RIGHTS-BASED APPROACHES TO TACKLING DISCRIMINATION AND HORIZONTAL INEQUALITY

BACKGROUND PAPER

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Rights-based approaches to tackling discrimination and horizontal inequality

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> It may be true that the law can't make a man love me, but it can keep him from lynching me. (Martin Luther King)[2]

> Any attempt to reverse entrenched discrimination … necessitates a closer look at the rights violations hidden under a landscape of poverty. (Narula and Macwan, 2001: 11)

In many societies there is a strong dimension of horizontal inequality, meaning gaps in well-being between clearly defined groups (for example, along lines of gender or ethnicity). Frequently, lack of respect for equal rights and difficulties in claiming entitlements, in particular for social groups subject to legal, political, social or cultural discrimination, is a major factor underlying poverty, associated with high levels of inequality and contributing to economic and social exclusion. Discrimination reflects socially-constructed identities and interests which, depending on the situation, operate along lines of gender, religion, class, ethnicity, nationality, age and other dimensions.

This paper reviews:
- the importance of human rights for equality and social inclusion;
- the extent and nature of discrimination, and its contribution in explaining inequalities in income, assets, health, education, and so on;
- the processes by which discrimination takes place and the extent to which states combat direct and indirect discrimination, in law and practice;
- the potential contribution of 'rights-based approaches' by governments, civil society and international donors in combating discrimination and the inequalities it creates.

1. Human Rights, Equality and Non-Discrimination

1.1 Human Rights

The value of a human rights approach

The 1948 Universal Declaration of Human Rights (UDHR) states that 'All human beings are born free and equal in dignity and rights' (Article 1). The principles of equality and non-discrimination are fundamental to ensuring that every human being can realise his or her human rights, regardless of race, ethnicity, language, religion, gender or any other sources of distinction.

The main value of adopting a human rights approach is that the beneficiaries of development are considered to be right-holders, not subject to charity, and are thus able to make legitimate claims on governments for their rights to be respected. This

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applies not just in the area of civil and political rights (for example, the right to a fair trial, to vote), but also in the social and economic spheres (for example, right to education, labour rights). Such an approach highlights obligations and duties that governments have to ensure that they do not engage in discriminatory practices, provide protection against discrimination, and take positive steps to promote respect for equality, both in terms of treatment and outcomes.

In terms of action, international human rights law offers a universal standard-setting and monitoring system which enables analysis of discrimination and responses to it. The International Bill of Rights in particular reaffirms the fundamental equality between all human beings.[3] The language of such law highlights the fact that combating inequalities in the process of development is important in itself, because of our shared humanity, and not purely for instrumental reasons (because it will contribute to social stability or economic growth). The fact that all states have signed the UDHR, and all are parties to most UN human rights treaties, show that combating inequality and discrimination is not simply a Western, liberal, social-democratic consideration, but a universal principle.

Furthermore, the international consensus reached at the Vienna World Conference on Human Rights in 1993 established that human rights are indivisible and interdependent; civil and political rights as well as social, economic and cultural rights are important for development. This does not mean that states are unable to prioritise policy actions but it does mean that civil and political rights should not be violated in the name of economic development, and conversely, economic and social rights cannot be ignored. An implication is that economic growth needs to be an inclusive process and that it matters if it has a negative impact in terms of equality and discrimination.

Human rights standards

The human rights framework introduces norms and enforcement mechanisms whereby the principles of equality and non-discrimination can be applied in practice and states can be held to account by the international community. These include international mechanisms, such as the UN Treaty Monitoring Bodies, which monitor the implementation of legally binding covenants and conventions, as well as regional mechanisms, in particular in Africa, America and Europe.

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibit discrimination in relation to all the substantive rights they enumerate and promote equal rights between men and women. In addition, the ICCPR establishes that non-discrimination is a non-derogable right (i.e. it cannot be violated even in situations of emergency) and that everyone has the right to equality before the law. The Committee which monitors the ICESCR has also argued that the principle of non-discrimination overrules the concept of the 'progressive realisation' of economic, social and cultural rights: discrimination cannot be justified on the grounds of lack of available of resources and should be addressed immediately.[4]

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3. The International Bill of Rights is composed of the 1948 Universal Declaration on Human Rights (UDHR); the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1966 International Covenant on Civil and Political Rights (ICCPR).
4. General Comments 3 and 11, CESCR.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provide further specification with regard to racial and gender discrimination. These conventions make clear that discrimination includes processes and actions that are discriminatory in intent *or* effect and CEDAW also highlights that discrimination can occur in the private sphere (for example, within the family) as well as in the public sphere (for example, with regard to voting rights). Parties to the conventions have agreed to pursue policies to eliminate discrimination, not just by ensuring that constitutions, laws, regulations and policies are non-discriminatory, but also by: developing policies that protect women and other groups; providing effective means of redress as well as sanctions; targeting discriminatory customs and practices against women; banning the dissemination of ideas based on racial superiority or promoting racial hatred; and encouraging organisations and movements that eliminate barriers between races and that promote tolerance.

Box 1: Non-discrimination in human right standards

'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status' (ICCPR, Art. 26)

'in time of public emergency… the States Parties to the present Covenant may take measures derogating from their obligations…provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' (ICCPR, Art 4(1))

'"racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (CERD, Art 1).

'"discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.' (CEDAW, Art. 1)

In addition to the legally-binding Treaty-based mechanisms, the UN Charter-based instruments also offer tools to monitor and bring to light ongoing discriminatory practices. For example the UN Commission on Human Rights has appointed Special Rappporteurs on: (i) freedom of religion and belief; (ii) the human rights and fundamental freedoms of indigenous peoples; (iii) contemporary forms of racism, racial discrimination, xenophobia and other forms of intolerance, and (iv) on violence against women. These are independent experts who can undertake country missions and provide regular reports on world trends. The reports are discussed by governments and civil society organisations, and international statements of condemnation can be issued.

Implementation

Standards are important because they provide shared norms that states have committed themselves to respecting. However, practice often fails to live up to lofty statements, and this has prompted many to question the value of such an approach.

The international human rights system is important because it creates a legitimate mechanism to monitor and challenge the behaviour of states, such as in the fight against South African apartheid. International sanctions were put in place and international companies eventually forced to recognise that it was not acceptable to trade with this country. More importantly perhaps, domestic activists can gain in strength and legitimacy when they can bring issues to the international stage, as was particularly the case with indigenous rights campaigners in Latin America during the 1990s.

Rights can best be protected through national institutions and policies, such as Constitutions which entrench fundamental principles of equality and non-discrimination. Domestic laws, regulations and policies must respect these fundamental rights and freedoms and courts can be used to bring to book state officials or individuals who engage in discriminatory practices. In addition, independent institutions such as National Human Rights or Equality Commissions may be charged with education, monitoring and advocacy.

Non-discrimination is also a fundamental aspect of democracy and the rule of law. The former requires formal equality, under the slogan 'one person, one vote' and the latter implies that the law has to be applied equally to all, regardless of their gender, ethnicity, religion, or other characteristics, and that courts should be independent of political influence and be accessible to all, including the poorest.

1.2 Poverty and Exclusion

Recent approaches to understanding poverty have highlighted its multi-dimensional and relational nature (WDR, 2000/01). The concept of social exclusion highlights these elements, helping to understand how people are often deprived of different things at the same time (e.g. citizenship rights, opportunities for employment, social services). It introduces a focus on the social processes and institutional arrangements that underlie it (de Haan, 1999). The concept captures the experience of certain groups as being set apart or locked out of participation in social life (Kabeer, 2000). Its origins lie in French social policy in the 1970s, where concerns for the impact of long-term unemployment, isolation of the elderly, drug abusers and categories of 'marginalised' persons were seen as a threat to social cohesion. Anglo-Saxon understandings of exclusion see it as reflecting discrimination – the drawing of group distinctions that denies individuals full participation in society (de Haan, 1999).

The term has grown in popularity in development policy, and actions to combat discrimination are seen as promoting social inclusion. For example, the 2001 Durban Declaration and Programme of Action, the outcome of a World Conference on Racism, reaffirms a vision of inclusive societies, respectful of diversity. Through its Article 6, states reaffirmed 'that all peoples and individuals constitute one human family, rich in diversity. They have contributed to the progress of civilizations and cultures that form the common heritage of humanity. Preservation and promotion of tolerance, pluralism and respect for diversity can produce more inclusive societies'.

2. Patterns of discrimination

2.1 The relationship between group-based identities and inequality

Disaggregated data are crucial to understanding patterns of inequality because, otherwise, inequality can appear to be purely a function of class-based (vertical) disadvantage. The 1970 Brazilian census omitted categories regarding colour and race and the myth of 'racial democracy' could only be challenged once disaggregated data became available in the late 1970s (Santos Roland, 2001: 10). The recording of progress towards the MDGs may represent a similarly political process and, in the absence of disaggregated results, could mask the groups that are consistently missing out, such as national, religious, or linguistic minorities or indigenous peoples (MRG, 2003: 14). When it is available, disaggregated data can demonstrate a relationship between particular groups and poverty. What is important about such patterns is that they indicate that membership of a particular group means a *disproportionate* chance of being poor, suggesting that such inequalities are, in part at least, an outcome of discriminatory structures and processes.

The group-based identities that appear to have the most pronounced influence on this disproportionate chance of experiencing poverty are race, ethnicity and gender (see Box 2). Although these examples only give a brief indication of the possible connections between these and poverty, what they do demonstrate is that the dimension in which poverty is experienced – economic, social or political – can vary according to the group-based identity in question. For some, it can mean political exclusion; for others, the inability to access basic services. For most, however, it results in a complex interaction between exclusion in different dimensions or inclusion on unequal terms.

Box 2: Factors influencing chances of experiencing poverty

- In countries in all income categories, minority and indigenous groups are more likely to be income poor than the rest of the population and they experience higher poverty rates. They are more likely to have poorer living conditions, less valuable assets, less and poorer access to education, health care and access to a range of services, worse access to markets for labour, land and credit, and weaker political representation (Justino and Litchfield, 2003).
- In China, ethnic minorities constitute 40% of the poor despite making up only 8% of the population (ibid.: 11).
- Unemployment rates for Romas in Bulgaria can be as high as 90% in contrast to a national average of just 3% (ibid.: 12).
- The life expectancy of 'untouchables' in Nepal is 15 years less than that of Brahmins (ibid.: 12).
- In the United States, the mortality rate of black infants is 2.5 times that of white infants and they are three times more likely to be placed in foster care (Forde-Mazrui: 2002: 9-10). Bangladeshi men have a better chance of living beyond forty than Afro-American men from Harlem (Sen, 1999).
- It is estimated that 70% of the 2 million children who do not attend school in China are girls (Murthy and Sankaran, 2003: 70).
- In Pakistan, women's share of total earned income in 1994 was just 20.8% (ibid.: 70).
- White men earn 250% more than black men in Brazil and 400% that of black women (Justino and Litchfield, 2003: 13).
- In 1997, 17 million of approximately 60 million disabled people in China were absolutely poor and in the wealthy province of Jiangsu disabled people made up over 60% of the total poor (CPRC, 2004).
- It is estimated that AIDS is likely to increase the incidence of chronically poor households in South Africa by 26-33% (Ibid.)
- 62% of the population is poor in rural areas in South Africa in comparison to 13% in metropolitan areas and 25% in secondary cities (Gelb, 2003).

What these examples do not say anything about is the cause of these linkages between membership of a group and the denial of rights; for this we need to go beyond snapshots of outcomes and get at the underlying processes and structures that produce them. The value of the social exclusion discourse for poverty reduction is that it focuses attention on the multidimensional processes that lead to exclusion. An examination of the social, economic and political processes that produce and maintain unequal access to services, assets, income, power and opportunities is required to address the discriminatory roots of inequality.

Examining the processes underlying inequality will also highlight that the way in which discrimination is experienced varies according the identity and characteristics of the individual. For instance, a female Brazilian Afro-descendant's experience will be different to that of a male Afro-descendant. It is simplistic to view such differences as 'double discrimination'; the notion of 'intersecting discrimination' is more adequate to convey the complex interaction of discriminatory processes rather than, for example, simply adding on racial discrimination to that of gender (Otto, 2002: 26). One of the ways this intersecting discrimination is manifested for female Afro-descendant's in Brazil is the cancelling out of their natural advantage in terms of life expectancy relative to white men (66 years and 69 years respectively) (Santos Roland, 2001: 3). Dalit women are furthest from legal protection in India due to the interaction of class, caste and gender. Furthermore, characteristics such as disability, age and location, which cut across groups, can also intersect with 'group'-based identities and impact on inequality within groups. These characteristics have a compound affect, further determining how services are accessed and making the conversion of capabilities more difficult.

A focus on processes will also make evident that inequality and discrimination may exist without significant levels of poverty. Discriminatory processes can be based on cultural/customary beliefs and practices and these should still be of concern from a rights-perspective. Women, for example, are under-represented in the senior management of the world's largest public companies; only seven *Fortune 500* Chief Executive Officers in America are women, and one *FTSE 100* in the UK. They face three types of discrimination: they fail to get selected for demanding jobs required for promotion; they lack required social networks, for example those that combine work and family life; and they find it difficult to develop a leadership reputation (Economist, 2003). Intra-household inequalities mean that women can be chronically poor even in a household that is less poor (CPRC, 2004). Equally, however, poverty can itself be a source of direct discrimination, such as social stigma associated with external signs of poverty. Poor people are also prevented from claiming their rights because of a lack of income and capabilities. They are less likely to be able to pay the transportation costs, or bribes, associated with going to court to equally claim their rights, and may be less comfortable with formal legalistic procedures (Anderson, 2003).

Of course, unequal outcomes are not necessarily the result of discriminatory processes. To take the example of unequal wages, these may be a reflection of differences in ability or choice or a result of factors such as regional demand for a particular skill. However, if two people with comparable qualifications and experience receive unequal remuneration, this is clearly a result of direct wage discrimination. Furthermore, whilst differences in pay can be a reflection of different

educational achievements and skills, and therefore not a result of direct discrimination, these differences in human capital can themselves be an outcome of indirect discrimination, that is past discrimination that has produced inbuilt disadvantage due to unequal service provision, etc. This will be discussed in more detail below.

Inequalities are also not only present between groups. Recent World Bank research in Latin America actually suggests that intra-group inequalities may be more significant than inter-group ones (World Bank, 2003). Inter-group inequalities are calculated on the basis of averages that do not reflect the complexities of intra-group inequalities. Policy-makers therefore need to ask who is actually benefiting from interventions. Policy actions aiming to combat discrimination, for example, will not necessarily be automatically pro-poor. Those that target specific groups may also not capture the most disadvantaged within these groups.

However, it must also be acknowledged that poverty reduction strategies that focus solely on vertical inequality are unlikely to capture all disadvantaged groups if they fail to take into account the discriminatory processes that produce horizontal inequality. Furthermore, addressing inter-group inequalities has value beyond it contribution to poverty reduction or social justice. Stewart argues that, in multi-cultural societies, political, economic and social horizontal inequalities are a crucial factor in determining whether relations between groups are peaceful or violent (Stewart, 2002: 3). Equally, policies to address such inequalities need to be carefully managed; Sri Lanka's recent history demonstrates the possibility for violent conflict when horizontal inequalities are hijacked for political ends (see below). The ways in which inter-group inequality is produced and maintained is examined in the next section.

2.2 Discriminatory processes

Categories of discrimination

Iturralde (2003: 2) provides a useful working definition of discrimination as being 'a combination of practices which deny or hamper the enjoyment of rights because of ethnic or cultural differences, and which are rooted in attitudes that interpret such differences in terms of socially accepted prejudices and stereotypes'. Such practices can take many forms and it is useful for conceptual clarity to make the following distinctions:

- **Formal discrimination:** Discrimination that is officially sanctioned. This includes not only constitutional provisions, laws, regulations and policies that explicitly further discriminatory practice but also those that fail to provide legal protection of, and redress for, the right to non-discrimination.

- **Informal discrimination:** Discrimination based on perceptions and attitudes. This form of discrimination permeates social interactions and can result in the stigmatisation of particular groups. Discriminatory perceptions and practices can also be based on customary beliefs and can reinforce formal discrimination when they influence decisions taken by, for example, public officials or employers.

- **Direct discrimination:** Current mechanisms (both formal and informal) which can be identified as directly causing discrimination.

- **Indirect discrimination:** Socio-economic disadvantage and unequal distribution of power due to the cumulative affects of historical discrimination (both formal and informal), which hinders the equal enjoyment of civil, political, economic, social and cultural rights.

Direct formal discrimination

Unequal recognition under the law is the most blatant type of formal discrimination. Under apartheid in South Africa, the majority of the population were denied full citizenship rights because of their race. Another example can be found in China where the law in some districts explicitly discriminates against people living with HIV/AIDS by restricting their rights of residence, education and marriage (Human Rights Watch, 2003b 42). In Jilin Province, for instance, it is against the law for people with sexually transmitted diseases to use public swimming pools (ibid.: 34). Yet another is the denial of citizenship to people of Korean descent in Japan (ICHRP, 2001: 6).

Furthermore, whilst the state may not explicitly discriminate against groups of people, it may fail to legislate to protect their right to non-discrimination. Job descriptions in Brazil for female-specific jobs, itself a reflection of informal cultural discrimination, can contain phrases such as 'good appearance' or 'women with nice faces', euphemisms for 'light-skinned' and thus racially discriminatory (Sanchez and Bryan (2003: 9). Another source of discrimination is the use of the majority language in, for instance, the education and justice systems, which will particularly affect minorities and indigenous peoples.

In other instances, non-discrimination legislation is in place but, because the state fails to effectively enforce it or ensure policy implementation, discrimination continues to occur. The continued discrimination against Dalits in India is a good example. For over 50 years, India has had legislation in place to protect its citizens' right to equal treatment, yet discriminatory practices against Dalits remain rife owing to a lack of will to ensure that this legislation is actually implemented and those that hamper its implementation are held to account. Recognising the particularly vulnerable position of Dalits, the Indian Government enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. However, its implementation has been undermined by caste bias and corruption in the police and judiciary, despite a dramatic increase in violence against Dalits during the 1990s due to their increasing attempts to claim their rights (Narula and Macwan, 2001: 7-8).

A more widespread problem, and one that is more difficult to demonstrate as being a result of direct, as opposed to indirect (see below), discrimination, is the denial of equal access to services (such as justice, education, health and infrastructure). Such discriminatory practice can be clear; in some villages in India, the state has provided infrastructure in the upper-class area but failed to do so in the 'neighbouring segregated Dalit colony' (Narula and Macwan, 2001: 8). However, when particular groups are concentrated in particular communities it can be more difficult to prove direct discrimination. For example, 64.7% of Afro-descendants in Brazil had access to

piped water in 1996 compared to 81% of whites, and the figures for access to sewage was 49.7% and 73.6% respectively (Santos Roland, 2001: 8). It could be argued that this unequal provision of infrastructure is a result of the concentration of Afro-descendants in communities which grew out of safe havens established following their escape from slavery. However, the case could also be made that this inequality is an outcome of policy choices and that, whether or not these were discriminatory in intent, they are discriminatory in outcome.

Direct informal discrimination

The perceptions and attitudes held by individuals, and which informs their behaviour and practices, provide the fuel for formal discrimination. These perceptions are often culturally produced and maintained and, at a broad social level, they produce stigmatisation, that is, the belief that 'certain groups are inferior in one or many ways based merely on membership in the group – which indirectly permit or promote discriminatory effects' (ICHRP, 2001: 5). The status of women in many parts of the world provides a glaring example of stigmatisation, based on cultural/customary beliefs and practices, and demonstrates how it can permeate social relations, restricting access to networks and opportunities. Estimates of intra-household resource allocation suggest that 50% more is spent on healthcare of boys in rural China, which had a sex ratio of 123:100 in 1995 (Song, 2003). Furthermore, stigmatisation can become internalised over time. In the Andean region in Bolivia, this internalisation is reflected in indigenous people changing their surnames to what society perceives to be a more 'civilised' one, with obvious consequences for the integrity of their identity.

These discriminatory attitudes can have an impact on different levels. They can operate in the private sphere, when cultural norms restrict access for certain groups to services, employment and decision-making. They also manifest themselves in the public sphere by influencing the perceptions and practices of teachers, police officers, bureaucrats, employers, etc., even when such practices are not officially sanctioned. Kabeer (2000: 87-91) argues that such attitudes dictate the 'rules of the game that govern entitlement and disentitlement' by forming institutional bias, social closure and 'unruly practices' (that is, the gap between rules and their implementation). At a social level, these attitudes also permeate social relations and restrict access to networks and opportunities, which can impact on employment opportunities, for example.

Indirect discrimination

Discrimination does not only refer to direct discrimination, that is, those practices and processes currently in progress. Even when groups have had the protection of legal equality for some time, socio-economic disadvantage and unequal distribution of power due to the cumulative affects of historical discrimination (both formal and informal) will often remain. Such indirect discrimination creates an uneven playing field, impeding the equal enjoyment of civil, political, economic, social and cultural rights. The instrumental importance of human capital is well known for personal development and social mobility and Ituraalde (2001) argues that the disparity in access to goods and services that has accumulated over time leads some groups to have a 'structural incapacity to assimilate growth'. Indirect employment and wage discrimination is an outcome of different levels of human capital owing to unequal access to services, in particular education. Furthermore, continuing disadvantage and informal discrimination are mutually reinforcing; continued disadvantage strengthens stereotypes and the resulting discriminatory behaviour enhances disadvantage.

In Brazil, Afro-descendants continue to experience disadvantage relative to white people over a whole host of human development indicators: in 1997 illiteracy rates for Afro-descendants aged 15 and over was 42.3%, as compared to 8.4% for white

Brazilians; Afro-descendants account for 45.1% of the population but only 14% of university students; during the period 1990-5, average life expectancy was 70 for white people and 64 for Afro-descendants; the average monthly income of white workers in São Paulo in 1998 was double that of Afro-descendant workers; and in 1999 infant mortality for 62.3 for Afro-descendants and 37.3 for whites. In 1998 the Human Development Index for Brazil was 0.747 (74th out of 174 countries). However, if the indicators are disaggregated by race, the HDI for white Brazilians rises to 0.796 (equivalent to the rank of 48), and the HDI for Afro-descendants falls to 0.680 (equivalent to rank of 108) (Santos Roland, 2001). Rejecting essentialist arguments, it must be accepted that this results from a cumulative impact of past formal and informal discrimination, whether or not direct discrimination continues to play a role.

3.   Combating discrimination

3.1   Affirmative action and collective rights

Affirmative action

Liberal approaches may not be equipped to deal with historically constructed inequality and group-based injustice because they regard the appropriate response to discrimination as being race-blind or race-neutral laws and policies. Such approaches are unable to take account of the 'raced' (or gendered) historical and social structures within which individuals operate. By failing to recognise that indirect discrimination means that some groups are unable to compete on an equal footing, the emphasis on procedural equality of treatment inherently favours the status quo: 'inequality engendered by historical violation of their right not to be treated differently because of race can persist indefinitely if no one takes any further account of race after the initial violation' (Loury, 2001: 15).

This difficultly in reconciling equality of treatment with differentiation aimed at promoting the rights and interests of particular groups is acknowledged by international instruments. CERD and CEDAW sanction the use of 'special measures' to give substantive content to the equal enjoyment of rights, making clear that what determines whether or not they are discriminatory is their purpose and that such measures should be time-bound and should not lead to the creation of unequal separate rights for different racial groups. (However, they do recognise that women specific characteristics will necessitate continuous differentiated treatment, for example, maternity rights.) Such measures are to be withdrawn when equality of opportunity and treatment are achieved, although in reality this is likely to prove difficult because groups will come to have a vested interested in the continuation of the policy.

As argued earlier, many of the groups that have been the victims of sustained discrimination will take generations to reach anything approximating a level playing field if policy interventions only revolve around establishing formal equality. So, whilst the aim need not be full equality of outcome, further measures are required to give substantive meaning to equality of opportunity and these 'special measures' may sometimes come into conflict with the equal treatment principle. These measures are given different names in different countries: in the UK, they are called positive

discrimination; in India, the reservation policy; and, in the US, affirmative action policies, which will be used here for consistency. All are examples of time-bound measures that aim to redress imbalances resulting from earlier discrimination. Such policies have been demonstrated to be successful in altering group inequalities. In Malaysia, for instance, tension was created by the economic dominance of the Chinese minority over the majority Bumiputera. Affirmative action effectively diffused this tension by creating economic opportunities for the Bumiputera through education, land ownership and public service employment quotas. However, the probable success of affirmative action programmes is increased in situations such as these where economic and political power is separated, which is not often the case (Stewart, 2002: 19).

India's constitutional provision for non-discrimination is explicitly adjusted to allow for affirmative action to advance the 'backward classes of citizens' (de Zwart, 2000: 238). This 'reservation policy' mainly consists of quotas for government and higher education positions for Scheduled Castes and Scheduled Tribes (15%) and Other Backward Classes (27%) (ibid.: 235). This policy has been, sometimes violently, contested by those who see it as challenging the status quo. Arguments advanced against it include the charge that it is unfair (both because it undermines competition based on merit and by placing an historical burden on current society), that it legitimises caste and strengthens identities based on caste, and that it only benefits the more 'advanced' sections of these groups – reservation is estimated to have benefited less that 1% of Dalits (Narula, 1991: 3). However, whilst affirmative action does have drawbacks, other commentators argue that these are outweighed by the benefits it generates. The reservation policy has tapped the potential of previously excluded groups and, by opening up new positions to lower castes, it has increased interaction between groups and undermined the relationship between caste and occupation. It has also created a new, non-upper-caste, elite who is able to operate as a lobby for lower-caste interests in the legislature (Mitra, 1990: 99-106).

The US is another well-known example of the use of affirmative action policies to redress disadvantage due to past discrimination. However, here there has been an increasing backlash, as evidenced by legislation such as Proposition 29 in California, which prohibits preferential treatment in the operation of public employment, education and contracting, and has led to a large decrease in African-American and Latino enrolment in higher education (Alexander and Jacobsen, 1999: 593). Such reactions have led commentators to consider how the objectives of affirmative action can be achieved without engendering hostility.

Van Jaarsveld considers the differences between the affirmative action programmes in the US and South Africa, in particular the role of the judiciary and government in influencing the likelihood of its comparative success. Unlike the US, affirmative action is explicitly embedded in South Africa's constitution and its purposes have been democratically discussed. Article 8 (3)(a) of the 1993 South African Constitution states that 'society will regard any measure designed to achieve adequate protection and the advancement of people who were disadvantaged by past discrimination as legitimate'. The judiciary have also taken a leading role in clarifying issues, particularly around the 'balancing test', which aims to reconcile equal and preferential treatment. Just as importantly, affirmative action is compulsory in the public sector but different guidelines exist for the private sector (van Jaarsveld, 2000: 25-6).

Loury also attends to how a backlash against affirmative action could be avoided. He argues that the widespread use of 'preferential affirmative action', meaning measures that give preference to a particular group by applying different criteria than that applied to the majority (e.g. in hiring or admission) erodes the perception of black competence. They also undercut incentives for these groups to develop their competitive abilities due to 'patronization', that is, the 'setting of lower standards of expected accomplishment for blacks than for whites because of the belief that blacks are not as capable of meeting a higher, common standard', which can then become a self-fulfilling prophesy. By contrast, 'developmental affirmative action' refers to measures that seek to meet the required levels of participation by a particular group without using differentiated standards of evaluation. Examples include measures that aim to enhance performance of targeting groups, for example, through assistance either in terms of knowledge (management assistance/additional training, etc.) or money (sponsorships/research assistantships, etc.) (Loury, 1999: 31-4).

Another route to avoid negative responses to affirmative action include policies that also factor in class considerations to foster multiracial support for reforms, or which can build gender coalitions across income and social status differences. For example, equalised funding of public education can help close the gap between black and white test performance, rather than relying on quotas for black students (Alexander and Jacobsen, 1999: 596). 'Territorial affirmative action' measures focus on the spatial organisation of opportunity. Despite a concentrated drive to reduce inequalities between Catholics and Protestants in Northern Ireland, affirmative action policies have failed to reverse the high unemployment rates for Catholics because it has neglected the impact of their concentration in poor, working-class areas (ibid.: 598). Finally, attention can be paid to how policy is evaluated and implemented. A recent 'race-blind' but not 'race-neutral', policy is the 10% rule in Texas, which was a response to the Federal court's ruling that affirmative action could not be used in college admissions. By guaranteeing college places for the top 10% of students in all high schools, this policy benefits students with good grades in less competitive high schools, who are disproportionately black and Hispanic (Loury, 2001: 16-17).

Collective rights

The affirmative action measures discussed above are time-bound, corrective measures and they need to be distinguished from permanent 'special measures'. Whereas corrective measures respond to the need for intervention to enable groups to access their rights equally, with the intention that they will become unnecessary at some future point, permanent measures respond to the call for differential treatment by groups who are attempting to claim particular rights in order to preserve their identity or way-of-life or are based on unique characteristics. Such collective rights highlight that discrimination can also be about non-recognition of difference (Itteralde, 2001: 15). Collective group rights can, however, be considered discriminatory because, by definition, they exclude those not part of that collective and can come into conflict with individual rights. The recognition of collective rights can also run counter to certain political traditions, such as in Thailand, which privileges an assimilationist conception of citizenship to promote national unity and social cohesion (Phongpaichit, 1996).

The demand for differential treatment may be about groups attempting to claim particular rights which are vital for them to combat economic exclusion and inequality. Although, there are, to date, no legally binding UN Conventions on persons belonging to minorities and indigenous peoples, their rights are increasingly being recognised as evidenced by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which acknowledges that the state will need to adopt legislative measures to protect and promote the identity of minorities. The International Labour Organisation Convention No 169 is the most significant document with regards to the protection of indigenous peoples. Many Latin American countries are also beginning to realise the need to constitutionally recognise the rights of minorities and indigenous peoples, although less progress has been made in terms of implementation (Feiring, 2003: 2). For example, indigenous communities in the Atlantic Coast region of Nicaragua are constitutionally recognised as owners of their land but these boundaries have often not been demarcated leading to conflict between holders of individual and collective rights over the land. Furthermore, communal land rights are undermined by contradictory constitutional provisions regarding the state's ownership of natural resources and legislation that favours private companies (ibid.: 11).

Alongside the importance of constitutional recognition of rights, indigenous peoples in Ecuador have demonstrated the need for organisational capacity and social cohesion to successfully defend a minority language, authority and tradition (Iturralde, 2001: 4). On the back of a long process of land redistribution and a return to pastoral use during the 1970 and 1980s following the Agrarian Reform Law, a revival of indigenous communes and strengthening of their traditional indigenous authority and language supported by the Catholic Church and Ecuadorian Federation of Indian Peoples, indigenous organisations have been able to go on to capture local electoral power and establish 'indigenous municipalities' to forward advance interests (ibid.: 9-12).

As noted above, collective rights can come into conflict with individual rights. This is perhaps most significant in relation to the violations of women's individual rights and efforts to protect customary indigenous practice need to recognise that these can perpetuate gender-based discrimination. As Kabeer (1997: 4-5) argues, the 'moral economy of community and kinship' is one of the institutional arenas which govern entitlements; informal rules can act as a gateway to formal rules. The need for the state to be an active promoter of equal rights can be seen in China, where the socialist policies of the post-1949 period transformed traditional patrilineal land inheritance and patrilocal kinship patterns and, along with them, a traditional basis for women's subordination (Murthy and Sankaran, 2003: 52). Unfortunately, there is evidence that economic reform has resulted in the loss of land rights for some women (Ibid.: 31). In Uganda, as in many other countries, the government has failed to realise its commitment to combat discriminatory practices against women embedded in customary practices, such as widow inheritance, 'bride price', unequal land rights and polygamy (Human Rights Watch, 2003a: 69). Ultimately, however, there is a need to tackle the structural causes of women's inequality if policy is to be effective in the long term, which means addressing gender hierarchies and stereotypes.

3.2 Summary of policy responses

Admission It is important for the international community, states and societies at large to admit that discriminatory practices are ongoing and negatively affect equal respect for human dignity and equal opportunities for development. For example, until Brazil recognised racial differences, it was not able to collect adequate data and develop appropriate policies. Public statements by senior officials, and apologies for wrongs committed in the past can positively contribute to creating a culture of trust.

Adequate data Adequate policy responses require disaggregated data which can allow an identification of inequalities across and within groups. Such data are not always available, and efforts are needed to develop domestic collection and analysis capacities.

Legal framework In line with international human rights standards, states need to ensure that their constitutional and legal frameworks embody principles of non-discrimination and equality, including between men and women, and repeal inconsistent legislations. On the basis of transparent and participatory processes, states may need to strengthen provisions that make it an offence to propagate incitements to violence and hate speech, balancing the need to respect freedom of thought and expression, and avoiding abuses that can be committed under the guise of preventing discrimination.

Redress and accountability mechanisms States need to ensure that there are available mechanisms to sanction discriminatory behaviour and provide effective remedies for victims. This requires strengthening legal and judicial systems, with a concern to enhance their effectiveness as well as their accessibility. Reforms such as simplification of procedures, use of local languages, and facilitating referrals between states and non-state systems may promote accessibility, as well as strategies to promote legal empowerment. Horizontal accountability mechanisms may also be useful to monitor behaviour of state actors (e.g. national human rights commissions or commissions for racial and gender equality, etc).

Institutional reforms Such reforms are needed to build awareness of discrimination amongst public servants, and put systems in place so that state institutions do not engage in discrimination. These are needed as matter of priority in periods of transition, for example in post-apartheid South Africa, or when racism and other forms of discrimination are considered to be institutionalised in parts of the public service (e.g. in the police). Public service reforms should also be sensitive to differentiated impacts on social groups. Retrenchment policies may disproportionately affect minority or excluded groups, and undermine inclusive recruitment policies aimed at enhancing the stake of women or ethnic groups in the state.

Resource transfers and appropriate social policies Priority areas for social investments will depend on patterns of discrimination. Evidence suggests that education, health, housing, and land are of particular importance and adequate policies need to be put in place to ensure equality of access. Land is of particular relevance for indigenous peoples and governments need to protect their rights to own and make use of its resources, and protect them against illegal dispossession or forced displacements. Policies should also address the capacity required to engage in the mainstream economy on an equal basis.

Affirmative action Human rights treaties recommend adopting 'special measures' to redress inequalities in treatment as well as outcomes. Examples of international practice have been provided above. Such policies are needed until an equal playing field has been established. Governments must be aware of the possibility of backlash as well as the difficulty in suspending temporary entitlements.

Political participation Reforms to ensure that all individuals are able to participate fully and fairly in domestic political processes are needed. Participation is a fundamental right, and is an essential strategy to ensure that excluded groups are able to have a say in policies that affect their lives. There should be adequate representation in public institutions, including parliaments, local governments, and anti-discrimination bodies.

Promotional and advocacy activities These are needed to raise awareness, provide formal or informal education, and initiate processes of social and cultural transformation. The state, as well as civil society organisations have a role to play. Responsible media reporting can make a significant contribution; the Rwanda genocide illustrate all too well the consequences of unbridled hate speech Respect for the rights of association, expression and information is a pre-requisite to ensure the ability to organise, advocate and speak out against discrimination.

Support to international human rights system International standards and monitoring systems are of fundamental importance to create external pressure for domestic reform. States need to sign up to international and regional treaties, in particular CEDAW and CERD, and fully participate in the monitoring mechanisms, inviting UN special rapporteurs when requested. Governments should continue to engage with new standards setting processes, in particular for persons belonging to minorities and indigenous peoples, and be supportive of processes aimed at strengthening UN human rights mechanisms. Treaty reservations, in particular to CEDAW which lower protection standards for women, should be revoked.

Rights based development assistance International development agencies should ensure that in their dialogue and assistance, they do not encourage or exacerbate discriminatory practices, that they raise awareness of the constraints for development posed by discrimination, adopt genuinely participatory approaches (and not just tokenistic consultations) and promote socially inclusive responses. For example, UNDP is developing a set of Practice Notes on minorities, indigenous peoples and rights-based approaches which can facilitate the genuine integration of non-discrimination into programming. International financial organisations, which do not recognise that they are subject to international human rights obligations, should nonetheless also ensure that their assistance does not exacerbate country situations and instead make positive contributions. The World Bank has for example adopted an Operational Procedure with regards to indigenous peoples. More can be done, and both IFIs and donors should take greater account of standards set by the relevant UN committees.

4. Conclusion

Overlapping forms of discrimination, based solely on membership to a particular group, prevent individuals from accessing and exercising their rights on equal terms and result in disproportionate levels of poverty for particular groups and high levels of

horizontal inequality. These inequalities are difficult to combat because historical (indirect) discrimination produces socio-economic and political disadvantages, which make accessing rights and fulfilling productive potential problematic, even in the context of legal (formal) equality. This situation is further compounded by the social stigma and informal discrimination that interacts with disadvantage to produce and maintain unequal access to rights, power and services. The establishment of a legal framework that protects the right to non-discrimination is a precondition for combating formal and informal discrimination and ensuring that victims of discrimination are able to seek redress. However, further measures are also required to give this right substance, including policies such as affirmative action, and efforts to ensure that laws and policies are actually implemented and are having the intended effect. Public education and civil society advocacy work is also essential to tackle informal and internalised discrimination.

The identification of appropriate policy responses is further complicated by the fact that horizontal inequalities are historically and culturally produced and are, therefore, context specific. For example, the reason for the continuation of boy-preference in South Asia, even where there is an increase in the status of women (and therefore mothers), varies according to country or region. In some, patrilineal kinship systems lead to the removal of women from their natal families on marriage and creates the perception that daughters are of less value than sons because they will not provide long-term support. In others, it is associated with dowry-giving (Croll, 2001). What this suggests is that successful policy responses need to be tailored to the needs of the specific context and based on an analysis of the particular causes of discrimination and inequality.

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