In this issue:

- Integrated approach to human rights and equality
- Testimony of an “erased” man
- Equality reform in Britain
- Colombia legislating for equal rights
- Multiple discrimination
- Formal and substantive equality
Contents

3 Dimitrina Petrova A Right to Equality Integral to Universal Human Rights: Editor’s Welcome to The Equal Rights Review

Articles

11 Jarlath Clifford Locating Equality: from Historical Philosophical Thought to Modern Legal Norms

24 Paola Uccellari Multiple Discrimination: How Law Can Reflect Reality

50 Patrick Delaney Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas, and Social Reform

60 Claude Cahn Slums, the Right to Adequate Housing and the Ban on Discrimination

Testimony

67 Testimony of an “erased” stateless person from Slovenia, taken by Donatella Fregonese

Interview

75 Replacing the Patchwork – a New Cloth for Equality? ERT talks with Barbara Cohen and John Wadham about recent developments in British equality law

Activities

85 Ivan Fišer The Equal Rights Trust Advocacy

92 Current Projects of The Equal Rights Trust

94 ERT Work Itinerary: January 2007 - January 2008
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A Right to Equality Integral to Universal Human Rights

Editor’s Welcome to The Equal Rights Review

Dimitrina Petrova

As authors’ views will not necessarily reflect the ERT’s official position or advocacy agenda, I am taking this opportunity to present the organisation’s background and philosophy.

The Equal Rights Trust opened office in London in January 2007 following a preparation period of approximately two and a half years. My previous work as the Director of the Budapest-based European Roma Rights Centre, an organisation which had attempted to use anti-discrimination law to defend the rights of the Roma in Europe, had led me to the realisation that something important was missing from the international struggle against discrimination. I had begun to identify certain needs and to come across people who shared similar thoughts. In November 2004, in response to my proposal to build a new international NGO to advance the right to equality, a small group of equality advocates and donors met at the invitation of Lord Lester of Herne Hill QC, to discuss ways in which to re-think and revitalise anti-discrimination work. I subsequently worked with Lord Lester, Professor Sir Bob Hepple and others toward the establishment of ERT. A

I am pleased to introduce the inaugural issue of The Equal Rights Review. By means of this biannual publication, The Equal Rights Trust (ERT) will provide a forum for debate on equality and non-discrimination. We will facilitate the free exchange of ideas, and encourage opposing opinions.
The Equal Rights Trust’s long-term objectives are:

1. To document, expose and help eliminate violations of the fundamental right to non-discrimination formulated in the Universal Declaration on Human Rights and in subsequent international treaties.

2. To ensure greater accountability of states and non-state actors regarding their obligation to protect individuals against discrimination and to promote equality.

3. To empower the victims of discrimination in combating abuses.

4. To improve the public understanding of equality as a value on which broader consensus is needed in all societies.

5. To contribute to developing the substantive and procedural aspects of the universal human right to equality.

6. To promote effective enforcement of existing anti-discrimination law and policies.

7. To promote and facilitate the adoption of comprehensive anti-discrimination law and policies without which the right to non-discrimination is not adequately protected.

feasibility study, recommended by the participants of the November 2004 meeting, was conducted between January and August 2005. The purpose of the study was to assess the need for building an organisation that would work to develop the general, overarching and cross-identity aspects of the right to equality and non-discrimination. The results of the study were encouraging and we incorporated ERT in September 2005.

The establishment of The Equal Rights Trust was a response to two major problems: the drifting apart of the fields of equality and human rights; and the fragmentation of equality. The first problem may be obscured somewhat by the rhetoric and ritual practice of mentioning non-discrimination among the first principles underlying human rights. In point of fact, however, non-discrimination is an underdeveloped human right. Its relationship to a right to substantive equality is unclear. Equality and human rights are not integrated well together either in law or in practice. This is demonstrated by the fact that equality lawyers and activists and human rights lawyers and activists are hardly cognizant of their respective fields of expertise. Furthermore, in spite of the fact that most states around the world are party to international and regional human rights treaties that guarantee equality of rights and prohibit discrimination, national anti-discrimination legislation is often disparate, weak and/or non-existent. Public understanding of the concept of discrimination is generally vague and inadequate. Many policymakers and ordinary people do not
know what conduct or policy amounts to a violation of equal rights provisions and thus are similarly ignorant of the various remedies that are, or ought to be, open to victims of such violations. Legal definitions of discrimination are not consolidated in international jurisprudence and are rarely found in national legislation. Finally, non-discrimination jurisprudence has come to be associated mostly with employment, education, housing, and provision of goods and services but not with matters related to civil and political rights. The European Union’s equality Directives of the last decade played a double role: on the one hand, they enhanced the progressive development of the right to equality but, on the other hand, reflecting the limited sphere of application of EU law, they had the negative effect of perpetuating the lacuna between universal human rights and equality as distinct bodies of law. Indeed, the normative de-coupling of international human rights and European equality law has been aggravated further by the institutional structure of the European Commission insofar as human rights and equality fall under different Directorates. Hopefully, the creation of the Fundamental Rights Agency, embracing both agendas, will work in the direction of re-locating back together the fields of human rights and equality.

The second problem to which the creation of ERT was a response concerns the fragmentation of equality law and, in a parallel dimension, the corresponding fragmentation of the global movements for equality. In the last few decades, anti-discrimination advocacy has been pursued in different parts of the world predominantly within the framework of isolated single-identity agendas related to gender, race, ethnicity, religion, language, sexual orientation, disability, age, etc. At present, the space of non-discrimination struggles is complex and fragmented, broken down into more or less closed boxes from which other boxes are not perceived as inter-related in their relevance to equality. Indeed, some groups have pressed for ground-specific non-discrimination norms or even for norms covering single groups. Very few organisations have advocated comprehensive, multi-ground anti-discrimination law and policy. The following legal aspects of the fragmentation problem should be recalled:

- Different grounds of discrimination (gender, race, religion, sexual orientation, language, disability, age, etc.) are regulated differently within the same jurisdictions. The issue of equality is thus entangled within the fragmentation, hierarchies and inconsistencies of the prohibited grounds.

- Rigid lists of grounds leave out cases of discrimination on other grounds and create boxes or “strands” of equality. The relationships between the different forms of discrimination are thus left vague and
ill-defined and multiple discrimination is not adequately reflected in the law.

- Protections against discrimination are not spread across all relevant sectors of social life such as the administration of justice, employment, education, provision of goods and services, or healthcare. Thus, it is not inconceivable for there to be protection against religious discrimination in the field of employment, for example, but not in education or in housing.

Notwithstanding that detailed anti-discrimination provisions and policies covering specific grounds of discrimination or specific groups may be effective, it is necessary to ensure coherence and consistency in the levels and modes of protection across identities. The next agenda in the field of equality is the development of an integrated approach. For example, it should not be necessary for a disabled ethnic minority woman to choose the correct pigeonhole in which to put her case, whether on the ground of her race, or gender or disability. Instead, account ought to be taken of her multi-faceted identity.

At this stage, it is imperative to stress that while we, as an organisation, take a unified approach to discrimination, this should not be understood as seeking to impose uniform solutions on very different groups in tackling very different types of discrimination. Rather, it involves developing and strengthening key legal concepts concerning equal rights and finding practical solutions across different cultures, geographical regions and social groups.

The fragmentation problem is also evident in the dynamic of particular struggles in their relatedness to an overarching anti-discrimination agenda. On one hand, it is not possible to eliminate discrimination, particularly historically entrenched systemic discrimination, without singling out certain identity groups. The struggle for Roma rights, for instance, would not have achieved much without singling out the Roma. On the other hand, the representation of these groups as perpetual victims and the exclusive focus on their difference can, over time, begin to undermine the understanding of equality as a universal right. Identity politics, driven too far, begins to threaten not only social cohesion, but the legitimacy of the universal human rights framework. Difference is celebrated, but one major human “sameness” -- that of equality in dignity -- is suppressed. A preferable approach lies in striking a balance between the identity silence of those who deny that discrimination has affected disproportionately certain groups and the essentialist

“The next agenda in the field of equality is the development of an integrated approach. It should not be necessary for a disabled ethnic minority woman to choose the correct pigeonhole in which to put her case, whether on the ground of her race, or gender or disability.”
tendency to forget the universal humanity of the individual in the name of a group identity.

The Equal Rights Trust pursues its goals through advocacy, documentation of discriminatory practices and legal and policy research. These strategies, in conjunction with consultations and training, will remain in place for the foreseeable future. The Trust gives priority to addressing the most serious patterns of discrimination and to providing redress to victims of systemic or multiple discrimination. The organisation is predicated on the principles contained in the Universal Declaration of Human rights and in subsequent international and regional treaties and provisions relative to equality and non-discrimination. Building on the highest achieved levels of protection against discrimination, ERT promotes a holistic, unified approach to equality and human rights.

In this and subsequent issues, our aim is to highlight the relationship between general non-discrimination principles and binding anti-discrimination legislation and policy. Progress in ensuring protection against discrimination has been hampered by the general and abstract nature of the positive obligation of states to give effect to the principle of non-discrimination. Furthermore, states have been constrained by the lack of clear guidance on legal standards to be internalised in their domestic laws. Minimum standards set out in the Europe-

an Union Article 13 Directives have created an agenda for legislative advocacy that can be useful for many countries outside the European Union. This journal encourages discussion on the elaboration of legal standards, as well as on the principles on which such standards should evolve. We are convinced that it is time to seek and to find moral and professional consensus regarding the basic principles of equality. Indeed, one of our priorities currently is to enlist a broad range of experts and activists in an attempt to distil a set of such principles.

Finally, let me formulate the vision for this journal. The Equal Rights Review is intended as neither an academic peer-review journal, nor an NGO activist newsletter. Its genre will be somewhere in the middle: ERR will combine features of both, seeking a synthesis of deep, innovative and original theory, policy oriented analysis and more immediate advocacy effects. Especially welcome are new or controversial ideas that generate debate or fundamentally rethink established concepts and approaches.

Thematically, The Equal Rights Review will be an interdisciplinary journal on equality: an encounter between legal, philosophical, sociological, and other social science, practice and movement discourses. Its special focus will be on the complex and complementary relationship between the different forms of discrimination, and on developing strategies for translating the
principles of equality into practice. Not limited geographically, it will be a medium of exchange on equality issues between different national and regional experts, policy makers and practitioners. Some of the publications will zoom into the detailed landscape of one country, allowing lessons from different jurisdictions and cultures to be shared and absorbed. Others will be addressing general and fundamental aspects of equality. Each issue will include analytical articles, testimony by victims of discrimination, interviews, activity reports and assorted other materials, all related to equality and non-discrimination.

The ERT team is determined to do its best in order to ensure that The Equal Rights Review makes its mark on the equalities debate. Privileged to be the Review’s first editor, I enjoy the challenge.
“The attraction of the human rights framework is that difficult questions on tensions between equality and other rights will be confronted. Integrating equality into a human rights framework will unlock new discourses, legal techniques and problem-solving capacities.”

Jarlath Clifford
Locating Equality: from Historical Philosophical Thought to Modern Legal Norms

Jarlath Clifford

1) Introduction

It is well recognised that a corollary exists between equality and non-discrimination. In order to understand this nexus, however, the meaning of equality and the characteristics that make it a progressive, universal, moral and legal principle must be explored. Equality remains a quandary in both general and legal philosophy. It has been described as a “treacherously simple concept”, yet a spectrum of opinions exist in respect to the meaning, scope and practical application of equality. Moreover, in public discourse the idea of equality is topical and ubiquitous. Moral philosophy, political rhetoric, legal doctrine as well as common daily usage all adopt different concepts of equality that serve both complementary and competing interests. Such interests infuse the idea of equality and illustrate its many normative and positive forms.

Any attempt to locate the conceptual root of equality needs to be undertaken with a key pragmatic consideration in mind, namely, is it feasible to provide a holistic vision of the overarching idea of equality? For the purposes of this article, however, it is not. Instead, this article locates some of the characteristics that a good vision of equality would contain and maps out the parameters of a legal model which is capable of incorporating these characteristics. This approach will account for the complacencies and inadequacies of the better recognised models of equality and will focus on what has informed various international and national legal standards. This article first briefly examines the idea of discrimination, unequal treatment and disadvantaging effects and submits a rationale of employing progressive social mores into national legislative frameworks. Next the article sets out the historical philosophical formulations of the idea of equality. This entails an understanding of how the idea of equality has been perceived within moral and social philosophy and the transformation which it has undergone through different epochs. The fourth section of this article critically analyses the different approaches to implementing the principle of equality into law and identifies the limitations of each model respectively. This section focuses on three versions of equality which appear to be more prevalently incorporated into Western democracies: (i) formal equality, (ii) equality of opportunity, and (iii) equality of outcomes. It is argued that all three versions, as foundations for a legal model of equality, are limited in terms of (a) providing an appropriate moral basis from which equality can be legally protected, and/or (b) meeting the emerging challenges which the living nature of discrimination will inevitably produce. Finally, section five puts forward an alternative model which addresses and accommodates some of these concerns. Supporting arguments are submitted to demonstrate how this model provides a better vehicle for today’s emerging equality issues.
2) Discrimination, Unequal Treatment and Disadvantaging Effects

In its ordinary sense, “discrimination” imports the notion of difference. However, as a legal term of art, “discrimination” generally signifies the difference that relates to disadvantaging treatment or effect. Equality laws are often justified as a response to the disadvantage suffered by individuals through discrimination based on ownership of a particular trait or membership of a group carrying a particular trait. Such discrimination can manifest itself in a plethora of forms including direct discrimination, indirect discrimination, incitement to discriminate, harassment or workplace bullying, victimisation, and egregiously the systematic exclusion or persecution of an entire people.

Although a “Golden Age” of fairness and harmony among humans is believed by some to have existed before the beginning of written history, discrimination as unequal treatment has defined the human experience throughout history and across regions of the world. Today, all people live in a cultural and social environment formed by past, current and emerging forms of discrimination. Modern social relations have not yet reached a sufficient state where fairness and harmony occur and the right not to be discriminated against can be guaranteed without coercive enforcement. In this sense, the case for legally enforceable equality norms necessary to redress the everyday discrimination meted out by society has been well made.

3) Equality: A Historical Perspective

As set out above, this section seeks to identify what the idea of equality is (or has been) within current and historical philosophical frameworks as opposed to describing what equality ought to be. This section thus navigates the philosophical debate describing how equality has been viewed in historical thought and briefly evaluates whether certain characteristics can be identified which will provide valuable direction for modern legal equality norms.

Confucianism

Confucius’ social philosophy has often been charged with promoting societal difference and inequality. To be sure, its advocacy of the distribution of rights and privileges on the basis of social difference suggests that by modern Western standards of equality, Confucian equality sits oddly. In a historical sense, however, Confucian teaching does have significance for the idea of equality. Modern defenders contend that Confucian philosophy is not at odds with the idea of equality per se but rather, is merely at odds with certain mainstream conceptions of equality. Nuyen, for example, argues that the standard view of equality today is one which stems from Marxist credentials and thus it is itself open to the charge of being unworkable:

“If there is to be equality of outcomes, there will have to be inequality in the distribution of resources, if resources or opportunities are equally distributed, some will make better use of them, if there is to be equality in welfare or happiness, there will have to be inequality in the ranking of preferences.”

Illustrating that equality has many more facets, Nuyen distinguishes between, in his terms, horizontal equality and vertical equality. It is within the sphere of vertical equality that the Confucian contribution to the idea of equality can be located. Confucian vertical equality therefore fits within the idea of equality that those who are unequal are treated unequally – in this sense it is closely connected to Greek formalism.
The Greeks

For the Greeks the idea of equality was an important principle in their understanding of ‘the democratic society’ which is closely associated to 20th century conceptions. Thucydides, for example, sets out a progressive interpretation of the idea of equality through the prescription of the ways in which law should operate in a democracy:

“If we look to the laws, they afford equal justice to all in their private differences; if to social standing, advancement in public life falls to reputation for capacity, class consideration not being allowed to interfere with merit; nor again does poverty bar the way – if a man is able to serve the state, he is not hindered by the obscurity of his condition.”

The conception put forward by Thucydides suggests that equality is intrinsic to any notion of social justice in which the democratic order is bound. But is the Greek idea of equality and the provision in law unduly bound up within a masculine norm? Passages from Plato’s The Republic setting out opposing arguments on the equality of the sexes indicates that equality meant something different in respect to men and women. In this narrative, Plato expresses the distinction between men and women, the latter being weaker and less suited to military and gymnastic exercise. Plato concludes that while women’s function in democracy can sometimes equate to that of men, they are by nature different and in exigent times, these differences should be accounted for.

Plato’s position, however, has been criticised by 20th century philosophers for its totalitarianism and promotion of a system in which there is little personal freedom or individual rights.

Likewise, the Aristotelian notion of equality was based on formalism. The procedural manner in which Aristotle viewed equality is represented in his distinction between numerical and proportional equality. For Aristotle, this distinction is significant as it had important implications for the nature of democracy and democratic justice respectively. In respect of the former, Aristotle states:

“Every citizen it is said, must have equality, and therefore in a democracy the poor have more power than the rich, because there are more of them, and the will of the majority is supreme.”

In his conception of democratic justice, however, Aristotle required limits to the principle of equality espoused above, thereby reducing its effectiveness as an egalitarian principle:

“(b)ut democracy and demos in the truest form are based upon the recognised principle of democratic justice, that should count equally; for equality implies that the poor should have no more share in the government than the rich, and should not be the only rulers, but that all should rule equally according to their numbers.”

Undoubtedly, the classical Greek idea of equality is still important for various modern conceptions. However, a number of qualities which we would feel confident in ascribing to any modern interpretation are missing from the ideas shared among ancient Greek thinkers. One such characteristic is universality. Equality in the mainstream ancient Greek philosophical sense applied only to citizens of a state. It was not similarly ascribed to foreigners or those who were excluded from Greek political life and consequently, the idea of universal citizenship never developed in this aspect of Greek equality. Any normative value we, therefore, wish to derive from the Greeks of the classical age of Pericles for a modern interpretation of equality appears to
exhaust itself once one looks beyond a formalist or procedural conception.

The Development of a Christian Idea of Equality

The notion of universalism, however, was adopted within the framework of early Christian thought. St Thomas Aquinas, though a millennia into the Christian tradition, continued to develop the idea of universal equality before God. His writings on divine law emphasised a more egalitarian approach to equality whereby everyone is united under the common bond of happiness in which all individuals are directed by God. Aquinas’ conception of divine law commands that all be united in mutual love:

“Since man by nature is a social animal, he needs assistance from other men in order to obtain his own end. Now this is most suitably done if men love one another mutually. Hence the law of God, which directs men to their last end, commands us to love one another.”

Divine law and the Christian doctrine break from the Aristotelian notion of equality existing within a democratic order. Nevertheless, the Christian position presupposes that equality is something given by a divine power. Therefore, while the universality approach to equality developed by Christian doctrine further developed the framework of the classical Greek idea, it was in itself subject to the limit and privilege of those who believed in the divine. One limitation this places on a modern notion of equality may be observed in the words of the New Testament:

“Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”

This verse illustrates the early Christian thought on equality, where inequality of power, status or wealth on earth was accepted due to the belief that the individual would obtain their true reward in heaven where everybody was equal under God.

Natural Law and Equality

Thomas Hobbes sets out succinctly his vision of equality within natural law theory in Leviathan:

“Nature hath made men so equal, in the faculties of body and mind; as that though there be found one man sometimes manifestly stronger in body, or of quicker mind than another; yet when all is reckoned together the difference between man and man is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.”

Hobbes’ view of equality suggests that despite the inevitability that individuals are different in respect of individual physical and mental talents, such differences should not by themselves imbue benefits. Conor Gearty has argued that Hobbes’ conception of a society, where an absolute ruler is needed to whom we all must sacrifice our freedom so as to be able to survive (a Leviathan), has important connotations for the modern idea of equality. Gearty submits that Hobbes’ basic premise within Leviathan appears to be that where all are equal in natural rights they are able to use their equal natural rights to make choices regarding their participation in society. Furthermore, he argues that the natural law discourse of Hobbes’ time created a progressive egalitarian vision of equality which provides direction for modern lawmaking in facilitating ‘real’ equality.

Hobbes and many other natural law philoso-
phers believed that equality imparted natural rights to individuals on the basis of their humanity. For example, Locke recognised that under natural law, all men were equal in the sense that every man has an equal right to his natural freedom without being subjected to the will or authority of any other man. However, without perceiving any contradiction to his idea of equality in nature, Locke did not suggest that all men were equal in everything:

"I cannot be supposed to understand all sorts of equality. Age or virtue may give men a just precedence. Excellency of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude, or other respects have made it due." 28

Further, in the seminal The Rights of Man, Thomas Paine reiterates that all men are born equal with equal natural right. 29 This unity of man position ascribes God as the source of such an endowment, wherein the only basis of distinction is that of the sexes.

Natural law shifted the discourse of equality into a rights-based framework that offered increased opportunities for individuals to assert the idea of equality in a political-legal sense. Natural law theorists do not, however; provide a vehicle for the exploration of a more egalitarian vision of equality. Indeed, the Hobbesian conception of equality only ever touches upon egalitarianism and does not take into consideration the socially progressive action required in order to achieve 'real equality'. 30

Marxism

Karl Marx elucidates his view on 'the equal right' in, Criticism of the Gotha Program. This work, in which he espouses his declaratory banner, "From each according to his abilities, to each according to his needs!", sets out a critique of 'the equal right' developed by natural law theorists. Here, Marx questions the nature of the equal right and its ability to promote 'fair distribution'. Exploring its effects on labour, Marx states that the equal right is still restricted by capitalist limitations and accordingly, is still a capitalist right. As individuals are physically or mentally superior to one another, the 'equal right is unequal right for unequal labor'. 31

The source of Marx's frustration with the natural law idea of an equal right is that it recognises the inequality of individual endowment and productive capacity as a natural privilege. Marx subsequently argues that:

"It is, therefore, in its substance, a right of inequality, as is all right." 32

Marx's perspective illuminates the subtle discrimination that can occur within systems if the idea of equality is based on a procedural form which envisages equality as the application of rules. Nevertheless, it is not wholly adequate for modern demands. The problem with Marx's perspective is its bias for labour and economic goods 33 to the exclusion of other social and cultural needs, and the subsequent demands that his conception of equality would place on individual liberty.

4) Equality in Context: Legal Application

American pragmatist, John Dewey contends that equality does indeed have democratic credentials but this should not be mistaken with the belief in an equality of natural endowments:

"All individuals are entitled to equality of treatment by law and its administration....(E)ach one is equally an individual and
entitled to equal opportunity of development of his own capacities, be they large or small in range.”

If Dewey’s contention that the proper place for equality is to facilitate opportunity whereby an individual’s talents can be maximised is valid, it is important to examine how this can best be achieved. Section 2 of this article postulated that certain elements are particularly worthy of integration into a modern approach to legal equality. Universalism, individual freedom, egalitarianism all certainly have strong claims for inclusion into a successful model of equality law. This section aims to analyse and evaluate the models of equality which have been integrated into different legal frameworks and to assess whether these models have sufficiently countered the modern nature of discrimination.

**Formal Equality and the Traditional Legal Approach**

Equality as formal equality is the common and traditional approach in a broad range of national legal systems. The formal approach employs the concept of equality as a system of formal rules. The idea of formal equality has a clear connection to Aristotle and his dictum that equality meant “things that are alike should be treated alike”.

This is the most widespread understanding of equality today. Formal equality promotes individual justice as the basis for a moral claim to vice and is reliant upon the proposition that fairness (the moral virtue) requires consistent or equal treatment.

Equality as formal equality has an important role in the law and policy of many countries with advanced equality norms. For instance, it forms the conceptual basis of the term “direct discrimination” utilised in the UK or the guarantee of “equal protection of the laws” contained in the United States Constitution.

The formal approach asserts that a person’s individual, physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain. At the heart of most protagonists’ defence of this model is the principle of merit. The liberal argument sets out that formal equality is necessary if the principle of merit is to be maintained in a democratic society.

Libertarians further defend formal equality by arguing that it disfavours arbitrary decision-making processes – as when policies or people selectively disadvantage others due to a particular irrelevant trait. The value of formal equality is its ability to protect against defects being introduced into the decision-making process and ensuring that irrational and unfair decisions based on arbitrary criteria are kept out. Furthermore, it prevents the harm which may occur from any arbitrary decision-making process by permitting a person the opportunity to secure a benefit which they may have otherwise been denied which can reduce psychological injury.

Others suggest that the supposed value of neutrality of formal equality is merely an illusion, as it is questionable whether the law, legislature and the judiciary can claim to be truly neutral to all parties. To this end, formal equality cannot adequately deal with certain types of laws including, laws concerning issues that do not relate to choices between groups, such as licensing laws, and laws that appear to be based on prima facie neutral criteria but which subsequently create a disparate impact for certain people. In this way, formal equality, it is argued, confuses more than it clarifies. By masquerading as an independent norm, formal equality blinds us to the real nature of substantive rights and creates a dichotomy between human rights and equality (or non-discrimination), wherein both principles appear to operate independently rather than in synergy.
One well-documented drawback of formal equality is that it requires comparison. The comparator predominantly applied in the UK in proving direct discrimination is white, male, Christian, able-bodied and heterosexual. This rule assumes the existence of a 'universal individual' which can neglect the variety and diversity of modern society.

Modern society is rich in diversity. The approach of formal equality is to ignore the personal characteristics of an individual altogether. For example, in respect of racial discrimination, advocates of formal equality would prescribe a colour blind rather than a colour conscious approach. Whilst the model of consistent treatment has a role in society, the richness and complexity of modern life and modern social relations makes the application of this approach overly simplistic, as a basis for an integrated and comprehensive set of equality laws and measures.45

Equality of Opportunity

Recent constitutional reforms, increasingly influenced by academic debate, have sought to develop a more sophisticated concept of equality which takes into consideration the richness and variety of modern human relations and the subtle characteristics which can lead to discrimination and disadvantage. The concept of equality of opportunity represents a departure from the traditional legal notion of formal equality and the idea of consistent treatment. It is partly based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination because to fail to do so would leave people and groups at different starting points. However, equality of opportunity is also partly based on an individual libertarian model as it seeks to limit the application of full redistributive justice. Certain academics suggest that one weakness of focusing on equality of outcomes is that it affords too much respect to utilitarianism at the expense of other systems of thought.48

The integration of these theoretical perspectives has led to a notion of equality which seeks to equalise starting points irrespective of a person’s background or status. At present only a small number of legal systems adopt an equality of opportunity approach. For instance, the European Union has legal mechanisms and policies in place which permit the use of positive action to prevent and compensate for disadvantage and to promote equality.49

In practice equality of opportunity is a permissive interpretation of the idea of equality, allowing individuals from traditionally disadvantaged groups to receive special education or training or encouraging them to apply for certain jobs.50 Equality of opportunity recognises the shallow nature of formal equality and injects a substantive element into its framework.

Nevertheless, it seems the equality of opportunity approach depends as much on the notion of opportunity as on equality. Within the concept’s substantive hub, the equality limb refers to equality in its procedural sense. It dictates the rule that there should be an equal starting line in relation to goods such as access to employment. It does not create a framework for aligning starting lines wherever disadvantage and discrimination occurs. Furthermore, the task of equalising starting lines becomes more difficult in spheres where the mechanics for creating opportunities are less well defined. While equalising starting lines for employment include wider advertising of posts and increased training of individuals, creating opportunities to combat unconventional forms of discrimination is a greater task. For example, the ability of the equality
of opportunity approach to combat discrimination against a gay couple seeking adoption remains unproven. On a practical level it does not appear to fit easily into the equality of opportunity approach and such cases may consequently remain outliers to any legal model.

In reality it is the conception of opportunity which gives the concept purpose. Dewey’s statement above that “each one is equally an individual and entitled to equal opportunity of development of his own capacities” emphasises this point and illustrates that ultimately, equality becomes lost within a conception that relates more appropriately to social movement. For example, most legal models that have adopted an equality of opportunity approach have focused on providing opportunities in respect of economic goods and to lesser degrees, social goods. The neglect shown to a wide spectrum of the discrimination areas raises further concerns regarding its capacity for universal applicability to all individuals who have suffered discrimination and disadvantage.

**Equality of Outcomes**

Equality of outcomes is a substantive conception of equality. Unlike formal equality, which dictates behaviour through applying rules and procedures consistently, equality of outcomes seeks to invest a certain moral principle (namely social redistribution) into the application of equality. This concept of equality manifests itself through a spectrum of policies and legal mechanisms in various jurisdictions. Reverse discrimination, positive discrimination and affirmative action are just a few which have been put forward to represent this concept. Positive discrimination can be succinctly discerned from the positive action approach of equality of opportunity:

“Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the grounds of race, sex, religion or belief, etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit.”

In many ways the terms describing the equality of outcomes approach have politically controversial interpretations. Moderate interpretations exist in the form of special treatment provisions wherein it has been recognised that the principle of equal treatment sometimes requires different treatment for certain grounds of disadvantage.

This conception is inherently linked to the group/redistributive justice model and the achievement of a fairer distribution of benefits. The equality of outcomes approach has been adopted in the past in certain spheres in the USA and Northern Ireland.

The social philosophy underlying this conception of equality is an egalitarian understanding of social justice and of “the good life”, wherein the moral worth of equality is centred on its ability to provide equal outcomes for individuals or at the very least a satisfactory outcome for the most disadvantaged groups. In this sense, equality of outcomes submits to a socialist agenda albeit one which has limits imposed on it by the central tenets of a liberal democracy. The application of this conception of equality is subject to stringent scrutiny from classical liberalism which maintains that the distributive justice theory is abhorrent to liberal democratic thought for it imposes too high a burden on the state and individual autonomy.

Likewise, one perceived danger of this approach is that it places too little emphasis on the importance of accommodating diversity
by adapting existing structures.\textsuperscript{60} In this regard, some philosophers and theorists believe that the focus on certain disadvantaged social groups under this conception of equality misdirects the wider debate away from more serious and arbitrary distinctions that lead to disadvantage.\textsuperscript{61}

This point of conjecture reveals the quandary of whether countries founded on common national and cultural values can expect to successfully incorporate individuals, whose values and traditions are different to that of the majority. It seems the answer must be positive: human rights and equality discourses have consistently and organically incorporated issues relating to diversity and cultural appreciation into their rubrics. It is clear that such issues are inherent to the human rights mainstreaming agenda. Therefore, it is necessary to recognise that treating these issues outside the equal rights framework will only serve to dilute the force of the human rights discourse in general. Furthermore, expanding global markets propel migration across borders. In order to accommodate these migration patterns, states need to be in a position to capture the advantage of economic migrants who possess the abilities and capacity to meet inevitable labour demands.

In sum, this legal conception of equality contributes to combating initiatives and processes which result in the worst cases of disadvantage and discrimination for different groups. However, it remains a politically charged interpretation of equality under which competing economic, social and political interests must be addressed and balanced.

5) A Human Rights Approach to Equality

It has been suggested that equality as a stand-alone principle has little impact on combating substantive disadvantage.\textsuperscript{62} Equality’s amorphous nature means it is capable of taking on a range of different interpretations. Similarly, it may be viewed as an empty vessel which provides a pattern for building human relations. Consequently, there is a need for it to take greater moral character; to invest in other moral principles and form an ethical basis from which acceptable human relationships can be derived. The concerns regarding the above equality models have led to the emergence of a human rights approach wherein equality becomes the vessel for the delivery of more enriching value-laden principles.

A contemporary approach of bringing the equality agenda within a human rights framework has the effect of highlighting other conceptions of equality that purely economic integrationist legal models seem to neglect. This approach is based on dignity but dignity, in this paradigm, is meant to reflect the universality, indivisibility, and inter-relatedness of all human rights as understood in present-day interpretations. It proffers a theoretical distinction between treating people equally in the distribution of resources and treating them as equals which suggests a right to equal concern, dignity and respect.\textsuperscript{63} Treatment as equals shifts the focus of analysis to whether the reasons for deviation between persons are consistent with equal concern and respect. Interpreted in this way, equality offers a range of different conceptions.

Equality of consideration, dignity, respect or worth as a foundation for equal rights may ensure that equality has universal and egalitarian application. Such conceptions of equality provide a moral basis which is comprehensive in respect to the spheres of society it can penetrate. Moreover, it replaces rationality with dignity as a “trigger of the equality right”.\textsuperscript{64} The human rights based approach to equality adopts a similar substantive approach to equality as the equality of outcome model (and to a lesser extent the equality of
opportunity model), however, it can be distinguished from these two conceptions by the way in which it incorporates a human rights framework within its conceptual core rather than some varying notion of socialism or economic materialism. This approach creates the potential for a more purposeful and workable application of law and policy, through correlating the equalities and the human rights agenda and removing any artificial conceptual distinction among them. In addition, such an approach presents a workable framework to the equality agenda which has the potential to avoid negative political rhetoric which surrounds so much current equality discourse.

Admittedly, any promotion of a human rights approach to equality law cannot repel all the charges that may be laid against it. For example, some would argue that such a model would fail in its ability to create certainty in difficult cases as when the right to equality is countered against other freedoms such as religion or expression. The attraction of the human rights framework, however, is that these difficult questions will be confronted. Integrating equality into a human rights framework will unlock new discourses, legal techniques and problem-solving capacities from which it may not have availed if it were restricted to its adopted economic integrationist legal model. Freedom from these economic integrationist chains will enable equality to engage the human rights framework in a way whereby every caveat of disadvantage and discrimination can be examined and if necessary countered.

6) Conclusion

The challenge of translating theory into practice is present in all facets of society. Equality law is neither unique in its inability to escape this challenge nor in its failure to accurately defeat the social issues requiring action. However, equality law can be charged with meeting this challenge in a conceptually erroneous way. If the motivation to implement equality law is to be more than mere rhetoric, its theoretical foundations need to be anchored in more than reactive policy formulation. Within many national legal systems and indeed absent in a great deal more, the theoretical formulation of equality law has, at best, been based on an economic integrationist model which overlooks many other modes and spheres of discrimination and at worst, based on a formal version of equality which has traditionally viewed equality as the procedural application of rules and laws.

This article has shown through a brief overview of the historical and philosophical foundations of the idea of equality that the legal models of formal equality, equality of opportunity or equality of outcome insufficiently account for various facets and caveats of modern discrimination. Similarly, all three of these equality legal models are missing important characteristics which we would be confident a good equality law could include. The implementation of equality law, with the exception of a limited number of national and regional jurisdictions, has been formulated from a perspective which borrowed but has not improved on past historical thought on equality. It is important that just as the philosophical notion of equality has evolved into a more substantive notion under the context of emerging issues, so too must the law. In order to combat these emerging issues, equality as guaranteed by law must reflect the dynamic interpretation set by its theoretical context.

To conclude, the principle of equality has undergone a range of interpretations and its scope of possible interpretation undoubtedly remains vast. Whilst no interpretation can claim to be a categorical truth in the application of the conception of equality, it seems the human rights based approach of ‘treatment as
an equal, not equal treatment’ provides an excellent philosophical maxim by which equality can be translated into meaningful legal and policy instruments. With such a philosophical basis in place, equality can regain its role as a central pillar of the human rights discourse and break down any artificial barriers which uphold the idea that equality is anything other than inherent, fundamental and indivisible to human rights.

1 Jarlath Clifford is Legal Officer at The Equal Rights Trust.
4 For example, the international human rights law contained within UN Conventions and Declarations jurisprudence, and the law of countries such as the UK, the USA, Canada, South Africa or Ireland.
5 For example, the definition contained within the Collins English Dictionary, states that “discrimination” is “1 unfair treatment of a person, racial group, minority, etc; action based on prejudice 2 subtle appreciation in matters of taste 3 the ability to see fine distinctions and differences”, Collins English Dictionary, Sixth edition, HarperCollins Publishers, 2006, p. 450.
8 See above, n. 7, p. 67.
9 Horizontal equality, Nuyen states, is when equals are treated equally, vertical equality is where those deemed unequal are treated unequally.
13 “Then let the wives of our guardians strip, for their virtue will be their robe, and let them share in the toils of war and the defence of their country; only in the distribution of labours the lighter are to be assigned to the women, who are the weaker natures”. (Plato. “The Republic”, see above, n. 12, p. 47.)
15 Perhaps the most significant representation of this approach is Aristotle’s dictum that, “things that are alike should be treated alike”, Aristotle, 3 Ethica Nicomachea, 112-117, 1131a-1131b, Ackrill, J. L. and Urmson J. O. (eds.), W. Ross translation, Oxford University Press, 1980.
16 Where numerical equality refers to equality in number or size and proportional equality refers to equality of ratios.
18 See above, n. 17, p. 50.
19 Another perhaps is individual over collective freedom.
Similarly, the idea of equality applied at varying degrees within the state.

See above, n. 10, p. 18.

22 See, for example, Cyprian, from ‘Ad Demetrianum’, who states: “You yourself exact servitude from your slave and, yourself a man, compel a man to obey you, though you share in the same lot of birth, the same condition of death, like bodily substance, the same mental frame, and by equal right and the same rule come into this world and later leave it.” (In Abernethy, George. “Chapter 12, Cyprian”, Introduction to the Idea of Equality: an Anthology, John Knox Press, 1959, p. 66.)


24 Mathew 22: verse 21, Bible of King James.


27 See, for example, the contention of the Levellers that ‘as the laws ought to be equal, so they must be good, and not evidently destructive to the safety and well-being of the people’, in Gearty above, n. 26, p. 6.


30 This term has been adopted by Connor Gearty in his lecture, “Can Human Rights Deliver Real Equality?”, see above, n. 26.


32 See above, n. 31, p. 30.

33 Marx’s states, “Labor is the source of all wealth and of all civilization.” See above, n. 31, p. 19.


35 See, for example, the early interpretation of the “Equal Protection Clause” by the Supreme Court of the USA in Plessy v. Ferguson 163 U.S. 537 (1896). Similarly, this was the approach in the incorporation of early anti-discrimination law in the UK, for example, the Race Relations Act 1965 or in the early interpretation of section 15 of the Canada Charter of Rights and Freedoms by the Supreme Court in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

36 See above, n. 15.


38 See for example, Section 1(1)(a) of the Race Relations Act 1976; Section 1(2)(a) of the Sex Discrimination Act 1975.

39 Section 1, Fourteenth Amendment to the United States Constitution.

40 For example, S merits X in virtue of M, where S is a person, X a mode of treatment or an outcome, and M some feature possessed by S. So, for example, we might say that John (S) merits the award of the sports prize (X) in virtue of having ran faster than anyone else competing in the race (M). See McCrudden, Christopher: ‘Merit Principles’, Oxford Journal of Legal Studies, Vol. 18, No. 4, 1998, pp. 543 – 579.


44 Which can be either real or hypothetical.

45 The limitations of the formal approach to equality are acknowledged in the interpretation of the idea of non-discrimination provided by the Committee on the Elimination of Discrimination against Women, where the Committee stated that Articles 1 to 5 and 24 together indicate that State Parties under CEDAW are required to go beyond a formal interpretation of equal treatment between men and women to counter and improve the de facto situation of women and to address prevailing gender relations and the persistence of gender-based ste-

46 For instance, in Canada in 1982 and the Supreme Court decision of Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 and South Africa in 1996.

47 Utilitarianism in this sense correlates to a socio-legal conception where the overemphasis on results, and the principle of distributing equal proportions of a resource, can mask the unfairness inherent in the process of achieving these results.


51 See, for example, the European Court of Human Rights case of E.B. v. France (application no. 43546/02).

52 For example, the United Kingdom and the EU.

53 Within this article equality of outcomes and equality or results are used interchangeably to represent the same concept.

54 The term is used in certain European contexts.

55 The term is commonly used in the context of the USA.


58 In the USA context equality of outcomes policies have been adopted (and legally challenged) through quota systems within university admissions procedures. See, for example, Regents of the University of California v. Bakke 438 U.S. 265 (1978). In respect to Northern Ireland, one particularly noteworthy example is in respect to criminal justice and recruitment onto the Police Service for Northern Ireland, as set out by Recommendation 121 of “A New Beginning: Policing in Northern Ireland: the Report of the Independent Commission on Policing for Northern Ireland”, 1999, (the Patton Report), (available at: http://www.nio.gov.uk/a_new_beginning_in_policing_in_northern_ireland.pdf, accessed on 11 March 2008).


61 For example, Nagel argues that the greatest source of injustice is not sexual or racial discrimination but intellectual discrimination where intellectual merit is regarded as a non-arbitrary moral virtue indicative of worth. He states, “One may be inclined to adopt admission quotas, for example, proportional to the representation of a given group in the population, because one senses the injustice of differential rewards per se..... The trouble with this solution is that it does not locate the injustice accurately, but merely tries to correct the racial or sexual skewed economic distribution which is one of its more conspicuous symptoms..... In most societies reward is a function of demand, and many of the human characteristics in most demands result largely from gifts or talents. The greatest injustice in this society, I believe, is neither racial or sexual but intellectual.” (Nagel, Thomas. “Equal Treatment and Compensatory Discrimination”, Philosophy and Public Affairs, Vol. 2, No. 4, 1973, pp. 356 - 357.)


65 For example, Canada, South Africa or the European Court of Human Rights system.
Multiple Discrimination: How Law can Reflect Reality

Paola Uccellari¹

1. Introduction

Multiple discrimination is discrimination against one person on the basis of more than one ground. A black disabled woman may, for instance, experience discrimination on the grounds of her disability, her race and her gender. Consideration of this phenomenon and its implications for equality legislation is a necessary corollary of recognition that individuals have multiple identities. Clearly, people are multi-dimensional and so cannot be classified according to, or defined by, a single characteristic. Each of us has a gender, sexuality, age, ethnicity, etc. and no single aspect of our identity is necessarily more important than all the others. Any one of an individual’s attributes, or any combination of them, may, therefore, form the basis of discrimination. In spite of this truism, many models of anti-discrimination law deal with each ground of discrimination separately. The law thus conceives of potential claimants as the bearers of single characteristics and assumes that discriminators are simple creatures who will only base their discrimination on one ground at a time. Further, in recognising only a single aspect of a person’s identity, the law fails to reflect the fact that people sharing one protected status may differ in respect of their other characteristics. It operates on the premise that all people within a protected group are the same.

This mismatch between law and reality has had several undesirable consequences. Firstly, equality law frameworks fail to provide adequate protection to individual victims of multiple discrimination. Secondly, in failing to accommodate the reality of a person’s identity, such equality regimes indicate to the individual that her identity is not valued by society. This is clearly a consequence which should be avoided, if it is accepted that equality law is intended to protect human dignity. Thirdly, it has engendered an oversimplified, single-ground analysis of discrimination among policy makers. As a result, policies intended to tackle discrimination fail to conceive of the types of disadvantage which arise out of multiple discrimination. Finally, the single-ground focus of the law has been mirrored in civil society. The lack of legal protection has therefore led indirectly to a dearth of moral and practical support for victims of multiple discrimination.

This article will seek to elaborate on the inadequacies, identified above, of a system of discrimination law which denies the reality of multiple discrimination and will make practical recommendations as to how the imperative for change might best be met. The legislative framework in Great Britain, which, at the time of writing, is under intense scrutiny owing to government reform proposals, will serve as an illustration of the particular features of an equality law regime which require attention if they are to be rendered fit to address multiple discrimination.

The second part of this article will outline the different ways in which a person’s multiple characteristics can interact to form the basis
of discrimination and will examine whether single-ground legislation can provide redress for such discrimination. Part three will explore the mismatch between the law’s approach and the reality of human experience and its implications for human dignity. This article will then show that discrimination experienced on the basis of more than one ground can be both qualitatively and quantitatively different from the sum of discrimination on each of those grounds. This will serve to support the writer’s central argument, which is that multiple discrimination demands a specific response from the law, not only to improve access to justice for individuals, but so that policy makers (part four) and civil society (part five) are made aware of and equipped to tackle the specific implications of the multiple discrimination experience. Part six will present arguments which suggest that states are obliged to tackle multiple discrimination by international law. Finally, an overview of the features of the British legislative framework which render it unfit to address multiple discrimination (part seven) will precede a detailed analysis of how legislation might best be designed to do so (part eight).

2. Practicalities: Multiple discrimination and Claims under Single-Ground Legislation

Types of Multiple Discrimination

A person’s multiple identities may result in that person experiencing discrimination on one ground on one occasion and on another ground on a different occasion. While a lesbian may on one occasion be rejected for promotion because she is a woman, she may on a subsequent occasion be excluded from a social event because she is a lesbian. In such circumstances, the victim of discrimination will be able to compartmentalise her experience of discrimination into separate unlawful acts based on a single ground. Each could be considered separately in any legal proceedings.

A person may, as a result of her multi-dimensional identity, experience separate discriminatory acts in relation to different grounds, each of which contributes to the same less favourable treatment. This facet of multiple discrimination has been referred to alternatively as compound, cumulative or additive discrimination. Gay Moon illustrates this point by reference to the facts in Perera. In this case, a personal specification for a job contained several discriminatory requirements, each of which operated to exclude the claimant from being successful in his application for that position. While no single requirement would alone have made his application fail, each one of the discriminatory requirements which the candidate was unable to fulfil contributed to make it increasingly unlikely that he would be selected for the job. Again, though, it is possible to see that each ground could be analysed separately under the law.

Intersectional discrimination is the term widely used to describe situations in which two or more grounds operate inextricably as the basis of discrimination, such as, for example, where black women are refused promotion in an organisation in which white women and black men are promoted. While the possession of either attribute alone (that is, the disadvantaged gender or race) would not have led to the discrimination, it is the combination of race and gender which form the grounds of the less favourable treatment. A victim will not be able to show that, but for her race or gender, she would have been treated differently. In legal proceedings the grounds must, therefore, be dealt with together. Since it is intersectional discrimi-
nation which requires specific treatment under the law, the remainder of this article will focus largely on this facet of multiple discrimination.

Claims under Single-Ground Legislation

In Great Britain, the courts have ruled out the possibility of bringing a successful case of intersectional discrimination on the basis of the current legislative framework. In Bahl v The Law Society a woman claimed that she had been discriminated against both on the ground that she was Asian and on the ground that she was a woman. The Court of Appeal decided that each ground must be separately considered by the tribunal and a judgment made in respect of each. The claimant’s case failed because she could not show that any aspects of her treatment related to only one ground.

Since this judgment, an applicant can bring a case in respect of intersectional discrimination by focusing on a sole ground, choosing the ground in respect of which her case is strongest, or by claiming alternate or cumulative grounds. This situation is, however, unsatisfactory. Where two or more grounds have in fact operated inextricably, so that the person would not have been discriminated against had she not had each one of the protected characteristics, being forced in law to address each ground separately will necessarily weaken a victim’s case. Even if a case concentrating on just one of multiple grounds were successful, such a result would be unsatisfactory to the victim because it would fail to acknowledge the reality of the victim’s experience and the extent of the injustice suffered. It is inconsistent with the dignity of the whole individual to exclude from protection treatment that the individual as a whole has received.

The current state of the British law poses the risk that discrimination will go unchallenged and that victims will remain uncompensated. Yet intersectional discrimination is not a peculiar type of act which, as a matter of principle, should remain outside the scope of equality legislation. The black disabled victim of intersectional discrimination will be thwarted in a claim of race discrimination by the existence of black able-bodied comparators and in a claim relating to disability by the existence of white disabled comparators who have not suffered the same treatment. This does not, though, show that the defendant does not discriminate against black or disabled people, it merely shows that she does not do so in all circumstances.

Further, the occurrence of multiple discrimination is not a rare phenomenon. Jurisdictions which have legislation providing for situations of multiple discrimination have monitored the number of cases being brought on multiple grounds. The Ontario Human Rights Commission has announced that 48% of discrimination cases brought between 1997 and 2000 related to multiple discrimination. In 2006, 21% of cases brought under the Irish Employment Equality Act and almost 30% of cases brought under the Equal Status Act were brought in relation to more than one ground. These figures show that this is a significant matter which all jurisdictions should equip their legal systems to address.

Despite the deficiencies of the current British legislation in this respect, the government has stated in its reform proposals that it does not have evidence that people are losing or failing to bring cases in relation to multiple discrimination and has indicated that this is a matter largely of academic interest. Next then, we will consider why “ac-
ademic commentators” are concerned that multiple discrimination should be properly addressed by anti-discrimination law.

3. Conceptual Problems: Multiple Discrimination and Human Dignity

The Joint Equality and Human Rights Forum, an organisation which represents the human rights and equality bodies of Britain, Ireland and Northern Ireland, commissioned a study, “Rethinking Identity”, to explore the implications of multiple identity.¹⁰ One of its most important conclusions is that identity is important to “people’s positive sense of self”.¹¹ Respect for people’s sense of their own identity is, therefore, integral to respect for their dignity.

One of the aims of equality legislation is to protect human dignity.¹² If, however, discrimination law imposes its own notion of identity on individuals, it will undermine the very values it is intended to uphold. There are two ways in which discrimination law can do so. Firstly, it requires a victim to place herself, in her legal pleadings, within a category (black/Asian/woman/man). If the available categories do not reflect the claimant’s perception of her identity, she will be required to describe herself in terms with which she does not identify. The legislator thus indicates that her true identity is not valued by society, as it is not worthy of protection against discrimination. Secondly, discrimination law which categorises those it seeks to protect will encourage policy makers to conceive of the individuals they serve in terms of the categories defined by the law. The resulting policies, designed by reference to artificial notions of identity, are likely to exert pressure upon their subjects to live according to those notions. People will try and fit into the categories which have influenced policy-design in order to gain the benefit of those policies. If discrimination law is susceptible to thus influence people’s sense of self, it should be designed so that the notions of identity it protects reflect human experience. Equality legal regimes which categorise identity and require each protected characteristic to be dealt with in isolation will, though, necessarily fail to reflect peoples’ sense of self. This is because they are based on an assumption that protected groups are objectively identifiable, mutually exclusive and internally homogeneous. A failure to address intersectional discrimination is, in fact, only one symptom of this flawed approach. It is valuable to consider here the broader sense in which a categorical approach to identity is divorced from human experience, because this will influence discussions as to how multiple discrimination should be addressed by the law.

The categorisation of identity implicit in the current structure of equality legislation reflects society’s construction of identity, not the individual’s experience. A participant in Rethinking Identity told researchers, “I don’t see myself as a person with a disability. It’s only the other person who sees me as that”.¹³ The law effectively labels and objectifies people and encourages society to do so also. This is belittling for the individual and damaging to human dignity. On this basis, it is the system of categorisation itself which should be challenged, if the law is not to undermine human dignity.

Even if a system of categorisation were accepted as an undesirable but practical necessity, the labels commonly available under equality law are inappropriate. The British law’s approach is based on an assumption that groups can be defined according to objective characteristics.¹⁴ This is by no means uncontroversial:
“Intersectionality as a tool of feminist analysis today acknowledges that identity composition reflects the broader power formations in society.” 15

This mismatch between the available labels and individual experience is even greater for victims of multiple discrimination. In selecting mutually exclusive categories to define groups, equality law serves to exaggerate differences between groups and ignores differences within groups. 16 This does not reflect an individual’s sense of her own complex identity for several reasons. Firstly, there is no clear dividing line between grounds. Thus, for example, ethnicity is “intimately bound up with religion”. 17 Secondly, the grounds are not, in fact, mutually exclusive. People are not either disabled or gay, but can be both. Individuals do not consider themselves as overwhelmingly defined by their gender or their race, but as a complete whole. Finally, an approach which renders differences within groups invisible has meant that the grounds are “defined as if they have fixed unchanging essences.” 18 People within a group are not, though, all the same. Thus, even where people share the same “objective” multiple identities, the possession of the characteristics which make up that identity will not mean the same to every person within the group. For some people, one identity can feature more strongly than another identity or other identities. 19 People may emphasise one aspect of their identity in one context and another aspect in another context. 20 Here again then we see that even if it were possible to provide labels which are more nuanced and so applicable in theory, the practice of labelling itself would remain objectionable.

A failure to recognise multiple discrimination is thus only one way in which categorical equality law regimes are divorced from the lived experience of identity. If equality law is to be fit for purpose it must seek to achieve a certain amount of fluidity in its response to individual experiences of discrimination.

4. The Specificity of the Multiple Discrimination Experience and Policy Responses

The intersectional discrimination experience can be different from other types of discrimination in three ways. Firstly, discrimination which is known to affect a disadvantaged group may have causes and consequences which are different in respect of a subset within that group. More significantly, subsets may experience discrimination which does not touch the wider group. Further, the disadvantage experienced by subsets may be greater than that experienced by the group as a whole. Each of these points has implications for policy makers, which will be addressed here.

If policy makers are not encouraged to look at the multidimensional aspects of discrimination, their understanding of the discrimination suffered will be very simplistic. Crenshaw, referring specifically to the interrelation between race and gender, has argued that “neither the gender aspects of racial discrimination nor the racial aspects of gender discrimination are fully comprehended within human rights discourses”. 21 A failure to acknowledge the phenomenon of multiple discrimination in the law has overemphasised the homogeneity of groups. This means that policies aimed at improving the situation of a group are designed by reference to the needs of the most dominant members of that group, that is, those who are in a position to represent the group and define its interests. Such policies fail to conceive of, and thus fail to address, the specific needs of subsets within the group. If, for example,
a link is identified between disadvantage in the labour market and gender, but analysis goes no further than this, the compound disadvantage experienced by Asian women or black women, will remain invisible. Where policy makers are unaware of the true complexities of the problem, the effectiveness of remedial efforts will be limited. Any measure aimed at addressing the disadvantage of the group as a whole, without distinction, will be inappropriate to improve the situation of the whole group, because the causes of the disadvantage will not be the same for all within its parameters. Further, such efforts may only be of assistance to the “dominant” members of a disadvantaged group and so not target those who are the most disadvantaged within the disadvantaged. Ashiagbor notes that though the increase in rights for part time workers has had a positive impact upon women’s experiences in the labour market, it is of more benefit to white women than to black women, since black women are more likely than white women to work full time.\textsuperscript{22}

An intersectional approach to analysing discrimination not only allows policy makers to identify new aspects (gender, racial etc.) of discrimination which has already been recognised, but also reveals types of discrimination which would otherwise remain invisible.\textsuperscript{23} If policy makers fail to look at multidimensional aspects of discrimination, they will identify the most obvious problems of the group as a whole, but will miss the less obvious specific concerns of groups within groups. An example of this was given in “Rethinking Identity”. Participants found that, as disabled women, they were not expected to have sex or children. One such participant found that when attending a doctor’s surgery for a postnatal check up, which was to include a cervical smear, the examination couch was inaccessible to her. Though the service had been designed with the needs of women in mind, account had not been taken of the specific needs of disabled women. Neither a disabled man, nor a woman who was not disabled, would have faced this barrier. In failing to conceive of the problems occasioned by multiple discrimination, the law provides no motivation to tackle them.

In addition to being “qualitatively different” intersectional discrimination can also be “quantitatively worse” than discrimination on a single ground.\textsuperscript{24} The Equalities Review found that, “multiple markers of disadvantage” drastically reduce the likelihood of being employed.\textsuperscript{25} The employment penalty suffered by Pakistani and Bangladeshi women at the beginning of the 21st century was 30 per cent, which compared with 12 per cent for Pakistani or Bangladeshi men and 23 per cent for women as a whole.\textsuperscript{26} These figures illustrate that where a person belongs to more than one disadvantaged group, she will be more likely to suffer hardship than those belonging to only one such group. The greater disadvantage experienced by victims of multiple discrimination might suggest that such discrimination should be specifically targeted. Yet, if the law fails to recognise the interaction of grounds, the specific and more extreme manifestations of disadvantage associated with it will go unaddressed.

The very fact that equality legislation exists to protect certain groups, in addition to human rights instruments guaranteeing rights for all, recognises that protective measures should be well targeted and address the problems of the most disadvantaged specifically.\textsuperscript{27} To recognise and address multiple discrimination in equality policies is merely to take this understanding – that some are unfairly disadvantaged in relation to others and so require specific protection under the law - a stage further, so that the disadvantaged within the disadvantaged are also protected.
5. Development of Civil Society

An important message which has resulted from the limited research into multiple discrimination is that it is not sufficiently recognised by civil society. While there are excellent examples of best-practice among NGOs in addressing this phenomenon, the level of awareness and commitment is not consistently high across the sector and many organisations find themselves limited by the terms of their mandate. If the law were to explicitly recognise the existence of multiple discrimination as a valid concern and offer new legal possibilities to challenge institutional behaviour, this would raise awareness in civil society and encourage the development of new groups, or links between existing single-ground organisations, to exploit those possibilities. This view is shared by Hannett, who argues that the existence of a single equality statute can serve as a “focus for links and solidarity between groups facing discrimination”.

A recent study on multiple discrimination carried out on behalf of the European Commission also supported this proposition and prioritised the promotion of multiple-ground NGOs as one of its seven concluding recommendations.

There are two broad reasons which make it important for civil society to respond to multiple discrimination. These mirror the reasons, identified in Parts three and four, that law should do so. Firstly, NGOs can enhance respect for human dignity. Civil society organisations representing multiple identities serve to affirm the value of those identities. They also counteract the negative impact on dignity which single-ground organisations can have. Such organisations have been found to encourage their members (whether explicitly or implicitly) to suppress elements of their identity which are not common to all members. “Rethinking Identity” documents the isolation of lesbian, gay and bisexual (LGB) disabled people owing to prejudice towards disabled people in the LGB community and the existence of homophobia in the disability movement.

Secondly, organisations addressing intersectional issues can work to raise awareness and so encourage policy makers to address the specificity of the intersectional experience. Rethinking Identity found that intersectional issues, such as those specific to disabled people from ethnic minorities, are marginal to both disabled groups and race equality movements and so remain invisible. Ground specific groups compete over territory but none address the needs at the intersections.

6. EU and International Law

The next section will briefly analyse the extent to which the phenomenon of multiple discrimination has been recognised by, or incorporated into, European and international legal instruments protecting equality and whether either of these two systems impose obligations on states to implement domestic legislation prohibiting this type of discrimination.

European Law

The European equality directives do not contain provisions dealing expressly with situations of multiple discrimination, but they do recognise the existence of the phenomenon:

“In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should...aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”

Further, it has been suggested that a purpo-
sive interpretation of the European equality legislation would result in a finding that it prohibits multiple discrimination.\textsuperscript{34} To return to the example used earlier, a failure to address discrimination against subsets of women will undermine efforts to tackle discrimination against women generally. If then, the purpose of the European legislation is to eliminate discrimination against women, this purpose demands that instances of multiple discrimination against disadvantaged subsets of women be prohibited. This reasoning would, of course, apply to the other grounds protected.

Similar arguments have been outlined by others. A recent study on multiple discrimination carried out on behalf of the European Commission suggests that references to race and gender in the recitals of the Employment Equality Directive,\textsuperscript{35} which deals with disability, age, religion and sexual orientation, indicate that the directive is intended to work in conjunction with existing provisions in relation to the other grounds. It is argued by the authors of that report that this is a valid basis upon which to assert that the EU equal treatment legislation does, in fact “encompass the possibility of addressing Multiple Discrimination on all protected grounds”.\textsuperscript{36}

Whether or not the current European legislation can be said to require member states to outlaw multiple discrimination, it certainly does not prohibit them from enacting legislation to address this problem. The directives do, of course, allow Member States to offer greater protection in national legislation than that required by the directives.\textsuperscript{37}

The legality of positive action measures to address multiple discrimination is less clear, but Fredman argues that since it is permissible under European law to take measures to compensate for disadvantage “linked to” the grounds protected by the directives,\textsuperscript{38} positive measures targeted at those suffering multiple discrimination will be permitted under European law, so long as they comply with the requisite criteria.\textsuperscript{39} Such measures will be linked to a ground protected by a directive, notwithstanding the fact that they will also be linked to another ground.

Finally, it should be noted that there has been increasing interest in multiple discrimination among the institutions of the European Union. This has been most clearly illustrated by the European Commission, which commissioned the Danish Institute of Human Rights to carry out a study on multiple discrimination. The second of the seven recommendations resulting from the study was that EU and national legislation should be amended to provide effective protection against multiple discrimination.\textsuperscript{40} It is possible that this may influence the content of future European law.

**International Law**

Many international human rights treaties contain provisions protecting the right not to be discriminated against. A detailed analysis of the discrimination provisions of each international treaty and related jurisprudence is beyond the scope of this paper. It is, however, appropriate to note that human rights treaty bodies have shown significant and increasing willingness to find a right to be protected against multiple discrimination within existing human rights provisions. The Human Rights Committee has, for example, observed that “[d]iscrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status”.\textsuperscript{41} The Committee on the Elim-

...as originally conceived. It is, however, well recognised in international human rights jurisprudence that the unique nature of human rights instruments justifies a dynamic approach to their interpretation, so that the content of human rights law can develop to reflect changes in attitudes. On this basis, recently gained awareness of different and aggravated forms of discrimination, shown to be equally, if not more, worthy of protection as traditional notions of discrimination, mean that these notions should form part of our understanding of what the right to equality entails.

Having outlined the conceptual, practical and legal reasons that domestic legislation should address multiple discrimination, it is appropriate now to consider the features of British legislation which render it unable to do so.

7. The British Experience

Division and Hierarchy

The British anti-discrimination legislation has developed in an ad hoc fashion, amended as societal attitudes evolved, in response to immediate political demands, or, more recently, as required by European law. This has resulted in a fundamental symbolic divide between the grounds, as each is dealt with by a discrete statutory regime. Further, prior to the Equality Act 2006, separate equality bodies were responsible for overseeing the working of the legislation addressing race, gender and disability. Thus victims of multiple discrimination were not only required to grapple with distinct statutory regimes to determine their rights, but were also unable to turn to a single body as a source of information. This symbolic divide between the grounds is compounded by the fact that there is no uniformity in the protection afforded by...
each regime. In some cases this is as the result of a policy decision that the protection in respect of one ground should be more extensive than that afforded other grounds. In other cases, concepts which are common to all the legislation have been defined differently in respect of different grounds. Further, different exceptions apply in relation to different grounds. These factors, which effectively produce a hierarchy of grounds, would make it difficult to bring a case claiming intersectional discrimination even if it were technically possible to do so.

Direct Discrimination

In order to show direct discrimination under the current legislative framework in Great Britain, the claimant must show that her treatment was less favourable than that which was, or would have been, afforded to another person, referred to as the “comparator”. It is well known that cases can be won or lost according to whether an appropriate comparator is chosen by the claimant. These problems of proof are exacerbated in cases of intersectional discrimination. The courts in Britain have not allowed reference to an “opposite” comparator. A black woman seeking to prove sex discrimination must compare her treatment with a “man”. His race, be it black, white or otherwise, is not taken into account for the purposes of a sex discrimination case. In a claim of race discrimination a black woman must refer to a white comparator, who is gender-free for the purposes of the comparison. Such a rule thwarts claims relating to situations in which it is only black women that are disadvantaged. The alleged discriminator would be able to point to non-disadvantaged white women to disprove a claim of sex discrimination. If the respondent is able to identify black men who have not been subjected to the same treatment as the claimant, this will weaken her case of race discrimination.

Indirect Discrimination

In proving indirect discrimination, it is necessary to show that an apparently neutral provision, criterion or practice (PCP) places members of a protected group at a particular disadvantage when compared with the comparator group. In order to prove this, reference is often made to statistics. If the law fails to take into account intersectional discrimination, claimants will be required to compare statistics relating to the broad groups defined by the law. Where the PCP disadvantages only a sub-group of the wider group, a claimant’s case will be weakened by the inclusion of those not adversely affected by the PCP within the “disadvantaged” pool. A commonly used example of indirect discrimination will serve to illustrate this point. If an employer requires that all staff work full time, women, who statistically are more likely to have childcare responsibilities, will be less likely than men to be able to comply with this requirement. It is, however, also statistically true that black women are more likely than white women to work full time. If protected groups are only defined according to single characteristics, in determining whether the requirement to work full time is indirectly discriminatory against women as a group, it will be necessary to assess the number of men that can comply with the requirement to work full time and to compare this with the number of women that are able to do so. The inclusion of black women within the class of women will serve to weaken the statistical data in support of a white woman’s case.49

Equal Pay

In relation to most grounds unequal pay is treated as direct or indirect discrimination. Claims relating to pay are, however, excluded from the scope of the Sex Discrimination
Act 1975 (SDA). Instead, the Equal Pay Act 1970 (EPA) inserts a clause into contracts of employment to the effect that any term in a woman’s employment contract which is less favourable than that contained in a comparable man’s contract is treated as modified so as not to be less favourable. Further, while in claims of discriminatory pay based on other grounds it is possible to refer to a hypothetical comparator as evidence of discrimination, in equal pay claims relating to gender, it is necessary to identify an actual comparator. Time limits and compensatory regimes also differ between equal pay and discrimination cases. These distinct regimes and differing evidential burdens present obstacles to claims in relation to discriminatory pay which are based on the intersection of gender with another ground. Moreover, the particular difficulties associated with bringing a successful equal pay claim, which are well-rehearsed, are likely to have a disproportionately negative impact upon those who suffer intersectional discrimination. The need to refer to an actual comparator in equal pay claims has meant that equal pay legislation is unable to address instances of occupational and workplace segregation, which contribute considerably to the gender pay gap. It is possible that this issue will impact particularly upon those experiencing multiple discrimination, because occupational and workplace segregation occurs along intersectional lines. Studies have, for instance, shown that women with a migrant background are particularly concentrated in low paying, low status and insecure sectors of the labour market, such as cleaning, catering, personal and domestic services, health and care.

8. Implications for Law Makers

It is mainly the disjunctive structure of the equality regime in Great Britain and differences in the protective regime in respect of each ground which have led the judges to exclude a more flexible approach to proving a multiple discrimination claim. Multiple discrimination can, therefore, be addressed through a few quite simple steps. More radical proposals have, however, been made as to how legislation might best address this phenomenon.

Structure

It is clear from the preceding discussion that multiple discrimination should be addressed by a single equality law, encompassing all grounds. To make multiple discrimination claims a reality in practice, the act should avoid creating a hierarchy of grounds and should, therefore, so far as possible, provide for the same level of protection across grounds. Where relevant, equality legislation should apply the same concepts, definitions and processes to all grounds. Specifically, unequal pay should fall to be considered under the provisions dealing with direct and indirect discrimination.

In designing equality legislation to address multiple discrimination, legislators must decide how the exceptions which apply to each individual ground should apply to a combination of grounds. There appear to be two possible approaches. When an exception applies to one ground, this might block the whole claim from succeeding. Alternatively, legislators may, as they have done in Germany, consider it appropriate to allow a claim to proceed, unless an exception applies to each ground. Clearly, the second approach will be that which is most protective, but would require a careful analysis of the significance of exceptions in respect of each ground, which is beyond the scope of this paper.
Redefining Discrimination

It has been explained above that the fundamental issue that has rendered multiple discrimination claims in Great Britain unsuccessful is one of proof. The judges have felt restrained in referring to “opposite” comparators and appropriate statistics because of the divide between grounds in the legislation. On this basis, removal of these obstacles should, without more, overcome the barriers to bringing a successful claim of discrimination on more than one ground. The experience in the United States would, however, suggest otherwise. The inclusive structure of Title VII of the Civil Rights Act renders it favourable to an intersectional application. The judiciary has, however, restricted its potential in this respect by holding that claimants are not permitted to combine more than two grounds as the basis of a claim. Even if equality law is designed so as to eliminate technical legal and procedural barriers to claims of multiple discrimination, judges may continue to take a conservative approach to this issue if legislation does not expressly provide that claims may be brought in relation to a combination of grounds. The Canadian Human Rights Act 1985 was amended to insert a provision to the effect that a discriminatory practice includes a practice based on one or more prohibited grounds or on the effect of a combination of prohibited grounds. The European Commission’s report, “Tackling Multiple Discrimination”, highlights the importance of this amendment in encouraging the development of an intersectional approach, as it “inevitably drew attention to the need for Courts, Human Rights Commissions and Tribunals to consider whether intersectional discrimination has occurred”. In order to raise awareness of the need to deal with this phenomenon among tribunals, courts, civil society and policy makers, legislation should expressly prohibit discrimination based on more than one ground and on a combination of grounds.

We have seen that a comparative approach to the analysis of direct discrimination has presented obstacles to bringing claims of multiple discrimination. The Ontario Human Rights Commission has stressed that:

“[A]n intersectional analysis would recognize that comparisons must be used with great caution as an inappropriate comparison can lead to the dismissal of a case that should have been adjudicated.”

The notoriously difficult task of choosing an appropriate comparator and of adducing evidence to show how that comparator would have been treated (if a hypothetical comparator is referred to) becomes increasingly onerous as the number of grounds for the treatment increases. One way of eliminating these difficulties is to move from a system of law which asks whether a person was treated less favourably than someone else, to one which asks why a person was treated in the way that she was. It is recognised by the judiciary in Great Britain that this might be more practical in certain cases:

“...in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the ‘less favourable treatment’ issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the ‘reason why’ issue)...Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining...Sometimes the less favourable treatment issue cannot be resolved without, at the same time, decid-
ing the reason-why issue. The two issues are intertwined......This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case.62

This approach might be reflected in legislation in the way proposed in the Equality Bill introduced by Lord Lester of Herne Hill Q.C. in the House of Lords.63 The bill defined direct discrimination thus:

“10 Meaning of direct discrimination

(1) A person ("P") directly discriminates against another person ("B") if, for a reason related to one or more of the prohibited grounds—

(a) P treats B less favourably than another person ("C") is, has been or would be treated by him in a comparable situation; or

(b) P subjects B to a detriment.”

Section 10(1)(b) merely requires that "B" show that she was subjected to a detriment “for a reason related to one or more of the prohibited grounds” and does not require "B" to show that this treatment was less favourable than the treatment of some other person, thus avoiding the need to identify a comparator. This would not, as the government of the UK has suggested, mean that people can bring claims of discrimination on the basis that they have simply been treated badly,64 as “[t]hey would have to show that they were subjected to a ‘detriment’ on grounds of their age, etc.”.65 This, though, presents its own difficulties, which must be addressed through appropriate rules in relation to proof of discrimination.

Proof

In cases concerning direct discrimination, claimants will often face insurmountable difficulty in showing what was in the mind of the respondent in meting out the treatment suffered. Unlawful discrimination is not usually overt, nor even deliberate. The challenge of proving the reasons behind treatment will be even greater for victims of multiple discrimination, when any one or more of a number of grounds may have motivated the respondent. This should be taken into account in the allocation of the burden of proof under equality legislation. The EU directives provide that where a claimant establishes facts from which it could be presumed that there has been direct or indirect discrimination, it shall be for the defendant to prove that there has not been any such discrimination.66 Domestic provisions to this effect have the potential to transform a technical right to bring claims of multiple discrimination into a reality in practice. Their impact in this respect will, though, depend on judicial decisions as to what facts are sufficient to shift the burden of proof. If the courts were to hold that claimants must prove that they were subjected to a detriment, but need not adduce evidence as to the reason behind that treatment, a claimant belonging to more than one protected class could plead alternate or cumulative grounds without having to prove which ground or grounds motivated the alleged discriminator. Once detrimental treatment were shown that could have been based on any one or more of a number of grounds, it would be for the respondent to show that there was a non-discriminatory reason for the treatment. The obvious objection to such an approach is that it will allow a flood of claims which, though they relate to unreasonable treatment, do not concern discriminatory treatment. Tribunals would not, though, proceed directly from a finding
of a detriment to an inference of discrimination, but would make such an inference in the absence of an adequate explanation for the treatment. The respondent could prevent any inference being drawn by satisfying the tribunal that she had a genuine “innocent” reason for the treatment. The reason would have to be non-discriminatory, but need not be reasonable. In effect all that a respondent would be required to prove is that decisions were not made arbitrarily. Since arbitrary treatment is often the only evidence of discrimination and it is frequently responsible for giving effect to subconscious discrimination, it should be guarded against by equality legislation. Ultimately, if the law is to get to the root of multiple discrimination, it must tackle the subtle and complex ways in which a range of discriminatory factors can interact to form the basis of discriminatory conduct. The only way that it might do so is to demand that a respondent take the simple step of explaining conduct which on the face of it appears unjustified, rather than requiring claimants to take on the impossible task of proving which factors influenced respondents’ actions.

**Grounds**

Parts two and three of this article established that if a legal system is to respect the right of individuals to live according to their own sense of identity and effectively guard against all unfair multiple discrimination a more holistic approach must be taken to defining the grounds protected by equality legislation. As much discriminatory disadvantage arises out of complex structural, systemic and institutional factors, it can not always be attributed to the acts of one individual, against another individual, on the basis of an individual ground. People do not see themselves, or others, as a product of their constituent, but discrete, identities and so much discrimination will arise out of a vague feeling that a person will not “fit in” rather than treatment with clearly identifiable grounds. The problems which arise in relation to multiple discrimination are in fact just an illustration of the problems of a legislative approach to equality which focuses more on the reason for bad treatment, than on its effect on the individual:

“We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction... we risk undertaking an analysis that is distanced and desensitised from real people’s real experiences.... More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.”67

It is suggested that a more substantive approach to determining whether a ground is protected, where the focus is on the evidence of unfair disadvantage and the impact of the treatment on the victim, will serve to address discrimination when this is due to a multitude of structural, systemic and institutional reasons.

**The South African Approach**

A system of equality law which has been designed with such considerations in mind is that of South Africa. Monaghan argues that the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (the “Promotion of Equality Act”) is more suited than other equality regimes to tackle multiple discrimination thanks to its focus on substantive equality, the breadth of the grounds protected and its quasi-general-
ized approach. The Act outlaws discrimination on a list of grounds, but also on any other ground where discrimination on that ground causes or perpetuates systemic disadvantage or undermines human dignity.

It might be argued that that by simply making allowance for further grounds, the South African legislation does not avoid the fundamental problems of a categorical approach, but merely allows the protection of additional categories. This is not the case, however, because of the way in which the further grounds are to be identified. The focus of analysis as to whether a ground is protected rests on the effect of treatment on the individual and requires a contextual analysis of the claimant’s situation. New grounds may thus be very different in nature from the listed grounds and might be defined according to the claimant’s own sense of identity. The fluid South African approach is thus able to address any ground, however defined by the claimant, so long as it can be shown to constitute a ‘marker of disadvantage’, or that it is an important element of a person’s sense of self. Such a system would, therefore, eliminate the main obstacles to bringing a claim of intersectional discrimination associated with categorical discrimination law. In doing so, it will allow people to express and live according to their identity and encourage policy makers to investigate and tackle the more complex causes and consequences of disadvantage.

A Non-Exhaustive List of Grounds

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) protects against “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”. Though the provision does not refer explicitly to discrimination on a combination or multiplicity of grounds, the non-exhaustive list of grounds leaves open the possibility for the European Court of Human Rights (ECtHR) to find that a combination of grounds constitutes another protected status. This has been the approach of the Supreme Court of Canada in interpreting Article 15 of the Charter of Rights and Freedoms (the Canadian Charter), which also includes a non-exhaustive list of grounds. It has held that an intersection of grounds can be considered as analogous to, or a synthesis of the listed grounds. The opportunity to apply an intersectional analysis in this way has not yet been exploited by the Strasbourg court. Even had it done so, there would remain doubts as to the ability of legislation which protects enumerated and analogous grounds to address all of the complexities of the multiple discrimination experience. Unlike the Promotion of Equality Act, neither the ECHR nor the Canadian Charter specify how further grounds should be identified. This has led the ECtHR to confine itself largely, though not entirely, to the identification of grounds which are analogous to the listed grounds, and thus “personal characteristics”. Many grounds which might be considered important to an individual’s sense of identity will thus gain the protection of the ECHR, as many of these could be described as intimate characteristics. This approach is, though, undeniably less fluid than the South African approach and is less likely, in practice, to be flexible enough to recognise grounds which are too far removed from the listed grounds or too multi-faceted for the comfort of the judges. Further, no account will be taken of whether the posited ground is an indicator of disadvantage. Similarly, the majority decision of the Canadian Supreme Court in Corbière v Canada analysed the enumerated grounds of section 15(1) and concluded that:
“It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”

On this basis the majority held that the level of group disadvantage is an inappropriate consideration in the identification of new grounds. L’Heureux Dubé J., writing a dissenting judgement on behalf of Iacobucci, Gonthier and Binnie JJ, agreed that “[a]n analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging”, but stressed that an alternative basis for determining whether a ground is protected by s. 15 is whether “those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked”. It would seem that L’Heureux Dubé J. was advocating an analysis similar to that demanded by the Promotion of Equality Act, comprising both a dignity and a disadvantage analysis, whereas the more conservative approach of the ECHR and the majority in Corbière has been limited to the first of such considerations.

The majority in Corbière appeared to be concerned that the approach adopted by L’Heureux Dubé J. involved a circular analysis, which required a finding of discrimination in order to identify a new ground. This is true only in the sense that a finding of historic discrimination indicates that a ground should be protected, not, as was suggested, so as to conflate the finding of a new ground with a finding that the act complained of is discriminatory. Where a group can be seen to be historically disadvantaged, the correlation between possession of the group’s common attributes and disadvantage should be seen as evidence of a discriminatory system. If the system were free from bias, such patterns would not exist. In this way, markers of discrimination can be identified as grounds upon which discrimination must have occurred in the past and should be protected against in the future. This is so whether or not the shared attribute is an important part of the group’s sense of identity. There is clear evidence that people experience discrimination on the basis of “statuses” which are markers of disadvantage, but are unlikely to form an element of their identity, as self-defined. The final report of the Canadian Human Right Acts Review Panel stated:

“Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy.”

Clearly “disadvantage” and “poverty” are relative concepts and their protection as protected grounds will have serious implications for legal certainty. The courts will minimise this impact, though, where they refer to objective markers of disadvantage in order to identify a new ground, rather than disadvantage itself. The Court of Appeal for Ontario has, for example, found the receipt of social assistance to be such a marker. Only socially identifiable groups should gain the benefit of legislation.

In the context of this article, the strongest argument in favour of a disadvantage approach to the identification of new grounds is that only such an analysis will be sensi-
tive enough to people’s lived experiences to address the subtle and complex reasons for which people experience discrimination. It will afford protection to those who are without doubt discriminated against, such as those of low social class, but who are unable to gain the protection of discrimination law gained on the narrow categories currently protected. This will be particularly important in the protection of intersectional discrimination, since one can imagine situations in which social class might be the trigger factor that leads to discrimination in relation to other grounds. While a middle class young/black/disabled/transgender person might not be subjected to discrimination, a young/black/disabled/transgender person of lower class might well be.

Whether or not disadvantage is considered relevant to the recognition of new grounds, the legal certainty objection to a non-exhaustive list of grounds will still stand. Clearly, there is a concern that such an approach places those potentially liable for discrimination in a position of uncertainty as to their obligations. Legislators must decide whether this is a lesser evil than an approach that guarantees to victims of complex discrimination the legal certainty that they will not gain the protection of equality legislation. Where a more flexible approach to protected grounds is introduced in combination with a shift in the nature of equality legislation, so that it focuses more on collective responsibility to promote equality, rather than individual fault finding, concerns as to uncertain legal liability should carry less weight. A more fundamental concern with such an approach is that where the protected grounds are opened up to be more inclusive and less certain, so must potential justifications. The absolute prohibition of direct discrimination under current British legislation is considered one of the regime’s strengths. A wider concept of protected grounds would mean that this absolute protection would probably be lost. While it is possible that this approach would still, on balance, result in greater overall protection, whether or not this is so would depend largely on the judiciary’s application of these principles on a case by case basis. Further, it should be borne in mind that any approach which conflates concepts of direct and indirect discrimination and makes it possible to justify both types of discrimination will probably not be in compliance with the requirements of European law in respect of equality and will not, therefore, currently be a model for the design of discrimination law in member states of the European Union.

Duties

It is generally accepted among equality experts that if substantive equality is to be achieved within a reasonable timeframe, or at all, there needs to be a shift in equality law regimes from systems based on retrospective individual fault finding to systems which impose obligations on organisations and individuals to take proactive measures to generate change. It is necessary to ensure that those responsible for designing measures to promote equality are aware of and equipped to address the specific challenges to equality posed by multiple discrimination.

Mainstreaming

The importance of mainstreaming for the promotion of equality is widely recognised. This article has, furthermore, highlighted the specific nature and increased seriousness of disadvantage experienced by those who suffer multiple discrimination. For these reasons it is suggested that duties to mainstream equality considerations should provide that such considerations include
multiple discrimination. It has been recognised that,

"The institutional domain poses perhaps the greatest challenge to understanding and accommodating the full complexity of human diversity. It requires a re-think of equality and diversity policies that incorporates an integrated approach. Such an approach is first of all based on the assumption that individuals have multiple identities. Secondly it analyses service and employment systems from the perspective of intersecting personal characteristics."\(^{81}\)

Such a recommendation cannot be made without acknowledgement that this will be perceived as excessively burdensome. This immediate reaction should, however, be allayed to some extent, if such an obligation is conceived of as a requirement which is inherent in existing obligations to mainstream equality considerations into policy making. Generic policies aimed at improving the situation of a group as a whole will be ineffective as they are based on over-simplified understanding of discrimination. Express reference to multiple discrimination is merely a direction as to how to render policies designed under existing mainstreaming duties more effective.

The need to incorporate an intersectional analysis into policy design has already been recognised in some jurisdictions. Spanish legislation imposes a duty of cross-sectional equality mainstreaming\(^{92}\) and the Ontario Human Rights Commission has confirmed that "an intersectional analysis has been added as one of the lenses through which [its] policy work is conducted"\(^{83}\)

**Data Gathering**

Referring to its proposal for multiple discrimination mainstreaming, the “Rethinking Identity” report remarked:

"While this may seem an awesome task, its practical implementation may benefit from research that identifies the experiences and aspirations of multiple identity groupings, and research on the identities of those who use the services or who are employed by them. This can provide a starting point for developing a mindset of integrated diversity, and bringing this to bear on system design and professional attitude and behaviour."\(^{84}\)

A duty to collect data in order to facilitate evidence-based decision making is particularly relevant in respect of multiple discrimination because of the current invisibility of much multiple discrimination. Currently, illuminating data in respect of multiple discrimination is sparse. The “Rethinking Identity” report noted that statistical data was not always available in respect of the groups with which they wished to work. The importance of this matter for tackling multiple discrimination is increasingly recognised. Indeed, the European Commission’s study on multiple discrimination devoted one of its seven concluding recommendations to data collection.\(^{85}\)

Professor Fredman has explained that data gathering techniques must change in the light of multiple discrimination:

"US experience shows that when there is a duty to monitor women and ethnic minorities, the groups tend to be defined as mutually exclusive, so that ‘ethnic minorities’ becomes ‘black men’. The definition of women then focuses on white, middle class, able bodied women…Since the aim is to redress disadvantage, and to promote a positive sense
of identity based on full participation, the groups need to be defined accordingly. For example, sub-groups should be demarcated because they exhibit disadvantage due to their cumulative identities... The need to promote participation and positive identity means that it is best to leave individuals to self-identify, and groups to define themselves, always bearing in mind the asymmetric nature of equality.”

Finally, given that recognition of multiple discrimination is an attempt to provide for discrimination in all its diversity, the gathering of data in respect of multiple discrimination should seek to be inclusive. The most widely discussed example of intersectional discrimination is the consequences of the interaction of race and gender. However, it is widely being recognised that multiple identities interlock to form the grounds for discrimination in a wide variety of ways. A recent report of the European Commission found that a tendency to concentrate on the intersection of race and gender probably resulted from a lack of information in relation to other groups. Data gathering, if properly conducted, should serve to redress this invisibility.

**Consultation**

If equality legislation is to effectively address experiences of multiple discrimination, it should ensure that the development of antidiscrimination policies involves grassroots participation, through the inclusion of a duty to that effect.

The longstanding absence of intersectional discrimination from public discourse, which has persisted until recently, has lead to widespread ignorance of its implications for real people. While policy makers may feel comfortable that they can identify how race and gender considerations should impinge upon their policy making, they are less likely to be familiar with how intersectional discrimination should be dealt with, making consultation necessary. Crenshaw argues that:

“...because the specific experiences of ethnically and racially defined women are often obscured within broader categories of race or gender, the full scope of their intersectional vulnerability cannot be known and must in the last analysis, be built from the ground up.”

Further, in designing legislation to tackle intersectional discrimination, it must be borne in mind that the very purpose behind doing so is to recognise and respect diversity, by eliminating decision-making based on stereotypes. Consultation with those who experience multiple discrimination is an essential means of doing so.

Explicit reference to multiple discrimination in an obligation to consult will encourage policy makers to ensure that those with whom they consult are representative of the diverse interests within affected groups. Fredman highlights the “crucial importance” of representative participation and cites Patel in this respect:

“Many relations between the state and minority communities are mediated through unelected self appointed community leaders, who are men, usually from socially conservative backgrounds with little or no interest in women’s rights or social justice. Most are from religious backgrounds and their interests lie in preserving the family and religious and cultural values.”

This example serves to illustrate that those organising consultations with a view to developing equality policies should be aware of the need to avoid indirectly silencing
dissenting voices through their choice of participants, if such policies are to address multiple discrimination.91

**Reasonable Adjustments**

The prohibition of indirect discrimination is an essential element of discrimination legislation, requiring barriers to be removed where they place a certain group at a particular disadvantage. Such barriers will be removed, though, by reference to the needs of the dominant members of the group. A duty to make reasonable adjustments (also referred to as reasonable accommodation) assesses barriers which an individual faces through a contextual analysis. This contextual analysis on a case by case basis is important because of the observations we have made about the individuality of identity. People do not necessarily attach equal weight to the identities that they hold and people may emphasise one aspect of their identity in one context and another aspect in another context.92 Thus policies aimed at tackling multiple discrimination necessarily require some element of individualisation and fluidity. Reasonable adjustments address the specific needs of the individual in the specific context that they are made and so can take into account the implications of a person’s identity for that person. Discriminatory barriers faced by individuals will be identified by reference to their individual experiences of identity, rather than through assumptions based on stereotypes.93 The importance of reasonable adjustments in addressing multiple discrimination has been acknowledged by the Ontario Human Rights Commission94 and more recently at a round-table of the national equality bodies in the EU.95 Legislators should thus consider whether equality legislation should provide for a broad duty to make reasonable adjustments in respect of all grounds, or a combination of them.

**Positive Action**

The potential of mainstreaming duties to bring about widespread change will be greatly increased if they are combined with the possibility of taking positive action to promote substantive equality. The limited data available indicates that multiple discrimination is linked with deeper disadvantage in society. It is victims of multiple discrimination that need, then, to be the target of positive action, and legislation should be designed to allow this. Taking into account intersectional discrimination in developing positive action measures will address the concern of some96 that positive action is only of benefit to the most advantaged within a disadvantaged group, while those who are less dominant within the group become increasingly marginalised.97

It is well established that organisations are hesitant about taking positive action for fear of unwittingly becoming liable for unlawful discrimination against those that did not benefit from positive measures. These concerns are likely to be heightened in respect of measures targeting a subset within a group which is usually considered as a beneficiary of positive action because of its historically disadvantaged status. Thus if an organisation takes positive action in relation to Muslim women, it will be concerned that it will have discriminated against Muslim men. This problem can be addressed however, by legislation or associated guidance making it clear that action supported by robust evidence will not be considered unlawful.

**Remedies**

As has been discussed above, experiences of multiple discrimination can result in heightened disadvantage. On this basis, some
suggest that equality legislation should allow account to be taken of the multi-ground dimension of multiple discrimination in the determination of sanctions, making it possible to award aggravated damages. The reasoning of L’Heureux-Dubé J. in relation to discriminatory legislation might be applied to individual acts of discrimination:

“No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable.”98

Thus because of the particular vulnerability of an individual subjected to multiple discrimination, the damage to that person may be more profound and this should be acknowledged in awards of damages for injury to feelings. This approach is endorsed by the Ontario Human Rights Commission.99 Further, the Austrian Disability Equality Act contains a provision stating that multiple discrimination may be taken account of in the award of damages. The Romanian Equal Treatment Act (2006) also provides that discrimination on two or more grounds constitutes an “aggravating circumstance”.

Equality Bodies

A single equality body, responsible for equality work in respect of all grounds, will best be able to promote work to eliminate multiple discrimination. A single institution reduces conceptual barriers to addressing multiple discrimination and is of practical importance, because it makes it possible for coherent, overarching and coordinated strategies to be developed addressing these issues.100 In research conducted directly with national equality bodies, they have referred to the challenges of dealing with intersectional cases when separate equality bodies exist in respect of each ground of discrimination.101 A single equality body will be able to offer litigants comprehensive advice on all grounds, rather than forcing them to choose between single ground institutions dealing with only one of the multiple grounds behind the discrimination experienced.102 The recently published report of the European Commission is enthusiastic about the potential of the Equal Employment Opportunity Commission in the United States, the documents of which “seem to indicate a tendency towards mainstreaming the intersectional approach”, to “pave the way for a broader understanding and acceptance of cases involving more than one ground of discrimination”.103

9. Conclusion

The complex balance in equality law between respect for individual dignity and worth and the importance of social context and group association plays out in the context of multiple discrimination. The equality debate, which has so far concentrated on single-ground discrimination, has taught us that value-judgements should not be made about an individual based on that person’s group membership. Rather, regard should be had to an individual’s value independently of that group. Yet we have learnt that group membership is not irrelevant to the way we should treat a person, because it determines our “starting points” in life and because group membership can be important to a person’s sense of self, and thus should be accommodated, if people are not to be forced to conform to the dominant culture. In the context of multiple discrimination, then, subjecting a person to detriment on the basis of their membership of several groups is no
more justified than doing so on the basis of a single ground, but multi-group membership should be recognised if people are to be able to live according to their true identity and if the consequences of multiple group membership are to be addressed.

We have seen, largely by reference to the legislative framework of Great Britain, that equality legislation which has been designed without regard to the need to tackle multiple discrimination can and does fail to provide a means of legal redress to victims of such discrimination. Yet it is indisputable that where discrimination occurs on the basis of more than one ground, each of which society has recognised as an unfair basis for the conferral of advantage and detriment, a victim should not be excluded from the protection of equality legislation because of the particular way in which the grounds combined to form the basis of that discrimination. It is therefore pressing that discrimination law should be designed so as to secure a remedy for individual victims of multiple discrimination.

Even more important than this, policies, procedures and practices must be designed so as to take account of and accommodate multiple identities and the experience of multiple disadvantage. This lesson too can be extracted from the single-ground equality debate. It is increasingly recognised that the achievement of substantive equality demands action on the part of policy makers to remove barriers and accommodate difference between groups. This is not about positive discrimination, it is about rectifying a flaw in a system which, as a consequence of having been designed by the most dominant groups for the most dominant groups, fails to meet the needs of all those it must serve. To maintain policies designed by reference to the “norm”, which is in fact the dominant group, leads people to suppress those characteristics which are not shared with the “norm” in order to fit into the system. This not only denigrates the value of those characteristics, but also fails to address structural forces which have meant that disadvantage is closely associated with the possession of certain personal characteristics. These considerations are important in the multiple discrimination context. If the idea that diversity should be recognised and accommodated is not exploited to its full, so that policies are designed only with regard to the single-ground issues, they will, for example, take into account the needs of people with disabilities, but will be designed for a gender-neutral, ethnicity-neutral, sexuality-neutral and ageless disabled person. This will lead disabled people to suppress their gender, ethnicity, sexuality and age and will fail to rectify the increased disadvantage experienced by people with multiple barriers. Failure to recognise the differences within groups and addressing only the differences between groups will ignore the most important lessons learnt throughout the evolution of equality law.

Different approaches to addressing multiple discrimination have been outlined. It is possible simply to list the protected grounds and specify that discrimination based on any one or more is unlawful. Alternatively, equality legislation might include a non-exhaustive list of grounds. If this approach is favoured, the legislator must decide whether to direct the judiciary as to how it is to identify further protected grounds. Experience has shown that a failure to do so is likely to result in a cautious approach from courts and tribunals, confined to the recognition of grounds which are an essential element of identity and eschewing those grounds which can be shown to be markers of disadvantage. It is true that a disadvantage analysis of potential new grounds would seriously undermine legal certainty, particularly when combined, as it
necessarily would be, with flexible justification provisions. Yet such an approach would have the potential to release discrimination law from the strictures of a categorical approach to identity and a formal notion of equality, the consequences of which include a failure to address multiple discrimination. This potential would, though, lie in the hands of the judiciary. The choice between such an approach and one which leaves the extension of equality protection to a legislature restricted by the demands of an equality-opposed electorate is not an obvious one and deserves further attention.

1 Paola Uccellari is Consultant to The Equal Rights Trust. This article resulted from research commissioned by the Trust and is a part of larger research project.
6 See above, Moon, n.4.
11 See above, Zappone, n.9, p.2.
12 The writer acknowledges that there is much controversy as to whether ‘dignity’ should inform the development of equality legislation, largely owing to ambiguity as to the implications of this term. See Reaume, Denise. "Discrimination and Dignity", Louisiana Law Review, 2003, Vol.63, pp.645-95; Graham, Emily. "Law v Canada: New Directions for Equality under the Canadian Charter?" Oxford Journal of Legal Studies, 2002, Vol.22, No.4, pp.641-61). There is, however, generally consensus that equality law should defend everybody’s feeling of self-worth and should thus protect people against being penalised for their identity. It is in this narrow sense that the right to dignity is referred to in this article.
13 See above, Zappone, n.9, p.19.
16 See above, Fredman n.13, p.158.
17 See above, Fredman n.13, p.158.
18 See above, Fredman n.13, p.158.
20 See above, Pierce, n.18, p.18.
24 See above, Hannett n.21, p.81.
26 See above Equalities Review Panel, n.24, p.63.
27 See above, Makkonen, n.22, p.58.
28 See above, Hannett, n.21, p.85.
30 See above, Zappone, n.9, p.135.
31 See above, Pierce, n.18, p.24.
32 References in this article to European law are to the law of the European Union.
35 Recitals 2, 3 and 10.
36 See above, European Commission, n.28, p.20.
40 See above, European Commission, n.28, p.53.
46 Para.(p).
48 See above, Makkonen n.22, p.51.
50 Section 6(6).
51 Save where the employer can show that variation between the woman’s contract and the man’s contract is genuinely due to a material factor which is not the difference in sex.
52 Though this requirement is arguably now in breach of European law. See above, Monaghan, n.48, para.6.304.
See above, Moon, n.1, p.14.


57 See above, Hannett, n.21, p.76.

58 Section 3(A).


61 See above, Moon, n.1, p.9.


64 See above, Department for Communities and Local Government, n.8, para.1.15.

65 Professor Sir Bob Hepple QC FBA and Mary Coussey CBE in a letter dated 28 August 2007 to the Discrimination Law Review Team at the Department for Communities and Local Government in response to the Consultation Paper.


68 See above, Monaghan, n.48, para.5.10.

69 Section 1(1)(xxii) defines the ‘prohibited grounds’ as:

“(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour; sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground—

(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 a ground in paragraph (a).”

70 “15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour; religion, sex, age or mental or physical disability.”


72 For discussion see Vakulenko, above, n.14.

73 Kjeldsen v Denmark, Judgement of 7 December 1976, Series A, No.23 (1979-80) 1 EHRR 711; Budak v Turkey (App No 57345/00) ECHR 7 September 2004 and Beale v UK (App No 16743/03) ECHR 12 October 2004.

74 Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R.203, para.13 (McLachlin and Bastarache J.), writing for Cory, Lamer C.J. and Major).

75 Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R.203, para.60.

76 Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R.203, para.7 (McLachlin and Bastarache J.).


78 Falkiner v Ontario (Ministry of Community and Social Services) [2002] O.J.No.1771.


80 See above, Makkonen, n.22, pp.36-37.

81 See above, Zappone, n.9, p.144.

82 See above, European Commission, n.28, p.20.

83 See above, Ontario Human Rights Commission, n.6, p.29.

84 See above, Zappone, n.9, p.144.

85 See above, European Commission, n.28, p.55.


87 See above, European Commission, n.28, p.47.

88 See above, Crenshaw, n.20.

89 See above, Fredman, n.85, p.27.

90 Patel, Pragna. “Notes on Gender and Racial Discrimination: An urgent need to integrate an intersectional
perspective to the examination and development of policies, strategies and remedies for gender and racial
2007.

91 See above, Fredman, n.85, p.27.

92 Crowley, Niall. “Re-Thinking Identity: an Irish Perspective” (speech at “Multi-Dimensional Discrimination
– Justice for the Whole Person”, an event organised jointly by the Equality and Diversity Forum and Justice on

93 See above, Ontario Human Rights Commission, n.6, p.25.

94 See above, Ontario Human Rights Commission, n.6, p.25.

95 Summary of the conference proceedings at “Equal Opportunities for All – Multiple Discrimination Matters”,
organised by the European Commission on 6-7 December 2007, p.6, available at <http://ec.europa.eu/emp-

96 See above, Fredman, n.38, p.18.

97 See above, Makkonen, n.22, p.52.


100 See above, Hannet, n.21, p.85.

101 See above, European Commission, n.28.

102 See above, Hannet, n.21, p.85.

103 See above, European Commission, n.28, pp.26-27.

104 See above, Fredman, n.85, pp.4-5.
Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas, and Social Reform

Patrick Delaney

Colombia receives little in the way of positive international reporting. The country’s international reputation is dominated by conflict, cocaine and coffee. Yet, as one would expect from a country of more than 44 million people, there is a great deal more to the nation than is immediately apparent. Colombia is home to a progressive constitutional system, the product of a relatively recent constitution and a rights-focussed constitutional court. The existence of these legal and institutional mechanisms alongside widespread poverty and social dislocation, places Colombia in a unique position with regards to the legal treatment of discrimination.

Central among the legal mechanisms for the protection of equality in Colombia is the tutela: an easily-accessible and quickly-resolved writ for the satisfaction of fundamental rights. As such, it has become a popular mechanism for ordinary Colombian citizens to claim their constitutionally protected rights, and one particularly apposite in a country where poverty would otherwise limit access to justice.

Nevertheless, the operation of the Colombian constitutional system, including the tutela, must be examined with a critical eye. In a context where the sources of inequality and discrimination are often structural, the law should not be invoked as a panacea. Rather, a socio-legal approach is warranted, in which the success of the legal system is measured by its tangible effects throughout the nation. Even given this more cautious approach, there is much to be praised in the Colombian constitutional system, and the protection it has provided to ordinary citizens. However, it is also important to remain conscious of the limits of the law, and the enduring responsibility of government and civil society for social reform.

A Brief History of Colombia

Colombian history is long and eventful, and central to understanding the seeds of modern conflict. Independence in the region was first secured by Simón Bolívar in 1819, but the ‘Gran Colombia’ he created soon destabilised, forming over time the modern nations of Colombia, Venezuela, Ecuador and Panama. As this process occurred, conflicts between Bolívar’s followers and those of Francisco de Paula Santander, his deputy, ultimately crystallised into two dominant, competing parties that dominate Colombia to the present: the Liberals and the Conservatives.

The competition of the Liberal and Conservative parties over the 19th and early 20th centuries often resulted in violence. The modern, defining instantiation of this antagonism came in the form of La Violencia. Sparked by the April 1948 assassination of Jorge Eliécer Gaitán, a charismatic and populist leftist leader, La Violencia lasted until
1958, and claimed up to 300,000 lives. While the joint ‘National Front’ government established by the Liberals and the Conservatives ceased the immediate violence, it prolonged the hegemony of the major parties and traditional powers, and ultimately gave birth to the modern guerrilla movement which continues to plague Colombia.4

The failure of the National Front to address widespread inequalities, alongside dubious election practices, encouraged the formation of a number of left-wing guerrilla movements. The most notable among these were the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN) and the April 19 Movement (M-19). To date, only the M-19 has fully disbanded, with the FARC and ELN still active in Colombia, despite a series of attempts at peace negotiations.5 The ideological character of these movements is disputed, but it is clear that the rise of narco-trafficking has not passed them by. After the fall of the Medellin and Cali cartels in the 1980s and 1990s, with which the guerrillas had had an uneven relationship at best, the guerrillas took a greater role in the production of cocaine.6 The money thus obtained was directed into further funding the struggle against the government. The violent paramilitaries who rose up to resist the guerrillas soon became equally ensnared in the web of cocaine money, and as these groups are demobilising, it appears that new armed groups are rising to take their place.7

Modern Colombia is a product of these historical influences, and the currents of political and social conflict run deep. The government of Álvaro Uribe has found itself repeatedly plagued by accusations that its supporters are responsible for collaboration with paramilitaries.8 Humanitarian negotiations such as prisoner exchanges continue to proceed shakily, and the enduring violence has produced record numbers of internally displaced persons.9 The direct victims of the violence from both sides are extensive, but the conflict also has more insidious discriminatory effects, as valuable internal and external resources are often diverted to the conflict.10

A Survey of Discrimination in Colombia

There are a number of particularly vulnerable groups in Colombia, who are the subject of disadvantageous social conditions. At a particular disadvantage are Afro-Colombians who, depending on the measure, could account for as much as a quarter of the Colombian population.11 Large sections of the Afro-descendent population remain in geographically isolated communities, such as Chocó, on the western seaboard, and on the Caribbean coast. These regions are some of the poorest; characterised by extreme poverty, and a lack of access to services such as health and education.12 One government estimate places 72% of Afro-Colombians in the two lowest socio-economic strata.13 By virtue of the location of their communities, they are also disproportionately affected by the conflict,14 making up 30% of the displaced population.15 Moreover, they lack significant political representation, with only nine Afro-Colombian members of the 268 member congress.16 As a result of these pressures, among others, the Afro-Colombian community is in danger of losing its unique culture.17

The other major ethnic groups to suffer long-term discrimination are indigenous. Despite accounting for less than 2% of the total population,18 Colombian indigenous peoples display extraordinary diversity. There are more than 90 distinct groups and 64 languages.19 Yet only rarely are these groups consulted on the exploitation of traditional land, and they generally suffer high levels of poverty, as well as poor health and a lack of education servic-
es. They have also been disproportionate victims of the internal conflict, as their traditional lands are often militarily occupied or the subject of fighting. The history and culture preserved by these groups continue to be threatened. Of the 90 indigenous peoples, 39 number fewer than 1,000 individuals, and 28 fewer than 500.

The rights of lesbian, gay, bisexual and transgendered persons have also been the subject of significant controversy in recent times. While still at their height, the right-wing paramilitaries engaged in widespread ‘cleansing’ of undesirable people, including homosexuals. Lesbians, gays, bisexuals and transgender persons continue to be the victims of murders, assaults and threats by the public at large and by the police and security forces.

Women too suffer particular disadvantage in the Colombian context. They are special victims of the conflict, as victims of sexual violence, as heads of households, and as the internally displaced. In addition, a hypermasculine ‘machismo’ (a macho sexism) affects everyday Colombian culture, leading to serious problems of violence against women. By one measure, domestic violence and its corollaries are the primary cause of death in women between 15 and 44 years of age.

The situation of these particular groups must be understood in the context of general poverty in Colombian society. Nearly half of Colombians live below the poverty line, and nearly 15% in conditions of extreme poverty. Colombia is marked by some of the highest income inequality in Latin America. Poverty is most pronounced in rural areas and in particular regions. Inequality, therefore, must be accepted as pervasive in Colombia and not merely the province of particular groups.

The State of the Law

A new constitution was promulgated in Colombia in 1991, bringing with it an entirely new constitutional system to address discrimination and inequality. At the heart of that document was a series of fundamental rights, including a guarantee of equality found in Article 13:

“All persons are born free and equal before the law, and shall be given equal protection and treatment by the authorities, and shall enjoy the same rights, freedoms and opportunities without any discrimination on grounds of sex, race, national or family origin, language, religion, political opinion or philosophy.”

Two subsequent paragraphs in Article 13 provide for the adoption of measures in favour of disadvantaged groups, in the context of a ‘real’, effective and material equality, and the protection of those in a situation of manifest weakness because of their economic, physical or mental state. Article 13 is framed broadly – it incorporates a negative injunction, found in the prohibition of discrimination, alongside a positive imperative, in the requirement that authorities provide for equal treatment. As such, it envisages both formal and substantive equality protections.

There are a number of more specific, complementary protections which feature in the constitution. For example, Article 43 prohibits discrimination between men and women; Article 45 provides protections for adolescents; and Article 68 provides for respect for the identity of indigenous communities. As in most constitutional systems, the true scope of these rights is only revealed through their judicial interpretation. Of particular note in this regard is the fact that the Colombian constitution expressly provides that the
rights within it shall be interpreted in accordance with international human rights treaties ratified by Colombia. As a result, international instruments have constitutional status within the judicial system.

The Colombian Constitutional Court has adopted broad understandings of these constitutional rights. For example, the right to the free development of personality has been extended to cover sexual orientation, despite significant social antagonism towards homosexuals. Moreover, these rights are analyzed in accordance with a proportionality approach. Discrimination between persons may be acceptable, on the Constitutional Court’s reasoning, only where it meets a set of criteria:

- the persons are in distinct factual circumstances;
- their distinct treatment has a purpose (finalidad) which is constitutionally admissible (that is, ‘reasonable’);
- the factual matrix, including the differential treatment and its ends, is rationally coherent; and
- the differential treatment is proportionate given the ends pursued.

These specific criteria incorporate the two overarching criteria of ‘reasonableness’ and ‘rationality’. The former relates to the legitimacy of the goal, viewed externally: can it be said to be pursuing a legally acceptable goal? In this case, for example, discrimination with the express purpose of distinguishing between men and women may lack the threshold legitimacy to satisfy the ‘reasonableness’ criteria. The latter criterion, rationality, relates to internal coherence: to what extent are the means and the ends rationally connected? For example, if the legitimate goal of some legislation is to advance the cause of indigenous people, but it has the opposite effect, it will fail the rationality criteria. This second criterion is particularly important in preventing discrimination with concealed intent, or unforeseen consequences.

The Colombian Constitutional Court has also borrowed the concept of ‘strict scrutiny’ from United States jurisprudence. This more demanding test of validity is invoked where the discrimination is based on suspicious criteria, where the discrimination principally affects those in a situation of manifest weakness, when the enjoyment of a fundamental right is affected, or where a privilege is created. In these cases, the measure must be necessary and intrinsically proportionate. These conditions result in much stricter tests of rationality and reasonableness, respectively.

In this system, the application of the prohibition on discrimination between individuals has been limited. The court has justified this on the basis of the combined importance of pluralism and autonomy. So long as individuals maintain the right to develop their personality in an autonomous fashion, they must maintain the capacity to make personal distinctions on grounds that might otherwise be prohibited, such as political orientation. However, this approach is balanced by situations in which the court has provided anti-discrimination protections against the exercise of private power, for example in the workplace, or by private actors exercising public functions.

**Mechanisms for Legal Protection**

Issues of access to justice occupy the crucial space between individuals and the Constitution. Therefore, in addition to considering the interpretation of constitutional anti-discrimination measures in Colombia, it is necessary to examine the means available to protect constitutional rights. First among
these, both in popularity and in significance, is the tutela action.

The tutela action and its analogues can be found throughout Latin America.\textsuperscript{47} It was first established under the name of amparo in Mexico in 1857, and has since spread throughout Latin America and beyond. However, it remains a relatively unfamiliar concept within the common law system and much of Europe. The Colombian tutela was established in the 1991 Constitution as an action to provide for the ‘immediate protection of one’s fundamental constitutional rights, when any of these are violated or threatened by the action or omission of any public authority’.\textsuperscript{48} The procedure to invoke a tutela is simple: an individual may complain, without the aid of a lawyer, to any judge with jurisdiction over the dispute.\textsuperscript{49} Applicants have broad rights to apply for themselves and to have others apply on their behalf in cases when they cannot protect themselves.\textsuperscript{50} The tutela petition need only contain the basic facts necessary for the judge to address the case, such as the parties in question and the right threatened.\textsuperscript{51} There is no formal written process, and in some cases, it may even be verbal.\textsuperscript{52}

Once a tutela has been submitted, it is incumbent upon the judges to respond within very limited time frames. Unless the tutela is reviewed or appealed, it must be ruled on within 10 days.\textsuperscript{53} In sum, it is a fast, accessible tool for the enforcement of fundamental rights. This fact must go some way to explaining its popularity. In its first full year of operation, 8,060 tutela decisions were submitted to the Constitutional Court, which receives all tutelas to consider for discretionary review.\textsuperscript{54} By 2005, that annual number had reached 221,348, and totalled around 1,400,000 tutelas since their establishment 14 years earlier.\textsuperscript{55}

The tutela, however, retains some procedural limitations. The Colombian tutela, in contrast to some of the broader equivalents in other Latin American nations, can only be invoked to protect ‘fundamental’ rights found in the 1991 constitution.\textsuperscript{56} While these rights form an expansive list, they are far from exhaustive. The Constitutional Court has tempered this requirement to some extent, by extending the application of tutelas to other rights where they have an intimate connection with a fundamental right, or are of the requisite status through their natural character.\textsuperscript{57} The court has also taken a broad interpretation of the requirement that a fundamental right be ‘threatened’ before a tutela can be successful.\textsuperscript{58}

Article 86 of the Colombian Constitution dictates that the tutela is only to be utilised where no other judicial mechanisms are available. In practice, this requirement has also been softened by the regulating statute and judicial interpretation. The availability of other remedies, therefore, is assessed in light of the applicant’s position, and the effectiveness of other options for that applicant. Moreover, the tutela can be invoked as an interim measure in cases where irreremediable damage would otherwise result.\textsuperscript{59}

Limitations are also present for cases in which a tutela is invoked against private individuals. The law makes provision for a number of circumstances in which a tutela is possible against private individuals. These are limited to situations where a private actor exercises a public function, or there is a particular relationship of disadvantage between the parties.\textsuperscript{60} Hence, while the tutela acts to some degree as a check on private power, there is no wide-ranging system of tutelas against individuals.\textsuperscript{51}
A judge can order a wide range of remedies for *tutela* applicants. A broad range of provisional remedies are envisaged by the law, from the suspension of the act in question, to measures to protect the right or limit the harm. The protection provided by final judgment is intended, insofar as possible, to return the petitioner to their earlier position in the case of a positive act, or in cases of omissions or rejections, to compel the body to protect the right. Importantly, these remedies extend to a declaration of unconstitutionality, which can have widespread implications on the provision of public services.

**Critically Assessing the Colombian System**

Equality law, in its many forms, is always an expressly socio-legal enterprise. While all forms of law exist within a social context, this is particularly true of efforts to combat discrimination, itself a social phenomenon. Therefore, while the characteristics of the Colombian legal system outlined above are central to understanding the legal situation, they form only part of the larger questions of legal efficacy. The jarring contrast between the evident discrimination and disadvantage present in Colombian society, with the progressive case law evident in the courts, must prompt questions of effectiveness.

The *tutela* mechanism has been the subject of controversy within Colombian judicial circles. Some have diagnosed Colombian society with ‘tutelitis’, which has exacerbated the already litigious nature of the Colombian justice system. Many judges, particularly those outside the Constitutional Court, have complained about the increased workload. One judge even complained that the proliferation of *tutelas* had contributed to the development of an ulcer. There can be little doubt that many *tutelas* are frivolous, but this need not be a damning criticism. The one-quarter of *tutela* actions which are successful indicate the writ serves to protect fundamental rights in a significant number of cases. The strain on the judicial system must be balanced against the good done in these cases.

While the awareness of the *tutela* as an option for ordinary citizens has resulted in its heavy use, it has also contributed to the increased awareness of fundamental rights within the Colombian society. Moreover, it appears that the very pressure applied to the judges under the time-limited *tutela* system is at least partly responsible for the popularity of the writ. For example, one study found 77% of respondents believed the *tutela* helped overcome inefficiency in the Colombian judicial system. In turn, the overwhelming popularity and the easy accessibility of the *tutela* have helped build a culture of rights within Colombia. In situations where a culture of legality is as important as the nature of the law itself, this is a particularly important advance.

At the same time, the limits of the *tutela* and the legal system at large must also be recognised. A culture of impunity still prevails in parts of the Colombian political system. The continuing problem of extra-judicial killings by security forces is but one aspect of this difficulty. At times, the tensions between the courts and President Uribe have verged on developing into a major political crisis. Equally, beginning in 2001, the interference with judicial investigations by the Prosecutor-General, a political appointee, has also added to the suggestion that the rule of law is yet to be firmly entrenched within the complex politics of Colombia. Without these foundational elements, the changes rendered by *tutelas* and constitutional decisions re-
main limited. Nevertheless, recognising the limits of the Constitutional Court need not render it wholly irrelevant, and it continues to make important decisions in highly-politicised fields.\textsuperscript{74}

At the foundation of most aspects of discrimination and inequality in Colombia are fundamental structural issues. Narco-trafficking and the enduring conflict are major contributors to poverty and mistreatment. While the law may, for example, be called upon to treat the victims of displacement equally, it is beyond the reach of the law alone to prevent the disproportionate impact of the conflict on the indigenous and Afro-Colombian population.\textsuperscript{75} Moreover, while the Constitution may demand the equal treatment of men and women, it can only attend to the social institution of machismo indirectly. At these margins, the realisation of equality falls as much in the realm of politics and development as it does in the realm of law. Law may help change culture and politics to some extent, but it is also subject to both.

\section*{Conclusion}

Colombia's constitutional system serves as an example of both the potential and the limits of the legal regulation of equality. From the perspective of equality law, the 1991 Constitution and its legal heritage of rights and access to justice must be considered as a model for development in other fields. In particular, the ready access to the \textit{tutela} action has empowered many citizens with the capacity to protect their fundamental rights. So too, however, does the state of discrimination in Colombia stand as a testament to the limits of law. Within the complex and tumultuous political environment that persists in Colombia, it is clear that the promise of equality must be delivered by the government as much as by the courts.

\begin{enumerate}
\item Patrick Delaney is graduate of the Australian University (BA/LLB(Hons), University Medal) and Oxford University (BCL) where he was a Clarendon and Fairfax scholar. He lived in Bogota, Colombia during the drafting of this article. He is presently working in the International Law Branch of the UK Ministry of Justice.
\item Presidents Betancur and Pastrana presided over these unsuccessful negotiations: see United States Department of State, above note 2.
\item Tuft, Eva Irene. "Integrating a Gender Perspective in Conflict Resolution: The Colombian Case", in Skjelsbaek, Inger and Dan Smith (eds.), Gender, Peace, and Conflict (2001) 139.
\item Internal Displacement Monitoring Centre. “Almost 4 Million Colombians Displaced by Violence Be-

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Salazar, above note 10.

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Ibid, 15.

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Ibid.


United Nations High Commissioner for Human Rights, above note 7, 43.


Ibid.


United Nations High Commissioner for Human Rights, above note 7, 14.

Ibid.

Ibid.


While implicit in the first paragraph of Article 13, this is made more explicit in the second: "The State shall promote the necessary conditions for real and effective equality and take action on behalf of groups that are discriminated against and marginalized".

For a full table of the rights relevant to indigenous communities, see National Planning Department (DNP), above note 17, 52.

Article 93, Constitution of Colombia.

See, for example, case C-481 of 1998, on homosexual teachers and case C-507of 1999 on gays in the military. These and other Constitutional Court cases can be accessed through the Constitutional Court website at http://www.constitucional.gov.co/corte/.

See case C-530 of 1993.


See case C-481 of 1998.

Such as those listed in Article 13: sex, race, national or family origin, language, religion, political opinion or philosophy. This list is non-exhaustive: see cases C-481 of 1998 and C-112 of 2000.

See case C-673 of 2001.

Ibid.

See case C-112 of 2000.

See case C-134 of 1994.

For an introduction and comparison of the various forms of tutela, or amparo, see Brewer, above note 36.

Article 86, Constitution of Colombia ('la protección inmediata de sus derechos constitucionales fundamentales, cuando quiera que éstos resulten vulnerados o amenazados por la acción o la omisión de cualquier autoridad pública').

Article 10, Decree 2591 of 1991. This and other statutes can be found through the Bank of the Republic legal portal, available at http://juriscol.banrep.gov.co:8080/.

Ibid.

Ibid, Article 14.

Ibid.

Ibid, Article 29; Article 86, Constitution of Colombia.


Ibid.

Articles 11-41, Constitution of Colombia.


Morgan, Martha I. "Taking Machismo to Court: the Gender Jurisprudence of the Colombian Constitutional Court" (1999) 30 University of Miami Inter-American Law Review 253, 278.

Cifuentes, above note 56, 7; Case T-225 of 1993.

Article 42, Decree 2591 of 1991; Cifuentes, above note 56, 6. There are also some provisions for tutela actions in cases of the correction or production of information held by private individuals.

Case T-251 of 1993; Cifuentes, above note 56, 6.

Article 7, Decree 2591 of 1991.

Cifuentes, above note 56, 9-10; Article 23, Decree 2591 of 1991.

Morgan, above note 57, 318-20.

"Magistrados, con úlcera por tutelas", El Tiempo (Bogotá), Aug. 27, 1997.

See, Morgan, above note 57, 319-21, citing the evidence of Judge Jose Roberto Herrera and Justice Jorge Arango Mejía.


Ibid, citing a study by the Centre of Judicial Investigations at Los Andes University.

Cepeda Espinosa, M. J. "Democracy, State, and Society in the 1991 Constitution: The Role of the Constitu-


74 See, for example, case C-370 of 2006, addressing the Justice and Peace Law which governs the demobilisation of paramilitaries. This is discussed in Córdoba Triviño, Jaime. “Comunicado de Prensa Sobre la Demanda Contra la Ley de Justicia y Paz : Ley 975 de 2005”, Press Release, Corporación Colectivo de Abogados (18 May 2006).

75 See, for discussion, Cepeda, above note 53, 21-2.
Slums, The Right to Adequate Housing and the Ban on Discrimination

Claude Cahn

Introduction

This brief article notes the absence of general commentary by international bodies on discrimination in the field of housing. It sets out some exploratory ideas as to challenges in providing holistic content to the anti-discrimination norm in the field of housing by examining potential discrimination issues in slum creation and maintenance. Finally it assesses critically the doctrine of restitutio in integrum as a valid basis for remedy in this area.

L.R. et al. v. Slovakia

In March 2005, the United Nations Committee on the Elimination of Racial Discrimination (CERD) found Slovakia in violation of international law for racial discrimination against Roma in the field of housing. In the case of L.R. et al. v. Slovakia, the CERD Committee held that Slovakia violated international law as a result of the actions of the municipality of Dobšíná, which agreed to cancel a social housing project which would have benefited Roma in the town. The cancellation followed a petition campaign against Roma receiving such housing, mounted by local non-Roma and ultimately garnering circa 2,700 signatures locally. The CERD held that this act of capitulation by the municipality was racially discriminatory, and therefore illegal.

The CERD ruling in L.R. et al. v. Slovakia (the Dobšíná case) applied the ban on discrimination in access to housing included in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD Article 5(e)[iii]). The definition of discrimination included in the ICERD at Article 1(1) bans acts ‘‘based on race, colour, descent, or national or ethnic origin’’ which have the ‘‘purpose or effect’’ of nullifying or impairing fundamental human rights, thereby eliding the distinction between direct and indirect discrimination. The ICERD also includes at Article 3 a ban on racial segregation, a distinct and particularly serious form of harm, but the CERD Committee chose not to find a violation of Article 3 in the Dobšíná case. The Committee did however find that the lack of a domestic remedy for housing discrimination in the instant case gave rise to a violation of ICERD Article 6, requiring remedy for Convention harms.

Considering the centrality of adequate housing to individual dignity, it is at least somewhat striking that key expert authorities have to date remained silent as to the content of the ban on discrimination in the field of housing. Neither the Committee on the Elimination of Racial Discrimination nor the Committee on the Elimination of Discrimination Against Women have issued General Comments or General Recommendations on discrimination in relation to housing. The silence of the former is particularly noteworthy given that, of all of the many areas covered by the ICERD ban on discrimination, as listed in Article 5, only relatively few could be areas to which the Article 3 ban on racial segregation could apply, and such a list would surely include housing. Approaching the issue from another normative angle, the Committee on Economic, Social and Cultural Rights (CESCR)
has not yet issued any general commentary on discrimination, although a number of the CESCR general comment documents -- including General Comment 4 on the right to adequate housing, General Comment 13 on the right to education and General Comment 15 on the right to water; to name only three -- are steeped in the discourse of equality.

What accounts for this silence? Perhaps one answer may lie in the plurality and complexity of cases at issue when the non-discrimination norm intersects with housing. Housing is an immensely rich field. The form and content of housing may be different in different parts of the globe, and rules regulating housing may be very different, depending on the type of housing, the type of tenancy, the situation of the person(s) concerned, as well as a range of other factors. In addition, housing issues frequently intersect with land rights, spatial planning issues, as well as property and other considerations, and may also engage rights to freedom of movement and/or basic security and protection.

In considering the range of issues which need to be addressed by those seeking to examine issues included in the ban on discrimination in housing, it may be useful to examine one small sliver of the broader pie: discrimination issues implicated in the housing (and/or failure thereof) of Roma in rural communities in Slovakia, i.e. racially segregated rural slums and the broader context surrounding the Dobšíná case.

**Slums**

The context of *L.R. et al. v. Slovakia* is the failure of Slovak authorities to provide housing to persons currently living in extremely sub-standard rural slums for reasons of belonging to a pariah ethnic group. The Committee engaged with the facts in *L.R. et al. v. Slovakia* at least in part for formal reasons; the municipality had first decided to construct social housing for these slum dwellers, and then reversed the decision when put under pressure by locals acting out of malicious motive. Thus, the discriminatory “decision” was particularly evident in the facts as they transpired in Dobšíná. However, there is no particular reason why this case alone might engage the non-discrimination regime or be distinguished from the many other types of decisions at issue in racially segregated slum housing.

The creation of Romani slums in Slovakia may take place in many different ways, but a number of factors are usually involved: (i) The municipality designates -- formally or informally -- an area which will be the “Gypsy slum”. Often -- though not always -- this area is already heavily or predominantly Romani; (ii) In some cases, though not all, this designated area is an “osada” -- an extremely sub-standard slum, usually in a rural area -- which has developed as an agglomeration of informal housing structures, sometimes constructed entirely by the Romani slum-dwellers themselves, and sometimes made up of a composite of regular constructions and informal constructions; (iii) Where such an area is not already 100% Romani, the municipality facilitates the removal of non-Romani families from the area, for example by preferentially awarding social housing to non-Roma, while passing over Roma. This was, to name only one example, an active element in the removal of non-Roma from Košice’s Lunik IX, a very large slum in a sub-urban housing estate; (iv) The municipality studiously fails to act to challenge racial discrimination on the private housing market. Thus, as Roma attempt to leave the new ghetto area by renting private housing, they are refused by both public and private authorities, and have no housing alternatives besides housing in the new ghetto area; (v) Using new powers to evict, created by the erosion of legal protec-
tions against eviction, municipal authorities evict Roma from housing in mixed areas, or sell public housing in which Roma live to private companies, on the understanding that they will evict the Roma concerned. Alternate housing, where it is made available at all, is provided only in the new ghetto area; (vi) As in Dobšiná, efforts by parts of the Slovak government, under pressure from entities such as the European Union, to provide social housing to Roma, are thwarted following pressure by those hostile to assisting Roma in any way.

The above is an idealised example. In some cases, racial segregation is created and/or enforced through other measures. Thus, for example, in some cases, (vii) Roma are moved into ‘temporary’ housing on some pre-textual ground or for some genuine reason (natural emergency, or renovation of existing housing), from which in fact authorities have no intention of ever removing them. In other cases, vigilante threats are used to enforce segregation. For example in the village of Svinia, (viii) locals simply decided that Roma would not move from the excluded pallet of land to which they had been relegated into town, and threatened violence if anyone tried to circumvent this community-generated norm.

In the foregoing, the complex as a whole creates the racial segregation. However, each element in and of itself may implicate different norms, or may implicate the same norms in different ways. For example, direct discrimination is evident in all of the numbered elements above. However, element (i) may not involve any formal act of any kind, and so there may be no formal act of discrimination.

Where the issues of element (ii) are present – that is, where the default situation is a rural slum settlement (“osada”), the norms infringed appear first and foremost to be those described in UN Committee on Economic, Social and Cultural Rights General Comment 4 on the right to adequate housing. That is, it likely lacks legal security of tenure, is excluded from various types of infrastructure, is not accessible, may not even meet minimum standards of habitability, etc. To the extent that the non-discrimination regime is infringed, it is most evidently infringed within the ICESCR definition of discrimination. That is, discrimination is at issue because Roma have not benefited to the same extent from development as non-Roma. While this is indeed discrimination, it is a difficult standard of discrimination to invoke before a court with any degree of success, in the absence of any other more evident acts of discrimination (such as those at issue in L.R. et al. v. Slovakia).

However, element (ii), might also be conceptualised as direct discrimination. The omission of the authorities to act to improve the situation as it exists is the discriminatory act. The comparator is hypothetical: the authorities would not have left non-Roma in such a situation without acting to improve their housing situation.

Element (iii) involves very evident direct discrimination, although it may be very difficult to prove direct discrimination in any individual act by the municipality. Thus, although the acts concerned (moving non-Roma, but not Roma, even though both have applied to move and are otherwise in comparable situations) are directly discriminatory, it may be more convenient to regard them as indirectly discriminatory, and view the overall phenomenon of non-Roma moving out of the ghetto area while Roma stay as the unequal impact of prima facie neutral procedures (in this case, rules for allocating public housing).

In element (iv), there is direct racial discrimination in decisions by private housing providers to refuse to rent to Roma, and there is also
direct racial discrimination in the failure by the public authority to act against the direct discrimination by the private housing providers. There is in addition a more general failure of bona fides on the part of the public authority, above and beyond the racially discriminatory character of its generalised failure ever to intervene in such matters. Here, however, rigid and intensely formalistic practices in anti-discrimination enforcement in Central and Eastern Europe will mean that anyone challenging the failure of the public authority to act in such cases will find themselves faced with a range of bureaucratic barriers which will thwart all but the most determined, and in practice will thwart most of the most determined also.

Element (v) is also very likely directly racially discriminatory, and in Slovakia, were a comprehensive study is available on the matter, likely indirectly discriminatory. Element (v) might also be viewed as discrimination in the sense of the European Court of Human Rights Thlimmenos jurisprudence,4 because in forcibly evicting Roma, the authorities have failed to take into consideration the different position they, as a vulnerable, isolated, destitute and despised minority, are in, as opposed to other, non-Roma.

Element (vi) is purely racially discriminatory, as the CERD Committee held. In element (vii), the non-discrimination and right to adequate housing norms may actually collide, or at least abrade. Fulfilling the requirement to rehouse persons made homeless (and thereby fulfilling elements of the right to adequate housing), officials undertake acts of racial segregation. If officials are indeed undertaking acts of racial segregation, then the acts of re-housing to avoid homelessness nevertheless infringe the right to adequate housing, but not in the vector at which homelessness is defined as the highest form of harm.

Finally, element (viii) calls into question the very rule of law in Slovakia.5 During the 1990s, the presence of abundant skinhead violence, as well as a number of anti-Romani pogroms, seemed to indicate that Slovak authorities had lost control over the systematic abuse and violence and that, where Roma were concerned, vigilante forces had partially taken over. The Slovak government has devoted some efforts in recent years to countering this impression, for example by creating a special department in the police force to combat extremist crime. Nevertheless, due to the fact that threats of violence can succeed in this area, the possibility of utter lawlessness cannot be entirely excluded from discussion.

However, if lawlessness is at issue, it is certainly not the primary issue driving the racial segregation of Roma in Slovakia. Rather, at issue is the veneer of legality imposed over procedures which are in fact saturated with racial considerations.

Content and Remedy

As noted previously, the discussion above has aimed to look, in a non-comprehensive way, at some of the potential racial discrimination issues at issue in slum creation and maintenance, where the slum-dwellers at issue are slum dwellers due to their ethnicity. The discussion above has not looked at discrimination in housing as a whole, nor has it examined any aspect of discrimination beyond racial discrimination.

In light of the foregoing, the remedy ordered by the CERD Committee in L.R. et al. v. Slovakia does not give rise to overwhelming confidence that the will exists at present to provide detailed flesh to the normative bones of the ban on discrimination in the field of housing. The remedy specified by the Committee is as follows:
“... the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.”

When weighed against the plethora of forces prevailing in slum creation and maintenance in places such as Slovakia at present, it is difficult to see how an approach, derived primarily from *restitutio in integrum*, might suffice as remedy in this scenario, if indeed that common law concept is ever appropriate in a human rights context.

While there is not necessarily a direct relationship between the content of the norm and type of the remedy available, these are indeed ultimately intrinsically linked. It is difficult to imagine how a remedy which solely aims to restore conditions prior to harm could be sufficient to address all or even most cases related to racial discrimination and slums. While this criticism might be leveled generally at the application of *restitutio in integrum* for human rights harms, *restitutio in integrum* has particularly glaring deficiencies in the context of housing discrimination, at least in those areas elucidated by examining slum creation and maintenance. As work to define the normative content of the ban on discrimination in housing takes shape in the coming years, more fruitful bases will have to be identified on which to establish the content of the ban on discrimination in housing.

Finally, as this article has benefited extensively from examination of the *L.R. et al. v. Slovakia* case, it would seem inappropriate to conclude without comment on the case itself. Despite the elapse of over two years since the decision, Slovak authorities show no signs of implementing the decision. Indeed, the Dobšiná municipality’s current primary line of defence in refusing to provide social housing to the Roma concerned is derived directly from a crass reading of *restitutio in integrum*; the municipality argues that, by providing no housing to the Roma concerned, it has restored the original condition.

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1 Claude Cahn is Head of Advocacy Unit, Centre on Housing Rights and Evictions (COHRE). He was previously Programmes Director, European Roma Rights Centre (ERRC). The author is grateful for comments provided by Margarita Ilieva on a draft of this paper. Parts of this article are also included in a longer paper, forthcoming in the European Yearbook on Minority Issues, discussing interface between the ban on discrimination on the one hand, and the right to adequate housing on the other:


4 “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” European Court of Human Rights, Judgment, Thlimmenos v. Greece, (Application no. 34369/97), 6 April 2000.

5 Although element (viii) also arguably implicates the anti-discrimination regime, insofar as the failure of the criminal justice and law enforcement authorities to stop and penalise this criminal behaviour by private parties who attack Roma may be directly racially discriminatory. Here again the comparator would be hypothetical: the same authorities would not have failed to act were the victims of such behaviour non-Roma.

“So who am I?
Without any identity document I have no rights.
My dog, my inseparable friend, has more rights than I do.”

Velimir ‘Dabetić’
Testimony of an “Erased” Man from Slovenia

On 26 February 1992, in the Republic of Slovenia, at least 18,305 people were unlawfully removed from the registry of permanent residents. They were mainly people from other former Yugoslav republics who had been living in Slovenia and had not acquired Slovenian citizenship after the country became independent in June 1991. As a result of their removal ex lege from the registry, an act also referred to as the “erasure”, they became foreigners or stateless persons. These “erased” persons remain to date among the most disadvantaged and marginalised groups in the country and in the region.

On 2 November 2007, in a joint statement, The Equal Rights Trust and Amnesty International urged the Slovenian government to withdraw a draft constitutional law, presented to parliament on 30 October 2007, which was intended to resolve the status of the “erased”. In its present form the draft law continues to violate the human rights of the “erased” and further aggravates their disadvantaged position. It maintains discriminatory treatment of the “erased”, provides new legal grounds for more discriminatory actions by the authorities, including the possibility to revise decisions on individual cases where permanent residency has been restored, and fails to retroactively restore the status of permanent residents to all the “erased”. The draft also disclaims responsibility by state bodies for the “erasure” and explicitly excludes the possibility of compensation for the human rights violations suffered by the “erased”. In the section of this journal dedicated to ERT advocacy, you can read more about the Trust’s concerns regarding the continuing discrimination of the “erased”, elaborated in a letter to Janez Janša, the Prime Minister of Slovenia.

Earlier, on 15 October 2007, ERT submitted a third party brief to the European Court of Human Rights in a case addressing the discrimination against “erased” persons in Slovenia. One of the eleven applicants in this case is Mr Velimir Dabetić. In December 2007, he spoke to ERT’s representative Donatella Fregonese, who wrote up his testimony on the basis of the Italian language original.

Photo © Velimir Dabetić 2007
“I was born in Koper⁴, in what was the Socialist Federal Republic of Yugoslavia, on 22 September 1969. In Koper I attended primary school and completed my high school, qualifying as an engineering worker. I then did my military service and lived in Slovenia, a federal unit of Yugoslavia, until the age of 20. I never had any doubts about my national identity: I was Velimir Dabelić, a Slovenian citizen. Now I am a non-citizen, a stateless person, and I have no rights because my legal identity was erased in 1992 together with that of 18,000 other people. Here is my story.

After qualifying, I initially worked for Mehano-tehnika, a toy manufacturing company in Izola, and then for Tomos in Koper. Unfortunately, the economic situation at the time was in a flux, and I was made redundant. At that point I said to myself: ‘I’m 20 and still very young. I can go to Italy - it is so close by – and try to find a job there!’ I was lucky: the day after I arrived I found a job and started working straight away. I signed all the official documents and got a permit to live and work in Italy. I found an apartment and started paying taxes.

While I was working in Italy, political tensions mounted in Slovenia as a result of the movement for independence. Slovenia became independent on 25 June 1991 and Koper, my home city, became one of the most important urban centres of the new state. In the meantime, I continued to work in Italy - first in Vicenza as a metal worker, then in Arzignano in a leather factory, and finally in a furniture factory in Verona. At that time I was 22 years old and I could not imagine how some of the events that happened subsequently would change my life.

Like all the other “erased”, I was unaware of the tornado that was about to hit me, bringing turmoil into my life. Actually, I should have known better and considered much more carefully what had happened to my family in Koper shortly after Slovenia became independent.

This has to do with the fact that my parents came to live in Slovenia in the 1960s from Montenegro.⁵ In the summer of 1991, a neighbour told the police that my family was hiding some Chetniks⁶ in the house. One night the police broke into my brother’s flat. They tortured him and forced him to walk on his knees to our parents’ house, two kilometres away, holding a gun to his head. When they arrived the officers shot at and damaged various objects around the house. Then they forced their way into the house, pointed their guns at my parents and shouted: “Where are the Chetniks?” My parents repeatedly told them that they never had any contact with such people. Actually, my grandfather had been an important partisan hero, an enemy of the Chetniks. When the police officers realised that they may have made a mistake, they left, without any explanation.

One day after this incident, my parents phoned me to say that the entire family had been removed from the official register of permanent residents. As a result, I became concerned that my Italian residence permit would be invalid after my Yugoslav passport expired. Therefore, I returned to Slovenia, my home country, to reapply for Slovenian citizenship. When I arrived, I was told that I had no right to Slovenian citizenship because there were no records of my past citizenship.

I could not believe what the woman from the Registry had explained to me. Although I was born in Slovenia, had gone to school there and considered my mother tongue
to be Slovenian, I had no right to be a Slovenian citizen. I could not understand how this could be. I thought that I was completely Slovenian, yet I was being denied Slovenian citizenship. In fact, it was suggested that I should apply for citizenship in either Italy or Montenegro.

At that point, I made my decision to go back to Italy. I was young and naive about the legal repercussions of my situation. And I still had a passport, although the federal state that had issued the document had ceased to exist, its validity had not expired so I could still use it. I had my Italian residence permit, my driving licence and an apartment. I went back in order to lead a normal life. At that time, I was living in Verona where I continued to work for another 10 years.

It was only in 2002, when I had to renew my work permit, that I had to face the consequences of being deprived of my Slovenian identity. I could not renew my passport and

Photo © Velimir Dabetić 2007
I had no other valid ID. All of a sudden, I became an illegal immigrant with no rights. I lost everything and ended up on the street.

Without work and without a flat, I had to manage somehow, day by day, simply to survive. I travelled around Italy, especially along the Adriatic coast, with a rucksack on my back, performing on the streets as a juggler and a fire-eater:

In many places I would be stopped by the police and taken to the police station. Usually they would keep me there for about 12 hours. Once they had established that I was in Italy illegally, they would order me to leave the country. However, they could not decide where I should be expelled to as my own country denied that I was its citizen. I have visited almost all of the police stations in major Italian cities: Trieste, Udine, Vicenza, Verona, Trento, Bolzano, Milan, Rimini, Ancona, Senigallia.

On Christmas Eve 2005, Bologna Chief of Police issued Velimir Dabetić an expulsion order. Threatened with arrest for not leaving the country, Mr Dabetić was advised to apply for formal recognition of his status as a stateless person. But before he could do this, Italian regulations required that he should obtain leave to remain from the Ministry of the Interior. In May 2006 his application for leave to remain was rejected, on the grounds that he “does not have a valid leave to remain”.

In April 2006, Pesaro Chief of Police ordered Mr Dabetić to leave Italy within five days or face imprisonment. On 16 June 2006, Mr Dabetić was arrested and imprisoned in Mantova. Three days later he was brought to court. The President of Mantova Tribunal, Dr. Giovanni Scaglioni stated the following in his decision: “The defendant has reported that he was unable to obey the expulsion order. Having been deprived of Slovenian citizenship, he could not be repatriated to a country which refuses to accept him. He has documented that he has asked to be recognised as a stateless person; the procedure is pending. His lawyer has submitted a note from the Slovenian Consulate in Trieste stating that Velimir Dabetić is not a citizen of the Republic of Slovenia. The defendant must be absolved from all charges. In fact, having been expelled from the country as a Yugoslav citizen and having lost his right to Slovenian citizenship, at present he has a justified reason for not leaving Italy, since he will not be received by Slovenia or by any other state. The fact, therefore, has no penal implications.”

“I now live in Pesaro where everyone knows me and my story. But initially I used to spend 12 hours or more at the police station every week! No one knew anything about the 18,000 people from Slovenia who had been ‘erased’.

I love Pesaro and I have decided to stay here, because I have grown tired of many years of life on the street with all the problems this brings. Living on the street is not easy and it can be dangerous. Especially if you have no documents to show to the police. They stop you all the time and aren’t always tolerant and understanding. Pesaro is a sea town; the people are nice and friendly. I met here a family who originally came from Rome and who have helped me a lot. I also receive support from Città della Gioia (the City of Joy), a small charity that supports young people in need. They found me a room to rent for 200 Euros a month. I know that this is not a permanent solution but I hope that I can stay here for as long as possible. I live every day
with the anxiety of ending up on the street again. Every morning I get up and I travel to a nearby city such as Rimini, Cesena and Forlì, to perform in the streets. In the winter few people stop to amuse themselves, but I still manage to earn 10 or 15 Euros – enough to buy some food.

I have lived half of my life in Italy. I now feel Italian and speak Italian, but I do not have a leave to remain. So who am I? Without any identity document I have no rights. My dog, my inseparable friend, has more rights than I do.

It is difficult to believe that things will change. I have almost lost faith in myself. Imagine the following. In Slovenia, my parents are now elderly and ill. I could go there as it is easy to cross the border now that Slovenia is a member of the European Union. But should the Slovenian police stop me, they would take me to a detention centre for illegal aliens. How is this possible in a democratic Europe? Why should I be treated as if I were a common criminal?

I hope that soon this situation will be resolved, for me personally, as well as everyone else in similar circumstances. I’m in contact with a network of people who deal with the “erased”. There are many who have helped me but little can be achieved without the full engagement of the EU and the Slovenian government.”

When contacted by ERT in January 2008, over 18 months after the Mantova Tribunal judgment, Dabetić had still not received leave to remain from the Italian authorities. He remains in a legal limbo as we go to press.

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1 Before the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), its citizens had also a second, republican citizenship. SFRY citizens of other republics living in Slovenia enjoyed the same rights as citizens having Slovenian republican citizenship. After Slovenia became independent in June 1991, citizens of other republics having permanent residence in Slovenia could apply for Slovenian citizenship by the deadline of 26 December 1991.

2 The text of this statement is available on http://www.equalrightstrust.org/newsstory-02112007/index.htm

3 See “ERT submits third party brief to the European Court of Human Rights on the discrimination against “erased” persons in Slovenia”, available on http://www.equalrightstrust.org/newsstory-15102007/index.htm

4 Koper is an Adriatic port town near the border of Slovenia with Italy.

5 One of the six federal republics and two autonomous provinces that comprised the SFR Yugoslavia.

6 In Second World War, this term was used by an anti-communist paramilitary formation loyal to the King-
dom of Yugoslavia’s government in exile. They were a disparate group and some bands were responsible for war crimes targeting Croatian and Muslim populations as well as Serbs who were suspected of assisting Tito’s Partisans. In the recent history of the Western Balkans, the term has, inter alia, also been used by extremist Serbian nationalists, as well as nationalists of other ethnic groups to pejoratively refer to anyone of Serbian or Montenegrin origin.

On 12 June 2007, the UK Government published a consultation Green Paper “Discrimination Law Review: A Framework for Fairness” setting out its proposals for a single equality bill for Great Britain. This consultation is part of a wider reform agenda currently taking place in Great Britain, which includes the integration into domestic law of the EU equality Directives and the establishment of a new Equality and Human Rights Commission. ERT interviewed Barbara Cohen, independent discrimination law consultant and Executive Committee member of the Discrimination Law Association, and John Wadham, Group Legal Director at the Equality and Human Rights Commission, and discussed some of the topical issues within the reform debate.
ERT: The proposed reform agenda for anti-discrimination law has been on the table since around 2000. What do you think have been the main drivers for this agenda?

John Wadham: We have had anti-discrimination legislation for a long time in this country; you can trace it back to even before 1965. But certainly since 1965 it has been very patchy, it doesn’t cover all of the issues that I think most people now feel need to be covered. It was never integrated with human rights and it’s obviously necessary to ensure that we have strong robust equality legislation that people understand. One of the concerns that we have is whether the Green Paper [the Discrimination Law Review] is going to be adequate or not. Is it just going to be bolted together? Why is it necessary to have an Equality and Human Rights Commission? Because for precisely the same reasons we need single equality legislation, there needs to be a single place where people can go to, there needs to be a single body promoting Human Rights and Equality and it is important we are able to ensure that those people who need our help are given it. Lastly of course that the agenda for promoting equality, for opposing discrimination and for promoting human rights are in one place.

Barbara Cohen: The European directives! If the UK was not required to enact legislation on grounds that were not already covered, for example, sexual orientation, religion or age, I doubt there would have been much discussion about reform of anti-discrimination law. There have been meetings since 2002 about how the UK was going to accommodate the requirements of the new Directives. Unfortunately, the government chose to do it through Regulations, under the European Communities Act 1972 rather than by introducing primary legislation, and the result is what I would describe as a legal mess. By using the
ERT: There has been a lot of debate surrounding both the merging of existing public duties and their process or outcome focus. In respect to the latter, do you believe that the positive duties should be outcome or process focused? What is the benefit of this approach?

Barbara Cohen: There is no benefit of something that only has a process. But we must recognise that the general equality duties aren’t process focused, they are outcome focused. The problem lies within the specific duties under the Race Relations Act in particular, where there is a duty to prepare a race equality scheme and to state arrangements for certain processes; it is the scheme that is supposed to indicate how an organisation is going to meet both the general duty and the specific duties, but without an obligation to carry out processes in order to do so.

I think a positive example is the equality duties under section 75 of the Northern Ireland Act 1998. The Northern Ireland Equality Commission (ECNI) recently did a review of how well the duties were working. Schedule 9 of the Northern Ireland Act 1998 requires some very particular processes, including equality impact assessments. The review found that in applying these duties nobody was asking for a change, nobody was saying ‘ah this is too process-driven’. Nobody has disputed the fact that you need to do equality impact assessments. And that was the position of public authorities, not just the NGOs and the ECNI.

So it seems to me that if the duty must be only outcome focused, which is what the government seems to be saying in its Green Paper, the question is ‘what outcomes’? Who designs the outcomes, based on what information? Perhaps what you should say is that the equality scheme needs to set some kind of objective or aim. So that the scheme says, ‘this is where the authority is trying to get to’, then the regulations can indicate the kinds of processes an authority is expected to use in order to achieve the outcomes you have set. The
real danger from the government proposals in the Green Paper is that authorities could pick and choose the easiest possible outcomes, and then they could just revert back to old ways of having a multiracial cultural event twice a year, for example, supporting gay pride or Chinese New Year.

Generally people want to be told how! They want to be told that this is what you are expected to do in order to get there and in my experience public authorities find it more burdensome if they aren’t really clear about what they need to do. Ultimately, I think that you should have a combination of the two. If you only had processes it would be a wasted exercise, but I think people who complain it is too process orientated have failed to have regard to the general equality duties which are not!

John Wadham: I think it is obviously important that we can use these to make a difference, - if they’re just process focused and not outcome focused then of course they’re less likely to make a difference. But you need to link the outcome to the process because people working in large public sector organisations need to understand exactly what they need to do to make a difference. I think there is an issue about transparency and fair process, but at the end of the day you need to ensure that the delivery of services is reaching everyone that should receive those services – and currently they’re not.

ERT: Do you believe that the transfer of a public sector positive duty to the private sector would be a successful endeavour?

Barbara Cohen: Not in the same form. From the outset you have to remember that this and previous governments signed up to a number of international treaties with commitments to equality in different kinds of ways, and they have passed legislation which says that they are trying to build equality into our society. Therefore, the government has made the public sector publicly accountable for what it does to achieve equality. However, the private sector is in business for business. They don’t have the same kind of public accountability – while they are accountable to their shareholders, they are never accountable to the public as a whole.

Would the duties as currently enacted under the various laws work for the private sector?

Positive Duty in British Equality Law

Within British law all public sector organisations listed under the respective Schedules of the Race Relations Act, Sex Discrimination Act and Disability Discrimination Act fall under a positive public duty to have ‘due regard’ to their General Duty.

General Duty

A General Duty under British equality law is a statutory obligation of listed public sector organisations to have due regard to the requirements of the respective equality act. For example, section 71(1) of the Race Relations (Amendment) Act 2000 states that, “everybody or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need— (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups.”

Specific Duties

The Specific Duties set the process by which a public sector organisation is to attain the requirements of the General Duty. This includes the creation of an ‘Equality Scheme’ containing details of how the organisation is going to fulfil its other specific duties, such as impact assessment, consultation, monitoring, staff training and ensuring access to information and services.
ERT: It has been argued by some that the hierarchy of protected grounds has hindered the successful application of the right to equality and non-discrimination. One area where this issue has been particularly contentious is in respect to reasonable adjustments. To what extent is it viable to extend the reasonable adjustment concept to all strands and not just disability?

Barbara Cohen: If you look at the Disability Discrimination Act 1995, reasonable adjustments apply in two different ways. They apply in a proactive way – in an anticipatory fashion – to non-employment - access to goods, facilities and services; and then in relation to employment – in a more reactive way – with a duty to make an adjustment for the individual. For the non-employment (anticipatory) reasonable adjustment you have to do some advance thinking; it seems to me that this type of reasonable adjustment involves the same kind of thinking that you would have to do in providing equality of opportunity. Certainly in the public sector I can’t see very much difference between an antici-

John Wadham: Well there are two separate issues. The first is that the public sector has to have clear rules about procurement. It needs to be clear what the procurement rules are and that people can insist that where significant amounts of public money is spent, that public money is going to organisations that have a clear record on the delivery of services and internal processes that respect equality.

The second issue is, should there be an equivalent of the public sector duty across the private sector and the Commission’s position is that there should. Whether it should be exactly the same or not is something we have debated, but we do think that there should be at least some process. The reason for that is obviously the very significant numbers of people employed in the private sector. If you ask the private sector organisations who are best in their fields and who are delivering their services and products across the whole of society, you will find that they are already doing something similar in relation to this.

So our proposal will be to take examples from some of the best private sector organisations and to use those in relation to some of the others doing less well. We hope that will improve the processes across the private sector generally.

But I do think that the State is entitled to say to the private sector, "you are a part of a society that has signed up to non-discrimination and equality, so you have to monitor who you employ and the users of your services.” They can do it formally or informally. The point is to make sure they look at their practices to see whether there appears to be some element of discrimination, some disparity wider than should be expected to occur.

If, as a private business, in the services you are providing, or if in the people you are employing there ought to be a particular mix which there isn’t, then it is up to you to figure out what has gone wrong and develop proposals for remediing it. In Northern Ireland for religion, political opinion and gender this has to be reported to the ECNI. However, in Great Britain to get all private businesses to report to a single commission would be totally impractical. I think it is worth looking at the new Companies Act 2006 which at the moment requires quoted companies in their business reports to report on work force matters but this could be extended by ministerial order. There is a need for required regulation of the private sector but not the same kind of statutory duties as on the public sector.
Ernst R. van der Linde: The phenomenon of multiple discrimination has recently received attention as an issue in need of targeted action. In the UK some have argued that effective protection from multiple discrimination requires a redefinition of discrimination. Others believe that the exigencies of proof, particularly the use of comparators, needs to be loosened. What approach in your opinion is best for UK law?

Barbara Cohen: I think first of all that one of the most important parts of law is that people understand what their rights are, so that they can feel confident that this is what they are entitled to receive from anyone with whom they have a formal relationship covered by legislation. So I think the new equality legislation should be stated as covering ‘protected grounds’ which would mean race, sex, sexual orientation etc. or ‘any combination of those grounds’. Thus protected grounds from the outset would include a combination; this ensures that direct and indirect discrimination and harassment etc. would apply to a combination of grounds, which is very often people’s real experience.

John Wadham: We have said in our response to the DLR Green Paper that there needs to be a more sensible approach to positive action measures. We would want to have a role in trying to help promote these measures. Equality is not just about treating people exactly the same, needs and circumstances are different. It is quite important that in some circumstances there should be an absolute bar on treating people differently; in other circumstances the legislation should require people to adjust their processes to accommodate difference. So you have to have both elements in any system to promote equality and protect from discrimination.
be a terrorist, whereas they employ Muslim women and they employ lots of men. So the discrimination was at the complete intersection of religion and gender: it wasn’t because he was a Muslim and it wasn’t because he was a man, it was because he was a Muslim man. The issue of the comparator is not the starting point but it is one of the aspects of the evidence that is used to establish discrimination. The government maintains that discrimination on multiple grounds is still a difficult issue; it isn’t difficult at all! Their arguments fall down on the realisation that it would be much easier for an employer to defend one case of multiple discrimination than two cases on separate grounds.

John Wadham: We have said in relation to our response to the DLR that it is not working at the moment and it needs to change. I think a significant amount of the change needs to relate to the process whereby people are able to use the system to demonstrate (if it is the case) that they have been discriminated against on more than one ground. That may require legislative changes but actually it is about the process rather than about strict law, but of course we may need to see some changes in that as well.

ERT: One recognised weakness of the current enforcement of UK anti-discrimination law has been that in respect to goods and services, the County Court system (which hears these cases) is ill-equipped to deal with the demands of equality law. Do you believe that there is a genuine argument for a unified equality tribunal system?

John Wadham: I’m not sure about this and the reason I’m not sure is because it happens to be the case that a significant amount of discrimination is discrimination within the work place. It also happens to be the case that the way in which we deal with disputes in the work place is via a tribunal system where there are no costs, or generally speaking costs are not part of the process.

Now in relation to goods and services the problem is that it’s plugged into the rest of the court system. So I see why some people argue that what you should do is move everything to the tribunal system. But then I’m not sure what you would do if somebody was being threatened with eviction and at the same time they were claiming that this was discriminatory. Because, in such circumstances, the only people who have experience of the housing law and the housing process are the County Courts. So the next question might be, ‘ok, why don’t you change the rules on costs in relation to equality cases’? Well, I think equality is very important but I know that other people think that the right to defend yourself from an eviction is equally important so why are there costs in relation to one and not the other. I don’t think it’s simple at all.

Barbara Cohen: Within the DLA there are some people – particularly with experience of bringing disability cases to the county court – who feel very strongly that the County Court is letting down applicants. As my experience of the County Court has been under the Race Relations Act – where there has always been a requirement to have lay assessors sitting with a judge – I don’t agree that the County Court is ill-equipped to deal with the demands of equality law.

I think that there are some arguments about practice and principle. On principle, I don’t agree that discrimination issues are so unique that they should be isolated into a separate institution. One of the things we know is that discrimination occurs across all the kinds of activities that we are engaging with all the
time. And if people have got issues about housing, education, policing or access to commercial services, it seems to me that the institutions that are already established to deal with other forms of wrongs in those areas should be expected to deal with discrimination within those areas also. You don’t want to deskill judges, you want to up-skill judges and make them understand that discrimination is another factor which disadvantages people in terms of full participation.

I have to say that in having conversations with other colleagues I’m not satisfied that someone who is not allowed into a disco or a restaurant due to discrimination has suffered more than a person who has to go to the County Court because their landlord has turned off their gas, electricity or their water. Some people talk of having equality tribunals, but then suggest that when complicated issues such as common law breach of police powers is part of the case, then the case should go back to the County Court. Employment tribunals work because you have got a set of judges that understand the employment situation and the respective discrimination aspects.

The real issue is that of simple civil litigation in the County Court and whether there are ways for better access to justice not just for discrimination cases but for other kinds of cases affecting ordinary people who don’t have means and who don’t have lawyers. Now, with the cut in legal aid you will almost never get a lawyer to do a simple discrimination case in the County Court. As far as I can tell there is almost no one to offer advice about how to make an application. There is advice available for employment cases but this doesn’t exist to the same extent for non-employment cases. So there is a huge gap in terms of the guidance and information available to people who want to go to the County Court.

I don’t agree that there should be a single equality tribunal but many do. Talking to people who sit as judges in the employment tribunal they say, ‘if you think the employment tribunal gets it right all the time, you’re wrong, the answer is they don’t.’ The rate of success for race discrimination cases in the employment tribunal in a recent year was 16%. Is that a great win? I’m not sure! I feel people have grabbed at the problems without thinking more fully about the whole of the justice system. I don’t think that discrimination is different from so many other civil wrongs that it should be treated in an entirely different way.

ERT: Is there scope in the current reform process for more sophisticated and progressive enforcement mechanisms which can produce structural and institutional change?

Barbara Cohen: Absolutely, the resistance of this government to incorporating anything which would begin to bring the UK law in line with the European Directives requirements – for sanctions to be effective, proportionate and dissuasive – is really disheartening. In Northern Ireland the Industrial Tribunal can make a recommendation not only to rectify the position of the complainant but one which impacts on other persons. Most times in the Employment Tribunal the person (the claimant) is no longer employed so the power to make a recommendation to protect the claimant is of little use.

It seems to me that it could become complicated in terms of determining who would ensure that the recommendation going beyond the claimant would be carried out, as the tribunal doesn’t want to have to keep monitoring hundreds of cases. So we need to think of a mechanism for this. The tribunal needn’t make an organisationally sweeping recom-
mendment but one which deals with the particular issue. In Ireland the Equality Tribunal has powers to make recommendations and in a number of other jurisdictions, for example, in Italy and Portugal they have powers to raise issues with the licensing authority if they have made a finding against a body that needs to be licensed. In Hungary the Equal Treatment Authority publicises the findings of their work much more widely. So there are lots of other methods which operate as deterents; often in the UK bad publicity is one of the greatest incentives to initiate change.

**John Wadham:** One of the things the Commission is trying to do and will try to do in the future is about prevention rather than cure. There are thousands and thousands of employment tribunal cases and people need to be properly represented at those, but it would be much better if rather than seeking compensation it was possible to try and avoid the discrimination in the first place. I think in the longer term the Commission will be using its enforcement processes and looking for policy changes. Given how important equality is, we need to change how people deal with it to try and ensure that we don’t get into a situation where people are being discriminated against. It seems to me that this is the answer in the long term, rather than only picking up the cases when it’s too late.

**ERT:** The UK has been seen by some as a leading jurisdiction in the legal protection against discrimination. What legal steps do you think the UK needs to take to retain its forerunner status in the current revision of the law?

**John Wadham:** Well I think for a long time it’s probably true that the UK had more sophisticated, better developed and more significant anti-discrimination legislation, at least in some strands. Obviously in relation to race and gender to begin with although it took a long time before we dealt with disability. And of course in the last three or four year’s issues such as sexual orientation, age, religion and belief were implemented first by Europe not by the UK domestically. And it’s probably likely that any new developments will come out of the EU. But I do think that we will have a chance with the new equality act to take the lead again. And that is something the Commission will be working with the Government on to try and improve and produce the best possible new equality bill that we can.

**Barbara Cohen:** I think to be a forerunner the statutory duty on public authorities needs to be extended to cover all grounds, it needs to be very clear and needs to have a combination of outcomes with some kind of required processes. Also there needs to be clarity in relation to positive action. The UK needs to incorporate public procurement within the equality framework, because not just in the UK but everywhere there is increased privatisation of public services. I think that there needs to be effective enforcement mechanisms within the legislation, as financial disincentives to discrimination don’t seem to be entirely effective. As a minimum it needs to incorporate the legislation within the European Directives and remove the existing gaps which it hasn’t yet done.

*Interviewer on behalf of ERT: Jarlath Clifford*
ERT Calling on OSCE to Promote Comprehensive Anti-discrimination Legislation in Central Asian States

ERT Urging Slovenian Government to Stop Discriminatory Treatment of the “Erased” Persons

ERT Appealing on Malaysia to Release Anti-discrimination Activists and Cease Arresting Civil Society and Opposition Party Activists
Equal Rights Trust Advocacy

Ivan Fišer¹

The Equal Rights Trust, as one of its objectives, aims to expose and help eliminate violations of the fundamental right to non-discrimination. The Trust also works to ensure greater accountability of states and non-state actors in order to protect individuals against discrimination and promote equality. Since September 2007, ERT has undertaken the following advocacy actions.

ERT Calling on OSCE to Promote Comprehensive Anti-discrimination Legislation in Central Asian States

On 25 September 2007, the Equal Rights Trust and the International Helsinki Federation for Human Rights, in a joint statement presented in Warsaw at the OSCE 2007 Human Dimension Implementation Meeting, urged the Organisation for Security and Co-operation in Europe (OSCE) to offer expertise and technical assistance to governments and civil society Organisations in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, to facilitate their efforts in developing comprehensive and effective national anti-discrimination legislation.

Although Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan have ratified human rights treaties that contain guarantees of equality before the law and prohibitions against discrimination, in practice these states have not fulfilled their obligation, as required by international law, to give unqualified and immediate effect to the right to non-discrimination in their domestic legal order. In the words of the UN Human Rights Committee, a failure to comply with this requirement “cannot be justified by reference to political, social, cultural or economic considerations within the state”²

ERT and IHF were concerned that cases of blatant, explicit discrimination inscribed in national laws persist in the Central Asia region of the OSCE. More commonly, discrimination persists in the deliberate, convenient silence of the law when there is ample evidence that society is permeated by xenophobic, racist, sexist and other discriminatory practices.

This observation is supported, inter alia, by the findings of the UN treaty bodies³, mandated to review states’ compliance with international human rights treaties. A thorough analysis of their reports uncovers a long list of concerns regarding discriminative practices and acts common to the five mentioned Central Asian states. UN treaty bodies invariably point out the low level of awareness of international anti-discrimination standards among civil servants, including judges and law-enforcement officials, and recommend appropriate and continuous training. They equally recommend public awareness raising measures about non-discrimination standards, particularly targeting the most disadvantaged groups such as women and girls, members of the national and ethnic minorities, migrant workers and other non-citizens or people with disabilities. Prominently featured among repeated recommendations is the adoption and implementation of a comprehensive anti-discrimination legislation as the most effective means of combating all forms of discrimination.

A brief overview of some of the observed discriminatory practices, with some variations in severity from state to state, highlights the urgency for the OSCE member states from Central Asia to adopt comprehensive anti-discrimination legislation.

¹ Equal Rights Trust Advocacy
² ERT and IHF, 2007
³ UN Treaty Bodies, 2007
based on race, ethnicity or religion includes: lack of or insufficient legislation regarding racial discrimination; inadequate participation of national and ethnic minorities in state institutions; inadequate provision of education in ethnic minority languages and their infrequent public use on radio and TV; lack of information about unequal treatment suffered by members of some pariah communities perceived as “Gypsies”; disparate treatment of foreigners, including their return to countries where they are exposed to torture and other ill-treatment; and no recognition of the right to conscientious objection to compulsory military service. The gravest violations in this field were perpetrated by Uzbekistan where, among other things, criminal law was enforced to penalise apparently peaceful exercise of religious freedom, resulting in the imprisonment of hundreds of people; and in Turkmenistan where policies of forced assimilation included internal displacement of populations to inhospitable parts of the country.

With regard to gender-based discrimination, concerns common to all states in the region include: the prevalence of violence against women and the paucity of effective measures, including adequate legislation, to effectively protect the victims and punish perpetrators of domestic violence; the revival of traditional stereotypes in relation to the role of women in society and the reappearance of phenomena such as polygamy and forced marriages even when such practices are illegal; gender inequalities in the fields of vocational training, employment and low representation of women in public life and managerial posts, both in the public and private sector; and on-going trafficking of women and children, particularly affecting non-citizens and ethnic minorities.

Prevailing disparities have also been observed in the enjoyment of the rights of children, in particular those belonging to the most vulnerable groups such as refugees, asylum-seekers, internally displaced children, children with disabilities, abandoned children and those living in institutions and in regions with socio-economic development problems.

Discrimination suffered by children and adults with disabilities ranges from the lack of appropriate and inclusive educational and vocational opportunities to the frequent use of confinement in psychiatric institutions as a means of treatment of mental health problems, without review bodies, including courts, systematically reassessing their confinement and involuntary treatment.

State efforts to comply with treaty body recommendations appear to be patchy, piece-meal and lacking in political will. It should be noted, however, that Kyrgyz authorities have invested more concerted efforts to address the noted patterns of discrimination with legislative and other policy measures.

ERT and IFH were also concerned that insufficiently independent and effective national human rights and ombudsman bodies as well as widespread corruption and nepotism in the states of the Central Asian region have a strong bearing on the realisation of the right to equality and non-discrimination.

In order to effectively combat all forms of discrimination, ERT and IHF appealed to Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan to work on adopting comprehensive anti-discrimination legislation. In their efforts the states should be guided by the following five principles:

- The goal of legislation and other measures should be to eliminate unlawful discrimination and to promote equality regardless of sex, race, colour, ethnic or national origin, religion or belief, disability, age, sexual orientation, or other status;
• There should be opportunities for those directly affected by discriminatory practices and acts to participate, through information, consultation and engagement in the drafting of the legislation;

• Anti-discrimination standards (legislative provisions) should be clear, consistent and easily intelligible;

• The regulatory framework must be effective, efficient and equitable, aimed at encouraging individual responsibility and self-generated efforts to promote equality;

• Individuals should be free to seek redress for the harm they have suffered as a result of discrimination through procedures which are fair, inexpensive and expeditious, and the remedies should be effective.

With regard to the content of a comprehensive, consistent and enforceable anti-discriminative legislation, ERT and IHF urged the above five states to meet the following minimum requirements:

• provision of legal definitions of the concept of discrimination, including direct and indirect discrimination;

• setting out clear and detailed provisions as to what conduct, actions, measures, policies, or criteria would be considered discriminatory;

• provision of a substantive, asymmetric approach to non-discrimination, as opposed to a merely formal understanding of non-discrimination as “same treatment”;

• prohibition of discrimination in all spheres of public life whether by state or non-state actors;

• prohibition of incitement to discrimination, harassment, and segregation;

• establishment of specialised bodies empowered to assist victims and promote a culture of equal rights;

• provision of effective judicial remedies, including as necessary through criminal, civil or administrative processes, to victims of discrimination, ensuring that sanctions which are set into place are efficient, dissuasive and proportional;

• allowing for the procedural possibility of proving discrimination, through appropriate rules and criteria of evidence and burdens of proof, based on the understanding that the victims of discrimination are usually at a disadvantage and would not be able to defend their rights in the courts unless special care is taken as to their procedural rights;

• establishing clear obligations of the state related to the duty to promote equality in a proactive way through appropriate policies.4

The ERT submission to the OSCE on Central Asian states is available at: http://www.equalrightstrust.org/view-subdocument/index.htm?id=38.

ERT Urging Slovenian Government to Stop Discriminatory Treatment of the “Erased” Persons

On 8 November 2007, ERT wrote to Janez Janša, the Slovenian Prime Minister, to express concern that by adopting the Draft Constitutional Amendment and introducing it to Parliament on 30 October 2007, the Slovenian Government had yet again failed to comply with its international obligations to prevent and provide effective protection from discrimination to all people in Slovenia.

At least 18,305 people were unlawfully removed from the Slovenian registry of perma-
inent residents on 26 February 1992. They were mainly people from other former Yugoslav republics who had been living in Slovenia and had not acquired Slovenian citizenship after Slovenia became independent. As a result of their removal ex lege from the registry, an act also referred to as the “erasure”, they became foreigners or stateless persons. These “erased” persons remain to date among the most disadvantaged and marginalised groups in the country and in the region.

The discriminatory treatment of the “erased” and the failure of the Slovene authorities to remedy their situation in line with Slovenia’s international human rights commitments, as well as relevant decisions of the Slovenian Constitutional Court ((U-I-284/94 of 4 February 1999 and U-I-246/02 of 3 April 2003), has been of concern to the international and regional treaty monitoring bodies as well as other European human rights monitoring mechanisms.

In February 2004, the Committee on the Rights of the Child expressed concern to the Slovene authorities that many children had been negatively affected by the “erasure”, as they and their families lost their right to health care, social assistance and family benefits as a consequence of losing their permanent residence status.

The Committee was also concerned that children born in Slovenia after 1992 became stateless. It recommended that Slovenia “proceed with the full and prompt implementation of the decisions of the Constitutional Court, compensate the children affected by the negative consequences of the erasure and ensure that they enjoy all rights under the Convention in the same way as other children in the State party”.

In July 2005, the UN Human Rights Committee recommended that Slovenia “should seek to resolve the legal status of all the citizens of the successor States that formed part of the former Socialist Federal Republic of Yugoslavia who are presently living in Slovenia, and should facilitate the acquisition of Slovenian citizenship by all such persons who wish to become citizens of the Republic of Slovenia”.

In November 2005, the UN Committee on Economic, Social and Cultural Rights observed that the situation of the “erased” entailed violations of these persons’ economic and social rights, including the rights to work, social security, health care and education. The Committee urged Slovenia to “restore the status of permanent resident to all the individuals concerned, in accordance with the relevant decisions of the Constitutional Court. These measures should allow these individuals to reclaim their rights and regain access to health services, social security, education and employment.”

Considering the Second Opinion on Slovenia adopted in May 2005 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Committee of Ministers of the Council of Europe, in June 2006, adopted a resolution calling, inter alia, on Slovenia to “find without further delay solutions to the situation of non-Slovenes from former Yugoslavia (SPRY) whose legal status in Slovenia has still not been regularised and take specific measures to assist these persons on the social and economic front”. Similar recommendations were addressed to the Slovene authorities in May 2003 and March 2006 by the Human Rights Commissioner of the Council of Europe.

Presently, the European Court of Human Rights is considering a case addressing the discrimination against the “erased” persons in Slovenia. In this case, ERT has submitted a third party brief elaborating on the discrimination based on national origin and on statelessness with regard to the enjoyment of family and private life, intersectional or multiple.
discrimination of the “erased” and indirect discrimination concerning the denial of pension benefits to which the “erased” should have been entitled. ¹⁰

The draft Constitutional Law submitted to the Slovene Parliament on 30 October 2007 continues to violate the human rights of the “erased” and further aggravates their disadvantaged position. It maintains discriminatory treatment of the “erased”, provides new legal grounds for more discriminatory actions by the authorities, including the possibility of revising decisions on individual cases where permanent residency has been restored, and it fails to retroactively restore the status of permanent residents of all the “erased”. The draft also negates responsibility of state bodies for the “erasure” and explicitly excludes the possibility of compensation for the human rights violations suffered by the “erased”.

The discriminative treatment of the “erased” in the past 16 years and the response of the Slovene authorities to the Constitutional Court rulings and the recommendations of international and regional treaty monitoring bodies, appear to be part of a deliberate policy to deny an effective legal remedy to the victims of discrimination and to unnecessarily delay giving effect to Slovenia’s legal commitments under both domestic and international law. Such conduct of the Slovene authorities in and of itself could be considered to constitute discriminatory treatment.

ERT reminded the Slovene government that it is required to give unqualified and immediate effect in the domestic order to the right to equality and non-discrimination guaranteed by the provisions of Article 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention on Human Rights and Fundamental Freedoms.¹¹

Furthermore, Slovenia’s commitment to provide an effective remedy against violations of the right to equality and non-discrimination, obliges Slovene authorities to:

- Ensure that individuals have accessible and effective remedies in order to realise their right to equality and non-discrimination. Such remedies should be appropriately adapted so as to take into account the special vulnerability of certain categories of person, including in particular children. A failure by a state to investigate allegations of discrimination could in and of itself constitute discriminatory treatment. Cessation of ongoing discrimination is an essential element of the right to an effective remedy.

- Ensure that those responsible for discriminatory acts or practices, where this has been established through prompt, thorough and effective investigations by independent and impartial bodies, are made accountable. As with failure to investigate, failure to make accountable those responsible for discriminatory acts or practices could, in and of itself, give rise to a separate breach of international law. The right to an effective remedy may in certain circumstances require states to provide for and implement provisional or interim measures to avoid continuing discrimination and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such discrimination.

- Ensure that reparation is made to individuals whose right to equality and non-discrimination has been violated. Without reparation to individuals whose human rights have been violated, the obligation to provide an effective remedy is not discharged.

- Take measures to prevent a recurrence of a violation of the right to equality and non-discrimination.¹²


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persons irrespective of racial or ethnic origin, commits Slovenia to "lay down the rules on sanctions applicable to infringements of the anti-discrimination legislation and ... take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive."\(^{13}\)

Therefore, ERT urged the Slovenian government to recall the Draft Constitutional Law and propose legislation that would grant full reparation to all individuals affected by the "erasure" by explicitly and publicly recognising the discriminatory nature of the "erasure"; retroactively restore the status of permanent residents of all "erased" people (in accordance with the relevant Slovenian Constitutional Court decisions); provide financial compensation to all individuals affected by the "erasure"; and provide rehabilitation to those individuals whose physical and mental health was negatively affected by the "erasure". The Slovenian authorities should also establish an independent commission of inquiry to investigate thoroughly the circumstances which led to the "erasure", to collect data and information on the people affected by this measure and to examine and analyse its human rights consequences. As it prepared to assume the European Union (EU) Presidency in January 2008, Slovenia should clearly and unequivocally demonstrate its commitment to equality and non-discrimination as a fundamental principle of EU law.

On 6 December 2007, ERT was informed by the Office of the Prime Minister that its letter had been passed on to the Ministry of Interior responsible for this matter.

The amicus brief submitted by the ERT to the European Court of Human rights on the case of the “erased” is available at: http://www.equalrightstrust.org/view-subdocu-

ment/index.htm?id=52. The ERT letter to the Prime Minister of Slovenia sent on 8 November 2007 is available at: http://www.equalrightstrust.org/view-subdocument/index.htm?id=75.

ERT Appealing on Malaysia to Release Anti-discrimination Activists and Cease Arresting Civil Society and Opposition Party Activists

On 14 December 2007, ERT wrote to Abdullah bin Ahmad Badawi, the Prime Minister of Malaysia, expressing concern about the arrests and detention of ethnic Indian and other civil society groups and opposition party activists. ERT was concerned that their arrest, detention and prosecution were in violation of their rights to freedom of expression and assembly. Furthermore, they had also been denied their right to equal treatment and non-discrimination on grounds of their ethnic origin and political or other opinion.

In November and early December 2007, dozens of activists of civil society organisations and opposition parties in Malaysia have been prevented by the police from exercising their rights to freedom of expression and peaceful assembly. Many were arrested and charged with offences ranging from sedition to organising illegal protests or obstructing police officers in carrying out their duties. The vast majority of the reported incidents took place in Kuala Lumpur, although police searches and arrests have also been carried out in a number of smaller towns.

These violations seem to have culminated on 13 December 2007 in a most serious breach of international human rights law. By the order of the Prime Minister, who is also Minister for Internal Security, five men of ethnic Indian origin were detained for two years under the Internal Security Act, without a warrant, trial and without access
to legal counsel, apparently solely for engaging in non-violent exercise of their rights to freedom of expression and assembly.


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1 Ivan Fisser is Research and Advocacy Director at The Equal Rights Trust.
2 Human Rights Committee General Comment no. 31 para 14.
3 For the purpose of this intervention we have limited these bodies to include: the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.
4 COMPLEMENTARY INTERNATIONAL STANDARDS, Study by the five experts on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance, HUMAN RIGHTS COUNCIL, Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, A/HRC/4/WG.3/6, 1 August 2007. Page 17, point 38.
10 The full text of Written Comments of Equal Rights Trust in the European Court of Human Rights Application No. 26828/06, Makuc and others v. Slovenia is available on: http://www.equalrightstrust.org/ертdocument-bank/Makucv.Slovenialegalbrief2.pdf
12 These legal obligations of states bound by the International Covenant on Civil and Political Rights result from the interpretation of the Human Rights Committee General Comment no. 31, paras. 15 – 19, with respect to the right to equality and non-discrimination.
Current Projects of The Equal Rights Trust

A. Legal Standards on Equality and Non-Discrimination

Purpose

The objective of this project is twofold. Firstly, to publish a concise document entitled, Principles on Equality (the Principles), that reflects a moral and professional consensus on the fundamental principles of equality law. Secondly, to publish a clear reference document that systematises the core normative standards of equality derived from public international law together with higher and/or more comprehensive standards derived from regional and national legal instruments, bodies and jurisprudence.

Project Description

The project began in June 2007 with an examination of international, regional and national legal standards of protection against discrimination. In December 2007, an Advisory Committee was set up to lead the work on the drafting of the Principles. An international conference of equality law experts and human rights advocates marks the second stage of the project. The conference is scheduled to be convened in April 2008 and is designed to facilitate the discussion and adoption of a draft of the Principles. In addition, thematic discussions at the conference will focus on emerging and controversial issues relevant to equality and non-discrimination law. These discussions will inform future ERT work in the development of a comprehensive reference document on the international legal standards of equality and non-discrimination.

Project Advisory Committee

The Advisory Committee includes the following members: Barbara Cohen, Discrimination Law Consultant, Vice-Chair of the Discrimination Law Association, London; Andrea Coomber, Senior Lawyer, Equality, Interights, London; Sandra Fredman, Professor in Law and Fellow of Exeter College, Oxford; Sir Bob Hepple, Chair of ERT’s Board of Trustees, Emeritus Professor of Law, Emeritus Master of Clare College, Cambridge (Chair of the Advisory Committee); Christopher McCrudden, Professor of Human Rights Law and Fellow and Tutor in Law at Lincoln College, Oxford; Alice Leonard, Independent Legal Expert, Bath; Gay Moon, Special Legal Advisor, Equality and Diversity Forum, London; Colm O’Cinneide, Senior Lecturer in Laws, University College, London; Michael O’Flaherty, Professor of Applied Human Rights and Co-Director of the Human Rights Law Centre at the University of Nottingham; and Dimitrina Petrova, Executive Director, ERT, London.

Donors

The Ford Foundation, Open Society Institute, Tides Foundation

B. Law Enforcement Discrimination and Deaths in Custody

Purpose

This project has three main objectives. Firstly, to systematise the existing pool of knowledge on the relationship between deaths in custody and discriminatory policy or con-
duct by law enforcement bodies. The second aim of the project is to further enhance the global understanding of the nexus between deaths in custody and discrimination. The final objective lies in developing and promoting new advocacy tools that will complement existing investigatory standards into custodial deaths by adding a distinct, anti-discrimination component. In that regard, the project will help investigatory authorities to fulfill their duty to take all possible steps to investigate whether or not discrimination may have played a role in the events leading to the deaths.

**Scope**

The project covers discrimination on one or more relevant grounds including, sex, race, ethnicity, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. The key terms of reference, namely, “custody”, “death”, “law enforcement” and “discrimination” are defined in accordance with the practice of international and regional treaty bodies responsible for the protection against torture. The project is not restricted geographically and encompasses in-depth case studies in a number of countries strategically selected to cover all relevant regions.

**C. Virtual Library on Equality**

A major preoccupation of The Equal Rights Trust is the building of a digital library on equality issues. The project’s purpose is to systematise existing resources and serve as an educational tool on equality and non-discrimination issues for a broad range of users. In the online library, the user will be able to find a variety of materials and descriptions of their relevance to equality. Types of resources include international, regional and national norms, case law, reports, policy papers, academic and other articles. Publications by The Equal Rights Trust can also be found in this library. To facilitate the user’s way through the complex and growing field of equality, the most important substantive issues are introduced by brief overviews created by The Equal Rights Trust. Patterns of discrimination and the current status of anti-discrimination legislation and policy in individual countries are presented in brief introductory country overviews.

This is an open-ended project that will always remain a work in progress. The Equal Rights Trust is currently working to make available relevant material and will endeavor to expand the Library and keep it up to date.
ERT Work Itinerary:
January 2007 - January 2008

January-February 2007: Setting up of the ERT office in London

January-June, 2007: Provided technical assistance to the UN Office of the High Commissioner on Human Rights by serving as independent expert and contributing to the UN Expert study on complementary standards on non-discrimination.

January 28-29, 2007: Spoke on “Definitions of the Concept of Discrimination” at a Seminar on draft regional convention on racism and discrimination, convened by the Organisation for American States, Washington DC.


February 2, 2007: First meeting of the international Board of Trustees of The Equal Rights Trust, London.


April 14, 2007: Spoke on issues of educational discrimination to participants in a deliberative poll organised by the Centre for Liberal Strategies, Sofia.


May 3-6, 2007: Participated in the annual meeting of the International Council on Human Rights Policy, and spoke on several issues related to equality, Bangkok.

May 14, 2007: Provided training to Slovenian and Italian lawyers participating in the legal defence of “erased persons” in Slovenia, Ljubljana.

June, 2007: Introduced the theme “Other Status Discrimination”, at OSCE ODIHR Conference on non-discrimination and tolerance, Bucharest.


August, 2007: Submitted an open letter to Trevor Phillips, the chair of the newly established
Equality and Human Rights Commission, as part of the open letter campaign coordinated by the Runnymede Trust.

**August 18, 2007:** Published a booklet presenting The Equal Rights Trust.

**September 5, 2007:** Participated in the conference “Positive Action and Diversity: Its Possibilities, Purposes and Limits”, organised by the Equality and Diversity Forum and Justice, London.

**September 25, 2007:** Submitted a Statement regarding the inadequate implementation of the principle of non-discrimination in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan to the Human Dimension Implementation Meeting of the OSCE, Warsaw.


**October 10, 2007:** Launched The Equal Rights Trust website.

**October 10, 2007:** Participated in the seminar “Human Rights and Social Exclusion”, organised by the Human Rights and Social Justice Research Institute, London Metropolitan University, London.

**October 11, 2007:** Delivered a keynote speech entitled “EU Equality Developments and the Need for a Comprehensive Approach to Non-discrimination” at the EU conference for the European Year of Equal Opportunity, “Parlement européen de l’égalité des chances pour tous”, organised by the European Commission, Brussels.

**October 12-13, 2007:** Talked on the nexus between vulnerability, discrimination and climate change at Roundtable “Climate Change and Human Rights: Mapping the Overlap”, organised by the International Council on Human Rights Policy, Geneva.

**October 15, 2007:** Submitted a third party intervention to the European Court of Human Rights on *Makuc v Slovenia* on ECHR Article 14 questions.

**October 17, 2007:** Observed a meeting of the Equality and Diversity Forum, London.

**October 18, 2007:** Meeting of the international Board of Trustees of the Equal Rights Trust, London.

**November 2, 2007:** Submitted a joint statement together with Amnesty International on Slovenian “erased”, calling on Slovenian Government to stop discriminatory treatment of the “erased” persons in Slovenia.

**November 9, 2007:** Participated in a conference “The Collection of Data on Ethnic or Na-
tional Origins for Antidiscrimination Policies: Equality, Privacy, and Diversity in European Perspective” organised by the Centre for Philosophy of Law (CPDR), University of Louvain, and others, Brussels.

**November 14, 2007:** Observed a meeting of the Equality and Diversity Forum, London.

**November 15, 2007:** Sent a letter to General Musharraf urging him to order the immediate release of all those arbitrarily arrested and detained, following the introduction of the state of emergency on 3 November 2007, to reinstate dismissed judges, to lift all imposed restrictions on the media and take all other necessary measures to return Pakistan to its constitutional rule. The focus of the letter was on the discrimination aspects of Pakistani developments.

**November 19, 2007:** Attended the launch of “A British Bill of Rights: Informing the Debate”, organised by Justice, London.


**November 23, 2007:** Participated in the conference “Multi-Dimensional Discrimination: Justice for the Whole Person”, organised by the Equality and Diversity forum and Justice, London.

**November 26, 2007:** Spoke at a National (UK) Conference on “Promoting Community Cohesion through Schools” organised by the Runnymede Trust, London.

**December 5, 2007:** Participated in the conference “Update on Equality Law: Are We Catching Up?” organised by the Institute of Employment Rights, London.

**December 12, 2007:** Participated in the Equality and Diversity Forum monthly meeting, London.

**December 14, 2007:** Sent a letter of concern on the repression against ethnic Indians protesting against discrimination in Malaysia urging the Prime Minister of Malaysia to ensure that everyone is protected from arbitrary arrest.

**January 4, 2008:** Held preparatory meeting to the workshop “Legal Standards on Non-discrimination and Equality” scheduled for April 2008, London.


The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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