

Tackling Socio-Economic Disadvantage: Making Rights Work

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Socio-economic inequality is the most pressing human rights and development issue of the 21st century. The ever greater gulf between the abundant wealth, sustenance and opportunities enjoyed by a few and the daily struggle to make ends meet, feed and educate the children of the many grows increasingly obscene. At the macro level, as a recent Oxfam report identifies, the 85 richest people in the world have, collectively, as much wealth as the world's poorest 3.5 billion.² At the micro level, in London for example, enormous mansions are left to decay un-lived in by their billionaire owners while the city experiences a major housing crisis and fails to find housing to meet a backlog of need.³ The present situation, in which we continue to allow and even foster extreme inequality in resource distribution is particularly unacceptable given that, as a global community, we are rich enough to feed, clothe and keep everyone healthy.⁴

In today's environment, no matter how able and driven a person is, the circumstances of their birth are among the most significant determinative factors of their likely future. Socio-economic inequality is a major part of the picture of inequality of opportunity, which is an affront to justice and human dignity. We all have a duty to work collectively to rectify socio-economic disadvantage. In my view, the starting point for human rights lawyers must be the internationally recognised human right of every individual to equality and, within that, to be free from discrimina-

tion in all aspects of their life. It is a powerful tool which, if used in the right way, can focus courts and legislatures on the state's obligation to eradicate socio-economic disadvantage. But there is much work to do. Socio-economic disadvantage is not a concept which appears in any of the international human rights treaties and reference to the notion by courts and treaty bodies is only in its nascent stages. This work needs to gather momentum if we are to address the problem.

In this article, I attempt to provide a brief introduction to the potential for the right to equality and the subsumed right to non-discrimination to tackle socio-economic disadvantage. I am aware that I leave questions outstanding and issues remaining for further consideration. Further, I do not provide all the answers. However, by way of brief introduction to the issue I do the following: first, conscious of the dearth of discussion on the meaning of "socio-economic disadvantage", I explore its content, with reference to the more widely used notion of "poverty". Second, I expound the relationship between discrimination and socio-economic disadvantage. Third, I provide a brief overview of the extent to which socio-economic equality is already protected in international human rights law. Finally, I explore some of the ways in which human rights should be developed, both theoretically and in practice, to better address socio-economic disadvantage, with a particular focus on the rights to equality and non-discrimination.

1. What is Socio-Economic Disadvantage?

There can be no denying that socio-economic disadvantage “is a complex, multidimensional problem” which is difficult to define.⁵ It is therefore unsurprising that in the discourse surrounding whether human rights law can and/or should protect the socio-economically disadvantaged, those in favour of its use shy away from defining what the term means and support for the view that the concept is too imprecise to form the basis for legal protection remains.⁶ However, “socio-economic disadvantage” is not beyond definition.

Socio-economic disadvantage is closely related to the similar and far more commonly used term “poverty”. A consideration of the latter can help shed light on the former. Like socio-economic disadvantage, poverty has been hotly contested and accused of being imprecise, yet it is possible to define it. In his famous 1979 work *Poverty in the UK*, Townsend, criticising Orhansky’s view that poverty is a value judgement which cannot be verified or demonstrated, noted that there would be difficulties in any approach to defining poverty. However, he argued, this did not mean a definition could not be objective or distinguished from “social or individual opinion”.⁷ Indeed, Townsend argued, poverty could be objectively defined in so far as it related to relative deprivation.⁸ The important thing was that the definition:

“[s]hould be comprehensive, should depend as much as possible on independent or external criteria of evaluation, should involve the ordering of a mass of factual data in a rational, orderly and informative fashion, and should limit, though not conceal, the part played by the value judgement [that may also have a role].”⁹

So it is not fatal for value judgement to play some small role in defining the term as

long as the definition is comprehensive and based as far as possible on independent data. Townsend summarised poverty as follows:

“Individuals, families and groups in the population can be said to be in poverty when they lack the resources to obtain the types of diet, participate in the activities and have the living conditions and amenities which are customary, or are at least widely encouraged or approved, in the societies to which they belong. Their resources are so seriously below those commanded by the average individual or family that they are, in effect, excluded from ordinary living patterns, customs and activities.”¹⁰

Four aspects of his definition are critical for our purposes. First, the definition illuminates that Townsend’s “poverty” is heavily related to a person’s access to resources. It is noteworthy that other definitions of poverty both before and since Townsend’s have adopted a definition with an even greater focus on income/material resources than Townsend did, with some definitions focusing exclusively on income.¹¹ Second, defining a person as living in poverty depends on a consideration of their deprivation relative to others.¹² Third, the deprivation is assessed by reference to their enjoyment of a number of different things including food, living conditions and amenities. Fourth, the definition notes that a lack of resources correlates to an exclusion from what I will call participation in society.

The first of these aspects indicates the important difference between Townsend’s poverty and socio-economic disadvantage. Socio-economic disadvantage is a broader notion than his poverty, encompassing not only a person’s access to material resources but also their access to social resources.¹³ As the UK government Equalities Office stated, when defining the term in 2010, although

poverty is the “most important factor” contributing to socio-economic disadvantage, socio-economic disadvantage may also be “about the complex interplay of factors such as health, housing, education, and family background, and the resulting lack of ambitions and expectations”.¹⁴ Elsewhere, Hepple has described the causes of socio-economic disadvantage as including a “lack of opportunities for poor persons to work or to acquire education and skills, childhood deprivation, disrupted families, inequalities in health and poor access to social housing.”¹⁵ A detailed consideration of all of the factors which contribute to socio-economic disadvantage and the creation of a comprehensive list of the aspects which make up the definition go beyond what is necessary for the purpose of this article. In my view Hepple’s summary is sufficiently comprehensive for our purposes.

The second, third and fourth aspects of Townsend’s poverty definition are common to the definition of socio-economic disadvantage. As to the second, to establish whether a person is socio-economically disadvantaged, an inquiry as to their position relative to others is necessary. This is an important point as it highlights that, in human rights terms, the notion is at the intersection between socio-economic rights and the right to equality.¹⁶ As Ferraz notes, when it comes to realising social rights, “[t]he main problem (...) is not insufficiency of resources, but rather inequality of distribution”.¹⁷ Furthermore, there is a problem to address regardless of whether the socio-economically disadvantaged in a given jurisdiction are or are not to be considered, in accordance with a current interpretation of international social and economic rights, to enjoy those rights.¹⁸ The right to equality requires that socio-economic disadvantage be tackled regardless of whether or not the socio-economic rights of all in question have been realised (even if there

is a jurisdiction in which they have). Where relative disadvantage continues to impact on individuals’ ability to participate fully in society, there is still an issue to tackle.¹⁹ This is one reason why the achievement of equality is so important.

Given this second aspect of the definition, in order to identify the socio-economically disadvantaged, we must consider what is meant by “relative to others”. Of course, its meaning (i.e. how localised a consideration this is) can significantly change the nature of the inquiry. In formulating his definition of poverty, Townsend was discussing the notion in the UK context. For our purposes, given that we are using the term in the context of human rights obligations – obligations on a state – “others” would be other people whose human rights the state in question has a responsibility to protect, respect and fulfil.²⁰

As to the third, a person’s disadvantage is assessed by reference to the enjoyment of a number of different things. With the interplay of a wide variety of factors relevant to socio-economic disadvantage, and the relevance of more than material resources to the definition, there are many indicators which may be used to measure a person’s socio-economic position.²¹ And there has been much debate about the most appropriate indicators.²² The Equalities Review, an independent review commissioned by the UK Prime Minister to understand long-term and underlying causes of disadvantage, proposed that “inequalities of outcome” be measured in respect of “ten dimensions of equality”: longevity; physical security; health; education; standard of living; productive and valued activities; individual, family and social life; participation, influence and voice; identity, expression and self-respect; legal security.²³ This is a laudably thorough approach. In order to reach

a conclusion as to the extent to which this approach is the most comprehensive and practically assessable, more work needs to be done. Debate as to the indicators and the best way of measuring them will inevitably be ongoing as this is a complex issue. However, in my view, the fact that valuable indicators have both been identified and adopted in a wide variety of situations already indicates that, even if they may thus far be imperfect, it is possible to measure socio-economic disadvantage.

As to the fourth, actual or effective exclusion from participation in society is a significant part of the picture of socio-economic disadvantage. For most individuals, such participation is an important aspect of their personal fulfilment and is integral to their ability to live with dignity. Further, the exclusion of the socio-economically disadvantaged from participation in decision-making processes helps make a cycle of socio-economic disadvantage which continues for generation after generation a certainty and social mobility no more than an aspiration.²⁴

In my view, these elements contribute enough content to the notion of “socio-economic disadvantage” for the term to be a useful one in law.

2. Socio-Economic Disadvantage and Discrimination

We have discussed the fact that socio-economic disadvantage is defined, in part, by a person’s relative position to others. Therefore, it is inherently only present where there is inequality. In addition, the relevance of discrimination to any discussion of socio-economic disadvantage is also clear: the two phenomena are inseparably intertwined. Socio-economic disadvantage is both a basis for and a consequence of discrimination. These

two aspects of the relationship will be considered in turn.

As to the latter, the fact that socio-economic disadvantage often results from discrimination is relatively well appreciated. There is abundant evidence that groups which have historically faced and continue to face prejudice and discrimination because of a characteristic they share, for example their race, gender or disability, are overrepresented among the socio-economically disadvantaged.²⁵ This is unsurprising. Pervasive discrimination continues to hamper their opportunities for employment, and structural barriers often impede their access to health-care and other services. Social structures which have been created by overrepresented groups to benefit people like them unsurprisingly fail to adequately cater to the needs of underrepresented groups. So it is for example that, in the majority of cultures around the world, women face expectations to be the primary child carer in the family and yet are faced with workplace environments lacking in the flexibility needed to enable them to work alongside this presumed responsibility.²⁶ This, in turn, leaves them more likely to be reliant on male family members rather than financially independent and leaves them more vulnerable to poverty.

As to the former, discrimination on the basis of a person’s socio-economic disadvantage is less understood and remains underexplored. This aspect of the relationship speaks to the less explored problem that people often face prejudice and other discrimination as a result purely of their socio-economic disadvantage. As the UN Committee on Economic Social and Cultural Rights (CESCR) has stated:

“A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination,

stigmatisation and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.”²⁷

There is evidence corroborating this statement and identifying that people face direct discrimination and prejudice within society based solely on their socio-economic status or the closely related characteristic, social class.²⁸ The problem is particularly acute for the poor, socio-economically disadvantaged, lower classes, who speak of not only facing directly discriminatory prejudice but also of being marginalised and underrepresented in decision-making processes.²⁹ The latter is complex, resulting from a range of structural inequalities including policies and practices which indirectly favour the more socio-economically advantaged. However, it is clearly invidious, resulting as it does in a cycle of disadvantage. Social mobility (for our purposes, the movement of individuals from one socio-economic group, or class, to another) is still an aspiration rather than a reality in most states.³⁰ It can only become a reality when discrimination on grounds of socio-economic disadvantage is eradicated.

So, in my view, the links between the notions are undeniable and tackling socio-economic disadvantage necessitates tackling discrimination. With this relationship between socio-economic disadvantage and discrimination considered, it becomes easier to identify the gaps in the current protection regime and focus on the solutions.

3. Socio-Economic Disadvantage and Traditional Understandings of the International Human Rights Framework

The human rights framework does not provide explicit protection from socio-economic

disadvantage. The concept does not fit easily within the traditional model of human rights, through which the framework and its interpretation have developed.³¹ As discussed, socio-economic disadvantage is a relative notion and assessed by reference to a person’s access to material and social resources amongst other things: addressing it necessitates redistributive considerations. To require a state to undertake a redistributive exercise is to require a state to take certain positive steps. By contrast, the emphasis in human rights discourse has traditionally been on duties of restraint rather than positive duties on the state to take action. “[S]ocio-economic inequality has generally been regarded as a matter of social policy” rather than law.³² As a result, although the human rights framework addresses factors at the heart of socio-economic disadvantage, significant gaps remain in the protection it provides. This section explores the rights available and their limitations in so far as they relate to the issue of socio-economic disadvantage.

Many of the rights contained in the international human rights framework have important implications for protecting people from socio-economic disadvantage. Most notable of these are the range of socio-economic rights and the rights to equality and non-discrimination. The International Covenant on Economic, Social and Cultural Rights (ICE-SCR) states that:

“The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”³³

It provides for a wide range of social and economic rights including the rights to education, work, health and an adequate standard of living.³⁴ Given that a person’s socio-e-

conomic disadvantage is caused, amongst other things, by a lack of access to the resources protected by these rights, their relevance in the eradication of socio-economic disadvantage cannot be overstated and they provide crucial protection for individuals.

Article 1 of the Universal Declaration on Human Rights (UDHR) declares that “[a]ll human beings are born free and equal in dignity and rights”. All of the substantive human rights conventions adopted since the UDHR recognise the importance of equality and protect every person’s right to be free from discrimination. Importantly, Article 2(2) of the ICESCR requires that rights under the Covenant be realised without discrimination against any person. In addition, the International Covenant on Civil and Political Rights (ICCPR) also provides a freestanding right to equality before the law and non-discrimination (Article 26) and there has been a proliferation of human rights treaties which protect the rights of particularly marginalised groups and provide crucial non-discrimination provisions.³⁵ The state’s obligation to protect, respect and fulfil a person’s rights to equality and non-discrimination applies, amongst other things, in relation to the person’s social and economic life.

If revisited, these rights have much to contribute to the eradication of socio-economic disadvantage, a fact which will be further explored in Part 4. However, they also have substantive and practical limitations. By far the biggest of these is that, although human rights are understood to be interdependent and interrelated, in practice, it is rare that cases are approached by reference to both the socio-economic right at stake and the right to non-discrimination. States are not explicitly compelled to focus on the eradication of socio-economic disadvantage and, although the ICESCR separately contains an

obligation to ensure non-discrimination in the enjoyment of its rights, there is no explicit requirement that adjudicators of the rights consider the equality or discrimination implications of any socio-economic rights related decision where Article 2(2) is not invoked. As a result, decisions enforcing socio-economic rights can, in practice, be to the detriment of those who are socio-economically disadvantaged. In a report for the World Bank published in 2012, Gauri and Brinks considered the distributive impact of socio-economic rights litigation in five countries and concluded that “only two had pro-poor distributive impacts (South Africa and India), with two being distribution neutral (Brazil and Indonesia) and one being ‘sharply anti-poor’ (Nigeria)”.³⁶ Ferraz, more critical than Gauri and Brinks in his assessment of the impact of health-related jurisprudence on the poor in Brazil, has argued that judgments on the right to health in the country have actually worsened health inequities.³⁷

Article 2(1) of ICESCR creates a critical substantive limitation to socio-economic rights under the Covenant, declaring that states are only obliged to take steps “to the maximum of [their] available resources, with a view to achieving progressively the full realisation” of socio-economic rights. As Ferraz notes, this wrongly assumes “that resources are simply insufficient in most, if not all countries in the world, to make the immediate implementation of [socio-economic rights] possible”.³⁸ Those interpreting and applying socio-economic rights often make the same assumption.³⁹ Of course, this assumption has an impact on the implementation of socio-economic rights in general. However, it is particularly problematic from the point of view of the rights of the socio-economically disadvantaged, given the redistributive considerations necessary to tackle this disadvantage.

Often the most apparently resource costly cases of socio-economic rights violations are those which relate to the protracted poverty of a large group within the population of the state. In such cases, Article 2(1) and the assumption it implies make it less likely that a state will ultimately be obliged to distribute resources to tackle the issue in question. The resource costly nature of such cases also makes it less likely that a court will issue a “coercive” remedy such as a structural injunction in which the state is ordered to take specific steps. Whilst there are a few strong judgments in such cases, they remain in the minority.⁴⁰ In contrast, judges’ willingness to make rulings in cases which do not have significant resource implications for the state is clearer. Ferraz has criticised the individualistic interpretation of socio-economic rights by Brazilian judges, stating that this interpretation “unduly favours litigants (often a privileged minority) over the rest of the population” and that such litigation “is likely to produce reallocation from comprehensive programs aimed at the general population to these privileged litigating minorities.”⁴¹

The right to non-discrimination is also not without its limitations. Although the right (in the form in which appears in instruments such as the ICESCR and ICCPR) protects people from discrimination of any kind – not only discrimination on the basis of a number of grounds explicitly identified such as race, sex and religion but also “any other status” – in practice the focus of jurisprudence has been on discrimination based on the explicitly enumerated grounds. This approach has been useful in indirectly tackling the socio-economic disadvantage of some groups in so far as their disadvantage is a consequence of one or more enumerated characteristics. As discussed, there are clear links between some of the enumerated grounds of discrimination and the likelihood that a person is

socio-economically disadvantaged.⁴² There are many cases in which the right to non-discrimination on an enumerated ground has been applied by courts to the benefit of socio-economically disadvantaged people.⁴³ And in limited instances the link between an enumerated ground and socio-economic disadvantage has been expressly referenced by the court.⁴⁴

However, as discussed, none of the human rights treaties expressly prohibit discrimination on the grounds of a person’s socio-economic disadvantage and there is no consistent recognition of this aspect of discrimination in jurisprudence.⁴⁵ Although there has been some discussion of “socio-economic situation” being an “other status” protected by the right, this has been limited.⁴⁶ So socio-economic disadvantage as a basis for discrimination is not currently fully addressed either explicitly in the right or in the interpretation of the right’s reference to “other status”.

To summarise, traditionally human rights have been seen only as resulting in obligations of restraint on states, with socio-economic inequality seen as having redistributive connotations which make it a matter for social policy. Whilst socio-economic rights and the right to non-discrimination are valuable tools, there are some limitations in the ways in which they are currently implemented. These need to be and can be addressed.

4. Fulfilling the Potential of the Rights to Equality and Non-Discrimination

More needs to be done in order for the human rights framework to be used effectively to address socio-economic disadvantage. This requires at least the following interlinking elements: clearer conceptualisation of the true nature of human rights obligations (in particular in relation to equality), a better

use of the international human rights framework that exists and improvements to the present framework. In this part, I propose: that Fredman's crucial work *Human Rights Transformed: Positive Rights and Positive Duties* has dealt admirably with the true nature of human rights obligations in so far as it expounds that the positive duties demanded of states by human rights have a redistributive dimension; that the most important change to the way we use the framework is to ensure that the rights to equality and socio-economic rights are never considered in isolation when addressing socio-economic matters; and that a recognition of the obligation not to discriminate on grounds of socio-economic disadvantage is one important improvement that could be made to the framework. I make no attempt to provide an exhaustive list of all of the possibilities here.

a) Human Rights Demand Resource Distribution

We have identified that, due to the traditional conception of human rights as imposing only negative duties of restraint, matters of socio-economic inequality which necessitate resource distribution (and thus a positive duty on the state) have been viewed as matters of social policy rather than law.⁴⁷ In jurisprudence, human rights, including the rights to equality and non-discrimination, have generally been interpreted through this lens of negative duties. And yet, as Fredman explains, all human rights give rise to positive duties as well as duties of restraint. For example, the civil and political fair trial and liberty rights require states to, amongst other things, set up and run a suitable judicial system to ensure that these rights are protected. An understanding of the implications of positive duties is critical.⁴⁸

Fredman has done much to develop this understanding. She notes that the positive view

of freedom requires a substantive conception of equality. It:

“[P]laces a duty on the state to pay particular attention to those who are not in a position to exercise their rights to the full, even if this entails supplying more resources or providing greater facilitation for those individuals than for others not in the same category.”⁴⁹

Socio-economic disadvantage has an invidious effect on a person's ability to live their life to the full and is antithetical to full enjoyment of human rights. Properly understood, the right to equality requires that states pay particular attention to the socio-economically disadvantaged and allocate more resources if necessary to ensure their full enjoyment of their rights. There is a much greater need for recognition of this fact. As Ferraz has pointed out, in a “world of plenty” we do not need to shy away from the resource implications of enforcing equal social rights.⁵⁰ Theoretically, there can be no doubt that human rights demand a degree of resource distribution and this includes distribution in order to eradicate socio-economic disadvantage.⁵¹ Lawyers need to demand, and judges need to feel empowered to grant, the remedies necessary for a full realisation of the rights of the socio-economically disadvantaged, even where this demands significant resource distribution in states whose plenty is controlled by its few.

b) Using Equality and Non-Discrimination in Socio-Economic Rights Jurisprudence

As discussed, despite the acknowledgement that rights are interrelated and interconnected, there is no recognised requirement that the equality implications of a socio-economic rights related decision

be borne in mind. As a result, some socio-economic rights jurisprudence has been assessed to be to the net detriment of the socio-economically disadvantaged/poor.⁵² If socio-economic rights and the rights to equality and non-discrimination continue to be considered separately, socio-economic disadvantage will remain. Enforcing socio-economic rights will not necessarily eradicate socio-economic inequality. Equally, without a clearer understanding of socio-economic disadvantage as a part of the picture of inequality and discrimination, the pursuit of equality and non-discrimination will not necessarily result in the eradication of poverty. However, if these rights cease to be considered in isolation, they can provide some protection from socio-economic disadvantage.

It is noteworthy that the interrelatedness of the rights is already beginning to be harnessed by lawyers in their litigation strategies and by adjudicators in their judgments. For example, in *International Movement ATD Fourth World v France* before the European Committee of Social Rights, the extreme poverty of the Roma families evicted from their homes, was a relevant fact raised when claiming that their rights to housing and freedom from discrimination under the European Social Charter, had been violated.⁵³ Ms da Silva Pimental's socio-economic background was a relevant factor in the violations of her rights to healthcare and non-discrimination that Brazil was found to have committed by the Committee on the Elimination of Discrimination Against Women.⁵⁴ After a number of big cases in South Africa in which the right to equality of the socio-economically disadvantaged was highly relevant but not claimed, the right formed part of the claim in the *Treatment Action Campaign* case.⁵⁵ However, Budlender, a litigator in South

Africa, explains that it was raised as a "subsidiary claim" in the case and "received little attention".⁵⁶ He is of the view that those litigating socio-economic rights cases in South Africa should have picked up the significance of the right to equality sooner.⁵⁷ Overall, in all jurisdictions, it remains the case that the socio-economic rights and the right to equality and non-discrimination tend to be considered in isolation. When they are considered together, litigators and/or judges do not always go far enough in their strategy or reasoning. We must build on these beginnings.

c) Prohibiting Discrimination On Grounds of Socio-Economic Disadvantage

One potentially useful development to the current framework would be the recognition of the right to be free from discrimination on grounds of socio-economic disadvantage. As discussed, none of international human rights treaties do this explicitly. However, there is room to develop the argument that socio-economic disadvantage is an "other status" for the purpose of anti-discrimination protection and the development of this argument is to be strongly encouraged.

There have already been some positive steps in this direction when, on rare occasions, "other status" has been interpreted to encapsulate discrimination on grounds of socio-economic disadvantage, poverty or similar concepts. In its general comment on non-discrimination in economic, social and cultural rights, the CESCR states that "[i]ndividuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society".⁵⁸ On this basis it has declared that "economic and social situation" is an "other status" under Article 2(2) ICESCR and so is a ground on

which states should prohibit any discrimination.⁵⁹ In addition, there have been a limited number of findings by national and regional courts of discrimination on grounds of poverty, homelessness or other grounds which are very closely associated with of socio-economic disadvantage.⁶⁰ But this is not enough.

Some are concerned about the proliferation of grounds of discrimination and do not believe it is the correct approach. In my view, it is *one part* of the correct approach. As Fredman has said, “anti-discrimination law is necessarily a response to particular manifestations of inequality.”⁶¹ This makes it reactive in nature. Anti-discrimination laws are only effective “if they are moulded to deal with the types of inequalities which have developed in the society to which they refer.”⁶² This need for evolution has been accommodated in the formulation of the right to non-discrimination in international human rights instruments, with the reference to a non-exhaustive list of protected grounds, meaning the right can accommodate our evolving understanding of discrimination.⁶³ Of course, a proactive as well as reactive approach is required to fully understand and respond to socio-economic disadvantage. As Fredman has identified: “[t]he demarcation between distributive and status inequality has become increasingly problematic” as “there are important interrelationships between the two kinds of inequality.”⁶⁴ Accordingly, securing the right to non-discrimination, with its focus on status inequality, is only one aspect of the struggle. But it is an important aspect. Socio-economic disadvantage is not a new phenomenon but our understanding of it and its impact on individual dignity has developed over time. We must ensure that our interpretation of

the right to non-discrimination responds to the indisputable evidence of massive socio-economic inequality both globally and nationally. To do this, we must recognise that the right protects people from discrimination on grounds of their socio-economic disadvantage. Developing our understanding of the right to non-discrimination in this way provides a useful interim step in the longer term goal of fully addressing distributive inequality through human rights law.

Conclusion

Serious measures to address the current reality of extreme socio-economic inequality have long been overdue. Socio-economic disadvantage is, in large part, a problem of discrimination both on the traditionally enumerated grounds and also because of a person’s socio-economic status. The situation is perpetuated by *laissez-faire* attitudes both amongst governments (who focus on individual autonomy and hope that everyone will be able to look after themselves) and amongst the judiciary (who consider resource distribution to be a matter of social policy, beyond the remit of their authority and to be left to the government). Human rights can be a powerful tool. They have already done much to address discrimination which results in socio-economic disadvantage for groups such as women and racial minorities. However, the framework needs closer attention and those of us relying on human rights need to develop new and better ways of using them, if we are to satisfactorily represent the poor. If we pursue these developments, we may make great inroads into tackling socio-economic disadvantage and contributing to a community in which all can live in dignity.

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 - 2 Oxfam International, *Working for the Few - Political Capture and Economic Inequality*, 20 January 2014, available at <http://www.oxfam.org/en/policy/working-for-the-few-economic-inequality> (last accessed 24 March 2014).
 - 3 For a report on the so-called "billionaires row" in North London see Booth, R., "Inside Billionaire's Row: London's rotting, derelict mansions worth £350m", *The Guardian*, 31 January 2014, available at <http://www.theguardian.com/society/2014/jan/31/inside-london-billionaires-row-derelict-mansions-hampstead> (last accessed 13 March 2014). For a discussion of the London housing crisis see London Councils, "The London Housing Challenge: A London Councils Discussion Paper", September 2013.
 - 4 For an excellent discussion of the myth of "resource scarcity" see Ferraz, O., "Inequality, Not Insufficiency: Making Social Rights Real in a World of Plenty", *The Equal Rights Review*, Vol. 12, 2014.
 - 5 See Hepple, B., "The New Single Equality Act in Britain", *The Equal Rights Review*, Vol. 5, 2010, pp. 20-21, in which Hepple discusses the concept in relation to its inclusion in section 1 of the UK Equality Act 2010, a section of the law which has not been brought into force.
 - 6 Although note that Fredman has given a detailed consideration of its meaning in the context of the UK's Equality Act 2010 in Fredman, S., "Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda", *University of Oxford Legal Research Paper Series*, No. 55, 2010, Part II (i).
 - 7 Townsend, P., *Poverty in the United Kingdom*, Allen Lane and Penguin Books, 1979, pp. 37-38.
 - 8 *Ibid.*, p. 31.
 - 9 *Ibid.*, p. 38.
 - 10 *Ibid.*, p. 31. It is important to note that I do not endorse this as the optimum definition of poverty. In fact, in my view, poverty properly understood is a multi-dimensional notion broadly synonymous with socio-economic disadvantage. However, my intention in this section of the article is to illuminate the meaning of socio-economic disadvantage by reference to the poverty more commonly understood despite my view that this is too narrowly construed.
 - 11 Townsend's definition of poverty is wider than many. He refers to "resources" as opposed to "income" and stresses that poverty is to be calculated by looking at more than simply cash income. Nevertheless, the focus is on the value of resources which are easily monetised such as cash income and social security payments. *Ibid.*, p. 55.
 - 12 Townsend sheds light on some of the debate and the corresponding challenges surrounding approaches to measuring poverty in Chapter 6 of his book. *Ibid.*, pp. 237-271.
 - 13 Australian Bureau of Statistics, "Perspectives on Education and Training: Social Inclusion", 2009, available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4250.055.001Main+Features32009> (last accessed 25 March 2014).
 - 14 The definition was provided in guidance on the meaning of "socio-economic disadvantage" to be used in section 1 of the UK's Equality Act 2010. As mentioned in note 5 above, the provision has not been brought into force. Government Equalities Office, *The Equality Bill: Duty to Reduce Socio-Economic Inequalities*, 2010, p. 14, available at: <http://sta.geo.useconnect.co.uk/pdf/Socio%20Economic%20pre-guidance%20guidancev2%2008012010.pdf> (last accessed 25 March 2014).
 - 15 See above, note 5.
 - 16 For a discussion of the relevant human rights framework, see Part 3 below.
 - 17 See above, note 4. Of course, if everyone was equally unable to access the socio-economic necessities for a dignified life e.g. food, water, housing, there would still be a serious problem for the law to address. However, I believe that there is socio-economic inequality in all states. In any event, socio-economic disadvantage would

not be the primary tool you would use to deal with this problem: instead you would seek to enforce the socio-economic rights of the whole population.

- 18 The threshold at which a particular social or economic right will be said to have been met is a matter of some contention and a subject for elsewhere.
- 19 It is no coincidence that those from wealthier, more socio-economically advantaged backgrounds are overrepresented amongst the political elite.
- 20 There are three points to note in this respect. The first is that, in the globalised economic world, this leaves difficult matters concerning the reach of a state's human rights responsibilities needing constant consideration and development. For example, the extent to which a state should be responsible under human rights law for non-state actors such as multi-national corporations subjecting workers in another jurisdiction to appalling conditions whilst managers and employers are among the few with plenty, is a matter of contention. In my view, states should be required to adequately regulate the practices of such companies, but I do not delve into this issue here. The second point to note is that I acknowledge that restricting the relativity to a consideration of disadvantage within a jurisdiction leaves the issue of the huge overall socio-economic disparity between states for consideration elsewhere. The third point is that I have not yet considered the possibilities for, and implications of, using a hypothetical comparator as part of this inquiry where required.
- 21 Townsend details the multitude of potential indicators of a person's poverty in Chapter 6 of *Poverty in the United Kingdom*, see above, note 7, pp. 237-271 (in particular p. 249 onwards). Considerations of indicators of socio-economic inequality are contained in Fredman above, note 6 and the UK focussed, *Equalities Review, Fairness and Freedom: The Final Report of the Equalities Review, 2007*.
- 22 For some discussion of the various options as discussed in the context of the UK Equality Act 2010, see Fredman above, note 6.
- 23 See *Equalities Review* above, note 21, Box 1.3.
- 24 For further discussion see Part 2 below.
- 25 Most research has focused on the links between poverty and an enumerated ground. These are also illustrative when considering the link with socio-economic disadvantage. For some examples of the links at the national level see *Poverty Rate by Race/Ethnicity in the United States for the period 2010-2011*, available at The Henry J. Kaiser Family Foundation's website at <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (last accessed 25 March 2014); in relation to the UK, Barnard, H., and Turner, C., "Poverty and Ethnicity: a Review of Evidence", *Joseph Rowntree Foundation*, 2011, available at <http://www.jrf.org.uk/sites/files/jrf/poverty-ethnicity-evidence-summary.pdf>; and Rao, J., "The Caste System: Effects on Poverty in India, Nepal and Sri Lanka", *Global Majority E-Journal*, Vol. 1 No. 2, 2010, pp. 97-106. For some consideration of the link between sex and socio-economic disadvantage see Brodsky, G., and Day, S., "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty", *Canadian Journal of Women and the Law*, Vol. 14, 2002, pp. 184-219; and Fredman, S., "Engendering Socio-Economic Rights", *South African Journal of Human Rights*, Vol. 25, Part 3, 2009. For further discussion of the link see Fredman, S., *Human Rights Transformed - Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 177.
- 26 For an interesting discussion of the unpaid work burdens on women in the South African context see Liebenberg, S., and Goldblatt, B., "The interrelationship between equality rights and socio-economic rights under a transformative constitution", *South African Journal on Human Rights*, Vol. 23, 2007, p. 340.
- 27 Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20, 2009.
- 28 Whilst I do not explore the link between socio-economic disadvantage and social class in this article, it is necessary to have the latter in mind as the two are closely linked and there is more data available in relation to the latter than the unexplored former. For a UK example, see Stuckler, D. et al., "Effects of the 2008 Recession on Health: a First Look at European Data", *The Lancet*, Vol. 378, 2011.
- 29 *Ibid.* With regard to direct discrimination and prejudice: accent can be seen as an indicator of real or perceived class. Research has indicated that the standard variety of accent is often associated with a high socio-economic status group whereas the nonstandard varieties are usually associated with the lower class (see Fishman, J., *Sociolinguistics: A brief introduction*, Rowley, 1971). A non-standard, "lower-class accent" may result in a disadvantaged position in education and in the employment market. Generally, studies have indicated that standard accented speakers are favoured for prestigious jobs, whereas the non-standard accented speakers are favoured for less desirable jobs (see Cargile, A., "Evaluations of employment suitability: Does accent always

- matter?”, *Journal of Employment Counseling*, Vol. 37, pp. 165-176). An examination of interactions between members of different social classes at work resulted in a conclusion that there is institutionalisation of discrimination based on social class, which perpetuates inequality (see Gray, B., “Encountering Social Class Differences at Work: How ‘Class Work’ Perpetuates Inequality”, *Academy of Management Review*, Vol. 38, No. 4, 2013, pp. 670–699). With regard to marginalisation from decision-making processes, in the UK for example, voting activity is reported to be lower among groups that are socio-economically disadvantaged. A detailed analysis of constituency variations in turnout by a team led by Paul Whiteley found that social resources explain much of the variance in turnout at the 2001 UK general election (see Whiteley, P. et al, “Turnout”, in Norris, P., (ed.) *Britain votes 2001*, Oxford University Press, 2001. For more on this subject see also: The Electoral Commission, “Social Exclusion and Political Engagement”, Research Report, 2005, available at: http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/63835/Social-exclusion-and-political-engagement.pdf (last accessed 25 March 2014).
- 30 For example, in Britain, Forsyth and Furlong note that there remain several barriers, including educational, financial, social and geographical, to access to higher education, which hinder social mobility. See Forsyth, A. and Furlong, A., “Socioeconomic Disadvantage and Access to Higher Education”, *The Policy Press*, 2000, pp. 34-46. Considering Europe, Breen notes that, although some countries have moved towards greater social mobility (e.g. Sweden), some have made no progress at all (e.g. Britain and Germany): Breen, R., *Social Mobility in Europe*, Oxford University Press, 2004.
- 31 However, in Part 4 below I argue that socio-economic disadvantage is a notion which falls squarely within the ambit of human rights protection properly understood.
- 32 See Fredman, above note 25, p. 177.
- 33 See the preamble of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- 34 See for example Articles 6, 11, 12 and 13 of the ICESCR.
- 35 See for example the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC).
- 36 The Equal Rights Trust, *Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights*, publication forthcoming 2014, discussing Brinks, D.M., and Gauri, V., “The Law’s Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights”, *Policy Research Working Paper 5999*, The World Bank Development Research Group, March 2012.
- 37 Ferraz, O., “Harming the Poor Through Social Rights Litigation: Lessons from Brazil”, *Texas Law Review*, Vol. 89, p. 1643; and Ferraz, O., “The Right to Health in the Courts of Brazil: Worsening Health Inequities?”, *Health and Human Rights Journal*, Vol. 11 No. 2, 2009, pp. 33-45.
- 38 See above, note 4.
- 39 *Ibid.*
- 40 Both substantive findings and remedies in socio-economic rights cases are discussed in The Equal Rights Trust, above note 36.
- 41 See Ferraz above, note 37. For a further example of a finding of a violation of the right to health which arguably has a negative impact on the most disadvantaged, see the Supreme Court of Canada’s decision in *Chaoulli v Quebec (Attorney General)* 1 S.C.R. 791, 9 June 2005, Supreme Court of Canada, available at: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2237/index.do> (last accessed 25 March 2014).
- 42 See above, Part 2 and note 25.
- 43 See for example, the judgment of the European Court of Human Rights in *Andrejeva v Latvia*, (Grand Chamber) Appl. No. 55707/00, 2009, the judgment of the Supreme Court of Canada in *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624, and the European Committee of Social Rights view in *Centre on Housing Rights and Evictions (COHRE) v France* Complaint No 58/2009.
- 44 See for example, *Alyne da Silva Pimentel v Brazil*, Communication No. 17/2008, Committee on the Elimination of Discrimination against Women (CEDAW).
- 45 See above, note 6, p.176.
- 46 For more on this see Part 4 below.

- 47 See Fredman above, note 26, p. 177.
- 48 *Ibid.*, pp. 1-3.
- 49 *Ibid.*, p. 3.
- 50 See above, note 4.
- 51 The question of what this equality looks like is highly contentious and I do not go into the detail of this debate here. Briefly, if simplistically, my own – far from original – view is that the human right to equality does not require that everyone has the same (sometimes known as equality of outcome or equality of result) – both an impossible and unhelpful goal to seek – rather that resources are distributed such that everyone has the equal opportunity to pursue their goals, whatever those may be. Fredman has discussed some of the theoretical positions on what positive equality duties entail at length above, note 6, pp. 18-180.
- 52 See Part 3 above.
- 53 *International Movement ATD Fourth World v France* No. 33/2006, 5 December 2007, European Committee of Social Rights. The Committee did not explicitly state the grounds of discrimination for the purpose of its finding under Article E (right to non-discrimination), which is why the complaint demonstrates a step in the right direction rather than the final destination.
- 54 *Alyne da Silva Pimentel v Brazil*, Communication No. 17/2008, CEDAW, Para 7(7).
- 55 Constitutional Court of South Africa, *Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721 (CC).
- 56 The Equal Rights Trust Interview with Iain Byrne and Geoff Budlender: “Socio-Economic Equality in the Courts: The Litigator’s Perspective”, *The Equal Rights Review*, Vol. 12, 2014.
- 57 *Ibid.*
- 58 See above, note 27.
- 59 *Ibid.*
- 60 See The Equal rights Trust above, note 36.
- 61 Fredman, S., *Discrimination Law*, 2nd Ed., Oxford University Press, 2011, p. 38.
- 62 *Ibid.*
- 63 We have already seen this as “sexual orientation”, “disability” and “age” have been added to the list of widely accepted grounds upon which discrimination is prohibited.
- 64 See above, note 6.