countries is evident from the fact that a substantial proportion of indigenous or Afro-descendant population are concentrated in rural areas.\textsuperscript{16} Indigenous groups are most likely to be found in remote and hard-to-reach parts of their countries, often pushed out of more productive areas by non-indigenous groups.\textsuperscript{17}
world, progress is evident. Not only has moderate and extreme poverty declined in many of the Latin American countries in recent decades, but income inequality has also been going down. However, extreme poverty remains much higher among indigenous people and Afro-descendants. In Brazil, for instance, while extreme poverty was around 17% among the white population between 1995 and 2002, it declined from 41% to 38% for indigenous and Afro-Brazilians. Afro-descendants continue to comprise the majority of households in the bottom income decile (73%) and a small minority (12%) in the top decile.\footnote{18}

In Bolivia, for the same period, extreme poverty declined from 28% to 26% for the white population and from 58% to 46% for the rest.\footnote{19} The intersection between spatial, ethnic and economic inequalities is evident in the fact that extreme poverty was twice as high among the indigenous compared to the non-indigenous population (33% compared to 17%), that extreme poverty was three times higher in rural than in urban areas (45% and 16%) and that 73% of the indigenous population living in rural areas was extremely poor compared to only 17% of those in urban areas.\footnote{20}

According to demographic and health surveys from the region, children from indigenous groups were considerably more likely to die than those from other groups across Latin America: around 1.5 times more likely in Bolivia, Brazil and Mexico and over 2.0 times more likely in Ecuador and Panama.\footnote{21} They were also between 1.6 and 2.5 times more likely to be undernourished than children of non-indigenous origin.\footnote{22} Marked ethnic inequalities persist in enrolment ratios at all levels of education, although there has been a narrowing in disparities at primary and secondary levels in a number of countries.

For instance, between 2000 and 2007, average years of education rose from 9.7 to 10.5 among non-indigenous groups and from 6.0 to 7.2 for indigenous groups in Bolivia.\footnote{23} The intersection of gender, ethnicity, class and location in Bolivia has meant that the average years of school education was the highest for urban-based, non-indigenous men in the highest income quintile (13.6 years) and the lowest for rural-based indigenous women in the poorest income quintile (2.9 years).\footnote{24}

### 3.2 Asia

Social exclusion in the Asian context is largely associated with ethnic and indigenous identities, but religion and language also feature in some countries. As in Latin America, indigenous ethnic minorities in Asia are often located in remote geographical areas. And as in Latin America, this location has not always been a matter of choice. The mountain ranges that stretch from Afghanistan to the Gulf of Tonkin have long been a refuge for indigenous communities who occupied a marginal position in relation to the dominant majorities in the valleys and plains. Ethnic and indigenous groups make up around 8% of the population in China, 10% in Vietnam, 8% in India and 37% in Nepal.\footnote{25} Their spatial concentration means that they are to be found in the poorest areas: rural areas of China’s western region; the remote, usually upland, mountainous areas of northern and central Vietnam; the hilly and forested regions of India, Bangladesh and Nepal.

Caste features as an additional marker of group-based disadvantage among the Hindu populations of the South Asian subcontinent. The “untouchable” castes, or Dalits, make up around 17% of the population in India. They tend to be more geographically dispersed than indigenous or Adivasi groups,
but around 80% live in rural areas.\textsuperscript{26} Nepal’s population is divided between a Hindu majority (58\% as of 2001), Janajatis or indigenous minorities (37\%), and religious minorities, mainly Muslims (around 4\%).\textsuperscript{27} Dalits make up around 12\% of the population.

Strong economic growth in much of Asia has led to major reductions in poverty, but this has been accompanied in many countries by significant increases in income inequalities. The poorest 20\% of the region’s population has seen their share of national income drop steeply, between 1990 and 2004 where it fell from 7.2\% to 6.7\% in South Asia and from 7.1\% to 4.5\% in East Asia.\textsuperscript{28} A disaggregated analysis of these trends shows how excluded groups have fared in relation to the MDGs.

The national incidence of poverty in India declined from 46\% to 27\% between 1984 and 2004, but the pace of this decline varied at the national level from 40\% to 35\% for Dalit and 31\% for Adivasi groups.\textsuperscript{29} As a result, the incidence of poverty remained much higher for Dalits (38\%) and Adivasis (44\%).\textsuperscript{30} As might be expected, Dalit and Adivasi groups were disadvantaged with respect to other indicators of deprivation as well. While under-five mortality was 74 per 1000 live births at the national level in 2005-2006, it was 96 for Adivasi groups and 88 for Dalits. The gap between mortality rates among Adivasis and the rest of the population increased between 1992 and 2006.\textsuperscript{31}

In Nepal, the overall decline in poverty between 1995 and 2003 varied between 46\% for the upper caste Brahman/Chhetri groups at one end of the social hierarchy to 10\% for Janajatis living in the hills and 6\% for Muslims at the other end.\textsuperscript{32} Despite improvements in overall literacy rates from 23\% in 1981 to 54\% in 2001, 30\% of Janajatis living in the hills had never been to school, compared with just 12\% of the upper castes.\textsuperscript{33} A similar pattern is reported for child mortality in 2006: the Newars and Brahman/Chhetri castes had the lowest rates while Dalit and Janajati groups had the highest.

In China, poverty declined from 33\% in 1990 to around 10\% but income inequalities rose. Ethnic minorities, largely concentrated in the western region, remained at a clear disadvantage: they made up 8.4\% of the population, but accounted for 46\% of people living in extreme poverty in 2003.\textsuperscript{34} However, the association between ethnicity and disadvantaged location may be driving ethnic differentials in income rather than ethnicity per se as there were no significant differences in poverty rates of ethnic minority and majority groups in the western region. Rates of decline in child malnutrition have also been much slower in the western provinces, giving rise to persisting regional disparities: for instance, 2005 figures on child malnutrition suggest 5.8\% of children were underweight and 10.7\% were “stunted” in the Eastern provinces compared to 12.5\% and 16.3\% in the western provinces.\textsuperscript{35}

In Vietnam, the rate of poverty among ethnic minority groups declined at an average rate of 2.6\% a year over the last decade compared with 3.4\% for the majority Khinh/Chinese community.\textsuperscript{36} Educational attainments were, and remain, lower among ethnic minority groups although they have been improving across all groups. Ethnic disadvantage varies by location. Ethnic minorities living in the lowlands have seen a dramatic rate of poverty reduction, while those in the northern mountains, the central highlands and the south and north central coasts remain in extreme poverty.\textsuperscript{37} Steady progress in reducing under-five mortality has been accompanied
by widening inequalities: the ratio of under-five mortality rates of the poorest to the richest quintile rose from 2.8 in 1997 to 3.4 in 2002. Only 23% of children from the majority Khinh/Chinese groups were underweight (“wasted”) compared with 34% of children from ethnic minorities in the northern mountains, and 45% in the central highlands and coastal areas.

3.3 Sub-Saharan Africa

Sub-Saharan Africa is home to more than 2,000 distinct ethnic groups characterised by different language, culture and traditions, and, sometimes, religious beliefs. Ethnic groups in Africa vary in size from millions of people to a few hundred thousand, and are often associated with a specific territory. Much of the region continues to suffer from the carving up of the continent by colonial powers in 1884 with scant regard for existing social, political, ethnic and linguistic contours. As a result, the political geography of the region, which has more countries than any other region of the world, has long been characterised by regional and civil armed conflicts.

In countries like South Africa and Zimbabwe, where colonial powers had a strong presence, intersecting inequalities have a strong racial dimension. More pervasive across the rest of the sub-continent are social cleavages associated with ethnicity, frequently reinforced by geographical location and distance from main urban centres.

South Africa represents an extreme case of intersecting inequalities given its “infamous history of high inequality with an overbearing racial stamp”. Ironically, this is also why it has the most comprehensive data on intersecting inequalities in the region. While the country is well on track to meeting the MDGs, deeply entrenched inequalities persist. Poverty has fallen in the post-apartheid period, but it remains acute for the African and “coloured” population. The majority African population has remained at the bottom of the income hierarchy, earning 16% of white income in 1995, a share that declined to 13% by 2008.

Infant and under-five mortality rates have declined between 1998 and 2003 from 45.4 to 42.6 per 1,000 live births and from 59.4 to 57.6 respectively. However, infant mortality risk is four times higher among black African children than white children, even after controlling for demographic factors such as the mother’s age and the timing and number of births.

The implications of the intersecting inequalities between gender, race and poverty in South Africa are illustrated by poverty data for 1993, 2000 and 2008 which show that for each of these years, the incidence and share of poverty was higher for Africans as a group than other groups in the population and that among Africans, both the incidence and share of poverty was consistently higher for women than men.

Elsewhere in Africa, data on the relationship between ethnic identity and poverty are less consistently available and generally captured by spatial variations that are known to have an ethnic dimension. For instance, in Nigeria, the northern states, which are dominated by the Hausa and Fulani, have higher levels of poverty than the south where the Yoruba and Igbo are predominant. Over 60% of Hausa speakers have less than four years of education compared to less than 10% of Yoruba speakers. The interaction between ethnicity, gender and location means that Hausa
females from poor rural households are the most educationally deprived section of the population.46

Child malnutrition, in terms of “stunting”, “wasting”, and being underweight is the highest among children of the Hausa ethnic group, followed by those of the Yoruba ethnic group, whereas children of the Igbo ethnic group have the lowest malnutrition rates.47 Child mortality rates follow this pattern; they are considerably higher in the northern zones. Again, regional and ethnic disparities reinforce one another; child mortality rates are lower for Igbo and Yoruba ethnic groups.48

One issue that has received continent-wide attention since the 1960s is ethnic differentials in early child survival. Data from the early 1990s confirms that these differentials do persist and have been spreading. Multivariate analysis suggests that socioeconomic differentials intersect with ethnicity; there was a close correlation between child mortality differentials, on the one hand, and ethnic inequalities in household economic status, female education, access to and use of health services and the degree of concentration in the largest cities, on the other hand. This suggests that, along with policies to reduce economic disparities among ethnic groups, “child survival efforts in African countries should pay special attention to disadvantaged ethnic groups and the locations in which they are concentrated”.49

4. The Intersecting Dynamics of Inequality: Why Social Exclusion Persists

The empirical evidence cited in the preceding section allows us to make two important points. Firstly, the intersecting inequalities which give rise to social exclusion are deeply entrenched in the historical structures and everyday practices of societies, making them appear remarkably resistant to change. Secondly, despite this apparent intransigence, these inequalities are not immutable. Change is evident in every region, more rapidly in some contexts than others, and more rapidly in relation to some MDGs than others. Efforts to tackle these inequalities in a more systematic way need to be cognisant of both sides of this equation: the forces that perpetuate inequality and the factors that have helped to bring about change. This section examines the persisting dynamics of social exclusion in greater detail while the next section focuses on promising avenues for change.

4.1 The Cultural Dynamics of Exclusion

The cultural norms and practices through which certain groups are defined as inferior to others on the basis of their socially ascribed identities are among the key mechanisms that serve to perpetuate social exclusion in the everyday lives of excluded groups and across generations. The effects of exclusion can work in silent and invisible ways which nevertheless have a profound impact on those who are excluded. Alternatively, they may work in ways that are visible and noisy, with negative spill-over effects within the larger society.

The everyday cultural dynamics of exclusion were meticulously documented in a survey of 565 villages across India published in 2007.50 It found that in over 70% of the villages surveyed, Dalits were denied entry into the home of the higher castes; in over 60% of the villages, they were denied access to public places of worship; in nearly half of the villages they were denied access to burial grounds; in 30% of the villages, they were forced to stand in the presence of upper-caste men while in 11% of the villages, they
were chastised for wearing sandals on public roads. In short, in almost every aspect of daily life, including using the post office or public transport, wearing decent clothes or even sunglasses, Dalits as a group were subject to a humiliating regime designed to remind them on a constant basis of their lowly status in their society.

Such norms and practices can have a profound effect on the sense of self-worth and identity of those who are treated in this way. An experimental study by Hoff and Pandey illustrates this point with respect to caste. The experiment, which was carried out with a group of school children in India, involved a maze-solving puzzle in exchange for payment. The study found that Dalit children performed as well as children from other caste groups when their caste identities were concealed. However, once the caste identities of the children were made public, the average number of puzzles solved by Dalit children declined by 23%. The number declined even further when the children were segregated by caste group. If such a finding can be generalised, it suggests that “internalisation” of ascribed inferiority can have a powerful effect on the capacity of excluded groups to respond to available opportunities.

In Nepal, a survey measuring the impact of social identity on various measures of empowerment and inclusion found that the upper castes scored twice as high as Dalits with regard to knowledge about rights and procedures, confidence in accessing services, exercising rights, social networks and local political influence. While 90% of the upper caste groups had never faced any restrictions or intimidation (the 10% exceptions were women), 100% of Dalit respondents had experienced some degree of restriction on entering certain public spaces, and 20% reported high levels of harassment, intimidation and restriction. In general, the upper castes scored higher on most indicators followed by Janajati groups and then Dalits. A disaggregation of the results showed that Dalit women scored lowest of all groups.

The Latino-barometer, an annual public opinion survey carried out in 17 countries in the Latin American region by the Latino-barómetro Corporation, included a question about which group were most discriminated against in their country in the survey carried out in 2000. Respondents in countries with large proportions of Afro-descendants and indigenous people were most likely to name these groups as facing the most discrimination while those with a more homogenous ethnic composition named “the poor”. Those who believed that ethnic groups were most discriminated against believed that they faced such discrimination in all spheres of life: at work, in school, in political parties, as well as in the justice system.

Evidence from a number of countries suggests that the internalising, self-destructive effects of cultural devaluation can lead to harmful activities, such as substance abuse, which ultimately serves to further their stigmatisation and compromise their life chances and those of the next generation. In Sri Lanka, for example, high levels of alcoholism among the predominantly Indian Tamil labourers in the plantation sector are seen as a major cause of the poverty, indebtedness and social stigma reported by these workers as well as high levels of domestic violence. In South Africa, higher levels of alcoholism and substance abuse by the coloured population compared to the black African population suggests that ways of coping with exclusion are not uniform across excluded groups. The Demographic and Health Sur-
vey of 2003 reported that 9.1% of adolescent women in the coloured population group reported harmful levels of drinking in the past 12 months compared with just 1.1% of black African adolescent women. Western Cape is reported to have one of the highest rates of Foetal Alcohol Spectrum Disorders in the world. This may account for the higher levels of infant and child mortality among the coloured population noted in recent studies.

If depression, addictive behaviour and sense of inferiority represent some of the silent consequences of social exclusion, the association between intersecting inequalities and levels of crime and drug-related violence represent its noisier consequences. It has been estimated that in urban Colombia, crimes were most likely to be committed by people from households with a per capita income below 80% of the national average. A survey from urban South Africa shows that patterns of crime vary by class and race. While the wealthier quartiles were more likely to report crimes without injury, it was the poorest and predominantly black population in informal settlements and townships who suffered the brunt of violent crime.

4.2 The Economic Dynamics of Exclusion: Asset Inequalities and Marginalised Livelihoods

The poverty of socially excluded groups is frequently mediated by cultural norms and practices which dictate what they can do and what they can own. In some cases, excluded groups are not permitted to own or buy land by virtue of who they are. This has long been the case for the “untouchable” castes in India and Nepal, and even today, the vast majority of people belonging to these castes are landless. In other cases, ethnicity differentiates the amount and quality of land people own.

In Peru and Ecuador, for instance, indigenous groups had landholdings that were between two and eight times smaller than those of non-indigenous groups and only 13% of all irrigated land in Ecuador was in the hands of indigenous farmers.

Indigenous people are more likely to be dispossessed of their land because their customary tenure systems may not be recognised by law. Non-recognition of customary land arrangements for forest dwellers and upland people has been a major factor in their impoverishment. Forest departments have traditionally held police and judicial powers, in addition to administrative powers, to enforce tight state controls over forest lands. This has resulted in forest dwellers being treated as criminals or squatters on their own land; in some countries (Thailand, for example), forest dwellers are not recognised as citizens. Indigenous people have also been at the receiving end of large-scale mining ventures, the expansion of the agricultural frontier, and other infrastructure projects from which they cannot expect to benefit.

The nature of livelihoods pursued by, or available to, marginalised groups can also serve to reinforce their marginal status. In many parts of the world, indigenous groups pursue a nomadic or semi-nomadic way of life that is regarded as “inferior” by the rest of society. In Thailand, for instance, the reliance of the Hmong, Akha, Lahu and Lisu on swidden agriculture in upland forested areas is perceived to signify their “uncivilised” way of life, in contrast to the settled wet rice cultivation practised by lowland villagers.

In other cases, social exclusion is associated with the cultural assignment of excluded groups to the worst paid and most demeaning jobs. The Hindu caste system in India and
Nepal assigns the lowest castes to the removal of night soil, sweeping, garbage collection and other jobs that are considered to be menial, degrading and dirty.

More generally, social discrimination combined with human, material and social resource deficits trap socially excluded groups in occupations with poorer pay and working conditions than other sections of society. In Vietnam, for instance, migrants from ethnic minorities earn half as much as those from the Kinh majority, are far less likely to have a work contract, and far less likely to receive help in finding a job. In Peru, white workers were more likely to be found in the higher hourly income quintiles than indigenous workers, and were more likely to be professionals, technicians and executive staff. In South Africa and Brazil, Afro-descendant and indigenous populations reported higher levels of informal employment. Moreover, in every employment category, hourly earnings were highest for white workers and lowest for black workers.

The interaction between gender and ethnic inequalities generally places women from ethnic minorities at the bottom of the income hierarchy: for example, indigenous and Afro-descendant women in Bolivia, Brazil, Guatemala and Peru were more likely to earn “poverty wages” ($1 an hour, purchasing parity power adjusted) than either men from their ethnic group or men and women from the rest of the population. In Brazil, Afro-descendant women earned the least, while white men earned the most for each level of education.

Lack of access to financial services, or access on extremely usurious terms, has been a major constraint for poor and excluded groups everywhere. In India, Pakistan and Nepal, the prevalence of bonded labour is a stark indicator of the unfavourable terms on which such groups obtain credit. They are disproportionately drawn from lower caste and ethnic minority groups. Such forms of indebtedness tend to serve as a mechanism for the intergenerational transmission of poverty, since the children of bonded labourers often become bonded labourers themselves.

4.3 The Exclusionary Dynamics of Service Provision: Access and Quality

The poor, more than any other group, rely on basic public services to meet their needs for health and education. The failure of such services to address their needs is a major factor in explaining the uneven pace of progress on relevant MDGs. Unequal spatial distribution of services, and the costs, quality and relevance of the services on offer, are some of the aspects of this failure as is the behaviour of those responsible for service provision.

In India, the most important source of variation in the per capita state provision of doctors, nurses and teachers in rural districts is religion and caste; the higher the percentage of Dalits and Muslims in the district population, the lower the provision of medical and educational services. Not surprisingly, religion and caste affect the uptake of maternal health and delivery services, along with household wealth status and women’s education. In addition, acts of discrimination against Dalits along with prejudice towards religious minorities are reported in the public health services. This includes avoidance by health workers, particularly paramedics and nursing staff, of physical contact with Dalits and reluctance to visit Dalit households. In turn, both real and anticipated discriminatory behaviour on the part of health workers deters Dalits from using health providers, particularly for services that involve physical contact, such as giving birth.
Teachers in India are also predominantly upper caste and bring their caste prejudices into the classroom. Dalit children are expected to run errands and are assigned menial tasks such as sweeping and cleaning the classrooms. Higher rates of teacher absenteeism were reported in areas where children were mainly from Dalit and tribal communities. In West Bengal, for example, teacher absenteeism was 75% in such schools compared with 33% elsewhere. Such treatment has particularly negative effects because Dalit children are likely to be first generation learners.

In Vietnam, ethnic minorities have to travel further than the rest of the population to get to a school or a market place, are further away from all-weather roads and less likely to have access to improved water and sanitation facilities. Compared to a national figure of 17% in 2002, 33% of women in the north east, 65% in the northwest and 40% in the central highlands gave birth with no assistance from qualified health workers. Ethnic minority women in Vietnam are less likely to report assistance from qualified health workers when they give birth partly because of their reluctance to seek help from male health workers and the difficulties of recruiting women to work in remote mountainous areas.

Nigeria reports large disparities in antenatal care between the north and the south. Only 4% of women in the north east received care from a doctor compared with 52% of women in the south west, while only 8.4% of mothers in the north west delivered in a health facility compared with 73.9% in the south east. Women from the north cited lack of money, distance to facilities and concern that there were no drugs available as the main reasons they did not deliver in a health facility.

A study of skilled attendance at childbirth in rural Tanzania found that ethnicity, education and household assets were important predictors of service take-up. Social positioning, past experience, entitlement, shame, and self-identity reinforced some women’s preference to deliver at home. Some had experienced substandard treatment, or been turned away from health facilities and felt humiliated.

More generally, in sub-Saharan Africa, pastoralist livelihoods are closely associated with specific ethnic groups. These are among the most excluded from education services. In many cases, national education systems have failed to offer relevant curricula, provide appropriate textbooks and respond to the realities of pastoralist livelihoods, which involve children travelling for long periods to tend cattle.

In Latin America, belonging to an indigenous group or being monolingual in an indigenous language constitutes a barrier to access health care. In Colombia, racial and ethnic disparities in health status and access to health care were largely explained by differences in socioeconomic characteristics, employment status, type of job and geographical location. In Brazil, utilisation of maternity-related services was found to be related to education and household resources, as well as location. Households in rural areas and in the poorer north and north east were less likely to make use of such services.

4.4 The Political Dynamics of Exclusion

When group-based inequalities are reproduced in the exercise of political power and access to public institutions, they undermine the confidence of socially disadvantaged groups in the government’s abil-
ity to rule fairly. Excluded groups are often minorities, and there is little incentive for political parties to take their interests into account. When the economic prospects of such groups are undermined by uneven development, when differential access to essential services persists, and when political opportunities for voice and influence are denied, grievances emerge and often spill over into group violence, riots and civil war, what could be seen as the “noisiest” consequences of social exclusion.

Studies of conflicts in different regions of the world point to the recurring significance of group-based disadvantage as a factor. Social exclusion does not inevitably lead to conflict, but it dramatically increases its likelihood. A report by the Indian government into the long-standing Naxalite insurgency, which affects 125 districts spread over 12 states, found that the movement’s main support comes from scheduled castes and scheduled tribes. It also found that while there are many districts with high concentrations of Dalits and Adivasis which did not have a Naxalite presence, it was generally the case that areas of Naxalite influence had a higher than average proportion of Dalits and Adivasis in their populations.

Nepal was, till very recently, governed by the 1854 Muluki Ain (Law of the Land) which essentially codified the inequalities of an orthodox Brahminical order, distinguishing between the pure, “twice born” castes (the Brahmins, Chhetris and high caste Newaris) at the top of the caste hierarchy and the rest of the population who were further distinguished by varying degrees of impurity: those regarded as “untouchable” (Dalit castes), those from whom water could not be accepted (Muslims and foreigners) and the liquor-drinking groups (non-caste indigenous groups) who were further subdivided into the “enslavable” and “unenslavable”.

The legalised ranking of social groups was evident in the political structure. Brahmins and Chhetris maintained around 60% presence in the legislature right through the period from 1959 to 1999, the last decade of which included the first ten years of multi-party democracy in the country. Dalits were almost entirely absent as were women, regardless of caste. Civil service positions were also disproportionately drawn from Brahman/Chhetri groups (83%) and the upper castes held virtually all positions in the judiciary.

There had been piecemeal efforts at legal reform but these had largely failed. Disillusionment with this continued failure finally led to a prolonged period of violent conflict led by the Communist Party of Nepal. Most analysts agree that the conflict was fuelled by grievances rooted in the structural inequalities of caste, ethnicity, gender and location.

In Mexico, the Zapatista uprising has its roots in the intersecting inequalities experienced by indigenous people, based on ethnic identity, location and poverty. The share of the indigenous population in the State of Chiapas, where the movement began, was over three times that of Mexico as a whole and the proportion of people on incomes below the minimum wage was nearly three times that of Mexico as a whole, while the proportion of people on high incomes was less than half the national rate. Indigenous people had substantially lower school attendance and incomes than the rest of the state’s population. They had been excluded from land reform efforts and consigned to poor and ecologically vulnerable land. For years, indigenous people sought to exercise political
voice through organised resistance but were met by political repression. The adoption of the North American Free Trade Agreement after a long period of worsening conditions as a result of neo-liberal policies provided a major impetus to the uprising which finally led to their grievances being heard, not just nationally, but internationally.

All post-conflict societies suffer from diminished resources. Eight of the ten countries with the worst human development index, and eight out of ten countries with the lowest gross national product per capita, have had major civil wars in the recent past, with causality working in both directions. These are likely to feature prominently among countries that are most off track in relation to the MDGs, although they are also characterised by poor data for monitoring progress.

5. Addressing Intersecting Inequalities: Responsive States and Active Citizens

5.1 The Critical Role of the State: Driving Legal Change

Experience has made it clear that the state has a critical role to play in carvign out an agenda for tackling social exclusion. The private sector undoubtedly has an important contribution to make because of its central role as an engine of growth, but driven as it is by profit considerations, it is unlikely to take a lead in promoting social justice. Civil society organisations are also indispensable because of their ability to mobilise against injustice and hold state and corporations accountable, but they represent specific interests. They rarely speak for, or are accountable to, society as a whole. Consequently, however flawed the state might be, it is the only institution that has a mandate to respond to claims for social justice by all its citizens. But where states fail in their responsibility to their citizens, citizens can play an important role in exercising pressure on it to do so.

This is evident in the Latin American context where it took over a decade for social mobilisation of citizens against a succession of repressive military governments to install democratic regimes in their place. The active participation by indigenous and black organisations within these movements has meant that Latin American governments lead in measures taken to incorporate various forms of affirmative action within their constitutions and legal systems. The Workers Party in Brazil, for instance, instituted a number of measures to explicitly address socially excluded groups: the establishment of quotas for Afro-descendants in public universities, the Brasil Quilombola program, the National Integral Health Policy for the Black Population, the national Policy for the Promotion of Racial Equality and, for women more generally, National Plans of Policies for women.

In Ecuador, the significance attached to the environment in the 2008 Constitution reflects the influence in the social mobilisations that had overthrown the previous military regime. The Constitution incorporated the notion of Buen Vivir (Living Well) as the foundational principle for nation-building and development efforts. In diametric opposition to neo-liberal privileging of the individual enterprise and market-led growth, Buen Vivir represents the indigenous worldview which values social responsibility, social, economic and environmental rights and harmony with nature. The Constitution also acknowledges the “multi-national” character of Ecuador, extending official recognition to indigenous languages and expanding the collective rights of indigenous and Afro-Ecuadorean populations.
Nepal’s new Interim Constitution, introduced after a prolonged period of conflict, granted equal status to men and women, banned discrimination on the grounds of ethnicity and caste, introduced measures to improve social justice and institutionalised proportional inclusion of Madhesis, Dalits, Janajatis and women in all organs of the state. The introduction of proportional representation in the country’s elections meant that the Constituent Assembly elected in 2008 had a very different composition from the parliaments of the 1990s. The most dramatic increases were for women and Dalits. Women made up 3% of the Assembly in 1991, compared to 33% in 2008. Similarly, Dalits made up only 0.5% of the Assembly in 1991, rising to 9% in 2008.98

Constitutional reform and legal measures are clearly important means for promoting affirmative action but governments can use the law to address inequalities in other ways as well. Given the role of asset inequalities in slowing down the translation of economic growth into poverty reduction, reform of property rights could be designed to favour poor and excluded groups. Land reform is particularly important in rural economies because it is a precondition for access to water, grazing rights, residential security and other resources.

Latin America has made considerable progress in the legal recognition of women’s land rights. This has been achieved through a combination of women’s own mobilising efforts, the transition to democracy in many countries in the region, and the impetus provided by the Convention on the Elimination of All Forms of Discrimination against Women.

Land legislation could also be revised to secure longer-term tenancy arrangements, and resolution of disputes regarding interpretation and enforcement of land rental arrangements. Where tenant protection has been vigorously implemented by the state, as in West Bengal, it has led to a rise in productivity.99 Elsewhere, poor and marginalised groups have had to engage in collective action to press for recognition of their claims.100

There is also a need to recognise different landholding patterns among indigenous people. The new Land Law in Vietnam provides for land allocation practices that accommodate communal land use patterns and also joint titling to include women. In Latin America, indigenous groups have been active in demanding recognition of indigenous territories and collective land rights. A review of the new constitutions and agrarian codes put in place in a number of Latin American countries since the late 1980s shows that they have made considerable gains.101

5.2 The Critical Role of the State: Redistributive Policies

Along with legal instruments, public policy represents a further set of instruments through which the state can tackle longstanding inequalities. Analysis of the factors that have contributed to the decline in income inequalities in Latin America over the past decade or so have identified the increase in social transfers and rising education as key factors, thus underscoring the redistributive potential of public policy.

As suggested by the earlier discussion, making social services more inclusive is one way to do this but it will require action on the various constraints that exclude certain groups. Directing services to areas that are underserved by service providers can be combined with a strong element of demand mobilisa-
tion to determine the shape and form of service provision. The Educational Guarantee Scheme in Madhya Pradesh, India guarantees state provision of a primary school to children in areas where there is no such facility within a kilometre, within 90 days of receiving a demand from the community. Eligible communities must have at least 40 learners in the 6-14 age group, but in tribal areas, only 25 learners are necessary.

To ensure health care outreach, a policy required doctors in Indonesia to complete compulsory service in health centres for five years, with shorter periods for more remote areas, before they could obtain a lucrative civil service post. This increased the number of doctors in health centres by an average of 97% from 1985 to 1994, with gains of more than 200% for remote rural areas. Reliance on women community health workers in countries where there are restrictions on women's mobility in the public domain, such as Bangladesh and Nepal, have made a considerable difference to maternal health.

Recruiting service providers from marginalised groups is an important means of bridging their social distance from service provision. Mongolia has experimented with the establishment of pre-school units using the traditional Gers (a type of Yurt) as training centres during the summer. Teachers are nomads, moving with their families and stock, together with a group of households involved in pre-school education programmes.

There is also policy recognition of the need for bilingual education for minority groups, initially providing instruction in the mother tongue, and gradually moving on to the mainstream language. Studies suggest that the implementation of this education model can improve the performance of minority language groups, increasing enrolment rates, improving educational results and reducing gender gaps in schooling.

The Brazilian government has created a law to teach the history of Africa and Afro-Brazilians. It has also begun a national school textbook programme to substitute books depicting racist stereotypes with those that promote the diversity of Brazilian society. In India, schoolbook examples of famous Dalit personalities are gradually being recognised as a tool to create pride and address prejudice. Behaviour-change communication in general is an under-utilised tool that could be used to great effect, notably in schools, health institutions, and public offices.

Social transfer schemes have also emerged as an important means of addressing social exclusion, some explicitly designed to do so while others build in a bias towards the poor. These transfers do not only increase the resources at the disposal of poor households but are often designed to expand education – the two factors associated with declining income inequality in Latin America.

Some of these are explicitly targeted to the poor. This is the case, for instance, with Mexico's conditional cash transfer programme, Oportunidades, where mothers in low-income households receive monthly cash transfers on condition that their children attend school and health clinics. It appears to have benefited indigenous peoples disproportionately – although it continues to exclude the most marginalised among them – and helped to close ethnic and gender disparities in education.

Some are more broad-based: for instance, the Bolsa Familia (family grant) in Brazil is also a conditional cash transfer program, but
eligibility depends on a simple declaration of income by the beneficiary and conditionality is only loosely enforced. More recently it has been supplemented with an additional programme which carries out an “active search” for the hardest to reach of the poor.

The 2006 National Employment Guarantee Scheme in India is a self-targeted public words programme with strong inclusive elements built into it. Along with providing employment if a minimum number of people in a locality demand it, it requires that a third of jobs should be reserved for women and creches provided where there are more than a certain number of women on a scheme. It also stipulates that some of the infrastructure projects should be used to promote land improvement and other assets for socially marginalised groups.

5.3 The Critical Role of Citizens: Protest- ing Injustice, Claiming Rights

While active citizens have mobilised to make states more accountable, responsive states can play a critical role in promoting active citizenship among excluded groups. While there has been increasing emphasis on decentralisation as a means of bringing decision-making closer to poorer groups, there is no a pri priori reason to expect that localised forms of governance will be any more inclusive or democratic than centralised ones. Additional measures can make the difference.

The government of Kerala, for instance, launched a People’s Campaign for Decentralised Planning in 1996 with the aim of devolving significant resources and authority to the panchayats (village councils) and municipalities. It also mandated village assemblies and citizen committees to plan and budget local development expenditures. Nearly one in four households attended village assemblies in the first two years of the campaign, and the assemblies continue to draw large numbers. Women accounted for 40% of the participants in village assemblies – much higher than elsewhere in India – while the participation of Dalits has exceeded their representation in the population. A large survey of key respondents found that “disadvantaged groups” were the main beneficiaries of targeted schemes and the widespread view that elected representatives had become more responsive to the needs of local people.

In Brazil in the 1990s, participatory budgeting was promoted by the Workers Party in several municipalities which they controlled. It allows for direct negotiation between government officials and representatives of civil society as they seek to find practical solutions to pressing needs. It thus allows various opportunities to citizens to debate and vote on policy proposals specific to their locality or their city. Research on participatory budgeting has demonstrated that a considerable majority of participants and elected delegates have low incomes and low levels of education, suggesting that the programs “have the greatest potential to affect the political behaviour and strategies of individuals from historically excluded groups.”

The capacity for active citizenship can also be built from below. Mobilisation to protest injustice and claim their rights by marginalised groups has been promoted though a wide variety of channels, including social movements, NGOs, faith-based organisations, women’s groups and trade unions, and self-organisation by the groups in question. While not all of these organisations are equally inclusive or effective, many have acted as a powerful force for change on a range of inequalities. In India, for example,
civil society groups, in collaboration with progressive political parties, succeeded in getting the Indian government to recognise the right to information, the right to food and the right to work. These rights have then been used by civil society to improve the implementation of public policy and to hold service providers accountable.

For instance, the Right to Information Act 2005, which requires all central, state and local government institutions to meet public demands for information has become an important tool in the transparency and accountability of the day-to-day functioning of government. The right to information has been combined with collective action by civil society to groups to ensure the proper implementation of government programmes aimed at assisting the most vulnerable and disenfranchised people.

As we noted earlier, the vast majority of socially excluded groups are engaged in marginalised forms of livelihoods carried out within the informal economy – where they fall outside the purview of the traditional trade union movement. The emergence of new forms of organisation based on their livelihood needs have provided these groups with an important means to negotiate with their employers and with the state. They have succeeded in getting legal protection for their members, despite their informal status.

Development organisations have worked with dispossessed tribal groups in Orissa, India, who had been forced into bonded labour, to take up resources offered under government rehabilitation schemes and to organise themselves to bargain with their landlords. Sankalp, in Uttar Pradesh, supports the self-help organisation of tribal mine workers in forming worker co-operatives and applying for mine leases as a tool against child and bonded labour. Social mobilisation efforts in these areas have resulted in children being sent to school and adults starting up their own literacy classes. Self-help organisations have also encouraged these groups to get more involved in the running of local schools in order to counter teacher absenteeism.

The Self Employed Women’s Association in India has been working with women workers in the informal economy – both waged and self-employed – since the 1970s. It combines a trade union approach to engage in collective bargaining on behalf of its members with a co-operative approach to promote their livelihood strategies. It has more than 700,000 members spread across a number of states in India and lobbies the government to win legal recognition of members’ rights, including minimum wage legislation. It has also been active at the international level and is one of the founding members of a global network of women workers, Women in Informal Employment: Globalising and Organising, which collects data, conducts research and engages in advocacy on behalf of its members.

Public action and community mobilisation can play an important role in extending services to socially excluded groups. In Mexico, for example, mobilisation by women’s reproductive health groups in collaboration with a research institute that focused on budgetary analysis highlighted long-standing inequalities in federal support to the poorest states, which had the highest rates of maternal mortality. In Bolivia, India and Nepal, community mobilisation through participatory women’s groups helped to improve birth outcomes in poor rural communities. Initiatives included setting up women’s organisations, devel-
developing women's skills in identifying and prioritising problems, and training community members in safe birthing techniques.

In Bolivia, community mobilisation led to a decline in perinatal mortality and an increase in the proportion of women receiving prenatal care and starting breastfeeding on the first day after birth. In Nepal, the same approach led to a reduction in neonatal mortality and an even larger and statistically more significant effect on maternal mortality rates. In the Indian context, where the intervention was carried out in two states with high proportions of Adivasi groups, it was associated with a dramatic fall in neonatal mortality rates.

6. Conclusion

Socially diverse societies do not have to be socially divided societies but group-based differences harden into inequality, exclusion and conflict in the face of systematic discrimination – the consistent denial of resources, recognition and representation to some groups on the basis of who they are. The persistence of historically established patterns of exclusion over the course of a life time, and often over generations, can give rise to a deep sense of despair and hopelessness. But there are enough examples of progress, some of which have been touched on in this paper, to suggest that change is possible. This concluding section highlights some basic principles that can guide the efforts of state and civil society in bringing about such change.

First of all, these efforts may need to be framed by the language of rights. Given that social exclusion entails the denial of full personhood and citizenship to excluded groups, the rights discourse has proved to be a powerful mobilising force in bringing such groups together in their search for justice. In addition, the importance of framing the demand for justice in the language of rights is that it lends itself to legal recognition. In contexts where intersecting inequalities run deep, and are reinforced on an everyday basis by culture, religion and long-standing traditions, the law may be the only discourse available to excluded groups to articulate their demand for equality of personhood.

Secondly, while building inclusive forms of citizenship requires the transformation of the relationship between the state and citizens, it also requires a transformation of relations between citizens themselves. It is not the state alone that is responsible for discrimination and it cannot be the state alone that can tackle it. This means that along with changing laws and policies, efforts to tackle exclusion must also challenge taken-for-granted norms and practices that make up the “mind-set” of a society, using the various means of re-socialisation available to it: education, media, popular culture, statistics, research as well as pro-active campaigns and public information messages.

Thirdly there is a need to balance equality and difference. For instance, to what extent can broad-based or universal policies to promote equality be combined with making special provision for those who have been systematically excluded in the past? While these are often treated as mutually incompatible approaches, they can, in fact, work successfully in tandem. Universalist approaches are essential to building a sense of social solidarity and citizenship, particularly critical for excluded groups. Universal coverage also gives privileged groups more of a stake in policy outcomes, a greater willingness to contribute to them, and hence the possibility of cross-subsidising marginalised groups.
At the same time, the fact that it is their “difference” from the rest of the poor that has led socially excluded groups to be left behind or locked out of processes of growth and development suggests that “universality” should not be taken to imply “uniformity”. There are strong grounds for plurality and diversity within universal frameworks of provision.

A fourth principle is the need to go beyond ameliorative approaches that address the symptoms of the problem to transformative approaches that address its root causes. It is quite possible to meet the basic needs of poor and marginalised groups without strengthening their capacity to challenge the dependency traps that keep them poor. There is no ready-made formula for achieving this but, given the intersecting nature of the causes and consequences of social exclusion, multi-pronged approaches that act simultaneously on different dimensions of disadvantage are likely to be more effective than a search for magic bullets. In addition, transformation is more likely to be achieved by using group-based approaches to tackle problems that are essentially group-based. Indeed, individual solutions may leave members of marginalised groups more isolated and impoverished than before. The need for more collective approaches is essential to overcome their isolation, to challenge the internalisation of inferiority or resignation to their subordinate status in society and to create forms of social mobilisation powerful enough to bring about change.

Finally, we may need to work towards a new social contract that recognises the increasingly interconnected nature of the world we live in. The MDGs provided a major impetus for coordinating national and international efforts to reduce poverty and promote human development. They helped to mainstream the fight against poverty in the policies, plans and programmes implemented across different regions of the world. However, the MDGs fall short of the social justice agenda spelt out by the Millennium Declaration.

This paper has examined some of the structural factors that give rise to deeply entrenched and intersecting inequalities and suggested some policy options that might help to carve out pathways to social justice. The multidimensional nature of poverty and social exclusion require such options to be pursued as part of a broader agenda of social transformation. A new social contract to build more responsive states and more active citizens is part of this broader transformative agenda.

What has been left out of the discussion so far is the role of the international community. The problems of poverty and social exclusion are not purely national in their causes or in their consequences. They are also the product of structural inequalities at the global level. This was not acknowledged by the MDGs. It is true that while MDGs 1 to 7 spell out what the developing countries of the world would strive to achieve, MDG 8 sought to address the relationships between developed and developing countries, articulating it in the language of global partnerships. However, it failed to acknowledge the unequal nature of these relationships – as manifested in the asymmetries that characterise the rules governing aid, trade and debt between these countries. It is also telling that MDG 8 was the only MDG with no targets or indicators to monitor progress. Not surprising, it has been criticised for singularly lacking “vision, bark and bite”.

The predominant focus on extreme poverty in the MDGs divided the world into those
who have, and hence provide aid and advice, and those who have not, and hence receive aid and advice. The focus on sustainability in the post-2015 development framework can help to overcome this dichotomy by highlighting the stake that all countries have in the future of the planet. A strong concern with inequality has also been expressed in the consultations leading up to the post-2015 agenda. Placing social justice at the heart of this framework would also help to unify countries around a shared agenda of tackling inequality – at global, national and subnational levels. A concern with sustainability and social justice would remind us of the challenges we face in common and provide the basis of a more genuine collaboration across national boundaries.

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4 Valued at 1993 purchasing power parity.

5 United Nations Department for Social Affairs, The inequality predicament. Report on the World Social Situation, UNDP, 2005. In exploring the nature and extent of inequalities, given the limits of space as well as the uneven availability of data by region and country, this paper can only offer illustrative examples of the situation in different regions. Further, one of the aspects of social exclusion is precisely the failure to document it systematically in national statistics. This paper is based on a comprehensive survey of the regional literature until 2010 with some updating subsequently.


9 Ibid.

10 Kabeer, N., International Development Studies, Can the MDGs provide a pathway to social justice? The challenge of intersecting inequalities, 2010. Note that some ascribed inequalities may be more enduring than others. According to Kapadia, India has made more progress in addressing caste inequalities than the structures of gender inequality: Kapadia, K., “Translocal modernities and the transformations of gender and caste”, in Kapadia, K. (ed), The Violence of Development: The politics of identity, gender and social inequalities in India, 2012.


18 Kabeer, N., above note 10.


24 See Paz Arauco, V., above note 19.


31 Kabeer, N., above note 10.

32 Kabeer, N., above note 10.


36 Kabeer, N., above note 10.


38 Kabeer, N., above note 10.


Kabeer, N., above note 10.


See above, note 42.


See above, note 57.


See above, note 29.

See Patrinos, H. and Skoufias, E, above note 17.


See Vanderveest, P., above note 65.


Kabeer, N., above note 10.


Ibid.


Ibid.

See Omilola, B., above note 47.


Ibid.

See above, note 46.

See above, note 22.


89 Ibid.


95 See Stewart, F., above note 8.

96 Ibid.


99 See above, note 14.


102 See above, note 46.

103 Ibid.

104 Law No.10.639/03.


106 See Hevia-Pacheco, P. and Vergara-Camus, L., above note 97.

107 See above, note 14.


109 Ibid.


112 Kabeer, N., above note 10.
A Feminist Perspective on the Post-2015 Development Agenda

Ana Ines Abelenda

World leaders and diverse development actors are currently embroiled in a series of negotiations around a new global development agenda to follow the Millennium Development Goals (MDGs) once they expire in 2015. The Association for Women’s Rights in Development (AWID) has been heavily involved in seeking to shape the new agenda to ensure that it adequately addresses human rights, including women’s rights and gender equality. The negotiation process has been complex, frustrating at times for civil society and women’s rights advocates, yet a historical opportunity to re-shape global understandings of development in the struggle towards social, economic, ecological and gender justice. As the world navigates a context of multiple intersecting global crises coupled with increasing inequality and militarism, it becomes clear that business as usual is not an option. A paradigm shift is needed. This position paper presents a feminist analysis to help unpack what is at stake for people and the planet by pushing the envelope on the kind of world we want to live in. This approach is one which both AWID and the author believe is key to systemic change. A mere look at the “shopping list” of goals and targets currently on the negotiating table is not enough. Feminist and progressive social movements must not bypass the opportunity to challenge the systemic root causes in the current economic system that continue to undermine women’s autonomy and the achievement of human rights for all.

Background: The Notion of Development at the Crossroads

A report by Oxfam International released in January 2014 asserts that 85 of the world’s richest people own the equivalent of the wealth of the poorer half of the world’s population. Massive economic inequality has become the global status quo. Not only extreme and persistent between the global North and the global South, but increasing and entrenching within countries of the North and South alike. Globalised inequality does not mean that some regions do not still suffer disproportionately from the specific legacies...
and continued application of colonialism, occupation or global economic apartheid. Africa, Asia and Latin America are richly endowed with mineral assets that are essential for the development and industrialised growth of a large part of the planet, yet the vast majority of globally impoverished peoples are from and living in the global South.

There are those who persist in asserting that economic growth, facilitated by giving free reign to corporations and business, can sustain a tide that will (eventually) raise all boats. The belief in the so-called "trickle-down effect" yet remains. However, it is unmistakable that the policies of privatisation and liberalisation that have been the hallmark of the neo-liberal model driving the global economy, the financial system, and aid and development policies over the past three decades have sustained a trajectory of deepening inequalities, gender injustice and environmental destruction that the world can ill afford. The notion of development that has prevailed for the past decades, built for the most part upon the premise of limitless economic growth, is thus going through an ideological crisis.

This assertion is at the background of deliberations taking place at the United Nations (UN) in the run up to 2015 when a new set of Sustainable Development Goals (SDGs) will be agreed to succeed the MDGs. This scenario presents a renewed opportunity for progressive civil society and women’s rights advocates in particular to challenge the systemic root causes of the failing development model to date and demand a framework less focused on economic growth figures and more on people’s wellbeing, environmental sustainability and gender justice.

The UN legitimacy as the only true democratic space for decision-making on global standards for development is also at stake in the post-2015 negotiation process. The increasing co-optation – by powerful groups of countries like the G8 and G20 or influential corporate sector gatherings like the World Economic Forum – of the power to set global development priorities, often with little or no participation of the most impoverished countries and even less so of civil society, is a significant concern.

Across its history, the UN has made great strides in building global consensus and commitments around universal development frameworks and rights: like the Universal Declaration of Human Rights 1948, the Declaration on the Right to Development 1986 and notably during the conferences of the 1990’s that marked the advancement of the women’s rights agenda.

The post-2015 process is thus a key opportunity for the UN to reclaim its global leadership in development agenda-setting with an ambitious outlook that has human rights at the centre and that addresses the structural causes of impoverishment, oppression and exploitation. In this effort, the UN must ensure a truly participatory process that brings all actors to the table on an equal footing.

**The Unfinished Business of the Millennium Development Goals and Lessons Learned**

Thousands of analyses and reports have been written on the achievements, gaps and failures of the MDGs. Without aiming to add to the pile, here I shall look briefly at their unfinished business from a women’s human rights perspective as a way to draw lessons for the current state of negotiations on the post-2015 agenda.

One of the major criticisms of the MDGs as the tools for achieving development is that...
The framework does not include a consideration of the larger macroeconomic context, in particular, the global financial and economic structural crisis and its impact on the implementation of those goals. By isolating development from the macroeconomic context, the MDGs have indirectly legitimised neoliberal policies as a basis for funding and implementation of the development agenda, rather than as part of the problem. As a consequence, the free-market economy which is promoted by International Financial Institutions (IFIs) and free trade agreements both outside and inside the sphere of the World Trade Organization (WTO) and which benefits transnational corporations and powerful countries, continues unperturbed while threatening sustainable development and human rights. For example, a report released by Eurodad in 2012 states that

"In 2010 external investments to the private sector by IFIs exceeded $40 billion. By 2015, the amount flowing to the private sector is expected to exceed $100 billion – making up almost one third of external public finance to developing countries."9

At the same time, according to data from the World Bank and Fortune Magazine, the revenues of mega-corporations Royal Dutch Shell, Exxon Mobil and Wal-Mart were larger than the GDP of 110 national economies, or more than half the world’s countries.10 The revenues of Royal Dutch Shell – known for its practices violating human rights in Nigeria in the 1990’s and responsible for contamination, leaks, explosions and other toxic events at many of its operations around the world11 – were on par with the GDP of Norway and dwarfed the GDP of Thailand, Denmark and Venezuela.

The Monterrey Consensus on Financing for Development agreed by governments in 2002 provided the financing framework for the MDGs and confirmed a market approach to development and its financing.12

Another aspect that is considered problematic by many civil society organisations and women’s rights advocates – and thus to be avoided going forward – is the fact that the MDGs agenda was not defined through a participatory multi-stakeholder dialogue, but through a top-down process where decisions on priorities were taken behind closed doors amongst powerful countries and institutions.13 This lack of participation by civil society undermined democratic ownership and provided little institutional space for citizens around the globe to demand accountability to their states for the progress made on those goals.

Specifically regarding gender equality and women’s rights, the MDGs missed the opportunity to fully integrate key women’s rights instruments and significant intergovernmental agreements like the 1995 Beijing Platform for Action, the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), or the Program of action of the International Conference on Population and Development (ICPD). Therefore, the MDGs addressed women’s rights from a mere superficial level leaving out crucial aspects like the full achievement of sexual and reproductive rights, or the recognition of women’s unpaid work as a key obstacle for the achievement of gender equality.14

Of course, the MDGs framework addresses important urgent issues like improving girls’ access to education, women’s political participation, addressing maternal mortality and stopping the spread of HIV and AIDS.15 However, it fails to link these to the profound root causes of gender inequality, in particu-
lar to women’s sexual and bodily autonomy and misogynistic norms and practices.16

Despite these shortcomings, there have been positive results in the advancement of women’s rights using the MDGs, particularly from the experience with funding for MDG 3 (relating to gender equality and women’s empowerment). The attention brought by the targets has created a strategic opportunity to extend greater dialogue between governments, the donor community and women’s rights organisations allowing richer analysis on the barriers to women’s full enjoyment of rights. AWID’s experience has been that MDG 3 has played an important role in galvanising financial and institutional support for women’s rights and gender equality. AWID’s own research on the Dutch MDG3 Fund demonstrates the lasting positive impacts of allocating specific funds to the advancement of women’s rights, particularly for women’s rights organisations and movements as opposed to relying on gender mainstreaming alone to provide the needed changes for women on the ground.17

Whether looking at the MDGs from a glass half-empty or glass half-full perspective, the inclusion and implementation of the full body of women’s human rights in the global development agenda is an unfinished business that cannot be forgotten when moving forward in any new agenda that aims to improve and replace the old framework.

**Who Shapes the New Agenda? Women’s Rights Organising for Transformation**

While there have been considerable efforts and resources invested in consulting civil society including women’s organisations both online and face-to-face across regions in the initial stages of the post-2015 process,18 the current phase of intergovernmental negotiations leading up to 2015 is shrinking the space for participation. The official UN discourse is that of an unprecedented multi-stakeholder process but just how much of it is really a “pantomime” of CSOs participation remains to be seen now that decision-making moves to private rooms and small committees where only a maximum of 30 government representatives are allowed in.19

As feminist activists have learned from many UN contexts where women’s rights are discussed (for example at the 58th session of the Commission on the Status of Women held March 2014 in New York),20 a roll-back on hard won gains is a real possibility in the face of increased presence and influence of conservative and fundamentalist forces in international policy fora. Indeed, as the UN attempts to build international consensus around a new development agenda, the complex array of interests and influence between states, the corporate sector and civil society with fundamentalist agendas against the advancement of rights are creating significant pressures on feminist gains.

Aware that collective voices united are stronger than a myriad of separate voices, women’s rights networks and gender equality advocates across regions have been organising and strategising as a collective movement on the run up to 2015 to jointly influence the negotiation processes within the UN. The Women’s Major Group (WMG),22 for example, currently comprises over 500 women’s human rights, environment and development organisations, activists and academics, and has substantively engaged in the post-2015 consultations and negotiations since they began to take shape at the Rio+20 Summit in July 2012. The structure of the major groups was born out of the Rio de Janeiro Earth Summit held in Brazil in 1992, where governments recognised women as
one of the nine important groups in society to achieve sustainable development. A series of different thematic advocacy teams within the WMG, allowed for consistent input to the 13 sessions of the Open Working Group on SDGs and the Intergovernmental Committee of Experts on Sustainable Development Financing, both processes that took place during 2013 and well into 2014.

The Post-2015 Women’s Coalition represents another collective of women’s rights and gender equality advocates across regions engaged in the post-2015 process. Initiated by a group of like-minded organisations previously connected through the Gender Equality Architecture Reform Campaign and other international advocacy efforts focused on the realisation of women’s rights and gender equality, the coalition gathers feminist, women’s rights and development, grassroots and social justice organisations working to challenge and reframe the global development agenda.

In February 2014 a Feminist Strategy Meeting was organised by the Center for Women’s Global Leadership, Development Alternatives with Women for a New Era, International Planned Parenthood Federation – Western Hemisphere Region, Realizing Sexual and Reproductive Justice Alliance, and Women in Europe for a Common Future. The three-day meeting brought together representatives of feminist and women’s rights organisations and networks working on sexual and reproductive rights and health, environment, agriculture, economic and social rights, peace and security, gender-based violence and women’s human rights, with the aim of producing a shared vision and strategy toward 2015. The meeting resulted in a joint statement “Gender, Economic, Social and Ecological Justice for Sustainable Development – A Feminist Declaration for Post-2015” (“the Feminist Declaration”). The Feminist Declaration calls for a truly transformative post-2015 agenda based on gender, economic, social and ecological justice.

The mobilisations by women’s rights and feminist advocates described above, in which AWID has been an active participant and supporter, have been crucial in pushing for progressive language in the proposal put forward by the Open Working Group on SDGs. Far from settling for a gender equality goal as the minimum common denominator, women’s movements demand more ambition to really push forward a transformative agenda. They are aware that any set of goals agreed on will only be good intentions on paper if they do not come hand in hand with solid monitoring and accountability frameworks and concrete funding based on human rights and justice principles.

The 17-goal Proposal of the Open Working Group on SDGs

The General Assembly’s Open Working Group on SDGs concluded its mandate in July 2014 producing a final outcome report, also known as the “zero draft”, with a proposal for 17 sustainable development goals to submit to the 68th session of the UN General Assembly as part of the post-2015 process. Below I offer a glimpse at some of the key aspects of the Open Working Group’s proposal, analyse these targets from a feminist lens and reflect on the gains and battles ahead for women’s rights advocates.

What Has Been Gained?

In a statement released on 24 July, the WMG welcomed the zero draft “as a significant step forward” and considered it “a commendable achievement” that the document was adopted especially given the “complex negotiation
process amidst sharp differences and disputes among member states”.28

Indeed, the inclusion of a stand-alone goal on gender equality and empowerment of women and girls (Goal 5) is a sign of hope. It currently includes key issues previously disregarded in the MDGs framework, including: the elimination of all forms of violence and discrimination against women; addressing early and forced marriage and harmful practices against women and girls; universal access to sexual and reproductive health and reproductive rights; recognition of unpaid domestic and care work; and women’s equal rights to land and economic resources.

The fact that gender equality and women’s rights are addressed in different goal areas was also an important gain. Key areas beyond the stand-alone goal that include gendered targets include equal rights to education and life-long learning (Goal 4); a right to decent work (Goal 8.5); and equal pay for work of equal value (Goal 8.5).

The inclusion of a stand-alone goal on inequalities within and between countries is also a positive outcome as this is imperative to addressing the root causes of impoverishment. Similarly, the targets that seek to reverse the trend towards ever growing income inequalities by reforming global financial systems and fiscal measures are critical to shift the global system that perpetuates impoverishment.

Other key gains in the current framework include the goal on peaceful inclusive societies and its targets on participatory decision making, as well as that on access to justice and reducing arms flows. Unlike the MDGs, the Open Working Group proposal presents standalone goals on ecosystems (Goal 15), oceans and seas (Goal 14), sustainable consumption and production patterns (Goal 12) and on climate change (Goal 13.b) that recognise the role of women.

What Is Missing?

In spite of the concrete recommendations from civil society organisations and some progressive governments, the report misses the opportunity to envision structural transformation. It does not refer to concrete mechanisms for the leverage of alternative visions for development. Nor does it call to change the global economic system and dismantle the existing systems that channel resources and wealth from developing countries to wealthy countries and from people to corporations.

In the statement released on 24 July 2014 mentioned above, the WMG reacted to the final outcome report with a list of “eight red flags” to signal the areas where the official proposal is still not sufficiently ambitious or transformative and fails to fulfil the entire spectrum of women’s right standards, principles, commitments and norms. These flags are:

- Absence of human rights;
- Sexual and reproductive health targets do not go far enough;
- Concentration of power and wealth imbalances that deepen poverty and inequalities within and between countries are not sufficiently addressed, and the agenda lacks targets to reverse this trend;
- There are no provisions to reduce and redistribute women’s unpaid care and domestic work;
- The call for more productivity based on technology in Goal 2 fails to recognise that women are key for sustainable natural resource management;
• Insufficient attention to women’s role in peace and justice;
• Enthusiasm for private sector financing and public-private partnerships lacking references to their accountability;
• Missing recognition of fair and equitable access to technology, including addressing intellectual property barriers.

In addition to these flags, the following areas of concern are worth noting ahead of the negotiation phase of the post-2015 process. Any development agenda must be geared towards the progressive realisation of human rights for all and ensure the use of the maximum available resources for their achievement and fulfilment without retrogression. Secondly, to seriously address structural poverty and inequality, decision makers must look beyond cash transfer processes and into reframing the role of the state, ensuring an equitable distribution of wealth, services and resources, social protection, decent work and sustainable modes of production and consumption. Furthermore, innovative funding mechanisms need to ensure that policy coherence between different kinds of policies, such as those regarding aid, financial regulation and trade, are aligned to national development plans and to internationally agreed human rights obligations and commitments. And lastly, a comprehensive assessment of existing and future partnerships among different stakeholders for implementation of the post-2015 agenda should be carried out through a governance model that ensures ex-ante transparency and accountability. Stronger commitments are needed from governments to implementing and enforcing clear rules for corporations and financial actors’ accountability, in alignment with human rights and for the protection of the environment.

**Where Is the Money?**

In addition to the necessity of developing a transformative development agenda incorporating a global consensus on clear goals for development justice, implementation is critical to making the agenda effective and this will invariably be linked to the funding possibilities. Debates around the means of implementation have been the predominant bottleneck in post-2015 negotiations. Curiously, substantial discussions around financing for development in the post-2015 agenda will likely not take place at the General Assembly next month but are being pushed back to July 2015 when a meeting in Addis Ababa, Ethiopia is set to take place to follow up on the process of Financing for Development started in Monterrey in 2002.

Large parts of civil society and women’s rights organisations are calling for structural transformation to financing which demands looking well beyond aid and into changing the global financial architecture. This implies dealing with illicit financial flows that drain public reserves and translate into fewer national resources available to improve access to key areas such as education, healthcare, or social protection. It also means taking bold steps on fiscal policies including, for example, the introduction of an international financial transaction tax to raise public revenue, and debt cancellation.

The development assistance model that emerged out of colonial relationships and is driven by a logic that prioritises markets and economic growth seems to be deep-rooted. AWID is noting that recent international processes have strongly affirmed the roles of diverse stakeholders in development: not just traditional bilateral donors and multi-lateral institutions, but also South-South coopera-
tion actors, private sector actors, philanthropic institutions, individual philanthropists and civil society organisations.

Mechanisms and sources of development financing and philanthropy are becoming increasingly diversified, but economic growth and return on investment are the priority, with human rights and wellbeing taking a backseat. Yet the context is complex precisely because of the increasing diversity of actors and agendas taking part. Just as states cannot be treated as a monolithic actor, neither can these new funding “partners”. These actors represent a range of agendas and experiences, with powerful groups coming from both traditional donor countries and emerging economies, and thus presenting complex challenges and diverse opportunities in terms of leveraging support for gender equality and women’s rights.31

If donors continue to channel resources only to those approaches that produce quick, “measurable” results by working on the symptoms of gender inequality – like individual access to resources – then fewer women’s rights organisations will be able to work effectively or adequately on root causes in their multiple dimensions.

The international community has the opportunity to play a critical role in influencing how far we can advance on gender and social justice. The wealth of experience of the women’s rights movement must be used to inform the best strategies and initiatives to be supported.

**Alternative Development Strategies: An Elusive Debate**

At the beginning of this article I noted how debates around the post-2015 could be an opportunity for feminist organisations and activists to challenge the mainstream development model based on limitless economic growth. There are timid hints at this idea in the proposals of the Open Working Group when referring to ensuring sustainable production and consumption patterns (Goal 12). But the reality is that the official proposal chose to ignore diverse alternative strategies coming from peoples’ movements and communities like experiences with agro-ecology, solidarity economies, *Buen Vivir*, or communal resource management and chose instead to look for innovation coming from technical private sector experts.

The current dominant economic paradigm grounded in the legitimisation of “market based development”, privatisation and liberalisation is increasingly being challenged for its role in perpetuating inequality, impoverishment, and environmental destruction.32 The conditions under which multi-national corporations are operating, imposed and promoted by international financial institutions and the extraction of resources being negotiated and accepted by “developing” country governments demonstrates that sovereignty and self-determination remain elusive goals. Extractivism, proven to cause the impoverishment of the majority, is still part and parcel of development frameworks.33 Extractivist models provide only limited development gains in resource rich countries, with selective sectors developed through specific industries useful for providing lucrative returns to corporations and capital exporting countries creating skewed economic “growth” unnoticeable in development indices. Women are disproportionately impacted by extractivism, particularly in resource rich developing countries. For example, WoMin conducted a collection of six case studies on Sub-Saharan Africa,34 where women are responsible for 60% to 80% of domestic food
production, documenting the displacement of poor peasant communities, the majority of them women, and the increased burden on women's shoulders to care for sick workers and family members, resulting from polluted soils and waters.

In the struggles for the protection of lives and livelihoods, increasing numbers of the most severely impacted are exposing the naked truths of the results of three decades of privatisation and liberalisation imposed on their countries in the name of development. Privatisation of public services has dramatically reduced access to adequate education, health care, water and energy, with disproportionate negative impacts on women around the world. The feminization of impoverishment is a result of the compounding effects of multiple oppressions experienced by people gendered as women and exploited as poor. Women's position in the global economy continues to be one of gender-based exploitation with their work undervalued in domestic subsistence, reproduction and in unwaged household production.

Social movements, scholars and activists in many parts of the world are making the connections between the ways in which the global economy functions and the urgent social, environmental and political crises facing humanity. Increasingly, people in every region of the world are protesting the negative impact of those crises on their lives. They are also resisting the narrowing of space and opportunities for the democratic determination of the ways in which their societies meet the needs of people and ensure the wellbeing of present and future generations. These voices of resistance insist that deep structural transformations, grounded in the principles of justice, human rights, women's rights, and environmental sustainability are required.

**Conclusion**

The outcomes of a new international development consensus must go beyond seeking agreement on shopping lists of band-aid solutions to advance collective strategies that address the demonstrated failures of current development models. It must go beyond negotiations that trade rights against development, that speak in Southern development and Northern aid dichotomies, to one that acknowledges a need for deep global structural transformation. It must seek to bring about just and healthy economies, which form the basis for the realisation of the fulfilment of the full gamut of rights and freedoms, including economic, social and women’s rights, rather than merely attempt to make the existing order appear less egregious in its exploitation.

Civil society groups and organisations are making efforts to confront the increasing dominance on local and global public policy by the corporate sector and international financial institutions and the narrowing of democratic political space for challenging economic models that maintain and deepen inequalities. In the post-2015 negotiations many women's rights and feminist organisations are challenging the persistent neoliberal assumptions within development discourse and practice that perpetuate inequity and impoverishment and that entrench gender inequality and injustice.

The status of the majority of women in all societies – our struggles, our knowledge and experience – not only provides insight into the ways in which exploitation and impoverishment function today, but also the possibilities for transforming this status to serve life and the wellbeing of planet and peoples, today and for future generations. There are pockets of peoples' movements across the
world that have taken up the task (some with their governments, others in opposition to them) of determining their path of development. The task of reformulating the world’s advancement towards equity, justice, rights and sustainability is daunting but one which we cannot afford not to take on for ourselves and future generations.

It is time to acknowledge with humility and with hope that transformative change is possible. Multiple and concurrent systemic crises (energy, food, finance and climate) pose serious and difficult challenges for governments, development practitioners and donors, activists and policy-makers to mitigate the social impacts in the short and medium terms. It is critical that global negotiations situate their responses to the immediate crises within a longer-term perspective that provides a genuine basis for optimism to move the world beyond the fatalism of the era of MDGs. Negotiations regarding models of development, financing for development, and democratisation of public policy must be carried out in light of the recognition of the increasing concentration of corporate power within societies and global institutions, with concomitant lack of accountability, as well as the impacts of economic policies of privatisation and liberalisation that have been the hallmark of the neo-liberal ideology driving the global economy, the financial system, and aid and development policies over the past three decades.

1 With input from Hakima Abbas, Lydia Alpízar, Nerea Carviotto, Molly Kane and Alejandra Scampini. The Association for Women’s Rights in Development (AWID) is an international, feminist, membership organisation committed to achieving gender equality, sustainable development and women’s human rights. Ana Abelenda has worked at AWID since 2011, currently as Programme Coordinator in the Economic Justice & Financing for Women’s Rights Area. Through sustained advocacy and knowledge building, she has struggled to put women’s rights and gender equality at the centre of macroeconomic and development policies globally.


3 See for instance the Global Compact report that claims that “business is the heart of virtually any widespread improvement in living standards”. UN Global Compact, Corporate Sustainability and the United Nations Post-2015 Development Agenda, 17 June 2013, p. 16.

4 The report of the High-Level Panel of Eminent Persons on the post-2015 Development Agenda also supports this idea when it asserts that “with slightly faster growth and attention to ensuring that no one is left behind we can eradicate extreme poverty altogether”. See A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development - The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, 2013, p. 32.

5 See, for example, the works of Joseph Stiglitz, Diane Elson, Naila Kabeer and Shahra Razavi documenting the effects of liberalisation in increasing inequality worldwide and impacting women disproportionately.

6 I refer here to the landmark UN conferences that resulted in the Beijing Platform for Action (1995), the ICPD Program of Action (1994), the Vienna Declaration and Program of Action (1993), and the UN Conference on Environment and Development (1992), to name a few.
Aside from the vast analysis in reports produced by UN Agencies such as UN Women, UNDP and UNICEF, among others, a detailed analysis on the subject matter can be found in the expert paper prepared by AWID, “Have the Millennium Development Goals promoted gender equality and women's rights?” published by UN Women, in collaboration with ECLAC, Expert Group Meeting, Structural and policy constraints in achieving the MDGs for women and girls, EGM/MDG/EP.12, October 2013.

Some of these policies include promotion of free trade, privatisation, reduced government spending on social programmes, increases in spending on subsidies to business and security, deregulation of businesses, no curbs on foreign investors, low taxes on the wealthy and corporations, minimal labor and environmental protections, no subsidies or supports for poor people and sectors, etc.


For further analysis on the complex history of the birth of the MDGs, the key actors involved and their re-formulation across years, see Hulme, D., Governing Global Poverty? Global Ambivalence and the Millennium Development Goals, Brooks World Poverty Institute and University of Manchester, May 2009.


These commitments can be found in Goal 3 (Promote gender equality and empower women); Goal 5, target 5.A - Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio; and Goal 6 target 6.A (have halted by 2015 and begun to reverse the spread of HIV/AIDS).

See, for example, Woods, Z., Sexual and reproductive health: A foundation for achieving the MDGs, United Nations, Division for the Advancement of Women (DAW), EGM/BPFA-MD-MDG/2005/EP9, 8 February 2005.


For more information on the consultation processes and civil society participation at the national, regional and international levels, see the briefs prepared by UN-NGLS, available at: http://www.un-ngls.org/spip.php?article4363.

For instance, the Intergovernmental Committee of Experts on Sustainable Development Financing that concluded its mandate in August 2014 comprised only 30 experts nominated by regional groups. Consultations with civil society, including the Women’s Major Group were scarce but for a few multi-stakeholder outreach events. More information is available from the Sustainable Development Knowledge Platform at: http://sustainabledevelopment.un.org/index.php?menu=1558.

For further reading on the politics at play at the 58th session of the Commission on the Status of Women, see Tolmay, S., and Scampini, A., CSW58 – Too Much Time Spent Pushing Back, AWID, 4 April 2014.


More information on the Women's Major Group, its membership, positions, analysis and statements presented at different UN spaces is available at: http://www.womenmajorgroup.org/.

Ibid.

More information about these intergovernmental tracks of negotiations and their outcomes is available from Sustainable Development Knowledge Platform, above, note 19.


Women’s Major Group, *Women’s ‘8 Red Flags’ following the conclusion of the Open Working Group on Sustainable Development Goals (SDGs)*, 21 July 2014.


For instance, the Righting Finance Initiative, of which AWID is a part. Further information is available at: http://www.rightingfinance.org/?page_id=2.


See above, note 5.

Extractivism is the appropriation of huge volumes of natural resources or their intensive exploitation, most of them exported as raw materials to the global market. Further research on this phenomenon is available at Friedrich Ebert Stiftung Sustainability, “Extractivism and Development in Latin America: A collection of article from Blog NuSo”, available at: http://www.fes-sustainability.org/en/extractivism-and-development-latin-america.


Ibid.
“I was looking for help because the father of my daughter did not want to take responsibility for her. She was unable to go to school because of this. I went to the chief’s office to get help but this was difficult and did not resolve the problem. I then went to Kibera Justice Centre to seek help.”

Jane Mulanda
Then the Women Started Coming to us:  
A Growing Women’s Rights Movement in Kenya

Testimony from Kenya

Women in Kenya are subject to discrimination and disadvantage in all areas of their lives. Inequality between men and women persists as a result of patriarchal attitudes and stereotypes about women’s role in society. Levels of gender-based violence and culturally harmful practices are egregiously high. Women experience inequality of opportunity and outcomes in relation to education and are at greater risk of poverty and landlessness.

The Constitution of Kenya was adopted by an overwhelming majority in August 2010. Equality is at the heart of the Constitution, which substantially enhances the legal protection of women from discrimination in areas that frequently impact on their lives. The new Constitution removes exceptions that were in the previous Constitution which allowed for discriminatory legislation regulating areas of personal life and discriminatory decisions to be made under customary legal systems.

The Equal Rights Trust, together with the Federation of Women Lawyers Kenya (FIDA), is implementing a project that aims to enhance the significant positive impact that the new Constitution will have on the lives of women across Kenya. Through the Legal Assistance Schemes Partnerships Project (Project), the Equal Rights Trust and FIDA provide support to grassroots organisations to provide legal advice to women experiencing disadvantage and discrimination, particularly gender based violence, denial of access to education and denial of access to land and inheritance. The Project is funded by Comic Relief and is in its third year.

In May 2014, the Equal Rights Trust spoke with two of the organisations participating in the Project: Tuone Mbee, an organisation based in Makueni in the Eastern Region of Kenya; and Kibera Justice Centre located in Kibera, a densely populated area of Nairobi that is one of the largest informal settlements in Africa and suffers from extreme poverty. The Equal Rights Trust spoke with Belice Oyanji, a paralegal who has supported many women at Tuone Mbee in accessing justice. Belice spoke about some of the issues faced by her clients and some of the changes she has seen. The Equal Rights Trust also spoke with Jane Mulanda, a client of the Kibera Justice Centre. Jane spoke about her experience of discrimination, the impact of the Project and her hopes for women in Kenya. John Paul Makere and David Mukunda also shared their experiences at Kibera Justice Centre advising women of their rights under the new Constitution.
Belice Oyanji

My name is Belice Oyanji, I come from Tuone Mbee, a community based organisation in Mikuene. We have been working with the support of the Equal Rights Trust and FIDA to provide women with legal services in relation to a range of issues. We receive a particularly high number of queries relating to domestic violence and to enforcement of land rights. Initially, when we were beginning this work, we realised that there was a need to raise awareness amongst women in the community of their rights and the fact that our legal services were available in order to support them. We held numerous meetings with community groups and undertook a range of awareness raising activities. Then the women started coming to us. We listen, support and advise. Sometimes we are able to help directly and other times we are able to support them in accessing other mechanisms, such as relevant administrative authorities. The response of the women we work with has been incredibly positive.

We have had women come to us with a variety of often very distressing issues. For example, one woman came into our office complaining that her in-laws were beating her. After a period of abuse, her in-laws decided to take her back to her parents and tied her with ropes and put her in a vehicle in order to do so. When she came to see us, she was very distressed and was crying. She had been injured by the beatings and mistreatment. In the first instance she had tried to seek justice by going to the community chief. This is often the first place people go to resolve issues and disputes. In this case, no resolution was reached by this method.

We advised the woman to go to the hospital to get treated for her injuries and in order to get a medical record of the fact that beatings had taken place. We recommended that she stay with her parents in the meantime to avoid further harm. There are very few effective mechanisms available for protecting women from domestic violence. With the medical record from the hospital, we visited the police station with the woman to get the case recorded. It went to court and we continued to support her throughout this process. Initially the in-laws had fled town and it was necessary for the police to investigate and bring them back. Her in-laws accepted that they were guilty of beating her and were jailed for five months. Afterwards they sought forgiveness. We have traditional methods of forgiving through the clan elders. This approach was adopted with the woman’s acceptance. Her husband had never beaten her and she felt that, with this process, she was comfortable that the situation had been resolved. We have stayed in touch with the woman in question who is happy with how things have now become. She knows we are always there if she needs us.

We are obviously working within the limitations of the systems here in Kenya to do our best. But I think the situation for women in Kenya is getting better. Now many women have learned their rights – we have seen this happening in the village since we began our work. In my experience it used to be commonplace for poor women in the village to be shoulderering most of the burden in the household. They have been staying at home like slaves doing all the work. In my community it has been normal to see women carrying water home on their backs while carrying their children on the front at the same time as seeing men hanging around in the marketplace playing games and being idle. This seems to have changed in many households. In the past you would find a woman carrying the man’s bag, carrying her own things and the man just walking idle without carrying
anything. In many cases now they have taken responsibility of sharing everything, even if it is a lot to carry, they share.

Jane Mulanda

I am a single mother with a daughter living in Kibera. Many single mothers come to live in Kibera because they have nowhere else to go; their own fathers will not allow them to live in the family home as unmarried women with a child and the fathers of their children do not take responsibility for the child and leave. Single mothers in Kenya face a difficult task. They work running small businesses because they cannot get jobs and also have to look after their children at the same time. They are not able to get out of the position where they are in constant financial difficulties because they don’t know their rights.

It is difficult for these mothers to access employment because they do not have education. There are schools for adults but a single mother doesn’t have time to stay in school and learn. Women working as household help must now be paid, but women without education cannot get house help jobs anymore because they cannot help the children of the house with homework. Women are resorting to prostitution because they can’t do anything else, they can’t get another job. I know women who see men at their house. I also think that those who are married face many problems and suffering because of a lack of education.

In my view, men in Kenya see women as weak, so they take our property. Women don’t know their rights and are afraid to stand up for themselves because they are women and that is not the role of women in Kenya. There needs to be more awareness of women’s rights in Kenya. Women need to know what their rights are and how they can defend themselves and their rights. Society in Kenya also needs to change. Women have the right to inherit land now, so society should also not mind if a woman sells the land that she has inherited – if you give me something, then you cannot mind what I am doing with it. I don’t know how the men of Kenya feel. They also have daughters – how do they feel when their daughter is being battered by her husband every day? If a father gives his daughter land, then she can come and live in peace with her parents and raise their grandchildren in peace, rather than staying with a man who is battering her every day or having to run away to an area like Kibera where she knows no one and her prospects are very poor.

I found out about the legal advice services that Kibera Justice Centre provides through a friend. I was looking for help because the father of my daughter did not want to take responsibility for her. She was unable to go to school because of this. I went to the chief’s office to get help but this was difficult and did not resolve the problem. I then went to Kibera Justice Centre to seek help. They explained my rights to me and the rights of my daughter. They then spoke to the father of my child and explained his responsibilities. He is now paying school fees for our child. The service has solved my problem and now I am able to sleep at night without thinking of my daughter’s school fees.

I now stay involved in the work Kibera Justice Centre is doing and tell all women about their rights and about where to find help. I hope that one day I’ll see all women standing on their own with nobody pressing them down. That day is coming, it must. If I was able to bring the father of my child on board, then surely all woman must be able to do that.
John Paul Makere

My name is John Paul Makere. I coordinate the legal assistance services provided through the project at Kibera Justice Centre. After my education, I began working in community development. I organised community members to work towards finding solutions to the problems we faced in Kibera. Through this work, we came up with the idea of a youth group. Different NGOs provided training to members of the youth group on the issue of community funding. Initially our main role was to inform the community about development and to teach them their rights in relation to accessing funds. We were then trained as paralegals to deal with tenancy and land issues as these issues went hand in hand with our community development work.

Kibera Justice Centre met FIDA through its paralegal work on tenancy and land issues. FIDA came to visit Kibera Justice Centre because they were very much interested in what Kibera Justice Centre was doing as it related to the work on empowering women that FIDA wanted to do in Kibera. Kibera Justice Centre was then offered a role as one of the organisations that would provide advice to women through this Project. I was identified by Kibera Justice Centre through my role in the community to coordinate the Project. I then received training from FIDA and the Equal Rights Trust on discrimination, women’s rights and also on how to run the service effectively.

We see clients in legal aid clinics every Tuesday. We keep to this time to ensure that women know that we will be available. On Thursdays we do follow up work. We try to
advise women on all of the issues that they face. Some of these issues include inheritance of land, tenancy problems, child neglect and difficulty obtaining identification cards.

We did not initially realise that women faced so many difficulties in obtaining identification documents. These difficulties became evident when we started to see women in the legal aid clinics. We found that most of the women that sought our assistance didn’t have identification cards or birth certificates. We have learnt that women have a particular issue obtaining identification documents and birth certificates for several reasons. Most of these women do not have the knowledge on how to apply for these documents. The procedures are also very lengthy and can lead to individuals without support giving up along the way. This problem affects women in all areas of their life. Without an identification card, a woman cannot open a bank account, she cannot get employment, she cannot do any business.

For those women who have had children out of marriage, the difficulties obtaining documents for their children are exacerbated because they require information from the father of the children and they have difficulty getting that information. This results in women being unable to obtain identity documents and birth certificates for their children. Without a birth certificate, children cannot be admitted to school or sit for examinations. In turn, these children will then have difficulty obtaining identity documents for their own children.

We decided to create a one stop centre to address this problem because it is so widespread and because it affects women in every aspect of their life, including their ability to ensure access to education for their children. We have been able to create this one stop centre to assist women to obtain identity documents and birth certificates for themselves or for their children through this project. The difficulties that children have in accessing education are further compounded by the lack of support provided by fathers to single mothers. Men are running away from the issues when young women become pregnant. So we also assist with advising mothers in this position.

Women are also affected by the lack of stable and adequate housing in Kibera. Tenancy disputes and problems affect many, many people in Kibera. Landlords take advantage of people’s vulnerability. They refuse to follow the law regulating rents and protecting tenants. Rents are being set at exorbitant rates and people just cannot afford them. Landlords also evict people without any notice. Women are particularly affected when they cannot find suitable housing or are evicted. If you have a problem with your landlord and your door is locked, as a man you can survive that – you can sleep somewhere else, but imagine it is a woman and a child, where do they sleep? In addition, many people rent a single room and landlords often do not provide essential facilities, like a toilet or bathroom. Most of the men can bathe and go to the bathroom elsewhere, but women and children are especially vulnerable in situations like this when there is no privacy.

While many of our clients are now able to claim their rights because of the Constitution, some new challenges are emerging because attitudes in society about women are not changing to reflect the Constitution. For example, my aunt was the only daughter in her family. My grandfather shared land only amongst his sons and my aunt did not receive any land. Once the new Constitution came into force, she went to a court of law and won the case so she was given back the land. After getting that land, she sold it and went back to where she was married. The community
view was that the land should have stayed within the family and that my aunt should not have been given the land because she would return to her husband’s family. When this happens the community questions why they should give their daughters land.

Examples like this show us that we need to be able to change people’s perceptions so that they understand why women’s rights, including inheritance, are important. This will allow women to exercise their rights fully with the support of the community. In Kibera, we raise awareness by visiting different groups and giving talks on these issues. While people wait for formal employment, they are often eager to join us and work voluntarily. In this way, more and more people in Kibera are becoming involved in the project and aware of their rights.

In addition to raising awareness, we also need more capacity building in order to be able to overcome these problems. Women have not previously been given the opportunities to learn about their rights and have often been denied an education. We need to give women those opportunities so that they can gain knowledge and the capacity to defend themselves in a court of law or anywhere. Women need basic knowledge of laws on property and succession. In addition, we need many women to be trained as paralegals so that women are better able to work together to assist each other. It is a great success for us when women who have been assisted by Kibera Justice Centre, like Jane, choose to stay involved and use their knowledge and experience to become part of the solution for other women.

**David Mukunda**

I do mostly community work at Kibera Justice Centre. Like John Paul, I was trained through the youth group. As a result of that training, I was also recruited to this project.

In Kenya, we have a number of traditions that restrict what women are able to do and that are contradictory to women’s rights. Women are traditionally not able to participate in decision making or to manage their own property. In one example we have seen, a husband leased a property belonging to his wife to the railroad. When she asked why he did that, he said it was because he believed that he owned the woman and everything that she had. People see women claiming their rights in a negative light. There is a belief that a woman should be confined to the role of child bearing and taking care of the homestead. This belief causes a lot of strain and conflict when a woman is well educated and well informed. A woman may know what her rights are but tradition cuts away at that and interferes with her ability to claim those rights freely.

The costs and difficulties associated with taking cases to court also impact on women’s ability to enforce their rights. We believe that you can collect the best evidence from the ground. In the case of many of our clients, this involves going back to the village where their family or their husband’s family is based. But it is difficult for clients to travel outside Nairobi to find that evidence. Women often have children to look after because this is seen as their traditional role, so it is difficult for them to travel away from where they are living – transport is expensive and travel is slow. Women need to arrange for someone to care for their children or raise the money to take the children with them. There are also costs of travel to lawyers and obtaining documents and so on. We often see that women feel that they need to balance the costs of looking after their children with fighting for their rights and, of course, they will choose their children. Women should not
be in the position where they have to choose one or the other.

We assist women with many different issues, including those who are unable to obtain identity documents for themselves or for their children. This causes a lot of other problems that become cyclical. For example, a woman who gave birth when she was not yet 18 years of age, may not get a birth certificate for her child because she gave birth under age and the father of the child does not want to notify the authorities of that. When the child reaches the age of five and should be enrolled in school, the child will not be enrolled without a birth certificate. So we assist women by explaining what they are able to do in this situation.

As John Paul mentioned, we are beginning to see that the implementation of the Constitution is difficult in a society which has strictly defined gender roles. For example, the Constitution requires that no more than two thirds of a decision making body can be of one gender. The government has now started monitoring how many women are in every group, even down to self-help institutions. So women are being appointed to decision making bodies. However, for some of these women, because they have previously been denied education opportunities, previous decision-making roles and because they are not given the requisite support, they may lack the information and skills to do the job. Some women may also not wish to participate. This, together with prejudice, contributes to why men often do not expect good results from women in these roles. We need to constantly create awareness, the community needs to be sensitised and women need to know their rights so that women do have opportunities to participate in decision making on an equal basis and are recognised as being capable and valuable in decision making.

Women in Kenya are often told that they are housewives and their place is in the household. Consequently, women have difficulties accessing information about their rights and some believe that their place is in the home. From where I come from, gender roles are very strictly defined and so there is no way that a woman would come back into the family to claim land or any property. So again, we need to be constantly giving women access to education and to explain to women and the wider community about women’s rights.
“The Zero Draft, which was produced by the Open Working Group of governments, will be presented to the General Assembly and takes a middle ground approach. It is an important symbol that it includes a stand-alone goal on inequality within and among countries. This emphasises the importance attached to this issue in the debates over the development agenda.”

Gay MacDougall
Equality in the Post-2015 Development Agenda

The Millennium Development Goals (MDGs) encompass eight development goals agreed at a global level with the aim of improving the lives of the world’s poorest by 2015. The eight goals – ranging from eradicating extreme poverty and hunger to improving maternal health and ensuring environmental stability – are complemented by 21 measurable targets and 60 indicators of progress.¹ As the 2015 target date for achieving the MDGs approaches, efforts have turned to agreeing a further set of development goals post-2015. These Sustainable Development Goals (SDGs), are intended to build upon the MDGs and apply universally to all countries.²

The MDGs have been the subject of both praise and criticism. Several of the targets have been achieved at a global level, yet many of the world’s poorest regions and countries have been left behind. Extreme poverty has been halved at a global level - 700 million people now no longer live in extreme poverty - but it is anticipated that this goal will not be met in Sub-Saharan Africa.³ Despite progress in all regions to reduce the maternal mortality rate, it remains 14 times higher in developing countries than in developed countries.⁴

ERT spoke with two experts on equality and development to discuss whether and how the post-2015 development agenda will address inequality. David Bull joined UNICEF UK as Executive Director in 1999 having previously been the Director of Amnesty International’s UK Section. Gay MacDougall is currently a Distinguished Scholar-in-Residence at the Leitner Center for International Law and Justice at Fordham University. She was the first United Nations Independent Expert on minority issues.
ERT: You are widely recognised for your expertise in development and, in particular, working on rights in the context of development. How did you get involved in this work? What life experiences and major influences played a role in getting you to your present position?

David Bull: I think it started with the common understanding that we all have when we’re children, that we have this innate sense of fairness and justice. I’m sure everyone can remember things from when they were a child that were not fair. Somehow we are persuaded in adulthood that a certain degree of unfairness and injustice is just life and to be accepted. I don’t think I ever got to that point of acceptance and instead decided that I wanted to do something about injustice. My biggest influences were my parents. My father was totally committed to education and its importance because he felt that he never had the education he was entitled to due to the poverty of the family in which he grew up. I think that my father always felt that this was a terrible injustice and he told me to get the best education I possibly could and take it seriously. My mum started off working as a secretary in a law firm and ended up as a family law professional supporting and protecting women who were victims of domestic abuse. From the outset, they both had an influence on my view that one shouldn’t accept injustice, rather one should do something to fight against it.

In terms of getting involved with international development, which has probably been the biggest part of my life, Dudley Seers who was the Director of the Institute for Development Studies at Sussex University at the time that I took my undergraduate economics degree there, was very influential. He told me development studies was where things really mattered and where I could make a difference. As a result of my conversation with him, I did a Masters in Development and everything else followed from there. I hope I have been able to help a few people in the same way. Just one conversation that you have can completely change your life and so I always take it very seriously when I meet young people and talk to them about what they are doing in their lives.

Gay MacDougall: I have always seen myself as involved in the human rights and civil rights movement. I grew up in Atlanta in the 1950s and 1960s, in a totally segregated society. I attended completely segregated public schools. My high school was the first (and for many years the only) public high school in Atlanta or even perhaps Georgia for African American kids. When I graduated from that school in 1965, the Brown v Board of Education5 Supreme Court decision was just a faint rumour. Atlanta’s schools were as segregated as ever. And so was the city.
More importantly, Atlanta had become the headquarters of the nation’s civil rights movement. And, because of the historic “Black Colleges” (Spelman, Morehouse, Clark, Atlanta University and Morris Brown) and the talent they had attracted over the decades, it had a long legacy of Black intellectual opposition to racial oppression. By his own telling, W.E.B. DuBois turned radical while he was teaching at Atlanta University during the 1906 riots and was stunned by how the white community regaled in the lynchings. We lived around the corner from Martin Luther King’s family. My aunt was one of the Young Women’s Christian Association (YWCA) organisers who, in the 1940s, moved around through the south trying to build a youth movement for inter-racial justice. The headquarters of Student Non-violent Coordinating Committee (SNCC) were down the street and around the corner. The Southern Christian Leadership Conference (SCLC) headquarters were on the other side of town on Auburn Avenue, a historic Black Atlanta business street.

During “the Atlanta Movement,” my family and I, and everyone else in my community walked miles while we were boycotting the buses. We refused to shop where the owners would not let us try on clothes or sit at the lunch counters. Throughout the 1960s, I participated in sit-ins, protest demonstrations, voter registration drives and community rallying projects in Georgia, South Carolina and Alabama. In 1965, I was chosen by community leaders to integrate into a previously all-white college in Georgia. It was an assignment, not an honour.

For as far back as I can remember, my own thinking and my focus was on poverty – on economic and social rights, as we would say today. While I never thought of myself or my family as poor, living in what would be called a township in apartheid South Africa, poverty was always around and very close to me. Racial segregation meant that one could not be a stranger to what that kind of hardship means in daily life. My community was still just two steps away from slavery. Limited life choices defined the entire community.

**ERT: How do you see the relationship between development and human rights in general? More specifically, what does the concept of development have to say about equity and equality?**

**Gay MacDougall:** Human rights and development as concepts are inter-related and inextricably linked. To fully enjoy the right to life, one must have both civil and political rights and economic and social rights.

Discrimination on the basis of an individual’s ethnic, religious or linguistic identity is usually a potent causal factor in the disproportionate poverty experienced by many minority groups and a key impediment in preventing minorities from benefiting from...
mainstream poverty reduction and social inclusion strategies. The dynamics of poverty are more complex for minority groups. Racism often defies the rationality of a common denominator development policy, conceived to benefit all.

The chronic poverty of many minorities is frequently structurally and causally distinct from poverty experienced by other groups. Discrimination compounds the effects of other impediments, such as residence in remote regions or language barriers. The gender dimensions of economic deprivation then overlap with other identity-based discrimination. Many minorities have historically been excluded from full participation in the economy for generations, making their impoverishment more entrenched. Further, even when societies may have successfully suppressed intentional acts of discrimination, the legacy of bias remains embedded because institutional factors operate automatically to exclude certain groups. Discrimination does not disappear without proactive intervention.

David Bull: I would add the third area of environment to that. I’ve always felt that these three issues are really the same issue, they are all really about how you make sure that people can have a decent life and live reasonably well with freedom, justice and the opportunity to fulfil their potential. People’s livelihoods depend on the environment in which they live and the resources that flow from that environment. Development is making sure that people have access to the resources that they need to develop as an individual, a family, a community and a society. People cannot develop if they’re suffering from oppression, abuse and discrimination. So, for me, those three things – environment, human rights and development – are so interconnected that it is very difficult to unravel them. Rights and development begin with children. If children don’t have their right to education and protection and the opportunity to fulfil their potential, that damages the whole of society and prevents development for everyone.

I think the fact that we are talking about sustainable development goals is enormous progress and very positive. At the time that I was doing my Master’s degree at Bath University I decided to write about the connection between development and the environment and I found only one book on the subject. At that time, these things were not seen in the connected way that they are now. I think the fact that we are talking about sustainable development goals is enormous progress and very positive.

ERT: What are the particular challenges around equity in relation to vulnerable groups, in particular children and minorities?

David Bull: I think the problem that we always have is that it’s easy to support and develop programmes of development that are picking off the low hanging fruit, if you like, to reach the easiest to reach people. That means that the hardest to reach people always get left out. That may be because they live in a remote geographical location. It may be because they are very poor and they don’t have a voice. It may be because they are disabled. It may be because they come from a minority community that suffers discrimination. For all those reasons there are people that are living at the margins of our society who are simply not being reached. Statistics in the world of development almost always refer to a certain percentage of people being reached and the MDGs were largely
constructed in this way (with the important exception of the goal of education for all). If we set our objectives in terms of reducing a problem by a certain percentage, we will inevitably leave out those who it is most challenging to reach, but they are the ones most in need of support.

I think that there has been a shift in the thinking about the post-2015 goals and it is recognised now that the goals have to be universal. It’s a shift which is incredibly important and that we must work hard to maintain. The goals should not only be universal in the world but universal in terms of the people that they are reaching. It’s about eliminating poverty rather than just taking a certain percentage of people out of poverty and leaving the remainder to suffer. I think that is the big challenge. I recently saw a map of Brazil that details the achievement of the MDG on child mortality. The first map was of the continent and Brazil appeared green because the goal had been achieved. The next map then broke down the achievement by region and the north east of Brazil was red. So although Brazil seems to have reached the goal of reducing child mortality, the north east hasn’t because they’re still suffering levels of child mortality that are not much different from some of the countries in Africa. When the statistics are broken down further to district and municipal level, you find that even in the wealthiest districts and in cities like Rio there are patches of red within the green. I think that map really explains the importance of equity; we are not achieving the goals that we set ourselves if we are still leaving out significant numbers of people who, even in the midst of relative prosperity, are suffering levels of child mortality which are not acceptable. You see this even in our own society. Districts of Glasgow within a mile or two of each other are seeing levels of life expectancy which are radically different by as much as 20 years.

UNICEF has worked to examine the results of a more equity based approach, looking at health particularly. We found that it would actually be in the interests of even the wealthier segments of the population if we were focusing our efforts on building access to health infrastructure and services for the poorest and most excluded. We know now that, thankfully, the number of developing countries is declining and that most of the people who are poor in the world are living in middle income countries, or in fragile states where there’s a different set of issues. In middle income countries, governments are able to afford some degree of social protection to the poorest and the most excluded, but it’s not always happening. The equity issue is therefore becoming more and more significant and it’s a human rights as well as a development issue.

Gay MacDougall: Both government and non-governmental constituencies have been reluctant to recognise differentiations within the broad class of “poor and marginalised.” Despite attempts to focus attention on the rights of indigenous peoples, there are only two fleeting references to them in the goals set out in the final draft text of the SDGs, both of which fall within lists of other groups. Similarly, race and ethnicity are also only mentioned twice and religion only once.

One possible reason for the relative absence of reference to specific groups has been their absence from the drafting process. Participating in this UN process has been time-consuming, costly (it is being held in New York City) and demands a degree of attention to detail that is hard to sustain as the text
changes almost daily. This formula excludes minorities and indigenous peoples.

On the other hand, there has been a clear recognition of the importance of addressing the barriers faced by women in gaining full inclusion in the development process. There is a broad consensus that national development policies cannot leave over half of the population excluded. Women are the great untapped resource in nearly every country. The Women’s Major Group of non-governmental organisations has been sizeable and well organised. The Group’s success has benefited from the leadership of the recently established agency, UN Women.

The draft post-2015 Development Agenda includes a free-standing goal on gender equality and empowering women. While the statistics on women and education have been improving over the past decade, cultural constraints, religious and traditional practices and stereotypes have proven to be the most intractable obstacles to the realisation of women’s full participation in the life and progress of their countries. Ending violence against women, respect for sexual and reproductive rights, enabling women to control assets and the means of economic production and to play equal and meaningful roles in decision-making are recognised in the draft agenda as minimum requirements for unleashing the power of women to advance national economies.

ERT: To what extent do you think the MDGs have been successful in addressing these challenges related to vulnerable groups? How would you assess the performance of the MDGs more generally on matters of inequality?

Gay MacDougall: The discussion was launched by former Secretary General Kofi Annan in 2000 with his successful effort to get world leaders and heads of state to commit to implementing the MDGs. The MDGs charted a fifteen-year plan to cut poverty in half and to advance human and economic development, chiefly in the “under-developed” world.

The achievements under the MDGs have been impressive. For the first time since records on poverty began, the number of people living in extreme poverty has fallen in every developing region, including sub-Saharan Africa. Preliminary estimates indicate that the proportion of people living on less than $1.25 per day fell in 2010 to less than half the 1990 rate. During the same period over 2 billion people gained access to improved drinking water sources. The share of slum dwellers in urban areas declined from 39% in 2000 to 33% in 2012, improving the lives of at least 100 million people. The rate of primary school enrolment in sub-Saharan African has increased from 60 to 78%.

One notable flaw in the MDGs was that there was no policy on how societies should address an uneven distribution of wealth within their nations, or how discrimination between certain groups within a population might result in entrenched inequalities. Countries reported on progress toward achieving the MDGs in terms of aggregate statistics, which did not reveal inequalities between population groups. As a result, some countries have moved from developing country status to middle income country status and achieved some of the goals without improving the life circumstances of the most marginalised communities. This was most often the case in countries where there were communities that suffered discrimination based on their race, ethnicity, religion or caste.
David Bull: The MDGs have been great. I have never taken the view that the MDGs were a waste of time or too simplistic. I think that persuading the international community to make firm and clear commitments to achieving specific outcomes, many of which are really about improving the lives of children, was amazing and historic. A great deal has been achieved and real progress has been made in increasing access to education, reducing infant and young child mortality and so on. Achieving those things has also led to important realisations, including revealing the inequity of those achievements. It has also revealed the need to look at other areas such as outcomes. The focus in education was on getting children into school rather than on the quality of the education that the children were receiving.

I think now is the time that we look at the outcomes for children and also at secondary education. I was incredibly moved by a conversation I had when I visited Uganda with a young girl who was about 11 years old. She had just finished her primary school and she was looking forward to secondary school. Her family were affected by the HIV/AIDS pandemic and they were very poor and she wasn't sure whether they were going to be able to afford to send her to secondary school. Her family were affected by the HIV/AIDS pandemic and they were very poor and she wasn't sure whether they were going to be able to afford to send her to secondary school. I asked why going to secondary school was so important to her. She replied if I don't get secondary education then the only job I'm going to be able to get in my community is in domestic service. When I'm working in domestic service the men in the household are going to abuse me and I'm going to be raped and I'll probably get HIV and then I'll die. I thought afterwards that we have been so wrong to take secondary education as seriously as we should. To give people that opportunity is so important to development and to the lives, rights and protection of children, especially girls.

ERT: What is the most memorable example you have witnessed or heard about of development in action?

Gay MacDougall: I think this is an interesting question. I have no answer to it now, but I hope that by 2030 there will be a great many examples that will come to mind.

David Bull: There are so many, so I will mention a very recent one. My last field visit was to Bangladesh and was one of the most inspiring visits I’ve been on. It was just before the recent Girls Summit12 and one of the issues that we were looking at was child marriage because it’s a big problem in Bangladesh. We went to an area deep in the south of Bangladesh in the delta. It was really remote and accessible only by boat. We went to a community where they had suffered quite a lot of flooding and disaster because of climate related sea-level rise and typhoons. I met a family who had recently been considering the marriage of their 15 year old daughter. I asked why they had thought it was a good idea for their daughter to marry at 15. The father said that because of all the flooding the land had become salty and they could not grow as much crop as they used to. Their income had reduced so, they could not afford to keep their daughter in school and could hardly afford to feed themselves. They thought the best thing for her would be if she married somebody from a family that was better able to look after her than they could. You can understand where they were coming from. This is a case where the effects of climate change were having a direct impact on the development prospects of a community and on the rights of a child. This was a
dramatic illustration of how direct the connection can be between climate change and child protection.

In the same community we met a 16 year old girl who was absolutely inspirational. She was well known in her community because she had disappeared during one of the floods when she was 12 and been presumed drowned. She managed to find her way home around a week later when the floods receded. In a way she was seen by the community as a special gift because they thought she had drowned and she hadn’t. She has used that in a very positive way to become a leader among the young people and indeed among the older people in her community. She is a very tough and determined young woman and formed a small group of adolescents who defend the rights of girls in the community, particularly in respect of child marriage.

When she heard that the girl I mentioned earlier was in danger of being married, she and some of the others in the group visited the family. They convinced the family that their daughter should not be married because she should be in school, it would be too dangerous for her if she became pregnant and she didn’t know this man. They managed not only to convince the family that it was not a good idea but because UNICEF had been supporting their adolescent group, a small stipend was also secured for the family to ensure that they could keep their daughter in school. I think this example illustrates one of the things that is most important and often forgotten in the world of children’s rights and development, which is how powerfully children can advocate for themselves and each other if we give them the support that they need.

I’ve met so many inspirational young people. When the G8 was in Gleneagles in Scotland in 2005, we at UNICEF UK organised a children’s summit, the C8. Children from eight of the poorest countries attended, including a 12 year old from Sierra Leone who was running her own radio show on children’s rights in Freetown in the aftermath of the civil war. She stood on a platform with Gordon Brown, who was the Chancellor at the time, and told him very clearly and precisely what he should be doing for children and young people in the world. There are so many young people who are so strong and determined and use their sense of justice and fairness to make a difference in the world. Our job really is just to support them as best we can.

We can’t do anything unless we get public support. The amount of public support that we get is great. UNICEF UK’s income in 2013 was around £80 million. You can do a lot with that amount of money because helping children in many cases is not very expensive. It doesn’t cost much for an immunisation, to educate a child or to provide support for a child protection programme. These things become expensive because there are so many children who need that help in so many parts of the world. There are so many different situations of humanitarian need right now. We have got those on the verge of famine in South Sudan, conflict in Syria, Iraq, Gaza and the Central African Republic and ebola in West Africa. I can’t remember so many of these dire emergencies previously happening simultaneously. So we need all the help we can get. In this country people are incredibly generous and we value that enormously.

ERT: What is your impression so far of how the process of agreeing the next set of post-2015 development goals has progressed? What needs to happen next to ensure that
children's rights and equal rights more broadly are properly reflected?

David Bull: The progress on the post-2015 goals is quite encouraging and there is a sense of acceptance of the integration of environmental considerations with development. There also appears to be a commitment to the universality of the goals; that they apply to people in the UK as much as they apply to people in Africa. At the moment there is a specific goal on climate change which is important. It is very important to us in UNICEF UK that there is a specific target on ending violence against children. We were quite concerned that the MDGs did not include child protection as a goal. There are so many children around the world who are suffering from violence, exploitation and abuse which sets back their prospects for achievement connected to all the other goals. In my view, we need to ensure that we retain those features of the open working group draft in the final form of the goals and targets.

Gay MacDougall: The post-2015 process has merged three otherwise discrete streams, which had distinct assumptions, language, understandings, objectives and players. One stream was a continuation of the fairly top-down approach used to develop the MDGs. The 2010 MDG Summit mandated the Secretary General to initiate a process to develop goals for the 2015-2030 era.

A second stream was grounded in the series of UN World Conferences that took place in the 1990s, starting with the Vienna Conference on Human Rights in 1993, the Beijing Conference on Women in 1995, the Copenhagen Social Development Summit and the Durban World Conference on Racial Discrimination in 2001. The 2012 Rio+20 United Nations Conference on Sustainable Development was a part of the tradition of world conferences as forums for global policy making.

The Rio+20 meeting generated a global consensus to take urgent action on issues of climate change. It built momentum around the concept of “sustainability” and “green economy policies” in development approaches, focused critical attention on the urbanisation of the global poor and drew new attention to the voices of regional groups such as the Group of Small Island Developing States.

The players who have come to the post-2015 process from this stream have had an expectation of a high level of civil society input in all stages of the process and have championed a rights-based approach to all aspects of the post-2015 Development Agenda contents. The Rio+20 Outcome Document emphasises the critical role of citizens and other stakeholders in developing and implementing sustainable development policies. It urges broad participation by civil society and highlights that access to relevant information is a requirement for realising that effective participation. The Rio+20 Outcome Document called for coherence across institutional initiatives and structures addressing development issues. This effectively merged the MDG process with the Sustainable Development process.

The third stream came out of the more traditional development processes that had always been under the UN Economic and Social Council (ECOSOC) and the various agencies dealing with development, social and environmental issues. Development initiatives have always been the weakest of the three pillars of the UN - peace and security, human rights and development. In order to avoid duplication of efforts, achieve system-wide coherence and increase synergies, it was de-
cided that all such efforts would be coordinated by a strengthened ECOSOC. For practical reasons, the structures used to organise the process were based on those routinely used by this sector to negotiate the development policies of the General Assembly. The Secretary-General established the post of Special Advisor on post-2015 Development Planning, and staffing support has been provided by UN Department of Economic and Social Affairs (UN DESA). One consequence of this was that the traditional institutional mechanisms gave relatively limited space for civil society input.

Finally the Rio+20 Outcome Document calls for the establishment of a new body, the high-level political forum that will apparently replace the Commission on Sustainable Development. This is the body into which all streams and rivers will flow. It will provide political leadership and oversight to all related processes and encourage mainstreaming of the SDGs and approaches by those institutions, such as financial institutions, that are independent of the system. The process is led entirely by member states, with a supporting role played by the secretariat which will supply “evidence-based inputs, analytical thinking and field experience”. However, the Secretary-General will, of course, continue to play a critical role.\(^{17}\)

The Zero Draft\(^{18}\) that will commence the negotiations in September 2014 is the product of a historic consultation among global civil society, economists, development specialists, climate scientists, human rights experts and politicians. Consultations with over a million stakeholders have been ongoing in numerous forums, both virtual and actual. Civil society has played a critical role in this exercise by bringing expertise to the table and by articulating the aspirations of ordinary people. But as the serious business began of condensing all of the inputs into a draft agenda, some of the aspirations clearly articulated by civil society disappeared. The space for civil society input also became hyper-formalised in ways that marginalised and excluded some important voices. During the hearings of the Open Working Group of governments, NGO input was managed through the organisation of major stakeholder groups (Major Groups).\(^ {19}\) For practical reasons, the Major Groups were dominated by New York based development and humanitarian assistance groups. In addition, the human rights caucus was an ad hoc formation whose communications were primarily online.

**ERT: If you could guarantee that one target was included in the final post-2015 development agenda, what would it be?**

**David Bull:** Violence against children is the one I would highlight. It’s so important. It’s highlighted right now by the situation in Gaza. I think everybody has been moved incredibly by seeing the suffering that children have faced there. Violence isn’t only in situations of conflict, it’s also in everyday life unfortunately and we need to ensure that children have places of safety and protection. In particular, schools must be safe places for children to be. The Girls Summit highlighted the issue of female genital mutilation as one form of violence against children. However, violence against children has still not got the profile that it should and so that is something that we must see as a specific target in the post-2015 agenda.

**Gay MacDougall:** If there was only one target in the post 2015 agenda that applied across all goals, it should be that by 2030 there must be an elimination of discrimination as that term is defined in the Interna-
tional Convention on the Elimination of All Forms of Racial Discrimination. To achieve that target, governments should be required to produce and publish socio-economic data on their populations that is disaggregated to reveal horizontal inequalities across social groups. This information would empower non-governmental organisations and community groups to take action and governments would be put under pressure to take steps to address inequalities.

ERT: How, if at all, can the post-2015 development agenda be used to shape states’ responses to addressing equity issues and inequalities affecting children and vulnerable groups more broadly?

Gay MacDougall: As the process began of drafting the new development agenda, the nations of the world committed to "strive for a world that is just, equitable and inclusive (...) to promote sustained and inclusive economic growth, social development and environmental protection (...) to benefit all". The High Level Panel of Experts, convened by UN Secretary General Ban Ki-Moon to initiate the discussion, urged that the slogan "leave no one behind" must be the core concept for the post-2015 Sustainable Development Agenda. At the same time, global civil society organisations pledged to press for an approach that is truly transformative. The first challenge was to understand the extent to which these broadly framed objectives overlapped, were mutually exclusive or conflicted.

The MDGs had a clear aim of reducing global poverty and elevating certain aspects of social development worldwide. In contrast, there has been a broader range of aspirations vying for inclusion in the post-2015 Agenda. To accommodate that broad set of objectives, the process has permitted a degree of ambiguity in the discussions among both governmental and non-governmental constituencies about whether the objective is to achieve an end to poverty, an end to extreme poverty (the definition of “extreme” would need agreement), a reduction of income inequality, and/or the realisation of economic and social rights.

There has been a lot of discussion about inequality within countries but a lack of clarity about whether the desired objective is equality of opportunity or equality of outcome, or whether it is the equal ability to have one’s life choices realised. If we choose equality of opportunity, questions arise as to how this would be measured. If the target is a reduction of inequality – rather than seeking absolute equality – then a decision must be made about how we would quantify the degree of inequality that is acceptable.

A UN taskforce suggested that addressing inequalities should be “the heart of the post-2015 agenda”. The World Bank announced its own two central goals, which are intended to guide its work in the years to come. The first goal is to effectively eradicate extreme poverty by reducing it to no more than 3% of the world’s population by 2030. The second goal aims to promote “shared prosperity” through growth in the incomes of the poorest 40% of the people in each country.

The High Commissioner for Human Rights stated that any new development paradigm would lack legitimacy if it does not advance “equity (fairness of distribution of benefits and opportunities), equality (that is, substantive equality of both opportunity and result, under the rule of law), and non-discrimination (prohibition of distinctions that are based on impermissible grounds and that have the effect or purpose of impairing the enjoyment or
The High Commissioner’s statement of the requirements for legitimacy is thrilling and sweeping. The conclusions from the worldwide consultations that took place with broad sectors of civil society would clearly agree with the High Commissioner, although some legal experts might quibble about its grounding in current interpretations of international legal obligations. Questions would be raised particularly about the exact sources of the “equity” or “fairness of distribution” standards. How do we measure “fairness”? There is certainly a growing consensus that extreme poverty violates principles of human rights law, so using that standard, is the World Bank’s proposal to leave 3% of the world’s population in extreme poverty acceptable?

The Zero Draft, which was produced by the Open Working Group of governments, will be presented to the General Assembly and takes a middle ground approach. It is an important symbol that it includes a stand-alone goal on inequality within and among countries. This emphasises the importance attached to this issue in the debates over the development agenda. The provision targets the bottom 40% of the population for special measures to accelerate their income growth faster than the norm. Political inclusion of marginalised groups is highlighted along with the need to ensure equal opportunity and reduce inequality of outcomes by reforming the framework of discriminatory laws, policies and practices. While wage and social protection issues are addressed, other goals deal with social disparities in areas like health, malnutrition and education.

It is important to remember that the current text may change in the state-centered negotiations during the General Assembly.

David Bull: Goals only take us so far. It’s positive that states sign up to strong, universal and equity based goals but there are two more tasks that we have. One is to make sure that we are measuring properly whether those goals are being achieved by measuring what progress is being made where. The collection of data, reporting and the publicity about progress is going to be absolutely vital. The data needs to be disaggregated as it has been in Brazil on child mortality. It also must be disaggregated by gender and poverty so that we can see that equity is really being delivered.

The second thing we have to do is to hold our governments to account. We must make sure that the goals are going to be delivered in practice. For our government in the UK that obviously involves doing the right thing for children in the UK, but it also involves supporting the capacity and the efforts which are being made in other parts of the world. For example, it is extremely important that our 0.7% aid target is maintained so that our government can continue to provide the kind of support that it does at the moment for children in need.

ERT: Do you think that the current division between the global North and the global South should be reconsidered to make the post-2015 goals universal, ensuring that all people everywhere are covered and not just those in developing countries?

David Bull: I think the distinction between North and South in many respects has already gone. A Swedish statistician, Hans Rosling, has created a website which allows you to see how various statistics have moved over time in different countries. If you looked at those statistics on poverty or on access to education, child mortality and so on around 50 years ago, there were two
very distinct groups of countries - developing countries that were poor and industrialized countries that were rich. If you look at those same graphs now the results are mixed and there are so many countries in the middle income group. The statistics for poverty, child mortality and educational access and so on now show that there are people in all of those different societies that fall within the different categories of disadvantage. Rosling argues that the distinction between the developed and the developing world no longer exists in reality, it only exists in our conversation and imagination. That may be putting it slightly strongly but I think that the statistics do indicate that we now have to look at poverty and injustice where it exists. We can no longer think it's about one part of the world being poor and the other not.

Gay MacDougall: Universal standards are the *sine qua non* of a human rights based approach. The MDGs were created around a traditional framework that saw the world divided between under-developed and highly-developed countries, the North and the global South, the rich and the poor countries. The MDGs then set goals and objectives for the developing countries to meet in order to receive development assistance from donor countries in the global North. This paternalistic model is not appropriate for current thinking and realities. The human rights culture that we now seek is centred around universal principles and obligations that must apply to all nations and all people.

Further, income inequality in the most developed countries in the global North is beginning to look similar to the patterns of inequality in developing countries. In addition, the movement of economic migrants from the global South to the industrialized global North has created an indivisible pool of people on the margins of the global economy.

Poverty within countries is fundamentally linked to macro-economic dynamics that must be addressed. As Navi Pillay, the UN High Commissioner for Human Rights said, today’s poverty is not simply a consequence of history: “Poverty is being created every day (...) [h]arms are being done to the rights of many by the economic activities that create wealth for others.” Global governance systems of the future must create development-friendly regimes for trade, taxation, science and technology transfers, investments and measures of international cooperation that generate balance and support equality within and between nations. Some of these points are addressed in the most recent draft.

ERT: Returning to the question of the relationship between human rights and development, would you agree that there has been a certain convergence of these agendas, with development organisations increasingly taking a human rights approach, while the human rights movement increasingly focuses on socio-economic rights?

David Bull: I think you see the convergence possibly more from the human rights side than you do from the development side. I know Amnesty International has moved to a social and economic rights agenda and is dealing with issues that appear more like development issues. Certainly the environmental organisations are much more interested in development issues than they were previously and we’re seeing the impact that environmental matters have on human rights and development. I think development organisations still tend to talk too much about need rather than rights. It’s perhaps difficult
when you’re talking to the general public to use rights language and be able to get your message across in the powerful way that you need to do in order to engage people. We want people to act and to feel empowered to make a difference and sometimes the language of need is more effective at doing that than the language of rights. We struggle with that at UNICEF. We want to work for a better world for children and our main reference point to achieve that is the Convention on the Rights of the Child.

One of the most transformative things that we are doing at UNICEF UK is the Rights Respecting Schools Award. We now have over 10% of schools in the UK involved in the programme, which helps schools use the principles of the Convention on the Rights of the Child as a foundation and an ethos for their school and all of their activities. I think we can expand that so an entire generation of people grow up in our country being taught from the very beginning of schooling what children’s rights actually mean and the duties and responsibilities that each person has towards each other person to ensure that those rights are respected. We will have a whole generation running our institutions and making decisions about our society with a full understanding of their rights and the rights of others all around the world. I think in the future we could then be in a situation where we really do achieve the full integration of human rights, development and environmental considerations and also a sense of being part of a world in which all the rights of people in one country are locked together with the rights of people in other countries so that we all work together for a better world. I think that is one of the most exciting things that we’re doing domestically.

Gay MacDougall: The relationship between human rights and development has been a historic discussion because for the first time, international development professionals have joined in a global conversation along with human rights professionals. Together they have searched for a common language that would allow them to integrate visions, expertise, and approaches into a human-centric rights-based development model.

However, for the human rights side of the equation, I think the successes have been limited. Over the past decade, as the human rights discourse has focused increasingly on economic and social rights, there has been a natural segue to attempting to fashion a rights-based approach to development. But while the theory has consolidated, there has been less progress in shaping an operational model that is sufficiently convincing to development specialists. It has been difficult for a number of reasons. Among them is the distance between the “theatres” in which we work. Human rights professionals are also considered by default to be anti-government, while development actors work with governments. Further, human rights principles are absolutist, while development strategies are pragmatic.

From the beginning of the process to shape the post-2015 development agenda, the High Commissioner for Human Rights along with the human rights caucus of civil society organisations have insisted that an effective road map for human progress must be centred around the international legal obligations of nations to guarantee fundamental rights. Yet, at the current stage, there is little if any reference to human rights in the draft. While a human rights framework would require that certain targets reflect zero levels by 2030, that is not consistently the case in the Draft. The goal on civil and political rights, which was the focus of much con-
troversy among governments, is extremely weak. In particular, the language on the rule of law is disappointing.

Finally, in an era in which transnational corporations command budgets larger than some governments, it is unacceptable that the draft does not address the issue of corporate responsibilities. It does not even refer to the “Ruggie Principles”.

ERT: What more, if anything, either within or outside of the 2015 agenda process does the international community need to do to ensure that the most disadvantaged groups and children benefit from development?

Gay MacDougall: Governments should be required to collect, analyse and regularly publish disaggregated data to measure and monitor the effective participation of minorities in economic progress. Improved data collection should be made a priority for the areas of employment and labour rights, poverty rates, access to social security, access to credit and other financial services, education and training and property and land tenure rights. Data should be benchmarked and disaggregated by ethnicity, language and religion and cross-tabulated by sex, age and urban-rural and geographical residence. Gathering statistics that specify the race, ethnicity, language or religion of individuals should not be considered an act of discrimination, as it is only when such data is available that it is possible to assess and redress inequalities.

Governments should also be required to adopt affirmative action programmes to close gaps in progress experienced by minority groups. Robust affirmative measures – time limited, monitored and specifically designed to address systematic, historic and institutionalised discrimination – are often required to address inequality and enable minorities to participate effectively in economic life. The use of these special measures is a fundamental component of the realisation of the right to equality.

Additionally, while the current draft agenda calls on governments to address the legal and regulatory framework for eliminating discrimination, it is important to emphasise that non-discrimination laws should target both government and business sectors. Governments should ensure sufficient allocation of resources to fully implement and monitor domestic and international standards on non-discrimination. Remedies for violations of the right to non-discrimination by public and private sector actors and institutions should be substantial, vigorously enforced and readily accessible to persons belonging to minorities.

Finally, minorities and indigenous peoples must be effectively involved in decision-making regarding all aspects of progress toward the SDGs. Minorities should participate in national as well as international dialogues on the SDGs. Lack of full and effective consultation and participation in decisions about development processes violates the rights of minorities and perpetuates their exclusion. The establishment of appropriate mechanisms for meaningful dialogue with representatives of minority communities is essential. Commonly, minorities lack a voice in government bodies responsible for policy, including in relation to economic life and national budgeting. Consequently the issues and situations of minorities are neglected. At the national level, the creation of statutory bodies composed of representatives of minority communities, which are mandated to review and monitor government policy, has proved useful.
David Bull: I’ve been thinking a lot recently about how the injustices that we see in the world are normally addressed. We make progress through time because people decide that something simply isn’t acceptable any longer and they fight against it. That is what happened with slavery, although of course there is still slavery in the world and so we must continue fighting. I think we have also achieved a great deal in women’s rights over the years, although again there is still a great deal to be achieved. I think it’s time that we said violence, exploitation and the suffering of children and denial of their rights is just as unacceptable. There needs to be a grassroots movement for children’s rights. We need broad public support and involvement if we’re going to get to a point where everyone in the world feels that the suffering of children is simply something that we can’t accept and live with any longer.

Interviewers on behalf of ERT:
Joanna Whiteman and Sarah Pickering

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4 Ibid., p. 29.
5 Brown v Board of Education of Topeka, 347 U.S. 483 (1954). In this landmark judgment the Supreme Court held that laws permitting or requiring racial segregation in public schools violate the Equal Protection Clause of the US Constitution.
7 Ibid., Goals 10 and 17.
8 Ibid.,
10 See above, note 3, pp. 4, 16-17, 46.

UN General Assembly, Keeping the Promise: United to Achieve the Millennium Development Goals, UN Doc. A/RES/65/1, 2010.


Ibid., Para 85.

See above, note 6.


See above, note 6, Para 4.


See above, note 6, Goal 10.


ACTIVITIES

- The Equal Rights Trust Advocacy
- Update on Current Projects
- Work Itinerary: January - June 2014
Equal Rights Trust Advocacy

In the period since the publication of ERR Volume 12 (March 2014), the Equal Rights Trust has continued with its work to expose patterns of discrimination globally and to combat inequalities and discrimination both nationally and internationally. The Trust’s advocacy is based on the Declaration of Principles on Equality which is an instrument of best practice reflecting the modern consensus on the major substantive and procedural elements of laws and policies related to equality. Below is a brief summary of some of our most important advocacy actions since March 2014.

International Events

In June 2014, the Equal Rights Trust attended the UNHCR NGO Consultations in Geneva. While at the Consultations, the Trust carried out awareness raising and advocacy activities on the Rohingya issue, in partnership with the Arakan Project. Activities included: hosting a side-meeting on the Rohingya, at which we presented our project research findings; a briefing of Permanent Missions based in Geneva; and bilateral meetings with the Myanmar desk officer of OHCHR, the Asia Bureau of UNHCR and the UNHCR Statelessness Unit. On 18 June, the Equal Rights Trust co-organised and participated in the launch event of the International Campaign to End Gender Discriminatory Nationality Laws. The Trust is a steering committee member of the campaign. The event was held as a side meeting to the UN Human Rights Council session in Geneva.

On 12 September 2014, the Equal Rights Trust spoke on the human rights of stateless Rohingya at the World Council of Churches International Ecumenical Consultation on Advocating for Stateless People. From 14-17 September, the Trust participated in the first Global Forum on Statelessness, an international conference attended by 300 representatives of governments, UN agencies, civil society and academia. We hosted and spoke on two panels, the first on the human rights of stateless Rohingya and the second on protecting stateless persons from arbitrary detention.

Azerbaijan

In June 2014, the Equal Rights Trust made a submission to the UN Committee on the Elimination of Discrimination Against Women (CEDAW), proposing questions for inclusion in the Committee’s list of issues for its review of Azerbaijan. The submission focused on the gaps and deficiencies in the Azerbaijani legal framework in respect of prohibiting discrimination against women, particularly a number of definitions within the existing laws which are inconsistent
with international standards and the failure of authorities to implement and enforce the existing legislation. CEDAW’s list of issues included, amongst other areas, judicial practice related to cases involving discrimination against women and the consistency of the definitions used in legislation with the requirements of the Convention.

Belarus

In September 2014, the Equal Rights Trust made a submission to the UN Human Rights Council, in advance of the Universal Periodic Review of Belarus. The submission was based on the findings and recommendations of our report Half an Hour to Spring: Addressing Discrimination and Inequality in Belarus published in November 2013. The submission urged states participating in the review of Belarus to endorse the principal recommendation made in the report: that, in order to fulfil its international obligations to respect, protect and fulfil the rights to equality and non-discrimination, Belarus should adopt specific and comprehensive equality legislation. The submission also presented evidence and made recommendations on issues such as the need to ensure religious freedom for all religious groups, including adherents of unregistered and “non-traditional” religions; the need to address discrimination and inequality affecting ethnic Poles, the Roma and others; the need to tackle inequalities based on use of the Belarusian language; and the need to adopt a law on prevention of domestic violence and take measures to eliminate gender discrimination in education and employment.

Kenya

In June 2014, the Equal Rights Trust made a submission on Kenya to the Human Rights Council as part of the Universal Periodic Review, presenting the findings of its 2012 report In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya. It urged participating states to adopt the recommendations made in that report, including in particular the recommendation that Kenya enact specific and comprehensive anti-discrimination law, in line with the Declaration of Principles on Equality. It also provided information on Kenya’s progress in addressing recommendations made at the previous review (in 2010), including that it decriminalise consensual sex between men, protect the rights of indigenous communities and improve protection from gender-based violence.

Kyrgyzstan

In June 2014, the Equal Rights Trust made a submission to CEDAW, proposing questions for inclusion in the Committee’s list of issues for its reviews of Kyrgyzstan. The submission highlighted a number of gaps and deficiencies in the Kyrgyz legal framework and practice, particularly a failure to prohibit multi-
ple discrimination, a lack of any temporary special measures to ensure gender equality and a near absence of efforts to implement and enforce existing legislative provisions. CEDAW's final list of issues included questions on two of these topics – court practices in cases involving sex-based discrimination and the use of temporary special measures.

Sudan

In June 2014, the Equal Rights Trust submitted a shadow report to the Human Rights Committee (HRC) in advance of its consideration of the state report by Sudan. Using original testimony and extensive desk research, the report highlighted the role of discrimination on grounds such as ethnicity, religion or belief, political opinion and gender in the violation of the rights to life, freedom from torture and other forms of ill-treatment, freedom from arbitrary detention, freedom of expression and other rights guaranteed by the International Covenant on Civil and Political Rights. The report called on Sudan to ensure full enjoyment, without discrimination, of the civil and political rights guaranteed by the Covenant and called on Sudan to audit and amend or repeal laws which discriminate or are open to discriminatory application and to develop and enact comprehensive anti-discrimination legislation.

In its concluding observations, issued in July 2014, the HRC made a number of recommendations which echoed those suggested by the Equal Rights Trust, including those related to the need to review and amend discriminatory laws and to adopt comprehensive anti-discrimination law.

Turkey

In June 2014, the Equal Rights Trust made a submission on Turkey to the Human Rights Council as part of the Universal Periodic Review on a wide range of issues on which recommendations were made to Turkey at its last review. This included developments in Turkey’s anti-discrimination legislation, particularly welcome reforms made to the Law on Persons with Disabilities; continued discrimination against religious and ethnic minorities such as the Roma, Greeks and Kurds; ongoing persecution and harassment of LGBT persons; and the limited efforts made to ensure equal participation of women in areas such as employment and public and political life.

Ukraine

In April 2014, the Equal Rights Trust made a submission to the UN Committee on Economic, Social and Cultural Rights (CESCR) in relation to Ukraine. The submission addressed two issues raised in CESCR’s list of issues: gaps and weaknesses in the existing anti-discrimination legislation (the Law “On the principles of prevention and combating discrimination”) and other legal provisions which prohibited discrimination in employment. The submission also highlighted a number of other pieces of legislation in Ukraine which discriminate in the enjoyment of economic and social rights.

On 23 May 2014, the CESCR published its concluding observations on Ukraine, in which the Committee echoed aspects of five recommendations made in the Equal Rights Trust’s submission. Specifically, the Committee recommended that Ukraine amend the Law in order to: explicitly include all the prohibited grounds for discrimination listed in the International Covenant on Economic, Social and Cultural Rights (ICESCR); bring the definitions of direct and indirect discrimination in line with Ukraine’s obligations under the ICESCR; prohibit discrimination in both
the public and private spheres; provide for a reversal of the burden of proof in civil proceedings relating to discrimination; and provide for access to redress and remedies in cases of discrimination.

United Kingdom

In 2013, the Equal Rights Trust made a submission to the United Kingdom Parliament’s Joint Committee on the draft De-regulation Bill. The submission involved a detailed analysis of provisions of the draft Bill which would impact on the rights to equality and non-discrimination. The submission recommended, *inter alia*, the rejection of a provision which would remove the power of employment tribunals to make “wider recommendations” going beyond the specific victim of discrimination. In June 2014, the Parliamentary Joint Committee on Human Rights published its report on the final Bill, highlighting the Equal Rights Trust’s evidence on the powers of employment tribunals and noting our conclusion that this would amount to a “clear violation” of the UK’s obligations under the International Covenant on Civil and Political Rights before recommending that the relevant provision be deleted. During the second reading of the Bill in the House of Lords on 7 July 2014, a number of peers spoke out against the provision on the basis of the Committee’s report.
Update on Current ERT Projects

I. Thematic Projects

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

This thematic project started in July 2011 and is aimed at building strategies of better enforcement of economic and social rights through drawing and communicating lessons from a global review of jurisprudence which has used equality and non-discrimination law to advance the realisation of social and economic rights. The major activities under this project have been completed. A book-length report is in the final editorial process and is due to be published in the coming months.

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

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

Since March 2014, the Equal Rights Trust's key activities under this project have been twofold. Firstly, it has continued to work on a Resource Pack on Disability and Torture for both India and Nigeria, based on the outcome of its consultations with key stakeholders in conjunction with HRLN and LEDAP. These Resource Packs describe patterns of torture and ill-treatment of people with disabilities in the respective country identified in the course of field research, present legal research and analysis, bringing together relevant international, regional and domestic law and jurisprudence on disability and torture, and make recommendations for change.

Secondly, the strategic litigation component of the project continues to progress. The project is supporting eight legal cases currently before the courts in India. It also supports a further 13 cases which, with the Trust’s support, have been filed before the Nigerian courts since March 2013. Amongst other positive developments, the High Court of Jammu and Kashmir found a violation of the article 21 (right to life) of a Kashmiri man with intellectual disabilities who was ambushed, tortured and killed by two army officers. The Court ordered that a trial of the two accused officers take place expeditiously and that compensation be awarded to family members of the victim. In Nigeria, in three cases, the court has found in favour of the clients, finding violations of their fundamental rights and awarding compensation. In one case, the court found no violations and LEDAP, supported by the Equal Rights Trust, is now in the process of appealing the decision.
Empowering Human Rights Defenders in Central Asia to Combat Discrimination on the Basis of Ethnicity and Religion

This project started in January 2013 and is implemented in partnership with two NGOs based in Central Asia, with the participation of further local activists and experts. It seeks to address ethnic and religious discrimination in five Central Asian countries, and to publish studies on the subject.

Since March 2014, the Equal Rights Trust has been coordinating field and desk research towards the production of a series of reports on discrimination and inequality in Central Asia. Our partner in Kazakhstan has completed initial field research and begun desk research on patterns of discrimination and inequality. In Kyrgyzstan, monitoring and documentation is underway, with researchers working in different geographical regions of the country. In addition, following the completion of two successful workshops for activists from other Central Asian countries, the Equal Rights Trust began detailed research planning for reports on Tajikistan and Uzbekistan. The Trust has now begun reviewing the draft chapters. In all of these initiatives, the Equal Rights Trust plays a leading role, providing guidance and feedback.

In July 2014, the Equal Rights Trust provided training to 20 human rights defenders from Turkmenistan, Tajikistan and Uzbekistan. The first two days of the training focused on introducing key concepts in equality law as provided in the Declaration of Principles on Equality and as utilised at the international level, with a focus on discrimination on the basis of race/ethnicity and religion. The final day focused on monitoring and documenting cases of discrimination. A further workshop for another 12 activists from the same countries was held in August 2014.

Ending Gender Discrimination in Nationality Laws

This project began in September 2014 in partnership with the Tilburg University (Netherlands). It aims to research two countries which maintain gender discriminatory nationality laws (Nepal plus one more to be confirmed) and two countries which recently amended gender discriminatory nationality laws (Indonesia and Kenya) for the purpose of conducting advocacy on this issue and supporting the international campaign to end gender discriminatory nationality laws (of which the Equal Rights Trust is a steering committee member).

In the first month of the project, the research team has been formed, and desk research and other planning and preparation activities are being carried out.

Equality and Freedom of Expression: Sudan and South Sudan

This project began in November 2012, in informal partnership with Journalists for Human Rights (JHR), a network of independent journalists operating in Sudan. It seeks to build on the Equal Rights Trust’s previous collaboration with the JHR in the period 2010-2012, expanding the work to involve journalists and human rights defenders from South Sudan, with the aim of establishing a sister network in that country. In addition to providing on-going support to journalists working in the challenging media environment in both countries, and providing training on human rights and equality, the project aims to increase collaboration between those working in Sudan and South Sudan. In so doing, the project aims to make a contribution to tackling one of the most important human rights and security concerns between the two countries: the perpetuation of hate...
speech by the political leadership and media in Sudan and South Sudan.

During the reporting period, we have continued to support the JHR network in Sudan and to foster the development of an informal sister network in South Sudan, in face of serious security challenges for journalists, human rights defenders and the wider population in both countries. In addition, the Trust has supported monitoring and documentation, by members of the two networks, on patterns of discrimination, violations of the right to freedom of expression, hate speech and other human rights abuses.

Greater Human Rights Protection for Stateless Persons

This advocacy project started in 2010 and follows on from a research project undertaken in 2008-2010, which resulted in the publication of Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons. The project had the following objectives: (1) Strengthening human rights protection standards for stateless persons, with a focus on detention; (2) Strengthening capacity and awareness on statelessness at an international level; (3) Developing networks on statelessness and encouraging greater civil society activity on statelessness; (4) Carrying out advocacy on statelessness at international and regional levels.

Under this project, the Equal Rights Trust continued its network building and coalition building activities on statelessness around the world. In particular, the Trust continued its engagement with the European Network on Statelessness (ENS), of which it is a founding steering committee member. The Equal Rights Trust attended ENS meetings and teleconferences and has contributed to the growth of the network through recruiting new members, developing its law and policy pillar and contributing to policy development, awareness-raising and capacity building activities of the Network.

The Equal Rights Trust is also a steering committee member of the international campaign to end gender discriminatory nationality laws. Other steering committee members are UNHCR, the Women’s Refugee Commission, the Tilburg University Statelessness Programme, Equality Now and UN Women. The Trust has been involved in conceptualising the campaign and regularly attended planning teleconferences during the reporting period. The campaign was launched on 17 June 2014 at a side event to the Human Rights Council session in Geneva. The launch was well attended, by states (including Algeria, Hungary, Kenya, New Zealand, Tunisia and the USA), UN personnel and civil society representatives. Consequent to the Trust’s role as a steering committee member, it has begun a new research and advocacy project on this issue (see below).

The Equal Rights Trust attended the annual UNHCR NGO Consultations in June 2014, and a retreat for organisations working on statelessness immediately prior to the Consultations. Through this and other efforts during this period, the Trust was able to continue its engagement with and contribution to the growing international movement to address statelessness.

In August 2014 Amal de Chickera served as a resource person at the Statelessness Summer Course at Tilburg University, the Netherlands. He took sessions on statelessness and discrimination, the detention of stateless persons and statelessness and advocacy.
The Equal Rights Trust also took active part in the first Global Forum on Statelessness on 15-17 September 2014.

**Rohingya 1: Strengthening Human Rights Protection of the Rohingya**

This project started in March 2011. It aims to strengthen human rights protection for stateless Rohingya through targeted research in six countries (Bangladesh, Indonesia, Malaysia, Myanmar, Saudi Arabia and Thailand) followed by advocacy at national, regional and international levels.

In June 2014, the Equal Rights Trust hosted a side event on the human rights of stateless Rohingya, at the UNHCR NGO Consultations. The Trust also spoke on the human rights of the Rohingya at a World Council of Churches consultation on statelessness and at the Global Forum on Statelessness in September 2014.

The Equal Rights Trust will be publishing research reports on the human rights of stateless persons in Malaysia and Thailand in October 2014.

**Rohingya 2: Strengthening the Right to a Nationality, Stay Rights and Human Rights of Stateless Rohingya**

This project began in January 2014. It aims to strengthen the right to a nationality, legal stay rights and human rights of stateless Rohingya through legislative and policy reform, advocacy, awareness raising and capacity building in Bangladesh, Malaysia, Myanmar and Thailand and at regional and international levels.

In April 2014, the Equal Rights Trust and its partners visited Myanmar for a scoping study. During the nine day visit, the team met with over 30 representatives of government, the international community, NGOs and Roh-
ingya leaders, to develop and strengthen ties, assess the situation and gather information necessary for strategic planning of future project activities in Myanmar.

Since this visit, the video and documentation activities have continued, with additional photography and video documentation being carried out in Bangladesh and Thailand. Furthermore, consultants have been identified to carry out legal research in Malaysia and Thailand.

II. Country Projects

Azerbaijan 2: Empowering Civil Society to Challenge Discrimination and Promote Equality in Azerbaijan

This second project in Azerbaijan began in November 2013, with the Equal Rights Trust again working in partnership with Women’s Organisation Tomris (Tomris). The project seeks to increase the capacity of Azerbaijani civil society to combat discrimination through documentation, litigation and advocacy. Project activities include training workshops on equality law, meetings of the Azerbaijan Equality Forum that was established under the first project in Azerbaijan, the publication of a comprehensive report on discrimination and inequality, an advocacy campaign for legal and policy reform and strategic litigation.

In April 2014, the project team produced a 40 page study baseline study on discrimination and inequality in Azerbaijan. It comprises an account of the major patterns of discrimination and inequality in Azerbaijan, combined with a broad overview of the legal and policy framework in place to combat discrimination. The study is complemented by a second baseline study on the capacity of civil society in Azerbaijan to combat discrimination through litigation and advocacy. Tomris held the first and second meetings of the Azerbaijan Equality Forum in April and June 2014.

On July 2014, the Equal Rights Trust provided training to over 50 civil society organisations in two cities in Azerbaijan (Gadabay and Qabala). The workshops focused on international and European standards and law on equality and non-discrimination as well as the protections offered in Azerbaijan. They covered key concepts in equality law as provided in the Declaration of Principles on Equality and as utilised at the international level and by the European Court of Human Rights; and protections contained within the Azerbaijani legal framework with an analysis of the gaps, deficiencies and weaknesses in terms of content and implementation.

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

This second project in Belarus began in April 2012, in partnership with the Belarusian Helsinki Committee (BHC). It aims to build on the achievements of the first Equal Rights Trust project by providing training on the development of advocacy campaigns and engaging in international advocacy on equality issues for civil society organisations; establishing a National Equality Forum; developing and implementing a strategic paper and action plan for the National Equality Forum; creating an Online Equality Forum; supporting international advocacy actions by Forum members; and generating new evidence of discrimination through documentation and research.

Between May and July 2014, the Equal Rights Trust supported the BHC in establishing a working group on equality law reform in Belarus to develop a concept paper on com-
prehensive equality legislation. The Trust worked with BHC to develop selection criteria for the members of the working group and terms of reference for the group’s work; we also provided BHC with information and guidance on the essential elements of comprehensive equality law, based on the Declaration of Principles on Equality.

On 22 July 2014, Dimitrina Petrova and Vadim Poletschuk (our consultant who worked on the report *Half an Hour to Spring: Addressing Discrimination and Inequality in Belarus*) participated in a roundtable meeting on equality law reform in Minsk. Leading civil society representatives discussed and agreed the recommendations made in the concept paper developed by the working group, which sets out the key substantive and procedural elements of a future national equality law, in line with established international law and best practice.

Following the publication in Russian of our report, *Half an Hour to Spring: Addressing Discrimination and Inequality in Belarus* in November 2013, we have continued to work on the English language version of the report.

*Bosnia and Herzegovina: Developing Civil Society Capacity to Combat Discrimination and Inequality in Bosnia and Herzegovina*

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

The Equal Rights Trust and its partners in Bosnia and Herzegovina identified and filed five strategic cases in the third quarter of 2013. At present, these cases are awaiting consideration in the respective municipal courts.

A draft of a report on discrimination and inequality in Bosnia and Herzegovina has been subjected to a first round of review and editing, with comments and feedback provided to the drafters. The revised draft is now undergoing a substantive edit, the penultimate phase before finalisation and publication.

*Guyana 3: Combating Discrimination through Advocacy and Strategic Litigation in Guyana*

This third project on Guyana began in January 2013, overlapping with the final phase of the Equal Rights Trust’s second project in Guyana which ended in 2013. It is being implemented in partnership with the Society Against Sexual Orientation Discrimination (SASOD) and the Justice Institute of Guyana (JIG). It seeks to address two major problems identified through the Trust’s research in Guyana: the failure of implementation and enforcement of laws which provide protection from discrimination; and the stark difference between the legal rights of LGBTI persons and all other persons in the country.
In April 2014, the Equal Rights Trust co-organised a Judicial Colloquium on the Rights to Equality and Non-discrimination in Guyana. The event was hosted by JIG and the office of the Chancellor of the Judiciary of Guyana. All bar one of Guyana’s High Court Judges participated in the colloquium, as did Justice Adrian Saunders, representing the Caribbean Court of Justice. Participants engaged in a peer-to-peer discussion on topics including the personal scope of equality law, forms of prohibited conduct and definitions of discrimination, exceptions and limitations, and remedies and sanctions. Our Trustees Stephen Sedley and Claire L’Heureux-Dubé, prominent retired judges, spoke at the colloquium and two other events in Guyana to promote equality law reform in the country. On 3 April 2014, Claire L’Heureux-Dubé gave a public lecture entitled “For a Better World: Speaking the Language of Equality”.

On 5 April 2014, Stephen Sedley spoke on the importance of the rule of law at an event organised by JIG.

Following the judicial colloquium, the Equal Rights Trust provided training on strategic litigation on equality and non-discrimination for civil society organisations and lawyers in Guyana. The workshop provided an introduction to key concepts in equality law and an introduction to techniques in strategic litigation; participants applied the knowledge acquired, working in groups to identify and develop proposed strategic litigation cases. The Equal Rights Trust and JIG have begun the process of identifying suitable cases to support, with the aim of filing several cases under this project.

The Equal Rights Trust is in the final stages of preparation for publication of its com-
prehensive report on discrimination and inequality in Guyana.

**Guyana 4: Empowering Civil Society to Combat Discrimination in the Enjoyment of Economic, Social and Cultural Rights**

In March 2014, the Equal Rights Trust began working with SASOD on a fourth project in Guyana. The project aims to combat discrimination in the enjoyment of economic, social and cultural rights through a range of activities, including training, documentation of discrimination and national and international advocacy.

In June 2014, SASOD held a meeting of the Guyana Equality Forum (GEF). The meeting focused on the expansion and extension of the GEF advocacy strategy. The GEF was established during the Equal Rights Trust’s first project in Guyana in 2011 and has continued to operate, with support from the Trust, since that time. The Trust will continue to support the GEF through this project. The GEF is currently working to provide an updated national advocacy strategy to encompass economic, social and cultural rights along with civil and political rights that are considered under the existing strategy.

The Equal Rights Trust provided training to over 50 participants in Georgetown through three training workshops held in August 2014. Each of the workshops focussed on introducing the right to non-discrimination and economic, social and cultural rights; they further contained discussions of discriminatory barriers to the enjoyment of socio-economic rights in Guyana and techniques and approaches to monitoring and documenting cases of discrimination. A wide range of participants were invited, due to the focus on discrimination in the enjoyment of socio-economic rights, including representatives from civil society organisations, lawyers, law
students and also nurses, teachers and representatives from trade unions.

SASOD and the Equal Rights Trust are currently in the process of engaging six civil society organisations to undertake monitoring and documentation of discrimination in the enjoyment of economic, social and cultural rights in all areas of life in Guyana. The documentation of this discrimination will form the basis for advocacy by SASOD and the Equal Rights Trust to the Committee on Economic, Social and Cultural Rights and other international bodies, and also support the national advocacy campaign.

The Trust will continue to support the GEF through this project. The GEF is currently working to provide an updated national advocacy strategy to encompass economic, social and cultural rights along with civil and political rights that are considered under the existing strategy.

Jordan 2: Empowering Civil Society to Increase the Protection of Groups in Jordan Vulnerable to Discriminatory Torture and Ill-treatment

The Equal Rights Trust’s second project in Jordan began in January 2014, and is implemented in partnership with Mizan for Law. It seeks to increase the understanding of laws prohibiting discriminatory torture and ill-treatment and of general equality law; improve the documentation of discriminatory torture and ill-treatment; and increase the capacity of civil society to engage in advocacy and strategic litigation to drive legislative and policy change. Project activities include training, civil society roundtables, advocacy and strategic litigation.

A baseline study on discriminatory torture and ill-treatment in Jordan was drafted by the project team, assisted by Professor Mohammed Moussa, a Jordanian academic spe-
cialising in human rights law. At the same time, the team drafted a second study assessing the capacity of lawyers and civil society in Jordan to combat discriminatory torture and ill-treatment. Both studies informed the planning and delivery of the Equal Rights Trust workshops on discriminatory torture and ill-treatment.

In August 2014, the Trust provided training to over 50 lawyers and representatives from civil society organisations in two cities in Jordan, Amman and Irbid. Each workshop provides participants with knowledge to contribute to advocacy and litigation strategies to address discriminatory torture, inhuman or degrading treatment in Jordan.

The Equal Rights Trust has continued planning for strategic litigation cases on discriminatory torture and ill-treatment which it will take with Mizan in the coming year. The completed project baseline studies have identified a number of important issues which may be appropriate for strategic litigation. In addition, the Trust and Mizan have begun identifying lawyers who may act in such cases, with concerted efforts being made through training workshops to recruit additional lawyers to Mizan’s network.

**Kenya 4: Improving Access to Justice for Victims of Gender Discrimination**

This five-and-a-half year long project began in April 2011 and is implemented in partnership with the Federation of Women Lawyers Kenya (FIDA). It seeks to increase access to justice for women and girls in Kenya who experience discrimination which contributes to or creates poverty. The project’s
central activity involves the establishment of community-based legal advice services (referred to as Legal Assistance Scheme Partnerships), situated within Community Based Organisations (CBOs). This is to be achieved through a combination of training, production of a handbook, ongoing support and advice and financial support to the CBOs and the lawyers with whom they work on the project.

In May, the Equal Rights Trust and FIDA convened a training workshop for CBOs participating in our legal assistance scheme for victims of gender discrimination. The training was designed as a follow-up to an initial training workshop provided in April 2013, before CBOs began delivering legal assistance in their respective communities. The workshop provided a refresher on the rights to equality and non-discrimination and Kenyan laws prohibiting discrimination and discriminatory violence. The workshop also focused on dealing with difficult or complex issues identified by CBOs in the first year of the scheme’s operation, with group discussions and interactive sessions used to enhance knowledge.

The Equal Rights Trust continues to review more than 1,100 complaints that have been received from women by CBOs working across Kenya. The complaints relate to a range of matters and largely fall within the scope envisaged for the project, namely issues of: gender-based violence; succession, land and other economic issues; and education. The Equal Rights Trust and FIDA have worked to improve the pro bono referral process to ensure that clients are referred to a lawyer as necessary.
Moldova 2: Empowering Civil Society in Moldova and Transnistria to Combat Discrimination through Documentation, Litigation and Advocacy

This second project in Moldova started in December 2013, and is implemented in partnership with Promo-LEX, based in Chișinău. It seeks to increase the capacity of civil society to combat discrimination in Moldova. The project was designed to respond to the needs of civil society following the adoption of new equality legislation in the country in 2012, and involves a range of capacity-building activities, including training, the establishment of a working group on equality law reform, the development of a comprehensive report on equality and non-discrimination in the country, advocacy for legal reform and strategic litigation.

In April 2014, a baseline study on discrimination and inequality in Moldova was produced by the project team. It comprises an account of the major patterns of discrimination and inequality in Moldova, combined with a broad overview of the legal and policy framework in place to combat discrimination. This study is complemented by a second, 20 page baseline study on the capacity of civil society in Moldova to combat discrimination through litigation and advocacy.

In May 2014, the first meeting of a working group on equality law reform in Moldova took place, with the Equal Rights Trust present. The working group was established in order to consult on and develop proposals to improve the implementation of anti-discrimination legislation in Moldova. Its members are made up of leading civil society actors working on issues of discrimination and inequality in Moldova, including the Human Rights Advisor at the United Nations Programme Office. At the first meeting, participants discussed potential priority areas for joint advocacy, including strengthening the recently-established Council on Equality and Non-discrimination and improving legislation on hate crimes.

In June 2014, the Equal Rights Trust and Promo-LEX held a roundtable event in Chișinău. At the meeting, which was attended by a range of civil society organisations and a representative from the Council on Equality and Non-discrimination, Promo-LEX presented the initial proposals made by the working group and encouraged discussion on priority areas for advocacy.

Also in June 2014, the Equal Rights Trust provided training to civil society organisations and lawyers in Chișinău and Bălți on international and European standards and law on equality and non-discrimination. The training focused on introducing key concepts in equality law as provided in the Declaration of Principles on Equality and as utilised at the international and European (including the European Union) level. It also focused on recently-introduced national legislation (the Law on Ensuring Equality) and the work of the Council on Equality and Non-discrimination, with presentations from Andrei Brighidin, a member of the Council. Finally, the participants were provided with training on monitoring and documenting cases of discrimination. Two further workshops were held in Chișinău in July, one in Russian and the other in Romanian, mirroring the first two workshops. In total, approximately 100 people participated in the workshops.

The Equal Rights Trust plans to file several strategic litigation cases over the next two years. During the reporting period, Promo-LEX has proposed a potential case which relates to inhuman treatment of a pre-trial prisoner with disabilities in prison detention.
The Trust has been supporting Promo-LEX’s lawyer in developing a case strategy and will continue to do so, including by providing an expert opinion on the relevant international and regional law in due course.

**Nigeria: Discrimination and Torture**

Under this project, which started in August 2010, the Equal Rights Trust supports the work of a Nigerian NGO, the Legal Defence and Assistance Project (LEDAP) to provide direct assistance to victims of torture. Our primary responsibilities involve overseeing the case assessment process, advising on the discriminatory elements of the torture and ill-treatment which has occurred and managing the project.

After a long period of procedural delays, there has been some progress in relation to four of the 13 cases of discriminatory torture or ill-treatment of people with disabilities which were filed in 2013. In three cases, the court has found in favour of the clients, finding violations of their fundamental rights and awarding compensation of between N1,000,000 and N5,000,000 (equivalent to roughly £3,750 and £18,500). The Equal Rights Trust and LEDAP are in discussion on the adequacy of the judgments to determine the appropriate next steps. In one case, the court found no violations and we are in the process of appealing the decision.

**Russia: Empowering Civil Society to Challenge Discrimination in Russia, Including on Grounds of Sexual Orientation and Gender Identity, in a Unified Framework on Equality**

This project started in December 2013 and is implemented in partnership with Sphere, an LGBT rights organisation based in St. Petersburg. It seeks to address the lack of capacity among civil society organisations to challenge discrimination against LGBTI persons, and to advocate for improved implementation of legal protection from discrimination, including on the grounds of sexual orientation and gender identity. Project activities include a roundtable “Combating Discrimination in Russia”; training workshops on monitoring and documenting discrimination; research to document incidents of discrimination in Russia; the establishment and meetings of the Russian Equality Forum; the publication of a report on discrimination in Russia; strategic litigation; and an advocacy campaign for legislative reform on equality.

At the end of May, the Equal Rights Trust participated in a roundtable in St Petersburg attended by civil society organisations. The roundtable aimed to begin building a coalition of organisations to work together to combat discrimination in Russia. Discussions were held on which forms of discrimination need to be addressed by civil society and on previous successes and failures in advocacy efforts; it concluded with consideration of the best approach to be taken in Russia.

**Serbia: Empowering Civil Society to Improve the Implementation of Anti-discrimination Laws in Serbia**

In May 2014, the Equal Rights Trust began working in partnership with Praxis on a project to improve the implementation of anti-discrimination laws in Serbia. The project will establish a working group to develop national advocacy strategies and includes training, roundtables, several events aimed at raising public awareness and strategic litigation activities.

In July, the Equal Rights Trust visited Belgrade for a scoping mission. Two focus group sessions were held with a number of civil so-
ciety organisations together with a number of meetings with practicing lawyers and the Deputy Commissioner for Equality. The visit was highly successful in providing the Trust and Praxis with valuable ideas for the project and generating enthusiasm amongst civil society to participate in the project. Following the visit, the team began work on a baseline study on discrimination in Serbia and another on the capacity of lawyers and civil society in Serbia to advocate for the improved implementation of anti-discrimination laws.

The Equal Rights Trust and Praxis have begun to explore two cases for strategic litigation to combat discrimination against Roma families in housing. A working group that will help to steer the project has been formed.

**Solomon Islands 2: Empowering Civil Society to Promote Gender Equality and Reduce the Incidence of Gender Discrimination**

This project began in April 2012 and is implemented in partnership with the Secretariat of the Pacific Community Solomon Islands Country Office and the Secretariat of the Pacific Community Regional Rights Resource Team. The Equal Rights Trust is responsible for training and report writing activities under this project.

In May 2014, we completed a first consultation draft of a report on Solomon Islands. This follows a period of desk research and analysis which has been ongoing since mid-2013, and field research which was conducted by the project team in 2013. The draft report has been disseminated to stakeholders from civil society, government and academia in Solomon Islands. In addition, we worked with local partners to consult practicing lawyers on the section of the report dealing with the legal and policy framework. In August 2014, the Trust’s local partners convened a roundtable discussion to gain further input on the report.

The Equal Rights Trust has also begun discussions with its partners on potential strategic litigation relating to gender equality.

**Sudan 1: Empowering Civil Society in Sudan to Combat Discrimination**

This project, implemented in partnership with the Sudanese Organisation for Research and Development (SORD), aims to build the capacity of Sudanese civil society organisations to advocate for improved protection from discrimination and for the promotion of equality, through training, support with documentation, publication of a country report and support with the development of an advocacy strategy.

All bar one of the project’s activities – the publication of a report on discrimination and inequality in Sudan – were completed in 2013. In respect of this final activity, having produced a first draft of the report in 2013, ERT and SORD agreed that the potential existed to produce a report of greater depth and breadth. The partners agreed to continue work towards this end, and work to produce this report continued throughout 2013 and into 2014, both under this project and under the project “Strengthening Civil Society Capacity to Combat Discrimination in Sudan”, detailed below.

**Sudan 3: Strengthening Civil Society Capacity to Combat Discrimination in Sudan**

This third project in Sudan began in July 2013, and seeks to create the foundations for sustained civil society and media advocacy on issues of discrimination in Sudan. The Equal Rights Trust drafted the first ever comprehensive report on discrimina-
tion and inequality in Sudan, *In Search of Confluence: Addressing Discrimination and Inequality in Sudan*. The report contains analysis of major patterns of discrimination and inequality, combined with an assessment of the legal and policy framework on equality and non-discrimination. The project also aims to engage key government departments and agencies, the National Human Rights Commission and civil society stakeholders on the report’s findings and recommendations, in order to maximise the impact on government policy; to publicise the report in the national, regional and international media; and to complete advocacy actions at the international, regional and national levels. The report is will be published in October 2014.

**Turkey: Empowering Civil Society to Challenge Discrimination against LGBTI Persons in the Aegean and Marmara Regions of Turkey**

This project began in January 2012 and is implemented in partnership with a Turkish LGBTI rights organisation based in Izmir, the Black Pink Triangle (SPU). It seeks to address the lack of capacity among civil society organisations in two of Turkey’s regions to challenge discrimination against LGBTI persons and to advocate for improved legal protection from discrimination, including on grounds of sexual orientation and gender identity, through improving documentation of all types of discrimination; increasing knowledge of anti-discrimination law and concepts among civil society organisations; creating civil society expertise in documenting cases of discrimination in the target regions; and cooperation between civil society organisations in the target regions through the creation of a Regional Equality Forum.

A report on Turkey, which focuses on the Aegean and Marmara regions, is currently being finalised. Draft sections of the report were produced by the project team. During the reporting period, these sections have been subjected to a first round of review and editing and a consolidated draft report has been produced, and is currently awaiting review.

**Ukraine: Empowering Civil Society to Challenge Discrimination against LGBTI Persons in Ukraine**

This project began in November 2012 and is implemented in partnership with an LGBTI organisation, Nash Mir, based in Kyiv. The project involves the delivery of training to civil society organisations, support to the Coalition on Combating Discrimination, and the development of a report on discrimination and inequality in Ukraine.

Civil unrest in Ukraine and the armed conflict in the east of the country had a significant impact upon the project. Nonetheless, in March 2014 the Equal Rights Trust provided training to LGBT activists in Ukraine on advocating for LGBT rights from an equality perspective. The training focused on introducing key concepts in equality law as provided in the Declaration of Principles on Equality and using this knowledge to analyse gaps and shortcomings in the Law on Combating and Prevention of Discrimination which was adopted in Ukraine in 2012. It also focused on advocacy strategies for LGBT organisations, using the history of the LGBT rights movement in the UK as a basis to draw out lessons and points for consideration.

The Equal Rights Trust is currently coordinating field and desk research towards the production of a report on discrimina-
tion and inequality in Ukraine. The majority of the field research was completed in April. Following completion of field and initial desk research, the team prepared draft chapters on patterns of discrimination and inequality, and on the legal and policy framework of Ukraine relevant to equality. These draft chapters are currently undergoing a first round of review; it is anticipated that this phase will entail additional research and analysis of the preliminary findings from the perspective of current international standards on the rights to equality and non-discrimination.

The Equal Rights Trust has also begun discussions with Nash Mir about potential strategic litigation opportunities. Nash Mir is working with its partners in the Coalition on Combating Discrimination to identify potential cases, through the Coalition’s Strategic Litigation Programme.

United Kingdom: Greater Protection for Stateless Persons

This project began in 2011 and its purpose is to deliver trainings on statelessness in the UK. The Equal Rights Trust with partners Asylum Aid and Garden Court Chambers delivered seven training workshops on statelessness and the use of the 2013 UK rules pertaining to the identification of stateless persons through this project. At each workshop, the Trust delivered training on the international statelessness and human rights frameworks and the principles of equality and non-discrimination. In March 2014, the final workshop was delivered in Bristol. Additionally, we delivered training on the international legal framework pertaining to statelessness to post graduate students at the London Southbank University in March 2014.
Equal Rights Trust Work Itinerary: January – June 2014

January 7, 2014: Conducted a focus group with Azerbaijani civil society organisations involved in work on non-discrimination and other human rights, in order to assess the capacity-building needs of these organisations, Baku, Azerbaijan.

January 16-22, 2014: Undertook a research visit to Sudan to interview academics, lawyers, civil society representatives and other experts on patterns of discrimination and inequality and the legal and policy framework in the country, in order to verify and validate the findings and conclusions of a draft ERT report on addressing discrimination and inequality in the country, Khartoum, Sudan.

January 21, 2014: Delivered training to lawyers on the new immigration rules on statelessness in the United Kingdom, in Liverpool, United Kingdom.

January 22, 2014: Delivered training to lawyers on the new immigration rules on statelessness in the United Kingdom, in Glasgow, United Kingdom.

January 31, 2014: Conducted a focus group with Russian civil society organisations involved in work on inequality in order to assess the capacity-building needs of civil society, St. Petersburg, Russia.

February 4, 2014: Hosted a public seminar on the human rights of the Rohingya, at the University Malaya, in Kuala Lumpur, Malaysia.

February 4-5, 2014: Hosted a workshop for civil society, UN agencies, government officials and the media on the human rights of stateless Rohingya in Malaysia, at the University Malaya, in Kuala Lumpur, Malaysia.


February 19, 2014: Delivered training to lawyers on the new immigration rules on statelessness in the United Kingdom, in Leeds, United Kingdom.

February 24, 2014: Conducted a focus group with Moldovan civil society organisations involved in work on discrimination and other human rights concerns, in order to assess the capacity-building needs of these organisations, in Chişinău, Moldova.
January 7, 2014: Conducted a focus group with Azerbaijani civil society organisations involved in work on non-discrimination and other human rights, in order to assess the capacity-building needs of these organisations, Baku, Azerbaijan.

January 16-22, 2014: Undertook a research visit to Sudan to interview academics, lawyers, civil society representatives and other experts on patterns of discrimination and inequality and the legal and policy framework in the country, in order to verify and validate the findings and conclusions of a draft ERT report on addressing discrimination and inequality in the country, Khartoum, Sudan.

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February 4-5, 2014: Hosted a workshop for civil society, UN agencies, government officials and the media on the human rights of stateless Rohingya in Malaysia, at the University Malaya, in Kuala Lumpur, Malaysia.


February 6-7, 2014: Held a workshop for civil society, UN agencies, government officials and the media on the human rights of stateless Rohingya in Thailand, in Bangkok, Thailand

February 19, 2014: Delivered training to lawyers on the new immigration rules on statelessness in the United Kingdom, in Leeds, United Kingdom.

February 24, 2014: Conducted a focus group with Moldovan civil society organisations involved in work on discrimination and other human rights concerns, in order to assess the capacity-building needs of these organisations, in Chişinău, Moldova.

February 24-26, 2014: Hosted an exhibition of photographs by Saiful Huq Omi on the Rohingya present in Bangladesh, Malaysia and the UK, at the Dhaka Art Centre, in Dhaka, Bangladesh.

February 24-26, 2014: Conducted a workshop for civil society, UN agencies, government officials and the media on the human rights of stateless Rohingya in Bangladesh, in Dhaka, Bangladesh.
February 26, 2014: Gave an evening lecture on strategic litigation organised by the Bangladeshi Legal Aid and Services Trust, in Dhaka, Bangladesh.

March 07, 2014: Delivered training to lawyers on the new immigration rules on statelessness in the United Kingdom, in Bristol, United Kingdom.

March 10-12, 2014: Delivered training to Ukrainian LGBT activists on advocating for LGBT rights from an equality perspective, and participated in strategic discussions on approaches to equality law reform in the country, in Kiev, Ukraine.

March 18, 2014: Conducted focus groups with Jordanian civil society organisations and lawyers involved in work on discrimination, inequality and the prevention of torture and ill-treatment, in order to assess the capacity and needs of these organisations, in Amman, Jordan.

March 25, 2014: Participated in a panel discussion on the human rights of stateless Rohingya at a conference entitled “Refugee Voices” at the Refugee Studies Centre, Oxford University, in Oxford, United Kingdom.

March 26, 2014: Participated in a roundtable on discrimination against minorities in Myanmar at the Refugee Studies Centre, Oxford University, in Oxford, United Kingdom.

March 27, 2014: Delivered training on the international legal framework pertaining to statelessness to Masters Students at the London Southbank University, in London, United Kingdom.

April 4-5, 2014: Convened a Judicial Colloquium on the Rights to Equality and Non-discrimination in Guyana, in partnership with the Justice Institute of Guyana and the office of the Chancellor of the Judiciary of Guyana, in Georgetown, Guyana.

April 6-7, 2014: Delivered training to Guyanese civil society organisations and lawyers on strategic litigation on equality and non-discrimination, in Georgetown, Guyana.

April 9, 2014: Participated in the European Network on Statelessness Steering Committee Meeting in Strasbourg, via Skype link.

April 22-30, 2014: Undertook a visit to Myanmar for a scoping study for a project on the human rights of stateless Rohingya, meeting with over 30 representatives of government, the international community, NGOs and Rohingya leaders, to develop and strengthen ties, assess the situation and gather information necessary for the strategic planning of future project activities, in Yangon, Myanmar.

May 13-15, 2014: Delivered training on the right to non-discrimination to paralegals from community based organisations across Kenya to enable them to provide advice to women through a community based legal assistance project, in Nairobi, Kenya.
May 29-30, 2014: Convened a two day roundtable on current trends in international equality law, key problems and priorities in Russia, successes in legal and policy reform, and possible advocacy strategies, in St. Petersburg, Russia.

June 2, 2014: Participated in a strategic roundtable with Moldovan civil society organisations on promoting equality and combating discrimination, in Chişinău, Moldova.

June 3-4, 2014: Delivered training to Moldovan civil society organisations and lawyers on international, European and national law on the rights to equality and non-discrimination, in Chişinău, Moldova.

June 5-6, 2014: Delivered training to Moldovan civil society organisations and lawyers on international, European and national law on the rights to equality and non-discrimination, in Bălţi, Moldova.

June 15-16, 2014: Participated in the annual UNHCR statelessness retreat for NGOs, in Geneva, Switzerland.

June 17-19, 2014: Attended the UNHCR NGO Consultations in Geneva, and used this opportunity to carry out awareness raising and advocacy activities on the Rohingya issue, through hosting a side meeting on the human rights of stateless Rohingya, a briefing of Permanent Missions based in Geneva, and bilateral meetings with the Myanmar desk officer of OHCHR, the Asia Bureau of UNHCR and the UNHCR Statelessness Unit, in Geneva, Switzerland.

June 18, 2014: Participated in the launch of the International Campaign to End Gender Discrimination in Nationality Laws at a side event to the Human Rights Council session, in Geneva, Switzerland.


June 20, 2014: Held its annual meeting of the Board of Directors, in London, United Kingdom, at which the Chair, Bob Hepple, stepped down after the expiry of his term, and a new Chair – Sue Ashtiany – was appointed.
Note to Contributors

Equal Rights Trust invites original unpublished articles for future issues of *The Equal Rights Review*. We welcome contributions on all aspects of equality law, policy or practice. We encourage articles that examine equality in respect to cross-cutting issues. We also encourage articles that examine equality law policy or practice from international, regional and national perspectives. Authors are particularly welcome to submit articles on the basis of their original current or past research in any discipline related to equality.

**Peer Review Process**
Each article will be peer reviewed prior to being accepted for publication. We aim to carry out the peer review process and return comments to authors as quickly as possible.

**Further Information and Where to Submit**
Articles must be submitted by email attachment in a Microsoft Word file to: info@equalrightstrust.org

For further information regarding submissions, please email: Joanna.whiteman@equalrightstrust.org

**Submission Guidelines**
- Articles should be original, unpublished work.
- Articles must be written in United Kingdom English.
- Articles must contain footnote or endnote referencing.
- Articles should be between 5,000 and 10,000 words in length.
- Articles must adhere to the Equal Rights Trust style guide, which is available at: http://www.equalrightstrust.org/ertdocumentbank/ERR%20STYLE%20GUIDE.pdf
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