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

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The Pyramid Question

This issue of The Equal Rights Review focuses on the relationship between equality and socio-economic rights. This relationship, it has been said, is complex, multi-dimensional, multi-faceted, requiring a holistic approach, etc. But I must admit that I am approaching it with some suspicion. The relationship of two very rich and broad notions, each of which having different and even opposite meanings for different people at different times and in different contexts, does not commend itself as a clear and honest member of the conceptual universe. I have therefore been concerned that a focus on this relationship might, to my horror, add to the widespread tautological hubris, confuse students of human rights law, and fail to illuminate anything on the subject.

Once I read the materials in this edition addressing the relationship between equality and socio-economic rights, I remained concerned about all of the above, but found one reason to be delighted. Each of the materials has managed to make a few clear and meaningful points – quite an achievement! Moreover, in an intriguing way, each appears to address the same topic from different angles by asking quite different questions, at various levels of abstraction. At the top of abstraction is Joanna White-man’s article, tackling the question of how to make human rights law oblige the state to redistribute resources so as to end socio-economic disadvantage. The relationship between equality and socio-economic rights in Octavio Motta Ferraz’ article forms part of the solution rather than the problem, with the problem being how to define socio-economic rights while escaping from the wrong assumption of resource scarcity; his solution comes in terms of equality of opportunity to satisfy basic needs. This particular concept of equality should constitute the content of socio-economic rights. The Equal Rights Trust, in a major forthcoming study, the summary of which we publish here, asks the more pragmatic question of how claiming discrimination or inequality can be instrumental for the purpose of realising socio-economic rights through court judgments.

Moving to a more specific set of issues, Bob Hepple is interested in how gender equality in employment can be achieved through equality law of a new type, and whether the existing convention(al) frameworks as interpreted to date will really work in the 21st century. Tarryn Banister explores how gender-based violence can be more effectively challenged through the interconnection between the right to equality and the right to have access to health care services, including reproductive health care. Finally, the double interview with Geoff Budlender and Iain Byrne adds some more facets to the theme from several other angles.

On such a polyhedron of a theme, many people would be tempted to work out their own approach. From my own angle, at the bottom of the relationship between equality and socio-economic rights lies what I call the
“pyramid question”. The pyramid is of course the predominant shape of current societies in terms of socio-economic inequality, where the more unequal societies resemble steeper pyramids. The question itself could not be simpler: are you happy to live in a pyramid, or are you not?

The evolution of human rights ideology has reached a point where most experts today will state that they support “equality in respect of socio-economic rights”. At least this is what Article 2 of the International Covenant of Economic, Social and Cultural Rights requires of them as a basic condition of speaking the human rights language. When it comes to the distribution of wealth, the socio-economic rights framework, and the rights framework more generally, accommodates everyone – left, right and centre. Thus, experts will display a large spectrum of different opinions, all of them legitimate within the human rights discourse, regarding the question: what exactly is meant by “equality in respect of socio-economic rights”?

Some experts mean, narrowly, an enforceable right to non-discrimination in respect to the exercise of certain recognised economic or social rights – for example, that no one should be treated less favourably because of a legally protected characteristic such as race or gender in school admissions, workplace benefits, rental contracts, etc. Among these experts, some will, and some will not accept that socio-economic status and/or poverty are, or should be, protected characteristics. Other experts would interpret “equality in respect of socio-economic rights” as containing a possibility, or even a state obligation, to eliminate poverty and/or socio-economic disadvantage. Still others would interpret “equality in respect of socio-economic rights” as amounting to socio-economic equality.

These interpretations, expressed in deceptively similar, overlapping and intertwining human rights law terms, mask completely different agendas. There is a fundamental difference between efforts to abolish poverty and efforts to abolish inequality. It is one thing to want to lift people from poverty and ensure everyone has basic necessities; and it is quite another to want socio-economic equality among people.

Socio-economic rights and equality rights experts are situated along the entire political spectrum from left to right; and all the nuanced positions about how the three options above interact are also found along that same axis of political economy. Some will not change the shape of the socio-economic pyramid while making race, gender and a couple of other characteristics irrelevant to one’s position inside it. Others will push the entire pyramid upwards, so that those at the bottom layers could enjoy basic necessities, and would no longer be poor in any way, but would still be at the bottom of a hierarchy. Still others will demolish the pyramid, if only they could. Among the latter tribe, there will be different views as to how fast, and through what means, the pyramid should be flattened out.

So from my own perspective, looking through the thick muddle of the relationship between equality and socio-economic rights, I see below the many theories essential disagreement over some of the most basic political values, sometimes articulated as conscious choices, sometimes “merely” political instincts. It is always interesting, at least for me, to watch how human rights and equality experts express their political instincts in normative language, when they are telling us how a certain right should be understood; what the right way to interpret its content is; or what that right really is.
And yet, despite the political diversity among human rights and equality experts, I suspect that a certain majority want to at least flatten the pyramid somewhat. The most radical ones will wish to interpret the universally recognised “right to equality” as containing a “right” to “socio-economic equality”, and they might as well use the law as a tool working in this direction. This is of course a legitimate use of the law, but the problem is not about legitimacy. The expectation that we can use human rights law (including equality law) to transform societies is a legal fantasy. Lawyers will not re-shape the pyramid unless they act with politicians. This is because rights are inferior to powers. Socio-economic rights are for the poor; says Geoff Budlender in this issue. Indeed, the poor have the right to education, while the rich have education. The poor have the right to food and housing, while the rich have food and housing, and so on.

The inevitability of politics flies in our face from the luminous article of Octavio Motta Ferraz in this issue: if resources are enough for everyone on earth to live a good life (a point which he re-claims with youthful energy, almost fifty years after Marcuse¹), then why? Why don’t we set out to re-distribute global wealth more equally?

Because we have come to the boundary where rights meet power; where law meets politics. The politics of the future is unpredictable. Will the political processes related to wealth distribution slowly build a global consensus about the immorality of a society of socio-economic inequality? This is not impossible. In a now lost civilisation in which I grew up, I was raised to perceive economic inequality as both immoral and distasteful. No amount of subsequent experience has been able to completely erase from the political DNA of my generation of East Europeans the vague disgust of the contrast between wealth and misery. Of course, political DNA is not guaranteed to be passed down. But what I am saying is that it is just possible that in the future, political processes might result in a shared understanding among growing numbers of people that to enjoy life’s worthy pursuits one should not want to be disturbed – indeed degraded – by the surrounding repulsiveness of material inequality.

However, it is also possible that such an understanding might not emerge for many centuries, in which case generation after generation will be measuring life’s victories by the vulgar and boring standards of material wealth. In any case, whatever lies in the future, there is likely to be a small but respectable role for equality rights. “Rights” may be inferior to powers, but in today’s pyramids, powers clash and compete in a game of “rights”, among other games; and within the rights game, equality and socio-economic rights are rising in importance. This is good news for those of us who are working in the hope to see, from time to time, a “right” to “equality” enforced, through legal coercion, as a symbolic reminder of our possible egalitarian future.

Dimitrina Petrova

"If a country’s social and labour market policies are “minimalist”, national courts will hardly refer to such policies to justify limitations imposed on older (and younger) age groups on the labour market. Quite logically, if older people are expected to take care of themselves, they should rely on the same level of protection against discrimination in employment as all other generations."

Vadim Poloshekuk
Older Age, Employment and Equality in Legislation: A “Progressive” Estonian Approach?

By Vadim Poleshchuk

This article sheds some light on the Estonian case law related to older age inequality and discrimination. The combination of liberal social policies and the high percentage of the aged population motivated the Estonian judiciary to take a “progressive” approach in this area which could also be transferred to other jurisdictions. In the article, the peculiarities of the situation of Estonian elderly people are explained in sections I (a statistical overview) and II (political and social context). Section III provides information on Estonian anti-discrimination law. Two important court cases are presented in sections IV and V. They explain how the Estonian Supreme Court has outlawed some patterns of older age inequality and discrimination in employment using two different tests: the “arbitrary decisions’ test” and the “proportionality test”. Conclusions follow in section VI.

1. Estonian Elderly: A Statistical Overview

Estonia’s population is ageing at one of the fastest rates in Europe and it has one of the largest proportions of elderly population in the European Union (EU). Changes marking the dawn of demographic transition have been observed in Estonia after the mid-1800s. At the end of the 1920s there was the first decline in fertility below the “replacement level”, that is to say that this was the first time at which population numbers were not maintained or increased. A temporary rejuvenation of the population was primarily caused by mass immigration to Estonia after the end of World War II, during the years of Soviet dominance. As an independent country, in the early 1990s, Estonia faced an abrupt acceleration of population ageing and, during this time, it was among the highest in Europe. Thus, in 1991–2013, the proportion of the elderly (age 65+) grew from 11.7% to 18.1% (i.e. an increase of more than 50%). This process was much more rapid among people of foreign origin. Provided the fertility rate remains the same, the proportion of the elderly (age 65+) will reach 26% in Estonia by 2050.

The total number of old-age pensioners reached 297,413 in 2012. Early retirement is quite unpopular in Estonia because those who retire early have a reduced pension entitlement. In 2012, early-retirement pensioners made up as few as 7% of the country’s old-age pensioners.

Before and soon after the end of the Soviet period, the retirement age was 60 for men and 55 for women. Today, the State Pension Insurance Act (Article 7) provides a right to receive an old-age pension for both men and women who have attained 63 years of age and have accrued 15 years of pension-
able service in Estonia. From January 2017, the pensionable age will be set at 65 years. A transitional period was established for those born in 1944-1960 with a gradual increase of the retirement age depending on the year of birth.

A well known attribute of the Soviet economy of the 1980s was a very high labour force participation rate for older workers: the percentage of working old-age pensioners was very high and there was almost no unemployment. In 1989, in Estonia, 52.3% of persons aged 60-64 and 40.1% of persons aged 65-69 were participating in the labour force. Drastic changes have occurred in the Estonian economy since the beginning of social and economic reforms. As Siim Krusell summarised in an overview of the early 1990s:

“[E]conomic and social restructuring in Estonia has resulted, among other things, in younger people achieving rather good positions on the labour market, since they were preferred to older workers. Transition to the market economy came with risen importance of human capital and education. However, employers considered the quality of education acquired at the end of the 1980s and at the beginning of the 1990s to be better than the one acquired earlier than that. Economy saw whole new fields/sectors emerge or old ones expand, which opened an expressway for the fresh-out-of-college to acquire managing positions.”

By the late 1990s, older generations managed to partially restore their position in the labour market. Their labour force participation rate has been increasing since then, due in part to changes in pensionable age. Nevertheless, there has not been a return to the Soviet-era labour force participation rate amongst the older population. In 2012, the respective figures were 50.4% of those aged 60-64 and only 27.7% of those aged 65-69.

People who are very close to the age at which they gain the right to claim a pension and people of pensionable age are overrepresented among the poor and are considerably underrepresented among the rich. In 2012, 24.1% of people aged 55-64 and 28.5% of those aged 65+ belonged to the lowest income quintile and these percentages were higher than for any other age groups. By contrast, their percentage in the highest income quintile was the lowest (16.4% in age group 55-64 and 5.6% in age group 65+). Furthermore, in 2012, the at-risk-of-poverty rate was relatively high for people aged 65 and older (24.4%) and those aged 50-64 (21.0%). The average for the age group 25-49 was only 14.1%.

According to findings by Mai Luuk, in 2001-2008, the average old-age pension increased almost three-fold due to annual indexation. However, rapid increases in necessary expenditure (food and housing) have undermined the economic subsistence of pensioners. Older people remain in employment up to the pensionable age, or even longer, because they can benefit both from earning wages and from disbursements of old-age pensions. In 2012, the average old-age pension was equal to Euro 313; average gross wages were Euro 887.

Seniority-based pay systems are not widespread in Estonia. Calculations on the basis of the Labour Force Survey 2009 show that a person’s age is an important factor when it comes to influencing pay regardless of his or her education, occupation, gender and ethnic origin. Understandably, small pensions (and, in general, low income) motivate people to continue to work after reaching retirement age.
To summarise, in Estonia the starting point (pre-transition) was a situation of full employment, which was characterised by the high prevalence of stable employment for older people. The rapid shrinking of the labour market in the early 1990s pushed out vulnerable groups, including older people. The active promotion of early retirement was subsequently substituted with more inclusive policies in the employment sphere, against the background of the now higher retirement age and low public pensions. In this regard, the Estonian situation is similar to many other countries of “New” Europe.

2. Political and Social Context

Using the gradation set out by Gøsta Esping-Andersen (three worlds of welfare capitalism), Estonia seems to be a typical liberal regime with rather modest social assistance provided from public funds to people in need. In 2011, social protection expenditure as a percentage of Estonian gross domestic product (GDP) was 16.1% (the average amongst the 28 surveyed EU member states was 29.1%). After 1991, right-wing political parties dominated the national political landscape. In Estonia, issues of social, including intergenerational, solidarity are often seen though a prism of traditional (“Protestant”) values. In practice, this means that older people are supposed to be proactive in social and economic life rather than to seek public support.

The issue of pension reform was the subject of heated debate in Estonia around 2010. However, relevant civil society organisation proved to be quite weak and unable to significantly influence public opinion and political decision-making. Trade unions and organisations representing employers were also involved in the discussion. For instance, in 2010, the Eesti Tööandjate Keskliit (Estonian Employers’ Confederation), adopted “The Employers’ Manifesto 2011-2015”, which included a separate section V on society’s ageing. Among other things, the Manifesto advocated an increase in the pensionable age to at least 67 and questioned whether it is justified to pay a working pensioner a full state pension while they are working. The Eesti Amentühingute Keskliit (Estonian Trade Union Confederation), an umbrella association uniting 19 branch trade unions, in its 2010 memorandum to parliamentary groups, questioned whether the state of health of older people in Estonia enabled them to work longer. According to the Flash Eurobarometer Intergenerational solidarity poll of 2009, Estonian respondents were divided regarding the need for major pension reforms to ease the financial burden on working-age people. In any case, the parliament extended the pensionable age to 65 (this was the second decision on an increase during the first decade of the century). The right of working pensioners to full public pensions remained untouched, however. These changes were controversial to many trade unions but there were no large-scale protests.

In 2012, Eurobarometer studied public opinion on the subject of discrimination in the European Union. In Estonia, 55% of respondents believed that discrimination on the ground of older age (age 55+) is very or fairly widespread in their country (the average amongst the 27 surveyed EU Member States – EU27 – was 45%). No other prohibited ground of discrimination was mentioned more often. Older age was also mentioned most often by Estonian respondents as a disadvantage in the eyes of a company that wants to make a choice between two candidates with equal skills and qualifications. This result was identical with the EU27 average (54%).
In 2007, a comprehensive anti-discrimination study was commissioned by the Ministry of Social Affairs. The study identified and considered individuals’ personal experiences of discrimination within the last three years. The oldest generations (age 60+) referred to unequal treatment first of all in access to employment. Scholars believe that the elderly face challenges in the labour market if they lose a job just before reaching a pensionable age; therefore, it is quite probable that they experienced unequal treatment while looking for a new workplace.

It should be mentioned, however, that in the 2012 Eurobarometer study, only 6% of older respondents (aged 50-74) stated they had personal experience of discrimination in employment (in their current workplace). Older people are still loath to interpret their own or their group’s negative experience in terms of age discrimination. Furthermore, both national authorities and civil society also rarely address the problems of older people in a context of age discrimination.

3. National Anti-discrimination Law

While talking about the fight against inequality and discrimination, we need to have an overview of relevant provisions of the Estonian Constitution (1992) as well as an understanding of the historical background. This section explores the constitutional provisions and historical background to general anti-discrimination and equality provisions before focussing on the background to laws relating to the involuntary retirement of older workers.

According to Estonian legal doctrine and court practice, all constitutional provisions related to fundamental rights, including the rights to equality and non-discrimination, are directly applicable in both the public and private spheres. Article 12(1) of the Constitution establishes an explicit ban on discrimination:

“Everyone is equal before the law. No one shall be discriminated against on the basis of ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds”.

Katri Lõhmus has explained that:

“Article 12 of the Constitution does ban unequal treatment in all spheres of activities which are regulated and protected by the State. Legislative, executive and judicial powers should observe the principle of equal treatment. (...) The principle of equal treatment is valid for all laws regardless of their scope of application.”

Thus, the general principle of equality is applicable to “all spheres of life” (an interpretation which is corroborated by the Supreme Court). Discrimination is banned on any “other” ground. This includes for instance, age, which is not explicitly included in the text of the Constitution (see the examples of relevant court cases at sections IV and V below). However, in the Estonian Constitution neither the general right to equality nor the right to non-discrimination are absolute and they may be limited in accordance with Article 11. This Article stipulates that constitutional rights or freedoms may be restricted only in accordance with the Constitution (first of all, following proper legal procedure). However, such restrictions must be “necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted”.

In recent years, the Supreme Court has assessed whether or not there has been a violation of the right to equality with ref-
ference to two types of test. First, in some judgments, the Court analyses whether the unequal treatment was arbitrary, that is to say, whether there were no reasonable grounds for the decision (a concept which has not been defined by the court in any detail). Second, in some other judgments, the Court uses the so-called proportionality control test. Both tests have been used by the Supreme Court in cases relating to older age equality and non-discrimination. These tests will be explored below in the discussion of exemplary court cases at sections IV and V.

The text of the Constitution explicitly refers to the elderly only in the context of the right to state assistance (Article 28(2)), which is hardly relevant in the context of equality law.

It is worth mentioning that the first provisions on prohibition of discrimination in the employment sphere are in law originating from the Soviet period. The Code of Labour Laws 1972\textsuperscript{26} banned the somewhat vague concept of direct or indirect infringement of rights or direct or indirect preferences in access to employment on the grounds of sex, race, ethnic origin or attitude to religion, but not age (Article 18(2)). When Estonia regained independence, parliament substituted the Code with the new Employment Contracts Act 1992 which used the same vague concept of prohibiting the direct or indirect infringement of rights or direct or indirect preferences in access to employment as the 1972 Act. The 1992 Act did, however, stipulate more protected grounds. Regretfully, age was not added to this new closed list of grounds (Article 10). Therefore, for many years in Estonia, protection against age discrimination in employment could be based only on the general equality and anti-discrimination provisions of the Constitution (Article 12).

Estonia became an EU member state on 1 May 2004. On the same day, the Employment Contracts Act 1992 was radically amended to transpose the EU Equality Directives. In labour law, age finally became a protected ground explicitly mentioned in the law and detailed definitions of discrimination were added to the text of the Employment Contracts Act. Since January 2009, the main set of anti-discrimination provisions (including those applying to the field of employment) have been found in a separate legal instrument – the Equal Treatment Act 2008. Neither the new Employment Contracts Act 2008 nor the new Public Service Act 2012 include any detailed anti-discrimination provisions.

Estonian employment law initially preserved several controversial issues related to older workers, including those relating to involuntary retirement. In the late 1980s, the federal Soviet legislation had been amended to enable employers to dismiss employees who had attained the age of 65 and who had a right to full old-age pension. The decision had been taken against the background of a baby boom and heated debates as to a perceived necessity to enhance efficiency of the Soviet economic model.\textsuperscript{27} The amendment was transferred to labour laws of Union Republics, including Estonia. It could also be found in the Employment Contracts Act (Articles 86(10) and 108). Similar provisions were added to the Public Service Act 1995 regulating the employment of public officials (Article 120).

This limitation of the employment rights of older people was repeatedly criticised by legal experts and civil society. The relevant provisions of the Employment Contracts Act were eventually abolished by parliament on 8 February 2006, following a report drafted by the Chancellor of Justice (an ombudsman-
like, constitutionality control institution). In his report, the Chancellor claimed that the provisions of the Employment Contracts Act might conflict with the equality and non-discrimination principles of the Constitution and EU law and that there were seemingly no good reasons to justify such unequal treatment of older workers. However, with respect to the rules regulating the employment of public officials, the policymakers were not similarly liberal and open-minded. As a result, public officials could be dismissed once they reached the age of 65 under Article 120 of the Public Service Act until the Supreme Court, on 1 October 2007, declared that it (and related provisions) violated Article 12(1) of the Constitution, which provided for equality before the law and banned discrimination on any ground.

With this background in mind, there are two cases of particular interest which have developed the law in this area. The rest of the article is dedicated to examining the cases in some detail.

4. Involuntary Retirement of Public Officials (Case I)

According to the Estonian Constitution, the court shall not apply any law or other legislation that is in conflict with the Constitution and the Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution (Article 152). A request to review the constitutionality of legislation of general application may also be initiated by a court by delivering its judgment or ruling to the Supreme Court. The case in question was initiated in June 2007 by the Tallinn Administrative Court which refused to recognise as constitutional Article 120 of the Public Service Act. It concerned two public officials working in the Citizenship and Migration Board who were released from service solely due to their age. Both filed actions with the Tallinn Administrative Court, which declared their release from service unlawful. The court did not apply Article 120 of the Public Service Act upon adjudicating the matter and transferred the judgment to the Supreme Court.

The Tallinn Administrative Court found that the fact that a person can no longer work in an office suitable to the person, solely because he or she has attained a certain age, constituted an intensive infringement of "free self-realisation", established in Article 19 of the Constitution. Furthermore, Article 12 of the Constitution prohibits treating a person unequally in comparison to others solely on the ground of age without reasonable and proportional justification. The court stressed that, in addition to the Constitution, the International Labour Organisation Convention No. 111 and the provisions of the Council Directive 2000/78/EC both require equal treatment in employment and service relationships. If an official who has attained more than 65 years of age is unable, due to his or her advanced age, to properly perform his or her duties, it is lawful to dismiss such an official due to unsuitability for position. The court went on to state that Article 120 was also in conflict with the obligation assumed by Estonia upon accession to the European Social Charter (Revised), to guarantee that no one’s employment is terminated without a legal ground. Under the Charter, legal grounds for release are the capacity or conduct of the employee or the operational requirements of the undertaking, establishment or service (Part II, Article 24 a).

The Citizenship and Migration Board (the employer) was of the opinion that the relevant provisions were in line with the Constitution. They stressed that public and private
sectors are subject to different legal regulation. Both the Constitution and EU law allowed exceptions from the principle of equal treatment in certain justified cases. Thus, Article 6 of the Council Directive 2000/78/EC established that differences of treatment on grounds of age did not constitute discrimination, if, within the context of national law, they were objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim were appropriate and necessary. The Citizenship and Migration Board was supported in its position by the Constitutional Committee of parliament. The Committee argued that Article 120 of the Public Service Act was not imperative by nature as it gave discretion to the employer to decide on how to proceed in relation to an individual employee on a case-by-case basis. Article 120 did not discriminate against elderly officials but rather was to their benefit, enabling them as it did, to leave with dignity and receive compensation. The Minister of Justice claimed that the age limit was reasonably justified by the need to guarantee the sustainable development of an agency, amongst other things. In addition, the Minister submitted that retired officials were also provided with decent compensation and pensions. Furthermore, officials of general public service and special service were comparable groups and, for the latter, the release from service upon the attainment of 65 years was a general rule.

In its judgment of 1 October 2007, the Supreme Court ruled that Article 120 in so far as it resulted in a situation where it was possible for an employer to keep on one employer over 65 whilst releasing another from service solely on the basis of age. Good reasons for the unequal treatment of officials who have attained 65 years of age could not be found in the explanatory note attached to the Public Service Act. The opinions of the Constitutional Committee of parliament and the Minister of Justice could not be accepted as a reasonable justification. Their claims that it was easier for an elderly person to cope with release from service due to age rather than due to unsuitability for office did not convince the Supreme Court. Instead, the Court held that, in order to avoid arbitrary unequal treatment, the motives for release from service must be transparent and reflect the actual situation. The Court concluded that the infringement of the “general right to equality” was not reasonably or appropriately justified and amounted to arbitrary unequal treatment. Accordingly, Article 120(1) of the Public Service Act and the related norms were in conflict with Article 12(1) of the Constitution.

It is interesting that the Constitutional Court of Belarus came to a completely different conclusion in a very similar case. In Belarus there were the same legal provisions that had essentially been inherited from the late-Soviet regulation which permitted employers to dismiss employees on the sole basis that equally. However, the Court said, unequal treatment of equals is permissible – the right to equality is not absolute – where the unequal treatment is not arbitrary. With the reference to its previous practice, the Court reminded: “if there is a reasonable and appropriate ground, the unequal treatment by law is justified”.

The Supreme Court concluded that there could be no reasonable justification for Article 120 in so far as it resulted in a situation where it was possible for an employer to keep on one employer over 65 whilst releasing another from service solely on the basis of age. Good reasons for the unequal treatment of officials who have attained 65 years of age could not be found in the explanatory note attached to the Public Service Act. The opinions of the Constitutional Committee of parliament and the Minister of Justice could not be accepted as a reasonable justification. Their claims that it was easier for an elderly person to cope with release from service due to age rather than due to unsuitability for office did not convince the Supreme Court. Instead, the Court held that, in order to avoid arbitrary unequal treatment, the motives for release from service must be transparent and reflect the actual situation. The Court concluded that the infringement of the “general right to equality” was not reasonably or appropriately justified and amounted to arbitrary unequal treatment. Accordingly, Article 120(1) of the Public Service Act and the related norms were in conflict with Article 12(1) of the Constitution.
they had reached the age of 65. The Belarusian Constitution (1994) provides for equality before the law and prohibits discrimination on any ground (Article 22). In relation to ordinary employment in the private sphere, the provisions permitting the dismissal of a person solely due to his or her age were declared to be unconstitutional in 1994.34 However, in 2001, the Constitutional Court came to the conclusion that similar age limits for public officials are justified and the latter are not in a comparable situation with ordinary employees.35 It found that age limits were established in the interests of the sustainable work of governmental agencies and that this was a valid and solid justification. The court noted that public officials enjoyed various privileges that may compensate them for the infringement of some of their rights.

In other words, in its analysis, the Belarusian Court compared public officials with ordinary employees and found that they were not in a similar situation and the differences in their situations justified differential treatment. The Estonian Court, however, looked at the case from a different perspective and found no good justification for the unequal treatment of public officials who belong to the same age group (age 65+). The Estonian law permitted arbitrary unequal treatment of public officials since, in the same office, it was possible to fire one older person and to allow another older person to stay in the service. There were no good reasons to maintain this regulation while any public official might be released from the service due to unsuitability for position.

5. Access to Work-related Benefits (Case II)

As was explained above, the Estonian Supreme Court declared that the legal provisions that permitted the firing of public officials solely due to older age were unconstitutional. In what follows, we will provide an overview of another judgment, of 7 June 2011,36 in which Estonia’s court of highest instance outlawed the unequal treatment, on an age discriminatory basis, of working older people in access to certain important benefits.

In this case, a working 67 year old pensioner was not provided with sickness benefits on an equal footing with younger persons. According to Article 5(2)(1) of the Health Insurance Act 2002, insured persons are those who work on the basis of a contract of employment and for whom the employer is required to pay social tax. Article 57(5) of the Act provides that an insured person has the right to receive sickness benefit for a maximum of 250 calendar days per calendar year. However, the maximum number of calendar days is much smaller for insured persons aged 65 years and older. They may receive sickness benefit in the event of an illness and injury for up to 60 consecutive calendar days for one illness but not for more than a total of 90 calendar days per calendar year (Article 57(6)). Due to these provisions, the applicant did not receive his sickness benefit in full and filed action with the court. A constitutionality control procedure was initiated by the Tartu Circuit Court (court of second instance).

The Tartu Circuit Court did not apply Article 57(6) of the Health Insurance Act, due to its unconstitutionality (as regards limitations for people who are at least 65 years of age). The final judgment was given by the Supreme Court en banc (i.e. a chamber comprised of all justices of the Supreme Court). The Court came to the conclusion that special provisions regarding sickness benefits for people aged 65 and older violated Article 12(1) of the Constitution, which provided for equality before the law and banned discrimination on any ground.
In this case, the Supreme Court used a proportionality test (which has been largely borrowed from Germany by the Estonian courts), as it considers itself permitted to do under the general provisions of Article 11 of the Constitution, relating to the restriction of rights. Similarly to the approach to proportionality assessments widely recognised in other jurisdictions’ interpretations of their own non-discrimination provisions, the Court reviewed the conformity of the restriction to the proportionality principle through the three characteristics thereof – suitability, necessity and proportionality in the narrowest sense.37

The Court rejected the argument that the relevant limitations were established in the interests of the health protection of those aged 65 and over: it was impossible to make this argument because there was no way the limitations could foster the achievement of this goal. The Court agreed, however, that the goal of the state to ensure a reasonable use of the health insurance fund (a semi-independent public institution which receives money from social taxes to pay medical services) and to save its money by paying less benefits whenever possible, was both suitable and necessary. The Court argued that it was not possible to achieve this goal by some other measures which were less burdensome on a person but which were at least as effective as the former. At the next stage of the proportionality test, the Supreme Court analysed the extent and intensity of the interference with the fundamental right on the grounds of age, on the one hand, and the importance of the objective of saving the health insurance funds, on the other hand. In other words, the Court had to decide on proportionality of a measure sensu stricto.

Proportionality in the narrowest sense means the court is required to consider whether the reasons given for the unequal treatment are reasonable. The Supreme Court studied various arguments provided by the parties. First, the Court found that unequal treatment on the grounds of a characteristic irrespective of a person’s will (in this case: on the grounds of age, an immutable characteristic of a person at a certain point in time) must be justified by weighty reasons. The Court found that the age limit of 65 years could not be justified by the statistics presented in the case by the Minister of Social Affairs. The Court argued that a person’s state of health did not necessarily deteriorate substantially upon reaching the age of 65. The statistics would probably be quite similar if, upon creating the age groups, one group consisted of persons who were, for example, either 63 or 67 years of age and older.

Second, there are many people significantly older than 65 years of age whose health and capacity for work is equal to that of younger people. Both younger and older people can fall ill for a longer period of time albeit with a temporary ailment (e.g. due to injury or illness without a permanent decrease in their capacity for work). While it could not be stated with certainty that precisely 65 years of age is a “bifurcation point”, restricting the duration of the payment of sickness benefit on the grounds of age constituted a serious interference with the fundamental right to equality of older persons.

Third, the Supreme Court disagreed with one of the proposed arguments that the payment of two different benefits for the same purposes (pension and the benefit for temporary incapacity for work) may constitute non-economical use of public resources:

“[T]he state old-age pension is a financial benefit in the case of old age. However, the sickness benefit is financial com-
pensation paid by the health insurance fund to an insured person on the basis of a certificate for incapacity for work in cases where the person does not receive income subject to individually registered social tax due to temporary release from his or her duties or economic or professional activity (Article 50(1) and (3) of the Health Insurance Act). The objective of the benefit for temporary incapacity for work is to ensure income during the time the person is unable, due to temporary incapacity for work, to continue the work necessary for the receipt of their usual income. On the other hand, the state old-age pension is a state benefit in the case of old age for persons who have contributed their labours and whose wages have been subject to taxes for, in general, at least 15 years (see also Article 30(1) of the State Pension Insurance Act), including the state pension insurance subjected to individually registered social tax which the amount of the old-age pension depends on (Articles 11(1) and 12(2) of the State Pension Insurance Act). The receipt of a state old-age pension does not depend on the person’s state of health or his or her ability to otherwise earn a living.\footnote{38}

Fourth, the Supreme Court also noted that not every person who is 65 years of age or older receives a state old-age pension and so that cannot be used as an argument. Furthermore, the discount for medicinal products and dental care enjoyed by old-age pensioners and insured persons who are at least 63 years of age does not make the distinction regarding the duration of the payment of sickness benefit “moderate”.

Consequently, the Court delivered the opinion that neither the worse-than-average state of health of the elderly, nor the receipt of an old-age pension, nor the saving of the money of the health insurance fund could justify the unequal treatment on grounds of age in relation to the receipt of sickness benefit. Finally, the Supreme Court \textit{en banc} declared that the wording “or insured persons who are at least 65 years of age” in Article 57(6) of the Health Insurance Act was unconstitutional and invalid.

It is evident that, in this judgment, the Supreme Court took an individual rights approach with due respect for the dignity and personal autonomy of older people on the labour market. The Court rejected token usage of statistics or hypocritical arguments that the infringement of their rights was actually in the interests of the older people (for the protection of their health). The Court emphasised that the right to receive a pension should not impact on the ability of a pensioner to make free decisions in the field of employment, namely in relation to whether or not to continue working.

Interestingly, in this judgment, the highest court of instance also reviewed its own practice and came to the conclusion that there are good reasons to apply the proportionality test to all cases related to Article 12(1) of the Constitution and that it is not necessary to use an “arbitrary decisions test”.\footnote{39} This decision is to be welcomed as the latter test is manifestly lacking the same level of clarity and scrutiny as the proportionality test.

6. Conclusions

Estonians believe that older age discrimination is most widespread in their country, when compared with discrimination on any other protected ground. Estonian economic liberalism has important implications for older generations: they are expected to be proactive on the labour market and less dependent on public assistance. The main reason for the activity of older people on the labour market seems to be the small size of
pensions or other income. Therefore, the labour force participation rate for older people in Estonia is relatively high.

Csilla Kollonay-Lehoczky, who compared the case law of the European Court of Justice (ECJ) and the US courts with respect to the automatic retirement age, concluded that the ECJ has “a significantly more deferential attitude towards regulations in member states forcing employees to retire involuntarily”. The difference in approach she attributed to the different backgrounds of the relevant legislation and to the fact that American lawmakers were motivated “by a strong respect for individual free choice and the intent to eradicate unfair stereotyping,” while the EU Framework Directive couples the anti-stereotyping intent with broader social and economic considerations as well as with reaction to labour market and budgetary complications and the problems of an “ageing society”.

As regards liberal social policies, Estonia is closer to the US than most EU member states. Estonian judges have to be quite open-minded when deciding age discrimination cases. If a country’s social and labour market policies are “minimalist”, national courts will hardly refer to such policies to justify limitations imposed on older (and younger) age groups on the labour market. Quite logically, if older people are expected to take care of themselves, they should rely on the same level of protection against discrimination in employment as all other generations. In other words, paradoxically, in the grim social environment, the Estonian elderly may benefit from a comparatively advanced manner of application of equality and non-discrimination principles to their group. While a lack of proactive social policies is normally not good for the elderly, under such circumstances, courts feel free to deal with the concept of age-related inequality and discrimination in the same way as with discrimination on any other ground.

The two exemplary cases of the Estonian Supreme Court discussed in this article may prove a “progressive” approach of the Estonian judiciary. Actually, the logic and arguments of the Estonian court in both cases need not be country-specific and may be transferable and applicable to other European jurisdictions with proactive social policies.

In the case of involuntary retirement, the Supreme Court, using solid legal argumentation, was able to highlight the evident arbitrariness of release from service motivated solely by the age of a public official. The judgment in the case of access to sickness benefits is another good example. The Supreme Court was motivated by respect for a person’s autonomy to decide the matters related to his or her life without unnecessary external interference. The thorough analysis by the Court showed that extensive justifications provided by authorities in this case were actually ill-founded. This judgement made us believe that numerous age limitations in access to work-related benefits are dependent on political decisions and that these decisions often lack proportionality in its narrowest sense, i.e. they are unreasonable.

1 Vadim Poleshchuk, LL.M., is Legal Advisor-Analyst of the Legal Information Centre for Human Rights (Tallinn, Estonia). He is also a national expert in the European Network of Legal Experts in the Field of Non-Discrimination.
4 Ibid., p. 27.
6 Ibid.
7 See above, note 3.
9 See above, note 3.
10 Ibid.
12 See above, note 3.
13 See above, note 8, p. 46.
15 Latvia is the only country in the EU where social protection expenditure was even lower (15.1%). See Eurostat, “Social protection. EU28 spent 29.1% of GDP on social protection in 2011”, News release No. 174/2013, 21 November 2013.
17 Similar regulations existed in Estonia in the 1990s.
27 Ukaz Prezidiuma Verkhovnogo Soveta SSSR ot 4 fevralya 1988 goda “O vnesenii v zakonodatel'stvo Soyuya SSR o trude izmeneniy i dopolneniy, svyazannykh s perestroykoy upravleniya ekonomikoy”.
30 Article 4 of the Constitutional Review Court Procedure Act (2002).

31 See above, note 29.

32 This right does not appear in the same terms in international human rights law but may broadly be understood to be a right to fulfil one’s potential.

33 It should be clarified that in the national context, these grounds were understood as those in line with the Constitution and good moral values.


36 Judgement of the Supreme Court en banc of 7 June 2011 in case 3-4-1-12-10, available on: http://www.riigikohus.ee/?id=1301 (last accessed 1 March 2014).


38 See above, note 36, point 55.

39 Ibid., points 34-35.


41 Ibid.

42 Ibid.
The Balancing Act: The Application of the Rights to Equality and Non-Discrimination in the Process of Adoption

Richard Wingfield

This article examines the application of the right to equality under international human rights law in relation to a crucial element of the right to respect for family life, namely the relationship between parent and child and, specifically, where a person seeks to create a parent-child relationship through one of the most commonly-used alternatives to natural procreation: adoption. The article first looks at whether international human rights law imposes a positive obligation on states to offer and regulate such services; secondly, it analyses human rights jurisprudence on justifications for differential treatment in the adoption process; and finally, it examines whether the jurisprudence in human rights law thus far sufficiently protects the right to equality in the field of adoption.

1. Background: The Rights to Equality and to Respect for Family Life, including Adoption Issues

1.1 The Right to Equality

The notion of equality lies at the very heart of international human rights law. Indeed, the very first article of the Universal Declaration of Human Rights boldly proclaims that “All human beings are born free and equal in dignity and rights”. Despite the elegant simplicity of this assertion, the “right to equality” has not been uniformly interpreted and developed in subsequent international human rights treaties.

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), for example, imposes an obligation on every state party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind”, with Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) using similar language.

The right is not, therefore, freestanding; nor does it impose any positive obligations upon the states. Instead it requires that there be no discrimination in the enjoyment of the rights contained within the Covenants. This limitation is remedied, however, through further Articles. Both Covenants contain provisions requiring state parties to take the necessary steps to ensure the rights contained therein are realised. Article 2(2) of the ICCPR, for example, requires the state party:

“[T]o take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”
Article 2(1) of the ICESCR contains a similar obligation, albeit worded to reflect the economic implications of ensuring the particular economic, social and cultural rights contained within it:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Article 2(3) of the ICCPR goes even further than any provisions contained within the ICESCR, requiring state parties to ensure that effective remedies are available for those whose rights under the Covenant have been violated.

This right to non-discrimination in the enjoyment of other protected rights stands in contrast to Article 26 of the ICCPR which contains no less than four separate elements relating to equality and non-discrimination. In addition to proclaiming both that “All persons are equal before the law” and that “[all persons] are entitled without any discrimination to the equal protection of the law”, Article 26 requires both that the law shall “prohibit any discrimination” and “guarantee to all persons equal and effective protection against discrimination on any ground”.

The notion of equality is broader than that of non-discrimination, as reflected in the Declaration of Principles on Equality\(^6\) (the Declaration), a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as “the current international understanding of Principles on Equality”\(^7\). Principle 1 of the Declaration states:

“The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.”

The broader notion of the right to equality is described by Dimitrina Petrova in her Commentary to Principle 1 of the Declaration:

“In Principle 1 [The Right to Equality], the ‘right to equality’ is given a meaning which is richer than the notions of equality before the law and equality of opportunity. (...) Principle 1 [The Right to Equality], reaffirms the inter-relatedness of equality and dignity articulated in Article 1 of the Universal Declaration of Human Rights which asserts that: ‘All human beings are born free and equal in dignity and rights’. Principle 1 further implies a vision of a just and fair society as one in which all persons participate on an equal basis with others in economic, social, political, cultural and civil life.

The content of the right to equality includes the following aspects: (i) the right to recognition of the equal worth and equal dignity of each human being; (ii) the right to equality before the law; (iii) the right to equal protection and benefit of the law; (iv) the right to be treated with the same respect and consideration as all others; (v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.”\(^8\)

Treaties subsequent to the ICCPR and the ICESCR have developed the rights to equality and non-discrimination for particular
groups of people who have been historically disadvantaged, notably racial and ethnic minorities via the International Convention on the Elimination of All Forms of Racial Discrimination, women via the Convention on the Elimination of All Forms of Discrimination against Women, and persons with disabilities via the Convention on the Rights of Persons with Disabilities.

This article examines the relationship between two rights: the right to equality and the right to respect for family life. The most relevant provisions to turn to are therefore those which prohibit discrimination in the enjoyment of other rights protected under international human rights law, the most established being Article 2(1) of the ICCPR and Article 2(2) of the ICESCR. It is in that context that the right to respect for family life – which, as will be seen below, is a well-established human right – and the prohibition of discrimination in the enjoyment of that right shall be examined.

1.2 The Right to Respect for Family Life

The right to respect for one's family life is often found alongside the right to respect for a number of other elements of one's personal life: Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17(1) of the ICCPR both protect a person's privacy, family, home, correspondence, and honour and reputation, as does Article 11(1) of the American Convention on Human Rights (ACHR). Article 8 of the European Convention on Human Rights, however, protects only the first four of these.

Article 12 of the UDHR provides that:

“No one shall be subjected to arbitrary interference with his (...) family (...). Everyone has the right to the protection of the law against such interference or attacks.”

Modelled on Article 12, the ICCPR includes a near identically-worded provision in Article 17, and similar provisions now appear in almost all major regional human rights treaties protecting civil rights. None of these provisions, however, includes a definition of what constitutes a “family”. Perhaps reflecting the wide cultural variations across the world – variations which are often closely tied to religious doctrine – there has been a tendency to avoid the creation of a single definition of “family” and, instead, to make determinations based on the facts of each individual case which comes before the court or treaty body. The Human Rights Committee, for example, in its General Comment No. 16, states:

“Regarding the term ‘family’, the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned (...) In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms ‘family’ and ‘home’.”

In its General Comment No. 19, the Committee looked at the term “family” in the context of Article 23 and stated:

“The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.”

This article does not attempt to provide a definition of the term “family”. It does, however, assume that family life can exist both between a child and their natural parent, and a child and their adoptive parent. The former assumption follows the decision of the European Court of Human Rights in Boughanemi v France (1996) where the Court stated:
“The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate (...). Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances (...).”

For the latter, the assumption is based on the decision of the European Court of Human Rights in \textit{Pini and others v Romania (2004)} \textsuperscript{22} in which the court stated that:

\begin{quote}
"[T]he relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention (...) [A] relationship, arising from a lawful and genuine adoption, may be deemed sufficient to attract such respect as may be due for family life under Article 8 of the Convention.”
\end{quote}

This assumption, and the interpretation of the right to respect for family life as prohibiting any distinction being drawn between natural children and adopted children, is also reflected in other human rights instruments. The Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, for example, provides at Article 9(a) that:

\begin{quote}
"In case of full adoption, adoptive legitimation, and similar institutions: (a) The relations between the adopter (or adopters) and the adoptee, including support relations, and the relations between the adoptee and the family of the adopter (or adopters), shall be governed by the same law as would govern the relations between the adopter (or adopters) and his legitimate family”.
\end{quote}

Similarly, Article 16 of the UN General Assembly Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, provides, in part, that:

\begin{quote}
“Legislation should ensure that the child is recognized in law as a member of the adoptive family and enjoys all the rights pertinent thereto.”
\end{quote}

\section*{2. Adoption under International Human Rights Law}

While states have long regulated many aspects of family law such as marriage, separation and divorce, and inheritance, the involvement of the state in adoption is a much more recent phenomenon. In Europe, historically, it was common for unwanted children to be left at the door of churches where they would often be subject to oblation (the raising of children within religious institutions); those in the care of the state would be kept at state-run foundling hospitals and orphanages. The formal regulation of passing parental responsibility for a child to a new person or couple was not seen until the mid-19\textsuperscript{th} century. The first legislation on adoption was the Adoption of Children Act 1851, passed by the General Court of Massachusetts in the United States of America. It was not until 1926 that the first legislation governing adoption was introduced in the United Kingdom via the Adoption of Children Act 1926.\textsuperscript{26}

As is clear from the following analysis, there is no "right to adopt” under international human rights law in the sense either that the state has an obligation to provide for and regulate adoption services, or that, where such services are provided for and regulated, any particular person should be eligible to adopt a child.

Explicit references to the practice of adoption can be found in three of the nine core United Nations human rights treaties: 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). The earliest of these, CEDAW, refers to the practice of adoption in Article 16(1)(f) (discrimination in marriage and family relations), the relevant part of which provides that:

"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (...) (f) The same rights and responsibilities with regard to (...) adoption of children (...) where these concepts exist in national legislation; in all cases the interests of the children shall be paramount."

Article 23(2) of CRPD (respect for family life) makes reference to adoption in similar terms:

"States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to (...) adoption of children (...) where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.”

Thus, although they prohibit discrimination against women and persons with disabilities in the adoption process, both Conventions include the phrase “where these concepts exist in national legislation” and thereby impose no obligation upon states to provide for an adoption process.

Article 20 of the CRC approaches the issue of adoption through the lens of the rights of the child rather than the right of persons generally to non-discrimination. It provides that:

“A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

States Parties shall in accordance with their national laws ensure alternative care for such a child.

Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background."

Article 20 does not, therefore, require states specifically to provide adoption services for children to be provided with new parents, but merely that those children receive “special protection and assistance” from the state. Adoption is given as one potential example of how such “special protection and assistance” can be provided, alongside foster placement, kafalah of Islamic law, and placement in suitable institutions, although it gives great leeway to the state in determining what steps to take. The interpretation that Article 20 does not require adoption services to be established is reinforced by Article 21 (which provides that the best interests of the child be the paramount consideration in any system of adoption) which explicitly applies only to “States Parties that recognize and/or permit the system of adoption”. The CRC does not, therefore, impose any obligation on states specifically to provide adoption services, acknowledging that the rights of children can be sufficiently protected through other means.

International human rights treaties can therefore confidently be said to provide no explicit obligation for states to provide for
and regulate adoption services, let alone provide an explicit right for persons to adopt a child. However, as can be seen from the above, international human rights treaties do not ignore the topic of adoption; indeed, the treaties quoted impose a number of requirements upon states during the adoption process. First, the “best interests of the child” must be the paramount consideration during any adoption process; second, “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background” during the adoption process; and third, the rights of women and persons with disabilities must be ensured with regard to the process of adoption.

3. Adoption and the Right to Equality: Current Jurisprudence

In this section, I will examine jurisprudence on the rights to equality within the adoption process in three jurisdictions: the Council of Europe, the state of Florida in the United States of America, and the United Kingdom. As will be seen, despite relying on different provisions which protect the right to equality in analysing differential treatment, the courts have consistently closely scrutinised the justifications put forward and have often referred to the requirement for a strong evidential link between the characteristic upon which the differential treatment is based and the impact it would have upon the child. There has been little case-law on the characteristics of the child and to what extent potential adoptive parents may select a child for adoption based on the child’s particular characteristics. Jurisprudence on whether provisions which allow such selection violate the child’s right to equality is extremely limited and, as such, this article focuses on the situation which has been much more thoroughly explored, namely the right to equality of the potential adoptive parent.

3.1 The European Convention of Human Rights

The European Court of Human Rights first examined discrimination within the regulation of adoption services in Fretté v France (2002). The applicant, Philippe Fretté, applied to the Paris Social Services, Child Welfare and Health Department for approval to adopt a child. Although the Department held that “Mr Fretté ha[d] undoubted personal qualities and an aptitude for bringing up children”, it questioned whether “his particular circumstances as a single homosexual man allow him to be entrusted with a child”. The Department ultimately rejected his application for approval to adopt a child with the references to his “choice of lifestyle” implicitly, yet undeniably, making the applicant’s sexual orientation the decisive factor.

The applicant argued that this constituted a violation of Article 8 of the Convention (the right to respect for privacy and family life) taken in combination with Article 14 (the right to non-discrimination in the application of Convention rights). The Government of France argued that the applicant’s sexual orientation was not the sole reason for his being refused authorisation to adopt, however it also put forward a number of reasons as to why any differential treatment was justified. First, the decision was taken with the best interests of the child as the paramount consideration. In that respect, “the rights of the child set the limits of the right to have children” and, so following, “the right to be able to adopt relied upon by the applicant was limited by the interests of the child to be adopted”.

Secondly, the criteria applied for that purpose had been both objective and reasonable:

“The difference in treatment stemmed from the doubts that prevailed,
in view of what was currently known about the subject, about the development of a child brought up by a homosexual and deprived of a dual maternal and paternal role model. There was no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexuality on a child’s psychological development and, more generally, his or her future life, and the question divided both experts on childhood and democratic societies as a whole.”

Thirdly, there was no consensus on the issue within the Council of Europe and states should therefore be allowed a wide margin of appreciation to determine who should be able to adopt.

By a narrow majority of four to three, the European Court of Human Rights accepted the arguments put forward by the French government. It acknowledged the lack of consensus within the Council of Europe and therefore held that “the delicate issues raised in the case” required “a wide margin of appreciation” to be left to the member states. Further, adoption means “providing a child with a family, not a family with a child”, and “the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect”. Because the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents, national authorities “were legitimately and reasonably entitled to consider that the right to be able to adopt was limited by the interests of children eligible for adoption”.

In a powerful dissenting judgment, three judges reiterated previous jurisprudence that differential treatment based on sexual orientation had to be justified by “very weighty”, “particularly serious” or “particularly convincing and weighty reasons”. In the present case, the government of France had put forward the protection of the rights and freedoms of the child as the legitimate aim, and the dissenters accepted this, even stating that this “in fact would even be the only legitimate aim”. However, the dissenting judges noted that:

“[T]he applicant’s personal qualities and aptitude for bringing up children were emphasised on a number of occasions. The Conseil d’État even specified in its statement of reasons that there was no reference in the case file ‘to any specific circumstance that might pose a threat to the child’s interests’. The legitimate aim was not therefore effectively established in any way.

In their general and abstract wording, the reasons given by the judicial authorities for their decision to refuse the applicant authorisation are based solely on the applicant’s homosexuality and therefore on the view that to be brought up by homosexual parents would be harmful to the child at all events and under any circumstances. The Conseil d’État failed to explain in any way, by referring for example to the increasing range of scientific studies of homosexual parenthood in recent years, why and how the child’s interests militated in the instant case against the applicant’s application for authorisation.”

It was not many years before the same question returned to the court in *E.B. v France* (2008). The applicant was a French nursery teacher and a lesbian in a long-term relationship with her partner. She applied to the Jura Social Services Department for authorisation to adopt a child and, in her application, mentioned that she was in a stable lesbian relationship with her partner. The adoption board made a recommendation that her application be rejected and the European Court of Human Rights found that the applicant’s sexual orientation was “a decisive factor leading to the decision to
refuse her authorisation to adopt". The arguments put forward by the government of France were similar to those put forward in Fretté: there remained a lack of consensus within the Council of Europe on the question of whether same-sex couples should be permitted to adopt, the scientific community was still divided as to whether adoption by a same-sex couple had any impact upon the development of the adopted child, and the Adoption Board had simply made their decision on the internationally-accepted test of who was best able to provide the child with a suitable home.

The court, by a majority of ten to seven, found for the applicant, overturning, in effect, its previous decision in Fretté. The majority spent little time analysing the arguments put forward by the French Government. Given that the legislation in France allowed single people – regardless of sexual orientation – to adopt, the arguments of the French government could not be regarded as "particularly convincing and weighty such as to justify refusing to grant the applicant authorisation".

The court noted the finding of the domestic courts in France that the applicant possessed "undoubted personal qualities and an aptitude for bringing up children" and that these "were assuredly in the child's best interests".

Of the seven dissenting judges, four (Judges Costas, Turmen, Ugrekhelidze and Jociene) accepted that, in principle, discrimination on grounds of sexual orientation in the adoption process could not be justified, but that on the specific facts in this case the decision not to allow the applicant to adopt was made based on factors other than her sexual orientation and thus Article 14 was not applicable. Another dissenting judge (Judge Mularoni) believed that the facts of the case did not even fall within Article 8 and that therefore Article 14, which is ancillary to the other Convention rights, only applies where the facts of the case fall within one of them substantively.

Only two of the seventeen judges, therefore (Judges Zupancic and Loucaides), held that there had been differential treatment on grounds of sexual orientation and that this could be justified.

The dissent of Judge Loucaides is the most striking in that he explicitly argued that a person's sexual orientation, like their religion or any other characteristic, could justifiably be taken into consideration during the adoption process. In his dissent, he argued that there were differences between heterosexuals and homosexuals which could impact upon the child, and that:

"[T]he erotic relationship with its inevitable manifestations and the couple's conduct towards each other in the home could legitimately be taken into account as a negative factor in the environment in which the adopted child was expected to live (...) [Homosexuals] (...) must, like any other persons with some peculiarity, accept that they may not qualify for certain activities which, by their nature and under certain circumstances, are incompatible with their lifestyle or peculiarity."

The most recent case on this particular issue is X. and others v Austria (2013). The applicants were a lesbian couple and the child of one of the couple, was born outside marriage. The child's father had recognised paternity, but the child lived with and was cared for by his mother and her partner. The mother's partner wished to adopt the child; however, the relevant provisions of the Austrian Civil Code did not permit a legal relationship between a child and more than one person of the same sex. If the partner adopted the child, the child's relationship
with the biological mother would be severed, as they were both of the same sex. In the case of an opposite-sex couple, however, the adoption by one partner of the child of the other partner would not affect the other partner’s legal relationship.

The court considered that there were three possible situations in which a homosexual person may want to adopt a child: first, he may wish to adopt by himself (individual adoption); secondly, he may be in a same-sex relationship and wish to adopt his partner’s child with the aim of giving both of them legally recognised parental status; and thirdly, a same-sex couple may wish to adopt a child together (joint adoption). The court noted that in the first of these three situations, it had already ruled, in *E.B. v France*, that the person’s sexual orientation could not prohibit them from adopting.

The court considered that the applicants were in a comparable position to an unmarried opposite-sex couple where one partner wished to adopt the other partner’s child. The relevant provisions of the Austrian Civil Code allowed for second-parent adoption by an unmarried opposite-sex couple but not an unmarried same-sex couple since it did not allow for a child to have a legal relationship with two persons of the same sex. The court therefore quickly found that the legislation made a “difference of treatment between the applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner’s child” and that this difference was “inseparably linked to the fact that the first and third applicants formed a same-sex couple, and was thus based on their sexual orientation.”

The court then looked at whether this difference in treatment pursued a legitimate aim and was proportionate. The aim put forward by the government of Austria was that its adoption law was “aimed at recreating the circumstances of the biological family” and “to protect the ‘traditional family’”; it did this by ensuring that a minor child should have two persons of the opposite sex as parents. The court accepted that the protection of the family in the traditional sense was a legitimate reason which could justify differences in treatment. However, it also considered that the protection of the interests of the child was also a legitimate aim. It therefore went on to examine whether the principle of proportionality was adhered to. The court referred to its previous case-law in which it stated that:

“...In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship, from the scope of application of the provisions at issue.”

In examining the proportionality, the court looked at Austrian legislation more broadly, and considered that it lacked coherence. The law allowed individual adoption by a homosexual person. The law also allowed for registered partnerships between same-sex couples, and, indeed, made it a condition that a registered partner consent before an individual in a registered partnership could adopt a child. The legislature therefore accepted that a child could grow up in a family based on a same-sex couple, and that this was not detrimental to the child. That Austrian legislation recognised same-sex couples and the possibility of a child growing up with such a couple meant the court casted “considerable doubt” on...
the proportionality of the absolute prohibition on second-parent adoption for a same-sex couple, and ultimately concluded that the government had failed to show any weighty or convincing reasons to show how excluding second-parent adoption in a same-sex couple was necessary for the protection either of the family in the traditional sense or for the protection of the interests of the child and, by a majority of 11 votes to 6, held that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

3.2 Florida

The issue of whether a prohibition on gay persons from adopting children could be justified was also addressed by the courts in Florida in the USA. An amendment to the Florida Statutes in 1977 provided that “No person eligible to adopt under [the statute] may adopt if that person is a homosexual.” This law was challenged in 2007 by a gay man seeking to adopt two children who had been placed in foster care with him. One of the main arguments put forward was that the legislation was unconstitutional and violated the equal protection clause of the Constitution of Florida, Article I§2 of which provides that “All natural persons, female and male alike, are equal before the law”. Specifically, the petitioner argued that the law violated the right to equal protection under in the law in that it singled out a class of persons based on their sexual orientation for unequal treatment, and failed to serve a rational basis, i.e. it could not be justified. Under Florida constitutional law, because the petitioner was not a member of a “suspect class” and the issue did not concern a “fundamental right”, the State of Florida needed only to show that “there [was] any reasonably conceivable set of facts that could provide a rational basis for the classification”, the classification being homosexuals as a distinct class prohibited from adopting.

The State of Florida put forward three rational bases: first, the best interests of children were served since, when compared to straight persons, gay persons experienced higher levels of stressors disadvantageous to children; second, the best interests of children were protected by placing them in adoptive homes which minimised social stigmas; and third, it was in the societal moral interest of the child.

Having heard expert testimony directly contradictory to the first rational basis suggested, the court rejected that argument outright, stating:

“Here, the evidence proves quite the contrary; homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse or relationship instability than their heterosexual counterparts. Accordingly, such governmental interest does not justify the legislation.”

With regard to the second rational basis put forward, the court again rejected it, having heard expert evidence which was contrary to the argument:

“In this regard, the professionals and the major associations now agree there is a well established and accepted consensus in the field that there is no optimal gender combination of parents. As such, the statute is no longer rationally related to serve this interest.”

Finally, the court rejected the third rational basis suggested stating that “public morality per se, disconnected from any separate legitimate interest, is not a legitimate government interest to justify unequal treatment”, high-
lighting the fact that there was no similar bar on gay persons from fostering children.

3.3 The United Kingdom

In the case of Re P (2008), the House of Lords was asked to review the compatibility of Article 14 of the Adoption (Northern Ireland) Order 1987 with the European Convention on Human Rights, incorporated into United Kingdom law via the Human Rights Act 1998. Article 14 of the 1987 Order prohibited adoption in Northern Ireland by unmarried couples. It did, however, permit adoption by single persons and married couples. The applicants argued that this was incompatible with Articles 8 (the right to respect for privacy and family life) of the European Convention when taken in conjunction with Article 14 (the right to non-discrimination in the application of Convention rights). The House of Lords readily accepted that the case fell within the ambit of Article 8 and that therefore the sole issue was whether or not the prohibition constituted discrimination within Article 14 on grounds of status as part of an unmarried couple rather than a married couple.

The government argued that the differential treatment pursued a legitimate aim, namely the best interests of the child, and relied upon statistics which showed that “married couples, who have accepted a legal commitment to each other, tend to have more stable relationships than unmarried couples, whose relationships may vary from quasi-marital to ephemeral”. This argument, however, was rejected by the court by a majority of four to one. Lord Hoffman, giving the lead judgment, stated that:

“It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience. The Crown suggested that, as they could easily marry if they chose, the very fact that they declined to do so showed that they could not be suitable adoptive parents. I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term welfare of the child. Once again, however, I do not see how this can be rationally elevated to an irrebuttable presumption of unsuitability.”

Although not requiring any particular scientific, medical or psychological evidence demonstrating a link between a person’s marital status and its impact upon the best interests of the child, Lord Hoffman nevertheless required that there be a rational relationship between the two. The court did not find any rational relationship and, indeed, that to connect a person’s status as part of an unmarried couple with an inability to meet the best interests of the child as adoptive parents “[defied] everyday experience”.

Whilst ultimately agreeing with the majority, the judgment of Baroness Hale, the sole family lawyer on the court, was far more nuanced and open-minded towards the possibility of such differential treatment being justified, going so far as to say that her initial view was that it could. After stating that the promotion of the best interests of the child was a legitimate aim, she added that children need a “stable and harmonious home in which to grow up” and therefore the stability of the parental relationship was an important factor in assessing the couple’s suitability to adopt. Whilst acknowledging that this alone would not justify differential treatment between married and unmarried
couples given that both are capable of breaking down, she stated that:

“[B]eing married does at least indicate an initial intention to stay together for life. More important, it makes a great legal difference to their relationship. Marriage brings with it legal rights and obligations between the couple which unmarried couples do not have. There is, for example, the right to live in the family home irrespective of who is its owner or tenant; the right to financial relief and property adjustment should the marriage break down; the right to succeed to a substantial portion of the estate of a spouse who has died intestate; and the right to financial provision from the estate if the provision made in any will or on intestacy is insufficient. (...) If the relationship does break down, the parent who is the primary carer of the child will be much less financially secure if the parents are unmarried. And if the primary carer is less secure then so will the child be.”

Baroness Hale continued by questioning whether there were good reasons why an unmarried couple wishing to adopt a child should not get married:

“It is (...) appropriate to look with deep suspicion at the reasons why a couple who wish to adopt are unwilling to marry one another. These are not the olden days when the husband and wife were one person in law and that person was the husband. A desire to reject legal patriarchy is no longer a rational reason to reject marriage. It is not expensive to get married. Marriage should not be confused with the wedding. The only rational reason to reject the legal consequences of marriage is the desire to avoid the financial responsibilities towards one another which it imposes on both husband and wife. Why should any couple who wish to take advantage of the law in order to become the legal parents of a child be anxious to avoid those responsibilities which could become so important to the child’s welfare if things went wrong in the future?”

Her analysis thus far suggested that marital status is relevant to the best interests of the child. If, in the future, the couple separates, the parent who is the primary carer of the child would be more financially secure if the couple were married than if they were not. Because many couples do separate, it would therefore be in the best interests of the child to place him with a couple, both of whom would better be able to provide financially for the child were they to separate.

Ultimately, however, Baroness Hale concluded that despite this, there were circumstances in which such a justification would not apply or would have much less force, for example where the couple could not marry (due to the conscientious objection to divorce of one or both of the parties), or where the unmarried couple have been looking after the child for a long time and wish the parent-child relationship to be secured. In the latter circumstances, the choice was not between placing a child with a married or an unmarried couple for the first time but between the child remaining in that home with one legal parent or two. Baroness Hale also referred to the fact that the law permitted single people to adopt, even if they were in a long-term relationship. Again, the choice was between the child having one new legal parent or two.

Baroness Hale also contrasted the situation from the perspective of the couple with that of the child. Whilst if the case was only viewed from the point of view of the couple, she stated that her inclination would be that any difference in treatment would not be disproportionate:
"[I]f one looks at this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remain unmarried, then the difference in treatment does indeed become disproportionate. At bottom the issue is whether the child should be deprived of the opportunity of having two legal parents."\textsuperscript{51}

This further analysis reduced the relevance of the relationship between the marital status of the potential adopters and the best interests of the child. Whilst relevant to the extent that it demonstrated the stability of the relationship between the adopting couple, an absolute prohibition deprived many potential children available for adoption from having two legal parents instead of one and the benefits that this would bring.

Despite the decision of the House of Lords, and the declaration that Article 14 of the 1987 Order was unlawful, the Northern Ireland Executive made no changes to the Order. In 2010/11, the Northern Ireland Human Rights Commission brought judicial review proceedings in the Northern Ireland courts, challenging both Article 14 (which prohibited unmarried couples from adopting) and Article 15 (which prohibited individuals in a civil partnership from adopting either jointly or as individuals).

The Northern Ireland High Court considered the application in 2012.\textsuperscript{52} Mr Justice Treacy, hearing the application alone, first examined Article 14 of the Order. After summarising the decision of the House of Lords in \textit{Re P}, he concluded that the decision "demolished" any argument that restricting the eligibility of who could adopt to married couples was in the best interests of the child, quoting from Lord Hoffman:

"The question therefore is whether in this case there is a rational basis for having any bright line rule. In my opinion, such a rule is quite irrational. In fact, it contradicts one of the fundamental principles stated in Art 9, that the court is obliged to consider whether adoption ‘by particular ... persons’ will be in the best interest of the child. A bright line rule cannot be justified on the basis of the needs of administrative convenience or legal certainty, because the law requires the interests of each child to be examined on a case-by-case basis. Gillen J said that ‘the interests of these two individual applicants must be balanced against the interests of the community as a whole’. In this formulation the interests of the particular child, which A9 declares to be the most important consideration, have disappeared from sight, sacrificed to a vague and distant utilitarian calculation. That seems to me to be wrong. If, as may turn out to be the case, it would be in the interests of the welfare of this child to be adopted by this couple, I can see no basis for denying the child this advantage in ‘the interests of the community as a whole’."\textsuperscript{53}

Mr Justice Treaty concluded that "Re P has shown that the purpose of the 1987 Order is hampered by the current eligibility criteria" and that "[I]n light of this, it is clear that the difference in treatment cannot be justified on any grounds".\textsuperscript{54}

In respect of Article 15, Mr Justice Treacy focused not on the different treatment between same-sex and opposite-sex couples to see whether a justification could be found, but instead on the fact that the prohibition extended to same-sex couples in a civil partnership “despite the fact that the commitment evinced by choosing to enter a civil partnership ought to be similar to marriage in indicating the security of that relationship”.\textsuperscript{55} With no substantive analysis, the judgment briefly states that “[t]his is quite irrational and plainly unlawful” before citing Baroness Hale in \textit{Re P} where she
stated that "it is difficult to see how this [total exclusion] could survive challenge under Article 14 of the European Convention, which takes a particularly firm line against discrimination on the ground of sexual orientation".56

The decision of the High Court was appealed at the Court of Appeal in Northern Ireland where it was unanimously upheld.57 The Court of Appeal reviewed the relevant authorities, including \( \text{Re P} \) and \( X. v \text{Austria} \) and quickly concluded that Articles 14 and 15 discriminated against unmarried couples and couples in a civil partnership contrary to Articles 8 and 14 of the European Convention of Human Rights, without providing any new analysis of the substantive issues.

3.4 Summary

Despite drawing upon different provisions protecting the right to equality in deciding the cases, the judgments of the courts in these jurisdictions suggest three consistent conclusions: first, the justifications put forward for any differential treatment are invariably couched within the general legitimate aim of protecting the interests of the child, albeit using slightly different phraseology. The approach of the courts appears to be that this is the sole legitimate aim under which differential treatment may ever be justified. Indeed, Judge Bratza in his dissent in \( \text{Fretté} \) explicitly stated that this would be the only legitimate aim. Second, the courts will not readily accept justifications put forward but will instead closely scrutinise them and demand a real and significant relationship between the relevant characteristic and the interests of the child. Third, the courts frequently required that relationship to be established by some kind of scientific, medical or psychological evidence as opposed to public opinion or morality.

4. Justifying Differential Treatment

International human rights law makes a distinction between direct discrimination (defined in the Declaration of Principles on Equality as occurring where "for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment") and indirect discrimination (defined by the Declaration as occurring "when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary").58 In the context of the adoption process, direct discrimination is most evident where persons with a particular characteristic are excluded entirely from eligibility to adopt, and indirect discrimination most evident where a general consideration which applies to all persons (for example, taking due regard of their race, religion, etc.) may impact disproportionately upon persons with a certain characteristic if the proportions of children up for adoption with a particular relevant characteristic differ from the proportions of potential adopters with that characteristic. For example, if, in a largely homogenous society, the vast majority of children eligible for adoption are of a particular race, and the relevant law governing adoption requires adoptive parents to be of the same race as the child that they seek to adopt, then racial minorities would be directly discriminated against given that they would only be eligible to
adopt a minority of potential adoptees, as opposed to those of the majority race.

Some have argued that the test of justification should differ depending on whether the discrimination was direct or indirect, with a stricter test for direct discrimination; however, others, such as the Committee on Economic, Social and Cultural Rights (CESCR) has accepted that there should be a single test which it lays out as follows:

“Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.”

In essence, the Committee establishes a two-stage test: the justification for the differential treatment must be reasonable and objective, and there must be a relationship of proportionality between the differential treatment and that legitimate aim. As the interpretation of the right to equality used in this article uses as sources both the Declaration of Principles on Equality and Articles 2(1) of the ICCPR and 2(2) of the ICESCR, it is appropriate to use the source containing the broader exceptions as that differential treatment which is prohibited using the broader exceptions will always be prohibited by that using the narrower exceptions; the same is not true of the reverse. Although the test for justification is largely similar in respect of indirect discrimination, by using the same test also for direct discrimination (as opposed to the stricter test contained within the Declaration), the permissible exceptions contained within the interpretation provided by General Comment No. 20 of the CESCR can be considered as broader. This article therefore uses the single, two-stage test laid out by the Committee in General Comment No. 20 in analysing whether differential treatment which would otherwise amount to discrimination (whether direct or indirect) may be justified.

4.1 Adoption Regimes which Discriminate Based on Particular Characteristics

Adoption regimes may treat persons with a particular characteristic differently either directly or indirectly. This section of the article examines differential treatment on four characteristics (or sets of related characteristics):

- **Age**: where a state imposes a minimum or maximum age for eligibility to adopt, thereby directly discriminating against persons underneath or above that age in excluding them from the adoption process;

- **Race, Colour, Ethnicity, Descent, Language, Religion or Belief, National or Social Origin, and Nationality**: where a state permits or requires these characteristics to be taken into consideration during the adoption process, potentially discriminating against persons with a particular characteristic; it can also amount to direct discrimination if, for example, a state allows adopters to reject a child because of the child’s race or ethnicity, in which case the child would be directly discriminated against;

- **Disability, Health Status, or Genetic or Other Predisposition toward Illness**: where a state either excludes persons with a particular disability, health status, or genetic or other predisposition toward illness, or permits or requires that characteristic to be taken
into consideration during the adoption process; and

• *Sexual Orientation*: where a state either excludes persons with a particular sexual orientation from eligibility to adopt or permits or requires their sexual orientation to be taken into consideration during the adoption process.

4.2 Legitimate Aims: Objective and Reasonable

The starting point under international human rights law, when determining whether differential treatment of a certain group of persons in the adoption process is a legitimate aim, is whether that restriction is in the “best interests of the child”. This is, after all, the paramount consideration in the adoption process. However, although the term is frequently used in treaties and in case-law, there is no standard definition of what the “best interests of the child” are. It is easy to see how different elements of what those “best interests” are could conflict with one another, most poignantly when attempts to ensure that what are considered to be the “best interests of the child” are met create delay in placing the child in an adoptive family. Is it, for example, in the best interests of the child to place them in an adoptive family as quickly as possible, or is it in their best interests to wait until an adoptive family becomes available which would provide the most suitable match and which most meets the needs of that particular child? Inevitably a balance has to be drawn: a child cannot be kept in care indefinitely until a family constituting a “perfect match” is available. Nor should a child be given to the first adoptive family available, regardless of suitability, for the sole reason of ensuring the process is as quick as possible.

A person’s characteristic will only ever be relevant to the adoption process where that characteristic impacts upon the best interests of the child. International human rights law appears to divide these characteristics into three categories:

(i) those which have such an impact on the ability of those possessing them to raise and care for a child that it would never be in the best interests of the child to allow such persons to adopt children;

(ii) those which have no impact (or a minimal impact) on the best interests of the child, the possession of which is therefore irrelevant for the purposes of the adoption process;

(iii) those which do have an impact upon the best interests of the child but are only a factor to take into consideration during the adoption process rather than amounting to a justified exclusion of all persons possessing them from the adoption process.

Analyses of whether a characteristic impacts upon the best interests of a child appear to require scientific, medical, psychological or other evidence on child-raising as opposed to considerations of “morality” or “public opinion”, the latter arguments being rejected relatively easily by the courts.

It will be rare for a characteristic to fall within category (i) such that possession of that characteristic has such an impact upon the person’s ability to raise and care for a child that it will never be in their best interests for them to be adopted by a person possessing that characteristic. However, that is not to say that such characteristics do not exist. The clearest and least controversial example is age: a minimum age for potential adoptive parents is not only justified, but arguably mandated by international human rights law, so long as that minimum age is consistent with scientific and medical understanding as to when a person develops sufficient mental
and emotional maturity to raise and care for a child. A second example would be persons who suffer from a mental or physical disability such that they would not be capable of raising a child, e.g. persons with Down’s syndrome or who are deaf-mute, or persons whose circumstances or condition are such that the child would be put at risk, e.g. individuals with a criminal record involving harm to children, those who are homeless, or persons with addictions to alcohol or drugs.

A significant number of characteristics will fall within category (ii), those characteristics which have no impact whatsoever upon the person’s ability to raise a child. Despite arguments put forward by national and regional governments in cases involving the sexual orientation of the potential parent, that would appear to be one example of a characteristic where worldwide scientific, medical and psychological opinion has reached a consensus that it is irrelevant in respect to the ability of that person to care for and raise a child. A second example may be those disabilities which are of such a nature that they do not impact upon the ability to child-raise in any meaningful way such as being colour-blind or having a slight physical impairment.

Many characteristics, however, will fall within category (iii), those characteristics which should not prevent a person possessing them from adopting, but which can legitimately be taken into account during the adoption process, and so may have some impact (albeit indirectly) on the person’s ability to raise children. International human rights law is explicit with regards to some of these characteristics: ethnicity, religion and language are all given as examples in Article 20(3) of CRC as characteristics of the child (and, by implication, the prospective adoptive parents) which should be given due regard during the adoption process. However, even for those characteristics which are explicit in international human rights law, there must still be a scientific, medical and psychological consensus (or a not insignificant opinion held by some within the scientific, medical and psychological community) that that characteristic does impact upon the best interests of the child, or they will fall into category (ii). Were a consensus to be reached that, for example, the race of the child and the adoptive parents had no impact whatsoever on the child’s upbringing and welfare, then this may well be considered an irrelevant characteristic, and one which should be given no (or minimal) weight during the adoption process.

This article does not attempt to classify each and every characteristic into one of the above categories. Instead, it suggests that the decision-making body must ask itself three questions:

(1) Does scientific, medical, psychological or other evidence suggest that the characteristic impacts upon the best interests of the child? If the answer is no, then the characteristic falls into category (ii) and the classification is not justified.

(2) If the answer to question (1) is yes, does that characteristic have such an impact upon the person’s ability to raise and care for a child such that it will never be in their best interests for them to be adopted by persons with them? If the answer is yes, the characteristic falls into category (i) and the classification is justified.

(3) If the answer to question (2) is no, the characteristic falls into category (iii) and the decision-making body must balance the competing interests (usually the interest in placing the child into adoptive care as quickly as possible with the interest in ensuring the child is matched with an adoptive family that best meets its particular needs) to determine where the best interests of the child
lay. This balancing exercise is likely to vary within each state’s particular adoption system and, even on a case-by-case basis.

4.2.1 Age

States are not only justified in prohibiting children from certain activities, but are required under international human rights law to ensure the wellbeing of children, and therefore to prevent them from entering into activities which – due to their physical or emotional immaturity – would be inappropriate for them. As such, restrictions on the ability of young persons to marry, vote, purchase alcohol or tobacco, etc., are all justified under international human rights law. Similarly, it is axiomatic that children – due to their emotional immaturity – are unsuitable as parents, and that it would breach the rights of the adopted child to be placed with parents incapable of effectively looking after his or her needs. States would therefore be justified – perhaps even required – in setting a minimum age before which a person or persons can adopt a child in order to ensure that the child’s best interests are met. Such is a requirement under Article 9 of the European Convention on the Adoption of Children, for example, which requires that there be a minimum age “being neither less than 18 nor more than 30 years” and that “there shall be an appropriate age difference between the adopter and the child, having regard to the best interests of the child, preferably a difference of at least 16 years”. Both the United Kingdom and Ireland have a minimum age of 21 for potential adopters.61

It is more controversial whether a maximum age could ever be prescribed. Sara Mills has argued that discrimination on grounds of age by way of excluding older persons from adopting children is not justifiable.62 She refers to age-related arguments frequently made by courts when reaching decisions denying a petition to adopt:

- the relationship between an adoptive parent’s advanced age and the likelihood that the child will suffer the loss of the parent during a period of the child’s growth;
- the problem that age can be a factor affecting the ability of the adoptive parent to supply the material needs of the child;
- the problem that a child might be under a psychological burden in having an adoptive parent old enough to be a grandparent;
- the circumstance that as people grow old they tend to become more fixed and inflexible in their mental attitudes;
- the consideration that advanced age limits the ability of the adoptive parent to participate in various social and school activities with the child; and
- the problem that an older adoptive parent may find it more difficult to muster the physical effort required to control a young child.63

Whilst an individual’s age is likely to impact upon some of these circumstances, such as the ability to control a child physically, or participate in certain social activities with the child, it will not always be decisive. There are older persons who are fit and active and younger persons who are not physically strong or active. In these circumstances, their age would fall into category (iii) and be a relevant consideration to take into account on a case-by-case basis. Although it may be more difficult to challenge the particular problem as one gets older, age alone should not be an absolute bar, as it is not inextricably linked to the particular problem or circumstance.

For some of these problems and circumstances, however, particularly the risk of the
adoptive parent dying, the link between age and the circumstance is so strong as to be almost intrinsically linked. Although a person’s life expectancy cannot be predicted with absolute certainty, for those who are particularly advanced in years, the likelihood of death within a specified period of time will be very high. This will certainly impact upon the best interests of the child and, in those circumstances, their age would fall into category (i) and the classification may well be justified.

4.2.2 Race, Colour, Ethnicity, Descent, Language, Religion or Belief, National or Social Origin, and Nationality

The characteristics on this wide-ranging list are linked by virtue of Article 20(3) of the CRC which governs the potential methods by which states can ensure the “special protection and assistance” of a child who is “temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment”. Article 20(3) requires states, when considering solutions, to pay due regard to “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”. This requirement is reflected in Article 10(2) (f) of the European Convention on the Adoption of Children which requires enquiries to be made into the adopter, the child and his or her family, which include enquiries into “the ethnic, religious and cultural background of the adopter and of the child.”

The inclusion of these characteristics in international human rights treaties has not eliminated their controversy. Recent debate in the United Kingdom on adoption law has centred on the perceived conflict between ensuring the continuity of children’s upbringing in terms of ethnicity, religion, culture and language, and the desire to get children in care into adoptive families as quickly as possible. Reflecting Article 20(3) of the CRC, section 1(5) of the Adoption and Children Act 2002, which reformed the law on adoption in England and Wales, requires adoption agencies to “give due consideration to the child’s religious persuasion, racial origin and cultural and linguistic background” when placing the child for adoption. The government announced in 2012 that it intended to remove this requirement “because of the concern that the express provision has caused local authorities to have undue regard to that factor”.

A report by the House of Lords Select Committee on Adoption Legislation, however, found “the evidence we have received does not suggest that this is such a significant problem” and rejected the need for legislative change.

Nowhere has it been suggested that it would ever be in a child’s best interests for certain groups of potential adopters to be excluded from the adoption process because of their particular race, colour, ethnicity, descent, language, religion or belief, national or social origin or nationality. Indeed, nowhere has it been seriously argued that any particular group of people is unable to raise a child so as properly to meet its needs because of one of these characteristics. Such a conclusion could clearly breach the right to equality. However, international human rights law does require such characteristics to be given “due regard” and the argument has therefore focused on to what extent such characteristics should be taken into consideration when matching children to potential adoptive parents when other competing considerations, particularly the effects of delay and the benefit of children being raised within an adoptive family rather than in state care. This article does not propose to go into the arguments put forward as to what extent it is necessary or desirable for a child to be adopted into a family which
shares its ethnic, religious, cultural or linguistic background. However, it is clear that international human rights law justifies the taking into consideration of such characteristics during the adoption process.

In practice, this might result in a disproportionate impact upon potential adopters of a certain ethnicity, culture, religion or language as the proportion of potential adoptive children sharing such characteristics may not reflect the proportion of potential adoptive parents with them, and this could be considered indirect discrimination. However, it is submitted that such indirect discrimination would be objectively justified by the legitimate aim of ensuring compliance with other strands of international human rights law and the right of the child to have his or her ethnicity, culture, religion or language given due regard in the adoption process.

4.2.3 Disability, Health Status, Genetic or Other Predisposition toward Illness

Similar to the arguments relating to age, a person’s disability, health status, or genetic or other predisposition toward illness may well impact upon their ability to meet the physical, mental and emotional demands of raising a child or their likely lifespan. Where the disability, health status, or genetic or other predisposition toward illness does impact upon either of those two factors, a state may well be justified in preventing the individual from adopting a child. This is acknowledged by Article 9(2)(a) of the European Convention on the Adoption of Children which requires enquiries to be made prior to adoption of the “personality, health and social environment of the adopter, particulars of his or her home and household and his or her ability to bring up the child”.

Where the disability or other characteristic was irrelevant or only minimally affected their ability to raise a child – such as colour-blindness, minimal physical impairment or food allergy – and, as such, does not affect either of the two factors, then it would certainly be unjustified if they were discriminated against in the adoption process, and the characteristic would fall into category (ii). Individuals whose disability, health status, or genetic or other predisposition toward illness is such that it does impact upon their physical, mental or emotional ability to care for a child properly would fall into category (iii) and an assessment made of the interest in placing the child into adoptive care as quickly as possible with the interest in ensuring the child is matched with an adoptive family that best meets its needs. Certain disabilities or conditions such as Down syndrome or Münchausen syndrome may mean that, in practice, almost no-one who possesses them would be able to care for a child properly and it would never be in the best interests of a child to be adopted by a person who possesses them as opposed to a person who does not, even if it would mean a delay in the adoption process. In such situations, the different treatment may be virtually indistinguishable from direct discrimination; however, as described below at section 4.3.1, decisions should be made on a case-by-case basis rather than through a blanket prohibition on persons with particular disabilities or conditions from being able to adopt.

4.2.4 Sexual Orientation

One of the arguments put forward by the government of France in Fretté v France was that there were:

“[D]oubts that prevailed, in view of what was currently known about the subject, about the development of a child brought up by a homosexual and deprived of a dual ma-
ternal and paternal role model. There was no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexuality on a child’s psychological development and, more generally, his or her future life, and the question divided both experts on childhood and democratic societies as a whole.67

That argument would now seem to be out of step with current thinking by experts in child-raising. The North American Council on Adoptable Children has stated that “all prospective foster and adoptive parents, regardless of sexual orientation, should be given fair and equal consideration” and that it “opposes rules and legislation that restrict the consideration of current or prospective foster and adoptive parents based on their sexual orientation.”68 A literature review produced by the Australian Psychological Society concluded that:

“[T]he main reason given (by law makers) for not allowing people to marry the person of their choice if that person is of the same gender has been the inaccurate assertion that this is in the best interest of children, and that children ‘need’ or ‘do better’ in a family with one parent of each gender. As the reviews, statements, and recommendations written by these bodies indicate, this assertion is not supported by the family studies research, and in fact, the promotion of this notion, and the laws and public policies that embody it, are clearly counter to the well-being of children.”69

Using the test established in international human rights law, it is clear that the sexual orientation of the potential adoptee has no impact upon the best interests of the child. The characteristic therefore falls into category (ii) and differential treatment based on sexual orientation cannot be justified.

4.3 Proportionality Assessment

4.3.1 Proportionality under Direct Discrimination

The above analysis suggests that there is at least one characteristic upon which persons who share them can be prevented from being able to adopt a child: age. Where the person is under a certain age (or, potentially, over a certain age) that fact alone will mean that they are entirely unable to meet the best interests of a child and a total exclusion of such persons may be justified under international human rights law, for example, persons under the age of eighteen. Here, proportionality plays a very limited role. The exclusion is absolute. Where the characteristic is such that any person who shares it, rather than a majority, is unable to raise a child, then an absolute exclusion will be proportionate as it is the only option available in the adoption process to ensure the best interests of the child are met.

Other characteristics – disability, health status, and genetic or other predisposition toward illness raise similar issues to considerations based on age. A person’s particular disability, health status or genetic or other predisposition toward illness may – in the same way as a person’s age – mean that they do not possess the necessary physical, mental or emotional ability to care for a child properly. However, whereas a blanket prohibition on all persons under a certain age may be justified under international human rights law, a blanket prohibition on persons possessing a particular disability, health status or genetic or other predisposition toward illness is less likely to be so justified. The Convention on the Rights of Persons with Disabilities uses the “social model” of disability which, instead of focusing on the particular impairment of the individual as the cause of their limita-
tions, looks at the relationship between the individual and the way society is organised and considers the disadvantage suffered by the individual to be a consequence of the society’s failure to take account of the impairments possessed by the individual rather than of the impairments themselves.

Consequently, any different treatment in the adoption process which is based on disability, health status, or genetic or other predisposition toward illness should not attach itself automatically to any particular disability or condition but can only be justified where the consequence of the individual’s disability or condition is such that they do not possess the necessary physical, mental or emotional ability to care for a child properly. Whether or not this is the case for a particular individual should be made on a case-by-case basis.

Such a consideration is likely to discriminate indirectly against persons with disabilities of a particular nature. For example, there are certain disabilities and conditions which impact upon the person’s physical, mental or emotional ability to care for a child such that it will be in the child’s best interests for them to be placed, if possible, with an adoptive parent who does not possess that particular disability or condition. It may be almost impossible for individuals with certain intellectual disabilities (such as Down syndrome) to be able to meet the needs of raising a child, and there will be cases where it would violate the rights of the child to be placed with individuals due to their particular disability or conditions (such as individuals who have Münchausen syndrome). In such circumstances, the different treatment may be virtually indistinguishable from direct discrimination. However, such a decision should be made on a case-by-case basis.

4.3.2 Proportionality under Indirect Discrimination

The situation is more complex where any potential discrimination is indirect, i.e. that the characteristic is given due regard during the adoption process rather than excluding persons who share it from the process in its entirety. In such circumstances, processes which take into consideration those characteristics will be proportionate so long as (a) the process does not exclude them (either formally or in practice) from eligibility to adopt, and (b) the characteristic is given only as much weight as is necessary based upon the impact it would have upon the child’s best interests. The impact should be determined based on medical, scientific or psychological evidence. As noted above, it is possible that such considerations could also amount to direct discrimination if, for example, in a largely homogenous society, the vast majority of children eligible for adoption are of a particular race, and the relevant law governing adoption requires adoptive parents to be of the same race as the child that they seek to adopt. In these circumstances, racial minorities would be directly discriminated against given that they would only be eligible to adopt a minority of potential adoptees, as opposed to those of the majority race.

In the case of disability, for example, there is a broad spectrum of disabilities ranging from those which have a minimal impact upon the ability of the person to best meet the needs of the child (for example, a minor speech impediment or colour-blindness) to those which have a much more substantial impact (such as a significant physical impairment). The weight given to that characteristic must be proportionate to the impact it has upon the person’s ability to meet the best interests of the child. This will vary on a case-by-case basis and it will be up to the court, based on
the evidence, to determine whether undue weight was given to that particular characteristic in order to determine whether the impact on that person’s eligibility to adopt can be justified.

5. Conclusion

Where the interests of more than one person or group of people are taken into consideration, there will frequently need to be a balancing act. In the case of the right to respect for family life in the adoption process, the competing rights are those of the child and those of the potential adopter. International human rights law is explicit in stating what those rights are: the child’s best interests must be the paramount consideration and, simultaneously, the potential adopter has a right to equality and not to be discriminated against during the adoption process. The requirement that the best interests of the child be the “paramount consideration” during the adoption process has resulted in courts treating the child’s best interests as the only legitimate aim where there is differential treatment. Courts have repeatedly, and with strict scrutiny, examined the arguments put forward as to why the characteristic upon which the differential treatment is based has an impact upon the child’s best interests. They have required scientific, medical, psychological or other evidence of some sort to establish a real and significant link between the characteristic and the child’s best interests, and have rejected arguments that morality or public opinion provides sufficient evidence. If a sufficiently significant link can be established, and differential treatment per se is reasonable and objective, the second stage will be to establish whether or not the particular differential treatment is proportionate. This will involve an analysis of the level of impact the particular characteristic has upon the person’s ability to meet the best interests of the child. Only when the level of weight given to the characteristic corresponds to the impact that characteristic has on the potential adopter’s ability to meet the best interests of the child should it be considered proportionate. Where, and only where, the characteristic means that the person is entirely unable to meet the best interests of the child, direct discrimination in the form of total exclusion from eligibility to adopt will be justified. Where the characteristic does not render that person entirely unable to meet the best interests of the child, then a total exclusion will not be proportionate and only an appropriate weight may be attached to the characteristic.

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2 See, for example, the comment of the Human Rights Committee in its General Comment No. 18: Non-discrimination, at Para 1 that “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.” Human Rights Committee, General Comment No. 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.1 at 26, 1994.


5 Article 2(2) reads, “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316, 1966.

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


See above, note 3.

See above, note 4.


European Convention on Human Rights, European Treaty Series 213; UNTS 221.

See above, note 3.

See, for example, Article 8 of the European Convention on Human Rights, Article 7 of the Charter of Fundamental Rights of the European Union and Article 11(2) of the American Convention on Human Rights. One notable exception is the African Charter on Human and Peoples’ Rights.

Human Rights Committee, General Comment No. 16: Article 17 (right to privacy), UN Doc. HRI/GEN/1/Rev.6 at 142, 2003.

Human Rights Committee, General Comment No. 19: Article 23 (the family), UN Doc. HRI/GEN/1/Rev.6 at 149, 2003.


Ibid., Para 35.

Ibid. and others v Romania, Application Nos. 78028/01, 78030/01, 22 June 2004.

Ibid., Para 148.

Organization of American States Treaty Series No. 62.

UN Doc. A/RES/41/85.


Ibid., Para 10.

Ibid., Para 36.

Ibid.

Ibid., Para 41.

Ibid., Para 42.

Ibid.


Ibid., Para 89.

Ibid., Para 94.

Ibid., Para 95.

X. and Others v Austria, Application No. 19010/07, 19 February 2013.

Ibid., Para 130.

Ibid., Para 137.

Ibid., Para 140.

Article 63.042(3) of the Florida Statutes.
In the Matter of the Adoption of John Doe and James Doe, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Juvenile Division, decided 25 November 2008.

In Re P and others [2008] UKHL 38.

Ibid., Para 12.

Ibid., Para 18.

Ibid., Para 108.

Ibid.

Ibid., Para 109.

Ibid., Para 112.


Ibid., Para 72, repeating Paragraph 13, in part, of the decision of the House of Lords (see above, note 44).

Ibid., Para 75.

Ibid., Para 76.

Ibid., repeating Paragraph 101, in part, of the decision of the House of Lords (see above, note 44).


See above, note 6, Principle 5, pp. 6-7.

See above, note 8.


For England and Wales, see sections 50 and 51 of the Adoption and Children Act 2002 (c. 38); for Scotland, see sections 29 and 30 of the Adoption and Children (Scotland) Act 2007 (asp 4); for Northern Ireland, see Articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 (S.I. 1987/2203 (N.I. 22)); for the Republic of Ireland, see Section 33 of the Adoption Act 2010 (Act No. 21 of 2010).


Ibid., p. 15.

See, for example, Harrison, A., "Adoption: David Cameron vows to cut adoption delays", BBC News, 9 March 2011.


See above, note 27, Para 36.


“As part of the ILO’s future reflections, the Organisation should examine how the equality conventions could better support transformative equality.”

Bob Hepple
Litigation Strategies of Using Equality and Non-Discrimination Claims to Advance Economic and Social Rights

The Equal Rights Trust

In the last three years, ERT has worked on a study which is forthcoming later this year, entitled Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights. Legal research, guided by an advisory committee of senior equality and socio-economic rights experts, was intertwined with broad consultations with practitioners and academics from many countries. We are publishing here the Executive Summary of the study.

This is a study about achieving equal enjoyment of economic and social rights (ESRs) for all. The study acknowledges that there is still some way to go before ESRs are fully realised and seeks to help move towards this goal, using an approach based on equality and non-discrimination. It identifies conceptual and practical links between the right to equality and ESRs, noting the mutually reinforcing nature of these rights. The study proposes that this link should be explored further when developing strategies for advancing ESRs. Specifically, it proposes that the right to equality (and the right to non-discrimination subsumed in it) should be employed to advance ESRs, in conjunction with ESRs where they are available in law and as an alternative where they are not.

The study finds that there are many strategies that NGOs, lawyers and activists may employ in seeking to advance ESRs. It focuses on a strategy which has, to date, received scant focus: how legal responses to inequality and discrimination can be used in litigation to advance the realisation of ESRs. In so doing, the study serves as a guide for litigators seeking to pursue such a strategy.

In conducting its research for this study, The Equal Rights Trust (ERT) has focussed on cases relating to the rights to: social security; an adequate standard of living, including adequate food, clothing, water and housing; the highest attainable standard of physical and mental health; and education. ERT has reviewed case law from international and regional jurisdictions as well as the national jurisdictions of Australia, Canada, Colombia, Germany, India, Ireland, United Kingdom and United States of America, where equality claims and arguments have been pursued. The study takes lessons from this case law and also identifies aspects of equality and non-discrimination law which have yet to be employed to advance ESRs before the courts.

The study comprises three parts. Part I introduces the rights framework upon which the study is predicated. Part II identifies the conceptual and practical reasons why equali-
ty and non-discrimination arguments should be employed when challenging violations of ESRs. The bulk of the study appears at Part III which is presented in the form of a guide to litigators seeking to raise equality arguments in relation to ESRs. It sets out an eight step process of consideration, proposed as a tool to facilitate the work of litigators seeking to employ such a strategy when deciding whether to bring a claim and which claim to bring. The study is accompanied by a series of appendices which provide litigators with some key reference documents, including a case compendium of useful cases in which equality or non-discrimination strategies have been employed in cases related to ESRs.

Part I: The Rights Framework

Socio-economic rights and the right to equality and non-discrimination are enshrined in international human rights law.

The key source of ESRs in international human rights law is the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) which recognises in its preamble 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.”

ICESCR protects everyone’s rights to, inter alia: social security (Article 9); an adequate standard of living – including food, clothing and housing (Article 11(1)); the highest attainable standard of physical and mental health (Article 12); and education (Article 13). The Covenant is the starting point for the study’s categorisation of cases as ESR-related. However, the study takes a broad approach to the interpretation of the relevant ESRs in order to encompass the most progressive thinking on their content. For example, its understanding of the right to health incorporates more recent discourses in relation to the social determinants of health.

The fundamental rights to equality and non-discrimination are at the heart of human rights law and are enshrined in all major international and regional human rights treaties. Article 1 of the Universal Declaration of Human Rights provides that “[a]ll human beings are born free and equal in dignity and rights”. The study makes reference to key equality and non-discrimination provisions in international and regional laws including ICESCR, the International Covenant on Civil and Political Rights (ICCPR), 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) and the Convention on the Rights of Persons with Disabilities (CRPD), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and People’s Rights (ACHPR), amongst others.

Noting that not all provisions for the rights to equality and to non-discrimination are identical, and that litigators need to be aware of the particularities of their jurisdiction, ERT applies the definitions of equality and non-discrimination set out in the Declaration of Principles on Equality as the basis for its analysis. This is because the Declaration represents a global consensus on the meaning of equality and non-discrimination. However, variations in interpretations across jurisdictions are acknowledged throughout the study.
Part II: Why Raise Equality Arguments to Challenge Socio-Economic Rights Violations?

This study does not advocate that equality and non-discrimination claims are the only or the best claims that should be made in relation to ESRs. On the contrary, litigators can and should be seeking the realisation of ESRs in their own "right", as it were. However, there are clear conceptual and practical reasons why equality arguments should sometimes be used either in conjunction with ESR claims – where they are possible – or as an alternative route where they are not.

- Many jurisdictions will provide a constitutional right to equality and/or non-discrimination but no constitutional ESRs. In such cases there may be no alternative but to use the constitutional right to equality or non-discrimination – either in conjunction with any national legislation which provides for certain elements of ESRs or on its own.

- Some jurisdictions benefit from detailed and progressive equality provisions in ordinary legislation which can provide avenues for claims which may further ESRs. Such legislation commonly prohibits, for example, discrimination in access to employment, in the provision of public services such as health and education, and in the exercise of public functions, such as taxation and the provision of social security. It may also provide clear causes of action against non-state actors and contain useful enforcement mechanisms.

- The conceptual link between equality and ESRs is clear. It is an accepted principle of international law that human rights are interdependent, interconnected and indivisible. The Committee on Economic Social and Cultural Rights (CESCR) has noted that equality and non-discrimination are “essential” for the realisation of ESRs. Many of the ESR issues most often tackled by activists are also problems of discrimination against historically disadvantaged groups. Poverty may be both a cause and a consequence of discrimination. And groups which are particularly vulnerable to status-based discrimination such as women, ethnic minorities, non-nationals and people with disabilities are over-represented among the poor.

- The right to equality may have what can be described as a “ratchet effect” upon ESRs. Once the state has made ESR-related provisions for some, the right to equality may be used to argue that it must do so for others. This is the case even where the state is providing a higher standard of provision than it would be required to at the time under its ESR obligations.

- In many jurisdictions, the traditional human rights discourse – whereby civil and political rights impose negative duties and are justiciable and socio-economic rights impose positive duties and are mere aspirations – is still central to the interpretation of rights by courts. This has an impact at the substantive and remedial stages of the claim. Firstly, an ESR claim which is demanding that state resources be dedicated to positive steps to achieve the right may be more likely to succeed if accompanied by a claim for non-discrimination. The state’s obligation to refrain from discriminating against historically disadvantaged groups is widely recognised and taken very seriously by the courts. It is a powerful argument to allege that a state’s failure to expend its resources constitutes a state failure to refrain from unlawfully discriminating against a particular group. Secondly, at the remedial stage, courts are more willing to make orders requiring the expenditure of state resources to redress inequality than to further ESRs per se.
• The rights are mutually reinforcing. The rights to equality and non-discrimination create immediate obligations on the state whereas ESRs are generally drafted so as to give rise to a right to the progressive realisation of each right, within the limits of available resources. Once a certain level of enjoyment of an ESR has been achieved for some, the state has a duty under its ESR obligations of non-regression, meaning that it cannot later reduce the level of enjoyment of the right. At the same time its obligation not to discriminate in its provision of social services can be used to argue that the state should “level-up” the social services enjoyment of the less advantaged to that achieved by others.

• Some jurisdictions adopt the opinion of CESCR that the substantive content of ESRs is restricted to “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” (CESCR, General Comment No. 3). By contrast, the right to equality allows a claimant suffering from deprivation to claim not only a minimum essential level of economic and social provision, but to demand the same treatment as those within the state’s jurisdiction who enjoy the highest standard of ESRs.

Part III: A Guide to Raising Equality Arguments in Relation to Socio-Economic Rights

The study recognises the burden on litigators of cases relating to ESRs given that the resulting jurisprudence may have significant implications for resource distribution by the state. It seeks to ease the burden on litigators working in jurisdictions around the world. Recognising that individual litigators are working in a variety of contexts, Part III is not a litigation strategy, but rather a guide for litigators developing their own contextualised strategies.

Part III takes the following step-by-step approach to developing litigation:

Step 1: Available Forum
Step 2: Appropriateness Assessment
Step 3: Goal Setting
Step 4: Claim Setting
Step 5: Claims
Step 6: Respondents
Step 7: Remedies
Step 8: Proof/Evidence

Step 1 is to consider whether there is an available forum for bringing a claim of equality and/or non-discrimination in relation to an ESR. Litigators must determine whether a forum is available both legally (in terms of the claimant’s standing and the causes of action available under the applicable laws) and practically (in terms, for example, of whether it attracts prohibitive costs, is too time consuming, has no efficacy in terms of enforcement, etc.). Litigators must also weigh the pros and cons of forums to help choose when there is more than one available option. The international and regional forums which may be available for bringing equality or non-discrimination claims in relation to ESRs are identified in the study, and litigators may wish to consider the benefits and weaknesses of each mechanism as discussed. In terms of national forums, there are many variations in the types of laws which may apply, from states which provide full constitutional protection to the rights to equality and ESRs, to states which have no constitutional protection for the rights but may have some relevant piece of national legislation (e.g. and Education Act). The particularities of the relevant jurisdiction will impact on the litigator’s decision.

At Step 2 litigators ought to consider whether it is appropriate to pursue litigation in the given instance. Litigation will
not always be the most appropriate or effective course of action. Litigators will need to consider the interaction between litigation and other social and political strategies of addressing the matter. Strategic litigation may be a good organising point, bringing together actors on the ground, and prompting dialogue with states or other respondents. Will the litigation empower the disadvantaged groups? Democratic participation is a key to the effective enforcement of ESRs and the right to equality. How well does the litigation fit in with the broader social and/or political strategy? Is this an optimal or appropriate time in the social and political contexts for bringing a case of the type or subject-matter envisaged? Are the litigators themselves the most appropriate persons to bring the case or do the facts or circumstances mean that others would be better placed and more able to bring a successful case?

Step 3 is the setting of goals by the litigator. Litigators should consider what kind of judgment or negotiated settlement they want to emerge from the case in an ideal scenario. What gaps in the law are they seeking to close; what previous jurisprudence, if any, would they like overturned and with what should it be replaced; what type of remedy do they want the court to order and with what scope?

At Step 4 the litigator will identify claimants. Where there is a choice between an individual and a collective complaint, the litigator will need to consider what will have an impact on the largest number of disadvantaged people. Collective complaints often seek significant institutional or policy change. However, individual complaints, if appropriately selected, and depending on the legal system, may also have a knock-on impact on a large number of people.

Potential claimants in equality claims are those who suffer an adverse impact as a result of a failure by the person against whom their claim may be brought to uphold the obligation to treat all persons equally. Strategically, litigators may wish, rather than to pick claimants with the aim of encapsulating every person who may be adversely impacted by the treatment in question, to pick claimants who represent a smaller but particularly sympathetic group and later seek to extend any protection granted by the court, to others.

When discrimination claims are considered, claimants will be those who possess a particular “protected characteristic” or “ground” on the basis of which the law protects them from discrimination. There can be different approaches to the choice of grounds, including the use of better established grounds or emerging grounds of socio-economic disadvantage. Four of the more traditional grounds of discrimination are particularly closely linked with a person’s likely socio-economic situation: sex, race, nationality/immigration status and disability. There have been useful cases in relation to each. For example, courts have required formal equality between men and women in social security, overcoming historical presumptions about sex roles in the family (e.g. Zwaan-de Vries v The Netherlands, Human Rights Committee); and have found that a failure to provide for specific healthcare needs of women constitutes discrimination (Alyne da Silva Pimentel v Brazil, CEDAW Committee).

In certain cases bringing a claim based on a traditional ground of discrimination would ignore other groups disadvantaged by a particular policy or status quo. There has been some, albeit limited, acknowledgment by adjudicating bodies of a ground of “socio-economic
**status**” in relation to an economic or social right (Alyne da Silva Pimental v Brazil, CEDAW Committee; International Movement ATD Fourth World v France, European Committee of Social Rights). But litigators may also seek to develop the law further in this area.

**Step 5** is to identify the form of prohibited conduct. The typical forms of prohibited conduct violating the right to non-discrimination include direct and indirect discrimination, and denial of reasonable accommodation. Direct discrimination is less favourable treatment because of a protected ground (e.g. race). An example of such a case is the African Commission decision in Malawi Africa Association and Others v Mauritania.

Indirect discrimination occurs where a provision, criterion or practice applies to everyone but places a person at a particular disadvantage because of their protected characteristic, and cannot be justified. Examples include a finding of indirect discrimination based on national origin in admission policies in higher education (Commission of the European Communities v Austria, CJEU).

Denial of reasonable accommodation is a failure to make modifications or adjustments necessary in a particular case to ensure to persons with a particular protected characteristic the enjoyment or exercise on an equal basis with others of a social or economic right without imposing a disproportionate or undue burden. Examples include a finding that failure to reasonably accommodate the needs of deaf patients in the provision of healthcare by providing sign language interpreters is a violation of the right to equality (Eldridge v British Columbia (Attorney General), Supreme Court of Canada).

The lack of positive action (also known as affirmative action or special measures) to overcome past disadvantage and to accelerate progress towards equality of particular groups can constitute a violation of the right to non-discrimination or the right to equality. Positive action measures are most commonly used to promote equality within the ambit of socio-economic rights such as, for example, in education, work, housing or health. Examples include the recognition of special protection and special consideration to the needs of the Roma due to their different lifestyle (Orsus v Croatia, European Court of Human Rights).

At **Step 6** litigators should identify the respondent who would be held accountable for violating equality rights. Whilst this will often be states, non-state actors are increasingly performing public functions and/or operating in areas of life relating to ESRs, such as in the provision of employment or goods and services. Over time, the distinction between state and non-state actors is becoming increasingly less relevant when determining whether an obligation in relation to equal enjoyment of ESRs exists.

**States** are obliged to respect, protect and fulfil human rights. This includes obligations to prevent violations of human rights by non-state actors. If discrimination is due to flawed or missing regulation, state responsibility can be engaged. States have been held responsible for ESR-related violations due to the actions or omissions of non-state actors, by a number of international and regional mechanisms including by the Inter-American Court of Human Rights in Yanomami v Brazil and the African Commission in The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria.

**Non-State Actors** have obligations stemming from a number of different sources.
The preambles of both the ICCPR and ICE-SCR recognise individual responsibility to strive for the promotion and observance of rights, a sentiment which has been echoed by other international bodies. Their obligations have also been recognised at a regional level by the European Union (e.g. Article 3(1) of the Racial Equality Directive) and the African Charter (Article 27). Depending on the country, non-state actors may have obligations under the national constitution and/or under pieces of national legislation regulating certain functions or areas of life. For example, the South African Constitution defines “organs of state” to be any body (public or private) exercising a public function in terms of either legislation or the Constitution. Accordingly non-state actors providing social services in terms of legislation are directly bound by the provisions of the Constitution including the Bill of Rights. Further, national anti-discrimination legislation often provides a useful path for holding non-state actors responsible for ensuring equal enjoyment of ESRs. In the United Kingdom, for example, the Equality Act 2010 places some responsibility for non-discrimination with a number of different non-state actors including employers, service providers, associations and those carrying out public functions.

Litigators, when choosing which claims to bring against whom, will be influenced by factors such as the likelihood of success and nature of the remedy. For example, at the substantive stage, there may only be limited causes of action against non-state actors. Whilst there is precedent for holding certain non-state actors directly to account for discrimination, unless the non-state actor is carrying out a “public function”, it will be a bigger challenge to argue that a non-state actor has an obligation to uphold the full right to equality.

**Step 7** is to consider the possible remedy which could and should be sought. It is critical that remedies be effective, proportionate, dissuasive and appropriate. The achievement of effective remedies in ESR-related cases will often be challenging where the potential impact is to require a large expenditure of resources by states. The availability of remedies is also strongly context-dependent and varies from a legal perspective as well as from the perspective of legal and political culture.

Litigators in any jurisdiction will need to be mindful of the following overarching considerations in deciding which remedies to pursue: (i) the aim of not only compensating individual claimants but also achieving wider social transformation; (ii) the legal and political limitations on the power of the adjudicating body in question to award certain remedies and the remedies awarded previously by the body; and (iii) the record of the relevant respondent in complying with the remedial decisions of the body in question. Available remedies vary in terms of their degree of coerciveness on the state, from legislative remedies such as striking down legislation or reading wording into legislation and structural injunctions requiring the state to take particular actions and supervising their implementation through damages to financially compensate the claimants to simple declarations of a violation and symbolic remedies such as public apologies.

Litigators should encourage courts to issue purposive remedies and to be creative to ensure that remedies are transformative. Courts should also be encouraged, where appropriate, to seek the co-operation of the state to ensure that remedies are implemented.

**Step 8** requires the litigator to consider the burden and standard of proof to which they will be held at the chosen forum, together
with the evidence available to them, to ensure their case is as strong as possible as well as to determine whether there are any insurmountable hurdles to their bringing a claim. Litigators will often be required to prove a *prima facie* case of discrimination and factors such as some courts’ insistence on the existence of a comparator may make this challenging. Forums which require litigators to prove their case “beyond reasonable doubt” as opposed to “on the balance of probabilities” may demand stronger evidence. However, the case law of the European Court of Human Rights shows that some courts may get around the higher standard imposed by relaxing their evidential standards, e.g. by showing willingness to draw inferences from circumstantial evidence. In considering the available evidence, litigators may need to be creative. They should consider the value of certain types of evidence for equality and discrimination claims, in particular the use of statistics, situation testing, NGOs’ and public bodies’ reports and pre-claim questionnaires (where available) in addition to witness statements.
The Key to Greater Gender Equality

Bob Hepple

On 7 March 2014 the International Labour Organisation convened a high-level panel of eminent equality scholars and activists from workers’ and employers’ organisations to mark International Women’s Day and in anticipation of the ILO’s centenary initiative to help "equip the Organisation to take up successfully the challenges of its mandate in the future". This is the text of the intervention by Professor Sir Bob Hepple QC, the Chair of The Equal Rights Trust. He wishes to thank Jude Browne, Mary Coussey, Nancy Fraser, Sandra Fredman and Dimitrina Petrova for their advice.

1. The most significant change in recent decades that influences the position of women at work is the transformation of state-managed capitalism into a globally marketised, privatised, deregulated system. This is accompanied by an ideological change from the post-war spirit of social solidarity, collective action, and participatory democracy into a belief in individual choice, personal autonomy and meritocracy. Women are told that they will succeed through individual advancement and by being more career-oriented.

2. This change has resulted in a new gender gap. The gap in numbers between economically active men and women has been slowly decreasing. Between 1980 and 2008, the rate of global female labour force participation increased from 50.2 to 51.7%, while male participation decreased slightly from 82.0 to 77.7%. But the gap based on inequity in the quality of employment has grown. Women who enter the labour market are now generally highly educated but still have a difficult time finding work. When they do, they are generally segregated in poorly-paid, insecure, home-based or informal work. There remain in many countries formal and informal barriers to women entering certain sectors of the labour market, including legal restrictions on working in certain jobs. These are often based on religious or patriarchal assumptions. There is persistent social and cultural pressure on women to combine family responsibilities with paid employment or to remain at home as carers while men are the principal breadwinners. Unpaid work is not valorised. The employment opportunities and earning potential of women continues to be well-below that of men.

3. Put another way, the roots of gender inequality lie in the socio-cultural traditions of countries, and also in the structures of employment and the way we measure economic value. What is needed is a more or less radical transformation that empowers women to the same degree as men and restores a spirit of social solidarity, collective action and participatory democracy. How can this be done? The ILO’s third global report on discrimination (2011) noted that an increasing number of countries have adopted anti-discrimination legislation and policies. (The organisation whose Board I chair, The Equal Rights Trust, has been working in over 30 countries...
to promote and advise on such measures.) However, giving the legal right to women to make individual complaints against discrimination is not enough. This is so even when the law goes beyond outlawing direct discrimination to include indirect discrimination, applying apparently neutral policies and practices in a way that puts women as a group at a particular disadvantage.

4. It has for long been recognised that “positive action” can bring about significant changes. This includes the eradication of practices that disadvantage women, like word-of-mouth recruiting, policies that seek to increase the proportion of women, for example by making the criteria for recruitment and promotion more objective and job-related, outreach programmes, and preferential treatment of women where they are under-represented, for example on company boards. The ILO Convention on Discrimination (Employment and Occupation) (C. 111, 1958), for its time a remarkably progressive international standard, now ratified by 172 countries, makes it clear that:

“[S]pecial measures designed to meet the particular requirements of persons who for reasons such as sex, age, disablement, family or social responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.” (Art 5)

This is framed as an exception from the general negative principle of non-discrimination.

5. What is missing from these 56-year old provisions and from most national legislation
is a positive duty on employers to advance equality of opportunity. In some countries (e.g. Denmark, Germany, Britain) legal duties have been imposed on public authorities to implement gender mainstreaming. This goes beyond “special measures” to help women. As the European Commission said in 2008:

“[I]t means mobilising all general policies and measures specifically for achieving equality by actively and openly taking into account at the planning stage their effects on women and men and by assuming that a transformation of institutions and/or organisations may be necessary.”

The economic crisis has made it extremely difficult to implement such policies. In Britain, where, since 2006, there has been a general duty on public authorities to advance equality of opportunity, the duty is interpreted as mainly procedural: to have “regard” to the need to advance equal opportunities; and provided the authority follows the correct procedure, cuts in public expenditure which will have an adverse impact on women can still be implemented.

6. What I am saying is that as part of the ILO’s future reflections, the Organisation should examine how the equality conventions could better support transformative equality. The younger generation cannot afford to be, or do not wish to be, herded into traditional full-time permanent employment based on the model of a male breadwinner and unpaid dependent partner. “Familial economic units” (with either shared or single-parenting) need to be provided for, with policy options that enable them to maximise their utility (for example, properly paid parental leave and the valorisation of unpaid labour). The major knowledge gap in this respect is that we are woefully short of data about the situation inside organisations, with regards to who works for what wage or salary. In Britain, successive governments have refused to require pay audits, and the present UK government goes no further than to advise workers to collect this information by asking colleagues what they earn!

7. This plea for an approach of transformative equality links with the question of the role of workers’ and employers’ representatives. Obviously, supporting workers’ representatives by law or otherwise (e.g. government contracts) is important. The growing feminisation of trade unions also heralds a shift in direction. But trade unions and other workers’ representatives cannot do much if the channels open to them are being squeezed by government measures. For example, in Britain, prohibitive fees have been introduced for taking complaints of discrimination to employment tribunals and the Equality and Human Rights Commission, which is supposed to help victims of discrimination, has had its budget cut from £70 million in 2010 to just over £18 million in 2014 (70%) and its powers curtailed. In other words, the promise of greater gender equality through the actions of individuals is being shown to be illusory.

8. The key to greater gender equality is through democratic participation in the making and enforcement of affirmative action schemes: to ensure a “fit” or “proportionality” between the aims of the scheme and the means used to achieve those aims, and to recognise that restorative justice is a process in which conflicting interests have to be reconciled. It has been suggested that most schemes fail because of the conflicts in a market-based economy between the right to private property and the right to equality, and also because of the inherent limits of law as an instrument of social change. The response to this must be through dialogue and participation of those whose interests are affected in the process of change, and there need to be mechanisms to ensure accountability of those who represent these interests.
Equal Access to Health Care Services for Survivors of Gender-Based Violence: A South African Perspective

Tarryn Bannister

1. Introduction

Gender-based violence (GBV) has been described as the most widespread and socially tolerated of human rights violations. This appears justified as, globally, more girls have been killed in the last 50 years, simply because they were girls, than men were killed in all the battles of the twentieth century. Due to the fact that women and girls remain disproportionately affected by GBV, this article primarily focuses on the needs of female survivors of GBV (SGBV). In relation to South Africa, statistics for the year 2012 revealed that a woman was murdered every eight hours by her intimate partner. Rape homicides have also increased annually within South Africa since 1999, while 66,387 sexual offences were reported to the South African Police Services during the year of 2013. This is an alarmingly high number when one considers that sexual offences are notoriously underreported. There are other forms of GBV currently plaguing South Africa, such as sexual harassment, stalking, corrective rapes, human trafficking and female genital mutilation, for which there are currently no reliable statistics. This is indefensible given the extreme levels of this violence, as well as the devastating consequences for women. The need to effectively address this epidemic is further justified by the Constitutional commitment to substantive equality, freedom from public and private violence and justiciable socio-economic rights. In spite of these progressive provisions, however, certain gaps within South Africa’s legal framework remain, effectively undermining the constitutional rights of abused women. For example, it is submitted that the interrelationship between the constitutional right to equality and the socio-economic rights has not been sufficiently recognised and addressed by the state. This is problematic as women’s poverty reinforces their social subordination, making them more vulnerable to violence and exploitation.

In particular, the interconnection between the right to equality and the right to have access to health care services, including reproductive health care, has not been fully utilised when addressing GBV. Developing this interrelationship is, however, of the utmost importance as GBV is both a human rights issue and a public health crisis. This article therefore highlights the negative health consequences of GBV. This is then followed by an overview of the constitutional normative framework, focusing on how interpretations of the right to equality and the right to have access to health care services have not been sufficiently responsive to the specific needs of women. This is
subsequently followed by an examination of existing gaps within health care legislation and policy that effectively neglect the health care needs of abused women. In conclusion, this article argues that in order to give effect to the transformative potential of the right to equality, it needs to be interpreted in a manner that is more responsive to the feminisation of socio-economic burdens. Similarly, in order to give effect to the constitutional right to have access to health care services, it needs to be interpreted in a manner that gives effect to substantive equality, which embraces the idea of taking positive steps to redistribute power and resources in order to eliminate disadvantage. This article therefore examines how substantive equality, with its focus on context, the impact of legal provisions, a positive recognition of difference and a reliance on values, can be streamlined into the reasonableness review model for adjudicating socio-economic rights. This article then posits that the right to substantive equality should be utilised to inform health care legislation and policy so as to reflect the specific needs and experiences of SGBV. This is of vital importance as timely access to quality health care interventions can assist in preventing future acts of violence, while reducing the risk of long-term health complications. For example, quality counselling services can assist in breaking the psychological pattern of abuse, while timely access to post-exposure prophylaxis (PEP) can prevent the transmission of HIV/AIDS. However, in spite of this potential, the right to health is not currently being fully utilised. It is therefore submitted that an interdependent understanding of the right to equality and the right to have access to health care services needs to inform the development of a comprehensive evidence-based plan to adequately prevent, address and respond to GBV.

2. GBV as a Public Health Crisis

GBV is both a human rights issue and a public health crisis with devastating health consequences. For example, GBV kills and disables as many women between the ages of 15 and 44 as cancer does. Its toll on women’s health also surpasses that of traffic accidents and malaria combined, while serving as a leading cause of death and disability for women. Specific examples of fatal health outcomes include AIDS-related mortality, maternal mortality, homicide and suicide. Non-fatal consequences include bone fractures, haemorrhaging, gastrointestinal problems, central nervous system disorders, chronic pain, sexual and reproductive health problems and mental illness. Health care services therefore need to be strengthened in order to mitigate these consequences while possibly preventing the escalation of violence.

In relation to reproductive health, GBV can result in HIV/AIDS infection, unwanted pregnancy, induced abortion and sexually transmitted infections and diseases. Cervical cancer has also been linked to domestic violence. Given that women are already physiologically more susceptible to HIV/AIDS infection, GBV has exacerbated this vulnerability, resulting in HIV/AIDS becoming a gendered epidemic. These biological vulnerabilities also intersect with gendered social roles. For example, the gendered division of labour results in the vast majority of poverty-stricken women being primarily responsible for child care and domestic work. While this work is rewarding, it is often undervalued, effectively preventing women from participating within the labour market on an equal basis. This undermines their socio-economic power and consequently restricts their ability to negotiate condom usage, to control the number and spacing...
of their children and to allocate resources to necessary health care services.\textsuperscript{29} It is not surprising then that GBV can result in severe depression, sleep disorders, anxiety and post-traumatic stress disorder.\textsuperscript{30} This, therefore, reveals that GBV has a devastating impact on the health and well-being of women. SGBV accordingly require a myriad of health care services, such as emergency contraception, HIV/AIDS prevention services (including screening for PEP), and the management of psychological health care problems. They also require screening programmes to identify survivors of domestic violence as well as screening programmes for cervical and breast cancer. However, in spite of this reality, this violence continues to be neglected, under-documented and under-reported by the South African health care system.\textsuperscript{31}

3. South Africa’s Relevant Legal and Policy Framework

a) The Normative Constitutional Framework

In 1996 the South African legal system underwent a major structural and normative change from a system of parliamentary sovereignty, which existed under apartheid, to a system of constitutional democracy, with an entrenched and justiciable Bill of Rights. The Constitution therefore serves as the supreme law of the Republic, while the courts have the power to declare invalid any law or conduct inconsistent with the fundamental rights protected within the Bill of Rights. While it is true that the law alone cannot create all of the social change that is required,\textsuperscript{32} legislation and policy for SGBV can be further infused with the fundamental human rights principles that are protected within the Constitution. For example, equality is included in the Constitution as both a value and a right. The founding values underlying the Constitution are human dignity, equality and freedom, as well as non-racialism and non-sexism.\textsuperscript{33} As a right, section 9(1) provides that everyone is equal before the law, and that everyone has the right to equal protection and benefit of the law. Section 9(2) goes on to specifically state that:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”

This provision therefore illustrates the right to equality’s interconnection to other fundamental rights, as well as the Constitution’s commitment to substantive equality, as opposed to formal equality. For example, while formal equality is focused on treating people the same, regardless of difference, substantive equality is concerned with taking differences into account so as to achieve equality of outcome.\textsuperscript{34} Sections 9(3) and 9(4) go on to prohibit unfair discrimination by the state and by private individuals respectively. Section 9(3) specifically provides a list of grounds of discrimination which includes gender, race, sex and social origin, while section 9(5) specifically states that discrimination on any of these listed grounds is presumed to be unfair discrimination. The Constitution also includes the rights to human dignity (section 10), life (section 11) and freedom and security of the person (section 12).

In relation to health care, section 24(a) provides for the services that are necessary for an environment that is not harmful to one’s health. Of particular importance, however, is section 27(1)(a) which states that everyone has the right to have access to health care services, including reproductive health care. Section 27(2) goes on to state that “reason-
able measures” must be taken to achieve the progressive realisation of this right “within available resources.” Section 27(3) does, however, state that no one may be refused emergency medical treatment. In relation to the interpretation of the Constitution, section 39(1)(a) mandates that, when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(1)(a) thus emphasises the interpretive importance of the value of equality when giving substantive content to the socio-economic rights. Section 195 of the Constitution further requires that public administration be governed by democratic principles while being responsive to people’s needs.

b) Relevant Constitutional Jurisprudence

(i) Equality Jurisprudence

Given the need to develop the interrelationship between the right to equality and the right to have access to health care services, it is necessary to analyse the extent to which the Constitutional Court has given effect to the principles underlying substantive equality. In Harksen v Lane NO and Others, the Constitutional Court of South Africa (the Court) developed a detailed test to determine whether a complainant has suffered unfair discrimination in terms of section 9 of the Constitution. The first enquiry is whether an impugned provision differentiates between people or groups of people. In evaluating this differentiation, one must determine whether there is a legitimate government purpose, rationally connected to this differentiation. If there is not, then the provision fails the test. If there is a rational connection, one must then determine whether the differentiation in fact amounts to discrimination. If the differentiation is based on a listed ground as set out in section 9(3) of the Constitution, then it is presumed to be discrimination. If, however, it is not based on a listed ground, then one needs to determine whether the differentiation is based on a characteristic capable of impairing the human dignity of the complainant. This is when the court considers the historical and current social context of the complainant. Even if the answer is in the affirmative, the court still needs to determine if this discrimination is indeed unfair. If the discrimination is based on a listed ground as set out in section 9(3), then it is presumed to be unfair. If it is not, then the court needs to ask if the discrimination entrenches existing patterns of disadvantage. This is when the Court looks at the impact of the legal provision on the complainant, as well as the need for a positive recognition of difference. Even if it is found that the discrimination is unfair, it is still possible for the state to try and justify the provision or practice in terms of section 36 of the Constitution. This section provides that a right in the Bill of Rights may be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This is when the court must consider the transformative values of the Constitution. The court therefore needs to consider whether the provision gives effect to restitution and ultimately the transformative aspirations of section 9(2) of the Constitution. Many subsequent interpretations of this test have unfortunately conflated considerations of human dignity and equality when analysing the impact of legal provisions. This is problematic as this approach effectively ignores the socio-economic (material) dimensions of deprivation and how this influences one’s feasible options. It therefore also disregards the role the law can play in broadening these choices. Certain equality decisions have also simply broadened social inclusion
while failing to dislodge the underlying conditions that promote inequality.\(^{39}\) The need to address the intersection between socio-economic deprivation and gender equality is effectively illustrated through the decision in *S v Jordan*\(^ {40}\) (*Jordan*). In this case, the appellants admitted in the Magistrate’s Court that they had contravened the Sexual Offences Act 23 of 1957, which criminalises the selling of sex and brothel-keeping. The applicants claimed that the relevant provisions were unconstitutional, however, as they only criminalised sex workers and not their clients. The Court therefore had to consider whether section 20(1)(a) of the Act was discriminatory towards women. The majority held that this provision was not discriminatory, as the provision criminalised both male and female sex workers.\(^ {41}\) This apparently rendered its impact “gender-neutral”.\(^ {42}\) The Court also went on to state that gender was not a differentiating factor in relation to sex work.\(^ {43}\) These statements are however clearly disconnected from the social context within which the law is operating in that the majority of sex workers are in fact female.\(^ {44}\) The majority of these women are also socio-economically vulnerable, often turning to sex work out of necessity, something which the minority judgment was able to recognise.\(^ {45}\) While both male and female sex workers require adequate health care services, women remain disproportionately affected by violence and harassment, as well as HIV/AIDS and STDs.\(^ {46}\) Women also have specific reproductive health care needs, such as those relating to birth control, which need to be effectively addressed. Criminalising sex workers therefore effectively entrenches existing vulnerabilities in addition to unequal social relationships, all of which is blatantly contrary to the spirit of section 9(2) of the Constitution, which requires the promotion of substantive equality.

(ii) Socio-Economic Jurisprudence

In relation to the socio-economic jurisprudence, many of these cases have been criticised for emphasising procedural criteria, in contrast to the substantive values and interests that the socio-economic rights are intended to protect.\(^ {47}\) Many decisions have also been criticised for failing to address the gendered barriers to accessing these rights.\(^ {48}\) While the socio-economic rights have both positive and negative duties, the Court has yet to provide a detailed account of what these positive obligations specifically entail. It has, however, adopted reasonableness review, which entails a context-sensitive evaluation of the reasonableness of a government programme, in fulfilling the state’s positive obligations under the socio-economic rights. In terms of this approach, the Court conducts an inquiry into whether a government programme is flexible, coherent, comprehensive and capable of effectively realising the particular socio-economic right.\(^ {49}\) A further factor that determines the reasonableness of a government programme is the degree to which provision has been made for the most vulnerable members of our society.\(^ {50}\) It is submitted that the elements underlining substantive equality, including attention to context, impact and transformative values can be effectively streamlined into these criteria. It is further submitted that such an approach would give greater effect to the transformative potential of the socio-economic rights. An interrelated interpretation of the constitutional rights has furthermore been approved by the Court. For example, in the case of *Government of the Republic of South Africa v Grootboom and Others*,\(^ {51}\) the Court specifically stated that:

“The proposition that rights are interrelated and are all equally important is
not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings".\textsuperscript{52}

The Court has also pointed out that the realisation of the socio-economic rights is integral to the advancement of gender equality and the establishment of a society in which men and women are "equally able to achieve their full potential".\textsuperscript{53} However, in spite of this recognition and the feminisation of poverty,\textsuperscript{54} women have largely been absent from the socio-economic rights cases.\textsuperscript{55} While the right to have access to health care services for women was considered in \textit{Minister of Health and Others v Treatment Action Campaign and Others},\textsuperscript{56} the Court's interpretation of this right has been criticised for not being sufficiently gender-sensitive. In this case, the focus was on the government's limited provision of the anti-retroviral drug (nevirapine) to particular research and training sites, despite its proven effectiveness in reducing intrapartum mother-to-child transmission of the HIV/AIDS virus. The drug was also provided for free to the government, highlighting the unreasonableness of the state's actions. Ultimately, the Court found the state's limited and inflexible programme did not comply with its obligations under sections 27(1) and 27(2) of the Constitution. While the robust application of reasonableness review within this case has to be commended, the Court has been criticised for interpreting the right to have access to health care services primarily within the context of pregnancy and motherhood.\textsuperscript{57} For example, the Court specifically stated that consideration needed to be given to the fact that the case concerned the lives of new-born babies who might be saved by the administration of nevirapine to mother and child at the time of birth.\textsuperscript{58} This is problematic as this approach perpetuates the stereotypical notion that women are only child-bearers and nurturers, while failing to develop a more nuanced understanding of the intersecting axes of gender, race and class.\textsuperscript{59} This further perpetuated the traditional approach that the health care needs of women become secondary, while their caregiving role retains primary importance.\textsuperscript{60} While the reality of caregiving and its impact on gender equality needs to be recognised, it needs to be done in a way that also recognises women as an end in their own right. In contrast, the Court's approach contributed to the invisibility of women's broader health care needs.

c) The National Legislative Framework Governing Health Care Services for SGBV

Over the years the state has enacted numerous pieces of legislation in seeking to provide health care services to abused women. However, in spite of certain progressive provisions, numerous forms of GBV are currently neglected by the state, such as corrective rapes, human trafficking and stalking. The current legislative framework is also plagued by implementation challenges and critical gaps. For example, despite the Domestic Violence Act 116 of 1998 (DVA) recognising that domestic violence is a serious social evil, and that the victims of domestic violence are among the most vulnerable members of our society,\textsuperscript{61} the DVA is notably silent as to the role of the Department of Health. This is somewhat surprising given that the DVA places specific responsibilities on police personnel to assist complainants of domestic violence.\textsuperscript{62} While the DVA does also provide a nuanced and detailed description of domestic violence,\textsuperscript{63} it fails to provide any refer-
ence to the provision of health care services for survivors of this violence. This omission is problematic as health care workers are often ideally situated to identify domestic violence. Research has also indicated that the health sector is the first and most frequently utilised sector by abused women.\textsuperscript{54} While the DVA does specifically mandate that the Police Services assist complainants in obtaining medical treatment (section 2(a) of the DVA), the criminal case of \textit{S v Engelbrecht}\textsuperscript{65} revealed the practical challenges of implementing such measures. In \textit{Engelbrecht}, evidence that was presented before the court revealed that when Mrs Engelbrecht had phoned the emergency services the police dispatchers had argued with her about why they were not going to assist her. Furthermore, despite the detailed provisions of section 2(a) of the DVA, many police officials do not believe that it is their responsibility to escort complainants to health care facilities. As further pointed out by Bonita Meyersfeld, this apathy effectively exacerbates the normalisation of GBV.\textsuperscript{66} This therefore reveals that while the DVA needs to be praised for its many progressive provisions, these innovative aspects will remain ineffective without an enabling environment to facilitate implementation.\textsuperscript{67} In this regard, positive duties need to be placed on health care providers to assist survivors of domestic violence in a humane manner. Police personnel and health care workers also need to be adequately trained, while a system of accountability needs to be introduced and effectively managed.

In 2004, the National Health Act (NHA) 61 of 2003 was introduced to give effect to the White Paper for the transformation of the South African health care system. Section 2(a) of the NHA specifically states that its purpose is to create unified services while protecting and promoting the rights of vulnerable groups, including women and children. However, in spite of these provisions, the NHA fails to mention rape, domestic violence or GBV anywhere within its provisions. In contrast, the primary focus of the NHA is on maternal health care services and on the termination of pregnancies. While these services are necessary and admirable, they have not been adequately implemented by the state. These services are, furthermore, insufficiently responsive to the broader health care needs of women in South Africa. For example, the NHA fails to acknowledge cervical and breast cancer, despite the fact that more women are dying from cervical cancer than maternal mortality.\textsuperscript{68} The broader health care needs of women, such as services relating to screening for cervical cancer or services for SGBV are thus effectively “missing” from this piece of health care legislation.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOA), aims to afford complainants of sexual offences, “the maximum and least traumatising protection that the law can provide”.\textsuperscript{69} However the SOA contains unnecessary obstacles to the provision of PEP and does not contain a broader section relating to the general health care management of rape survivors. For example, section 28(1)(a)(i) of the SOA states that a rape survivor exposed to the risk of HIV “may” receive PEP, subject to the condition that the rape survivor lays a charge with the South African Police Services (section 28(2)(a)) or reports an incident in respect of an alleged sexual offence in the “prescribed manner” at a “designated health establishment” (section 28(2)(b)). This is problematic as there are numerous reasons as to why a complainant may be afraid or reluctant to report such an offence and the provision of services should not be limited as a result of the devastating nature of sexual offences. The focus within the SOA is also narrowly placed on the provision of
PEP and HIV/AIDS services, ignoring the emotional and psychological needs of rape survivors. It is submitted that the removal of section 28(2) is necessary as rape has reached extreme levels within South Africa, while effectively intersecting with, and compounding the HIV/AIDS epidemic. It is also necessitated by the fact that section 28 primarily concerns women who cannot afford to pay for medical services. Limiting PEP thus ultimately entrenches the disadvantage predominantly experienced by poor black women. As pointed out by the Court in the case of Minister of Health v Treatment Action Campaign, when drafting health care legislation and policy, the state needs to take into account the differences between those who can afford to pay for services and those who cannot.

**d) Relevant Policy**

The policy paper on National Health Insurance (NHI), which is to be funded through a compulsory taxing system and an insurance scheme, seeks to give effect to section 27 (1) (a) of the Constitution. It attempts to do this by ensuring that all South Africans will have access to a defined comprehensive package of appropriate and quality health care services, regardless of their socio-economic status. The policy paper also states that the underlying principles intended to govern the NHI system include free access to health care services, social solidarity, effectiveness, appropriateness, equity, affordability and efficiency. While the policy paper does briefly refer to violence against women, it does not adopt any practical strategies on how the state intends to address this epidemic. There is also an insufficient focus on improving the quality of existing services for survivors of rape and domestic violence. This is in spite of the recognition in both the National Strategic Plan and the policy paper on the NHI system that violence forms part of the quadruple burden of disease currently ailing South Africa. Therefore, while the NHI system does have the potential to improve equal access to health care services for women, the specific needs of women should be further integrated into the NHI policy document.

The 365 Day National Action Plan to end Gender Violence of 2007 does contain certain progressive health care goals, such as the increased training of health care providers, as well as the need to implement the National Sexual Assault Policy (NSAP). However, in spite of these provisions, implementation of the NSAP remains erratic and slow. For example, the NSAP states, under its guiding principles, that health care services should be provided in a non-judgmental manner and that services should always be provided by specialists. However, services for survivors of rape are offered in a variety of settings, from district, regional and tertiary-level hospitals, with health care providers often unable to provide specialised care. Rape survivors are also often bypassed by patients who are more severely physically injured, while being exposed to a stressful environment. There are also persistent complaints that health care workers are judgemental and abusive.

Furthermore, the 365 Day National Action Plan only briefly refers to its commitment to the socio-economic rights without further recognising their particular importance for women and how they can effectively empower abused women.

Compounding these problems is the fact that South Africa’s health care system is currently in a state of crisis. For example, the public health care system is severely under-staffed and under-resourced despite the fact that it is currently catering for the majority of South Africans. Research conducted by the South African Human Rights Commission has fur-
ther described this system as “lamentable”, with problems including an inadequate infrastructure, limited or non-existent transport, long waiting hours and the discriminatory attitudes of overworked and desensitised staff members. While the legacy of apartheid still haunts the South African health care system today, corruption is also undermining the system. This is illustrated through a report by Section 27 (a public interest law centre) which highlighted that over a period of 18 months from January 2009, more than R800 million was stolen from the public health sector by public officials. It is no wonder then that the health care system has been described as a democratic failure.

This effectively reveals that the state is currently neglecting many of the most urgent health care needs of SGBV, as well as the health care needs of the poor. Given the extreme levels of GBV, infusing health care services with the principles underlying substantive equality is therefore necessary in order to transform systemic gender inequality in South Africa and to affirm the inherent value of all South Africans. Engendering health care services is also essential, as, while the devastating health consequences of GBV cannot be prevented completely, many of these consequences could be ameliorated by a comprehensive and multi-dimensional health care response. Quality health care interventions can also reduce the potential for disability and can help women to cope with the impact of violence in their lives.

4. Developing an Appropriate Health Care Response to GBV

a) Developing The Jurisprudence – Interpretive Interdependence

It is submitted that an interrelated interpretation between the right to equality and socio-economic rights can assist in ensuring that the contextual analysis in unfair discrimination cases is more responsive to the socio-economic deprivation experienced by the applicant. A form of related interpretation known as “interpretative interdependence” between these rights has also been specifically advocated for by Sandra Liebenberg and Beth Goldblatt. In terms of this approach, the two rights are treated as separate but complementary, with one effectively considering how the values and purposes underpinning one right (for example, equality) may be relevant and useful to the development of the jurisprudence on the other right (such as the right of access to health care services).

In accordance with this approach, integrating the material (socio-economic) interests of complainants could effectively shift the focus of equality jurisprudence back onto group-based understandings of material disadvantage, ultimately preventing the disproportionate focus on dignity. Adding considerations of material disadvantage to the analysis would also reveal the manner in which poverty exacerbates gender inequality. Equality arguments can further take account of socio-economic rights as tools to redress issues of material disadvantage based on discrimination and status. For example, providing access to adequate shelter for abused women would go a long way to broadening their feasible options, while protecting them from violence. The strong correlation between status inequality and poverty therefore means that the right of everyone to access socio-economic goods can positively reinforce the redistributive dimension of section 9(2). This interrelationship has the additional potential to recognise particular needs while preventing the “levelling down” of services in the name of equality. For example, while equality can be used to justify treating people equally badly,
socio-economic rights call for the progressive realisation of these rights. In addition, when individuals or groups are deprived of existing access to socio-economic goods, this is perceived as negative infringements on the socio-economic rights. This infringement then requires justification in terms of section 36 of the Constitution, which requires that the infringement must be based on a law of general application and justifiable in light of the constitutional vision of a society based on human dignity, equality and freedom. It is submitted that an interrelated interpretation between the right to equality and the socio-economic rights can also inform the development of health care legislation and policy, so as to be more responsive to the specific needs and experiences of women.

**b) Developing Health Legislation and Policy**

In relation to existing legislation, the DVA and the SOA could be amended to place positive duties on health care providers to provide quality and humane health care services to SGBV. It is also imperative that neglected forms of GBV, such as corrective rapes, are specifically addressed by the state. It is further necessary to improve implementation of the NHA, while the proposed NHI system needs to be reviewed so as to be infused with women’s particular health care needs. This can be complemented by the improvement of the existing infrastructure so as to facilitate increased privacy and protection for SGBV. Health care providers will also need to be adequately trained if the state is to address the deeply entrenched social and cultural beliefs that justify the ill-treatment of women. In this regard infusing health care services with a substantive equality perspective may assist health care providers in understanding that a woman’s health and choices are often shaped by wider social, economic and political relations. Legislation and policy should therefore guide health care providers on how to recognise and adequately respond to the nature of GBV in a manner that respects the dignity, autonomy and agency of women.

In terms of policy, it is submitted that in order to infuse the right to have access to health care services with the right to equality, the Department of Health needs to develop a comprehensive national programme on GBV, with a particular focus on advancing the rights of women. This programme needs to recognise the full extent of GBV and its devastating impact on women. It also needs to positively recognise the specific needs and experiences of women, as well as the different forms of GBV. The programme also needs to effectively transform gendered relations within our society through redistributive measures, extensive training and education.

In December 2012, the Minister of Women, Children and People with Disabilities, Lulu Xingwana, announced the establishment of the Council for Gender-Based Violence, which, according to the Minister, will take the war against GBV to a higher level while monitoring progress on initiatives aimed at addressing GBV. The Council is also tasked with implementing the 365 Day Action Plan on GBV. The Council has however been worryingly quiet over the past few months. While the 2014 National Plan of Action on GBV is currently being developed by the Council, it has not yet been released, despite plans to finalise it in December 2013. It is submitted that this plan could however be utilised to effectively recognise the historical and current social context of entrenched gender inequality within South Africa and how it manifests into various forms of GBV, including previously neglected forms of violence. The state can also set out its specific strategies to improve socio-economic services so as to alleviate the devastating consequences of such violence,
while effectively protecting women. The programme will also need to engage men and boys while encouraging women to demand more from men and to recognise their own worth.\textsuperscript{89} In this regard, recognising women’s specific needs and empowering them socio-economically has the powerful potential to shift understandings of gender within our society, as well as gendered power relations. It is therefore submitted that the National Council has the opportunity, and the responsibility, to recognise and cultivate the inter-relationship between the socio-economic rights and substantive gender equality in developing its Action Plan.

c) Allocating the Necessary Resources

Simultaneously, the state needs to develop a comprehensive information system in order to generate and collect gender-disaggregated data on the prevalence and consequences of GBV. Such information then needs to be publicised so as to empower abused women and health care providers. It is also clear that such measures will need to be coupled with budgetary allocations. While the South African public health care system is facing various crises, the health care needs of abused women cannot simply be ignored. This is due to the extremely high prevalence of GBV, its devastating health consequences, and the Court’s affirmation that the needs of the most vulnerable members of our society cannot be neglected within government policy.\textsuperscript{90} In order to facilitate women’s participation in shaping health care services, the state will also need to be more transparent in relation to such budgetary allocations.

5. Conclusion

It is thus clear that despite the extreme levels of GBV in South Africa, we are not powerless to address it. In contrast, positive measures are specifically needed (and constitutionally mandated) in order to shift South Africa’s gendered political and social institutions in a direction that effectively fosters substantive gender equality. In terms of interpreting the constitutional rights, substantive equality can effectively serve as a tool to enhance the power of socio-economic rights through recognising the specific challenges facing many women while requiring the redistribution of socio-economic goods to compensate for this disadvantage. By interpreting the socio-economic rights and the right to equality substantively and as mutually reinforcing, judicial interpretations of these rights will therefore be more responsive to the intersecting axes of poverty and inequality.

The legislature and the executive also have a crucial responsibility to develop effective legislative and policy responses to the particular health care needs of SGBV. By facilitating the participation of abused women in shaping such health care responses to GBV, the law can be used to articulate the experiences of abused women and to contribute to the social change that needs to occur. Furthermore, by grounding such services in the lived reality of abused women’s lives, the law is able to provide remedies that are more responsive to the needs and experiences of SGBV. The provision of quality health care services, such as effective counselling, can further serve to prevent the escalation of domestic violence, while improving adherence to PEP. Simultaneously, by improving access to PEP, the state can effectively prevent the spread of HIV/AIDS. Sufficient psychological health care services can further empower abused women to effectively deal with the consequences of GBV within their lives.\textsuperscript{91} The state is thus called upon to take the necessary steps to recognise all forms of GBV and to provide adequate and timely access to
quality health care services for SGBV. A more proactive response is further necessary as research has revealed that more women are killed in this routine “gendercide” in any one decade than people were slaughtered in all the genocides of the twentieth century. In order to protect the constitutional rights of abused women, it is thus imperative that all law-makers in South Africa take the intersection between the constitutional commitment to gender equality and the right of access to health care services seriously.

1 Tarryn Bannister is a doctoral candidate at the Socio-Economic Rights and Administrative Justice Research Project (http://www.sun.ac.za/seraj) at Stellenbosch University. This article is based on his 2012 LLM thesis titled: “The right to have access to health care service for survivors of gender-based violence”. Thank you to Professor Sandra Liebenberg for reading an earlier draft of this paper.

2 Within the South African Women Empowerment and Gender Equality Bill of 2012, GBV is defined as “[a]ll acts perpetrated against women, men, girls and boys on the basis of their gender which cause or could cause them physical, sexual, psychological, emotional or economic harm and includes threats to do so.” See Department of Women, Children and People with Disabilities, Women Empowerment and Equality Draft Bill, 2013, available at: http://www.info.gov.za/view/DownloadFileAction?id=173252.


7 Ibid.


10 Section 9(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

11 Section 12(1)(c) of the Constitution.

12 Sections 26, 27 and 28 of the Constitution.


14 Section 27(1)(a) of the Constitution.

15 See Budlender, D., “Women and Poverty”, Agenda, Vol. 64, 2005, pp. 30-35 where she points out that: “While there are many different ways of measuring poverty, all suggest that women are more likely than men to live in poverty. This statement holds, whether we measure poverty simply by income, or use wider measures which encompass other aspects.”


17 Joyner, K., Health Care for Intimate Partner Violence: Current Standards of Care and Development of Protocol Management, DPhil Thesis at University of Stellenbosch, 2009, p. 59: “Women appear to become trapped in a cyclical pattern of IPV, with brief moments within the cycle when they are more likely to seek help, which creates windows of opportunity for intervention.”; Mercy, J., Butchart, A., Rosenberg, M., Dahlberg, L., and Harvey, A., “Preventing Violence in Developing Countries: A Framework for Action”, International Journal of Injury Con-

18 See above, note 6.
19 See above, note 3.
20 Ibid.
25 See World Health Organization, above note 23; See also Heise, above note 22, p. 100.
27 Chisala, S., “Rape and HIV/AIDS: Who’s Protecting Whom?”, in Should We Consent?: Rape Law Reform in South Africa, (eds.) Artz, L. and Smythe, D., Juta, 2008, p. 55. Chisala observes that this biological vulnerability is a result of the fact that semen carries a high viral load, and because of the physiological nature of the vagina which has a large mucosal area.
28 As pointed out by the Constitutional Court in President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC); 1997 6 BCLR 708, Para 38: “The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. The generalisation upon which the President relied is therefore a fact which is one of the root causes of women’s inequality in our society”
29 See above, note 17, pp. 178-179. “In a climate of coercion and violence by men, women's capacity to resist behaviours which increase the risk of contracting HIV is compromised, so IPV has a knock-on effect for other health issues (...) [F]orced to choose between the immediate threat of violence and the possibility of HIV infection, women frequently resigned themselves to the sexual demands and indiscretions that might increase their risk of HIV acquisition”. See also: Chant, S., “Re-thinking the Feminisation of Poverty in regard to Aggregate Gender Indices”, Journal of Human Development Promotion, Vol. 7, 2006, p. 206: “Household income may bear no relation to women's poverty because women may not necessarily be able to access it.”
30 See World Health Organization, above note 23; See Heise, above note 22, p. 100.
31 See Joyner, above note 17, p. 103.
33 Preamble to the Constitution.
35 1997 11 BCLR 1489 (CC); 1998 1 SA 300 (CC).
36 See above, note 34, p. 243-245; Discrimination is defined as differential treatment on illegitimate grounds. Differentiation based on a listed ground mentioned in section 9(3) is presumed to be unfair discrimination. The Court has also recognised analogous grounds not listed in section 9(3), including HIV/AIDS in Hoffman v South African Airways 2001 1 SA 1 (CC); 2000 11 BCLR 1235 (CC). If such differentiation is not based on a listed ground then the applicant must prove that it is unfair discrimination. Currie and De Waal describe unfair discrimination as discrimination that entrenches existing inequality.
37 See above, note 34.
38 Cathi Albertyn has pointed out that the conflation of dignity and equality is problematic in that dignity is then often prioritised, while the purpose of remedying disadvantage is ultimately suppressed. See Albertyn, C., “The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa”, Constitutional Court Review, Vol. 2, 2009, pp. 165-185.

40 S v Jordan (Sex Workers Education & Advocacy Task Force as Amicus Curiae) 2002 6 SA 642 (CC); 2002 11 BCLR 1117 (CC).

41 Ibid., Para 9.

42 Ibid.

43 Ibid., Para 15.


45 See above, note 40, Para 68: “The evidence suggests that many women turn to prostitution because of dire financial need and that they use their earnings to support their families and pay for their children's food and education.”

46 Ibid., Para 87. Counsel for the applicant specifically pointed out that the marginalisation of sex workers by the law renders these women vulnerable to violence as they are forced to work in isolated circumstances and because they fear reporting assaults to the police.


50 Ibid., Para 44.

51 Ibid.

52 Ibid., Para 83.

53 Ibid., Para 23.

54 See above, note 15.

55 Cathi Albertyn points out that women have been effectively “missing” in all socio-economic rights cases so far (except for Minister of Health v TAC). See above, note 48, p. 599.

56 Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 5 SA 721 (CC); 2002 10 BCLR 1033 (CC).

57 See above, note 48, p. 591.

58 See above, note 56, Para 72.

59 See above, note 48, pp. 591-603.

60 Ibid.


65 2005 2 SACR 41 (W).

66 See Meyersfeld, above note 24, p. 191.

67 Bannister, T., The right to have access to health care services for survivors of gender-based violence, LLM Thesis at University of Stellenbosch, 2012, p. 74.

69 Section 2 of the SOA.

70 See above, note 56.


77 See above, note 75.


82 See above, note 67, p.135.


87 See above, note 67, pp. 17-18.


90 See above, note 56, Para 44.

91 See above note 67, p. 178.

92 See above, note 4, p. xviii.
Inequality, Not Insufficiency: Making Social Rights Real in a World of Plenty

Octavio Luiz Motta Ferraz

Introduction

Supporters of social and economic rights to health, education, food, housing, social security, etc. (hereinafter simply "social rights") often complain that these rights are neglected in comparison to civil and political rights (e.g. freedom of speech and religion, the right to vote, the right not to be tortured). This often quoted passage of the Committee on Economic, Social and Cultural Rights provides a good example of this rather typical stance:

“[T]he international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.”

Several academics and activists have echoed these claims. David Bilchitz, for instance, has stated that social and economic rights are “more honoured in the breach than in the observance”, whereas Margot Salomon, in a similar vein, urges that “[e]qual attention and urgent consideration (...) be given to the civil, political, economic, social and cultural rights.”

Many think that this alleged neglect is in great part due to a misconceived belief that social rights are different in nature to civil and political ones, especially in relation to their dependence on scarce resources. A lot of effort is therefore employed by supporters to prove this distinction wrong in the hope that, by establishing parity between the two types of rights, social rights will finally receive the attention they deserve and be more effectively enforced through the legal system. The following extract from a UN document illustrates well this widespread approach.

“[E]conomic, social and cultural rights have been seen as requiring high levels of investment, while civil and political rights are said simply to require the State to refrain from interfering with individual freedoms. It is true that many economic, social and cultural rights sometimes require high levels of investment—both financial and human—to ensure their full enjoyment. (...) Similarly, civil and political rights, although comprising individual freedoms, also require investment for their full realisation. For example, civil and political rights require infrastructures such as a functioning court system, prisons respecting minimum living conditions for prisoners, legal aid, free and fair elections, and so on.”

I believe that this strategy (let us call it the “parity thesis”) is not only based on an im-
plausible argument but is also largely unhelpful for the project of strengthening the implementation of social rights. Even if it were true that these civil and political rights are identical in relation to their dependence on scarce resources (something I reject but will not deal with in this article), the main obstacle to strengthening the implementation of social rights, i.e. the difficulties that this resource dependence creates for the definition of their precise content, would still be there. All the parity thesis would have achieved would have been to highlight that resource dependence also affects civil and political rights.

In my view, thus, rather than keep complaining that social rights are neglected in comparison to civil and political rights and waste time and effort with the parity thesis, the main task for social rights supporters, but one that has been largely neglected, should be the development of a more concrete conception of these rights, i.e. one that faces the resources issue head on and clarifies the content and nature of these rights. Until such a conception is developed and attains the level of consensus achieved in some civil and political rights, complaints about social rights’ neglect will remain purely rhetorical.7

This article attempts to contribute to that endeavour by proposing a conception of social rights which I believe fulfils the criteria set out above. I start by trying to clarify the meaning of resource scarcity (and the related idea of “available resources”). Understanding resource scarcity properly, and, in particular, dispelling some common misunderstandings surrounding it, is a necessary and crucial step in the effort to make the content of social rights more determinate and their implementation possible and effective.8 My main goal is to show that resource scarcity is not solely or chiefly a practical obstacle to the implementation of social rights stemming from insufficiency (i.e. lack of resources), as many in the debate seem to wrongly assume, including social rights supporters. The world as a whole, and most of the countries within it, including so-called developing countries, are rich enough to satisfy the basic needs of their entire populations. The main problem, thus, is not insufficiency of resources, but rather inequality of distribution, and the main obstacle for the consolidation of social rights is the complexity of the questions that the definition of their content and nature necessarily raise in this context of what I call “relative abundance” of resources. Is redistribution of privately held resources from the better off to the worse off normatively required for compliance with social rights? If so, to what extent? Should it happen only within the borders of national states or also across them? How politically and practically feasible would the appropriate redistributive measures, whatever they are, be? All these intractable issues of distributive justice need to be dealt with and achieving consensus on them, although extremely difficult, perhaps even utopian, is a crucial step in making the content and nature of social rights more concrete and their implementation more effective. The second part of this article discusses these issues and puts forward a conception of social rights based on the idea of equality of opportunity which in my view could be a step forward in the pursuit of that consensus.

I. Understanding Resource Scarcity

I.1 Resource Scarcity in the Literature

It is not disputed in the literature that the provision of the goods and services related to social rights is dependent on so-called scarce resources. There is an acceptance, moreover, even among social rights supporters, that these rights cannot be immediately
implemented, but are rather to be "progressively realised", because some, and perhaps many states, may not be in a position to afford to guarantee these rights immediately to their populations within their "available resources". This position was well summarised in the following passage of the oft-cited General Comment No. 3 of the Committee on Economic, Social and Cultural Rights:

"The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. (...) It is (...) a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights (...).

[But] it (...) imposes an obligation to move as expeditiously and effectively as possible towards that goal.

(...) [A]ny assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'."

This approach is reflected in several legal instruments recognising social rights in the domestic and international sphere. The International Covenant on Economic, Social and Cultural Rights (Article 2(1)), for instance, formulates the obligation of states in the following manner:

"Each State Party to the present Covenant undertakes to take steps, (...) to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." [my emphasis]

I happen to believe that the idea of a “progressive right” (i.e. one to be achieved progressively, in future rather than immediately) is conceptually flawed because it is incompatible with the concept of right in the well-established strong sense of the term, i.e. as a norm of high priority to be respected immediately unless there are some special and exceptional grounds not to do so. However, I do not have space to discuss this issue here. My aim here is to try to clarify the concept of resource scarcity that needs to be taken into account when determining the content of social rights. The assumption, explicit in the passages quoted above and implicit in a large part of the literature, is that resources are simply insufficient in most, if not all countries in the world, to make the immediate implementation of social rights possible.

James Nickel explains that assumption well in his entry to the Stanford Encyclopaedia of Philosophy on human rights when referring to some criticisms levelled against them:

"It is very expensive to guarantee to everyone basic education and minimal material conditions of life. Perhaps social rights are too expensive or burdensome to be justified even in rich countries."

Surprisingly, social rights supporters have not by and large taken issue with this assumption, but rather accepted it, as already noted, and then tried to counter it with the claim that civil and political rights are also costly (the parity thesis I referred to in the Introduction above). David Bilchitz, for instance, a leading South African academic and
supporter of social rights, states in his book that “[t]he world (...) does not contain an abundance of all the resources that we need to fulfil our [social] rights”. The Office of the UN Commissioner for Human Rights echoes the claim:

“[T]he reference to ‘resource availability’ reflects a recognition that the realisation of these rights can be hampered by a lack of resources and can be achieved only over a period of time.”

But are social rights really “too burdensome”, or “too expensive” to be implemented immediately? It depends, of course, on how one defines the content of these rights, an issue on which, as already noted, there is no consensus at present, not even among social rights supporters. In Nickel’s statement, for instance, there is an assumption that social rights are entitlements to the satisfaction of a certain minimum level of needs in education, healthcare, housing, etc. Other commentators, however, interpret these rights in a much more generous manner. This lack of consensus is reflected in legal instruments. In the Constitution of Finland, for instance, there is a “right to basic subsistence” and a duty on the state to guarantee “adequate social, health and medical services”. In other constitutions and in some international legal instruments, however, these rights are formulated in more generous terms. In the International Covenant on Economic, Social and Cultural rights, for instance, the right to health is recognised as a right to the “enjoyment of the highest attainable standard of physical and mental health”, and other social rights are formulated as rights to adequate rather than basic “food, clothing and housing”.

There is also no consensus on whether social rights are unconditional or targeted, i.e. belonging only to those who are in need through no fault of their own. Whereas in the ICESCR there seems to be no condition for the enjoyment of these rights, in the Universal Declaration of Human Rights these rights are formulated as conditioned on “lack of livelihood in circumstances beyond the individual’s control” (Article 25) [my emphasis]. A similar provision is found in the Brazilian Constitution which expressly states that the system of social security and social assistance funded by the state through general taxation has the objective to protect the ill, the disabled, the very old, pregnant women and those involuntarily out of work, i.e. all those who are needy through no fault of their own.

Now, given that there is no consensus as yet on the precise content and nature of social rights, it is rather surprising that the literature has converged so easily, supporters and detractors alike, on the assumption that resources are simply not sufficient in most countries for immediate implementation of these rights. That would have been appropriate only if most of the world were clearly too poor to afford these rights even at their least generous possible formulation (i.e. as rights to the satisfaction of minimum basic needs brought about by circumstances beyond the individual’s control) or if there was consensus around the most generous conception that advocates the highest standards of health, education, housing, etc. For those supporting the latter, most generous formulation, Maurice Cranston’s infamous remarks made several decades ago would still be appropriate:

“How can governments of those parts of Asia, Africa and South America, where industrialisation has hardly begun, be reasonably called upon to provide social security and holidays with pay for the millions of people who inhabit those places and multiply so swiftly? (...) [F]or a government to enforce
[social rights], it would need to have access to great wealth, wealth that most governments of the world have no means of acquiring.”

If this most generous and implausible formulation is rejected, however, then the most appropriate stance is to approach the resources issue in a less rhetorical and superficial manner than the literature has tended to do. Two main interrelated and crucial questions that need to be addressed are these: how poor, or rich as the case may be, our world and the individual countries in it actually are? What should the content and nature of social rights be in such a world? The next sub-section addresses the first question. The latter is the subject of section II.

I.2 The Poverty and Wealth of Nations: Is Most of the World Simply Too Poor to Afford Social Rights?

Let us start by noting that the level of wealth in our world has never been greater than it is today. Gross world product (GWP), i.e. the combined gross national product of all the countries in the world, was, in 2011, approximately US$78.95 trillion. That makes a per capita GWP of approximately US$12,000. Despite all financial and economic crises, including the most recent one of 2008 (“The Great Recession”), GWP and GWP per capita have not stopped growing and have never been so high. It has actually almost doubled in the past twelve years alone.

We can immediately dismiss, therefore, any claims that the world as a whole is simply too poor to guarantee all its inhabitants the satisfaction of their basic needs, most certainly if these are set at a reasonably basic level. Indeed, if one divides GWP per capita by the days of the year, the result adds up to just over US$32 a day, which would be plenty to enable everyone in the world to afford basic needs in food, clothing, shelter, education and health at a reasonably high level. To see this one can compare this figure...
with a couple of other indicators intended to measure the resources necessity of individuals to achieve a basic standard of living. In the USA, for instance, the living wage calculator of the Massachusetts Institute of Technology estimates that a family of four in the county of New York needs US$39,348 a year after tax to afford food, medical, housing, transportation and other basic expenses. That makes US$26.95 a day per person.\(^2^1\) At the other end of the spectrum, the World Bank sets its absolute poverty thresholds at US$1.25 and US$2 a day, that is, 25 and 16 times below respectively what GWP per capita would allow everyone to have under a perfectly equal distribution. At the higher US$2 a day threshold a redistribution of less than 0.5% of GWP, or less than 1% of high income countries Gross National Product’s combined, would be sufficient to take out of poverty everyone in the world (i.e. the 40% of the world population who live below that threshold). For the lower US$1 a day extreme poverty threshold, even less would obviously be required.\(^2^2\) Thus, as the World Bank affirmed more than fifteen years ago:

> “The world has more than enough resources to accelerate progress in human development for all and to eradicate the worst forms of poverty from the planet. Advancing human development is not an exorbitant undertaking. For example, it has been estimated that the total additional yearly investment required to achieve universal access to basic social services would be roughly $40 billion, 0.1% of world income, barely more than a rounding error. That covers the bill for basic education, health, nutrition, reproductive health, family planning and safe water and sanitation for all.”\(^2^3\)

It is clear from the data above that resources produced in the *world as a whole* would in no way be insufficient to enable everyone to satisfy their basic needs, even when these are set at reasonably high levels.\(^2^4\) We can confidently and quickly refute, therefore, the argument often accepted without contestation by many, including social rights supporters, that it would be simply too expensive and burdensome to guarantee to everyone basic education, health, food, housing, etc. The problem, so far as the world as a whole is concerned, is clearly not one of pure scarcity (i.e. insufficiency), but rather one of distribution.

Whether this unequal distribution is morally wrong, represents a violation of social rights or could be changed without significant negative implications for the production of resources are, of course, different and crucial questions. I will discuss them further in the second part of this article. The point for now is simply that social rights cannot be dismissed *tout court* or regarded as impossible to realise in the short term on grounds that the world as a whole is simply too poor to guarantee basic needs to everyone.

Let us now change the focus from the world as a whole to individual countries within it. Perhaps what those stating that the world is simply too poor to afford social rights really mean is that *most countries in the world, individually considered, are* too poor. They may well be assuming the more accepted position that social rights’ corresponding duties are primarily domestic matters. Under this assumption, the generic claim that social rights cannot be immediately implemented and are therefore to be progressively realised would be plausible if most of the countries in the world were indeed too poor to afford them. In an insightful article on social rights James Nickel proposes this very test: “The test of feasibility for an international human right that I propose is that most countries in the world today are able to implement the right in question.”\(^2^5\)
But is this modified claim any more plausible than the previous one? We must look at the wealth of empirical data available on the economic situation of individual countries to test it. It is worth re-emphasising, first, that the plausibility of the claim depends on how the content and nature of social rights are defined. But let us again leave that complex matter aside for the moment (I will return to this issue later) and start by looking at the economic situation of individual countries in the world. Gross Domestic Product (GDP), the standard measure of a country’s wealth, varies enormously among countries, and a large share of the world’s GDP is indeed heavily concentrated in the most developed ones. This might give many the impression that for most countries in the world it would indeed be impossible or extremely difficult to afford the satisfaction of the basic needs of their entire populations. But this impression would again not be borne by the facts. All but the poorest country in the world (The Democratic Republic of the Congo) have a GDP per capita above the lowest World Bank threshold of US$1.25 a day, and all but six would have a GDP per capita above the higher US$2 dollar a day threshold. More than half of the countries in the world have a GDP per capita above US$28 a day, or US$10,500 a year, which is the GDP per capita of Palau, ranked 114th among the 227 countries in the world with available data. You will remember that the living wage in New York, not one of the cheapest places in the world, was calculated by the MIT as being US$26.95 a day per person. Almost 75% of the countries of the world have a GDP per capita above US$10 a day, which is the current GDP per capita of India (US$ 3,800 a year, 2012 data), often used as an example of social rights unfeasibility. China, another country often intuitively regarded as too poor to afford social rights to everyone, has a GDP per capita of US$24.83 a day, almost the living wage in New York just mentioned.26

![Potential ability to guarantee basic needs](image)
The data just presented seems again to show that the intuitive belief that social rights are much too expensive for most countries, in particular developing ones, to afford, a belief shared both by supporters and detractors of these rights, cannot be substantiated by the facts. Again, just as the world as a whole would be able, in principle, to support its entire population's basic needs at a relatively high level with a GDP per capita of US$32 a day, most countries in the world considered individually produce enough resources a year to support their whole populations above, and often well above the US$2 a day level.\(^{27}\)

It is important to reemphasize, at this juncture, that the exercise so far has been a pure economic plausibility assessment. Nothing written so far has touched on the extremely complicated issues of normative justification and political feasibility, crucial to the definition of the content and nature of social rights. These will be discussed in the next section of this article. But the empirical data just presented enables us to approach these issues in a more informed and less abstract manner than the literature has so far tended to do.

The main issue for the vast majority of countries and for the world as a whole is not one of absolute insufficiency of resources, but rather inequality, i.e. that the relatively abundant world resources are distributed across and within nations in such a manner that some people are able to enjoy very high standards of living while others are incapable of satisfying even their most basic needs. Is redistribution of privately held resources from the better off to the worse off normatively required for compliance with social rights? If so, to what extent? Should it happen only within the borders of national states or also across them? How politically and practically feasible would the appropriate redistributive measures, whatever they are, be? The discussion of these intractable issues, to which we now turn, is essential for progress in the understanding and implementation of social rights and must be carried out within the backdrop of the concrete empirical data just presented.

II. Social Rights in a Context of Relative Abundance

When terms such as “resource scarcity”, “resource availability” and “lack of resources” are used in connection with social rights, we must therefore be careful not to accept too readily and, as shown above, mistakenly, that the whole world, and most countries within it, are simply not rich enough to enable everyone to satisfy the needs related to these rights. A better and more helpful way of approaching the issue, I suggest, is through a distinction between two types of scarcity: *absolute scarcity* (insufficiency) and *relative scarcity* (inequality). A situation of absolute scarcity is one in which available resources are clearly insufficient to guarantee everyone’s satisfaction of basic needs. A situation of relative scarcity is one in which available resources are in principle sufficient to satisfy everyone’s basic needs yet, due to the way these resources are distributed, some individuals are able to satisfy all their basic needs and more whereas others fall below basic needs satisfaction.\(^{28}\)

As the data presented above clearly shows, if our focus is the world as a whole, the appropriate standard to use is that of *relative scarcity*. The same goes for most of the countries in the world, but exactly how many would depend on at what level we set the threshold of basic needs satisfaction. In any event, as we saw, even if we set the threshold at a reasonably high level (say at double or triple the poverty threshold of the World Bank),
the standard of *absolute scarcity* would apply only to a handful of countries in the world.

Some important implications follow from this. First, social rights cannot be dismissed as infeasible on grounds of resource limitations alone as some critics do, even if one adopts a more generous interpretation of the content of these rights. These critics might be right in relation to some few countries, as feasibility should indeed be an important consideration when determining the content of a right and its corresponding duties, but are clearly wrong in relation to most countries in the world.29 Secondly, and most importantly for the purposes of this article, social rights supporters themselves should understand this and change their strategy in their fight for these rights accordingly.

Once it is realised that inequality (i.e. relative scarcity) rather than insufficiency (absolute scarcity) is the actual obstacle to the satisfaction of basic needs of most poor people in the world, the intractable yet unavoidable question for social rights supporters is this: what precise redistributive duties, if any, are entailed by social rights in our world of relative abundance of resources? Ought available resources to be more evenly distributed? If so, to what extent? To the extent that everyone is able to satisfy a minimum level of basic needs, or further to enable everyone to achieve an adequate standard of living? Should that right apply equally to everyone irrespective of what they do with their lives or only to those who cannot support themselves for reasons beyond their control? Should redistribution operate only within countries or also across countries? Would such redistribution be economically and politically feasible?

These are the intractable questions that most social rights supporters have for too long evaded under the cover of “progressive realisation” but that need to be answered in a plausible manner if these rights are ever to achieve equal status with more established civil and political rights. I can obviously not offer here a fully developed discussion of all these issues.30 In the remainder of this article, however, I want to propose, even if in sketchy form, how I think the task should be taken forward. The discussion will be focused on the following three main interrelated issues: (i) should social rights’ corresponding duties apply only within national states or globally?; (ii) what level of basic needs satisfaction should social rights guarantee?; and (iii) should this guarantee benefit everyone unconditionally or only those in need through circumstances beyond their control?

**II.1 Social and Economic Rights: Universal or Local?**

Answering whether social rights should be universal or local involves the controversial issue of whether principles of distributive justice should apply globally or be confined to nation states. The problem was insightfully discussed by Thomas Nagel in his paper “The Problem of Global Justice”.31 He distinguishes between two main views, the cosmopolitan and the political one. Cosmopolitans, such as Peter Singer and Thomas Pogge, for instance, believe that justice applies among individuals and see institutions as a mere instrument for the achievement of justice. The current absence of global institutions capable of implementing economic justice among individuals is thus something to be regretted and fought against. Supporters of the political view, such as John Rawls and Ronald Dworkin, see the locus of application of principles of distributive justice not on individuals but rather on institutions that exert sovereign power over individuals. No obligation of distributive justice exists, therefore,
between individuals not living under the same sovereign power. Given that the world is currently organised into separate sovereign states and lacks a global institution that exerts sovereign power, socio-economic justice is restricted to nation states. Further, there seems to be no duty for individuals to create such global institutions.

Nagel himself seems to favour the political view, and tries to defend it by claiming that “it is this complex fact—that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal preferences—that creates the special presumption against arbitrary inequalities in our treatment by the system”.\(^{32}\) As he explains, this does not mean that no obligations are owed to individuals of other nation states; but they are mostly negative obligations, to respect “the most basic human rights against violence, enslavement, and coercion”, and exceptionally positive obligations to perform “the most basic humanitarian duties of rescue from immediate danger”.\(^{33}\) His conclusion is neatly summarised in the following passage: “Everyone may have the right to live in a just society, but we do not have an obligation to live in a just society with everyone.”\(^{34}\)

I find this line of argument persuasive. In the way our world is currently organised, the nation state and its political, economic and legal systems are still by and large a much stronger determinant of someone’s circumstances and available choices than foreign countries and international institutions (although there are, of course, exceptions and great variations – more on which later). My income, wealth and well-being still depend mostly on the economic and social policies of the nation state under whose rules I live, especially its regulation of the economy, its taxation and social policies. My political right to influence them and my political duty to abide by its outcomes is what directs my distributive justice claims primarily towards my state and fellow citizens.

This current situation can, of course, change and is indeed changing, although to what extent and with what effects is a complex empirical matter open for debate. Some have claimed that the massive deprivation we witness in the world today is a direct consequence of an unjust global institutional order. Thomas Pogge is one of the leading supporters of this thesis. He claims:

“Given that the present global institutional order is foreseeably associated with such massive incidence of avoidable severe poverty, its (uncompensated) imposition manifests an ongoing human rights violation – arguably the largest such violation ever committed in human history. It is not the gravest human rights violation, in my view, because those who commit it do not intend the death and suffering they inflict either as an end or as a means. They merely act with wilful indifference to the enormous harm they cause in the course of advancing their own ends while going to great lengths to deceive the world (and sometimes themselves) about the impact of their conduct. But still, the largest.”\(^{35}\)

But Pogge’s opinion, although extremely well argued and backed by robust empirical data, is not uncontroversial. Many others claim that the global order is actually beneficial to the world’s poor and indeed directly responsible for the significant reduction in poverty experienced in countries such as China in the past decades.\(^{36}\) I do not think that this intractable dispute will be settled anytime soon. As a short and medium-term strategy to
strengthen social rights, therefore, I suggest supporters should adopt the less controversial political view that distributive justice is a national matter and attempt to define the content of these rights and their corresponding duties within countries. Moreover, extending distributive justice beyond borders is a less pressing concern than usually thought. As I have demonstrated in the previous section, most countries in the world are today sufficiently rich (be it because of or despite globalisation) to enable every one of its citizens to satisfy their most basic needs with their own national resources.

II.2 The Content and Nature of Social Rights

The next two questions I proposed above can be dealt with together since they are closely interrelated. They are questions about the content and nature of social rights. To recapitulate: (i) what level of basic need satisfaction should social rights guarantee? and (ii) should this guarantee benefit everyone unconditionally or only those in need through circumstances beyond their control?

The literature has by and large evaded these crucial questions by assuming uncritically that resources are insufficient to provide even a basic minimum to everyone in most countries and relying thus on the vague idea of progressive realisation. But if my argument in the previous section is correct, these questions, however intractable, should not be avoided. The difficulty comes mostly from the fact that distributive justice is still a highly controversial issue, philosophically and politically, and this is in great part due to an impossibility, in most cases, of us knowing the actual causes of a person’s predicament in terms of her ability or inability to satisfy basic needs, and also fierce disagreement about whether these causes are relevant or not for distributive justice. This issue is often discussed in the distributive justice literature with use of a dichotomy, choice and circumstance, or choice and chance, to distinguish between the two main potential determinants of a person’s predicament in life. Imagine a homeless person, like Mrs Grootboom in the famous South African case. Should it matter, for distributive justice purposes, whether her homelessness was a result of her lack of effort and hard-work (choice) or lack of opportunity or some kind of disability beyond her control (circumstance)?

Political philosophers, politicians and people in general disagree fiercely about this, as the age old and never ending disputes about the social security system vividly attests. Many believe that only those who find themselves in need through no fault of their own have a right to be supported by society (i.e. people should bear personal responsibility for their free choices, but not for the circumstances that affect them), whereas others argue that a decent society has a duty to support needy individuals simply because they are needy, irrespective of causes. The dispute is well summarised in the following passage of an article by Tom Campbell, a leading proponent of the latter view:

“If poverty is a violation of human rights it is primarily because of the stringency of the moral demands arising from the existence of suffering, irrespective of the special characteristics or merits of those involved. On this view, poverty is the basis of a universal, unqualified claim based on the moral relationships between those who suffer and those who can do something about it.”

Again, as with the dispute between holders of the cosmopolitan and the political view discussed in the previous section, I don’t think we are anywhere near settling this dispute.
However, I do think that the view that personal responsibility matters in social justice is currently the less controversial and more accepted one. Peter Singer, another leading proponent of the moral irrelevance of personal responsibility, himself admits its radical nature, accepting that it would require a change in “the whole way we look at moral issues – our moral conceptual scheme – (...) the way of life that has come to be taken for granted in our society”.39

It would again be strategically wise, therefore, for social rights supporters to push for a definition of the nature of these rights not as unconditional claims on society’s support, but rather as claims for support in cases of deprivation caused by circumstances beyond an individual’s control. The Universal Declaration of Human Rights itself adopts this less radical position in Article 25, as already noted above. Moreover, as I will claim below, such a strategy, if well implemented, would enable the eradication of poverty from most of the world without the need to disrupt the intuition held by many that personal responsibility is indeed an important element of distributive justice.

The problem is that at the same time that, for the reasons explained above, it would be unwise to leave the principle of personal responsibility aside, it is often impossible to implement it. As put by Richard Anerson in an insightful paper:

“The idea that we might adjust our distributive-justice system based on our estimation of persons’ overall deservingness or responsibility seems entirely chimerical. Individuals do not display responsibility scores on their foreheads, and the attempt by institutions or individuals to guess at the scores of the people they are dealing with would surely dissolve in practice into giving vent to one’s prejudices and piques. The criminal justice system has a difficult time making reliable determinations of an individual’s guilt or innocence with respect to the charge that she committed a particular criminal act; the thought that we could construct a distributive-justice system that assesses people’s lifetime responsibility is surely a nonstarter.”40

Other difficult obstacles to the implementation of a personal responsibility based system of distributive justice are related to the privacy of individuals (we would need to pry too much into peoples’ personal lives)41 and the fact that choice and circumstance are often inextricably linked.42 But there is a potential solution to these problems. It is the adoption of credible presumptions that someone’s inability to satisfy basic needs is the result of circumstance rather than choice. The challenge is to specify these presumptions credibly, that is, in such a way that enables one to assume, with a reasonable level of certainty, that an individual’s deprivations of basic needs satisfaction are likely to be mostly a result of circumstance rather than choice. If our presumptions are not credible, then we are back to square one, that is, open to challenges from those who deny social rights on grounds that basic needs deprivation is a matter of choice rather than circumstance (the so-called “undeserving poor”).43 But one does not need complete certainty to make these presumptions acceptable and legitimate. We content ourselves with less than certainty in many fields of policy and law; how could we do otherwise? We make people pay compensation to others on a balance of probabilities, and we put people in jail even if we cannot be 100% sure that they are responsible for the crime they are accused of. So why should we not also confer social rights on individuals based on a reasonable presumption that they suffer deprivation out of no choice of their own? In the final subsec-
tion of this part of the article I discuss briefly how such a credible presumption could work using the idea of equality of opportunity.

II.3 Equality of Opportunity and Social Rights

How can we establish a credible presumption that someone’s deprivation of basic needs is a consequence of circumstances beyond her control rather than choice, that is, one that would satisfy believers in personal responsibility that this person deserves to be guaranteed the provision of a certain level of basic needs as a matter of right? The well-accepted idea of equality of opportunity and the growing data available on it could, in my view, be helpful here. It reconciles the idea of equality, embedded in social rights, with that of personal responsibility, thus satisfying this important condition, as I defended above. Here is how John Roemer, a leading proponent of this idea, defines it in general terms:

"Citizens of western liberal democracies generally endorse equality of opportunity, I believe, because we think it is morally correct to hold persons responsible, at least to some degree, for their actions. This moral view about responsibility devolves in turn from the western liberal view of the value of individual freedom. If individuals are to be free to choose how to lead their lives, then they must be held accountable for those choices: otherwise such a freedom is vacuous. In economic phraseology, the cost of freedom is responsibility."

I have already noted the difficulties in distinguishing what should be attributed to individuals’ free choices and what should be regarded as caused by their circumstances. Roemer is obviously aware of this problem, as he himself notes that “[a]ny particular action a person takes, and its associated consequences, are (...) caused by a highly complex combination of circumstances and autonomous choices.” The complexity is not only of an empirical factual nature, i.e. of accessing information about an individual’s life and disentangling choices from circumstances in all her actions, but also of normative character. People often disagree about what should be considered an individual’s autonomous choice and what should be regarded as circumstances beyond an individual’s control. Take the classic example of smoking, discussed by Roemer, which can cause lung cancer and several other illnesses. Do individuals freely choose these consequences? But there are also much less controversial cases. No one would reasonably dispute, for instance, that discrimination of any sort (e.g. racial, gender, age) is a matter of circumstances that should not put individuals in disadvantage regarding their opportunities in life. The level of education and income of one’s parents is also clearly something that no one is able to choose. When inability to satisfy basic needs is caused by any of these factors, we have a clear case of inequality of opportunity and, as a consequence, a violation of social rights under the conception I am proposing.

Now, it is clearly impossible (and also undesirable for reasons already explained) to implement this conception in a perfectly accurate manner, individual by individual, with the information that is possible and legitimate to obtain on individuals’ lives. But we can make credible presumptions of injustice (i.e. of basic needs deprivation due to inequality of opportunity) based on the growing availability of data on inequality of opportunity. In an early study, for instance, Bourguignon et al. found that "between 10 and 37 percent of observed earnings inequality among Brazilian males can be attributed to a set of only five exogenous circumstance variables: race; place
of birth; mother’s and father’s education; and father’s occupation.” In a broader survey of six Latin American countries (Brazil, Colombia, Ecuador, Guatemala, Panama and Peru), Ferreira and Gignoux looked at how total household income per capita, which they use as a proxy for well-being, is influenced by a set of circumstances beyond individuals’ control related to family background (parent’s occupation and education), ethnicity, region of birth and gender. After a complex analysis of data available in national household surveys for these countries, they are able to construct what they call “opportunity-deprivation profiles”, which identifies “combinations of predetermined, morally irrelevant circumstances [that] lead to the greatest opportunity deprivation in a given society.”

In all countries, despite some important variations, the data reveals that household income in strongly influenced by ethnicity, parent’s occupation and education, and region of birth. In Brazil, for instance, black or mixed raced individuals, whose parents work in agriculture, whose mothers have no education and who were born in the North or North-East are significantly more likely to be poor than individuals with a different circumstance profile. To put it in more precise economic terms, they found that “between one quarter and one half of observed consumption inequality is due to differences in opportunities” in the selected countries; and their estimate is rather conservative, as it focuses on a rather small set of circumstances. In France, according to a study by LeFranc et al., “[d]ifferences in social origin translate into significant gaps of living conditions”, so “[e]quality of opportunity in income acquisition does not prevail”, although the “average gap between the most advantaged social group, the children of higher-grade professionals, and the least advantaged one fell by one half” between 1979 and 2000. Even in Sweden, which is regarded as a land of equal opportunity, residual inequalities remain, which cannot be properly attributed to individual effort. According to a recent study by Björklund et al. (2011) using a “set of circumstances that is about as complete as one can expect to compile, given existing data sets”, they concluded that “only at most one third, and in general less, of inequality is due to circumstances in Sweden”.

In another study, the World Bank has produced an index, called the Human Opportunity Index (HOI) focusing on children up to the age of 16. The focus on children eliminates many problems of separating choice from circumstance as it is more likely that children’s inabilities to satisfy basic needs will mostly derive from their circumstances and not their choices. As put in the report: “focusing on this age range obviates the need to make any distinction between access and utilisation related to effort, attitudes or preferences of the child or parents. The assumption is that as long as society agrees on universalising an opportunity, it must ensure utilisation by children, independently of the preferences of the child or her family.”

The study analyses opportunity of access to a set of basic services and goods, divided into basic education and adequate housing, in light of seven circumstances of children’s lives: parent’s education; family income per capita, number of siblings, presence of both parents at home, child’s gender, head of household’s gender and location of residence (rural or urban). It then constructs an index ranging from zero to 100, where 100 is a situation of perfect equality of opportunity, that is, all children, irrespective of circumstances, have access to all basic services.

Even if the current data is not sufficient to disentangle with 100% accuracy choice and
circumstance in order to enable the principle of personal responsibility to be implemented individual by individual, it can give us the necessary confidence to establish presumptions, in many countries, that a great part of basic needs deprivation in our world of relative abundance is not due to a lack of effort by poor people (choice), but rather the significant inequalities of opportunities that they face in their lives (circumstance). This presumption becomes stronger the more basic the level of needs deprivation we take into account.

If the conception of social rights I defended above is correct, the corresponding duty of states is to adopt measures that correct or minimise the inequality of opportunities suffered by these groups and, failing that (or until the effects of these measures are felt), to compensate these groups by guaranteeing a minimum level of basic needs satisfaction which, most likely, they would have been able to achieve had opportunities in their society been equal.

Conclusion

I have argued in this article that social rights supporters should stop complaining that social rights are neglected in comparison to civil and political rights and investing so much effort in the argument that both types of rights are identical in terms of their dependence on scarce resources (the “parity thesis”). We should instead try and clarify the concept of resource scarcity and how it affects the determination of the content of social rights. I have tried to contribute to this project by arguing, first, that resources in the world as a whole and in most of its countries are currently sufficient to guarantee everyone a reasonably high level of basic needs satisfaction. The problem, therefore, is not insufficiency, but rather inequality in the distribution of these resources. This raises several intractable questions on resource inequality and re-distribution that need to be answered for the determination of the content of social rights, all pertaining to the controversial political and philosophical field of distributive justice. I have then discussed these questions and claimed that the most plausible way of conceiving social rights under circumstances of such fierce disagreement on how the relatively abundant resources of the world and its individual countries should be distributed is to view them as rights to an equal opportunity to satisfy basic needs, that is, a right not to be unjustly deprived of the opportunity to satisfy these needs. I have also claimed that the implementation of this conception would require the adoption of credible presumptions of inequality of opportunity as the cause of basic needs satisfaction deprivation, and that the growing empirical data on inequality of opportunity can help in that effort.

There is of course much left to do in the task of making social rights real, but I hope this article has at least indicated a plausible, realistic and promising way forward.

1 The author is an Associate Professor of Law at the University of Warwick.


7 For a similar claim see Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 3: “[I]t is not enough to acknowledge the need to transcend the traditional distinctions. There is still much to be done to develop a full understanding of the implications of positive duties triggered by human rights, both from a theoretical and practical legal perspective.”


12 See, for instance, Fabre, C., *Social Rights under the Constitution*, Oxford University Press, 2000. In this otherwise extremely interesting monograph on social rights, a single paragraph is devoted to this issue, pp. 166-7.


14 See above, note 3, p. 84.

15 See above, note 6.

16 See, for instance, Bilchitz, above note 3.


20 In 1999 it was US$ 6800. See http://www.indexmundi.com/g/g.aspx?c=xx&v=67.

21 Available at http://livingwage.mit.edu/ (last accessed 9 February 2014).


23 World Bank, State of Human Development Report, 1998, p. 37. It is also perhaps relevant to note, to put this into perspective, that the world’s billionaires (497 people, approximately 0.000008% of the world’s population) were worth an estimated $3.5 trillion (over 7% of world GDP) and the total wealth of the top 8.3 million people (0.13% of the world’s population) was $30.8 trillion in 2004, about 25% of the world’s financial assets in 2004. See Pogge (2008), above note 22. A recent report by Oxfam reinforces this point: the world’s 85 richest individuals are as wealthy as half of the world’s poorest population together, i.e. 3.5 billion people. See Wearden, G., “Oxfam: 85 richest people as wealthy as poorest half of the world”, *The Guardian*, 20 January 2014.

24 It is important to note that I am using annual national income as a proxy for available resources, which is a conservative estimate. A perhaps more adequate measure would be so-called national wealth, which also takes into account accumulated wealth and is therefore a more accurate measure of countries’ capacity to support financial burdens. If national wealth is considered, then total world resources would add up currently to an as-


27 It is important to re-emphasise here that GDP represents the wealth produced only in one year. Accumulated wealth is often several times that. See above, note 24.

28 In an interesting paper Nick Ferreira makes a related point using a distinction between two senses of the concept of feasibility. (See Ferreira, N., “Feasibility constraints and human rights: Does ‘ought’ imply ‘can’?”, South African Journal of Human Rights, Vol. 28, Issue 3, 2012, pp. 483-505.) He proposes a distinction between two senses of infeasibility of rights. As he explains it, a right can be infeasible because “it is not possible to implement the right” (he calls this “infeasibility-p”), or because “it is too costly to implement the right” (“infeasibility-c”), p. 491. My argument so far is simply that what Ferreira calls infeasibility-p is clearly not the problem for social rights. Whether they are also infeasible-c, i.e. “too costly”, depends of course on how “too costly” is defined, and this relates to the discussion of section II.

29 A similar point was made by Nickel, J., above note 25, p. 400: "But it seems likely that at least the top third of them are able to implement basic economic and social rights." My claim goes further as he seems to be using actual GDP rather than PPP (purchase power parity).

30 I have dealt with some of the issues in previous work, in particular Ferraz, above note 11, and Ferraz, O., "Harming the poor through social rights litigation: lessons from Brazil", South Texas Law Review 89 (7), 2008, pp.1643-1668.


32 Ibid., pp. 128-129.

33 Ibid., p. 131.

34 Ibid., p. 132.


37 Government of the Republic of South Africa and Others v Irene Grootboom and Others, CCT 11/00. This was a famous case decided by the Constitutional Court of South Africa in which Irene Grootboom and other homeless people successfully argued that their right to housing under the South African Constitution had been violated; yet no effective remedy was granted, at least from the perspective of the claimants, who remained homeless. Mrs Grootboom herself died homeless more than 10 years after her court “victory”.

38 In Pogge (2008), above note 22, p. 66.


41 Ibid., p. 107.


43 “Undeserving poor” is an expression that dates back to Victorian times and is still often, but not exclusively, employed by conservative critics of the welfare state to refer to those beneficiaries who “don’t deserve” to be helped by the state since their predicament is allegedly their own fault due to, for instance, their alleged laziness and lack of will to work. For an interesting philosophical discussion of the topic, see Anerson, R., “Egalitarianism and the Undeserving Poor”, The Journal of Political Philosophy, Volume 5, Number 4, 1997, pp. 327-350.


45 Ibid.


48 Ibid.

49 Ibid., p. 654.


51 See above, note 42. It is important to note that the study measures pre-tax income. So, given Sweden’s extensive redistributive policies, this residual inequality of opportunity driven inequality of income is dealt with by the state. In the USA, conversely, the more significant pre-tax inequality of opportunity driven inequality of income is less reduced, and it is left almost intact in Latin America. See The OECD Latin American Economic Outlook 2009, available at http://www.oecd.org/dev/americas/latinamericaeconoomicoutlook2009.htm (last accessed 26 February 2014); Stiglitz, J., The Price of Inequality: How Today's Divided Society Endangers Our Future, W.W. Norton & Company, 2013.


53 Ibid.
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. 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. 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.

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 discrimination 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. 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. 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”. Indeed, Townsend argued, poverty could be objectively defined in so far as it related to relative deprivation. 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].”

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.”

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. Second, defining a person as living in poverty depends on a consideration of their deprivation relative to others. 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. 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”. 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.” 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. As Ferraz notes, when it comes to realising social rights, “[t]he main problem (...) is not insufficiency of resources, but rather inequality of distribution”. 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. 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. 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.

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. And there has been much debate about the most appropriate indicators. 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. 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 healthcare 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.”

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. 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. 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. 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. 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. 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 (ICESCR) 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.”

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

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.

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.” Those interpreting and applying socio-economic rights often make the same assumption. 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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{43} And in limited instances the link between an enumerated ground and socio-economic disadvantage has been expressly referenced by the court.\textsuperscript{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.\textsuperscript{45} Although there has been some discussion of “socio-economic situation” being an “other status” protected by the right, this has been limited.\textsuperscript{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. 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.

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.”

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. 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. 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. 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. 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. 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. However, Budlender, a litigator in South Africa, explains that it was raised as a “subsidiary claim” in the case and “received little attention”. 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. 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”. 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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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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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.

It is no coincidence that those from wealthier, more socio-economically advantaged backgrounds are overrepresented amongst the political elite.

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.


For some discussion of the various options as discussed it the context of the UK Equality Act 2010, see Fredman above, note 6.

See Equalities Review above, note 21, Box 1.3.

For further discussion see Part 2 below.


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.

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

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).


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/décision-ssc-csc/decisions/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.


45 See above, note 6, p.176.

46 For more on this see Part 4 below.
47 See Fredman above, note 26, p. 177.
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.
58 See above, note 27.
60 See The Equal rights Trust above, note 36.
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.
“On 1 September 2011, I was dismissed from my teaching position in the university, so my teaching career came to an end. I am convinced that my political beliefs were the reason for my dismissal. In May-June 2011, members of national security and the president’s administration came to the university for an inspection visit. The decision to dismiss me was made by the end of July and was made in complete silence. I then was notified of the non-renewal of my contract. When I asked for the reason behind my dismissal, they responded by saying that they do not remember.”

Andrey Leonidovich Zawadski
Socio-Economic Inequality in Belarus

Testimony of Political Activists

The International Covenant on Economic, Social and Cultural Rights requires states to guarantee that the rights contained within it, including those to education and work, be exercised without discrimination on any grounds, including that of “political or other opinion”. In its recent EU-funded project in Belarus, ERT discovered widespread discrimination against political opponents of the Belarusian regime. In particular, we found that, as a result of their political opinions, political and social activists in Belarus are exposed to disadvantages when participating in employment and education.

In January 2014, ERT spoke with two Belarusians whose views are, in one way or the other, not in line with those of the Belarusian regime. Tatsiana Shaputska, a journalist, spoke of her experience of discrimination in higher education. Andrey Leonidovich Zawadski, a teacher, told us that his political views were the reason for the termination of his job teaching law to undergraduates.

Tatsiana Shaputska

I am 23 years old. I was born and have lived all my life in Minsk. From 2007 to 2011, I was a member of the Young Front, a youth political organisation. Now, I am trying to enrol in the European Humanitarian University and simultaneously working part time as a journalist while on maternity leave.

I initially started thinking about the political situation in my country following the political demonstrations and “Squares” (camps in one of the main city squares in Minsk) which were connected to elections in Belarus in 2006. At the time, I was 16 years old and my parents did not allow me to participate in those events. A year later, on 26 March 2007 (the day of Belarusian liberty not recognised by current authorities but celebrated by the political opposition), I participated in demonstrations. At the same time, I joined the Young Front. My political views came from the influence of mass media and my own consideration of issues. When I first joined the organisation in 2007, I became involved in website development and, after some months, I was given the position of Press Secretary.

The Young Front is a Christian democratic organisation with conservative views that has a history of organising cultural and ed-
Educational activities. As with most political opposition organisations, it is a democratic opposition with the major aim of establishing democracy through democratic elections. This is usually done through street protests around the time of the election. In particular, the Young Front protested against the Belarusian government’s manipulation of the electoral process by compelling certain citizens to vote in the pre-election term period. However, at the present time, the organisation is not as active as it used to be because of conditions on its activities imposed by the local authorities.

The general situation in Belarus is that your political views influence all aspects of your lifestyle. There are many ways of supporting the current powers. For example, teachers are automatically expected to support the regime. Many teachers are members of the electoral commission and it is usual practice for teachers to be such members because the counting of election votes occurs in schools. It is a vicious cycle: if you do not support the current authorities, you inevitably stand out from the crowd because the majority does not want to oppose authorities. However, you must oppose the authorities because of your political views. As a result, you feel different from everyone else and this becomes your special lifestyle as you have become “special” in the country.

My personal experience of discrimination on grounds of my political views was when I was a law student at a university in Belarus. In mid-November 2009, as a representative of the Young Front organisation, I was invited to the civil society forum of the [European Union] Eastern Partnership in Brussels. My attendance at the forum meant that I was absent from classes for three days. At the time, there was a rule that students may not leave the country’s borders during the school term unless they had special written permission from the administration. However, this rule was nominal and rarely enforced.

After my return, on 3 December 2009, I was summoned to the dean’s office and was presented with an order of dismissal signed by the rector of my university. I was shocked. I had a good attendance, had participated in scientific conferences and the public life of the faculty, and had a high grade point average of 8.5 points. By contrast, other students who had committed a similar infraction by crossing the borders, sometimes for far longer, and who had worse performances in their studies than me, continue to study in the university.

In my view, the way I have been treated by the faculty is an exception to the usual approach. Even the dean of the faculty proposed in a memo to limit the punishment. The copy of the dismissal order stated that the dismissal was based on two things: first, on my failure to explain my absence from classes upon being confronted with the dismissal order that had shocked me; and, secondly, on two memos, the contents of which have not been explained to me. The European Commission intervened in my defence to oppose the dismissal but I was not surprised that I got expelled anyway.
I think that my expulsion was motivated by my political beliefs. As I was the press secretary of the Young Front, my participation in the Eastern Partnership forum was widely covered in the media and the Belarusian authorities were aware that the forum did not invite pro-government and public organisations.

The formal reason for my absence was my participation in the forum, and a three day absence for such an event was justifiable – I did not think it was disrespectful. First, I gave notice to my superior, and second, my participation in the civil society forum of the Eastern Partnership has allowed me to gain important experience as a political activist student, which is particularly important as this was my specialist subject at university. Later on in court, my lawyer reasoned that I did not need a written permission because my specialisation at university was political science and so it was logical that being a representative of a political organisation in an international forum was a benefit to my studies. But the university administration insisted that I had to take a written permission from the central office of the university and this was the basis of my expulsion.

In reality, people violate this unenforced rule all the time – it would be difficult to find a person who did not go abroad at some point during term time – and many people have been absent for much longer periods than me without sanction. It would be ridiculous to enforce the rule fully because then people would not be able to go anywhere at all. In my case, the administration used this requirement as the basis for my expulsion. There was no further investigation into whether the requirement applies only during the school term time and not holidays and the rule is drafted in such a way that you cannot understand whether you have to receive permission or not. But, in any case, if the administration needed to use it, they could do so – as they did in my case. Its application was arbitrary.

I appealed against the decision of the Ministry of Education to the court of the Moscow district. In court, I pointed to the discriminatory nature of my charges. However, the court rejected the petition. In court, my lawyer requested to make a comparison of my case to similar cases of others where students in university went abroad without permission to prove that I was not guilty, or, alternatively, at least the fact that nobody follows this requirement. The judge declined this request.

At the trial, I was blamed along with some other students. But among those other students, the days missed were as many as 70 days! The court's final decision was made on the formal grounds of the violation of internal rules.

Most of my friends are members of the Young Front or are like-minded people. They suffer because of their political views in many ways – some of them are arrested, others have received administrative fines. Our political views affect all of our lives in some way here.

In terms of the future of Belarus, all we can do is hope for the best. I believe that the time will come for change, and it is important for now that there are enough people with fresh ideas and resources to take the initiative and make the necessary changes.

Andrey Leonidovich Zawadski

I am 52 years old. I was born and grew up in Minsk. I originally trained as an engineer and later, in 2001, graduated in law. I have also been involved in politics for many years. Since 1993, I have been an active member of
a civic organisation named in honour of one of the most prominent Belarusian figures, Lev Sapieha, whose main aims are to restore traditions, promote democratic principles, develop local self-government and support local initiatives. I am also the author of many publications on the development of local self-government.

In 1990-1996, I was the Deputy of a City Council. The major source of my political beliefs is and was my family who were critical of the Soviet regime and were positive of the democratic events in Poland and the other neighbouring countries in the 1980s and 1990s. This, along with the strong sense of nationalism I gained from my family and background, influenced my political views and opinions. I made friends with leaders of Belarusian national political groups including the Belarusian Popular Front and the Belarusian Social Democratic Party, which were originally aimed at promoting cultural identity and organised cultural events. From those political groups, later on political leaders emerged. My most memorable event at the time was when I participated in restoring Belarusian culture names to Belarusian streets (i.e. the pre-communist historical street names).

On 1 September 2003 I became a teacher of several subjects including Administrative Law, Constitutional Law, Municipal Law, and the History of the State and Law at a university. On 1 October 2008, under a fixed-term contract, I obtained the position of Associate Professor of Theory and History of Law. The content of my teaching focused on the juridical aspects of my country’s situation. I tried to present objectively a critical view of the current situation in the country with the aim that my students could understand laws as they should be implemented in practice.

On 1 September 2011, I was dismissed from my teaching position in the university, so my teaching career came to an end. I am convinced that my political beliefs were the reason for my dismissal. In May-June 2011, members of national security and the president’s administration came to the university for an inspection visit. The decision to dismiss me was made by the end of July and was made in complete silence. I then was notified of the non-renewal of my contract. When I asked for the reason behind my dismissal, they responded by saying that they do not remember. It is not normal to have a silent non-renewal of contract especially as I had worked for the university for eight years, not two weeks or two months. The university has obligations towards dismissed employees. I should have been invited by the commission to a meeting when the decision to not renew my contract was made, and I should have been given reasons for my dismissal. This did not happen – the proper procedure was not followed.

I suspect that the national security and the president’s representatives advised, during their visit, on what type of people should be teachers and what should not. I suspect they were not happy with me teaching, on
account of my political beliefs, and told the university to dismiss me. I can think of no other explanation. Throughout my teaching career, I never received any complaints, I was an honorary associate professor and, in the university ratings, I was the top rated among the students. Furthermore, another senior lecturer who was a member of a religious organisation that was not popular with the government was dismissed as well. There is no reasonable justification for the non-renewal of our contracts.

I had a lot of support. I am grateful for the support of my colleagues and my students who collected a total of 300 signatures protesting my dismissal. Further, my Faculty expressed surprise at the university’s administrative decision in a written statement in August 2011, unanimously recommending that the administration reconsider its decision and renew my contract. This did not happen. When I took the matter to court for compensation, although I had the law on my side under the Labour Code, I was denied compensation in the end.

The situation is difficult in Belarus. Even though organisations are by nature far from being political, if they express an opinion different from that of the official authorities, they are considered to be political opposition bodies. This was the case with me, as I am a member of a cultural organisation and my colleague is a member of a religious organisation. The fact that I had expressed an opinion that did not coincide with the official view had resulted in me being labelled as someone who associates with the political opposition.

In my view, there are many people in Belarus who are not afraid to express their political opinion. However, in practise, life is unpredictable for such people. Political activities are suppressed in Belarus. Presidential candidates in the previous election have been illegally detained, including for example Mikalaj Statkievič. Some organisations have been denied registration, resulting in the absence of organisations in some regions, and other organisations are given conditions which restrict their Activities.

Although I have lost my full time job as a teacher, I still have other means of earning income. I have contracted some work outside of the teaching sector, and I have recently been involved in European initiatives. I have held seminars on questions of local self-government in Minsk and edited brochures on the topic of the possibility of Belarus joining the European Charter of Local Self-Government. I also have contacts in different countries.

However, that is not my main concern. I want to do what I think is right and promoting democracy remains my priority. Although I know that it is difficult to make forecasts, the actions of my colleagues and I, in particular the preparation of a concept on the reform of local self-government, are for the sake of the future. I understand that change will not happen overnight. In Poland, for example, the concept of social reforms born in the mid-1960s was only brought to life 15-20 years later.

I think that we must be ready for gradual progress and we must understand that the changes will eventually come and when they do we must be ready to accept them. Otherwise, we will not be hoping for anything and when something changes we will not be ready for it, which would be worse. Even if I do not live to see the changes, I am sure that they will come and I want to help set the foundations for reform for this inevitable change.
“In South Africa, the litigation to attempt to enforce socio-economic rights got off to a bit of a false start: the issue of equality was not raised in either of the first two big cases, Soobramoney (the right to health services, 1997) and Grootboom (the right to housing, 2000). The focus was on the content of the positive obligation on the state to fulfil the rights. We chased after the minimum core for a while. That proved to be a dead end.”

Geoff Budlender
Socio-Economic Equality in the Courts: The Litigator’s Perspective

For the last three years, ERT has worked toward producing a book which is forthcoming later this year, entitled Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights. As the research for this publication found, whilst there has been much development before courts around the world in advancing protection of socio-economic rights and, separately, equality and non-discrimination, to date there is a dearth of litigation focusing explicitly on the right to equal enjoyment of socio-economic rights.

Addressing socio-economic disadvantage and poverty is arguably the biggest but most pressing challenge for equality lawyers in the 21st century. The gap between the rich and poor is ever increasing, both within particular countries and across borders. And yet, there is some way to go before human rights are implemented in such a way as to adequately address this challenge.

ERT spoke with two experts in matters of socio-economic rights and the rights to equality and non-discrimination, both of whom have a wealth of experience of litigating these rights before the courts. Geoff Budlender is a practising barrister in South Africa. He was one of the founders of the Legal Resources Centre and continues to undertake socio-economic rights work now that he is in private practice. Iain Byrne is Acting Head of the Economic, Social and Cultural Rights Team at Amnesty International. During his time at INTERIGHTS, he was involved in numerous socio-economic rights cases being brought before courts in Europe.

ERT: You are widely recognised for your expertise in strategic litigation in relation to the socio-economic rights of the poor. How did you get involved in this work? What life experiences and major influences played a role in getting you to your present position?

Geoff Budlender: From my schooldays, I was in general opposed to apartheid, I think mainly because that was what I learnt from my parents, who were liberal. When I went to university, I became a student activist. I learnt in practical ways about the realities of apartheid, by working with the people who were on the receiving end of apartheid in various ways. I was heavily influenced by Steve Biko, who was a leader in the black consciousness movement and the South African Students Organisation. He made a very effective and radical challenge to white liberalism. I was forced to re-think who I was, and what I could and should do in the struggle against apartheid. I changed my course of study from
medicine to law because I thought it created opportunities to make a contribution.

When I first became a lawyer, I was involved in representing political activists who were being prosecuted for their anti-apartheid activities. I then became interested in how the law could be used strategically to challenge some of the underlying iniquities of apartheid. In 1979, I was one of the founders of the Legal Resources Centre (LRC), a public interest law centre which was established with that goal.

Finally, in 1994, we achieved political democracy. The challenge now became how to deal with the deeply entrenched poverty and inequality which had been created by apartheid. The struggle against apartheid had not only been a struggle for the vote – it was also a struggle against poverty, hunger, landlessness, homelessness, poor education and so on. So it was not surprising that the 1996 Constitution included pretty generous social and economic rights – the challenge became how to operationalise them.

My involvement in these issues was a natural progression from the work which I had previously done. I left the LRC for just under four years to serve as civil service head of the new Department of Land Affairs, which was creating and implementing a national land reform programme. I then returned to the LRC for another four years, during which almost all of my work was in strategic litigation on socio-economic issues. Now I am in private practice as a barrister, still doing a good deal of work in that area.

Iain Byrne: Like many people, I first became interested in human rights as a member of Amnesty International. However, in those days (the 1980s) Amnesty did not work on socio-economic rights, reflecting the relative lack of attention given to those rights by international NGOs at that time. I would not have imagined that nearly 30 years later I am now part of the economic, social and cultural rights (ESCR) team at Amnesty, the organisation having started to work on them a decade ago.

It was not until I studied at the Human Rights Centre, Essex University in the 1990s that I became more aware of socio-economic rights. This interest was reinforced when I taught a postgraduate course on the subject in Brazil for the Centre followed by research for a study auditing ESCR protection and enjoyment in the UK.

During my time at INTERIGHTS, working with my colleagues, I developed the socio-economic rights work of the organisation. In so doing I became involved in litigation including the first cases taken by INTERIGHTS to the European Committee of Social Rights (ECSR) under the collective complaints mechanism.
One of the biggest influences on me personally was the late Professor Kevin Boyle at Essex University. Not only was Kevin a brilliant academic but he was committed to translating this expertise into practical action (in his particular case taking ground-breaking cases to the European Court of Human Right). At the same time he was also encouraging and supportive of younger colleagues. It was thanks to Kevin that I came to work on socio-economic rights and to realise their importance in ensuring that everybody can enjoy a dignified and decent life.

ERT: How do you see the relationship between the rights to equality and non-discrimination on the one hand and socio-economic rights on the other? How do you assess global developments in human rights in the last few decades in these two areas?

Geoff Budlender: I see these rights as closely connected. Socio-economic rights are a means of addressing inequality. And the right to equality is a means of achieving socio-economic rights.

When our Constitution was negotiated, there was controversy about whether it should entrench and protect existing property rights. There was a concern that this would entrench the existing inequality. The introduction of socio-economic rights was in part to create a counter-balance to the possible entrenchment of inequality. In practice, socio-economic rights are poor people's rights, because wealthy people are able to use their own resources to achieve their social and economic needs or desires.

Iain Byrne: The two are inextricably linked. As the UN Committee on Economic, Social and Cultural Rights (CESCR) has stated, “[n] on-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights”.

Ensuring equality and non-discrimination for all is an immediate and cross-cutting obligation and the failure to do so is a clear rights violation. This fundamental guarantee is reflected in the current debate around the post-2015 development goals as exemplified in the need this time “to leave nobody behind” – compared to the failure of the current Millennium Development Goals (MDGs) to incorporate human rights which has resulted in huge inequalities across many of the current goals.

In 2009 the CESCR recognised the importance of the link with a dedicated General Comment. In so doing, the Committee specifically highlighted “economic and social situation” as a ground of discrimination, noting that “[a] person’s social and economic situ-
ation 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.”

Both areas have witnessed a significant growth in standard-setting and jurisprudence during the last 20 years. In particular, there has been an increasing amount of socio-economic rights caselaw at all levels, much of it concerning lack of equal access to, and enjoyment of, rights such as health, education and adequate housing. The recent coming into force of the International Covenant on Economic, Social and Cultural Rights’ own complaint mechanism (nearly 40 years after its civil and political rights counterpart) should herald significant new decisions, as will a similar system for the Convention on the Rights of the Child.

However, this increasing judicial attention has not always translated into positive economic and social change on the ground, especially for the most disadvantaged and marginalised. Implementation remains a key challenge.

**ERT: To what extent is the lack of enjoyment of socio-economic rights a problem of inequality in the jurisdiction in which you have been practicing?**

**Geoff Budlender:** Inequality is both a cause and a manifestation of the lack of enjoyment of socio-economic rights in South Africa. Unequal access to education, health care and employment aggravates and perpetuates the lack of enjoyment of socio-economic rights. Inequality lies at the heart of it all.

**Iain Byrne:** Inequality is clearly one of the most (if not the most) significant issues impacting on lack of socio-economic rights enjoyment in Europe. The austerity measures implemented by governments across Europe following the financial crisis have resulted in systematic and widespread socio-economic rights retrogression.

However, the impact has been particularly disproportionate on disadvantaged minorities such as the Roma, migrants, people with disabilities and children living in low income families. Even where economies are recovering we are often seeing growing inequality as people at the bottom do not share in socio-economic progress. This phenomenon is reflected in the assessments by human rights bodies such as the Council of Europe’s European Committee of Social Rights and the UN’s Committee on Economic, Social and Cultural Rights.

**ERT: Can you talk a little bit about the legal landscape in your jurisdictions regarding equality in respect to socio-economic rights? What is the extent of the courts’ involvement in this area?**

**Geoff Budlender:** Because of the litigation history in respect of socio-economic rights that I mentioned earlier, the courts have only slowly become involved with issues of equality in respect of socio-economic rights. We now have a fairly well-developed jurisprudence with regard to the meaning of “unfair discrimination”, the core concept in our equality right. However, we have not yet adequately translated this into a means of addressing systemic inequality in the provision of services or benefits. In some ways, our task should be easier than in many other countries because of the close correlation between race and poverty.

It is relatively easy to characterise some forms of social inequality as racial inequal-
ity. This means that we have not yet had to address the sometimes contested question of poverty as a ground of discrimination.

**Iain Byrne:** Although not every European country has a comprehensive framework of legally entrenched socio-economic rights (e.g. the UK and Ireland lack such) all of them will have some form of regulatory legislation governing areas such as housing, education, health, work and social security. This will often involve scrutiny by quasi-judicial bodies such as employment or housing tribunals with a right of appeal to courts. Many (if not the majority) of the cases will concern lack of equal access or discrimination which could of course also be examined by dedicated equality rights bodies.

All of the above demonstrates that economic and social issues are capable of both adjudication and enforcement even if the actual number of cases concerning alleged violations of substantive legally entrenched socio-economic rights may be relatively small but growing. Across Europe from Hungary to Finland, from Portugal to Latvia, courts have handed down significant socio-economic rights related decisions. Only recently, Portugal’s Constitutional Court struck down government austerity measures cutting public sector pensions.

**ERT:** Has there been much litigation in which the rights to equality and/or non-discrimination have been employed to protect the socio-economic rights of disadvantaged groups?

**Geoff Budlender:** The litigation to attempt to enforce socio-economic rights got off to a bit of a false start: the issue of equality was not raised in either of the first two big cases, *Soobramoney* (the right to health services, 1997) and *Grootboom* (the right to housing, 2000). The focus was on the content of the positive obligation on the state to fulfil the rights. We chased after the minimum core for a while. That proved to be a dead end.

I think *Treatment Action Campaign* (prevention of mother-to-child transmission of HIV, 2002) was the first occasion on which equality was raised in a major socio-economic rights case – but it was raised as a subsidiary argument amongst many others and received little attention. It was only as we progressed, that we began to appreciate the full significance of an approach based on the right to equality. We should have picked this up earlier.

An early case (*Larbi-Odam*, 1998) dealt with discrimination in the refusal to employ non-citizen permanent residents as teachers. But I think most of us missed the signal which it sent. Even now, the issue of equality is not adequately explored and raised. It is too often raised only as a “fall-back” argument. We have not adequately explored either its content or the question of appropriate remedies for a breach.

**Iain Byrne:** Some of the groundbreaking socio-economic rights cases at both the domestic and supranational level have involved issues of equality and/or non-discrimination with respect to disadvantaged groups such as the Roma and migrants. These include *DH v Czech Republic* before the European Court of Human Rights, concerning systematic discrimination against Roma pupils in the education system and a number of cases before the European Social Rights Committee (e.g. *FIDH v France* – medical assistance for illegal migrants; *ERRC v Italy*, *ERRC v Greece* and *INTERIGHTS v Greece* – inadequate housing for Roma).

Both the European Convention on Human Rights (ECHR) and the European Social Char-
ter contain dedicated provisions on equality and non-discrimination (Article 14 of the ECHR and Article E of the Revised Charter), both of which have to be argued with other substantive rights provisions.

**ERT: In your experience, what are the main challenges in litigating the socio-economic rights of the disadvantaged?**

**Geoff Budlender:** The fundamental problem is that inequality is so gross and all-pervasive that one sees it in all parts of our national life, all the time. Government is committed to addressing it, but often does so clumsily or ineffectively. We have not yet worked out a means of identifying which aspects are vulnerable to constitutional challenge and what the appropriate remedies would be.

A good example of this is the school system, which is highly unequal and, in fact, dysfunctional in some places. There is a constitutional right to basic education and a constitutional right to equality. The breach is obvious. The remedy is, however, less obvious.

**Iain Byrne:** Beyond the general challenge in socio-economic litigation of ensuring sufficiency of evidence, involving disadvantaged groups can present particular challenges.

The very fact that people are disadvantaged means that they are frequently marginalised from society, including the legal system. For such groups, trying to convince them that litigation can be an effective means of achieving positive and meaningful change in their lives can be difficult. Even if *pro bono* legal assistance is available, the length of time of some litigation (especially if it involves exhausting all available domestic remedies and going to supranational bodies such as the European Court of Human Rights) can be lengthy with no guarantee of implementation at the end. The more disadvantaged the group, the greater the likelihood that it will be subject to some form of stigma and/or prejudice which will have a negative influence on the willingness of the state to comply with any positive decision.

Assuming victims can be identified and willing to proceed (something, of course, which is not required for the collective complaints system under the Social Charter but is more a question of effective collaboration with national NGOs), the challenge of evidential proof can be daunting in socio-economic cases. Clearly, and particularly in proving inequality and discrimination, the use of statistical data can be vital. However, such disaggregated data does not always exist, especially with respect to ethnic minorities such as the Roma or undocumented migrants, requiring potentially costly and time-consuming collection and analysis.

Even if a successful case can be argued, the court may consider that what it is being asked to do exceeds its powers and is something more within the remit of the legislature or executive. This is clearly the case where socio-economic rights are not explicitly constitutionally entrenched and/or there are significant policy or resource implications.

Finally, as I have reiterated before, even if the victims’ complaints are upheld, the challenge of implementation remains, which may deter future litigants.

**ERT: What are the key strategic considerations you take into account when deciding whether to take litigation and how it should progress? Apart from legal strategies, how should the litigation interact with the wider advocacy strategy? To what extent is and should the media be involved?**
**Geoff Budlender:** Major litigation works best when it is part of broader strategy. In major cases, the achievement of rights involves many actions: public education about the rights; social mobilisation by the people affected; campaigning and advocacy (including through the media); litigation; and the monitoring and enforcement of compliance with the order made by the court. The litigation has to be planned with all of this in mind.

A test case has to be carefully chosen in order to present the most favourable case and facts to the court. And underlying all of this is that the case must be “owned” by the people who are affected, not by the lawyers.

**Iain Byrne:** The first question you need to ask is what problem are you seeking to address and whether litigation can make a contribution to resolving it? In many cases it will be unlikely that litigation on its own can address the wider underlying political and socio-economic issues, but at the very least it should be able to play a positive role and not be counterproductive. Effective and ongoing consultation with partners and victims is vital in this respect; otherwise there is a danger of international organisations parachuting in and out.

In so doing you need to comprehensively address the risks and assumptions. Clearly the prospects of success will be a significant criterion. However, even if the prospects look bleak and there is a strong likelihood that the case will be lost, this does not automatically mean that you decide not to take a case. The surrounding publicity, increase in public awareness and resulting political pressure could make strong headway in the positive change being sought. To this end, getting the media on board early on to understand the issues at stake and why the case is being brought is important. This may not mean there is much attention given to the filing of a case or even the hearing compared to the final outcome but at least journalists are briefed so that they can be motivated to devote sufficient space at key moments.

The potential for wider social mobilisation around the case, particularly in terms of securing implementation, is another key factor. Affected communities and civil society organisations should be able to appreciate the significance of using the litigation as a springboard for raising related concerns. Above all, such litigation requires a long term commitment from all the key actors beyond just the actual hearing phase.

**ERT:** What has been the most memorable case in the area of equality in respect of socio-economic rights that you have been involved in and why?

**Geoff Budlender:** The most memorable equality case was in the pre-Constitutional era, and it was not about socio-economic rights (*Machika v State President*, 1983). Part of the apartheid master-plan was the denationalisation of all South Africans of African origin. They were allocated to “homelands” on an ethnic basis, whether or not they had ever lived in the 13% of the country which constituted those “homelands”. The apartheid parliament would declare each of the “homelands” constitutionally “independent” Their citizens would then lose their South African citizenship. In time, there would be no South African citizens of African origin. Between 1976 and 1981, four of the nine “homelands” were declared constitutionally independent. The fifth, KwaNdebele, was to be declared independent in 1983. This led to widespread resistance, and vicious repression.

Four rural women challenged the legal validity of the puppet administration which
had been established for the area. They contended that this apartheid institution, created by law, had not been validly established – because women had been excluded from qualifying as candidates and from voting. The governing statute authorised racial discrimination, but it did not explicitly authorise discrimination on the grounds of gender.

Relying on long-established administrative law doctrine, the women contended that their exclusion amounted to unlawful discrimination which rendered the relevant administrative decisions invalid. A conservative judge upheld the argument as correct. The process of “homeland independence” was stopped in its tracks.

The case was memorable for many reasons, not least the brave and wonderful applicants. At a legal or doctrinal level, it illustrated that the principle of equality can be a private tool even in the absence of a bill of rights or equivalent instrument.

Iain Byrne: In INTERIGHTS v Greece, a collective complaint before the European Committee of Social Rights, as well as obtaining a positive decision regarding widespread housing violations against the Roma community, we managed to set an important precedent. The case was the first to revisit an issue previously considered by the Committee some five years earlier (ERRC v Greece). Despite protests from the Greek government that this case covered exactly the same facts (wrong – it raised new issues as well as showing the ongoing failure to address previous violations) and was more appropriately dealt with under the periodic reporting system, the Committee declared the case admissible. In so doing the Committee made it clear that it was not prevented from considering complaints solely because similar issues were assessed during the reporting cycle. In upholding the complaint the Committee found that the Roma continued to experience widespread discrimination in access to housing and that its previous criticisms had not been adequately addressed.

More generally, the case demonstrates the importance of adjudication bodies – whether domestic courts or international tribunals – continuing to monitor implementation of their decisions and, if appropriate, make further findings of violations to increase the pressure on the state to comply.

The case could not have happened without the involvement of the local partner, the Greek Helsinki Monitor, which had worked on the first case with another international NGO and continued to commit to working on the Roma despite an increasingly hostile environment. Although domestic organisations cannot automatically bring complaints (compared to registered international organisations) but require permission from states, they play a critical role in providing the necessary evidence and contacts with affected communities.

ERT: What practical impact do you think litigation on the equality of access to socio-economic rights has had in your jurisdiction of expertise?

Geoff Budlender: For the reasons which I have given, equality litigation has so far had only limited impact on socio-economic rights. This is, I think, because it is in some ways easier to rely directly on the social and economic rights in the Constitution. This has however been a strategic and doctrinal mistake.

I think in time we will find that equality moves to centre stage in social and economic rights litigation. This will be so particularly
where the litigation is aimed at achieving a positive right to a benefit, as opposed to preventing the negative deprivation of a right – for example, eviction from housing. A negative right is readily protected by litigation based on the social and economic right in question. This has been the focus of most of the social and economic rights litigation. As we increasingly focus on the positive rights which are involved, the right to equality will become increasingly important. This has already started to happen in litigation around the right of access to water (Mazibuko).13

Iain Byrne: Looking at the often mixed record of implementation of even some of the leading cases such as DH v Czech Republic14, it is easy to be cynical about whether litigation ever makes a difference for the victims, let alone in terms of wider impact. However, in some cases litigation has led to action by government (e.g. FIDH v France15 did lead to changes in the provision of medical assistance to illegal non-nationals, whilst Portugal addressed child labour issues following the Social Rights Committee’s first ever decision in ICJ v Portugal).16

Given the widespread, entrenched and systematic socio-economic inequality across Europe, it would be surprising if litigation could make significant changes overnight. However, in the case of the Roma the litigation has at least helped to raise awareness both in and outside countries and probably contributed to the European Union taking a much stronger stand, culminating for the first time in December 2013 in a EU-level legal instrument for Roma inclusion.

ERT: Socio-economic rights cases are often perceived to require judges to make policy decisions with big implications for the state’s resources. Do you accept this analysis? And to what extent does approaching the matter from the perspective of the rights to equality and/or non-discrimination help in this regard, if any?

Geoff Budlender: Inevitably, some of these decisions do have significant resource implications. Judges are often anxious about the implications of this for the principle of the separation of powers. Judges also find it difficult to answer the question, “How much does the Constitution oblige the state to provide?”, and some doubt that this is a question which they can answer at all. The equality right offers a way through this dilemma. It offers the answer, “As much as other people receive”. That puts the state to the test – it must either equalise upward or equalise downward (assuming this is permissible), but it must equalise.

In other words, the state will decide what resources will be allocated to the service or benefit in question – what the court insists is that when that decision has been made, the distribution of the benefit must be done in accordance with the principle of equality. It is often very difficult to equalise downward, because those who are currently favoured are usually those who have most power or influence in the political process. They will not take easily to having their services or benefits reduced. So there will often be a political pressure to equalise upward – and the advantaged will become the allies of the disadvantaged in pressing for this. At least that’s the theory!

Iain Byrne: It is certainly true that some cases do have significant resource implications. However, this is also true for civil and political rights cases – a finding of violations in the treatment of a prisoner could have implications for reforming the whole prison system. At the same time many socio-economic cases have little or no resource implications, e.g.
respecting people’s right to adequate housing by preventing forced evictions or ensuring that coercive sterilisations are not being carried out against minorities.

Clearly, if a court finds that a particular individual or group have been unfairly denied equal access to an aspect of a socio-economic right, this could have wider significant implications if many others in a similar situation are affected, e.g. all undocumented migrants should receive a certain health or welfare benefit. However, by relying on the principle of equality/non-discrimination courts may feel more emboldened to hold that nobody should be socially or economically excluded, regardless of their status or the cost implications. In this respect the historically strong equality legislative framework in the UK compensates to some extent for our lack of entrenched socio-economic rights.

ERT: What has the state’s reaction been to the courts’ jurisprudence in the area of equality in respect of socio-economic rights?

Geoff Budlender: As I have indicated, there has not been a great deal of litigation on equality in respect of socio-economic rights. It is too early to discern a relevant trend. The state complies with orders which are made, sometimes after some delay. There is significant anxiety in the state about the issue of the separation of powers with some prominent people warning the courts not to stray beyond their constitutional mandate.

Iain Byrne: As I have already highlighted, obtaining effective implementation of court decisions, even at the domestic level, can be challenging, particularly where there is a lack of political will and/or significant socio-economic implications. The continuing failure of the Czech government to implement the DH judgment concerning discrimination against Roma pupils in the education system over 5 years later (as documented by Amnesty) is a case in point. The greater the envisaged political cost, the less likelihood of compliance and unfortunately equality/non-discrimination cases concerning unpopular minorities often fall into this category. However, failure to comply not only breaches the victims’ fundamental right to a remedy but also undermines the rule of law – states should not be able to pick and choose which decisions they implement. Even if there are significant socio-economic implications, states should design appropriate implementation plans which show they are making concrete progress towards compliance.

ERT: If you could make one change to the law in relation to equal enjoyment of socio-economic rights, what would it be?

Geoff Budlender: The doctrinal development which we need is the development of appropriate remedies for the systemic breach of the right to equality. This can be done by the courts, which have wide remedial powers. As we move towards being an increasingly class-based society, discrimination on the grounds of poverty will become increasingly important. We need legislation which explicitly makes this a prohibited ground of discrimination.

Iain Byrne: To ensure that all states have a comprehensive set of legally entrenched enforceable economic, social and cultural rights which can be directly argued by everybody before domestic courts.

Interviewer on behalf of ERT: Joanna Whiteman


3 *Soobramoney v Minister of Health, KwaZulu-Natal*, CCT32/97.

4 *Government of the Republic of South Africa and Others v Grootboom and Others*, CCT11/00.

5 *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*, CCT2/97.

6 *D.H. and others v the Czech Republic* [GC], European Court of Human Rights, no. 57325/00, 13 November 2007.


8 *European Roma Rights Center (ERRC) v Italy*, ECSR, complaint no. 27/2004.

9 *European Roma Rights Center (ERRC) v Greece*, ECSR, complaint no. 15/2003.


11 *Ibid*.

12 See above, note 9.

13 *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)*, CCT39/09.

14 See above, note 6.

15 See above, note 7.

16 *The International Commission of Jurists (ICJ) v Portugal*, ECSR, complaint no. 01/1998.
ACTIVITIES

The Equal Rights Trust Advocacy

Update on Current ERT Projects

ERT Work Itinerary: July - December 2013
The Equal Rights Trust Advocacy

In the period since the publication of ERR Volume 11 (September 2013), ERT has continued with its work to expose patterns of discrimination globally and to combat inequalities and discrimination both nationally and internationally. ERT advocacy is based on the Declaration of Principles on Equality which is an instrument of best practice reflecting the modern consensus on the major substantive and procedural elements of laws and policies related to equality. Below is a brief summary of some of the most important ERT advocacy actions since September 2013.

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

On 17 September 2013, ERT published “Equal Rights at the Heart of the Post-2015 Development Agenda”, a position paper calling for the adoption of comprehensive equality legislation to be included as a specific development goal in the framework established to succeed the Millennium Development Goals (MDGs). The paper responds to proposals made in “A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development”, the report produced by the High Level Panel on the Post-2015 Development Agenda established by the UN Secretary General. The paper argues that a failure to address inequality has been one of the undeniable failings of the MDGs and uses ERT research to illustrate that status-based discrimination is among the causes of both income poverty and denial of access to economic and social rights, such as education and health, which are central to the current MDG framework. The paper further argues that establishing effective legal protection for the rights to equality and non-discrimination can provide an important mechanism for alleviating poverty and its consequences, and concludes that this is only possible with the adoption of comprehensive equality legislation. The position paper has been placed on the United Nations Sustainable Development Knowledge Platform and has been published by www.post2015.org, a website on the post-2015 development agenda hosted by the Overseas Development Institute. ERT actively sought opportunities to raise awareness of the arguments and recommendations in the paper, including through its participation on the NGO steering committee of the Open Working Group on Sustainable Development established under the UN General Assembly.

United Nations Human Rights Committee

On 4 October 2013, ERT sent a submission to the UN Human Rights Committee containing its position and recommendations on
the proposed General Comment 35 on Article 9 (Liberty and security of the person) of the International Covenant on Civil and Political Rights. ERT proposed specific textual amendments related to equality and non-discrimination, immigration detention, and the protection of stateless persons, drawing on our work on these issues, particularly the 2010 study on statelessness (Unravelling Anomaly) and the 2012 Guidelines to Protect Stateless Persons from Arbitrary Detention.

Belarus

In October 2013, ERT submitted a parallel report to the Committee on Economic, Social and Cultural Rights in respect of Belarus. The parallel report analysed the existing legislative framework related to equality in Belarus and highlighted a number of gaps, weaknesses and deficiencies such that it did not meet the standards required by Article 2(2) of the Covenant. The report also examined a number of rights protected under the Covenant where discrimination results in the denial of their effective enjoyment by different groups of persons in Belarus, including women, persons with disabilities, political opponents, lesbian, gay, bisexual and transgender (LGBT) people, persons living with HIV/AIDS and the ethnic minorities, including Roma, Jews and Russians. In its concluding observations, published in December 2013, the Committee called on Belarus to “adopt a comprehensive anti-discrimination law that addresses discrimination, including in the private sphere, prohibits direct and indirect discrimination on all the grounds set forth in the Covenant and provides for effective remedies”, echoing the principal recommendation in ERT's report. It also called on Belarus to address gender role stereotypes and their impact on the enjoyment of economic, social and cultural rights, the impact of short-term contracts on the enjoyment of labour rights and the persistence of discrimination on grounds of HIV status, all issues highlighted by ERT.

On 29 November, at an event held alongside the European Union Eastern Partnership Summit taking place in Vilnius, Lithuania, ERT in partnership with the Belarusian Helsinki Committee, launched Half an Hour to Spring: Addressing Discrimination and Inequality in Belarus. The report – the third in the ERT Country Report Series – is the first ever comprehensive account of discrimination and inequalities on several grounds and in many areas of life in Belarus. It is based on extensive field research and rigorous analysis of legislation and policies, and makes a set of recommendations to the Belarusian authorities on the necessary reforms to law, policy and practice on equality and non-discrimination. The report reveals a complex picture. It finds significant evidence of discrimination on grounds of religion, ethnicity, language and political opinion, against those associated with heterodox views of the country’s future. Yet it also identifies a range of policies aimed at accelerating progress towards equality for women, persons with disabilities and other groups traditionally exposed to discrimination. Nonetheless, the report concludes that the Belarusian hybrid between a social state and an authoritarian polity is ultimately unfavourable to the realisation of equality as a human right.

Bosnia and Herzegovina

On 23 September, ERT submitted a parallel report on Bosnia and Herzegovina to the Committee on Economic, Social and Cultural Rights. The report, based on ERT's research and experience from the project Developing Civil Society Capacity to Combat Discrimination and Inequality in Bosnia and Herzegovina, provided a detailed assessment of the
legislative framework on equality and non-discrimination, highlighting deficiencies and gaps and concluding that the framework falls short of what is required under Article 2(2) of the Covenant. The report also highlighted a number of areas where, despite the existence of legislation, there has been a failure effectively to implement certain provisions so as to ensure that the rights to equality and non-discrimination are realised in practice. In its concluding observations, published in December 2013, the Committee called for Bosnia and Herzegovina to improve enforcement of its anti-discrimination legislation including through appropriate mechanisms and targeted programmes.

Indonesia

On 1 October, ERT submitted proposals for the List of Issues to be adopted by the Committee on Economic, Social and Cultural Rights in relation to Indonesia. Based on its research under the project Empowering Civil Society to Use Non-discrimination Law to Combat Religious Discrimination and Promote Religious Freedom, ERT proposed a series of questions for the Committee to put to Indonesia, addressing gaps and weaknesses in the legislative framework to prohibit discrimination. The List of Issues was published in December 2013 and included a number of ERT’s questions, specifically on the implementation of existing anti-discrimination legislation, the provisions on sanctions, remedies and the application of special measures, and reasonable accommodation for persons with disabilities.

Kazakhstan

In January 2014, ERT made two submissions to UN Committees, commenting on periodic reports submitted by Kazakhstan. A submission was sent to the Committee on the Elimination of Discrimination against Women in relation to Kazakhstan’s combined sixth and seventh periodic reports as part of the 57th session (10 to 28 February 2014). The submission recommended that the scope and definition of the right to non-discrimination provided by the Equal Opportunities Law be amended to provide the highest level of protection from discrimination against women.

ERT also made a submission to the Committee on the Elimination of Racial Discrimination as part of its 84th session (3 to 21 February 2014) detailing patterns of discrimination and inequality on which ERT had collected testimony during its project in Kazakhstan since 2012. The submission made recommendations to adopt a comprehensive legal and policy framework to ensure the equal participation of ethnic minorities within political and public life, the protection of stateless persons and the right to education on an equal basis.

Moldova

At its 56th Session (30 September to 18 October 2013), the Committee on the Elimination of Discrimination against Women considered a parallel report submitted by ERT in relation to Moldova. The report examined the deficiencies and gaps within the legislative framework to combat discrimination. It also provided information on violence against women, and contained excerpts from the report Discriminatory Ill-Treatment in Moldova published by ERT’s Moldovan partner PromoLEX, in partnership with ERT. The Committee published its concluding observations in October 2013, making use of the information provided by ERT both by raising concerns over the deficiencies in the national legal framework as compared to the Convention, and making a series of detailed recommendations on tackling violence against women.
Nigeria

In January 2014, ERT wrote to President Goodluck Jonathan of Nigeria calling on him not to sign the Same Sex Marriage (Prohibition) Bill which imposes lengthy prison sentences on any person who attempts to enter into a same-sex marriage or civil union; who participates in a gay club, society or organisation; or who makes a public display of affection with a person of the same sex. Unbeknownst to ERT, other interested parties and the media, President Jonathan had signed the Bill - in secret - at the beginning of the month.

Sudan

As reported in the previous edition of the Equal Rights Review, in August 2013, ERT submitted a suggested list of issues in relation to Sudan to the Human Rights Committee. ERT urged the Committee to include questions in its List of Issues on: the introduction of specific and comprehensive equality legislation in accordance with Articles 2(1) and 26 of the Covenant; positive action measures; steps taken to tackle violence against women and other forms of discrimination faced by women; and steps taken to investigate and prosecute perpetrators of racially-motivated violence in Darfur and other conflict areas. The List of Issues was published in December 2013 and included a number of ERT's questions, specifically on what measures had been taken to combat high levels of discrimination and violence against women, violence against persons in conflict areas, and whether Sudan plans to introduce comprehensive anti-discrimination legislation.

Thailand

On 6 February 2014, ERT launched an advocacy report entitled *The Human Rights of Stateless Rohingya in Thailand*, at an event at the Foreign Correspondent’s Club in Bangkok. The launch was well attended (over 100 persons) and speakers included Professor Vitit Muntarbhorn (Chulalongkorn University), Dr. Nirun Pitakwatchara (Human Rights Commission of Thailand), Saiful Huq Omi (photographer and activist) and Amal de Chickera (The Equal Rights Trust). The report looks at the human rights situation of stateless Rohingya in Thailand with a focus on the equality, non-discrimination, statelessness and lack of legal status of the Rohingya.

Uganda

On 16 January 2014, ERT repeated, for the fifth time since 2009, its call to the President of Uganda, Yoweri Museveni, urging him to not sign the Anti-Homosexuality Bill. Reports had emerged that the President had indicated his intention not to sign the Bill due to the manner in which it was passed, allegedly violating parliamentary procedure rules. However, in February the President ultimately signed the Bill despite its incompatibility with many of Uganda’s obligations under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights.

Ukraine

As part of ERT’s ongoing legislative advocacy work in Ukraine, on 7 October, ERT Executive Director Dimitrina Petrova led an expert seminar in Kyiv aimed at politicians and others with an interest in legislative reform on how to improve Ukraine’s legislative framework to ensure the rights to equality and non-discrimination are fully protected. The seminar followed a series of roundtables and workshops during which ERT had
engaged with activists from across Ukraine on the need for amendments to Ukrainian anti-discrimination law. Following the seminar, ERT published and disseminated a legal analysis of the Law “On Principles of Prevention and Combating Discrimination in Ukraine” to policy-makers, lawyers and activists. ERT’s legal analysis recommended a series of amendments to the Law, in order to address inconsistencies with international and domestic law and ensure effective realisation of the rights to equality and non-discrimination in Ukraine.

Also in October 2013, ERT submitted a list of issues in relation to Ukraine, to the Committee on Economic, Social and Cultural Rights at its 52nd Session. The submission made recommendations for questions for the Committee to put to Ukraine, based on an analysis of Ukraine’s legal framework on equality and non-discrimination. The Committee made recommendations on all of the issues raised by ERT. The Committee called on Ukraine to “improve its anti-discrimination legislation to ensure adequate protection against discrimination in line with the Covenant and other international human rights standards”. The Committee also called on Ukraine not to permit draft legislation on “propaganda of homosexuality” to become law and to repeal other pieces of discriminatory legislation.

At the end of November 2013, on the eve of discussions at the European Union Eastern Partnership Summit in Vilnius, Lithuania, ERT called on Ukraine to reform its country’s equality legislation. Concerned about the loss of momentum of legal reform on equality following a suspension of negotiations on an Association Agreement between the EU and Ukraine, ERT urged Ukrainian authorities to continue their efforts to address the problems identified in its legal analysis.

**United Kingdom**

On 16 September 2013, ERT made a submission to the United Kingdom Parliament’s Joint Committee on the Draft Deregulation Bill. The submission involved a detailed analysis of provisions of the Bill which would impact on the rights to equality and non-discrimination. The submission recommended the rejection of provisions which would remove the power of employment tribunals to make “wider recommendations” going beyond the specific victim of discrimination, and which would further dilute the potential impact of the public sector socio-economic duty in section 1 of the Equality Act 2010 if it is brought into force. The submission also recommended that further attention be given to provisions reforming the process by which certain rail vehicles are exempted from requirements to ensure that they are accessible to persons with disabilities and thereby not allowing a weakening of protection.
Update on Current ERT Projects

I. Thematic Projects

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

This thematic project started on 1 July 2011 and is aimed at building strategies of better enforcement of economic and social rights through drawing and communicating lessons from a global review of jurisprudence which has used equality and non-discrimination law to advance the realisation of social and economic rights. The major activities under this project have been completed. During the reporting period, ERT finalised the text and appendices of a major study which, following a final editorial process, is due to be published later this year.

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

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

Since September 2013, ERT’s key activities under this project have been twofold. Firstly, it has continued to finalise the Resource Packs on Disability and Torture for both India and Nigeria. This has included updating the India draft in line with some significant legislative developments, in particular with regard to the Rights of Persons with Disabilities Bill. The Resource Packs describe patterns of torture and ill-treatment of persons with disabilities identified in the course of field research in the two countries; present legal research and analysis, bringing together relevant international, regional and domestic law and jurisprudence on disability and torture; and make recommendations for change.

Secondly, the strategic litigation component of the project continues to progress. The project is supporting ten legal cases which are currently before the courts in India. It also supports 13 cases which, with ERT’s assistance, have been filed before the Nigerian courts. Amongst other developments, one of the Nigerian cases is ready for judgment and a number of the Indian cases have concluded at the first instance and, where matters have not been successfully resolved, moved to appeals procedures.

Empowering Human Rights Defenders in Central Asia to Combat Discrimination on the Basis of Ethnicity and Religion

This project started in January 2013 and is implemented in partnership with two NGOs based in Central Asia and the participation of further local activists and experts. It seeks to address ethnic and religious discrimination in five Central Asian countries, and to publish studies on the subject.
During the reporting period, ERT completed two of three planned training workshops – in Kyrgyzstan and Kazakhstan. The first four-day training workshop took place near Bishkek in late October and early November 2013, and was attended by approximately 20 participants from civil society organisations across the country. The focus of the first three days of the workshop was on international and Kyrgyz equality law. The fourth day, organised by ERT’s partner, Peremena, focused on increasing the capacity of civil society to undertake advocacy and included presentations on networking, boosting links with other CSOs, and undertaking monitoring and research. The second workshop took place in Almaty in the first week of December 2013, and was attended by approximately 20 participants from different civil society organisations. This workshop followed a similar structure and had the same focus in its content as the workshop in Kyrgyzstan.

**Equality and Freedom of Expression: Sudan and South Sudan**

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

A project workshop was held in mid-October 2013 for 20 journalists from each country, following a previous workshop which took place in July 2013. The training programme covered monitoring and reporting on discrimination, the violation of the freedom of expression, hate speech and other human rights abuses, together with modules on journalistic ethics, techniques and best practice in conflict situations. The workshop was effective in equipping participants with the tools to ensure effective reporting on discrimination and other human rights abuses, to promote equality and non-discrimination and to recognise and challenge ethnic and religious hate speech. The workshop also provided an important opportunity to bring leading journalists from the two countries together, a step towards improving cooperation between the media in these two states.

Between the workshops in July and October, ERT and the JHR convened a roundtable meeting bringing together ten leading figures from the media in each of the project countries. The roundtable provided a forum for participants to discuss collaboration in promoting equality and freedom of expression, and the role of the media in combating hate speech and promoting improved relations between the two countries. The meeting was a great success, with participants endorsing and publishing a declaration of their shared commitment to non-discrimination, freedom of expression and peaceful reconciliation of the issues between the two states.

In the period since the workshops ERT has continued to support the JHR in facilitating the work of journalists and human rights defenders and documenting and publicising human rights abuses and restrictions on freedom of the press. In South Sudan, the conflict which began in December 2013 has had an adverse impact on the project, delaying the planned launch of the JHR’s sister network.

**Greater Human Rights Protection for Stateless Persons in Detention**

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

In October 2013, ERT made a submission on draft General Comment 35 – Article 9 ICCPR (liberty) to the UN Human Rights Committee for their consideration during the 109th Session of the Committee.

The European Network on Statelessness – of which ERT is a founding member – continued its activities during the reporting period. ERT attended ENS teleconferences and has contributed to the growth of the network through recruiting new members, developing its law and policy pillar and contributing to policy development, awareness-raising
and capacity building activities of the Network. On 25–27 November 2013, ERT participated in the ENS Train the Trainer workshop in Budapest and delivered training on discrimination and statelessness. On 28 November 2013, ERT participated in the ENS Steering Committee Meeting in Budapest, via Skype link.

ERT participated in the fourth UNHCR expert meeting on statelessness (ERT was represented at the first and second expert meetings as well) that was held in Tunisia on 30–31 October 2013. The meeting focused on the loss and deprivation of nationality under the 1961 Convention on the Reduction of Statelessness. ERTs inputs, in particular on the link between discrimination and the loss or deprivation of nationality were well taken on board and many have been included in the draft meeting conclusions, which will eventually be adapted into UNHCR Guidelines on the Loss or Deprivation of Nationality.

Rohingya 1: Strengthening Human Rights Protection of the Rohingya

This project started in March 2011. It aims to strengthen human rights protection for stateless Rohingya through targeted research and advocacy activities. The project envisages research in six countries (Bangladesh, Indonesia, Malaysia, Myanmar, Saudi Arabia and Thailand) followed by advocacy at national level (Bangladesh, Malaysia and Thailand), regional level (ASEAN and OIC) and international level. The project has five objectives. (1) To increase understanding of the scope of discrimination, vulnerability and abuse suffered by stateless Rohingya in Bangladesh, Malaysia, Myanmar, Saudi Arabia, as well as additional countries including China, India, Indonesia, Pakistan and Thailand; and to increase awareness on international, regional and national norms pertaining to the rights of the stateless in order to lobby for and afford greater protection for the stateless Rohingya; (2) To encourage NGOs, lawyers’ forums and other such groups to prioritise the Rohingya issue in their work; (3) To improve the quality of life of all stateless Rohingya in the region including Rohingya women, children and the disabled through strategic activities aimed at addressing the human rights concerns faced by stateless Rohingya; (4) To pursue change at a structural level to strengthen protection for Rohingya in the ASEAN region and also in specific target countries; (5) To increase visibility of the Rohingya issue internationally, through engaging with the UNHCR, UN treaty bodies, Special rapporteurs, and the international community.

During the reporting period, ERT conducted workshops on the human rights of stateless Rohingya in Malaysia (4-5 February 2014), Thailand (6-7 February 2014) and Bangladesh (24-26 February 2014). The workshops were for NGOs, academics, lawyers and journalists in each country. Additionally, on 4 February 2014, a public seminar on the human rights of Rohingya was hosted at University Malaya, Kuala Lumpur. Speakers at the event included Chris Lewa (The Arakan Project), Maung Zarni (University Malaya), Saiful Huq Omi (photographer and activist) and Amal de Chickera (The Equal Rights Trust).

On 6 February 2014, ERT launched a report entitled *The Human Rights of Stateless Rohingya in Thailand* at an event at the Foreign Correspondent’s Club in Bangkok. The launch was well attended (over 100 persons) and speakers included Professor Vitit Muntarbhorn (Chulalongkorn University), Dr. Nirun Pitakwatchara (Human Rights Commission of Thailand), Saiful Huq Omi (photo-
ERT hosted an exhibition of the photographs of Saiful Huq Omi on the Rohingya in Bangladesh, Malaysia and the UK at the Dhaka Art Centre, Dhaka, Bangladesh on 24 – 26 February 2014. The exhibition was launched on 24 February 2014 at the Dhaka Art Centre. Speakers included Saiful Huq Omi, Dr. Shapan Adnan (academic), Stina Ljungdell (UNHCR Representative to Bangladesh) and Dr. Dimitrina Petrova (The Equal Rights Trust).

During this period, ERT also continued its engagement with civil society networks that work collectively on the Rohingya issue, including through attending Rohingya Advocacy Meetings in the UK.

On 25 March 2014, ERT participated in a panel discussion on the human rights of stateless Rohingya at a conference entitled “Refugee Voices” at the Refugee Studies Centre, Oxford University. On 26 March, ERT participated in a roundtable on discrimination against minorities in Myanmar at the Refugee Studies Centre, Oxford University, for which it co-organised a session on the Rohingya and made a presentation at the session.

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

This new project which began in January 2014 aims to strengthen the right to a nationality, legal stay rights and human rights of stateless Rohingya through legislative and
policy reform, advocacy and capacity building in Bangladesh, Malaysia, Myanmar and Thailand as well as at regional and international levels. The project has four objectives: (1) the integration of and sustainable solutions for Rohingya in Myanmar through advocacy aimed at the amendment of discriminatory citizenship and immigration laws that are the basis of exclusion and discrimination of Rohingya and other minorities; (2) securing durable solutions for Rohingya communities in Bangladesh, Malaysia and Thailand through law and policy reform and advocacy aimed at securing legal stay rights for long-term settled Rohingya and other irregular migrants; (3) establishing a civil society coalition and encouraging NGOs, lawyers, academics and other such groups to prioritise the Rohingya issue in their work; and (4) increasing visibility of the Rohingya issue internationally, through engaging with the UN-HCR, UN treaty bodies, Special Rapporteurs and the international community.

ERT has two informal partners for this project, the Institute of Human Rights and Peace Studies of Mahidol University Thailand (IHRP) and renowned photographer and activist, Saiful Huq Omi. In February 2014, the project team carried out a scoping visit to Bangladesh. ERT met with its informal partners during this scoping visit and began planning for the implementation of various project activities over the first phase of the project.

II. Country Projects

Azerbaijan 1: Developing Civil Society Capacity for Preventing Discriminatory Torture and Ill-Treatment

ERT’s first project in Azerbaijan began in November 2011, in partnership with Women’s Organisation Tomris based in Ganja, Azerbaijan’s second city. It sought to increase the capacity of civil society organisations (CSOs) and other professionals to understand and apply anti-discrimination and human rights law in challenging discriminatory torture and ill-treatment; to create an institutional framework for civil society dialogue and advocacy on issues relating to discriminatory torture and ill-treatment through establishing CSO Forums; and to increase awareness and understanding among CSOs and other key stakeholders of the link between discrimination and the occurrence of torture and ill-treatment in Azerbaijan. The project envisaged training workshops in three major cities in Azerbaijan (Baku, Ganja and Kurdemir) and the publication of a report on discriminatory torture and ill-treatment in Azerbaijan, the establishment of a CSO Forum and an advocacy campaign.

During the period since September 2013, ERT finalised its work with Tomris on the final activity, a report on discriminatory torture and ill-treatment in Azerbaijan, and brought the project to a close.

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

This second project in Azerbaijan began in November 2013, with ERT again working in partnership with Women’s Organisation Tomris. The project seeks to increase the capacity of Azerbaijani civil society to combat discrimination through documentation, litigation and advocacy. Project activities will include training workshops on equality law in three major cities in Azerbaijan, meetings of the Azerbaijan Equality Forum which was established under the first project in Azerbaijan, the publication of a comprehensive report on discrimination and inequality and an advocacy campaign for legal and policy reform and strategic litigation.
In January 2014, ERT travelled to Baku for a kick off meeting with Tomris. ERT and Tomris discussed and planned the various activities that will take place throughout the project, starting with the training workshops and initial meetings of the Azerbaijan Equality Forum. Whilst in Baku, ERT also hosted a day-long focus group meeting with representatives of civil society organisations in Azerbaijan in order to assess civil society capacity in promoting equality and get an insight into recent political developments.

Following the visit, ERT and Tomris have worked to complete two baseline studies. Tomris undertook research towards the completion of the first study, summarising the principal patterns of discrimination and inequality in the country, and assessing the legal and policy framework. ERT completed the second study, assessing the capacity of civil society to combat discrimination through advocacy and litigation.

Belarus 1: Empowering Civil Society in Belarus to Combat Discrimination and Promote Equality

This first project in Belarus began in December 2010 in partnership with the Belarusian Helsinki Committee, based in Minsk. The project sought to improve knowledge of anti-discrimination law among NGOs in Belarus, to enable them to monitor and report on discrimination and to bring discrimination cases to courts; and to create a coalition of NGOs with a joint advocacy platform on issues of discrimination.

The main project activity, a comprehensive report on discrimination and inequality in Belarus, was completed in November 2013. This 300-page report, entitled Half an Hour to Spring: Addressing Discrimination and Inequality in Belarus, was launched in November 2013 at the EU Eastern Partnership Summit in Vilnius, Lithuania. It forms part of the ERT Country Report Series and is the first comprehensive account of discrimination and inequalities on the most important grounds and in many areas of life in Belarus. It is based on extensive field research and rigorous analysis of legislation and policies, and makes a set of recommendations to the Belarusian authorities on the necessary reforms to law, policy and practice on equality and non-discrimination.

This report reveals a complex picture: considered by many to be Europe’s last dictatorship, Belarus carries forward from its Soviet past a claim to be a state for the people and a model of tolerance. The report finds significant evidence of discrimination on grounds of religion, ethnicity, language and political opinion, against those associated with heterodox views of the country’s future. Yet it also finds evidence of a range of policies aimed at accelerating progress towards equality for women, persons with disabilities, and other groups traditionally exposed to discrimination. The report concludes that the hybrid between a social state and an authoritarian polity is ultimately unfavourable to the realisation of equality as a human right.

The report was published in Russian. An Executive Summary in English is presently available and a full English language version is coming soon. The report is available in print as well as online.

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

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

During the period since September 2013, BHC and other NGOs have continued to monitor and document incidents and patterns of discrimination. Researchers trained and supported by ERT have been documenting discrimination on grounds of religion, disability, gender, sexual orientation and gender identity, nationality and ethnicity, and age in areas such as education, the media and the provision of goods and services in the public and private sectors.

BHC continued work to establish a National Equality Forum to coordinate civil society activity on discrimination. In the period since September 2013, the National Equality Forum held a further two meetings, bringing the total for the project to four. At a meeting in December 2013, the strategic paper for the National Equality Forum (Activity 3) and the Online Equality Forum (Activity 4) were both launched.

In November 2013, ERT attended the review of Belarus by the Committee on Economic, Social and Cultural Rights. The parallel report also examined a number of rights protected under the Covenant where discrimination results in the denial of their effective enjoyment by different groups of persons, including women, persons with disabilities, political opponents, LGBT people, persons living with HIV/AIDS, and some ethnic minorities such as the Roma. In its Concluding Observations, published in December 2013, the Committee called for Belarus to “adopt a comprehensive anti-discrimination law that addresses discrimination, including in the private sphere, prohibits direct and indirect discrimination on all the grounds set forth in the Covenant and provides for effective remedies”, echoing the principal recommendation in ERT’s report. It also called on Belarus to address gender role stereotypes and their impact on the enjoyment of economic, social and cultural rights, the impact of short-term contracts on the enjoyment of labour rights and the persistence of discrimination on grounds of HIV status, all issues highlighted by ERT.

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

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

Throughout the period, ERT and its partners worked to finalise the report on discrimination and inequality in Bosnia and Herzegovina for publication. A second draft of the report, produced after an extensive consultation and validation exercise involving stakeholders from government and civil society, was prepared in January 2014. This draft of the report is currently being edited and finalised.

In respect of the project’s strategic litigation activity, the fourth and final planned case was developed and filed in September 2013.

In October 2013, ERT submitted a parallel report to the Committee on Economic, Social and Cultural Rights in respect of Bosnia and Herzegovina. The parallel report focused on the legislative framework related to equality in Bosnia and Herzegovina, particularly the Law on Prohibition of Discrimination. It first examined and highlighted the deficiencies and gaps within the legislation, and then highlighted a number of areas where, despite the existence of legislation, there has been a failure to implement effectively certain provisions so as to ensure that the rights to equality and non-discrimination are realised in practice. In its Concluding Observations, published in December 2013, the Committee called for Bosnia and Herzegovina to improve enforcement of its anti-discrimination legislation including through appropriate mechanisms and targeted programmes.


Croatia: Empowering Civil Society through Training and Establishing a Croatian Equality Forum

This project began in May 2011 and ended in October 2013. It was implemented in partnership with the Croatian Law Centre (CLC) and the Association for Protection of Human Rights and Citizens’ Freedoms (HOMO). It sought to increase the capacity of stakeholders to improve the implementation and application of anti-discrimination law and policy; to create an institutional framework for civil society debate on equality and diversity issues through establishing an NGO coalition to cooperate on issues related to equality; and to increase the communication and coordination of work agendas between CSOs working on different equality issues and key Croatian decision-makers in the field of anti-discrimination.

In October 2013, ERT submitted a parallel report to the Committee on Economic, Social and Cultural Rights in respect of Bosnia and Herzegovina. The parallel report focused on the legislative framework related to equality in Bosnia and Herzegovina, particularly the Law on Prohibition of Discrimination. It first examined and highlighted the deficiencies and gaps within the legislation, and then highlighted a number of areas where, despite the existence of legislation, there has been a failure to implement effectively certain provisions so as to ensure that the rights to equality and non-discrimination are realised in practice. In its Concluding Observations, published in December 2013, the Committee called for Bosnia and Herzegovina to improve enforcement of its anti-discrimination legislation including through appropriate mechanisms and targeted programmes.

In the period between September 2013 and October, when the project ended, the three final meetings of the Croatian Equality Forum were held. The first, on 10 September 2013, focused on proposals to develop a new Labour Act which had been put forward by the Ministry of Labour and Pension System as part of the Regulatory Impact Assessment process. The second, on 16 October 2013, focused on the Act on Associations, which sets out to regulate the activity of civil society organisations in Croatia. The third meeting of the period – and the twelfth and final CEF public meeting of the project took place on 23 October 2013. The purpose of the Forum was to discuss the legislative plans of the Government for 2014. All of the meetings were well-attended by civil society organisations and representatives from relevant government departments.
Guyana 1: Empowering Civil Society to Challenge Homophobic Laws and Discrimination against LGBTI Persons

ERT’s first project in Guyana began in 2010 in partnership with the Society Against Sexual Orientation Discrimination (SASOD), an LGBTI-rights organisation based in Georgetown. It seeks to build the capacity of civil society to challenge discrimination against LGBTI persons by both increasing the technical skills and capacity of LGBTI organisations and by fostering improved cooperation between LGBTI organisations and other human rights NGOs. The project involves a number of activities, including training for civil society organisations, the establishment of a Guyana Equality Forum and the development of a comprehensive report on discrimination and inequality in Guyana.

In the period since September 2013, ERT has continued to work to finalise a report on addressing discrimination and inequality in Guyana, undertaking additional research, taking account of feedback received during a consultation process on an earlier draft and incorporating information on recent developments in law and policy in the country.

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

This third project on Guyana began in January 2013, overlapping with the final phase of ERT’s second project in Guyana which ended in 2013. It is being implemented in partnership with SASOD and the Justice Institute of Guyana (JIG). It seeks to address two major problems identified through ERT’s research in Guyana: the failure of implementation and enforcement of laws which provide protection from discrimination; and the stark difference between the legal rights of LGBTI persons and all other persons in the country.

Since September 2013, SASOD has continued its work to advocate for improved protection for LGBTI rights, and to cooperate with other civil society organisations on equality law reform. SASOD held a meeting of the Guyana Equality Forum – established under ERT’s first project in Guyana – on 20 September 2013. The meeting provided an opportunity for SASOD to bring together civil society allies to discuss its advocacy strategy and in particular the means for civil society to engage in the consultations which the Guyanese government is holding on a number of human rights issues, including the decriminalisation of same-sex conduct between men. SASOD have continued to undertake advocacy on equality issues and have started to plan their response to the government’s proposed consultation on the decriminalisation of same-sex sexual activity which is due to take place in 2014 or 2015. ERT is liaising closely with SASOD on how it should be involved in civil society’s response to the national consultation.

Between September and March, ERT and JIG finalised plans for a judicial colloquium, which will take place in Georgetown, Guyana, on 4-5 April 2014 and will be attended by members of the Guyanese judiciary and judges from the Caribbean Court of Justice.

Indonesia: Empowering Civil Society to Use Non-discrimination Law to Combat Religious Discrimination and Promote Religious Freedom

This project began in November 2010, and is implemented in partnership with two of Indonesia’s leading human rights organisations, the Indonesian Legal Aid Foundation
(YLBHI) and the Institute for Policy Research and Advocacy (ELSAM). It seeks to build the capacity of Indonesian civil society to use the right to non-discrimination to combat religious discrimination and promote religious freedom. The project involves a range of activities including training, documentation, the production of a report on religious discrimination in Indonesia, and the development of advocacy strategies.

In the period since September 2013, ERT has continued to work on the development of a report on religious discrimination in Indonesia, with a focus on expanding the report to examine issues of multiple discrimination and the role of religion in perpetuating discrimination against women, disabled people and other groups.

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

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

In the first two months of the project, ERT and Mizan planned the project kick-off meeting and prepared for the development of two baseline studies, one assessing patterns of discriminatory torture and ill-treatment and the legal and policy framework, and a second examining civil society capacity for work related to equality.

In March, ERT visited Amman for a three-day kick-off meeting, during which ERT met with Mizan to discuss risks and opportunities, the needs of civil society and ongoing advocacy and litigation initiatives, in order to ensure that the project responds appropriately to the current context. In addition, ERT undertook two focus group discussions, one with civil society organisations working with victims of torture and groups exposed to discrimination, and a second with lawyers working in human rights litigation. The focus groups were designed to enable ERT to assess the capacity and needs of these two groups, and improve ERT’s understanding of the context in which the project will be delivered. ERT also met with a number of leading academics to discuss the possibilities for research and advocacy under the project. The visit was highly successful, with civil society organisations, lawyers and academics all expressing enthusiasm about the project, and providing constructive feedback on the feasibility of proposed activities.

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

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

In the period since September 2013, FIDA has completed two rounds of visits to the CBOs which are participating in the project by providing community based legal services, following an initial visit to ten CBOs by both ERT and FIDA in August 2013. In total, 1438 women have brought complaints to participating CBOs, and CBOs have completed a total of 630 reports, reflecting the number of cases which have been selected from these complaints. FIDA, supported by the 15 lawyers who have been trained and funded by the project, has begun the process of reviewing these initial case reports and providing initial advice to women. FIDA is in the process of transmitting case intake forms to ERT in order that ERT can undertake a secondary review, including identifying cases suitable for strategic litigation.

ERT and ERT have begun planning for a second training workshop, bringing together all CBOs participating in the project to review their progress, refresh the training provided in April 2013 and discuss challenges with the implementation of the project. The training is due to take place in May 2014.

ERT’s Richard Wingfield (3rd from right) at a meeting with members of Ewangan Emam Community Based Organisation, Kajiado County, Kenya, August 2013.
**Moldova 2: Empowering Civil Society in Moldova and Transnistria to Combat Discrimination through Documentation, Litigation and Advocacy**

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

In February 2014, ERT travelled to Chișinău for a kick off meeting with Promo-LEX. ERT and Promo-LEX discussed and began to plan the various activities that will take place throughout the project, starting with the training workshops and first roundtable. Whilst in Chișinău, ERT hosted a day-long focus group meeting with representatives of civil society organisations in Moldova in order to understand civil society capacity in the area of equality and non-discrimination. ERT and Promo-LEX also met with a number of other NGOs in Moldova working on equality issues, as well as the Equality Council, a quasi-judicial body established in 2013 and charged with reviewing complaints of discrimination and making recommendations, issuing advisory opinions on the draft laws in the field of non-discrimination, monitoring the implementation of relevant legislation, and awareness-raising.

**Nigeria: Discrimination and Torture**

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

Since September 2013, ERT has continued to support LEDAP in litigating thirteen cases of discriminatory torture or discriminatory ill-treatment against persons with disabilities. These cases, which were identified as part of ERT’s project Developing Resources and Civil Society Capacities for Preventing Torture and Cruel, Inhuman and Degrading Treatment of Persons with Disabilities: India and Nigeria, were all developed and filed earlier in 2013, and are ongoing.

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

This project started in December 2013 and is implemented in partnership with Sphere, a national LGBT rights network based in St. Petersburg. It seeks to address the lack of capacity among civil society organisations to challenge discrimination against LGBT persons, and to advocate for improved implementation of legal protection from discrimination, including on the grounds of sexual orientation and gender identity. Project activities include a roundtable “Combating Discrimination in Russia”; training workshops on monitoring and documenting discrimination; research to document incidents of discrimination in Russia; the establishment and meetings of the Russian Equality Forum; the publication of a report on discrimination in Russia; strategic litigation; and an advocacy campaign for legislative reform on equality.
In February 2014, ERT travelled to St. Petersburg for start-up activities under the project. ERT and Sphere discussed and began to plan the various activities that will take place throughout the project. ERT also hosted a day-long focus group meeting with representatives of civil society organisations in Russia in order to assess civil society capacity and improve understanding of the context in which the project will be delivered. A legal defence service for LGBT persons who have been victims of discrimination, which is an essential component of the project, was set up at Sphere and is expected to provide legal advice and representation to hundreds of LGBT victims of discrimination throughout Russia.

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

This project began in April 2012 and is implemented in partnership with the Secretariat of the Pacific Community Solomon Islands Country Office (SPC-SI) and the Secretariat of the Pacific Community Regional Rights Resource Team (RRRT). ERT is responsible for training and report writing activities under this project.

In the period since September 2013, ERT has continued to make progress in producing a report on discrimination and inequality in the Solomon Islands. A draft section on the legal and policy framework has now been revised to reflect feedback from lawyers in the region, who had been asked to review ERT’s initial draft. At the same time, ERT has undertaken desk-based research on patterns of discrimination, to complement the material gathered through field research in the second and third quarters of 2013.

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

This third project in Sudan began in July 2013, and seeks to create the foundations for sustained civil society and media advocacy on issues of discrimination in Sudan. ERT aims to produce the first ever comprehensive report on discrimination and inequality in Sudan, containing analysis of all major patterns of discrimination and inequality, combined with an assessment of the legal and policy framework on equality and non-discrimination; engage key government departments and agencies, the National Human Rights Commission and civil society stakeholders on the report’s findings and recommendations, in order to maximise the impact on government policy; publicise this report in the national, regional and international media; and complete advocacy actions at the international, regional and national levels.

In the period since September 2013, ERT continued to research and draft the comprehensive report on equality and non-discrimination in Sudan, building on the work completed during the first project in Sudan. Building on initial desk and field research undertaken before the commencement of this project, a second, improved draft of the report was produced between September 2013 and mid-January 2014. This draft was then distributed to relevant stakeholders for review and validation.

In January 2014, ERT travelled to Sudan for a week-long validation visit. During this visit, ERT held over twenty meetings with stakeholders from government, civil society, academia, the media and the legal profession. ERT met with and interviewed victims of discrimination on the basis of sexual orientation, religion and political opinion. The visit was highly successful:
ERT’s efforts to produce a report on discrimination and inequality were widely welcomed, and the team was able to collect large amounts of new evidence on discrimination on various grounds, in addition to validating and corroborating many of the findings of the draft report. Since the completion of the visit, ERT has been working to expand and amend the report to reflect the voluminous feedback received.

In August 2013, ERT had submitted a suggested list of issues in relation to Sudan to the Human Rights Committee. ERT urged the Committee to include questions in its list of issues on: the introduction of specific and comprehensive equality legislation in accordance with Articles 2(1) and 26 of the Covenant; positive action measures; steps taken to tackle violence against women and other forms of discrimination faced by women; and steps taken to investigate and prosecute perpetrators of racially-motivated violence in Darfur and other conflict areas. The List of Issues was published in December 2013 and included a number of ERT’s questions, specifically on what measures had been taken to combat high levels of discrimination and violence against women, violence against persons in conflict areas, and whether Sudan planned to introduce comprehensive anti-discrimination legislation.

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

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

In the period since September 2013, field research on discrimination in the project region was completed. Participating organisations had been provided with a guide produced by ERT and tasked with undertaking interviews and focus groups with victims of discrimination on different grounds, while maintaining the project’s focus on discrimination against LGBTI persons within the project region. The researchers completed their work and submitted reports to ERT’s local partners in September 2013. The results of the field research activity were then integrated into the draft report on discrimination and inequality in the Aegean and Marmara Regions of Turkey by SPU.

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

This project began in November 2012 and is implemented in partnership with an LGBTI organisation, Nash Mir, based in Kyiv. The project involves the delivery of training to civil society organisations, support to the Coalition on Combating Discrimination, and the development of a report on discrimination and inequality in Ukraine. In September and October 2013, the partners completed four training workshops on equality law and concepts in Kyiv, Odessa, Kharkiv and Dnipropetrovsk. These workshops provided training to approximately 80 civil society activists and lawyers from across Ukraine on international, regional and national law, and gave practical training on monitoring discrimination and undertaking litigation. In addition to these workshops, ERT provided training for the UN project team in Ukraine, including representatives from UNDP, UN Women, UNICEF and the UN Office of Drugs and Crime, at the invitation of the UN Human Rights Representative to Ukraine. All project workshops were positively evaluated by participants.

In early October 2013, ERT published a detailed legal analysis of the anti-discrimination law currently operative and its proposed amendments for their compliance with international legal standards and best practice. The 40-page analysis was aimed at law-makers, the Ministry of Justice which prepared amendments to the current law on behalf of the government, and other stakeholders.

On 7 October 2013, ERT led a public roundtable on “Lessons from Addressing Discrimination in Eastern Europe”, hosted by the Coalition against Discrimination in Kyiv, aimed at politicians, lawyers and civil society representatives with an interest in legislative reform on how to improve Ukraine’s legislative framework to ensure the rights to equality and non-discrimination were fully protected. ERT discussed the experience of the adoption in 2003 of a comprehensive equality law in Bulgaria, and the subsequent decade of rich judicial practice. On 8 October, ERT held a meeting, convened by the EU Delegation to Ukraine, with the Ukrainian Ministry of Justice to discuss the current anti-discrimination
law in Ukraine and the amendment bill introduced by the government.

On 14 October 2013, ERT submitted proposals for the list of issues to be adopted by the Committee on Economic, Social and Cultural Rights in relation to Ukraine. The issues identified by ERT concerned gaps and weaknesses in the legislative framework to prohibit discrimination such that it falls short of Article 2(2) of the Covenant. ERT suggested that the Committee invite the state party to explain what steps it plans to take to reform in this area. The Committee published its List of Issues in December 2013 and included some of ERT’s questions, specifically on whether existing anti-discrimination legislation was compatible with Article 2(2) of the Covenant, whether the legislation prohibited discrimination on all relevant grounds including age, sexual orientation and nationality, and the status of draft legislation which would potentially amend and improve the anti-discrimination legislation.

Prior to the EU Eastern Partnership Summit in late November 2013, ERT and Nash Mir engaged in a sustained advocacy campaign aimed at both Ukrainian authorities and the European Commission on the need for reforms to anti-discrimination legislation in Ukraine to be made to meet international and EU standards.

The political crisis in Ukraine has dictated much of ERT and Nash Mir’s work from No-
vember onwards. Despite this, there has been some progress in relation to some of the project activities. A number of local organisations were identified and appointed to undertake field research on incidences of discrimination against various groups in Ukraine. This research will feed into the comprehensive report on discrimination and inequality.

United Kingdom: Greater Protection for Stateless Persons

Under this project, ERT continued to remain engaged on the issue of the protection of stateless persons in the UK. ERT is a member of the Working Group on Indefinite Detention of the Detention Forum, and contributed towards the strategy and theory of change to end indefinite detention that was developed and finalised by the Working Group.

ERT with partners Asylum Aid and Garden Court Chambers has undertaken the delivery of seven training workshops on statelessness and the use of the 2013 UK rules pertaining to the identification of stateless persons. At each workshop, ERT delivers training on the international statelessness and human rights frameworks and principles of equality and non-discrimination. The pilot training session was held on 16 October 2013, and the first workshop in Birmingham was held on 28 October. Additional workshops were conducted in Bristol, Glasgow, Leeds, Liverpool and London.
ERT Work Itinerary: July – December 2013

**July 2, 2013:** Attended a High Level Roundtable Discussion on peace building in Myanmar, organised by the Overseas Development Institute (ODI), London, UK.

**July 8, 2013:** Delivered a presentation on the development and operation of equality impact assessment processes, at a meeting of the Croatian Equality Forum, Zagreb, Croatia.

**July 9, 2013:** Participated in a meeting of the Bosnia and Herzegovina Equality Forum, discussing a draft comprehensive report on addressing discrimination and inequality, Sarajevo, Bosnia and Herzegovina.

**July 11, 2013:** Participated in Just Fair Consortium evidence-gathering event, London, UK.

**July 18, 2013:** Attended Foreign and Commonwealth Office Meeting on the UK Response to the situation in Myanmar, following the visit of President Thein Sein to the UK, London, UK.


**July 29-August 2, 2013:** Provided training for journalists from Sudan and South Sudan on international law and best practice on the right to equality, the documentation of cases and discrimination, and the role of the media in combating hate speech.

**August 26-31, 2013:** Undertook monitoring and support visits for community-based organisations engaged to provide legal services to women and girls who have experienced discrimination, as part of ERT’s project “Improving access to justice for victims of gender discrimination”, Makueni, Kibera, Kajiado, Naivasha, Nakuru and Narok, Kenya.

**September 2, 2013:** Provided training on Challenges of Using UN Human Rights as part of a course run by University of Westminster, London, UK.

**September 4-5, 2013:** Convened a high-level roundtable meeting for leading figures in the media of Sudan and South Sudan, to discuss collaboration in promoting equality and freedom of expression, the role of the media in combating hate speech and promoting improved relations between the two countries.

**September 23-29, 2013:** Provided training for civil society organisations in Ukraine on the application of international law and best practice on the right to equality, Kiev, Odessa and Kharkiv, Ukraine.

**September 25-26, 2013:** Provided training for members of staff at UN agencies operating in Ukraine on the application of international law and best practice on the right to equality, Kiev, Ukraine.

October 5-6, 2013: Provided training for civil society organisations in Ukraine on the application of international law and best practice on the right to equality, Dnipropetrovsk, Ukraine.


October 7-12, 2013: Provided training for journalists from Sudan and South Sudan on international law and best practice on the right to equality, the documentation of cases and discrimination, and the role of the media in combating hate speech.

October 11, 2013: Delivered training on statelessness in the UK in collaboration with Asylum Aid and Garden Court Chambers, London, UK.


October 26, 2013: Conducted a training sessions on “Identification and proof of Discrimination Cases”, at a seminar on Promoting Equality and Combating Discrimination: Workshop for Russian Regional Commissioners for Human Rights, St Petersburg, Russia.

October 28-31, 2013: Provided training for civil society organisations in Kyrgyzstan on the application of international law and best practice on the right to equality, Bishkek, Kyrgyzstan.

October 31 - November 1, 2013: Participated in UNHCR expert meeting on statelessness, Tunis, Tunisia.

November 5-8, 2013: Delivered training on statelessness, equality and non-discrimination, detention and the Rohingya at UNHCR and Tilburg University South East Asia Regional Course on Statelessness, Bangkok, Thailand.


November 13-14, 2013: Provided a briefing to members of the UN Committee on Economic, Social and Cultural Rights regarding the review of Belarus’ compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights, and observed the Committee’s consideration of the state’s report.

November 20, 2013: Delivered training on statelessness in the UK in collaboration with Asylum Aid and Garden Court Chambers, Birmingham, UK.
November 25-27, 2013: Delivered training on statelessness, equality and non-discrimination at European Network on Statelessness, Train the Trainer workshop, Budapest, Hungary.

November 28, 2013: Published Half an Hour to Spring: Addressing Discrimination and Inequality in Belarus, the third in ERT’s series of comprehensive country reports which combine an assessment of the lived experience of those exposed to discrimination and inequality and analysis of relevant laws, policies and practices.

November 28, 2013: Participated in European Network on Statelessness Steering Committee Meeting (via internet link from London), Budapest, Hungary.

December 3-6, 2013: Provided training for civil society organisations in Kazakhstan on the application of international law and best practice on the right to equality, Almaty, Kazakhstan.

December 5, 2013: Delivered training on statelessness in the UK in collaboration with Asylum Aid and Garden Court Chambers, London, UK.
Note to Contributors

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

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

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

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

Submission Guidelines
- Articles should be original, unpublished work.
- Articles must be written in United Kingdom English.
- Articles must contain footnote or endnote referencing.
- Articles should be between 5,000 and 10,000 words in length.
- Articles must adhere to the ERT style guide, which is available at: http://www.equalrightstrust.org/ertdocumentbank/ERR%20STYLE%20GUIDE.pdf
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 relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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