

Learning InEquality

USING EQUALITY LAW TO TACKLE BARRIERS
TO PRIMARY EDUCATION FOR OUT-OF-SCHOOL CHILDREN



EQUAL RIGHTS TRUST

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TO PRIMARY EDUCATION FOR OUT-OF-SCHOOL CHILDREN

London, November 2017

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

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I was forced to leave by one of my teachers. He would kick me out of class saying that because I was Muhamasheen I did not deserve to study with white people. My white classmates would avoid sitting next to me and refuse to play with me. (...) I was the best behaved one in my class. I never hit anyone or caused any problems. (...) I hate school, I hate the discrimination and the marginalisation I faced there. The teacher expelled me because he said I said a bad word, but I didn't. He said to me, "You don't belong here, you Khadim [Servant]" (...) I was 5 years old.

Equal Rights Trust interview with Abdullah
Al-Masbah, Taiz Province, Yemen
13 December 2016

People have the equal right to receive an education, and can hold their Government to account to address discriminatory practices or the failure to provide for their education. Governments in turn have the duty to provide education, and their obligations are based in national and international law.

Kishore Singh
Former Special Rapporteur on the Right to Education
2013

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Acronyms and Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ASEAN	Association of South-East Asian Nations
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Committee on the Rights of the Child
CRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRPD	Committee on the Rights of Persons with Disabilities
ECSR	European Committee of Social Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBT	Lesbian, gay, bisexual and transgender
NGO	Non-governmental Organisation
OSCE	Organisation for Security and Co-operation in Europe
OSJI	Open Society Justice Initiative
SDG	Sustainable Development Goal
UDHR	Universal Declaration of Human Rights
UIS	UNESCO Institute for Statistics
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

UNESCO

United Nations Educational, Scientific and Cultural
Organization

UNICEF

United Nations Children's Fund

UPR

Universal Periodic Review

WHO

World Health Organization

EXECUTIVE SUMMARY

Introduction

Despite the longstanding and continued pledges of governments to tackle the issue of out-of-school children, an estimated 61 million children of primary school age are out of school. The data commonly cited regarding the demographic of out-of-school children indicates that this phenomenon is closely connected to issues of discrimination and inequality.

Whilst the importance of equality and inclusion in tackling out-of-school children is now widely recognised, the extent to which discrimination, in all its forms, contributes to the denial of primary education, and the potential for the rights to equality and non-discrimination to offer solutions, are currently under-explored. This report seeks to fill this gap by (1) identifying the ways in which inequality and discrimination underpin children's lack of access to and completion of primary education, through illuminating the discriminatory nature of the barriers and challenges children face in this context; and (2) exploring ways in which equality law may be used to tackle this problem, looking in particular at equality law approaches to advocacy and strategic litigation.

The report's **research methodology** was determined by the Equal Rights Trust, in consultation with a seven-member Expert Advisory Committee. The research itself consisted of three key aspects: (1) desk-based research was undertaken by a team of researchers for the Trust; (2) country-specific research and case studies were collated through consultation with the Trust's local partner organisations and networks; and (3) input was sought from key informants working on equality and non-discrimination in primary education. The draft report was subject to a validation process, with feedback sought from the Expert Advisory Committee and other expert contributors at a one-day conference in London.

Given the considerable literature that already exists regarding access to primary education and the issue of out-of-school children, and the gap in such literature identified by the Trust, the **scope** of the report and its potential **limitations** were clearly delineated at the outset. Firstly, in order to understand how the law on equality and non-discrimination are relevant to the issue of out-of-school children, it was necessary to look beyond issues of access and consider the circumstances surrounding drop-out rates and retention. Secondly, issues of *quality* in education were only addressed insofar as they influence failure to enrol and drop-out rates, and are thus directly relevant to the problem of out-of-school children. Thirdly, the report is limited to the issue of the discriminatory denial of *primary education* and, as such, it does not consider the circumstances

surrounding children who do not attend/complete secondary education and/or who fail to transition from primary to secondary education. Finally, the report does not comprehensively address individual instances and patterns of discrimination in every country; rather, it is intended to provide a high-level, overarching framework of analysis regarding the way in which discrimination and inequality contribute to the problem of out-of-school children.

1. The Legal Framework

Children have the equal right to receive a primary education; this is enshrined in a number of international and regional treaties, with these rights also being protected at the domestic level through constitutional and legislative guarantees.

The **rights to equality and non-discrimination** are protected in all of the core international and regional human rights treaties, which oblige states to refrain from discriminating against certain groups of individuals, and to respect, protect, promote and fulfil the right to equality. The **right to primary education** is specifically provided for in Article 13(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – which provides that “[p]rimary education shall be compulsory and available free to all” – and has also been guaranteed and elaborated upon by other international and regional instruments. The substantive content of states’ obligations in relation to the right to education has been organised into “4 As”: Availability, Accessibility, Acceptability and Adaptability.

Under ICESCR, states must ensure enjoyment of the right to a free primary education on a non-discriminatory basis. In addition, there are specific instruments protecting the right to equality and non-discrimination in primary education. The United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education (UNESCO Convention) has the express aims of proscribing any form of discrimination in education and promoting equality of opportunity and treatment in education. In addition, provisions guaranteeing the equal enjoyment of the right to education can be found in a number of international human rights treaties and instruments aimed at protecting vulnerable or marginalised groups, including: the United Nations Convention on the Rights of the Child (UNCRC); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

States can be held **accountable** for failing to respect, protect and fulfil the rights to equality and non-discrimination and the right to education through various mechanisms at the **international** and **regional** levels. However, states are also obliged to ensure that the rights contained in the international human rights treaties they have ratified are given effect in the **domestic legal order**. In incorporating these rights into the domestic legal order, states must ensure that they are **justiciable**, meaning that victims must be able to claim an accessible and effective remedy when their rights are violated.

In order to give full effect to the rights to equality and non-discrimination in their domestic orders, states are required to adopt appropriate constitutional, legislative and administrative measures. The way in which the rights to equality and non-discrimination have been incorporated in national constitutions and legislation, the precise scope of legal protection against discrimination at the domestic level, and the nature of the remedies available will differ from state to state.

There is both significant variance in the approaches of individual states and often differing views about how to implement a best practice approach. This report uses the **Declaration of Principles on Equality** (the Declaration) as the conceptual framework for its analysis of the barriers and challenges that influence children's ability to access and/or complete primary education, and its discussion regarding the use of equality law approaches to tackling the issue of out-of-school children. The Declaration is a statement of best practice, signed initially by 128 and subsequently by thousands of experts and activists on equality and human rights from around the world, based on concepts and jurisprudence developed in international, regional and national contexts, which promotes a unified approach to equality and non-discrimination.

Under the Declaration, the **right to equality** is understood as 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. In order to be effective, the right to equality may require states to take **positive action** measures in order to remove disadvantage caused to particular groups by underlying structural inequalities. The **right to non-discrimination** is a freestanding right, subsumed within the right to equality. It encompasses four prohibited forms of discrimination: **direct discrimination, indirect discrimination, harassment, and failure to provide reasonable accommodation.**

2. Why Use Equality Law to Tackle the Issue of Out-of-School Children?

This Chapter considers the conceptual and practical reasons why the legal framework on equality and non-discrimination should be central to efforts to tackle the issue of out-of-school children.

Firstly, equality and education are inextricably linked: inequality in education plays a clear role in perpetuating social inequalities and socio-economic disadvantage, which themselves correlate with patterns of historical discrimination against marginalised groups. Given the relationship between education, socio-economic disadvantage and historical patterns of discrimination, it is unsurprising that education is fundamental to alleviating the poverty and marginalisation suffered by groups that face entrenched and systemic forms of discrimination. However, in order for education to have a transformative and empowering effect for marginalised groups, it is imperative that the rights to equality and non-discrimination in education are guaranteed.

Secondly, the issue of out-of-school children is a development issue and adopting an equality law approach in relation to the issue of out-of-school children is a necessity if the development agenda is to be achieved. Not only is equality explicitly central to the achievement of a number of the Sustainable Development Goals (SDGs), the SDGs require an equality *law* approach to be adopted, with Target 16B of SDG16 requiring the promotion and enforcement of non-discriminatory laws and policies for sustainable development, and the promotion of the rule of law. The recognition of the necessity of the rule of law and, in particular non-discriminatory laws and policies, in the SDGs is important in two key respects. Firstly, the adoption of an equality law approach is a human-rights based approach emphasising the importance of education for *all*. As such, it moves away from earlier instrumentalist or utilitarian arguments for inclusive education and thus contributes importantly to ensuring that no child is left behind in education. Secondly, equality law – unlike the SDGs themselves, which are merely aspirational – entails binding legal obligations for states, providing a means through which individuals can enforce their rights and hold states accountable for failures to respect, protect and fulfil the rights to equality and non-discrimination.

Thirdly, the rights to equality and non-discrimination may have stronger legal and rhetorical force than the right to education. The rights to equality and non-discrimination are more likely to be justiciable in domestic courts than the right to education: whilst the right to education is justiciable in around half of states, many jurisdictions have progressive equality legislation prohibiting discrimination in the provision of public services such as education. Reliance on equality legislation to advance the right to education also has certain specific advantages, including the potential for claims to be brought against non-state actors. In addition, the language of equality and fairness carries strong rhetorical force, and can be extremely powerful in communicating and achieving consensus around controversial issues. Arguments regarding the need to tackle inequality and discrimination in education may have greater resonance – and thus greater effect in achieving change – particularly in countries where equality and non-discrimination hold a prominent place on the political agenda or within public opinion.

Fourthly, equality law can play an instrumental role in guiding the allocation of state resources in favour of increasing free access to primary education for all children. States frequently defend failures to fulfil their obligations in respect of the right to education by citing budgetary constraints. However, there is a strong argument to be made that state investment in education is, in many cases, not inhibited by an absolute lack of resources, but rather suffers from inequality in the allocation of resources. An equality law framework provides some useful direction on how states should allocate their resources in order to ensure that *all* children enjoy their right to a free primary education: it requires states not to discriminate between different groups of children in the way they invest in primary education, and requires that they ensure sufficient funds are dedicated towards accommodating the needs of different learners. In certain instances, the equality law framework may also require more resources to be directed towards the education of certain children than towards others, in order to ensure the equal participation in education of children from historically disadvantaged groups.

Finally, the unified framework on equality set out in the Declaration allows full consideration and analysis of the complex and multi-faceted reasons why children are out of primary education. This framework acknowledges that discrimination must be addressed holistically if it is to be challenged effectively, thus illuminating the relevance of inequality and discrimination as a pervasive and cross-cutting issue. The unified framework on equality also enables an examination of the extent to which multiple discrimination influences children's enrolment and completion of primary education, and offers scope for considering the link between protected characteristics and factors such as conflict and poverty in inhibiting children's access to and completion of primary education. Finally, the unified framework requires that all manifestations of inequality and discrimination in primary education be considered and tackled as a matter of state concern, and provides the legal architecture with which multi-level barriers to education can be analysed and challenged.

3. Patterns of Discrimination and Inequality in relation to out-of-school children

This Chapter analyses the way in which many of the barriers and challenges children face in accessing or completing primary education are manifestations of discrimination or grounded in substantive inequality, applying the principles on equality set out in the Declaration.

This exercise entails a number of challenges: **firstly**, there are difficulties in drawing direct causal links between discriminatory barriers and enrolment or drop-out rates, given the complex and multi-faceted nature of the circumstances affecting school attendance; **secondly**, these difficulties are compounded by insufficiencies in the available data, including a lack of data disaggregated by reference to all protected characteristics; **thirdly**, existing research and data does not necessarily rely on common definitions of the protected characteristics under consideration in this Chapter (such as disability), meaning that the definitions contained in relevant human rights treaties have been used for consistency; and **finally**, the discussion of the violations of the rights to equality and non-discrimination discussed in this Chapter should be seen as illustrative only, given that the exact type of discrimination at play in any given case will depend on a careful consideration of the specific facts and local context.

Patterns of discrimination

This Chapter analyses the patterns of discrimination inherent in the following barriers:

3.1 The direct and indirect costs of schooling

The obligation to ensure that primary education is free for all is unequivocal under the ICESCR, and includes the elimination of both direct costs (such as school fees) and burdensome indirect costs (such as requirements to wear expensive uniforms).

The failure by states to eliminate the direct and indirect costs of schooling has a disproportionate impact on children from low socio-economic backgrounds, and thus appears to be *prima facie* **indirectly discriminatory** on the grounds of socio-economic disadvantage: there is considerable evidence that many schools continue to charge fees and other indirect costs associated with schooling, due to the poor enforcement of laws prohibiting the charging of such costs. Research indicates that these costs have a significant impact on children's enrolment and drop-out rates. Trends towards the privatisation of education in recent years, including through the establishment of "low-fee" private schools, can entrench the discrimination faced by children from low socio-economic backgrounds.

Children with disabilities and children from ethnic or racial minorities may experience multiple discrimination as a result of states' failure to eliminate direct and indirect costs of schooling, given that children from these marginalised groups tend to be overrepresented amongst the poor. Where a family is struggling to cover the costs associated with schooling, this can also disproportionately affect girls given social or cultural perceptions regarding the value of girls' education. Children with disabilities can also face **direct discrimination** where they are required to pay additional fees or costs in order to attend primary school.

Given that many children provide a source of labour or income to their families, families may incur an indirect "opportunity cost" if their children attend primary school, as they potentially lose the opportunity of realising this labour or income. The International Labour Organisation has noted that child labour can lead to children dropping out of school or completing primary education late. This has a prejudicial impact on children of low socio-economic status, thus appearing to be *prima facie* **indirectly discriminatory** on the grounds of socio-economic disadvantage. Child labour also has a gendered dimension, with the work undertaken by girls and boys often being divided according to societal gender norms.

3.2 Geographical inaccessibility of schools

In many areas, primary schools are not within safe physical reach for children, thus contributing to low enrolment and attendance rates. Research suggests that this has a discriminatory impact, with children who share certain identity characteristics – girls, children from particular ethnic, religious or social groups, as well as children with disabilities – being particularly disadvantaged by the need to travel long distances to primary school.

The geographical inaccessibility of schools may arise as a result of the fact that a state has allocated its resources towards the establishment of schools unequally; where this unequal allocation of state resources is related to one or more protected characteristics (such as ethnicity or religion) this may amount to **direct discrimination**. Where the failure to ensure that schools are geographically accessible has a prejudicial effect on children with certain protected characteristics (such as children from particular ethnic, religious or social groups, girls, or children with disabilities), and where such failure cannot be objectively justified,

this may amount to **indirect discrimination**. Children belonging to nomadic communities may also face difficulties in physically accessing primary schools, arising directly from the fact that they do not live in one fixed area, meaning that states may be required to make **reasonable accommodation** by ensuring that primary education is provided in a way that is adapted to their mobile lifestyle.

3.3 Enrolment requirements and procedures

Documentation requirements, testing and assessment procedures, and uniform requirements can have a discriminatory impact on primary education attendance and completion rates.

As regards documentation requirements, there is clear evidence that requirements to submit certain documents as a condition of school enrolment (such as a birth certificate or proof of residence) puts children from ethnic minorities (including indigenous and Roma children), children with disabilities, children from low socio-economic backgrounds (including street children), and non-nationals (including migrants, refugees, asylum seekers and stateless children) at a particular disadvantage. If there is no objective justification for the requirements, they may be **indirectly discriminatory** or, where the seemingly neutral policy is applied in such a way as to purposefully withhold access to education from certain children on the basis of their membership of a certain group, **directly discriminatory**.

Testing and assessment procedures may result in children with disabilities being segregated into so-called “special schools”, a practice which is **directly discriminatory**. There is also evidence that children from ethnic and racial minorities are at risk of being diverted into special schools, which can amount to **indirect discrimination**. The disproportionate placement of Roma children in special schools in the Czech Republic and Hungary has been considered by the European Court of Human Rights (ECtHR), which found the practice to amount to indirect discrimination on the grounds of ethnic origin.

Requirements to comply with a strict uniform policy may also be **indirectly discriminatory** on the grounds of religion or belief where the policy effectively prevents children from wearing items of clothing or symbols that are worn for religious or cultural reasons. There are examples of children being threatened with exclusion from primary school on the grounds that their wearing of a religious symbol or clothing is in breach of the school’s uniform policy. The question of whether this amounts to indirect discrimination can be particularly thorny where the wearing of the item in question is alleged not to be a “compulsory” requirement of the child’s religion or culture.

3.4 Inadequacy of physical and human resources

The inadequacy of physical and human resources within schools – including the inadequacy of school buildings and classrooms, poor sanitation facilities, and a lack of skilled teachers – contributes to children being out of primary education.

This is often attributable to a failure on the part of the state to allocate sufficient resources towards quality school facilities and resources.

Such a failure may amount to **direct discrimination** where a state has invested unequally in school infrastructure, and where the unequal allocation of state resources is related to one or more protected characteristics, such as ethnicity or race. In such circumstances, this inequality in state investment means that children sharing certain protected characteristics are treated less favourably than other children when it comes to accessing schools with adequate, quality infrastructure.

State policies regarding investment in school infrastructure may also be **indirectly discriminatory** where such policies are neutral at face value, but where they disproportionately affect the education of children who share certain protected characteristics without any objective justification. Research indicates that children from certain ethnic or racial groups can suffer disproportionately from poorly resourced schools, and that, for example, a lack of investment in sanitation facilities and skilled teachers can have a particular impact on girls' school attendance and drop-out rates. School infrastructure is often inadequate to ensure the inclusion of children with disabilities, with barriers to physical access being **indirectly discriminatory**. Schools also often fail to make physical and human resources available which accommodate the needs of children with disabilities, with such failure to provide **reasonable accommodation** amounting to discrimination on the grounds of disability. The difficulties faced by children with disabilities in relation to school infrastructure are often exacerbated in conflict and other humanitarian crises.

3.5 Issues surrounding language, curricula and other educational materials

In many contexts, the form and substance of education perpetuates discrimination and exclusion through being taught in a language that is inaccessible to some children, and through school curricula and other teaching materials being inflexible, irrelevant to, or disrespectful of the needs of particular children.

As far as language is concerned, certain children – in particular, children from ethnic and linguistic minorities – may suffer **indirect discrimination** on the grounds of language where the state's policy regarding the language of instruction means they are unreasonably disadvantaged or excluded from participating in primary education on an equal basis with other children. Research also indicates that language barriers intersect with gender inequalities to exacerbate disadvantage and exclusion, such that girls suffer multiple discrimination on the grounds of language and gender. The question of whether a state's language policy amounts to unlawful indirect discrimination will depend heavily on an assessment of whether its impact on minorities can be justified as proportionate; there is significant evidence of the way in which language barriers impact upon children's ability to participate in primary education, and, conversely, of the pedagogical benefits (including reducing dropout rates) in providing moth-

er-tongue based bilingual education in the early years of schooling. The failure to provide **reasonable accommodation** by ensuring that education is delivered in the most appropriate language and mode of communication can impact on enrolment and drop-out rates of children with disabilities.

Research also indicates that, in some contexts, the discriminatory content of school curricula and educational materials can impact on children's school attendance and drop-out rates. Where these materials treat or portray children who share certain protected characteristics – such as ethnicity, or gender – less favourably than other children, this can amount to unlawful **direct discrimination**. There are examples of school curricula and resources being overtly denigrating of minorities, and of influencing girls' school retention rates through perpetuating discrimination and stereotypical gendered assumptions regarding women and men. Failures to ensure that school curricula and education materials provide **reasonable accommodation** for children with disabilities can also affect school attendance and drop-out rates.

3.6 School-based violence, bullying and harassment

School-based violence, bullying and harassment are prevalent in a number of primary education settings across the world, with the nature of the violence ranging from systemic sexual violence and abuse perpetrated by teachers, to in-school fighting between classmates. Research indicates that such violence and harassment can affect children's attendance at school, and thus contribute to drop-out rates, as well as causing serious psychological harm. Where such conduct relates to a protected characteristic – such as gender, ethnicity, or disability – it can amount to unlawful **direct discrimination** and/or **harassment**.

School-related sexual violence is a serious issue in a number of countries. There is evidence that girls are more susceptible to such sexual violence than boys and, whilst this is more prevalent in secondary school settings, such violence still occurs in primary schools, leading to absenteeism and drop-outs. Girls with disabilities can be particularly vulnerable to sexual violence in schools. Research also indicates that the incidence of sexual violence in and around schools is exacerbated in conflict settings.

Corporal punishment in schools remains prevalent, despite the fact that it has been widely prohibited, with evidence suggesting that children who are subject to such punishment are more likely to drop out of school. Research suggests that children who share certain protected characteristics are more vulnerable to experiencing corporal punishment than other children: boys are likely to experience more and harsher forms of corporal punishment than girls, lower caste children and children from racial and ethnic minorities are disproportionately targeted for punishment, and children with disabilities are also at greater risk of being victims of corporal or other forms of cruel and degrading punishment.

In addition to experiencing physical violence, many marginalised children are subject to psychological violence, harassment, bullying and other degrading

treatment by their teachers and fellow classmates, including through teachers' classroom attitudes and teaching methods, which can affect their school attendance and increase their vulnerability to drop out. There is ample evidence of such conduct being discriminatory, including on the grounds of ethnicity (for example, bullying Roma and other Traveller children across Europe), descent or colour (for example, harassment and verbal abuse of lower-caste children in India and Muhamasheen children in Yemen), nationality or national origin (for example, bullying and harassment of refugee children in Turkey, Lebanon and Jordan), sexual orientation and gender identity (including homophobic bullying of children who have LGBT parents or family members), and disability or health status (including bullying and harassment of children with HIV/AIDS).

3.7 The Duty to Take Positive Action

The issues described in this Chapter not only engage the right to non-discrimination, they also engage the broader right to equality. In order to be effective, the right to equality requires states to take **positive action** to overcome the past disadvantage faced by historically marginalised groups and to accelerate progress towards equal participation in education.

Many of the examples of discrimination discussed above are linked to historic and systemic discrimination. For example, the barriers to education faced by children with disabilities often stem from systemic societal discrimination: there remains a high degree of societal stigma surrounding disability, meaning that the discrimination faced by children with disabilities is deeply rooted and widespread. In order to enable their equal participation in primary education, it is imperative that positive action is taken by states to remedy the negative stereotypes and stigmatisation that underlies the marginalisation faced by children with disabilities.

Positive action requires states to take legislative, administrative and policy measures to remove the disadvantage caused to particular groups by systemic inequalities. What measures are necessary and appropriate will vary depending on the context. However, examples of measures which may be necessary in primary education contexts include: addressing the disadvantage faced by children from non-dominant or minority language groups by introducing mother-tongue bilingual education programmes, and recruiting and training teachers who are able to speak both the minority/non-dominant and official language, including teachers from the non-dominant or minority language groups; ensuring that curricula and teaching materials promote equality of all children; and taking steps to improve school governance systems in order to prevent and deter discriminatory violence and harassment.

Positive action measures to address systemic inequalities on the grounds of characteristics such as gender, race, ethnicity, language and disability will not be sufficient to ensure equal participation in primary education for all children unless measures are also taken to redress the socio-economic disparities that feed so centrally into many of the barriers discussed in this Chapter. As such,

in order to ensure that children from lower socio-economic backgrounds are able to participate in primary education on an equal basis with other children, measures to alleviate poverty should be central to any action taken to eliminate inequalities in primary school attendance and completion.

4. Strategies for Civil Society Intervention

This Chapter explores strategies for civil society intervention to tackle the issue of out-of-school children in accordance with the Trust's **Theory of Change**. According to this Theory, and as demonstrated in this report, discrimination and inequality impede children's access to and completion of primary education. It follows that improved enjoyment of the rights to equality and non-discrimination in education will enhance children's access to and completion of primary education. In order to improve enjoyment of the rights to equality and non-discrimination in education, it is necessary to have effective laws and policies that promote equality and prohibit all forms of discrimination, and for such laws and policies to be effectively implemented and enforced. There are a number of strategies that can be employed by a large variety of change actors to this end, although the Trust has focussed in this Chapter on advocacy and strategic litigation strategies for civil society.

Whilst advocacy and strategic litigation are discussed separately in order to allow for an analysis of the specific considerations that arise in relation to each, it is crucial to consider these strategies as symbiotic rather than separate. Furthermore, these are, of course, not the only strategies for intervention that can be employed by civil society; instead, they should be seen as complementary to other tools and strategies, such as the use of data, campaigning to change public opinion and direct action.

4.1 Advocacy

This section is intended to assist civil society actors advocating to tackle the issue of out-of-school children to apply approaches that are grounded in the rights to equality and non-discrimination. Such approaches are referred to as "equality law approaches".

The application of an equality law approach to advocacy on the issue of out-of-school children has two elements. Firstly, such an approach is necessary if state actors involved in the provision of education and the formulation of education policies and legislation are to reach all of those out of primary school, since the policies and laws themselves must be grounded in equality law. Secondly, there may be tactical advantages to applying an equality approach in advocacy for increased access to primary education, in terms of the way in such an approach can influence the messaging and framing of the issues, the identification of key stakeholders, and the fora in which those key stakeholders can be engaged. There is thus both a **need** and an **opportunity** for advocacy regarding out-of-school children to be grounded in equality law.

The Trust's approach to the development of an advocacy strategy is to conduct a context analysis by answering a number of questions. The first question for advocates to answer is what their overall objective is; that overall objective may be broken down into several subsidiary outcomes, representing steps towards the objective or necessary elements on the achievement of the objective. After these have been identified, there are a number of further questions to be considered: who has the power to influence the achievement of these outcomes; who and what influences the decision-makers; what the political, policy and legislative, media, civil society, public, and international climate context is in which advocacy is taking place; and which theory/theories of change are to be adopted (such as taking advantage of policy windows or levers, or effectuating change through appropriate messaging and framing of the issues).

National advocacy

In shaping a national advocacy strategy that is based on an **equality law approach**, the above questions must be considered through an equality law lens:

- In considering how an equality law approach influences **the identification and formulation of objectives and outcomes**, advocates must bear in mind that the substance of any policy or legislative reforms sought must comply with states' obligations regarding equality and non-discrimination.
- Where an equality law approach is adopted, this will likely **identify decision-makers and stakeholders** that hold power or influence in respect of equality and non-discrimination and who would otherwise be overlooked, such as state entities other than Departments of Education, and National Human Rights Institutions.
- The adoption of an equality law approach may mean that new **policy windows** can be identified, such as proposed reforms or strategies in relation to historically disadvantaged groups, or the development of a state's National Human Rights Action Plan.
- Advocates may find that an equality law approach leads to the identification of new **levers** that can be used to exert pressure on the government, such as UN level reviews by Treaty Bodies, or the goals set out in the post-2015 development agenda.
- An equality law approach may carry advantages when it comes to the **messaging and framing** of the issues, since the language of equality and fairness can be extremely powerful in communicating and achieving consensus around controversial issues.
- An effective advocacy campaign needs to be evidence-based, and advocates should ensure that any **evidence** presented in support of the arguments being made in the advocacy campaign is collected in accordance with equality law principles.
- An equality law approach to advocacy may present opportunities for **collaboration** between stakeholders that would not otherwise have considered themselves to be "allies".

Whilst the above considerations are by no means exhaustive, they should provide inspiration for advocates who are considering how any advocacy campaign aimed at tackling the issue of out-of-school children can maximise the chances of reaching *all* those out of primary education

International and Regional Advocacy

In addition to influencing national advocacy strategies, an equality law approach also opens up a range of international and regional advocacy opportunities for civil society actors, which may reinforce, support and strengthen domestic advocacy campaigns.

International advocacy opportunities include

- **Engagement with Treaty Bodies:** Treaty bodies are supervisory bodies tasked with reviewing states' compliance with their treaty obligations through the State Reporting process, and elaborating on the scope, content and interpretation of the rights contained within the relevant treaty through issuing General Comments or Recommendations. Adopting an equality law approach means that advocates can engage with the full range of treaty bodies concerned with the rights to equality and non-discrimination.
- **Engagement with the Universal Periodic Review Process (UPR):** The UPR is an oversight mechanism of the UN Human Rights Council which assesses the extent to which states respect the obligations set out in all human rights treaties to which a state is party. Civil society actors have the opportunity to engage in various stages of the review process and, through adopting an equality law approach in their interventions, can highlight states' failures to fulfil their obligations under all treaties in which the rights to equality and non-discrimination are protected.

There are also a number of opportunities for civil society to engage in advocacy at the **regional level**; these include the following:

- **Inter-American Commission on Human Rights (IACHR):** Civil society actors can engage with the IACHR through various mechanisms in order to exert pressure on national governments, including participating in thematic hearings, and submitting information to various thematic rapporteurs. Adopting an equality law approach provides opportunities to engage with a broader range of thematic rapporteurs who are charged with considering the situation of groups, communities and peoples that are at risk of human rights violation due to issues of historic discrimination.
- **African Commission on Human and Peoples' Rights:** Civil society actors may engage with the Commission through submitting Shadow Reports under the Commission's periodic review process and through various "subsidiary mechanisms", including those focussing on marginalised groups.

- **EU and Council of Europe:** There are a number of ways for advocates to influence state policy and practice through engaging with different EU institutions, such as the European Commission. The Council of Europe also contains various mechanisms under its human rights mandate which provide opportunities for civil society advocacy and engagement, including the thematic work of the Commissioner for Human Rights.
- **ASEAN Intergovernmental Commission on Human Rights (AICHR):** Civil society organisations and institutions can apply for consultative status with the AICHR, allowing them to provide information regarding human rights violations to the AICHR.

4.2 Strategic litigation

As with advocacy, there is no single, authoritative definition of “strategic litigation”: in this report, it is understood as synonymous with “public interest litigation”, meaning legal action that has the aim of creating a broader societal transformation to the benefit of the marginalised within society. In the context of out-of-school children, strategic litigation can be used to ensure that the rights to equality and non-discrimination are respected, protected and fulfilled by the state in law and policy, and thus improve enjoyment of the rights to equality and non-discrimination in education.

There are a number of issues to be considered by any civil society actor thinking about embarking on strategic litigation. Given that claims based on the rights to equality and non-discrimination are available, applied and interpreted in varying ways across different jurisdictions, the discussion below is intended to provide general guidance and inspiration for litigators in developing strategies that are tailored to their own legal and factual contexts. In all cases, where the civil society actors themselves are not lawyers, and in some cases where they are, it will be necessary to gather an appropriately qualified and expert legal team to litigate the case. In any instance, lawyers will need to be heavily consulted in respect of most of the steps which follow.

Is litigation appropriate: The first question to consider is whether it is appropriate in all of the circumstances to pursue strategic litigation, taking account of: the time- and resource-intensive nature of litigation; external factors, such as the broader political context; and the interrelation between litigation and other potential strategies for achieving change, such as advocacy.

Mapping out your objectives: Achieving positive social change through strategic litigation is complex, and litigators must be careful only to take on a case that they consider will best advance their wider objectives. Unlike in broader legal services, the objective will not necessarily be to “win” the case and, indeed, traditional notions of winning and losing a case may be misleading. For example, where a case is “won”, change will not necessarily occur unless the court’s judgment is effectively implemented; on the other hand, an unsuccessful claim may nevertheless prompt the government to take action. When setting objectives,

litigators must also think beyond the judgment stage and consider what will be required in terms of an implementation strategy.

Identifying a forum: Actors must identify an available “forum” for bringing a claim based on the rights to equality and/or non-discrimination, meaning the place where the case or complaint will be heard and decided. This could include bodies or courts at the domestic, regional and international levels. In choosing a forum, litigators must consider whether the forum is legally available, meaning that the claimant must have standing to bring a claim, and the rules governing the forum must enable an equality and/or discrimination claim to be brought. They must also consider whether the forum is practically appropriate, considering factors such as the applicable rules of evidence, the costs of litigating in the forum, and the remedies available.

Claimants: A suitable claimant may need to be identified and selected, taking into consideration whether an individual or collective complaint would be more appropriate, and whether the claim could and should be brought by a representative organisation. In a claim based on the right to equality, potential claimants will include children who have not received equal protection and benefits of laws relating to the provision of primary education. In a claim based on the right to non-discrimination, it is necessary to consider the extent to which the potential claimant or group of claimants’ complaints relate to one or more protected characteristics; where a potential claimant possesses a number of protected characteristics, actors should consider whether to argue the case based on “traditionally” recognised grounds (such as sex), on less accepted grounds (such as socio-economic disadvantage) or on both. Relying on a “traditional” ground, such as sex or race, will allow actors to draw upon existing jurisprudence (both national and international); claims brought on grounds that are less well-recognised at the national level may be more challenging, but may serve an important purpose in progressively developing the law.

Claims: the claim itself must be formulated. When bringing a claim for non-discrimination, claimants will generally have to show less favourable treatment because of a protected characteristic (direct discrimination); a particular disadvantage resulting from a neutral criterion, rule, policy, or practice (indirect discrimination); a failure to make reasonable accommodation; or harassment. In some jurisdictions it is also possible to claim that the state has violated a person’s right to equality by failing to take positive action. Illustratively, claims may be brought to:

- challenge discriminatory policies and practice in education, such as in the US cases of *Plyler v. Doe* (which concerned the exclusion of undocumented children of Mexican origin from schools in Smith County, Texas) and *Antoine et al. v Winner School District* (which concerned the claim that the disciplinary policy in schools in Winner School District, South Dakota discriminated against Native American students);
- challenge discrimination or inequality in state policies regarding the provision of school resources, such as in the cases litigated in South Africa combating disparities in the provision of school resources that were

grounded in racial discrimination (including *Madzodzo and Others v. Minister of Basic Education and Others* and *Minister of Basic Education v Basic Education for All*);

- challenge discrimination or inequality in state policies regarding investment in the education of specific groups, such as in the South African case of *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa and Another* (which challenged the failure by the Western Cape Government to provide children with intellectual disabilities with appropriate and adequate education);
- ensure that states implement the right to equality by taking positive action to secure the equal participation of all children in education, such as in the Colombian case *Decision T-025 of 2004* (which concerned access to education for internally displaced children) and the Sri Lankan case of *de Soya and de Silva (Minor) v Minister of Education and ors* (in which the court emphasised the need to take measures to eliminate discrimination against persons living with HIV/AIDs, including in education).

Respondents: Careful consideration should be given to choosing the most appropriate respondent. Often this will be a state actor, since the state is the primary duty-bearer responsible and accountable for fulfilling the rights to equality and non-discrimination. Given the interlinking nature of the many discriminatory barriers to primary education discussed in Chapter 3, there may be a number of potential respondents aside from the national government and ministry for education, including the state treasury and ministries for transport, social affairs and health. Depending on the applicable national law, non-state actors (including private school providers) may also be held accountable for breaches of the rights to equality and non-discrimination.

Evidence and proof: The precise procedural and evidential rules applicable in a case will depend on the forum; however, there are certain considerations that are often relevant in discrimination and equality cases. Firstly, the burden of proof is usually such that the claimant must provide some evidence of discrimination (a *prima facie* case) which the respondent(s) must then rebut. Secondly, litigators may need to be resourceful in gathering evidence for claims, including through taking steps pre-litigation such as submitting questionnaires or freedom of information requests.

Remedies: The remedies available in any given case will be context dependent. However, when determining the remedies to be sought from the court, actors should consider how they might seek both to achieve wider social transformation and compensate the claimant(s); the legal and political limitations on the power of the court to award certain remedies; and the respondent's record in implementing remedies previously awarded. Remedies may include legislative remedies, which can potentially have a far-reaching impact; structural injunctions, which direct a government or administrative body to take particular steps towards reform and are therefore often considered to be particularly 'coercive' in nature; financial compensation, including pecuniary and non-pecuniary damages; and declaratory orders, which involve a declaration that there has been a violation of the right in question. If a case is settled out of court, this may provide

an opportunity to negotiate remedies that are more extensive than would be ordered by the court. In order for change to be achieved, any remedies awarded by the court or agreed out of court must be effectively implemented.

Implementation strategies: Actors should ensure that their litigation strategy includes an advocacy component, with a particular emphasis on follow-up advocacy to ensure compliance with the court judgment or settlement. This may involve engagement with grassroots actors, local and international media, parliamentarians and legislators, the national human rights institution and international stakeholders (such as international organisations and donors).

Other possibilities for involvement in strategic litigation: NGOs and other interested parties can play an important and influential role in cases, even if they are not involved in initiating them. In many forums, interested third parties may be permitted to intervene in the case through submitting a third party intervention or amicus curiae brief, thus giving the opportunity to draw the court's attention to arguments or information that the parties may not have presented, including relevant comparative jurisprudence.

5. Conclusion and Implications

This Chapter provides some conclusions to the report's findings as well as identifying the key implications of the report both for governments and for other education stakeholders.

It reflects on how the report has demonstrated the extent to which discrimination and inequality impede children's access to and completion of primary education, and thus contribute to children being out of school. As evidenced in Chapter 3, the discriminatory barriers that children face in accessing and/or completing primary education are many and various. These range from the **failure to eliminate the direct and indirect costs of schooling**, the **geographical inaccessibility of schools** and **enrolment requirements and procedures**, to **inadequacy of physical and human resources within schools**, problems with **language, curricula and other educational materials** and **discriminatory violence, bullying and harassment**. This multitude of barriers indicate the central relevance of inequality and discrimination to children being out of primary education.

This Chapter also notes that the report has shown it is imperative that those seeking to tackle the issue of out-of-school children integrate an equality law approach into their interventions in order to improve enjoyment of the rights to equality and non-discrimination in primary education. This is partly due to the clear relationship between education, historical patterns of discrimination and socio-economic disadvantage; and that the issue of out-of-school children is a development issue, and adopting an equality law approach in relation to this issue is a necessity if the development agenda is to be achieved. Further, practically, the rights to equality and non-discrimination can potentially have strong

legal and rhetorical force and can play a crucial role in guiding the allocation of state resources to benefit the most disadvantaged.

The Chapter identifies multiple **implications for states**, of adopting an equality law approach. It notes that the state is the primary duty-bearer of binding human rights and is obliged to protect, respect and fulfil the equal right to education for all without discrimination and that this comprises multiple legal obligations. States have also committed to inclusive education by supporting the Sustainable Development Goals (SDGs) and so have both political commitments and legal obligations. The key implication of conducting the appropriate equality analysis on access to primary education is that, if states are to meet their obligations, taking general measures aimed at ensuring universal access to and enjoyment of education is insufficient. States must take specific and targeted measures to eliminate discrimination and ensure equality in education. This requires the identification and removal of discriminatory barriers which prevent certain groups and individuals from accessing education as well as the taking of positive targeted action to correct historic disadvantage which keeps certain children from school.

Given the serious gap between obligation and reality in respect of ensuring no primary school child is out of school, the Chapter also notes that it is necessary for all relevant stakeholders and actors – including **civil society, international human rights and development actors, education providers, international organisations and donors** – to take action to put the findings of this report into practice. The need for these actors to integrate an equality law approach into all education-related work has implications, particular in respect of education policy, education programme financing, the way in which international organisations structure and prioritise their support for domestic actors and programmes and the need to integrate thinking about equal education into other areas of tangential programming e.g. those working to eradicate child labour, access to water and healthcare and the provision of humanitarian aid. Finally the Chapter concludes that an equality law approach is essential if we are to ensure the move from children learning inequality to receiving equality in education.

INTRODUCTION

According to the latest statistics, there are currently an estimated 61 million out-of-school children of primary school age.¹ Of these children, approximately 43% have never attended school and are likely never to attend, whilst 23% have attended school in the past but were unable to continue their education.² Whilst the total number of children out of primary school declined in the early 2000s, this decrease appears to have “stagnated” over the last decade,³ despite the long-standing and continued pledges of governments across the world to tackle the issue of out-of-school children and ensure “Education for All”.

This commitment to ensuring primary education for all children is rooted in the International Covenant on Economic, Social and Cultural Rights 1966, an international treaty now ratified by 165 states, which mandates that “[p]rimary education shall be compulsory and available free to all”. The achievement of universal access to primary education has also been on the global development agenda for almost three decades, having first been articulated in the World Declaration on Education for All in March 1990;⁴ the Declaration noted that over 100 million children had no access to primary schooling, and promised to universalise access to primary education for all children before the end of the decade.⁵ This target was not, however, met, and so governments from across the world gathered in Jomtien again in 2000, pledging to achieve “Education for All” by 2015. This commitment included six goals, the second of which was to:

*[ensure] that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to and complete free and compulsory primary education of good quality.*⁶

1 Global Education Monitoring Report, *Reducing global poverty through universal primary and secondary education*, June 2017, p. 1, available at: <http://unesdoc.unesco.org/images/0025/002503/250392E.pdf>.

2 UNESCO Statistics (UIS) and UNICEF, *Fixing the Broken Promise of Education for All: Findings from the Global Initiative on Out-of-School Children*, 2015, p. 18, available at: https://www.unicef.org/education/files/allinschool.org_wp-content_uploads_2015_01_Fixing-the-Broken-Promise-of-Education-For-All-full-report.pdf.

3 See above, note 1, p. 1; Global Education Monitoring Report, *Accountability in education: Meeting our Commitments*, 2017, p. 124, available at: <http://unesdoc.unesco.org/images/0025/002593/259338e.pdf>.

4 World Declaration on Education for All, Meeting Basic Learning Needs, 1990.

5 *Ibid.*, Preamble and Article 5.

6 The Dakar Framework for Action, Education for All: Meeting our Collective Commitments, adopted by the World Education Forum Dakar, Senegal, 26–28 April 2000, p. 15.

However, as is evident from the statistics cited above, primary education remains out of reach for millions of children.

The data commonly cited regarding the demographic of out-of-school children indicates that this phenomenon is closely connected to issues of discrimination and inequality. For example, there are 4 million fewer boys out of primary education than girls, with girls making up 53% of all children out of primary school;⁷ overall patterns suggest that girls of primary school age are more likely never to attend school than boys, whereas boys are more likely to have some exposure to primary education.⁸ In some countries, a child with a disability is twice as likely never to enrol in school than a child without a disability, and is more likely to drop out if they do attend school.⁹ Large numbers of out-of-school children live in communities where the language of schooling is rarely used at home;¹⁰ children from ethnic minorities are more likely to drop out of school or fail to enrol in school than their peers from majority ethnic groups;¹¹ and the latest statistics show that half of refugee children have no access to primary education, with refugee children being five times more likely to be out of school than non-refugee children.¹² There is a strong association between poverty and education – the primary out-of-school rate is 19% in low-income countries and 3% in high-income countries¹³ – and children from rural areas are generally more disadvantaged.¹⁴

Research also indicates that discrimination operates cumulatively to increase disadvantage and marginalisation. Girls from minorities are more likely to be excluded from education than their male peers in some countries:¹⁵ in **Guatemala**, for example, 54% of indigenous girls are enrolled in school at the age of seven, as compared to 71% of indigenous boys and 75% of non-indigenous chil-

7 See above, note 2, p. 56.

8 See above, note 2, p. 56.

9 Grimes, P., Kumar, K. and Stevens, M., *An examination of the evolution of policies and strategies to improve access to education for children with disabilities, with a focus on inclusive education approaches, the success and challenges of such approaches and implications for the future policy direction – Background Paper for Education for All Global Monitoring Report 2015*, 2015, p. 7, available at: <http://unesdoc.unesco.org/images/0023/002324/232454E.pdf>.

10 Global Education Monitoring Report, *If you don't understand, how can you learn?* Policy Paper 24, 2016, p. 2, available at: <http://unesdoc.unesco.org/images/0024/002437/243713E.pdf>; Bender, P., et al, World Bank, "In Their Own Language: Education for All", 2005, available at: http://siteresources.worldbank.org/EDUCATION/Resources/Education-Notes/EdNotes_Lang_of_Instruct.pdf.

11 Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2009, Events of 2008 – Education Special*, 2009, p. 7, available at: <http://minorityrights.org/publications/state-of-the-worlds-minorities-and-indigenous-peoples-2009-july-2009>.

12 UNESCO, *No more excuses: Provide education to all forcibly displaced people*, 2016, p. 2, available at: <http://unesdoc.unesco.org/images/0024/002448/244847E.pdf>.

13 Global Education Monitoring Report, *Out-of-school children, adolescents and youth: global status and trends*, 2017, p. 9, available at: <http://unesdoc.unesco.org/images/0025/002503/250392E.pdf>.

14 In low income countries, 36% of children from rural areas are out of school as compared to 16% of children from urban areas, whilst in lower middle income countries, 22% of children in rural areas are out of school as compared to 13% of children in urban areas: World Inequality Database on Education, *Out-of-school children*, visited 31 October 2017, available at: [http://www.education-inequalities.org/indicators/edu_out_pry#?sort=mean&dimension=community&group=\[Urban|Rural\]&age_group=edu_out_pry&countries=all](http://www.education-inequalities.org/indicators/edu_out_pry#?sort=mean&dimension=community&group=[Urban|Rural]&age_group=edu_out_pry&countries=all).

15 See above, note 11, p. 7.

Disparities in primary education The effect of discrimination and inequality

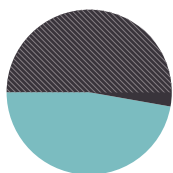
There are currently an estimated
61 million
 out-of-school children of primary school age

61 million is
 equivalent to the
 population of
 Italy

GENDER

Girls of primary school age are more likely
never to attend school than boys

53%
 of all children
 out of primary
 school are girls



There are
4 million
 more girls out of
 primary education
 than boys

MINORITIES

Fifty percent of the
 world's out of school
 children live in
 communities where
 the language of the
 schooling is rarely, if
 ever, used at home

DISABILITY

10%

The gap in primary
 completion rates
 between children with
 and without disabilities

In some countries, **a child with a
 disability is twice as likely never to enrol
 in school** than a child without a disability

POVERTY

There is a strong association between
 poverty and education

The primary out-of-school rate is

19% in low-income countries



3% in high-income countries



REFUGEES

50%

of refugee children
 are out-of-school



Refugee children are **five times
 more likely to be out of school**
 than non-refugee children

Children in rural areas are in
 general more disadvantaged.

The primary out-of-school rate in
low-income countries

36% in
 rural areas



16% in
 urban areas



The primary out-of-school rate in
lower-middle income countries

22% in
 rural areas



13% in
 urban areas



dren, with similar disparities being evident in relation to tribal girls in **India**, Hausa-speaking girls in **Nigeria**, Roma girls in Eastern Europe, and Mong girls in **Vietnam**.¹⁶ Girls with disabilities are also more likely than boys with disabilities to be out of school.¹⁷ In **Nepal**, for example, 77% of girls with disabilities are out of education, as compared to 59.6% of boys with disabilities.¹⁸

These statistics suggest that **inequality** and **discrimination** impede children's access to and completion of primary education, and thus contribute to children being out of school. The importance of equality and inclusion in tackling the issue of out-of-school children is increasingly recognised by the international community, as exemplified by the Sustainable Development Goals (with Goal 4 being to ensure "inclusive and equitable quality education"¹⁹) and the Education 2030 Framework for Action:

*Inclusion and equity in and through education is the cornerstone of a transformative education agenda, and we therefore commit to addressing all forms of exclusion and marginalisation, disparities and inequalities in access, participation and learning outcomes. No education target should be considered met unless met by all. We therefore commit to making the necessary changes in education policies and focusing our efforts on the most disadvantaged, especially those with disabilities, to ensure that no one is left behind.*²⁰

This has been echoed by the UN General Assembly, which has emphasised its commitment "to providing inclusive and equitable quality education at all levels", and has noted that all persons "irrespective of sex, age, race or ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations" should have access to education.²¹ Most recently, in late 2017 the UN Special Rapporteur on the right to education devoted her report to the UN General Assembly to the issue of inclusion and equity in education, recognising the need to "focus on eliminating discrimination and promoting equity and inclusion" in order to identify and tackle the barriers to education faced by marginalised children.²²

16 Subrahmanyam, G., *Gender perspectives on causes and effects of school dropouts*, 2016, p. 32, available at: <http://www.sida.se/contentassets/959a3a2f5b6c4bdc85ac716d31c7b9ad/35ea0b87-c238-407f-984b-77bbd0fd28.pdf>; UNICEF, *Thematic Report 2013: Basic Education and Gender Equality*, 2014, p. 29, available at: https://www.unicef.org/publicpartnerships/files/Basic_Education_and_Gender_Equality_2013_Thematic_Report.pdf.

17 See above, note 2, p. 80.

18 Singal, N., *Education of children with disabilities in India and Pakistan: An analysis of developments since 2000*, background paper for *EFA Global Monitoring Report 2015*, 2015, p. 8, citing UNICEF and NPC, available at: <http://unesdoc.unesco.org/images/0023/002324/232424e.pdf>.

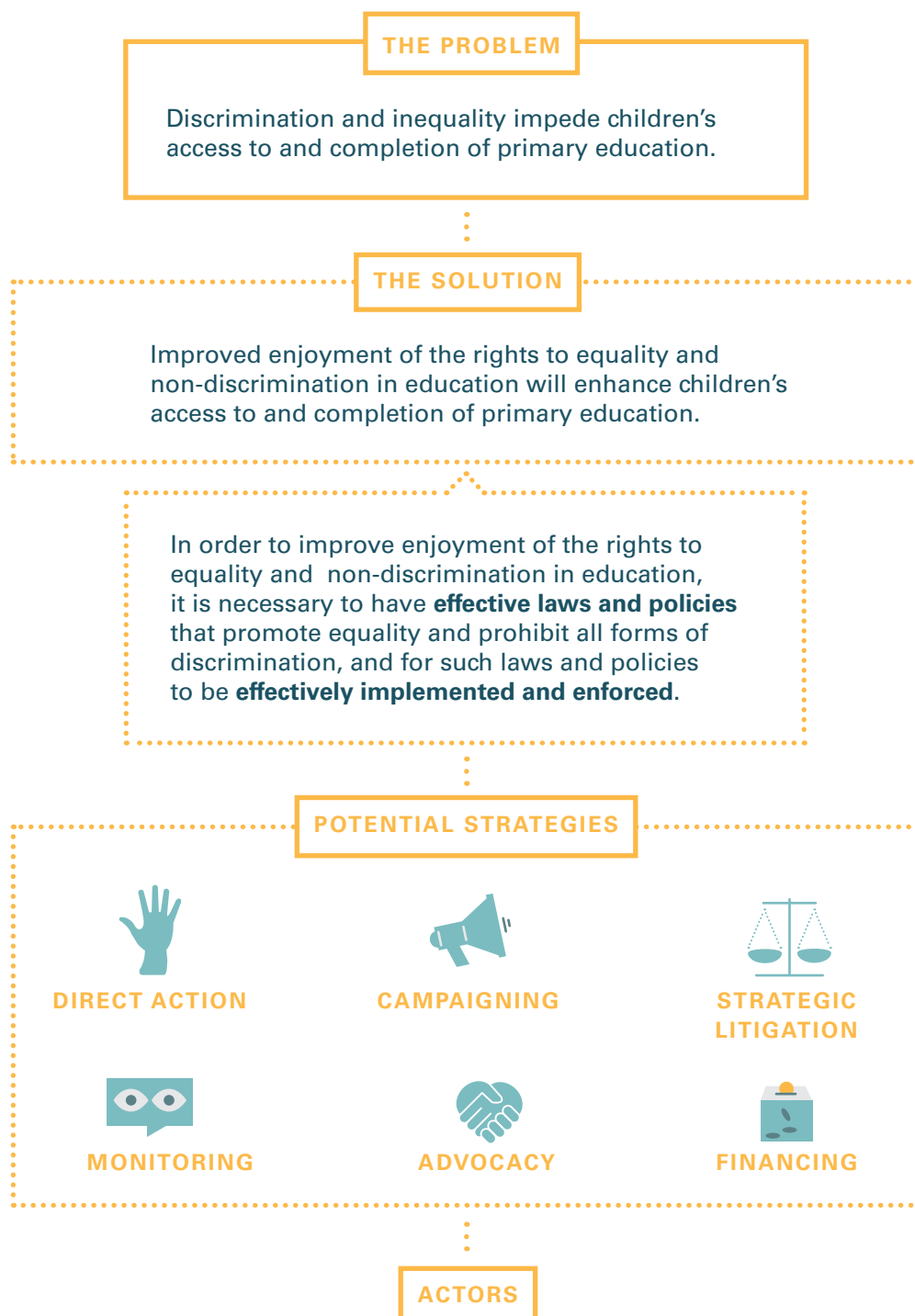
19 UN General Assembly, *Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, 2015.

20 Incheon Declaration, *Education 2030: Towards inclusive and equitable quality education and lifelong learning for all*, 2015, Para 7 (emphasis added).

21 See above, note 19, Para 25.

22 UN General Assembly, *Report of the Special Rapporteur on the right to education*, Koumbou Boly Barry, UN Doc. A/72/496, 2017, Para 4.

Theory of change



International organisations • Civil society • Development actors • Lawyers
Donors • Education providers • Governments • Children and their families

Purpose of this report

In summary, this report seeks to (1) identify the ways in which inequality and discrimination underpin children's lack of completion of primary education; and (2) explore ways in which equality law may be used to tackle this problem.

It is clear that solutions to reduce the number of out-of-school children must be equality-sensitive, and attentive towards patterns of inequality and discrimination.²³ However, despite significant work having been undertaken to understand the possible causes for children being excluded from primary education and to explore solutions to the problem,²⁴ there has previously been no attempt to draw together this existing research in order to understand the way in which the barriers and challenges that lead to children being out of primary education are underpinned by **patterns of discrimination and inequality**. As such, the extent to which discrimination, in all its forms, contributes to the denial of primary education, and the potential for the rights to equality and non-discrimination to offer solutions, are currently underexplored.

This report aims to explore these issues by analysing existing research through the lens of the law on equality and non-discrimination in order to illuminate the discriminatory nature of the barriers and challenges children face in accessing and/or completing primary education. In doing so, this report hopes to present a more comprehensive picture of the extent to which discrimination and inequality affect the realisation of the right of all children to a free primary education, and thus highlight the essential link between children's enjoyment of the rights to equality and non-discrimination, and their enjoyment of the right to primary education.

Having demonstrated this link, the report aims to explore **equality law based strategies** to improve school attendance among children of primary school age. In particular, the report looks at how an equality law focussed approach to advocacy and strategic litigation can be used to tackle "all forms of exclusion and marginalisation, disparities and inequalities" in access to and participation in primary education, and ensure that no child "is left behind".²⁵

23 See, for example, the UN Special Rapporteur on the Right to Education's comments regarding the need for post-2015 education agendas to explore marginalisation and exclusion: UN General Assembly, *Report of the Special Rapporteur on the Right to Education, Kishore Singh*, UN Doc. A/68/294, 2013, Para 110.

24 The Global Education Monitoring Reports (formerly known as the *Education for All Global Monitoring Reports*), and the global, regional and country-specific reports prepared by the Global Initiative on Out-of-School Children explore the issue of out-of-school children comprehensively. In addition to these global initiatives, there is a patchwork of smaller pieces of research on specific elements of the problem, which indicate that protected characteristics (including race or ethnic origin, gender, disability and language, all of which are prohibited grounds of discrimination under international law) are, in various degrees and combinations, among the root causes for children being out of primary education.

25 See above, note 20.

Research Methodology

The Equal Rights Trust defined the scope and structure of the report, and set the framework for the research methodology in consultation with an Expert Advisory Committee comprised of seven experts. The Expert Committee was established in order to provide guidance and direction to the Trust regarding the methodology and strategy, relevant sources of information, and key stakeholders.

A number of definitions were agreed at the outset of the research. In this report, “**primary education**” is defined as the first stage of formal education, whilst “**out-of-school children**” are defined as those who have not enrolled in primary education by the time they have passed the national age of entry for primary school (usually between five to seven years of age) or who have dropped out before completing the full curriculum that constitutes primary education in the respective country (usually four to six years).

The research consisted of three key aspects. Firstly, **desk-based research** was undertaken by a team of researchers for the Trust. Researchers were tasked with: (i) conducting legal research regarding the applicable international human rights law framework governing equal access to education (including reviewing international legal instruments, international/regional case law and jurisprudence from UN Treaty Bodies, using the UN Treaty Collection database²⁶ and the website of the Office of the High Commissioner for Human Rights²⁷); (ii) reviewing existing publications regarding the issue of out-of-school children (including reports published by International and National Non-Governmental Organisations (NGOs), national human rights institutions, academics, institutions, governments, Special Rapporteurs, and grass-roots level organisations and researchers); and (iii) reviewing disaggregated statistical data gathered by other organisations, primarily the two UN agencies entrusted with children’s rights and the right to education (UNICEF and UNESCO), the Global Initiative for Out-of-School Children, and the World Inequality Database on Education.²⁸

Secondly, **country-specific research and case studies** were collated through consultation with the Trust’s local partner organisations and networks in relation to: (i) patterns of discrimination and inequality in the denial of primary education; (ii) individual discrimination cases; and (iii) best practice examples of interventions (including litigation and advocacy efforts) that have been applied to improve access to and completion of primary education for marginalised individuals and groups at a local level. The Trust reached out to over 60 individuals working at a local-level in more than 30 different countries in an attempt to obtain illustrative examples and

26 United Nations, United Nations Treaty Series Online Collection, visited August 2017, available at: https://treaties.un.org/pages/Content.aspx?path=DB/UNTS/pageIntro_en.xml.

27 Office of the High Commissioner for Human Rights, visited September 2017, available at: <http://www.ohchr.org/EN/pages/home.aspx>.

28 World Inequality Database on Education, *Out-of-school children*, visited 10 August 2017, available at: http://www.education-inequalities.org/indicators/edu_out_pry#?sort=mean&dimension=wealth_quintile&group=all&age_group=edu_out_pry&countries=all.

information from a cross-section of countries, and thus gain a broad understanding of the principal patterns of discrimination and inequality in relation to out-of-school children. Where witness and/or victim testimonies were obtained through this aspect of the research, steps were taken to ensure confidentiality and anonymity where necessary. In presenting any first-hand testimony of victims of discrimination, names have been withheld where appropriate in order to ensure the personal safety of these individuals and to respect their wishes for confidentiality.

Finally, the Trust also sought to collate **evidence from key informants** working in the field of primary education, including individual experts contacted in connection with obtaining country-specific research, as well as other relevant stakeholders and experts.

Following the completion of the research and the preparation of a first draft, the draft report was subject to a **validation process**. The Expert Advisory Committee and a number of other expert contributors attended a one-day validation conference in London, at which they interrogated the draft and its conclusions in order to validate and fine-tune its findings and conclusions. The feedback received from the Committee members and expert contributors was subsequently incorporated into the draft.

Scope and Limitations

Given the considerable literature that already exists regarding access to primary education and the issue of out-of-school children, and the gap in such literature identified by the Trust (as outlined above), the scope of the research was clearly defined at the outset in order to ensure a focussed approach.

Firstly, when considering how the law on equality and non-discrimination could be used in order to tackle the issue of out-of-school children in primary education, it was clear that the research needed to look beyond issues of access alone. As the statistics indicate, the problem of out-of-school children concerns both (i) children who have never entered and will never enter primary education (issues of access), and (ii) children who have attended primary education for a period of time but who are unable to continue or complete their education (issues of retention and completion). It has been noted that existing research on the topic of out-of-school children pays insufficient attention to this second limb²⁹ – namely, the issues surrounding drop-out rates and retention – with some commentators noting that “[d]ropping out is often obscured within statistical data and by the emphasis on initial access”.³⁰ Whilst efforts have been made to increase school accessibility and enrolment rates – through, for example, implementing free education policies, or instituting financial incentive schemes – the number of out-of-school children in some communities continues to increase. Improvements in enrolment rates are clearly not meaningful if children are dropping out of primary education prior to completion.

29 See above, note 16, p. 8.

30 Hunt, F., *Dropping out from School: A Cross Country Review of the Literature*, 2008, p. 1, available at: <http://sro.sussex.ac.uk/1864/1/PTA16.pdf>.

The need to look beyond issues of enrolment and access is not only a matter of practical importance in tackling the issue of out-of-school children; it is also a normative necessity, considering the scope of the right to education under international human rights law. As will be explained in Chapter 1, the right to education comprises four interrelated obligations (the “4-A scheme”), whereby governments must ensure that education is not only Accessible, but also Available, Acceptable, and Adaptable.³¹ As such, this report applies an equality law approach in analysing the way in which discrimination and inequality influence not only accessibility and availability through analysing enrolment rates, but also *retention* rates in primary education. This is reflected in the definition of out-of-school children decided upon at the outset of the research.

Secondly, issues of *quality* in education are only addressed in this report insofar as they influence failure to enrol and drop-out rates, and are thus directly relevant to the problem of out-of-school children. It is acknowledged that improving attendance at and completion of primary education is not a panacea when considering whether the right to primary education has been fulfilled. Just as improving enrolment rates is not meaningful if children do not regularly attend and ultimately complete primary education,³² ensuring children’s completion of primary education is not meaningful if those children are receiving a poor quality of education that does not develop their personality and potential or respect their dignity and values. However, a full consideration of discrimination and inequality in relation to the right to *quality* education is beyond the scope of this report.

Thirdly, the report is limited to the issue of the discriminatory denial of *primary education* and, as such, it does not consider the circumstances surrounding children who do not attend/complete secondary education and/or who fail to transition from primary to secondary education (although it is acknowledged that the latter is an issue requiring further research and scrutiny, given the statistics on transition to secondary education). It should be noted, however, that much of the literature on the issue of out-of-school children does not differentiate clearly between primary and secondary educational settings. Whilst every effort has been made to weigh the relevance of evidence, some of the examples explored in Chapter 3 of the report are not strictly confined to the primary education context.

Finally, this report is intended to provide a high-level, overarching framework of analysis and intervention regarding the way in which discrimination and inequality contribute to the problem of out-of-school children. It does not comprehen-

31 Tomasevski, K., “Human rights obligations: making education available, accessible, acceptable and adaptable”, *Right to Education Primers*, No. 3, 2001, available at: http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf. See further Chapter 1, section 1.1.2.

32 Sedwal, M. and Kamat, S., “A consideration of caste as a barrier to access in India” in *Education and Social Equity: With a Special Focus on Scheduled Castes and Scheduled Tribes in Elementary Education*, CREATE Pathways to Access, Research Monograph No 19, 2008, p. 6, available at: http://www.create-rpc.org/pdf_documents/PTA19.pdf.

sively address individual instances and patterns of discrimination in every country, nor does it attempt to analyse the position of every group which is vulnerable to discrimination and inequality on the grounds identified. As such, the report is not intended to be “global” in the sense of being geographically comprehensive, or of discerning patterns of discrimination and forming conclusions that apply on a global scale. Rather, the report draws on evidence from a cross-section of countries with different numbers and percentages of out-of-school children, and thus presents a broad overview of the most significant patterns of discrimination and inequality affecting children’s access to and completion of primary education.

Structure of this Report

The report is divided into five substantive parts:

- **Chapter 1** sets out the relevant legal framework, providing an overview of the international human rights law framework on the rights to equality and non-discrimination and the right to a free primary education, and explaining key concepts of discrimination law as set out in the Declaration of Principles on Equality.³³
- **Chapter 2** considers why the legal framework on equality and non-discrimination should be central to efforts to tackle the issue of out-of-school children, looking at the conceptual links between equality, education and the development agenda, and the legal and rhetorical value of an equality law approach to advancing the right to primary education.
- **Chapter 3** contains an in-depth exploration of the key discriminatory barriers and challenges that inhibit children’s access to and/or completion of primary education, analysing the way in which these barriers and challenges impact disproportionately on children who share certain protected characteristics, and are exacerbated by situational factors such as conflict.
- **Chapter 4** focuses in on strategies for civil society intervention, looking at how equality law approaches to advocacy and strategic litigation can be used by civil society to ensure that effective laws and policies that promote equality and prohibit discrimination in education are in place, and that such laws and policies are effectively implemented and enforced in order to tackle barriers to primary education for marginalised children.
- **Chapter 5** contains some conclusions and an overview of the key implications of the report’s findings for stakeholders from local authorities and national governments to international organisations. It highlights, in particular, implications in areas such as education policy, financing and international programmes.

33 Declaration of Principles on Equality, Equal Rights Trust, London, 2008.

1. THE LEGAL FRAMEWORK

As noted in the Introduction, states have reaffirmed their commitment to achieving equality and inclusion in education as part of the post-2015 development agenda, as articulated in the Incheon Declaration¹ and the Sustainable Development Goals.² However, this commitment by states is not simply an expression of a development goal or aspiration: it is reinforced by binding legal obligations under international law. In the words of the previous Special Rapporteur on the Right to Education, Kishore Singh:

*People have the **equal right to receive an education**, and can hold their Government to account to address discriminatory practices or the failure to provide for their education. Governments in turn have the **duty to provide education**, and their obligations are based in national and international law.*³

The “equal right” to receive a primary education is enshrined in a number of international and regional treaties, with these rights also being protected at the domestic level through constitutional and legislative guarantees. This Chapter discusses:

- the rights to equality and non-discrimination and the right to a free primary education under international and regional human rights law, which guarantee the equal enjoyment of the right to a free primary education for all children (**section 1.1**);
- the domestication of international human rights law obligations, looking in particular at the way in which the rights to equality and non-discrimination are protected at the national level (**section 1.2**); and
- the key concepts of discrimination law, which help elucidate the content of the rights guaranteed under section 1.1 in particular and provide the analytical framework for the issues discussed and analysed in this report (**section 1.3**).

1 Incheon Declaration, Education 2030: Towards inclusive and equitable quality education and lifelong learning for all, 2015.

2 UN General Assembly, *Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, 2015.

3 UN General Assembly, *Report of the Special Rapporteur on the Right to Education, Kishore Singh*, UN Doc. A/68/294, 2013, Para 40 (emphasis added).

1.1 The International Human Rights Framework

1.1.1 The Rights to Equality and Non-Discrimination

The rights to equality and non-discrimination are essential to ensuring the fulfilment of all other human rights, including the right of all children to a free primary education. All the core international and regional human rights instruments oblige states to refrain from discriminating against certain groups of individuals, and to respect, protect, promote and fulfil the right to equality.

First and foremost, the rights to equality and non-discrimination are guaranteed in the **International Bill of Human Rights**, which consists of the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). The UDHR proclaims that “[a]ll are entitled to equal protection against any discrimination”,⁴ whilst the ICCPR enshrines freestanding rights to equality and non-discrimination in all areas of life:

*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 guarantee 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.*⁵

The ICESCR also requires states to secure the enjoyment of social, economic and cultural rights free from discrimination of any kind:

*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.*⁶

The Committee on Economic, Social and Cultural Rights (CESCR) – the international “treaty body” that is tasked with interpreting and monitoring the implementation of the rights contained within the ICESCR – has emphasised that the right to non-discrimination “is an immediate and cross-cutting obligation in the Covenant”,⁷

4 Universal Declaration of Human Rights, G.A. Res. 217 A (III), 1948, Article 7.

5 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 1966 (ICCPR), Article 26 (emphasis added).

6 International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 1966 (ICESCR), Article 2(2) (emphasis added). See also Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009.

7 *Ibid.*, CESCR, Para 7.

and must be “implemented fully and immediately”.⁸ The CESCR has underlined that this necessitates the adoption of national legislation prohibiting both formal and substantive discrimination in the field of economic, social and cultural rights.⁹

There are also a number of **regional treaties** that protect the rights to equality and non-discrimination. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention,¹⁰ and its Protocol 12 includes a general prohibition of discrimination in the enjoyment of any right set forth by law.¹¹ The European Social Charter also provides that the enjoyment of the rights in the Charter are to be secured without discrimination on any ground.¹² The American Convention on Human Rights and the African Charter on Human and Peoples’ Rights (African Charter) similarly oblige States Parties to guarantee the rights and freedoms contained therein without discrimination or distinction.¹³

In addition to these general guarantees of equality and non-discrimination, there are a number of core international human rights treaties that are dedicated to the eradication of discrimination against specific historically disadvantaged or vulnerable groups, including:

- the UN Convention on the Rights of the Child (UNCRC);
- the Convention on the Elimination of Discrimination Against Women (CEDAW);
- the International Convention on the Elimination of Racial Discrimination (ICERD);
- the Convention on the Rights of Persons with Disabilities (UNCRPD); and
- the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW).

These treaties all contain provisions aimed at eliminating discrimination against these groups, and at promoting their equal participation in all areas of political, social, economic and cultural life.

8 CESCR, *General Comment No. 11: Plans of Action for Primary Education* (Art. 14), UN Doc. E/1992/23, 1999, Para 10; CESCR, *General Comment No. 13: The Right to Education*, UN Doc. E/C.12/1999/10, 8 December 1999, Para 43.

9 See above, note 6, CESCR, Para 37.

10 Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 005, 1950, (ECHR), Article 14.

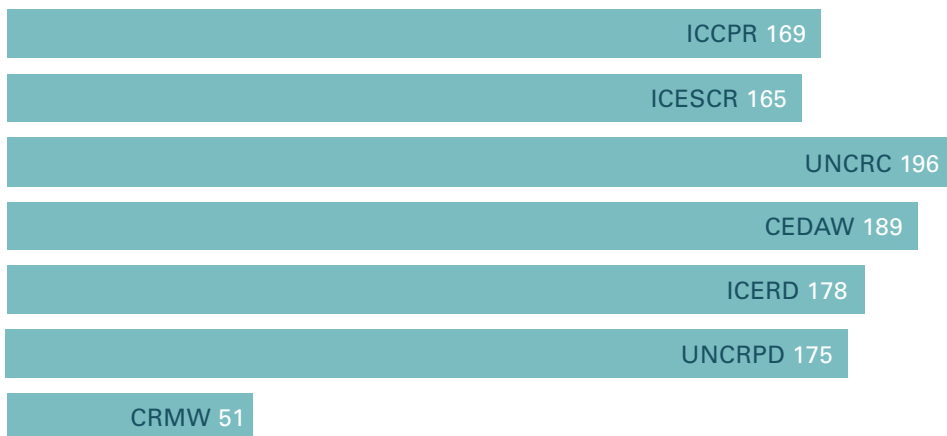
11 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 1950, Protocol 12, Article 1.

12 European Social Charter (Revised), ETS 163, 1996, Article E, Part V.

13 American Convention on Human Rights, “Pact of San Jose” OAS Treaty Series 36, 1969, Article 1; African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 1981, Article 2. The ASEAN Human Rights Declaration, whilst not legally binding, also recognises that “Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law”: ASEAN Human Rights Declaration, 2012, General Principles 3.

Treaty ratifications

out of 196 states



1.2.2 Equality and Non-Discrimination in Primary Education

The Right of all Children to a Free Primary Education

The right to education is provided for in Article 13 of the ICESCR. Article 13(1) recognises “the right of everyone to education”, and acknowledges the purposes of education in terms of enabling “all persons to participate effectively in a free society” and “promot[ing] understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups”.¹⁴ The right to **primary education** is specifically provided for in Article 13(2):

2. *The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:*
 - (a) *Primary education shall be compulsory and available free to all; (...)*

The fact that primary education must be made available “to all” implies equality of participation: states must ensure that *all* children are able to realise their right to primary education, with no child left behind or excluded. This is reinforced by the fact that Article 2(2) of ICESCR dictates that all rights under the convention must be exercised without discrimination, as noted above.¹⁵ Indeed, the obligation to ensure access to primary education on a non-discrimination basis is considered to form part of the “minimum core” of the right to education, which must be secured immediately by all states.¹⁶

14 ICESCR, Article 13.

15 *Ibid.*, Article 2(2).

16 See above, note 8, *General Comment No. 13*, Para 57. Under Article 2(1) ICESCR, states are required to take steps to “progressively realise” the rights contained therein to the maximum of available resources. It has

The CESCR has emphasised that the “compulsory” nature of the right under Article 13(2) ICESCR means that “neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education”.¹⁷ Moreover, the requirement that primary education shall be “available free” is “unequivocal”, and prohibits not only direct costs (such as school fees) but also certain indirect costs (including compulsory levies, and requirements to wear expensive uniforms).¹⁸

The right to education has been guaranteed and elaborated upon by other international and regional instruments, including the following:

- the UNCRC contains detailed provisions regarding the rights of children to education, echoing the ICESCR in providing that states parties shall “make primary education compulsory and available free to all”;¹⁹
- Protocol 1 to the ECHR states that “no person shall be denied the right to education”;²⁰
- the Charter of the Organization of American States provides that Member States will “exert the greatest efforts (...) to ensure the education of the right to education”;²¹ and
- the African Charter states that “[e]very individual shall have the right to education”.²²

As far as the substantive content of the right to education is concerned, the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski, organised states’ obligations in relation to the right to education into “4 As” – Availability, Accessibility, Acceptability and Adaptability – known as the “4-A scheme”.²³ These “4 As” are considered to be “interrelated and essential features” of education, which must be respected, protected and fulfilled by states in order for the right to education to be effectively realised.²⁴ The CESCR has emphasised that the obligation to provide free *primary education* for all under Article 13(2) (a) ICESCR “includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms”.²⁵

been suggested that the principle of “progressive realisation” is not practically relevant for the majority of states, which are not constrained by resource availability (see, for example, the discussion of Ferraz in Chapter 2, section 2.4); in any event, the CESCR has made clear that the principle of progressive realisation does not apply to rights falling within the “minimum core” of state obligations, such as the right to a free primary education: See above, note 8, *General Comment No. 13*, Para 51.

17 See above, note 8, *General Comment No. 11*, Para 6.

18 *Ibid.*, Para 7.

19 Convention on the Rights of the Child, G.A. Res. 44/25, 1989 (UNCRC), Article 28(1)(a).

20 ECHR, Article 14 and Protocol 1, Article 2.

21 Charter of the Organization of American States, 1951, Article 49.

22 African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 1981, Article 17(1).

23 United Nations Economic and Social Council, *Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33*, UN Doc. E/CN.4/1999/49, 1999, Chapter II, Para 50.

24 See above, note 8, *General Comment No. 13*, Paras 6 and 50.

25 *Ibid.*, Para 8.

Spotlight: The 4-A Scheme:

“Availability”, which is expressly included in provisions regarding the right to primary education under ICESCR and the UNCRC, means that states must ensure that there are sufficient functioning primary schools available for all children.²⁶ Functionality in this context refers to the sufficiency of educational infrastructure: adequate buildings, sanitation facilities, trained teachers, teaching materials and equipment.²⁷

- **“Accessibility”** requires primary education to be accessible to all, without discrimination.²⁸ The CESCR has noted the “three overlapping dimensions” of Accessibility, namely the prohibition of discrimination (particularly as regards the most vulnerable groups); the importance of physical accessibility (encompassing safe access, and geographical convenience); and the need for economic accessibility (as encapsulated in the requirement that education be “free to all”).²⁹
- **“Acceptability”** relates to the “form and substance of education”, which must be “relevant, culturally appropriate and of good quality”.³⁰ Tomasevski commented on the importance of *quality* in this context, noting that this necessitates the enforcement of minimum standards of health and safety, freedom from censorship, respect for diversity (such as diversity in language), and respect for the rights of children (including prohibiting corporal punishment as a method of school discipline).³¹
- **“Adaptability”** means that primary education must be flexible and respond to the individual needs and circumstances of each child, rather than requiring children to adapt to fit the educational environment made available to them.³² This includes ensuring that reasonable accommodation is made for children with disabilities, and extends to adapting education to be inclusive of children for whom conventional schooling may be impractical (such as nomadic children, or children living in refugee camps).³³

26 See above, note 23, Para 51; See above, note 8, *General Comment No. 13*, Para 6(a).

27 *Ibid.*, *General Comment No. 13*, Para 6(a).

28 See above, note 23, Para 57; see above, note 8, *General Comment No. 13*, Para 6(b).

29 See above, note 8, *General Comment No. 13*, Para 6(b).

30 *Ibid.*, Para 6(c).

31 Tomasevski, K., “Human rights obligations: making education available, accessible, acceptable and adaptable”, *Right to Education Primers*, No. 3, 2001, pp. 12–15, available at: http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf.

32 See above, note 8, *General Comment No. 13*, Para 6(d); *Ibid.*, p. 15.

33 See above, note 31, p. 15.

Specific Protections for Equality and Non-Discrimination in Primary Education

In addition to the general rights to equality and non-discrimination discussed at section 1.1.1, there is a convention dedicated to eradication of discrimination in education: the **UNESCO Convention against Discrimination in Education** is a binding convention that has the express aim of proscribing “any form of discrimination in education” and in promoting “equality of opportunity and treatment in education for all in education”.³⁴ The Convention details the legislative and policy requirements with which states must comply in order to eliminate and prevent discrimination in education, including ensuring that there is no discrimination in the admission of pupils to educational institutions; prohibiting any restrictions or preferential treatment by public authorities based on the fact that pupils belong to a particular group; and providing non-nationals within their territory the same access to education as nationals.³⁵

There are also specific provisions guaranteeing the equal enjoyment of the right to education contained in a number of international human rights treaties and instruments:

- The **UNCRC** specifies that the right of the child to education must be achieved “on the basis of equal opportunity”,³⁶ as well as providing that the right to education must be provided without discrimination of any kind.³⁷
- The **CEDAW** provides that women shall have equal access to education, and mandates states parties to “take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education”.³⁸
- The **ICERD** requires states to guarantee the equal enjoyment of the right to education “without distinction as to race, colour, or national or ethnic origin”.³⁹
- The **UNCRPD** recognises that children with disabilities may face specific barriers to education where their individual needs are not taken into account by those responsible for facilitating the right to education.⁴⁰ States parties are mandated to ensure that “children with disabilities are not excluded from free and compulsory primary education” on the basis of disability; that children with disabilities can access “an inclusive, quality and free primary education (...) on an equal basis with others in the communities in which they live”; and that children with disabilities receive

34 United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education 1962 (UNESCO Convention), *Preamble* and Article 4.

35 *Ibid.*, Article 3.

36 UNCRC, Article 28(1).

37 *Ibid.*, Article 2.

38 Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13, 1979, (CEDAW), Article 10.

39 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 U.N.T.S. 195, 1965, Article 5(e)(v).

40 Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3, 2006, (UNCRPD), Article 24.

reasonable accommodation of their needs and “individualised support” in order to maximise their academic and social development.⁴¹

- The **ILO Indigenous and Tribal Peoples Convention** provides that indigenous peoples shall have the opportunity to acquire education “on at least an equal footing with the rest of the national community”.⁴²
- The **CRMW** provides that the children of migrant workers must be able to access education “on the basis of equality of treatment with nationals of the State concerned” and that their access to education must not be refused or limited on the grounds of the irregularity of their stay in the country or that of their parent(s).⁴³
- The **Convention relating to the Status of Refugees** provides that refugees must be accorded “the same treatment as is accorded to nationals with respect to elementary education”,⁴⁴ with Article 3 adding that the provisions of the Convention – including the provisions regarding access to education – must be applied to refugees “without discrimination as to race, religion or country of origin”.⁴⁵
- Whilst they do not have the status of binding law, the **Guiding Principles on Internal Displacement** – which identify the rights relevant to the needs and protection of internally displaced persons – emphasise the fact that all persons have the right to education,⁴⁶ and provide that “the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level”.⁴⁷

Spotlight: The Right of all Children to Inclusive Education

In the wake of the World Declaration on Education for All in 1990, 92 governments and 25 international organisations met in June 1994 for a **World Conference on Special Needs Education** in Salamanca, Spain. The resulting Statement on Principles, Policy and Practice in Special Needs Education – known as the Salamanca Statement⁴⁸ – set out a new dynamic position on the education of all children with disabilities, which was premised on the principle of **inclusion**. The Salamanca Statement recognises that “every child has unique characteristics, interests, abilities and learning needs” and that education systems

41 *Ibid.*, Article 24(2)(a)-(e).

42 International Labour Organisation Indigenous and Tribal Peoples Convention C169. 1989, Article 26.

43 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 U.N.T.S. 3, 1990, Article 30.

44 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, 1951, Article 22(1).

45 *Ibid.*, Article 3.

46 Guiding Principles on Internal Displacement, 1998, Principle 23(1).

47 *Ibid.*, Principle 23(2).

48 UNESCO, Salamanca Statement and Framework for Action on Special Needs Education, UN Doc. ED-94/WS/18, 1994.

should be designed and implemented “to take into account the wide diversity of those characteristics and needs”.⁴⁹

These commitments on inclusion were subsequently incorporated into binding international law in the 2006 **Convention on the Rights of Persons with Disabilities**, which provides that states must ensure “an inclusive education system at all levels”.⁵⁰ The content of states’ obligations regarding inclusive education has been progressively developed by the Committee on the Rights of Persons with Disabilities (CRPD), which has made clear that **inclusion** requires a “process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education”.⁵¹

Importantly, the CRPD has noted that inclusive education is not only applicable to children with disabilities. Rather, it should be understood as a “fundamental human right of all learners”,⁵² requiring a “transformation” in policy to remove any barriers preventing the accommodation of the needs of individual students.⁵³ Respect for diversity is at the heart of the concept of inclusive education:

*All members of the learning community are welcomed equally, with respect for diversity according to, inter alia, disability, race, colour, sex, language, linguistic culture, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status. **All students must feel valued, respected, included and listened to.** Effective measures to prevent abuse and bullying are in place. Inclusion takes an individual approach to students.⁵⁴ (emphasis added)*

As such, whilst discourse on inclusive education has largely centred around children with disabilities, it is a framework that can – and should – be used to address the exclusion and discrimination experienced by children from all marginalised groups, drawing together the wide-ranging protections under international human rights law described above.⁵⁵

49 *Ibid.*, Para 2.

50 UNCRPD, Article 24(1).

51 Committee on the Rights of Persons with Disabilities (CRPD), *General Comment No. 4 on the right to inclusive education*, UN Doc. CRPD/C/GC/4, 2016, Para 11.

52 *Ibid.*, Paras 2 and 10(a).

53 *Ibid.*, Para 9. *Ibid.*, Para 9.

54 *Ibid.*, Para 12(e).

55 United Nations Children’s Fund (UNICEF), *The Right of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education*, 2012, p. 9, available at: https://www.unicef.org/ceecis/UNICEF_Right_Children_Disabilities_En_Web.pdf.

Specific Content of the Rights to Equality and Non-Discrimination

The above overview focusses on the sources of the rights to equality and non-discrimination in international and regional law. It does not detail the precise scope of the rights as they have been separately considered by international and regional mechanisms. Section 1.3 below summarises the key concepts of equality and discrimination, drawing in large part on the development of international and regional jurisprudence, in addition to national best practice.

1.1.3 International and Regional Scrutiny and Accountability

The international and regional treaties discussed above give rise to binding obligations on states to **respect, protect** and **fulfil** the rights contained therein, with a failure to perform any one of these three obligations constituting a violation.⁵⁶

States can be held accountable for such violations in a number of different ways. As far as **international** human rights treaties are concerned, in ratifying these treaties, states agree to be subject to the supervision of an international “treaty body” that is tasked with interpreting and monitoring the implementation of the rights contained within the relevant treaty. For example, the CESCR is responsible for monitoring compliance with the ICESCR, and the Committee on the Rights of the Child (CRC) monitors compliance with the UNCRC.⁵⁷ In some cases, individuals and groups may bring complaints before the relevant treaty body i.e. where states have also ratified or acceded to Optional Protocols that provide for an individual complaints mechanism. States also report to the UN Human Rights Council once every four to five years regarding the extent to which they respect their human rights obligations under the various treaties and conventions to which they are party, in a peer-review process known as the Universal Periodic Review (UPR).

At the **regional** level, there are a number of mechanisms that adjudicate one or more of the conventions containing protection for the equal enjoyment of the right to education. Notably, these include the European Court of Human Rights, the European Committee of Social Rights, the Inter-American Court on Human Rights and the African Court on Human and Peoples’ Rights. Whether or not a mechanism, such as a regional court or body, is available in a given case will depend in part upon whether a country has ratified the convention in question and, where relevant, has agreed to submit to the jurisdiction of the regional court or body.⁵⁸

56 See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 2E/C.12/2000/13, 1997, Para 6.

57 For more information on the work of the different treaty bodies, see Equal Rights Trust, *Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights*, 2014, pp. 35-39, available at: http://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf.

58 For more information on the regional mechanisms available, see *Ibid.*, pp. 31–35.

1.2 Domestic Application of International Human Rights Law

1.2.1 Domestication of International Human Rights Obligations Generally

The extent to which the rights and obligations contained in international and regional human rights treaties are applicable and enforceable at the domestic level will depend on the national legal system in question. In some national systems, international and regional conventions are regarded as forming part of national law upon ratification of the convention, meaning that domestic legislation is not required in order to translate the rights contained therein into national law (these are known as ‘**monist**’ systems). In some states, however, the rights and obligations contained in international and regional treaties will only form part of national law if they are incorporated into the legal system through the enactment of domestic legislation (these are known as ‘**dualist**’ systems).

Whether or not a state has a monist or dualist legal system, they are obligated to ensure that the rights contained in the international human rights treaties they have ratified are given effect in the domestic legal order. As noted by the Human Rights Committee in respect of the ICCPR:

[U]nless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.⁵⁹

Depending on the national legal system in question, this may involve ensuring that the rights contained in international human rights treaties are enshrined in the national **constitution**, or that national **legislation** is enacted to guarantee the rights in question.

However, constitutional or legislative recognition may not, in and of itself, be sufficient to make these rights *enforceable* at the domestic level: when incorporating the rights into domestic law, states must also ensure that victims are able to claim an “accessible and effective” remedy where a violation has occurred or is likely to occur.⁶⁰ This ensures that the right is **justiciable**, meaning that the rights-holder has a legal course of action to enforce the right in the event of a violation, and has access to suitable reparation.⁶¹ Whilst the availability of reparation will be context dependent, there is potential for victims of human rights violations to secure remedies which not only compensate them for the harm suffered, but which also achieve wider social transformation,

59 Human Rights Committee (HRC), *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, Para 13.

60 *Ibid.*, Para 15.

61 International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, 2008, p. 6, available at: https://www.humanrights.ch/upload/pdf/080819_justiziabilit_esc.pdf.

including through the striking down or amendment of legislation,⁶² or the issuance of “structural injunctions” ordering a change in the government policy or the behaviour of government officials.⁶³

1.2.2 Domestication of the Rights to Equality and Non-Discrimination Specifically

In order to give full effect to the rights to equality and non-discrimination in their domestic orders, states are required to adopt appropriate constitutional, legislative and administrative measures. As noted in section 1.1.1 above, the CESCR has made clear that the “[a]doption of legislation to address discrimination is indispensable” in order for states to comply with their obligation to guarantee that the rights contained in the ICESCR will be exercised without discrimination of any kind.⁶⁴

However, as with all international human rights obligations, the extent to which the rights to equality and non-discrimination are directly applicable and enforceable at the domestic level depends on the legal system in the state in question:

- Most national constitutions guarantee a right to equality and/or non-discrimination to some degree,⁶⁵ although there is often significant variation in the extent of the constitutional protection available. In the **United States**, for example, the Fourteenth Amendment simply prohibits each state from denying “to any person within its jurisdiction the equal protection of the laws”,⁶⁶ whereas the Bill of Rights in the **South African** Constitution provides for detailed protection of the rights to equality and non-discrimination.⁶⁷
- Some states have enacted national legislation that provides for equality and prohibits discrimination. This may be through the adoption of a comprehensive law on equality and non-discrimination (such as the **UK’s** Equality Act 2010, which prohibits discrimination in a variety of spheres of life including education), or in the form of separate pieces of legislation that provide for protection from discrimination on different grounds (such as **Australia**, which has separate legislation covering discrimination on the grounds of race, sex, disability and age).⁶⁸

Given the variance in the way and extent to which the rights to equality and non-discrimination have been incorporated in national constitutions and leg-

62 See above, note 57, pp. 100–105.

63 *Ibid.*, pp. 105–106.

64 See above, note 6, CESCR, Para 37.

65 See above, note 61, p. 54.

66 Fourteenth Amendment to the US Constitution, 1868, section 1.

67 Constitution of the Republic of South Africa, 1996, section 9.

68 Racial Discrimination Act, 1975; Sex Discrimination Act, 1984; Disability Discrimination, Act 1992; and Age Discrimination Act, 2004.

isolation, the precise scope of legal protection against discrimination at the domestic level and the nature of the remedies available will differ from country to country.

1.3 Key concepts in equality and discrimination law

As is evident from the exposition of the rights to equality and non-discrimination under international human rights law in section 1.1, the way in which the rights have been formulated in the various international and regional treaties are not identical, and each has been the subject of significant jurisprudence and commentary. Furthermore, as noted above, domestic protections and guarantees of the rights to equality and non-discrimination vary in different states.

In light of this variance, this report uses the concepts of equality and discrimination law set out in the **Declaration of Principles on Equality** (“the Declaration”)⁶⁹ as the conceptual framework for its discussion and analysis of the barriers and challenges that influence children’s ability to access and/or complete primary education (Chapter 3), and its discussion regarding the use of equality and non-discrimination strategies to tackle the issue of out-of-school children (Chapter 4).

The Declaration was drafted in 2008 by a number of human rights and equality experts from different regions across the world, and is a statement of international best practice “based on concepts and jurisprudence developed in international, regional and national contexts”.⁷⁰ It promotes a unified approach to equality and non-discrimination, emphasising the integral role of equality in the enjoyment of all human rights, and encompasses equal participation in all areas of life in which human rights apply. The Declaration has been endorsed and/or cited at a judicial or legislative level in a number of jurisdictions,⁷¹ and its conceptual framework has recently been utilised by the Committee on the Rights of Persons with Disabilities in its Draft General Comment No. 6 on the rights to equality and non-discrimination.⁷²

69 *Declaration of Principles on Equality*, Equal Rights Trust, London, 2008.

70 *Ibid.*, p. 2.

71 In 2008, the CESCR made use of a number of the key concepts from the Declaration in its General Comment No. 20: Non-Discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2008. In 2011, the Parliamentary Assembly of the Council of Europe adopted Resolution 1844 calling on the 47 Council of Europe member states to take the Declaration into account when developing equality law and policy (see Council of Europe, Parliamentary Assembly, *The Declaration of Principles on Equality and activities of the Council of Europe, Resolution 1844*, 2011, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18046&lang=en>).

72 CRPD, *Draft General Comment on the right of persons with disabilities to equality and non-discrimination (article 5)*, 2017, available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CallPersonsDisabilitiesEqualityResponsibility.aspx>.

THE RIGHT TO EQUALITY

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

POSITIVE ACTION
REQUIRED

States must take legislative, administrative and policy measures to **overcome past disadvantages** and accelerate progress **towards equality** for a particular group

THE RIGHT TO
NON-DISCRIMINATION

A free-standing fundamental right, subsumed within the right to equality

ALL GROUNDS

- Disability
- Race
- Gender
- Other

ALL FORMS OF
DISCRIMINATION

- Direct consideration
- Indirect discrimination
- Harrassment
- Failure makes reasonable accommodation

ALL REGULATED
AREAS OF LIFE

- Education
- Work
- Healthcare
- ~~Private life~~

Principle 1 of the Declaration defines the **right to equality** as follows:

*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.*⁷³

The Declaration identifies an extensive list of grounds on which discrimination must be prohibited, drawing together the characteristics protected under the international and regional instruments discussed in section 1.1 above:

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

(...)

*Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.*⁷⁴

The Declaration also provides a “test” for the inclusion of further prohibited grounds of discrimination, according to which “candidate grounds” should meet at least one of three listed conditions:

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.*⁷⁵

73 See above, note 69, Principle 1.

74 *Ibid.*, Principle 5.

75 *Ibid.*

Most modern legal systems which provide protection against discrimination recognise that discriminatory treatment includes both **direct** and **indirect discrimination**. Principle 5 of the Declaration of Principles of Equality defines direct and indirect discrimination as follows:

***Direct discrimination** occurs when 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. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.*

For example: The laws of Country A provide that non-national children are only permitted to enrol in government-run primary schools if they are nationals of Countries B or C. A refugee child from Country X is denied entry to a government-run primary school in Country A. This is **direct discrimination** on the grounds of nationality, since the refugee child from Country X is being treated less favourably than children who are nationals of Countries A, B and C.⁷⁶

***Indirect discrimination** occurs 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.*⁷⁷

For example: The laws of Country A require all children to provide residential papers in order to enrol in primary school. Children belonging to a nomadic ethnic minority group in Country A do not have residential papers due to their nomadic lifestyle, and are therefore denied entry to primary schools. This is **indirect discrimination** on the grounds of ethnicity as, whilst the requirement to provide residential papers applies to all children, it places children from the nomadic ethnic minority group at a particular disadvantage compared with other children. This discriminatory treatment may be justified if it can be shown that the requirement to provide residential papers is justified by a legitimate aim, and that the means of achieving that aim are appropriate and necessary. However, the Trust has never come across a situation where there is such a justification in an example of this type.⁷⁸

⁷⁶ See, for example, the discussion of nationality in Chapter 3, section 3.3.1.

⁷⁷ See above, note 69, Principle 5.

⁷⁸ See, for example, the discussion of ethnicity in Chapter 3, section 3.3.1.

Importantly, intention is not required for discrimination on a particular ground to be found: an act of discrimination may be committed intentionally or unintentionally.⁷⁹ Furthermore, **harassment** may constitute discrimination:

[W]hen unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.⁸⁰

For example: Lower caste children attend classes alongside upper caste children, and are taught by upper caste teachers. The lower caste children are subject to verbal abuse from the upper caste teachers and children, who frequently call them “untouchable”, “dirty” and “stupid”. This verbal abuse constitutes **harassment**: it is unwanted conduct related to the lower caste children’s descent, which has the effect of violating their dignity and of creating a degrading, humiliating and offensive environment.

The right to be free from discrimination also implies a right to **reasonable accommodation**, which arises in relation to all protected characteristics (not simply in relation to disability). Principle 13 of the Declaration elaborates on what is required to accommodate difference, and from whom it is required:

To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.

For example: Child A is visually impaired and requests her school to make certain **accommodations** in order to enable her to participate in class on an equal basis with other children. These accommodations include making adjustments to the classroom lighting, and providing reading and other classroom materials in an accessible format. When determining whether these accommodations are “**reasonable**”, consideration will be given to whether they impose a disproportionate or

79 See above, note 69, Principle 5.

80 *Ibid.*

undue burden on the duty bearer, be that the education authority and/or individual school in question.⁸¹

The right to equality can also require the state to institute **positive action** (also known as affirmative action, or special measures) in order to remove disadvantage caused to particular groups by underlying structural inequalities, where this is necessary to ensure equal participation in all areas of economic, social, cultural, political and civil life.⁸² Principle 3 of the Declaration states:

*To be effective, the right to equality requires positive action. Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.*⁸³

It has been recognised that the prohibition of discrimination in education is not sufficient in and of itself to ensure equality and inclusion, and that states are required to take positive action in this context to enable equal enjoyment of the right to education.⁸⁴ For example, the ICERD expressly provides that states may be required to take special measures to overcome past disadvantage and exclusion in the exercise and enjoyment of the right to education,⁸⁵ and the CDESCR has recognised that discrimination must be eliminated “both formally and substantively”, with the latter requiring that states pay attention to ending the systemic and persistent disadvantage faced by certain groups of individuals.⁸⁶ The CEDAW and the CRPD also recognise the importance of positive action in accelerating or achieving de facto equality for disadvantaged groups.⁸⁷

For example: Children belonging to a minority language group in Country Z have been historically disadvantaged in primary education, since classes are taught in the official state language which they do not understand. As a result, these children have low rates of primary school completion. Country Z must take **positive action** to redress the historic disadvantage

81 See, for example, the discussion of reasonable accommodation in Chapter 3, section 3.4.

82 See above, note 57, p. 81.

83 See above, note 69, Principle 3.

84 See, for example, United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly resolution 47/135 of 18 December 1992, Article 4(4); See above, note 8, *General Comment No. 13*, Para 47; UN General Assembly, *Report of the Special Rapporteur on the right to education, Kishore Singh, Report on the Post-2015 Education Agenda*, UN Doc. A/68/294, 2013, Para 111.

85 ICERD, Article 1(4).

86 See above, note 6, CDESCR, Para 8.

87 CEDAW, Article 4(1); UNCRPD, Article 5(4).

faced by these children, which may include investing in a bilingual education programme, and/or ensuring the recruitment and training of teachers who are able to speak both the minority and official language.⁸⁸

The concepts of equality and non-discrimination law set out in the Declaration provide a useful analytical framework through which to analyse patterns of discrimination and inequality, and a firm foundation for tackling the full complexity of the issues to be addressed in this report regarding children who are out of primary education.

⁸⁸ See, for example, the discussion of Mother Tongue Bilingual Education in Cambodia in Chapter 3, The Duty To Take Positive Action.

2. WHY USE EQUALITY LAW TO TACKLE THE ISSUE OF OUT-OF-SCHOOL CHILDREN?

It has been noted that “the right to education is among the most widely recognised international rights”.¹ Yet, despite the unequivocal nature of the right to a free primary education, the enjoyment of this right “is often least accessible to those who need it most – disadvantaged and marginalised groups”.² This Part will consider the conceptual and practical reasons why the legal framework on equality and non-discrimination should be central to efforts to tackle the issue of out-of-school children.

2.1 Links Between Equality and Education

Equality and education are inextricably linked: inequality in education plays a clear role in perpetuating social inequalities and socio-economic disadvantage, which themselves correlate with patterns of historical discrimination against marginalised groups. This is because fulfilment of the right to education is central to the effective realisation of other fundamental rights and freedoms, including the rights to health, work, civil and political participation. The right to education is viewed as an “empowerment” right and a “powerful lever for eliminating the intergenerational transmission of poverty”,³ with the Committee on Economic, Social and Cultural Rights (CESCR) noting its importance in ending cycles of poverty and disadvantage:

*[E]ducation is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.*⁴

The correlation between socio-economic disadvantage and discrimination against marginalised groups on the basis of a personal characteristic is evident.⁵

- 1 UN General Assembly, *Report of the Special Rapporteur on the Right to Education, Kishore Singh*, UN Doc. A/68/294, 2013, Para 44.
- 2 Human Rights Council, *Report of the Special Rapporteur on the right to education, Kishore Singh, justiciability of the right to education*, UN Doc. A/HRC/23/35, 2013, Para 2.
- 3 See above, note 1, Para 61; Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights*, UN Doc. A/HRC/32/31, 2016, Para 15.
- 4 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education*, UN Doc. E/C.12/1999/10, 1999, Para 1; see also CESCR, *General Comment No. 11: Plans of Action for Primary Education (Art. 14)*, UN Doc. E/1992/23, 1999, Para 4.
- 5 Equal Rights Trust, *Equal Rights at the Heart of the Post-2015 Development Agenda*, 2013, pp. 6–7, available at: <http://www.equalrightstrust.org/ertdocumentbank/130916%20Equal%20Rights%20at%20the%20Heart%20of%20the%20Development%20Agenda.pdf>.

The CESCR has noted that “individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical (...) forms of discrimination”.⁶ For example, there is a clear connection between disability and poverty: persons with disabilities are disproportionately represented amongst the poor, with disability being both a determinant and consequence of poverty.⁷ There is also a connection between discrimination against ethnic minorities, lower-castes and indigenous communities, and economic deprivation and poverty.⁸ Further, there are clear links between a person’s sex and their socio-economic status, with Fredman explaining that women are not only more likely to live in poverty than men, but also that “gender inequality specifically shapes women’s experience of poverty”.⁹

Given the relationship between education, socio-economic disadvantage and historical patterns of discrimination, it is unsurprising that education is fundamental to alleviating the poverty and marginalisation suffered by groups that face entrenched and systemic forms of discrimination. For example:

- It is widely recognised that educating girls is integral to “enabling girls and women to fully participate socially and politically, and of empowering them economically” and thus achieving gender equality within societies.¹⁰
- The Committee on the Rights of Persons with Disabilities has emphasised that inclusive education enables children to redress their socio-economic disadvantage by ensuring their full participation in society,¹¹ since the positive impacts of education can mitigate against children with disabilities suffering poverty as adults.¹²

6 CESCR, *General Comment No. 20: Non-Discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2008, Para 1.

7 Filmer, D., “Disability, poverty and schooling in developing countries: results from 14 household surveys”, *The World Bank Economic Review*, Vol. 22, No. 1, 2008, p. 149, available at: http://siteresources.worldbank.org/DISABILITY/Resources/280658-1239044853210/5995073-1246917324202/Disability_Poverty_and_Schooling_in_Developing_Countries.pdf; UIS and UNICEF, *Fixing the Broken Promise of Education for All: Findings from the Global Initiative on Out-of-School Children*, 2015, p. 80; Grimes, P., Kumar, K. and Stevens, M., *An examination of the evolution of policies and strategies to improve access to education for children with disabilities, with a focus on inclusive education approaches, the success and challenges of such approaches and implications for the future policy direction – Background Paper for Education for All Global Monitoring Report 2015*, 2015, p. 7, available at: <http://unesdoc.unesco.org/images/0023/002324/232454E.pdf>.

8 See, for example, Saravankumar, S. and Palanisamy, M., “Status of Primary Education of Scheduled Caste Children”, *International Journal of Research in Humanities and Social Sciences*, Vol. 1, No. 8, 2013, p. 54, available at: https://raijmronlineresearch.files.wordpress.com/2017/08/9_54-61-dr-s-saravankumar-mr-m-palanisamy.pdf; Equal Rights Trust, *Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights*, 2014, p. 53–54, available at: http://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf.

9 Fredman, S., “Engendering Socio-Economic Rights”, *South African Journal of Human Rights*, Vol. 25, Part 3, 2009, p. 412, available at: <http://www.tandfonline.com/doi/abs/10.1080/19962126.2009.11865211>.

10 Incheon Declaration, *Education 2030: Towards inclusive and equitable quality education and lifelong learning for all*, 2015.

11 Committee on the Rights of Persons with Disabilities, *General Comment No. 4 on the right to inclusive education*, UN Doc. CRPD/C/GC/4, 2016, Para 10(c).

12 International Disability and Development Consortium, *#Costing Equity: The case for disability-responsive education financing*, 2016, p. 19, citing Filmer, D., available at: https://iddconsortium.net/sites/default/files/resources-tools/files/costingequity_full_report.pdf.

- The Committee on the Rights of the Child has noted the importance of the right to education for indigenous children in “achieving individual empowerment and self-determination”.¹³

In order for education to have a transformative and empowering effect for marginalised groups, it is imperative that the rights to equality and non-discrimination in education are guaranteed and ensured. This includes ensuring that children do not face any discrimination (whether direct or indirect) in accessing education; that reasonable accommodations are made to facilitate the ability of every child to participate on an equal basis with others; that the learning environment is free from discrimination and harassment; and that positive action is taken to help overcome the disadvantage faced by historically disadvantaged children. The legal framework on equality and non-discrimination therefore has a crucial role to play in ensuring the equal enjoyment of the right to education, and thus in redressing the socio-economic inequality faced by historically disadvantaged groups of individuals.

Discrimination on the Grounds of Socio-Economic Disadvantage

Discrimination and socio-economic disadvantage are “inseparably intertwined”, since socio-economic disadvantage is “both a basis for and a consequence of discrimination”.¹⁴ Given this interrelation, there has been much discussion of whether equality law recognises the prohibition of discrimination *on the grounds of* socio-economic disadvantage – and, if not, whether it should do so.¹⁵ Whilst this is still a developing area of law, there is increasing recognition of **socio-economic disadvantage** as a ground of discrimination and, in a world of growing socio-economic inequality, a need to use equality and discrimination law to tackle this.

Defining “Socio-Economic Disadvantage”

Debates over whether or not the law should prohibit discrimination on the grounds of what has variously been described as a person’s “socio-economic status”, “poverty” or “economic and social situation”¹⁶ have often centred around the difficulties of defining such statuses. The term “poverty” is often criticised for being imprecise and laden

13 Committee on the Rights of the Child, *General Comment No. 11: Indigenous children and their rights under the Convention*, UN Doc. CRC/C/GC/11, 2009, Para 57.

14 Whiteman, J., “Tackling Socio-Economic Disadvantage: Making Rights Works”, *The Equal Rights Review*, Vol. 12, 2014, p. 98; Office of the High Commissioner for Human Rights, *Guiding Principles on Extreme Poverty and Human Rights*, 2012, Para 18.

15 See above, note 8, Equal Rights Trust, pp. 68–75.

16 European Network of Equality Bodies (Equinet), *Addressing poverty and discrimination: two sides of the one coin: An Equinet Opinion*, 2010.

with value-judgments,¹⁷ whilst “socio-economic status” is potentially so wide as to provide protection to all individuals,¹⁸ and also arguably “risks the possibility of challenges by better off people against programmes specifically designed to benefit poor people”.¹⁹

Fredman’s suggestion is to adopt the phrase “socio-economic disadvantage”;²⁰ this “asymmetric” construction recognises the need to tackle the disadvantage faced by the poor in enjoying and exercising their rights, and mitigates against the risk of the law being abused by the better-off.²¹ The term “socio-economic disadvantage” also goes beyond notions of “poverty” in that it not only encapsulates a person’s access to material resources, but also their access to social resources, including education.²² As such, the term “socio-economic disadvantage” broadly refers to the condition of “living in poverty with inadequate access to financial help to secure housing, food and water and with inadequate or no access to education or healthcare”.²³

Recognition at the International, Regional and National Level

Whilst the international and regional human rights treaties discussed in Chapter 1 do not explicitly refer to socio-economic disadvantage or status as a ground of discrimination, its recognition can be inferred through the protection of grounds such as “social origin”, “property”, “birth” and “economic condition”;²⁴ furthermore, these treaties all contain non-exhaustive lists, prohibiting discrimination on the grounds of “other status”.²⁵ The CESCR has in fact identified “economic and social situation” as a relevant “other status”, and thus a ground of discrimination which should be prohibited by states, noting that “individuals and groups of

17 See above, note 14, Whiteman, J., p. 96.

18 Kadar, T., An analysis of the introduction of socio-economic status as a discrimination ground, Equality & Rights Alliance, 2016, p. 5, available at: <http://www.eracampaign.org/uploads/Analysis%20of%20socio-economic%20status%20as%20discrimination%20final.pdf>.

19 Fredman, S., “Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda”, European Human Rights Law Review, 2010, p. 10, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631771.

20 *Ibid.*

21 See above, note 8, Equal Rights Trust, pp. 68–69.

22 See above, note 14, Whiteman, J., p. 96, citing Australian Bureau of Statistics.

23 See above, note 8, Equal Rights Trust, p. 69.

24 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 1966 (ICCPR), Articles 2 and 26; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 1966 (ICESCR), Article 2(2); United Nations Educational, Scientific and Cultural Organisation Convention against Discrimination in Education (UNESCO Convention), 429 U.N.T.S. 93, 1960, Article 1(1).

25 In addition, the UN Guiding Principles on extreme human rights adopted by the Human Rights Council in September 2012, whilst not legally binding, note that states must eliminate “[a]ll forms of legislative or administrative discrimination, direct or indirect, on grounds of economic situation or other grounds associated with poverty”: Office of the High Commissioner for Human Rights, Guiding Principles on Extreme Poverty and Human Rights, 2012, Para 19.

individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society”.²⁶

At the European level, the European Committee of Social Rights (ECSR) has explicitly recognised that the non-discrimination clause of the European Social Charter (Article E) “obviously includes non-discrimination on grounds of poverty”.²⁷ Whilst the European Convention on Human Rights (ECHR) does not explicitly prohibit discrimination on the grounds of socio-economic disadvantage, the European Court of Human Rights has recognised its relevance in case law when determining whether a state has taken adequate measures in pursuit of a right, and has proven willing to require states to give particular consideration to ensure the protection of the most vulnerable socio-economic groups in society.²⁸

In terms of recognition in national legislation, the European Commission’s recent comparative analysis of non-discrimination law in Europe in 2016 shows that legislation in 22 out of 35 European countries provides protection against discrimination on a ground related to socio-economic status or disadvantage,²⁹ as compared to 20 in 2015.³⁰ These 22 countries variously prohibit discrimination on the grounds of “social standing” (*Austria*); “wealth” or “social class” (*Cyprus*); “financial status” (*Hungary*); and “economic situation” or “social condition” (*Portugal*).³¹ A number of countries outside Europe also recognise the prohibition of discrimination on grounds akin to socio-economic disadvantage, from *Bolivia*³² and *Argentina*,³³ to *South Africa*³⁴ and *Canada*.³⁵

26 See above, note 6, Para 35.

27 European Committee of Social Rights, Conclusions 2013: Statement of interpretation on Article 30, 2013, available at: http://hudoc.esc.coe.int/eng/?i=2013_163_06/Ob/EN. See also ECSR, *International Movement ATD Fourth World v France*, Complaint No. 33/2006, 5 December 2007.

28 See above, note 8, Equal Rights Trust, p. 71; See, for example European Court of Human Rights (ECtHR), *Horváth and Kiss v Hungary*, Application No. 11146/11, 2013, Para 115, and ECtHR, *Airey v Ireland*, Application No. 6289/73, 9 October 1979, Para 29.

29 European Commission, *A comparative analysis of non-discrimination law in Europe 2016*, 2016, pp. 11–14, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=52837. This covers the 28 EU Member States, the former Yugoslav Republic of Macedonia, *Iceland*, *Liechtenstein*, *Montenegro*, *Norway*, *Serbia* and *Turkey*.

30 See above, note 18, p. 11.

31 See above, note 29.

32 Law against racism and all forms of discrimination includes “economic condition” (condición económica) as a prohibited ground of discrimination: Ley No 045, Ley contra el racismo y toda forma de discriminación, Article 5(a).

33 Article 1 of Act No. 23.592 on the Punishment of Discriminatory Acts 1988, recognises discrimination on grounds of “economic standing” or “social status”.

34 In South Africa, “socio-economic status” is a directive principle under the Constitution, defined as meaning “the social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status, or lack of or low-level educational qualifications” (Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 2000, Sections 1(xxvi) and 34(1)).

35 Section 1 of the Northwest Territories Human Rights Act 2004 protects “social condition”, whilst section 10 of the Quebec Charter of Human Rights and Freedoms 1975 contains a general prohibition of discrimination and harassment on the ground of “social condition”.

Despite this growing recognition in national legislation, there have been relatively few domestic cases in which individuals or groups have successfully argued that they have been unlawfully discriminated against because of their socio-economic situation. In the UK, for example, the High Court recently interpreted Article 14 of the ECHR as covering socio-economic status in the context of the right to education, but the underlying claim was ultimately unsuccessful.³⁶ The European Commission has noted, however, that national equality bodies across Europe have been receiving large numbers of claims of discrimination on socio-economic grounds, indicating that this is a growing field.³⁷

Using Socio-Economic Disadvantage as a Ground of Discrimination

Given the relatively nascent status of socio-economic disadvantage as a ground of discrimination, there may be challenges in pursuing a claim on this ground.³⁸ However, it is imperative that analyses of the way in which discrimination influences children's attendance and completion of primary education take account of discrimination on the grounds of socio-economic disadvantage, particularly given the way in which this intersects with other grounds – such as gender, race, ethnicity and disability – to exacerbate disadvantage. As explained by the Equality & Rights Alliance, “[t]his multiple discrimination aggravates the situation of certain groups and it means that certain situations and disadvantages are difficult to fully understand and respond to without taking socio-economic status into account”.³⁹ As such, Chapter 3 incorporates discrimination on the grounds of socio-economic disadvantage into its analysis of the barriers that contribute to children being out of primary education.

2.2 Equality Law is Key to Achieving the Development Agenda

The issue of out-of-school children is a development issue and adopting an equality law approach in relation to the issue of out-of-school children is a necessity if the development agenda is to be achieved. As noted in the introduction, education is central to the development agenda: The Special Rapporteur on the Right to Education has noted that “[a]ll development goals have educational dimensions and the right to education provides indispensable leverage

36 *R (Hurley & Moore) v Secretary of State for Education* [2012] EWHC 201 (Admin). See Chapter 4, section 4.2.1.B, for further discussion of this case.

37 See above, note 18, p. 12.

38 For further discussion, see Chapter 4, section 4.2.1.B.

39 See above, note 18, p. 19.

Interactions between equality law and the Sustainable Development Goals

LEAVE NO ONE BEHIND

A well-implemented equality framework is essential to the realisation of the Sustainable Development Goals

Sustainable Development Goals

The equality law approach



GOAL 4 QUALITY EDUCATION

Ensure **inclusive and equitable quality education** and promote lifelong learning opportunities **for all**

- Enables children to challenge discriminatory school policies and practices, such as school-based violence and harassment
- Requires state investment and policies in education to be non-discriminatory in purpose or effect
- Requires positive action aimed at securing the equal participation of all children in education



GOAL 10 REDUCED INEQUALITIES

Reduce inequality within and among countries

- Ensures legal prohibition of discrimination and guarantees equality of opportunity
- Provides a basis for identifying and repealing discriminatory laws and policies
- Outlaws discrimination on the basis of socio-economic disadvantage
- Provides the legal framework to enable the social, economic and political participation of all



GOAL 16 PEACE, JUSTICE & STRONG INSTITUTIONS

Promote peaceful and **inclusive societies** for sustainable development, provide **access to justice for all** and build effective, accountable and **inclusive institutions at all levels**

- Enables individuals to challenge inequality and discrimination in the courts
- Mandates positive action measures where historical underrepresentation of groups in decision-making
- Meets the requirement to promote and enforce non-discriminatory laws and policies for sustainable development

for development.”⁴⁰ There is also an increasing recognition that equality and inclusion, in particular in education, are fundamental to realising development goals. The post-2015 development agenda – as encapsulated in the Sustainable Development Goals (SDGs) – places particular emphasis on equality and “inclusive growth” as integral concepts. Equality is explicitly at the heart of SDG4 (regarding the need for “inclusive and equitable quality education”), SDG5 (on gender equality) and SDG10 (on reducing inequalities within and among countries), with the latter noting the importance of “empower[ing] and promot[ing] the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.”⁴¹ Accordingly, it is evident that “equality” is central to the achievement of these goals.

However, crucially, it is also clear that, if these goals are to be realised, the adoption of an *equality law* approach is part of the solution. SDG16 requires that states promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Most notably, Target 16B of SDG16 is the promotion and enforcement of non-discriminatory laws and policies for sustainable development. It also includes promoting the rule of law and access to justice for all (Target 16.3) and developing accountable institutions (Target 16.6) both of which necessitate adequate and enforceable legal protections.

The recognition of the importance of the rule of law and, in particular non-discriminatory laws and policies, in the SDGs is important in two key respects.

Firstly, a human-rights approach based on the rights to equality and non-discrimination has important implications in terms of fulfilling the commitment in the SDGs to “leave no one behind” and ensure “inclusive and equitable” primary education.⁴² Historically, much discourse regarding the need for inclusive education has focussed on instrumentalist or utilitarian arguments, looking at the “productive or commercial efficiency” of educating historically disadvantaged groups, such as girls.⁴³ However, these approaches – which focus on the “costs of exclusion” and “investment returns” – may still lead to the most marginalised children being “left behind” (such as children with disabilities living in poor, remote areas), since the perceived economic benefits deriving from investing in their education may be less obvious or compelling to governments. Moreover, such analyses ignore the crux of the issue, namely that *all* children have the equal right to primary education in order to allow for “the full development of the human personality and the sense of its dignity”,⁴⁴ regardless of any actual or perceived economic benefit to society.

40 See above, note 1, Paras 31 and 61.

41 UN General Assembly, *Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, 2015.

42 See above, note 10, Para 7.

43 Commission on Human Rights, *Girls' right to education: Report submitted by the Special Rapporteur on the right to education, Mr. V. Muñoz Villalobos*, UN Doc. E/CN.4/2006/45, 2006, Paras 32–37.

44 ICESCR, Article 13(1).

The UN Special Rapporteur on extreme poverty and human rights made this critical distinction when he explained the importance and value of adopting a human-rights-based approach when tackling issues pertaining to socio-economic advancement, such as education:

*[T]he use of the human rights framework ensures that in the midst of programmes designed to ensure collective well-being, **the rights of the individual** and not just the overall goals of the programme and the interests of the collectivity are taken into account (...) the language of rights recognises and insists on the dignity and agency of **all individuals** (regardless of race, gender, social status, age, disability or any other distinguishing factor) and it is intentionally empowering.*⁴⁵

The equality framework described in Chapter 1 provides the basis for applying a human-rights-based approach that is specifically aimed at ensuring that no child is “left behind” in education, since it mandates that states ensure equality of participation amongst *all* children. The rights to equality and non-discrimination are therefore essential tools through which to achieve the SDGs.

Secondly, whilst the SDGs are expressions of an aspiration to take action at the domestic level rather than binding commitments,⁴⁶ the equality law framework which the above-mentioned goals necessitate – being a human rights framework – entails legal obligations to prevent discrimination and ensure substantive equality. As discussed in Chapter 1, the rights to equality and non-discrimination under international human rights law provide a powerful framework that entail legally binding obligations for states, including the immediate obligation to refrain from discriminating against certain groups, and to promote, protect and fulfil the right to equality.⁴⁷ This legal framework provides a means through which individuals can enforce their rights to equality in primary education, and states can be held accountable for failures to meet their obligations in this regard.⁴⁸ As described in Chapter 1, there are a range of ways in which states can be held accountable at the international, regional and national levels.

45 See above, note 3, Human Rights Council, Para 8 (emphasis added).

46 Overseas Development Institute, *Global goals and international agreements Lessons for the design of the Sustainable Development Goals*, November 2014, p. 12, available at: <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9295.pdf>.

47 See Chapter 1, section 1.1.1.

48 See above, note 1, Paras 61 and 85.

2.3 Legal and Rhetorical Force of the Rights to Equality and Non-Discrimination

Legal Force: Justiciability of the Rights to Equality and Non-Discrimination

As noted above, one of the key advantages of adopting a human rights framework in tackling the issue of out-of-school children is that it is a *legal* framework that entails enforcement and accountability mechanisms. Where individuals or organisations wish to hold their governments accountable at the national level for failing to ensure that all children are in primary education, litigators or advocates may prefer to – or indeed, need to – rely on the rights to equality and/or non-discrimination, instead of (or in conjunction with) the right to education. This is because the rights to equality and non-discrimination are often more likely to be **justiciable** in domestic courts – i.e. capable of being enforced through legal action – than the right to education.

As explained in Chapter 1, a state's international human rights obligations (which include the right to primary education, and the rights to equality and non-discrimination) may be enforceable at the domestic level where they are guaranteed in the national constitution, or where they are enshrined in national legislation.⁴⁹ As far as the right to education is concerned, a recent study of 195 countries found that the right to education appeared in the majority of all constitutions,⁵⁰ and a compendium on the right to education prepared by UNESCO with input from states parties to the UNESCO Convention against Discrimination in Education also found that many states provide some form of constitutional guarantee or recognition of the right to education,⁵¹ with some states expressly guaranteeing *equal access to education* (such as **France, Ghana, Sri Lanka**) or *equality of educational opportunity* (such as **Nigeria** and **Tanzania**).⁵² However, even where the right to education is enshrined in a state's constitution, it may not give rise to a legal cause of action for individuals whose right to education has been violated, thus hindering the prospects of legal enforcement. However, according to the 2017 Global Education Monitoring Report, the right to education is only justiciable in 55% of countries, thus limiting the ability of individuals to hold governments legally accountable.⁵³ As noted by the UN Special Rapporteur on extreme poverty and human rights, “constitutional recognition on its own means relatively little in practical terms” if the right to education is not actually enforceable in domestic courts.⁵⁴ Furthermore, whilst many states have

49 See Chapter 1, section 1.2.

50 See above, note 3, Human Rights Council, Para 33, citing Jung, C., Hirschl, R. and Rosevear, E.

51 UNESCO, *Implementing the Right to Education: A Compendium of practical examples Based on the Eighth Consultation of Member States on the implementation of the Convention and Recommendation against Discrimination in Education (2011–2013)*, 2016, p. 16, available at: <http://unesdoc.unesco.org/images/0024/002451/245196E.pdf>.

52 *Ibid.*, pp. 14–15.

53 UNESCO, *Global Monitoring Report – Accountability in education: Meeting our Commitments*, 2017, p. 33, available at: <http://unesdoc.unesco.org/images/0025/002593/259338e.pdf>.

54 See above, note 3, Human Rights Council, Para 44.

laws that regulate the provision of education and the establishment of educational institutions, such legislation may not acknowledge that individuals have a legal *right* to education.⁵⁵ As such, it can be difficult to hold the state legally accountable for failing to respect, protect and fulfil the right to education at the domestic level.

By contrast, the **right to equality** – both generally, and in relation to education – is more likely to be protected through both justiciable constitutional guarantees and detailed provisions in ordinary domestic legislation. The vast majority of states enshrine the right to equality in their domestic constitutions,⁵⁶ and many jurisdictions also have progressive equality legislation prohibiting discrimination in the provision of public services such as education.⁵⁷ This legislation can be relied upon by litigators or advocates who are seeking to tackle the inequality and discrimination underlying the issue of out-of-school children, either in conjunction with a right to education claim or as an alternative where no such claim is possible.

Reliance on equality legislation to advance the right to education also has certain specific advantages:

- Non-discrimination legislation may provide an explicit cause of action against non-state actors, such as private education providers, which may be the only option for holding such actors to account for discriminatory practices.⁵⁸
- Progressive equality legislation may provide for particular enforcement mechanisms that make justice more accessible and less costly for victims of discrimination, including provisions for class or representative actions.⁵⁹
- Courts may be more receptive to equality and non-discrimination arguments than to claims relying on the right to education: courts are more likely to consider claims based on the rights to equality and non-discrimination as being within their powers of adjudication, which is partly due to the fact that the legal obligation to refrain from discriminating against historically disadvantaged groups is widely recognised and taken very seriously.
- Furthermore, courts appear to be more comfortable making orders requiring states to take action (for example, by incurring expenditure, or amending legislation) in response to a finding of inequality, meaning that claims

55 *Ibid.*, Para 25.

56 According to the Constitute Project, which provides access to a searchable database of the world's constitutions, 183 national constitutions contain a general guarantee of equality: Constitute Project, "Explore Constitutions: Equality, Gender, and Minority Rights", visited 3 October, available at: <https://www.constituteproject.org/search?lang=en&key=equal>.

57 See the examples of legislative guarantees of equality and non-discrimination in the provision of education in: see above, note 51, pp. 24–26, 30–33, 43–44 and 46–51.

58 See above, note 8, Equal Rights Trust, p. 14.

59 *Ibid.*, p. 14.

based on the rights to equality and non-discrimination may be more likely to result in remedies that lead to transformative social change.⁶⁰

It is important to stress that this emphasis on utilising the legal rights to equality and non-discrimination to challenge violations of the right to education is not intended to detract from efforts to ensure that socio-economic rights – such as the right to education – are enforceable in their own right at the domestic level.⁶¹ Rather, arguments based on the rights to equality and non-discrimination can provide a useful entry point to litigating social and economic rights, such as the right to education; to expanding the scope and understanding of the content of the right to education itself; and to demanding appropriate responses to the particular issues at play in any given context.

Rhetorical Force of the Rights to Equality and Non-Discrimination

The rights to equality and non-discrimination not only have strong legal force: they also carry strong emotional and rhetorical force, which can be advantageous in discourse relating to tackling the issue of out-of-school children. As will be discussed in more detail in Chapter 4, the Trust's experience in working to promote equality in a number of countries worldwide has been that the language of equality and fairness – and, conversely, discrimination and disadvantage – can be extremely powerful in communicating and achieving consensus around controversial issues. Whilst the equality law framework is primarily a legal language, it is also a powerful political language, and in some circumstances has more rhetorical force than the language surrounding the right to education. Arguments regarding the need to tackle *inequality and discrimination* in education may therefore have greater resonance – and thus greater effect in achieving change – particularly in countries where equality and non-discrimination hold a prominent place on the political agenda or within public opinion as a combatable affront to human dignity and where issues of education, in a broader sense, are seen as intractable problems.

2.4 Importance of Equality Law in Guiding the Allocation of State Resources

A frequently invoked defence for why states have not fully implemented their obligation to fulfil the right of all children to a free primary education is that they simply do not have the resources available to do so, particularly considering the other “competing” demands on state resources.⁶² However, when considering

60 See further the discussion in: *Ibid.*, pp. 19–21.

61 See, for example, the concerns raised by the Special Rapporteur on extreme poverty and human rights regarding approaches that rely on using a discrimination lens, instead of using the economic and social rights framework: See above, note 3, Para 57.

62 See, for example, the arguments made by the Government of South Africa in *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa & Government of the Province of Western Cape*, Case no: 18678/2007, High Court of South Africa (Western Cape High Court, Cape Town), 2010,

states' failures to ensure that all children enjoy their right to a free primary education, the crux of the issue in many cases is not that states do not have sufficient resources available to do so, but rather that states have *allocated* the resources that they do have in a way that does not fulfil the rights to equality and non-discrimination in primary education.

This point is made forcefully by Ferraz, who notes that the issue of "resource availability" is more often than not a matter of *relative* rather than *absolute scarcity*: what he means by this is that states' resources may often be sufficient to satisfy everyone's basic needs but, due to the way in which those resources are distributed, "some individuals are able to satisfy all their basic needs and more whereas others fall below basic needs satisfaction".⁶³ Ferraz notes that *absolute scarcity* – whereby available resources are clearly insufficient to guarantee the satisfaction of everyone's basic needs – would only be an appropriate descriptor in "a handful of countries in the world".⁶⁴

By way of example, research undertaken by Development Finance International and Oxfam, which measures the commitment of governments to reducing inequalities through analysing indicators including social spending (on health, education and social protection), has demonstrated the way in which certain low-income countries have had a greater impact in reducing inequality through their policies on social spending than middle- and higher-income countries.⁶⁵ One notable example is **Ethiopia**, which – despite being a low-income country – ranked highly in relation to education: it spends 22% of its budget on education, the 12th highest proportion in the world, with the report noting that Ethiopia devotes "significantly more to 'redistributive' and 'pro-poor' spending than developed countries did at a similar stage in their history".⁶⁶ It has also been noted that countries such as the **Philippines**, **South Africa** and **Turkey** do not perform well in terms of net primary school enrolment rates in comparison to other countries when considering their relative Gross National Product per capita,⁶⁷ suggesting that the issues in these countries relate to decisions regarding resource *allocation* rather than resource insufficiency.

However, in order to tackle the issue of out-of-school children, it is necessary to look beyond meta-level decisions relating to the amount states spend on educa-

Paras 17 and 28 (discussed in Chapter 4, section 4.2.1.C), that the Department of Education had "extremely limited resources and competing demands on the public purse such as housing, health care and social services" and was therefore "not in a position to make further contribution" to the education of children with profound intellectual disabilities.

63 Ferraz, O., "Inequality Not Insufficiency: Making Social Rights Real in a World of Plenty", *The Equal Rights Review*, Vol. 12, 2014, p. 84.

64 *Ibid.*, pp. 84–85.

65 Development Finance International and Oxfam, *The Commitment to Reducing Inequality Index*, 2017, available at: <http://policy-practice.oxfam.org.uk/publications/the-commitment-to-reducing-inequality-index-a-new-global-ranking-of-governments-620316>.

66 *Ibid.*, pp. 10 and 32.

67 UNESCO, *EFA Global Monitoring Report 2010: Reaching the Marginalized*, 2010, p. 70, available at: <http://unesdoc.unesco.org/images/0018/001866/186606E.pdf>.

tion as opposed to, say, health or social protection. In order to ensure that the right of all children to a free primary education is fulfilled, states must ensure that the funds they allocate towards investment in primary education are spent by the government in a way that complies with and respects the rights to equality and non-discrimination. This means ensuring that the state does not discriminate against certain children by, for example, allocating more of the state budget towards educating children of a certain religion, race or ethnicity than other children. Chapter 3 discusses some manifestations of this inequality in resource allocation, looking at disparities in investment in school infrastructure and teaching resources in *South Africa*⁶⁸ and *Turkey*,⁶⁹ and considers the way in which this influences children's school attendance.

Whilst the right to education requires states to use their resources to ensure that *all* children enjoy their right to a free primary education – with the CESCR making clear that this is an “immediate duty” on states that is not subject to progressive realisation⁷⁰ – it does not provide any clear guidance or framework as to *how* states should allocate their resources in order to achieve this. By contrast, the equality law framework provides far greater clarity on this issue: it requires states not to discriminate – either directly or indirectly – between different groups of children in the way they invest in primary education; and requires that they ensure sufficient funds are dedicated towards accommodating the needs of different learners.⁷¹ In some cases, the equality law framework may also require *more* funds to be directed towards the education of certain children than towards others, in order to ensure the equal participation in education of certain historically disadvantaged groups (such as girls, children with disabilities and children from racial, ethnic and linguist minorities).⁷² It is only through applying this equality law framework that states can ensure their resources are directed in such a way as to tackle the issues underlying why children are out-of-school; approaches to education financing which do not consider equality requirements will result in children from the most marginalised groups continuing to be left behind.

2.5 Examination of Intersecting Vulnerabilities

As is evident from existing research, and as will be discussed in Chapter 3, the reasons why children are out of primary education are multi-faceted; often, it is the combination of a number of different factors – such as their low socio-economic status and their sex – that make certain children particularly vulnerable to being out-of-school. It follows that it is necessary to consider and address

68 See the discussion of race and ethnicity in Chapter 3, section 3.4.

69 See the discussion of race and ethnicity in Chapter 3, section 3.4.

70 See above, note 4, *General Comment No. 13*, Paras 51 and 57.

71 See, for example, the report by the International Disability and Development Consortium (IDDC), looking at the financing of disability-inclusive education, and the need for “inclusive budgeting”: See above, note 12.

72 See Chapter 1, section 1.3, regarding the duty to take positive action.

these different intersecting vulnerabilities in order to ensure that all children enjoy their right to a free primary education.

The unified framework on equality and non-discrimination set out in the Declaration of Principles on Equality⁷³ provides a useful basis for such efforts. Firstly, the unified framework on equality – which acknowledges that the phenomenon of discrimination must be addressed holistically if it is to be challenged effectively – necessitates an approach that focuses on *all* children who are marginalised or excluded in primary education, thus illuminating the relevance of inequality and discrimination as a pervasive and cross-cutting issue. As will be demonstrated in Chapter 3, inequality and discrimination in access to and completion of primary education manifests itself in a number of contexts, and also operates cumulatively, with children who share a number of protected characteristics (such as girls from ethnic minorities) suffering multiple discrimination.

The unified framework on equality is particularly valuable in enabling an examination of the extent to which multiple discrimination influences children's enrolment and completion of primary education; it recognises that a single child may experience discrimination on a combination of subtly interacting grounds, or on grounds not previously or widely recognised as “prohibited” (such as socio-economic disadvantage⁷⁴), and that the cumulative impact of discrimination on these different grounds can be bigger than the sum of its parts. The unified framework also offers scope for considering the link between protected characteristics and factors such as conflict and poverty in inhibiting children's access to and completion of primary education, as it expressly acknowledges that measures to alleviate poverty should be coordinated with measures to combat discrimination, given that poverty may be “both a cause and a consequence of discrimination”.⁷⁵

Furthermore, the unified framework on equality requires that all manifestations of inequality and discrimination in primary education be considered and tackled as a matter of state concern. The discriminatory barriers faced by children in primary education are wide-ranging and, without applying the conceptual approach set out in the unified framework, it may not be immediately apparent that these barriers constitute state violations of the rights to equality and non-discrimination. Indeed, development-sector discourse regarding the issue of out-of-school children often divides these barriers into ones of supply and demand,⁷⁶ or categorises them as arising at the “individual level”, “household/ community-level” or “school-level”, thus implicitly suggesting that many such

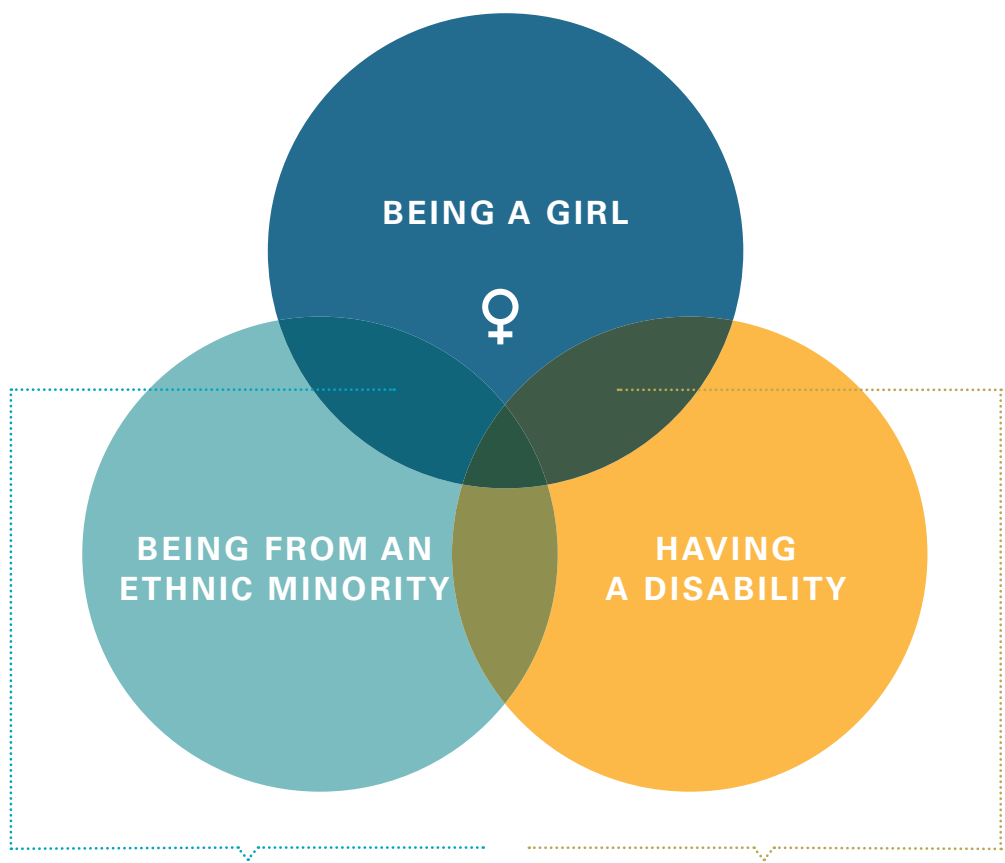
73 See above, Chapter 1, section 1.3, for discussion of the Declaration of Principles on Equality.

74 See the discussion regarding the prohibition of discrimination on grounds of socio-economic disadvantage at section 2.1 above.

75 *Declaration of Principles on Equality*, Equal Rights Trust, London, 2008, Principle 14; see section 2.1 above regarding the connection between poverty and discrimination.

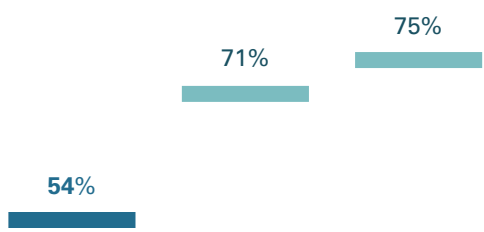
76 See, for example, UNICEF, *Enhanced Programming and Results through Monitoring Results for Equity Systems (MoRES)*, 2013, available at: https://www.unicef.org/about/employ/files/MoRES_Briefing_Note.pdf. The briefing note identifies and categorises barriers as the following: I) Enabling Environment; II) Supply; III) Demand; IV) Quality.

Multiple discrimination leading to cumulative disadvantage



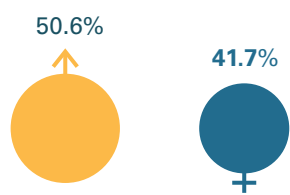
GIRLS FROM ETHNIC MINORITIES are more likely to be excluded from education than ethnic minority boys

In Guatemala, for example, **54% of indigenous girls are enrolled in school at the age of 7**, as compared to 71% of indigenous boys and 75% of non-indigenous children



GIRLS WITH DISABILITIES are less likely than boys with disabilities to complete primary education

50.6% of boys with disabilities complete primary school, as compared to **41.7% of girls with disabilities**



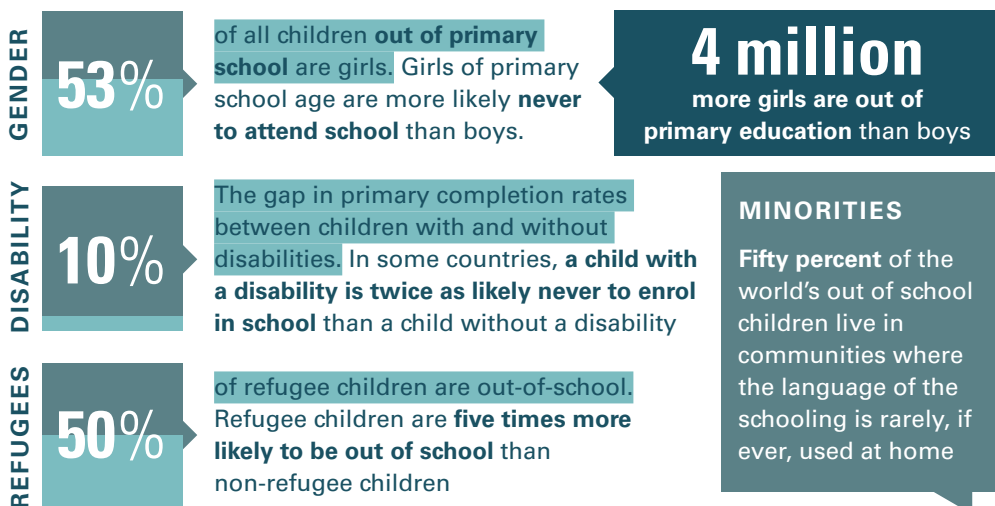
barriers fall outside the state’s sphere of legal responsibility. The unified framework on equality elucidates the way in which many of these “multi-level” barriers are, in fact, in breach of states’ obligations to refrain from discrimination and take positive action to ensure the equal enjoyment of the right to education. As such, the unified framework on equality provides the architecture with which these barriers – many of which relate to structural, societal inequalities, and macro-economic policies regarding the provision of education – can be analysed and challenged.⁷⁷

77 See above, note 8, Equal Rights Trust, p. 14.

3. PATTERNS OF DISCRIMINATION AND INEQUALITY IN RELATION TO OUT-OF-SCHOOL CHILDREN

Statistics regarding the demographics of out-of-school children indicate that this is an issue that is firmly rooted in inequality and discrimination. The children who fail to enrol in primary education, or who enrol but subsequently drop out of school, are often from the most marginalised groups within society, and children who possess a number of protected characteristics – such as poor girls from ethnic minorities – are overrepresented in the population of out-of-school children.

Disparities in primary education The effect of discrimination and inequality



POVERTY There is a strong association between poverty and education

The primary out-of-school rate is

19% in low-income countries



3% in high-income countries



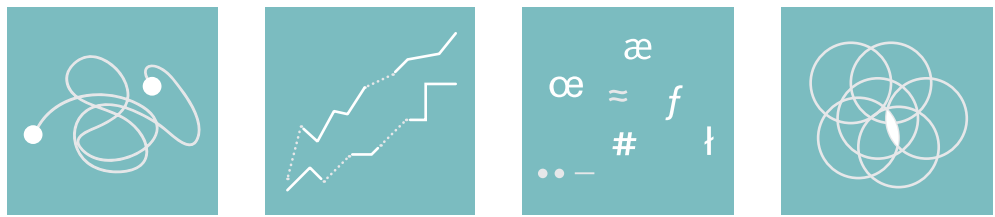
Children in rural areas are, in general, more disadvantaged.

The primary out-of-school rate in **low-income countries** is **36% in rural areas and 16% in urban areas**. The primary out-of-school rate in **lower-middle income countries** is **22% in rural areas and 13% in urban areas**.

Whilst the reasons why certain children are vulnerable to being out of primary education are explored in the literature in this field, existing analyses do not necessarily consider the way in which the barriers and challenges that children face in attending and completing primary education are manifestations of discrimination. As such, there is a certain level of disconnect between discussion regarding these barriers and challenges, and the statistical inequalities identified in the available data on out-of-school children. This Chapter aims to draw such a connection by analysing the way in which many of the barriers and challenges that children face in accessing or completing primary education are in fact discriminatory and/or grounded in substantive inequality, looking at the way in which these barriers and challenges have a disproportionate impact on children who share one or more **protected characteristics**.

As explained in Chapter 1, this report uses the unified framework on equality set out in the Declaration of Principles on Equality¹ to identify the way in which these barriers and challenges constitute violations of the right to non-discrimination (**direct discrimination, indirect discrimination, harassment, and failure to make reasonable accommodation**), as well as looking at the way in which these barriers engage states' obligations to take **positive action**.² It is important to emphasise that the concepts of discrimination and equality law contained in the unified framework on equality – and thus applied in this Chapter – are principles of best practice under international human rights law, and that the exact scope of protection against discrimination and the way in which discrimination is defined at the domestic level will differ from state to state. However, the unified framework on equality provides a clear analytical framework through which to address the complexity of the issues discussed in this Chapter.

Challenges



Challenges in drawing direct causal links

Historical insufficiency of data

Lack of common definitions and language

Contextual specificity and complexity

There are some inherent difficulties in trying to draw connections between discriminatory barriers and out-of-school children, which should be noted at the outset.

1 Declaration of Principles on Equality, Equal Rights Trust, London, 2008.
2 See Chapter 1, section 1.3, for a discussion of these concepts of discrimination and equality law.

Firstly, whilst the evidence explored below indicates that many of the barriers that inhibit children's enrolment in or completion of primary education have a disproportionate impact on children who share certain protected characteristics and are, therefore, *de facto* discriminatory, it is difficult to draw direct causal links between these discriminatory barriers and enrolment or drop-out rates. The circumstances that lead to a child failing to enrol in primary education or dropping out of education prematurely are complex and often multi-faceted, and – as the evidence indicates – barriers may operate cumulatively such that children face multiple disadvantage. This confluence of factors makes it particularly challenging to analyse what causes children to drop out of school, given that this “is not a distinct event, but rather a process of events, situations and contexts which work together to produce drop-outs”.³ As such, whilst the key discriminatory barriers have been identified and analysed separately below for the sake of clarity, it should be noted that these barriers do not operate in isolation in practice, and the patterns of discrimination and equality identified in this Chapter should therefore be viewed holistically.

Secondly, and relatedly, the difficulties in drawing direct causal links are compounded by the fact that, whilst a significant amount of research has been conducted regarding the issue out-of-school children, the data collected has historically focussed on enrolment rates rather than school drop-outs or completion rates. There has also been an insufficiency of disaggregated data that enables a consideration of the intersectionality of identities and the cumulative disadvantage faced by children who share a number of different protected characteristics, and much of the data is drawn from national household surveys that do not necessarily respect principles of equality and non-discrimination in their methods of data collection, meaning that certain groups (such as persons with disabilities) remain somewhat invisible. This has begun to change, particularly with the launch of the World Inequality Database on Education in 2012, which contains useful data on indicators regarding primary school access and completion rates (including numbers of out-of-school children, over-age primary school attendance, and primary completion rates), with such data being disaggregated by gender, location (urban vs rural), region, wealth, ethnicity, religion and language.⁴ However, this level of disaggregation is not yet available for every country, and certain key groups of marginalised children are still missing from the data analysis (such as children with disabilities and stateless children, who are particularly vulnerable to being omitted from data collection methodologies). It is hoped that the quality of the available data will improve with time, given the focus in the Sustainable Development Goals on the need for disaggregated data and indicators that enable analysis of disparities amongst the most vulnerable groups.⁵

3 Hunt, F., *Dropping out from School: A Cross Country Review of the Literature*, 2008, p. 44, available at: <http://sro.sussex.ac.uk/1864/1/PTA16.pdf>.

4 World Inequality Database on Education, *Out-of-school children*, visited 25 October 2017, available at: http://www.education-inequalities.org/indicators/edu_out_pry#?sort=mean&dimension=wealth Quintile&group=all&age_group=edu_out_pry&countries=all.

5 UN General Assembly, *Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, 2015, Para 17.18; Incheon Declaration, Education 2030: Towards inclusive and equality quality education and lifelong learning for all, 2015, Para 18, available at: <http://unesdoc.unesco.org/images/0023/002338/233813M.pdf>.

Thirdly, the research and data that exist regarding out-of-school children do not necessarily rely on common definitions of the protected characteristics under scrutiny in this Chapter. For example, the definition of “disability” has historically been contested, meaning that there is not necessarily a standard operational definition of disability applied by those working in the education and development sectors; however, the definition formulated in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is now becoming widely accepted.⁶ There are also issues surrounding self-identification (for example, how people define their own race or ethnicity, or whether they identify themselves as having a disability) and with identity categorisations applied by the state (for example, where the state denies the existence of certain ethnic minorities). For the purposes of this report, the definitions of protected characteristics contained in the relevant international human rights treaties (as interpreted by the treaty bodies) are used.

**Definition of Disability
in Article 1 Convention
on the Rights of Persons
with Disabilities:**

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

Finally, whilst different forms of discrimination have been identified in relation to the various barriers discussed below, the exact type of discrimination at play in any given scenario will depend on the specific context and circumstances at the local level. Many of the barriers discussed below are multifaceted and will engage a number of different aspects of the rights to equality and non-discrimination; for example, certain barriers may be both directly and indirectly discriminatory, as well as engaging the state’s duty to take positive action. Furthermore, determining whether a barrier is unlawfully discriminatory requires careful consideration of the individual facts in order to establish whether the policy or practice can be objectively justified. The discussion of the violations of the rights to equality and non-discrimination identified in each example below is therefore not exhaustive, but rather intended to be illustrative of the application of the unified framework on equality.

With the above in mind, this section identifies a number of barriers that inhibit children’s access to and completion of primary education, and which engage the rights to equality and non-discrimination. These are:

- the direct and indirect costs of schooling (section 3.1);
- the geographical inaccessibility of schools (section 3.2);
- enrolment requirements and procedures (section 3.3);

- the inadequacy of physical and human resources (section 3.4);
- issues surrounding language, curricula and other educational materials (section 3.5); and
- school-based violence and harassment (section 3.6).

Patterns of Discrimination

3.1 The Direct and Indirect Costs of Schooling

3.1.1 School Fees and other Costs

States have an “unequivocal” obligation under the International Covenant on Economic, Social and Cultural Rights (ICESCR) regarding the costs of primary education:⁷ primary education must be available “free to all”.⁸ This obligation prohibits not only direct costs (such as school fees) but also certain indirect costs (including compulsory levies, and requirements to wear expensive uniforms).⁹ As noted by the UN Committee on Economic, Social and Cultural Rights (CESCR), economic accessibility is an essential aspect of the right to education, since fees and other direct and indirect costs may “constitute disincentives to the enjoyment of the right [to primary education] and may jeopardise its realisation”.¹⁰

Indirect Discrimination on the Grounds of Socio-Economic Disadvantage

The failure by states to ensure that primary education is free from both direct and burdensome indirect costs is not only a breach of their obligation to ensure that primary education is available “free to all” under ICESCR; it is also contrary to the principle of non-discrimination under international human rights law. The charging of such direct and indirect costs, whilst neutral at face value, has a disproportionately prejudicial effect on children from the poorest families, and thus appears to be *prima facie* **indirectly discriminatory** on the grounds of **socio-economic disadvantage**.¹¹ The question of whether this differential treatment can be objectively justified has to be determined on a case-by-case basis; importantly, the CESCR has emphasised that a lack of resources “is not an objective and reasonable justification unless every effort has been made to use all resources that are at the state party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority”.¹²

7 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, UN Doc. E/1992/23, 1999, Para 7.

8 International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI), 1966 (ICESCR), Article 13(2).

9 See above, note 7.

10 *Ibid.*

11 For a discussion of socio-economic disadvantage as a ground of discrimination, see Chapter 2, section 2.1.

12 CESCR, *General Comment No. 20: Non-Discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2008, Para 13.

Indirect Discrimination: a Refresher

A *prima facie* case of **indirect discrimination** occurs when a provision, criterion or practice puts persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons. In order to determine whether that provision, criterion or practice is indirectly discriminatory, it is then necessary to determine whether it can be objectively **justified** by a legitimate aim, and whether the means of achieving that aim are appropriate and necessary.

Whilst most states have instituted policies or passed national legislation prohibiting the charging of formal tuition fees (“direct” costs),¹³ such legislation is often poorly implemented or enforced. In some countries, schools still levy formal tuition fees despite the fact that it is prohibited by national law (such as in **Laos**, where around half of schools charge fees despite this being prohibited¹⁴), or charge students for other “indirect” costs associated with schooling. In **India**, for example, the Right of Children to Free and Compulsory Education Act 2009 (RTE Act) provides that “free” education means the state has to ensure that no child is liable to pay any kind of fee, charges or expenses that would prevent him

or her from pursuing and completing primary education;¹⁵ however, schools “continue to charge fees by stealth” in breach of the RTE Act, by insisting that children pay fees for school events such as sports day.¹⁶

Certain schools in Yemen openly demand fees for registration, the issuance of certificates, seating, exams, cleaning materials and absenteeism, despite the fact that primary education is officially meant to be “free”.¹⁷ In **Tajikistan** and **Kazakhstan**, students may be required to contribute to the costs of school repairs, heating and classroom supplies, and in some circumstances are required to pay informal costs in the form of bribes.¹⁸ Such “informal” costs tend to be charged on an *ad hoc* basis, meaning there is little visibility regarding the extent

- 13 UNESCO, *Global Database on the Right to Education: Education Policies: Primary Education*, visited 25 October 2017, available at: <http://www.unesco.org/education/index.php?subtheme%5B%5D=3&search=Search&change=&action=themes&db=COUNTRY&show=&criteria=Tjs%253D&lng=en>.
- 14 UNESCO, *EFA Global Monitoring Report 2010: Reaching the Marginalized*, 2010, p. 166, available at: <http://unesdoc.unesco.org/images/0018/001866/186606E.pdf>.
- 15 Government of India, Ministry of Human Resource Development, *The Right of Children to Free and Compulsory Education Act, 2009, Clarification on Provisions*, 2016, p. 1, available at: http://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/RTE_Section_wise_rationale_rev_0.pdf.
- 16 Sinha, S., “Perceptions on Getting Children to Schools Before and After RTE Act”, *Journal of International Cooperation in Education*, Vol. 16, No. 2, 2014, p. 51.
- 17 UNICEF, *Yemen, Country Report on Out-of-school Children*, 2014, p. 64, available at: http://allinschool.org/wp-content/uploads/2015/04/Yemen_Full-report_En.pdf.
- 18 UNESCO Institute for Statistics (UIS) and UNICEF, *Tajikistan Country Study. Global Initiative on Out-of-School Children*, 2013, p. 61, available at: <http://dx.doi.org/10.15220/uis-unicef-cntry-tajikistan-2013-en>; UIS and UNICEF, *Kyrgyzstan Country Study. Global Initiative on Out-of-School Children*, 2012, p. 54, available at: <http://dx.doi.org/10.15220/978-9967-26-912-5-en>.

of the financial contributions that schools require parents to make. Furthermore, other “indirect” costs (such as the costs of books, uniforms, stationery, transport and food), are often prohibitively expensive. Evidence from **Nigeria**, for example, indicates that, whilst national law now provides for “free basic education”, the costs of purchasing school uniforms and books are in fact higher than the now-abolished school fees.¹⁹ There is ample research regarding the way in which direct and indirect costs impact on children’s enrolment and drop-out rates, with parental inability to afford education being cited as playing a key role in parents allowing children to drop out of school.²⁰ For example, a study in **Western Kenya** found that students who did not own a school uniform were 13% more likely to attend school where they were given a free uniform,²¹ whilst another study in **Kenya** found that the

“My children never went to kindergarten, or school. I had not had an opportunity to educate them. (...) When my eldest started school he came to me almost every day asking for money. Teachers forced [my children] to bring money for the school fund, then for the class fund, for cleaning, and even for school guards. How could I supply so much? We are glad if we earn for our food every day.”

(Mother in **Uzbekistan** interviewed by the Equal Rights Trust, 2016)

costs associated with exams were driving student drop-out rates.²² A study on school drop-out in **Bangladesh** has highlighted that indirect costs (such as for uniform, transport, and stationery) can impose a significant burden on families that are financially unstable, with an increase in school expenditure leading to a 91% increase in the likelihood of children dropping out of school.²³ In **Sri Lanka**, research has highlighted the connection between a child’s socio-economic position and drop-out rates, with the inability to contribute towards indirect schooling costs – such as the purchase of furniture and cleaning – being a factor in children failing to attend school.²⁴ Research conducted in the **Philippines** has also found that poverty is a key reason why children drop out of primary school, since they do not have the funds to pay for school transport or to buy school supplies.²⁵ A number of other studies have demonstrated that children from

19 See above, note 14.

20 UNESCO, *EFA Global Monitoring Report 2011: The hidden crisis: Armed conflict and education*, 2011, p. 50, available at: <http://unesdoc.unesco.org/images/0019/001907/190743e.pdf>; See above, note 3, p. 9; Human Rights Watch, *The Education Deficit: Failures to Protect and Fulfil the Right to Education through Global Development Agendas*, 2016, p. 10, available at: <https://www.hrw.org/report/2016/06/10/education-deficit/failures-protect-and-fulfill-right-education-through-global>.

21 See above, note 14, p. 190, citing Holla, A. and Kremer, M.

22 See above, note 20, p. 49, UNESCO, citing Somerset, A.

23 Sabates, R., Hossain, A. and Lewin, K. M., “School drop out in Bangladesh: Insights using panel data”, *International Journal of Educational Development*, Vol. 33, No. 3, 2013, p. 226.

24 UIS and UNICEF, *Out-of-School Children in Sri Lanka. Global Initiative on Out-of-School Children*, 2013, p. 34, available at: <http://unesdoc.unesco.org/images/0022/002216/221627e.pdf>.

25 David, C. C. and Albert, J. R. G., *Primary Education: Barriers to Entry and Bottlenecks to Completion*, 2012, p. 6, available at: <http://dirp3.pids.gov.ph/ris/dps/pidsdps1207.pdf>.

poor backgrounds are at risk of dropping out of primary education where their parents are unable to afford the direct and indirect costs of schooling,²⁶ meaning that a child's ability to access and/or complete primary education is often inextricably linked to his or her **socio-economic status**.

In Focus: Inequality and the Privatisation of Education

There has been a trend towards the **privatisation of education** in the last couple of decades in many countries, especially in developing countries.²⁷ The Global Initiative for Economic, Social and Cultural Rights has noted that this takes various forms, including the establishment of **"low-fee" private schools** targeting poor households (such as the Bridge Academies funded by private and public investors, from the UK Government to Bill Gates), private tutoring, the growth of faith-based and community schools, and the privatisation of examinations and testing.²⁸ Certain International Financial Institutions reportedly promote privatisation as a condition of receiving international aid.²⁹ There are, however, concerns that this proliferation in privatisation in education "runs counter to the fundamental principles of human rights law" since it as it "cripples the notion of education as a universal human right" and "[aggravates] marginalisation and exclusion".³⁰ This is particularly the case in respect of primary education, which should be available *free* for all.

- 26 See, for example, Grimes, P., Kumar, K. and Stevens, M., *An examination of the evolution of policies and strategies to improve access to education for children with disabilities, Background Paper for Education for All Global Monitoring Report 2015*, 2015, p. 33, available at: <http://unesdoc.unesco.org/images/0023/002324/232454E.pdf>; Equal Rights Trust, *Stand Up and Fight: Addressing Discrimination and Inequality in Solomon Islands*, 2016, pp. 90–91, available at: <http://www.equalrightstrust.org/resources/stand-and-fight-addressing-discrimination-and-inequality-solomon-islands>; Kielland, A., *Evolution in approaches to improve access to education for children living in urban slums, background paper for EFA Global Monitoring Report 2015*, 2015, p. 34, available at: <http://unesdoc.unesco.org/images/0023/002323/232395e.pdf>; UIS and UNICEF, *Romania Country Study: Analysing the Situation of Out-of-School Children in Romania. Global Initiative on Out-of-School Children*, 2012, p. 42, available at: <http://unesdoc.unesco.org/images/0022/002212/221282e.pdf>.
- 27 Global Initiative for Economic, Social and Cultural Rights, *Human Rights Guiding Principles on the Obligations of States regarding Private Schools*, 2017, available at: <http://globalinitiative-escr.org/advocacy/privatization-in-education-research-initiative/human-rights-guiding-principles-on-the-obligations-of-states-regarding-private-actors-in-education>; Global Initiative for Economic, Social and Cultural Rights, *Joint submission to the United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), Contribution to Half-Day Discussion on girls'/women's right to education, Privatization and its Impact on the Right to Education of Women and Girls*, 2014, available at: <http://globalinitiative-escr.org/wp-content/uploads/2014/07/140627-Right-to-Education-Submission-to-CEDAW-Final-with-logos.pdf>.
- 28 *Ibid.*, Global Initiative for Economic, Social and Cultural Rights, *Human Rights Guiding Principles on the Obligations of States regarding Private Schools*, 2017.
- 29 See above, note 27, *Joint submission to the United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), Contribution to Half-Day Discussion on girls'/women's right to education, Privatization and its Impact on the Right to Education of Women and Girls*, p. 4.
- 30 Kishore Singh, "Education is a basic human right – which is why private schools must be resisted", *The Guardian*, 23 April 2015, available at: <https://www.theguardian.com/global-development/2015/apr/23/education-is-a-basic-human-right-why-private-schools-must-be-resisted>.

Privatisation in primary education has the effect of entrenching structures and patterns of social inequality by promoting the exclusion of children from **low socio-economic backgrounds** whose families cannot afford to pay the **fees**. Whilst “low-fee” private schools are purportedly accessible to poorer children, research has indicated that the fees are still highly burdensome. For example, in Uttar Pradesh in India, studies estimate that poor families would need to spend almost half of their income in order to send all of their children to “low-fee” schools,³¹ whilst in Kenya, families living on \$1.25 a day would need to spend almost a third of their monthly income in order to send three of their children to a Bridge Academy school.³² Rights groups have also highlighted the risk that the increase in privatisation in education in the form of “low-fee” schools will exacerbate existing patterns of **gender inequality**, given the tendency of many families to prioritise educating boys over girls (see below, section 3.3.1).³³ There are also concerns regarding the lack of regulation and oversight of private education providers, with this sometimes leading to a lack of accountability for discriminatory practices.³⁴

Given this recent increase in the involvement of private actors in education, it is important for stakeholders to determine how this interacts with – and whether it is compatible with – states’ obligations to fulfil the right to education free from discrimination. The Global Initiative for Economic, Social and Cultural Rights is currently working to analyse the existing law applicable to the role of private actors in education with a view to developing a set of **Guiding Principles** that provide a normative reference point on the involvement of private actors in education. These principles will be underpinned by the international human rights framework, including the right to free, quality, compulsory education without discrimination.³⁵

31 See above, note 27, *Joint submission to the United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), Contribution to Half-Day Discussion on girls’/women’s right to education, Privatization and its Impact on the Right to Education of Women and Girls*, p. 5.

32 Ratcliffe, R., and Hirsch, A., “UK urged to stop funding ‘ineffective and unsustainable’ Bridge schools”, *The Guardian*, 3 August 2017, available at: <https://www.theguardian.com/global-development/2017/aug/03/uk-urged-to-stop-funding-ineffective-and-unsustainable-bridge-academies>.

33 See above, note 27, *Joint submission to the United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), Contribution to Half-Day Discussion on girls’/women’s right to education, Privatization and its Impact on the Right to Education of Women and Girls*, pp. 1–2; Muntasim, T., “Education: The Great Equalizer & the inequalities of privatisation”, *ActionAid*, 14 October 2015, available at: <http://www.actionaid.org/2015/10/education-great-equalizer-inequalities-privatisation>.

34 *Ibid.*

35 See above, note 27, *Human Rights Guiding Principles on the Obligations of States regarding Private Schools*.

Direct Discrimination

Disability

The direct and indirect costs of schooling may **directly discriminate** against children with disabilities where they are required to pay additional fees or costs in order to attend primary school. In *South Africa*, for example, the government has taken steps to ensure that primary education is available free of charge by creating “no fee” schools; however, children with disabilities tend to be sent to so-called “special schools” which are fee-paying,³⁶ and where children with disabilities *are* permitted to attend “no fee” mainstream schools they may be required to bear the costs of expenses – such as special personal assistants, assistive technologies and adapted learning materials – that children without disabilities do not have to pay for.³⁷

Multiple Discrimination

As explored in Chapter 2, the connection between low socio-economic status and discrimination is such that marginalised groups – such as ethnic minorities, and persons with disabilities – are overrepresented amongst the poor. Given that children from these marginalised groups tend to be more vulnerable to socio-economic deprivation, they may experience **multiple discrimination** as a result of states’ failure to eliminate the direct and indirect costs of schooling.

Race, Ethnicity and Poverty

Socio-economic status, race and ethnicity are often closely intertwined, with individuals belonging to racial and ethnic minorities often experiencing greater socio-economic deprivation than their majority counterparts.³⁸ As such, the direct and indirect costs of schooling can cause cumulative disadvantage for children belonging to racial and ethnic minorities. For example, indigenous persons are often in the poorest wealth quintiles of the countries in which they reside, and thus the costs of schooling combine with other barriers (such as language, as discussed in section 3.5 below) to exacerbate the challenges they face in accessing or completing primary education.³⁹ Similarly, the Roma – a traditionally nomadic ethnic group – are widely affected by poverty across Europe, with a recent survey of 11 countries in Europe showing that over 90% of Roma

36 The practice of sending children to special schools is itself directly discriminatory, as discussed at section 3.3.2 below.

37 See above, note 20, Human Rights Watch, p. 21; Human Rights Watch, “Free Primary Education Still Out of Reach in South Africa”, *Human Rights Watch*, 13 April 2017, available at: <https://www.hrw.org/news/2017/04/13/free-primary-education-still-out-reach-south-africa>.

38 See Chapter 2, section 2.1.

39 Minority Rights Group International, *State of the World’s Minorities and Indigenous Peoples 2009, Events of 2008 – Education Special*, 2009, p. 71, available at: <http://minorityrights.org/publications/state-of-the-worlds-minorities-and-indigenous-peoples-2009-july-2009>.

households live below the poverty line;⁴⁰ as such, Roma children are particularly affected by the costs of schooling. In **Moldova**, for example, 43% of Roma children between the ages of seven and 15 do not attend school, as compared to 6% of non-Roma children, with poverty being a key barrier given the widespread practice in Moldova of informal payments for education.⁴¹

Disability and Poverty

Persons with disabilities are disproportionately represented amongst the poor;⁴² meaning that children with disabilities face multiple discrimination on the grounds of both socio-economic disadvantage and disability where states fail to eliminate the direct and indirect costs of schooling. The earning potential of parents of children with disabilities may sometimes be limited if they have extensive caring responsibilities for their children, which can contribute to their inability to pay the direct and indirect costs of schooling.⁴³ Where financial resources are limited, and parents have a number of children, parents may also choose not to incur the costs associated with educating a child with disabilities. In **Bangladesh**, for example, research suggests that parents can be biased towards spending their financial resources on educating children without disabilities since this is considered to provide a higher return on investment, particularly given the societal stigma surrounding disability in Bangladesh.⁴⁴

Gender and Poverty

Where a family is struggling to cover the costs associated with schooling, this can have a disproportionately prejudicial impact on **girls**. In such circumstances, traditional notions regarding gender roles, combined with attitudes towards the benefits of education (or the perceived lack thereof), can mean that parents choose not to send female children to school, or give preference to educating boys over girls where their resources are limited.⁴⁵ For example, in **Tajikistan**, 68% of the parents consulted during a survey stated that the principal reason for not sending their daughters to school was cost.⁴⁶ A study of 44 countries

40 Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, 2016, p. 25, available at: <https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-roma-school-desegregation-20160407.pdf>.

41 Equal Rights Trust, *From Words to Deeds: Addressing Discrimination and Inequality in Moldova*, 2016, p. 48, available at: http://www.equalrightstrust.org/ertdocumentbank/From%20Words%20to%20Deeds%20Addressing%20Discrimination%20and%20Inequality%20in%20Moldova_0.pdf.

42 See Chapter 2, section 2.1; International Disability and Development Consortium (IDDC), *#CostingEquity: The case for disability-responsive education financing*, 2016, p. 14, available at: https://iddcconsortium.net/sites/default/files/resources-tools/files/costingequity_full_report.pdf.

43 See above, note 20, Human Rights Watch, p. 16.

44 Lamichhane, K. and Kawakatsu, Y., "Disability and determinants of schooling: A case from Bangladesh", *International Journal of Educational Development*, Vol. 40, 2015, p. 99.

45 Global Campaign for Education, *Gender Discrimination in Education: The Violation of Rights of Women and Girls*, 2012, pp. 6–7, available: http://campaignforeducation.org/docs/reports/GCE_INTERIM_Gender_Report.pdf; See above, note 3, p. 8.

46 See above, note 39, p. 17.

in sub-Saharan Africa found that, where school fees have the effect of inhibiting school attendance, girls are affected more than boys: in the poorest 40% of households, 45% of girls attend school as compared with 55% of boys.⁴⁷ In *Nigeria*, studies have observed that the differential value attributed to male and female children means that girls tend to be withdrawn from schooling first where resources are limited.⁴⁸

Spotlight: Gender Inequality and Out-of-School Girls

Achieving gender equality in education is increasingly recognised as a key strategic development priority, with a number of initiatives focussed on girls' education – such as the United Nations Girls' Education Initiative, Camfed (Campaign for Female Education), and the "Because I am a Girl" initiative by Plan International – noting the centrality of girls' education to alleviating intergenerational poverty. All of these initiatives highlight the fact that, whilst progress has been made on achieving gender parity in primary education, girls continue to suffer disadvantage and exclusion, with an estimated 30 million girls of primary school age still out of school. As noted by the Committee on the Elimination of Discrimination against Women, despite "the seeming global consensus on the right of girls and women to education", gender disparities in education – including disparities in the numbers of girls and boys out of school, and in literacy rates – continue to be "a feminised phenomenon".⁴⁹

Issues of gender discrimination and gender inequality feature consistently in all of the barriers that are discussed during this Chapter. These barriers to girls' education are interrelated. They are all recognisable as manifestations of structural gender inequality, and of societal and cultural norms regarding male and female roles in society. At a basic level, cultural norms and attitudes held by many societies can mean that parents choose not to send their girls to school because they do not see the value in educating them, or because the perceived value is insufficient to justify the costs. A study conducted in Guinea, for example, found that parents believed primary schooling to be "irrelevant to girls' future roles".⁵⁰ When conducting research in Kenya, the Equal Rights Trust received testimony from one girl who explained that her

47 Lewin, K. M., "Access to education in sub-Saharan Africa: patterns, problems and possibilities", *Comparative Education*, Vol. 45, No. 2, 2009, p. 168.

48 UIS and UNICEF, *Nigeria Country Study. Conducted within the Conceptual and Methodology Framework (CMF). Global Initiative on Out-of-School Children*, 2012, p. 39, available at: <http://dx.doi.org/10.15220/uis-unicef-cntry-nigeria-2012-en>.

49 Committee on the Elimination of Discrimination against Women (CEDAW Committee), *CEDAW Statement: Protection of Girls' Right to Education, adopted on 19 October 2012 during the 53rd session*, 19 October 2012, available at: <http://www.ohchr.org/documents/HRBodies/CEDAW/Statements/CEDAWstatementGirlsEducationAsAdopted.pdf>.

50 See above, note 3, p. 31.

father “did not educate us girls as he said it was a waste of money”.⁵¹ Such attitudes are exacerbated in poor households with limited financial resources, where the direct and indirect costs of schooling can mean that preference is given to educating boys over girls, and where gendered expectations regarding the division of household chores can mean that girls are more likely to be kept at home to help with domestic work (**section 3.1.2**). Where girls are sent to school, they often enrol in school much later than their male peers and may therefore reach puberty whilst in primary education, meaning they may be affected by the lack of adequate sanitation facilities at many schools (**section 3.4**).

Societal expectations regarding the future roles and occupations of girls and boys can lead to gender stereotypes pervading school curricula and teaching materials (**section 3.5.2**), and can manifest themselves in teachers’ teaching methods and attitudes. The fact that teachers often have low expectations of girls’ educational attainment can mean that female students are side-lined or simply ignored, thus impacting on their performance and increasing their susceptibility to school drop-out (**section 3.6.3**). In *Ethiopia* and *Guinea*, for example, studies indicate that teachers tend to perceive boys as being more interested and intelligent than girls in schools.⁵² In *Peru*, research suggests that teachers believe that girls will drop out of school and so have low expectations regarding their performance and participation,⁵³ thus perpetuating the issue. Child marriage and pregnancy – whilst more of an issue in the secondary education context – can nonetheless mean that girls do not complete primary education, particularly when they start later than their male peers;⁵⁴ in *Yemen*, for example, there have been reports of girls as young as eight years old being married.⁵⁵

Gender norms and stereotypes which portray women and girls as subordinate or inferior, and which value male domination and aggression, can manifest themselves through gender-based violence and harassment. Such violence can take place inside and outside the classroom, and can have a significant impact on girls’ enrolment and drop-out rates (**section 3.6**). Girls’ vulnerability to gender-based violence and

51 Equal Rights Trust, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, 2012, p. 136, available at: <http://www.equalrightstrust.org/spirit-harambee-addressing-discrimination-and-inequality-kenya>.

52 See above, note 3, p. 41.

53 *Ibid*.

54 See the concerns expressed by the CEDAW Committee, *Concluding Observations of the Committee to End All Forms of Discrimination against Women, Uganda*, UN Doc. CEDAW/C/UGA/CO/7, 22 October 2010, Para 31; *Concluding Observations of the Committee to End All Forms of Discrimination against Women, Sierra Leone*, UN Doc. CEDAW/C/MRT/CO/1, 11 June 2007, Para 30.

55 Elie, J., “Yemen child bride, eight, ‘dies on wedding night’”, *The Guardian*, 11 September 2012, available at: <https://www.theguardian.com/global-development/2013/sep/11/yemen-child-bride-dies-wedding>.

harassment (whether perceived or real) can be a barrier to attendance when schools are located at a significant distance from their home (**section 3.2**), and can lead to drop-out when such violence and harassment takes place within schools (**section 3.6**). Parents may keep their daughters at home in order to avert the risks of violence and harassment occurring, particularly where the benefits of girls' education are already considered to be low.

Girls' ability to access and complete primary education is also impacted by historic and systemic gender inequality. There is evidence that the presence of female teachers has a positive impact on girls' attendance rates, and on the rates of school-related sexual violence. However, there is a dearth of qualified female teachers in many settings as a result of historic disadvantage, with this being a particular issue in poorer rural areas. Research also suggests that the disadvantage faced by girls is *intergenerational*: girls are less likely to attend primary school where their mothers have not been educated to primary school level, or where their mother does not speak the language of instruction in schools, meaning that patterns of disadvantage become entrenched. Research conducted in **Tanzania** has shown that the probability of girls enrolling in primary school increases by 9.7% if their mother was educated to primary school level,⁵⁶ whilst in **Yemen**, children are more likely to be out of school where their mother has received no education at all compared to where their mother has received at least basic education.⁵⁷ In **Turkey**, a mother's ability to speak Turkish and the extent to which she accepts traditional gender roles are considered to be significant indicators in school participation rates.⁵⁸ This is manifested in a regional disparity in girls' enrolment rates, with girls being more likely to enrol in school than boys in the North (where women are known to enjoy relatively higher levels of independence), whilst girls in the East (where patriarchal culture is much stronger, and traditional gender roles are enforced) are much less likely to be in school.⁵⁹ Gendered norms and attitudes influence and intersect with additional barriers and challenges faced by girls who share other protected characteristics – such as disability, or belonging to an ethnic minority – and can also be exacerbated in conflict and other insecure settings (see **section 3.6** below).

56 Subrahmanyam, G., *Gender perspectives on causes and effects of school dropouts*, 2016, p. 32, available at: <http://www.sida.se/contentassets/4334380a5b754ef9924a6e25a4ca6e8a/babf2dad-1010-4035-8bfd-ce7d7f9108d7.pdf>.

57 UNICEF, *Middle East and North Africa Out-of-school Children Initiative, Yemen, Country Report on Out-of-school Children*, October 2014, p. 30, available at: http://allinschool.org/wp-content/uploads/2015/04/Yemen_Full-report_En.pdf.

58 Gumus, S. and Chudgar, A., "Factors affecting school participation in Turkey: an analysis of regional differences", *Compare*, Vol. 46, No. 6, 2016, p. 947.

59 *Ibid.*, pp. 945–96.

In order to advance girls' integration into education, it is imperative that states take **positive action** to rectify the systemic inequalities faced by girls in education.⁶⁰ The importance of positive action measures has been recognised by the CEDAW Committee, which has emphasised the need for states to take steps to address the underlying systemic causes of discrimination against women if substantive equality is to be achieved.⁶¹

3.1.2 Child Work and Child Labour

The direct and indirect costs described above are not the only "costs" of schooling: in many families children provide a source of labour or income (whether inside or outside the home) which is considered necessary by the family. Accordingly, the attendance of the child at primary school "costs" the family the opportunity of realising this labour or income gain. Certain forms of "work", such as assisting with general household chores, and assisting with a family business outside school hours, are not generally considered to constitute "child labour".⁶² According to the International Labour Organisation (ILO), "child labour" refers work that is "mentally, physically, socially or morally dangerous and harmful to children" and which:

*interferes with their schooling by: depriving them of the opportunity to attend school; obliging them to leave school prematurely; or requiring them to attempt to combine school attendance with excessively long and heavy work.*⁶³

The most harmful forms of child labour – including child slavery, child prostitution, and hazardous work – have been prohibited in ILO Convention No. 182 on the worst forms of child labour, whilst ILO Convention No. 138 prescribes the minimum age at which children can legally be admitted to employment and work. However, whilst the position under international law is clear, cultural perceptions of the distinction between child work and child labour can vary; in **Bolivia**, for example, children from indigenous communities often start working full-time to support their families from a very young age, with this being seen as a natural part of everyday life for indigenous communities rather than "child labour".⁶⁴

60 CEDAW Committee, *General recommendation No. 5: Temporary special measures*, UN Doc. A/43/38, 1988.

61 CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, on 'temporary special measures'*, UN Doc. HRI/GEN/1/Rev.8, 2004, Para 10.

62 International Labour Organization, "What is child labour?", visited September 2017, available at: <http://ilo.org/ipec/facts/lang--en/index.htm>.

63 *Ibid.*

64 Equal Rights Trust focus group with child rights organisations in Cochabamba, Bolivia, 7th July 2017.

The ILO has noted that child labour can affect children's school attendance and completion in a number of respects, with the burden of combining work with school often resulting in children dropping out of school, or completing primary education late.⁶⁵ This correlation between child labour and lack of school attendance and/or drop-out rates is evident in a number of countries. In *Iraq*, for example, 87% of child labourers do not attend school, with a significant gap in school attendance existing between child labourers and other children of the same age who do not work.⁶⁶ In *Egypt*, a study by the Freedom Association for the Development of Society and the Environment indicated that 64% of children who drop out of school do so because they are working.⁶⁷

Whilst not the sole driver, poverty is often one of the principal reasons for children engaging in child labour, with poor families often being reliant on the cash income or labour provided by their children to meet the family's basic survival needs.⁶⁸ Accordingly, a family's "opportunity cost" consideration of whether to send their child to primary school has a disproportionate impact on children of **low socio-economic status**. Parents from poorer families may prefer to keep their children at home – rather than sending them to school – in order to bring in further income, undertake unpaid family work, or care for family members (including younger siblings).⁶⁹ With the most socio-economically disadvantaged children, the loss of opportunity for supplemental income or domestic labour can have a critical impact on their family's financial stability.

The impact of child labour can be particularly pronounced in poor rural areas, which may rely on child labour to assist with seasonal agricultural work. However, children of the urban poor are also affected by the opportunity costs associated with primary education, although the patterns of school absence that arise may differ from poor rural areas. Kielland notes that, unlike in rural areas (where the need for agricultural labour is seasonal), the opportunities afforded by child labour in urban slums are "constant", and the loss of income from child labour may be critical in some slum households.⁷⁰ Child labour can be crucial to meet short-term cash flow fluctuations amongst the urban poor, thus preventing school enrolment and/or regular school attendance.⁷¹

65 International Labour Organization (ILO)– International Programme on the Elimination of Child Labour (IPEC), *ILO-IPEC's strategies and priorities for addressing child labour and its resource needs*, 2013, p. 7, available at: <http://www.ilo.org/ipecinfor/product/download.do?type=document&id=23475>; see also UNICEF, *MENA Regional Report on Out-of-school Children*, October 2014, p. 59.

66 *Ibid.*, UNICEF.

67 UNICEF, *Egypt Country Report on Out-of-school Children*, 2014, p. 68, https://www.unicef.org/egypt/eg_Egypt_report_English_Preview.pdf.

68 Anker, R., "The Economics of Child Labour: A Framework for Measurement", *International Labour Review*, Vol. 139, No. 3, 2000, p. 262.

69 See above, note 65, UNICEF, p. 59; See above, note 20, Kielland, A., p. 48; Hillman, A. and Jenkner, E., *Educating Children in Poor Countries*, 2004, available at: <https://www.imf.org/external/pubs/ft/issues/issues33>.

70 See above, note 26, Kielland, A., p. 9.

71 *Ibid.*

Gender and Child Labour

The “opportunity costs” associated with children attending primary education also have a **gendered** dimension. In many countries with a large number of out-of-school children, a child’s sex will be relevant to the family’s consideration of the necessity, possibility and/or value of child labour, and thus impact on whether they attend school. This is because the nature of the work undertaken by girls and boys is often divided according to societal gender norms.

The Global Campaign for Education notes that a significant proportion of the work undertaken by child labourers relates to domestic work, which is undertaken predominantly by **girls**.⁷² This impacts on girls’ school attendance. In **Sri Lanka**, children are considered to be at increased risk of dropping out of school where they spend five hours or more per day on household chores, with statistics indicating that girls spend 5.5 hours per day on average working on household chores, with boys only working 3.9 hours on average.⁷³ A similar disparity is evident in **Nigeria**, where there is a high level of demand for girls to undertake domestic labour in particular, since they are generally “perceived to be more obedient, hardworking, submissive and trustworthy than the boy-children”, meaning that girls are more vulnerable to being out of primary school than boys.⁷⁴

Research from **Western Kenya** found that girls involved in the collection of drinking water were more likely to be absent from school, with this being a household chore undertaken predominantly by girls in sub-Saharan Africa.⁷⁵

Some of the household chores that children are required to undertake relate to access to other socio-economic rights, such as the **rights to adequate food and water**: for example, a lack of access to water means that children (particularly girls) can be required to travel to collect clean drinking water. The need to undertake such chores leads to absences from school and impacts on the **right to education**, thus demonstrating the inter-linked nature of the enjoyment of all socio-economic rights.

A study of Roma children living in **Turkey** found that, despite the fact that girls and boys carry out similar amounts of work in the fields, boys between the age of five and 11 have a higher attendance rate at school due to the fact that girls perform significantly more housework than boys.⁷⁶ Meanwhile, in **Yemen**, only

72 See above, note 45.

73 See above, note 24, pp. 24–25.

74 See above, note 48, p. 41.

75 Dreibelbis, R., Greene, L. E., Freeman, M. C., Saboori, S., Chase, R. P. and Rheingans, R., “Water, sanitation, and primary school attendance: a multi-level assessment of determinants of household-reported absence in Kenya”, *International Journal of Educational Development*, Vol. 33, No. 5, 2013, pp. 462–464.

76 Minority Rights Group International, *Discrimination Based on Colour, Ethnic Origin, Language, Religion and Belief in Turkey’s Education System*, Nurcan Kaya, 2015, p. 68–69, available at: http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/MRG_Discrimination_in_Turkey%27s_Education_Sytem_2015_En.pdf.

half of female child labourers attend school as compared to 70% of male child labourers, which has been attributed to girls working longer hours undertaking household chores (including water collection⁷⁷) and the higher societal value placed on male education.⁷⁸ Whilst undertaking field research in Yemen, the Trust spoke with a number of girls who explained that they were unable to complete primary education due to the need for them to perform household chores or other unpaid work. One girl explained that she was taken out of school by her father when she was 10 years old in order to perform domestic work,⁷⁹ whilst another nine year old girl explained that she had not been able to attend school since she was seven years old, as her parents require her to stay at home and look after her younger sister in order to enable her mother to go to work.⁸⁰

By contrast, in many contexts, **boys** are likely to undertake agricultural or paid work rather than domestic chores.⁸¹ In India and Pakistan, for example, out-of-school male child labourers are more likely than girls to be undertaking paid work as opposed to unpaid family work or household chores.⁸² As such, in countries where there are opportunities for boys to generate income (such as in **Bangladesh**) they are much more likely to drop out of school than girls.⁸³ In the **Philippines**, boys who belong to rural farming communities tend to start helping with agricultural work from a young age, with the resultant absences from school causing repetition and eventual drop-out.⁸⁴ The fact that gender roles dictate that boys must contribute towards a household's livelihood can, in certain cases, allow girls more flexibility to attend school. A study of semi-nomadic fishing communities in **South Western Madagascar** found that boys were less likely to be enrolled in primary school than girls, since their contribution to fishing allowed them less flexibility to attend school than the girls' domestic chores.⁸⁵ As such, almost two thirds of pupils in primary schools were female.⁸⁶

77 See above, note 57, p. 44.

78 See above, note 14, p. 67.

79 Equal Rights Trust interview with Ola, Al Jowf, Yemen, 2015.

80 Equal Rights Trust interview with Yara, Sana', Yemen, 2015.

81 See above, note 3, p. 14.

82 UIS and UNICEF, *South Asia Regional Study: Covering Bangladesh, India, Pakistan and Sri Lanka. Global Initiative on Out-of-School Children*, 2014, p. 32, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/SouthAsia_OOSCI_Study_27Jan_014Final.pdf.

83 Saravankumar, S. and Palanisamy, M., "Status of Primary Education of Scheduled Caste Children", *International Journal of Research in Humanities and Social Sciences*, Vol. 1, No. 8, 2013, p. 226.

84 See above, note 25, pp. 7–8.

85 Moreira, C. N., Rabenevana, M. W. and Picard, D., "Boys go fishing, girls work at home: gender roles gender roles, poverty and unequal school access among semi-nomadic fishing communities in South Western Madagascar", *Compare: A Journal of Comparative and International Education*, Vol. 47, 2017, pp. 6–7.

86 *Ibid.*, p. 6.

Spotlight: Out-of-School Boys

Whilst education-sector attention has been focussed on the disadvantage that girls face in education, it is important to note that gender norms and cultural stereotypes can also negatively impact on boys and contribute to their drop-out rates in primary education. For example, as discussed in this section, societal expectations regarding gender roles can mean that boys are more likely to be engaged in particular types of child work and child labour than girls, and are thus more likely to be out of school in certain contexts and communities. Completion of primary school can often be more of an issue for boys than girls. For example, the Kenyan National Gender and Equality Commission has noted that boys are “considered a ‘man’” from as young as eight years old as a result of traditional cultural beliefs within certain communities, meaning that they are expected to take on familial responsibilities and provide basic household needs from that age.⁸⁷ As such, whilst boys may be more likely than girls to enrol in primary education in Kenya, drop-out rates are higher amongst boys than girls as children progress through primary school.⁸⁸ Furthermore, as discussed in **section 3.6.2** below, boys are often more vulnerable than girls to certain types of violence in schools, such as corporal punishment, due to cultural perceptions regarding the need to apply tough, physical discipline to boys.

When taking **positive action** to address systemic gender discrimination, it is therefore important that states ensure they look to address harmful gender norms in a **holistic** way, considering how such societal norms prejudice and disadvantage boys as well as girls in education.

3.2 Geographical Inaccessibility of Schools

The CESCR has noted that education must be “within safe physical reach, either by attendance at some reasonably convenient location (...) or via modern technology”.⁸⁹ However, in many areas, schools are not within “safe physical reach” for children, thus contributing to low enrolment and attendance rates. In some countries – such as **Cambodia** – the long distances to be travelled to school, coupled with the lack of appropriate and reliable transport, are key reasons for children dropping out of school.⁹⁰ Research suggests that this has a discriminatory impact, with children who share certain identity characteristics – girls, children

87 National Gender and Equality Commission, *The Status of the Boy Child in Kenya: A Report of emerging perception on the exclusion of the boy child in the gender equality agenda*, 2015, pp. 19–20, available at: <http://www.ngeckenya.org/downloads/all>.

88 *Ibid.*, pp. 23–24.

89 CESCR, *General Comment No. 13: The Right to Education*, UN Doc. E/C.12/1999/10, 1999, Para 6.

90 See above, note 56, p. 46.

from particular ethnic, religious or social groups, as well as children with disabilities – being particularly disadvantaged by the need to travel long distances to primary school.

Direct Discrimination

The absence of a primary school “within safe physical reach” may arise as a result of the way in which a state has chosen to allocate its resources in respect of the establishment of schools. Where a state has allocated its resources towards the establishment of schools *unequally*, and where this unequal allocation of resources is related to one or more protected characteristics, this may amount to **direct discrimination**. In such circumstances, this inequality in state investment means that children sharing certain protected characteristics are treated less favourably than other children when it comes to accessing schools that are within safe physical reach.

Ethnic and Religious Minorities

Disparities in the supply of primary schools may exist along ethnic or religious lines, meaning that schools are less geographically accessible to children from certain ethnic or religious groups. This can impact on primary school attendance and drop-out rates amongst children from these groups. In *Turkey*, for example, most villages in Kurdish areas do not have a school as a result of the government’s refusal to formally recognise the Kurdish minority, leading to poor education metrics amongst Kurdish children.⁹¹ In *Israel*, there are very few primary schools in Arab Bedouin villages as a result of government policies that have favoured investment in the Jewish sector over the Arab sector (discussed in detail in section 3.4 below), and the government does not provide transport to take children to schools in neighbouring towns.⁹² As such, statistics indicate a significant disparity in primary school access and attendance rates between Arab Bedouin children and Jewish children.⁹³

Gender

The gendered impacts of the geographical inaccessibility of schools appear to be indirectly discriminatory, as discussed below. However, there are examples of **direct discrimination** occurring where governments have favoured or prioritised the establishment of boys’ schools over girls’ schools, meaning that girls are treated less favourably than boys when it comes to having safe physical access to primary schools. In *Afghanistan*, for example, remote areas of the country are lacking in schools as a result of school infrastructure being destroyed over many

91 See above, note 39, p. 16.

92 Adalah, *The Inequality Report: Palestinian Arab Minority in Israel*, March 2011, p. 35, available at: https://www.adalah.org/uploads/oldfiles/upfiles/2011/Adalah_The_Inequality_Report_March_2011.pdf.

93 Amjad Iraqi, “Arab school strike highlights Israel’s discriminatory education policies”, *+972 Magazine*, 7 September 2015, available at: <https://972mag.com/arab-school-strike-highlights-israels-discriminatory-education-policies/111480>.

years of conflict. However, provincial plans for school construction indicate that the rebuilding of boys' schools has been prioritised over the rebuilding of girls' schools.⁹⁴ This means that girls tend to have to travel further than boys in order to access schooling, and may therefore be susceptible to non-attendance or drop-out given the security risks that they face in travelling long distances alone.⁹⁵

Indirect Discrimination

The failure to ensure that primary schools are geographically accessible may also be **indirectly discriminatory** where this has a disproportionately prejudicial effect on children with certain protected characteristics (such as children from particular ethnic, religious or social groups, girls, or children with disabilities) and where such failure cannot be objectively justified. In the examples discussed below, the patterns of disadvantage give rise to a *prima facie* presumption of indirect discrimination, since the inaccessibility of schools means that children belonging to certain groups are less likely to enrol in, and more vulnerable to drop out of, primary education. The question of whether this can be objectively justified will need to be considered carefully by reference to the factual circumstances in each case.

Ethnicity

Research indicates that the geographical inaccessibility of schools can have a disproportionate impact on the attendance and drop-out rates of children belonging to certain **ethnic groups**, who often live in remote or socially isolated areas, and thus frequently have to travel long distances in order to reach the nearest school.⁹⁶ For example, in the **North Eastern Province of Kenya**, which is almost entirely populated by Kenyan Somalis, the school infrastructure is poor and schools are often located many miles away;⁹⁷ only 83% of school-aged children are enrolled in school in this province, as compared to 96% in the former Central province,⁹⁸ with many Kenyan Somali children not starting school until the age of 12 or 13.⁹⁹ Due to a lack of data disaggregated by ethnicity in areas such as education, it is difficult to demonstrate any *direct* discrimination in the allocation of public resources; however, the regional variations in access to education disproportionately disadvantage the Kenyan Somalis living in the North Eastern Province, thus giving rise to an inference of **indirect discrimination** in resource allocation on the grounds of ethnicity.¹⁰⁰

94 See above, note 56, p. 40, citing Lexow, J.

95 *Ibid.*, p. 40.

96 See above, note 39, p. 73.

97 See above, note 51, p. 83.

98 Uwezo, *Are our children Learning? The State of Education in Kenya in 2015 and Beyond*, 2016, p. 18, available at: <http://www.uwezo.net/wp-content/uploads/2016/05/05-16-Kenya-small-size.pdf>.

99 See above, note 51, p. 83.

100 *Ibid.*, p. 52.

Gender

Research indicates that a failure to ensure that primary schools are within safe physical reach has a greater impact on girls than on boys, as girls' enrolment and attendance rates are more likely to be affected by the need to travel long distances to school. Research from **Chad**, for example, has shown a direct correlation between the rate of enrolment and the distance to the nearest school, with girls' enrolment rates falling more sharply than boys' enrolment rates as distances increase.¹⁰¹ A study conducted in **Western Kenya** also found that long distances to primary school correlated with an increase in school absences for girls more so than for boys.¹⁰²

The discriminatory impact of distance to the nearest school is closely linked to **systemic gender discrimination and inequality**. For example, in **Israel**, Arab Bedouin girls living in the Naqab have higher drop-out rates than boys; this gender disparity has been attributed to the fact that Bedouin culture does not permit girls to travel outside their villages without being accompanied by a relative, thus causing issues where girls are required to travel long distances to attend school outside their village.¹⁰³

Systemic issues of gender inequality can also mean that girls are more vulnerable – or are perceived to be more vulnerable – to certain security risks than boys where they have to travel long distances to school.¹⁰⁴ This can result in girls failing to enrol in or attend primary school, or in parents delaying enrolment until girls are considered mature enough to make their own way to school.¹⁰⁵ For example, in some countries, physical barriers posed by the local terrain and climate combine with traditional gender norms to make parents reluctant to allow girls to travel even relatively short distances to school. In **Tajikistan**, the insecure travel conditions in rural areas – particularly in poor weather conditions, where there is risk of landslides, flooding, mudflows and heavy snow – can affect girls' attendance at school, particularly when combined with cultural norms that dictate against girls walking alone.¹⁰⁶

In other countries, concerns about letting girls travel long distances to school centre around the risks of girls being subject to harassment, violence or attack. It is not possible on the basis of current research to identify how often these risks are real and how often they are perceived, although such violence is certainly a genuine risk for girls in many contexts. In West and Central Africa, there have

101 UNESCO, *EFA Global Monitoring Report 2015: Education for All 2000-2015: Achievements and Challenges*, 2015, p.177, available at: <http://unesdoc.unesco.org/images/0023/002322/232205e.pdf>.

102 See above, note 75, p. 461.

103 NGO Pre-Sessional Report to the CEDAW for the List of Issues Prior to Reporting on Israel at the 68th Session, submitted by Adalah (The Legal Center for Arab Minority Rights in Israel), 1 July 2016, p. 3; See above, note 39, p. 79.

104 See above, note 101, p. 171; See above, note 45, p. 7.

105 See above, note 56, p. 35.

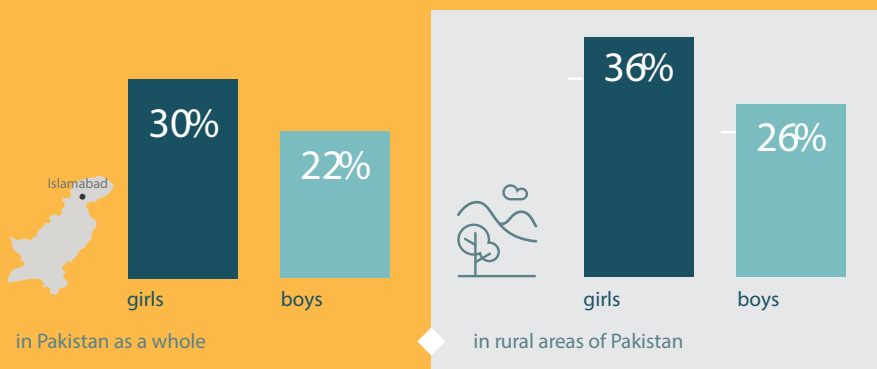
106 See above, note 18, *Tajikistan Country Study*, pp. 59 and 64.

been incidents of sexual violence on the roads travelled to school perpetrated by men and soldiers at checkpoints, which have affected girls and girls with disabilities in particular.¹⁰⁷

In Focus: Geographical Inaccessibility of Schools in Rural Pakistan

Gender disparities in primary education in Pakistan

Children out of primary school



*When sons go to schools that are far away we don't get worried, but for our daughter we get worried.*¹⁰⁸ (women, Southern Punjab)

In **Pakistan**, the official age of entry in primary school is five years old, with Article 25A of the constitution of Pakistan providing that “[t]he state shall provide free and compulsory education to all children between five and 16 years of age”.¹⁰⁹ However, there are around 24 million children out of school in Pakistan, amounting to almost half of all children between the ages of five and sixteen.¹¹⁰ There is a pronounced gender disparity in the number of children out of primary school, with 30% of girls being out of school as compared to 22% of boys.¹¹¹ This disparity increases in rural areas, with 36% of girls out of primary school in rural areas as compared to 26% of boys.¹¹²

107 UNICEF, Plan West Africa, Save the Children Sweden, and Action Aid, *Too Often in Silence: A Report on School-Based Violence in West and Central Africa*, 2010, p. 27.

108 Jacoby, H. G. and Mansuri, G., *Crossing Boundaries: Gender, Caste, and Schooling in Rural Pakistan*, 2011, p. 6, available at: http://siteresources.worldbank.org/INTPOVRES/Resources/477227-1326215418878/HananJacoby_Paper_CB_June_11.pdf.

109 Constitution of the Islamic Republic of Pakistan 1973.

110 Chaudry, H., “Why do so many children drop out of Pakistani schools?”, *Dawn*, 25 February 2016, available at: <https://www.dawn.com/news/1241630>.

111 World Inequality Database on Education, *Pakistan Country Profile*, visited 25 October 2017, available at: <http://www.education-inequalities.org/countries/pakistan/#?dimension=all&group=all&year=latest>.

112 *Ibid.*

Research undertaken in rural **Pakistan** indicates that geographical inaccessibility of primary schools is a key reason for children failing to attend or complete primary education.¹¹³ The lack of geographically accessible schools appears to disproportionately prejudice girls, as there are around twice as many boys' schools as girls' schools in rural areas,¹¹⁴ and is thus discriminatory on the grounds of gender.

This disparity in the availability of girls' schools and boys' schools in rural areas combines with other issues of **systemic gender inequality** – including girls' increased vulnerability to harassment and sexual violence – to hinder their attendance at primary school. A 2004 survey of primary schools in Punjab by the Society for the Advancement of Education found that a number of girls' schools were located very far away from their homes, and that the distance made parents reluctant to let girls travel alone due to safety concerns;¹¹⁵ a number of girls surveyed also explained that they dropped out of primary school because of the harassment they faced during the long journey to school.¹¹⁶ More recent research indicates that such safety concerns remain an issue in inhibiting girls' access to education.¹¹⁷ There is evidence that girls are more likely to attend school where there is an all-girls school in the village¹¹⁸ and that “enrolment drops off sharply with each 500-metre increase in distance from the closest school admitting girls”, with “this ‘distance penalty’ account[ing] for 60% of the gender gap in enrolments”.¹¹⁹

Disability

The failure to provide schools that are geographically accessible may also indirectly discriminate against **children with disabilities**, since they may be unable to travel long distances alone without some kind of assistance and/or transportation.¹²⁰ The Committee on the Rights of Persons with Disabilities (CRPD) has stipulated that the educational environment “must be within safe physical reach

113 See above, note 82, p. 58.

114 *Ibid.*

115 Society for the Advancement of Education (SAHE), *Drop-out of Girls from Primary Education in the Punjab Case Studies of Selected Districts*, 2004, p. 33, available at: <http://www.ncsw.gov.pk/resource/previewlibrary/8>.

116 *Ibid.*, p. 41.

117 See, for example, Noor-i-Hirra, W., “Out of School children in Punjab: Looking at Access & Equity”, *ASER Pakistan Annual Status of Education Report Briefing Paper*, 2011; Shahrya, F., “Out of School Girls Enjoy Their Right to Education in Southern Punjab”, *UNICEF*, February 2014, available at: https://www.unicef.org/pakistan/reallives_8672.html.

118 See above, note 3, p. 37.

119 See above, note 14, p. 68.

120 Verma, G.K. et al (eds), *International Perspectives on Educational Diversity and Inclusion*, Routledge, 2007, p. 37.

for persons with disabilities, including safe and secure transport”,¹²¹ and yet, geographical accessibility remains a significant problem for children with disabilities.

Research conducted in **Bangladesh**, for example, found that younger children with disabilities find it more challenging than older children with disabilities to access schools located far from home,¹²² and that the absence of appropriate transport or transport subsidies was considered to be a major obstacle by parents of children with disabilities living in rural areas.¹²³ In certain lower income countries, including **Kenya**, **South Africa** and **Zimbabwe**, children with disabilities face challenges in completing long journeys to school due to the lack of affordable, safe and reliable transport options, rather than the lack of transport per se.¹²⁴ Research conducted in Umkhanyakude District in northern Kwa-Zulu Natal, **South Africa**, found that children with disabilities living in rural areas have difficulties in accessing school; these children either have to use private transport, which is usually in the form of “Umalume Transport”, or may have to walk (sometimes up to 10km) in order to reach school.¹²⁵ “Umalume Transport”, or “Uncle Transport”, is informal transportation provided by drivers who try to fit as many children as possible into their vehicles, and who are reportedly very intolerant and rude towards children with disabilities.¹²⁶

Similarly, in **Zimbabwe**, research conducted in four districts in Mashonaland West Province found that most children were required to walk to school, which posed difficulties for children with impairments that inhibited their ability to walk long distances alone.¹²⁷ As such, children either had to take lengthy and expensive journeys by public transport, be carried to school by parents or siblings, or simply did not attend school at all.¹²⁸ The research found that, where transport was in theory available, the vehicles were often inaccessible to children with disabilities; furthermore, the vehicle drivers displayed discriminatory attitudes towards children with disabilities, as they were sometimes unwilling to pick up them up due to concerns that this would delay their journey and thus have a knock-on financial impact.¹²⁹

The discrimination faced by children with disabilities in this context is closely linked to the failure of schools to make **reasonable accommodation** for chil-

121 Committee on the Rights of Persons with Disabilities (CRPD), *General Comment No. 4 on the right to inclusive education*, UN Doc. CRPD/C/GC/4, 2016, Para 27.

122 See above, note 44, p. 103.

123 See above, note 14, p. 191.

124 Kett, M. and Deluca, M., “Transport and Access to Inclusive Education in Mashonaland West Province, Zimbabwe”, *Social Inclusion*, Vol. 4, No. 3, 2016, p. 37.

125 Section 27, *Too Many Children Left Behind: Exclusion in the South African Inclusive Education System*, 2016, p. 17, available at: <http://section27.org.za/wp-content/uploads/2017/01/umkhanyakude-2016-ENG-web.pdf>.

126 *Ibid.*

127 See above, note 124, p. 65–66.

128 *Ibid.*

129 See above, note 124.

dren with disabilities (see sections 3.4 and 3.5 below). A study conducted in relation to a number of low and middle income countries found that most children with disabilities live in rural areas, where local schools are often ill-equipped to accommodate the needs of children with disabilities; as such, children wishing to attend school may have no choice but to travel to segregated special schools located in urban areas, thus increasing the marginalisation they face in education.¹³⁰

Socio-Economic Disadvantage

Schools tend to be more numerous, and thus more geographically accessible, in urban locations,¹³¹ with schools often being in shorter supply in rural areas.¹³² For example, research conducted by UNICEF in South Asia found that early year school provision is more prevalent in urban areas in **Pakistan, India** and **Sri Lanka**.¹³³ As such, the need to travel long distances to school can be a particular issue for rural populations.¹³⁴ This differential in the accessibility of schools in rural and urban areas is consistent with statistics that indicate that there is often a sharp disparity between the numbers of out-of-school children living in rural and urban areas, with more children being out of school in rural areas.¹³⁵

This differential in resource allocation between rural and urban areas may be indirectly discriminatory on the grounds of **socio-economic disadvantage**: research indicates that **poverty** tends to be **concentrated in rural areas**, with the World Development Indicators suggesting that approximately two thirds of the world's poor live rurally.¹³⁶

There are, however, exceptions to this: for example, in Latin American countries, around 60% of the poor and 50% of the extreme poor live in urban areas.¹³⁷ Where children grow up in urban poverty, research suggests that access to public education is limited, in particular in slum areas.¹³⁸ For example, a study con-

130 Banks, L. M. and Polack, S., *The Economic Costs of Exclusion and Gains of Inclusion of People with Disabilities*, 2014, p. 27, available at: <http://disabilitycentre.lshtm.ac.uk/files/2014/07/Costs-of-Exclusion-and-Gains-of-Inclusion-Report.pdf>.

131 See above, note 3, p. 33.

132 See above, note 82, p. 66.

133 *Ibid.*

134 See above, note 3, p. 37.

135 In low-income countries, 36% of children in rural areas are out of school, as compared to 16% of urban children; in lower-middle income countries, 22% of children in rural areas are out of school, as compared to 13% of urban children. See World Inequality Education Database, visited 25 October 2017, available at: <http://www.education-inequalities.org/>; See above, note 3, p. 33.

136 The World Bank, *Urbanization is good for rural poverty (at least in India)*, 2013, available at: <http://blogs.worldbank.org/developmenttalk/urbanization-is-good-for-rural-poverty-at-least-in-india>.

137 The World Bank, *The Urban Poor in Latin America*, 2005, p. 1, available at: <http://documents.worldbank.org/curated/en/102351468016242316/pdf/337950Urban0Po110rev0See0also030465.pdf>.

138 UNICEF, *The State of the World's Children 2012: Children in an Urban World*, 2012, p. 29, available at: https://www.unicef.org/sowc2012/pdfs/SOWC%202012-Main%20Report_EN_13Mar2012.pdf.

ducted in **Egypt** found that the levels of poverty and deprivation in urban slum areas often exceeded those in the most deprived rural areas of the country,¹³⁹ and that the majority of slums in the areas studied did not have primary or preparatory schools.¹⁴⁰ Slum children may therefore have to travel long distances to attend a school, travelling in environments where there is a risk of violence and other health hazards.¹⁴¹ Studies suggest that this can have a disproportionate impact on **girls**, thus giving rise to **multiple discrimination**: for example, research conducted in Dhaka, **Bangladesh**, found that the long distances to school meant parents living in slums were afraid to send their daughters to certain schools for fear of them suffering harassment along the way and damaging the family's reputation, meaning girls were at increased risk of dropping out.¹⁴²

Internal Displacement

Conflict or other humanitarian crises have a significant impact on children's ability to access and/or complete primary education: statistics show that there are approximately 28.5 million children of primary school age out of school in conflict-affected countries, which is roughly half of the world's out-of-school primary population.¹⁴³ Research suggests that children who enter primary school in countries experiencing armed conflict are 20% more likely to drop out of school than children in comparable countries that are not afflicted by conflict.¹⁴⁴

Internal displacement arising from conflict or other humanitarian crises can mean that children are required to live in areas where schools are geographically inaccessible. For example, research conducted by the Children's Parliament in **Yemen** in 2011 found that many families had been displaced, thus requiring them to live in refugee camps located far away from schools.¹⁴⁵ In the governorate of Sa'ada, only 73.8% of children were in primary education, with 27.5% of these children explaining that this was due to the distance between the school and the refugee camp being too far.¹⁴⁶ In a subsequent study conducted in 2016, teachers noted that the civil war was having a significant impact on the access

139 UNICEF and Informal Settlements Development Facility, *Multidimensional Child Poverty in Slums and Unplanned Areas in Egypt*, 2013, p. 1, available at: [https://www.unicef.org/egypt/eg_UNICEF_ISDF_2013_Child_poverty_in_slums_English\(3\).pdf](https://www.unicef.org/egypt/eg_UNICEF_ISDF_2013_Child_poverty_in_slums_English(3).pdf).

140 *Ibid.*, p. 4.

141 See above, note 26, Kielland, A., pp. 2 and 11.

142 Cameron, S. J., "Urban inequality, social exclusion and schooling in Dhaka, Bangladesh", *Compare*, 2016, pp. 7 and 13.

143 Global Coalition to Protect Education from Attack, *Lessons in War 2015: Military Use of Schools and Universities during Armed Conflict*, May 2015, p. 21, available at: http://www.protectingeducation.org/sites/default/files/documents/lessons_in_war_2015.pdf.

144 *Ibid.*

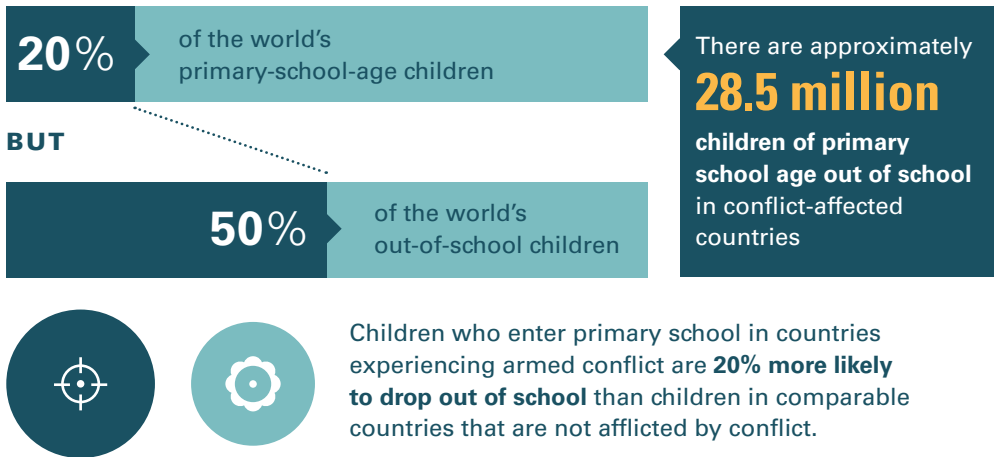
145 The Children's Parliament, "The impact of peaceful demonstrations in 2011 on the rights of children to education, healthcare and protection", Democracy School Initiative, Yemen, 2012 (لإفطالانام لرب), 2012, (ةيكارقنيدلا قسردملا ماعلا تيملسلا تاجتدلا رثا لود ٢٠١١ تيامحلاو تيميلعلا لاقطلا اعاضوا لعريرقت), pp. 3–5.

146 *Ibid.*, p. 10.

to education of displaced children,¹⁴⁷ and that in some regions – such as Hadramout – the schools were mostly closed, meaning that children were simply unable to attend school.¹⁴⁸ In *Iraq*, access to education amongst internally displaced children is reportedly “commonly hindered by the distance of learning facilities from places of residence”, with the security situation making it unsafe for internally displaced children to travel the distances needed to reach the nearest schools.¹⁴⁹

The exacerbating effects of conflict

Conflict-affected countries have:



Failure to Make Reasonable Accommodation

Children from **nomadic communities** can also face difficulties in physically accessing primary schools, arising directly from the fact that they do not live in one fixed area.¹⁵⁰ In the Horn of Africa, over 10% of the population are considered to be nomads or pastoralists,¹⁵¹ with children often having to walk long distances to school every day given that the populations are sparsely distributed over a large area. In *Ethiopia*, nomadic children may have to travel long distances to reach the towns where schools are located, and the high costs of food and lodging in those towns exacerbates the risk that they will not attend

¹⁴⁷ *Ibid.*, p. 9.

¹⁴⁸ *Ibid.*, p. 13.

¹⁴⁹ Minority Rights Group International and CEASEFIRE Centre for Civilian Rights, *Humanitarian challenges in Iraq's displacement crisis*, 2016, p. 24, available at: http://minorityrights.org/wp-content/uploads/2016/12/MRG-report-A4_english-DECEMBER-2016_WEB-2.pdf.

¹⁵⁰ See above, note 101, pp. 98–99.

¹⁵¹ See above, note 39, p. 37.

school.¹⁵² In **Sudan**, almost all of the nomadic children living in four of 15 states of Sudan are “out-of-school”.¹⁵³

It has been argued that the term “out-of-school children” is misplaced when it comes to nomadic children, since it assumes that *formal* schooling is a necessary part of education provision.¹⁵⁸ Whilst ICESCR simply guarantees a right to primary *education*, as opposed to schooling, fulfilling the right to education is often conflated with providing formal conventional schools.¹⁵⁹ In **India**, for example, the Right to Education Act 2009 guarantees children the right to free, quality education in a “neighbourhood school”, which arguably does not take account of the right to education of mobile communities.¹⁶⁰

In **Somalia**, nomadic pastoralists account for 65% of the population.¹⁵⁴ The majority of pastoralist children have not attended school,¹⁵⁵ with 50% of pastoralist parents interviewed in a research study stating that they did not send their children to school because there was either no school or no access to schools, with other reasons including the lack of perceived benefits of schooling, the constant movement of the community and financial constraints.¹⁵⁶ However, non-formal education is provided for many such children by mobile teachers who travel with the groups.¹⁵⁷

It is important to recognise that ensuring the equal enjoyment of the right to education does not necessarily equate with formal schooling, but rather requires the recognition and **accommodation** of the varying needs of children. In the case of nomadic children, this may require taking steps to ensure that the education system is adaptable to their mobile lifestyle, for example through open and distance learning programmes, and providing training to teachers within pastoralists groups in order to enable mobile classes.

152 See above, note 14, p. 143.

153 See above, note 65, UNICEF, p. 33.

154 UNICEF, *Education in Somalia*, visited 25 October 2017, available at: <https://www.unicef.org/somalia/education.html>.

155 Carr-Hill, R. A., “Education of children of nomadic pastoralists in Somalia: Comparing attitudes and behaviour”, *International Journal of Educational Development*, Vol. 40, 2015, p. 167.

156 *Ibid.*, pp. 167–169.

157 *Ibid.*

158 Dyer, C., *Evolution in approaches to educating children from mobile and nomadic communities*, background paper for EFA Global Monitoring Report 2015, 2015, p. 9.

159 *Ibid.*, p. 20.

160 *Ibid.*, p. 16.

3.3 Enrolment Requirements and Procedures

3.3.1 Documentation Requirements

Under the United Nations Convention on the Rights of the Child (UNCRC), all children have the rights to be “registered immediately after birth” and to have a name, with states being obliged to implement these rights.¹⁶¹ As such, states have established civil registry systems for recording and registering births, as well as mechanisms for recognising nationality, citizenship and residency. However, it is reported that over 100 developing countries do not have well-functioning birth registration systems,¹⁶² with approximately one third of all children under the age of five not having been registered at birth.¹⁶³ UNICEF’s research into this phenomenon has uncovered a correlation between birth registration and a child’s social, economic and demographic characteristics, with significant disparities evident on the grounds of socio-economic background, ethnicity and religion.¹⁶⁴

Where inequalities exist in a state’s documentary practices, such as those relating to birth registration, such inequalities can subsequently affect children’s ability to enrol in school. There is clear evidence that formal enrolment requirements – such as the requirement to submit a birth certificate or proof of residence – are resulting in the **discriminatory** exclusion of certain children from primary education.

Direct and Indirect Discrimination

The requirement to submit certain documents (such as a birth certificate, or residential papers) may be **indirectly discriminatory** on the grounds of ethnicity, social origin, descent, nationality and disability, since it puts children who share these protected characteristics at a particular disadvantage when compared to other children. This has been expressly recognised by the CESCR, which has commented that “requiring a birth registration certificate for school enrolment may indirectly discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates”.¹⁶⁵ However, in certain contexts, what appears at first glance to be indirect discrimination – namely, a neutral policy that has a disproportionately prejudicial effect on children who share certain characteristics, and which cannot be objectively justified – may in fact be a more pernicious form of **direct discrimination**, where the seemingly neutral policy is applied in such a way as to purposefully withhold access to education from certain children on the basis of their membership of a certain group.

161 United Nations Convention on the Rights of the Child (UNCRC), G.A. Res. 44/25, 1989, Article 7.

162 Plan International, *Count Every Child – Birth Registration Initiative*, visited 25 October 2017, available at: <https://plan-international.org/birth-registration/count-every-child-birth-registration>.

163 UNICEF, *Every Child’s Birth Right: Inequities and trends in birth registration*, 2013, p. 14, available at: https://www.unicef.org/media/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf.

164 *Ibid.*, pp. 22–29.

165 See above, note 12, Para 10(b).

Ethnicity and Descent

As noted above, UNICEF's research regarding unregistered children has indicated that **ethnicity** can impact on birth registration levels.¹⁶⁶ For example, studies indicate that **indigenous children** are less likely to have birth certificates than non-indigenous children in many countries, meaning they are disproportionately prejudiced by the requirement to submit formal documents in order to enrol in school. In the **Republic of Congo**, more than half of indigenous children do not have a birth certificate (as compared to 19% of the population as a whole),¹⁶⁷ whilst in **Cameroon** many indigenous children lack formal identity documents, including a birth certificate, meaning they are effectively excluded from accessing education.¹⁶⁸ Evidence suggests that this may be attributable to a combination of poverty, cultural beliefs (with some indigenous communities believing that children should not be officially named until they say their first word), and the inaccessibility of formal registration processes.¹⁶⁹ In **Guatemala**, indigenous women are reportedly discouraged from registering the birth of their children by the need to travel to urban areas and interact in a setting that they perceive to be culturally alien.¹⁷⁰ Such difficulties can be compounded where civil registries do not allow indigenous families to register their children with traditional names,¹⁷¹ or where indigenous names are misspelt on the child's birth certificate, thus causing issues for their future school enrolment.¹⁷²

Across Europe, Roma children's school attendance is impacted by the need to produce formal identity documents as a condition of enrolment. Many Roma children do not have birth certificates, which has been attributed variously to the socially isolated nature of the Roma lifestyle,¹⁷³ their lack of understanding of the need for such documents and knowledge as to how to obtain them,¹⁷⁴ and the incompatibility of formal identification documents with their nomadic lifestyle and customs.¹⁷⁵ Research from **Ukraine, Romania, and Bosnia and Herzegovina** has indicated that Roma children are frequently refused admission to schools as a result of being unable to produce the required identification docu-

166 See above, note 163, p. 22.

167 See above, note 39, p. 106.

168 Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2016, Events of 2015*, 2016, p. 87.

169 See above, note 39, p. 126; *Ibid.*; See above, note 163, p. 22.

170 See above, note 39, p. 126.

171 UNICEF, *The right to an identity: birth registration in Latin America and the Caribbean*, 2011, p. 7, available at: <https://www.unicef.org/lac/challenges-13-ECLAC-UNICEF.pdf>.

172 Equal Rights Trust focus group with child rights organisations in Cochabamba, Bolivia, 7th July 2017.

173 Equal Rights Trust, *In the Crosscurrents: Addressing Discrimination and Inequality in Ukraine*, 2015, p. 134, available at: <http://www.equalrightstrust.org/ertdocumentbank/In%20the%20Crosscurrents%20Addressing%20Discrimination%20and%20Inequality%20in%20Ukraine.pdf>.

174 See above, note 26, p. 39.

175 Hodzicm Lejla, Mr Sci. (*Anti*) *Discrimination of Roma Children in the Primary Schools of the Sarajevo Canton*, Sarajevo, 2013, p. 17.

ments.¹⁷⁶ Roma parents in *Greece* and *Turkey* also reportedly face difficulties in registering their children in schools; in Greece, parents are often unable to produce proof of residence (such as a utility bill) in order to register with the local authorities, as many Roma settlements are not connected to Greece's national power grid,¹⁷⁷ whilst in Turkey, the nomadic lifestyle of the Roma means they may not have a registered address.¹⁷⁸

A lack of identity documents affects a number of other groups across the globe. In *Yemen*, for example, children of the Al-Muhamseheen – a lower caste group which sits at bottom of the Yemeni socio-economic hierarchy – may be refused entry to school on the grounds that they do not have a birth certificate. In field research conducted by the Equal Rights Trust in Yemen, a number of Al-Muhamseheen children interviewed in Aden explained that members of the Al-Muhamseheen do not tend to have birth certificates, and that primary schools would not accept them as a result.¹⁷⁹

Children of Internal Migrants: China's "Hukou" System

Internal household registration systems can also impede children's ability to enrol in primary education. **China** operates a household registration system known as the *Hukou*, which designates a resident's status as being either rural or urban, and ties the provision of essential public services to *Hukou* status,¹⁸⁰ with only urban *Hukou* holders being eligible for social protection tied to their workplace. This system means that internal migrants with a rural *Hukou* do not have access to public services, despite working in a city,¹⁸¹ resulting in the children of these migrant workers facing discrimination in accessing free public education.¹⁸² Whilst the Chinese central government has taken steps to address this problem, some local governments still require migrant parents to pay "guest" school fees in order to enrol their child

176 See above, note 173, p. 139.

177 See above, note 168, pp. 177–178.

178 See above, note 76.

179 Equal Rights Trust interview with Nussri, Aden, Yemen, 21st October 2015; Equal Rights Trust interview with Noola, Aden, Yemen, 22nd October 2015; Equal Rights Trust interview with Makan, Aden, Yemen, 22nd October 2015.

180 Independent, "Outdated 'urban passports' still rule the lives of China's rural citizens", *Independent*, 13 January 2017, available at: <http://www.independent.co.uk/news/world/politics/outdated-urban-passports-still-rule-the-lives-of-china-s-rural-citizens-a7517181.html>.

181 The Diplomat, "China's Hukou Reforms and the Urbanization Challenge", *The Diplomat*, 22 February 2017, available at: <http://thediplomat.com/2017/02/chinas-hukou-reforms-and-the-urbanization-challenge>.

182 The Guardian, "Millions of Chinese rural migrants denied education for their children", *The Guardian*, 15 March 2017, available at: <https://www.theguardian.com/world/2010/mar/15/china-migrant-workers-children-education>.

in a public school,¹⁸³ and parents can also be required to submit extensive documentation in order for their children to be eligible for enrolment. In Beijing, for example, migrant parents wishing to enrol their child in a local school are required to submit dozens of residential and employment documents, which can pose an insurmountable barrier for many.¹⁸⁴ The CESCR and Committee on the Elimination of Racial Discrimination (CERD) have noted their concerns regarding the continued discrimination faced by internal Chinese migrants, including in access to education, with the CESCR calling on the Chinese government to abolish the *Hukou* system.¹⁸⁵

Nationality

As noted by the CESCR, non-nationals who do not possess identity documents may also face indirect discrimination on the grounds of **nationality** in registering in schools: whilst the requirement to provide identity documents applies to all children, it places non-national children at a particular disadvantage compared with other children. This amounts to indirect discrimination, unless it can be shown in each particular case that the requirement to provide residential papers is justified by a legitimate aim, and that the means of achieving that aim are appropriate and necessary.

This is a particular issue for the children of **migrants, refugees and asylum seekers**. The significant numbers of refugees fleeing recent and on-going conflicts in the Middle East has led to refugee children facing difficulties in accessing education in neighbouring countries on account of their lack of documentation. This is a particular issue for Syrian refugee children. The majority of Syrian refugees are hosted in **Turkey, Lebanon and Jordan**, although significant numbers of Syrian refugee children cannot attend school: 63% are out of school in Turkey, 80% in Lebanon, and 45% in Jordan.¹⁸⁶

Research conducted by Human Rights Watch has found that schools in Lebanon and Turkey can require refugee children to provide proof of grades or previous

183 *Ibid.*; UNESCO, *Rural-Urban Migration and Children's Access to Education: China in Comparative Perspective*, 2015, pp. 9-10, available at: <http://unesdoc.unesco.org/images/0023/002324/232466e.pdf>.

184 South China Morning Post, "China has 61 million left-behind children ... that's almost Britain's total population", available at: *South China Morning Post*, 2016 <http://www.scmp.com/news/china/economy/article/2038731/its-official-china-has-61-million-left-behind-children-thats>.

185 CESCR, *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, UN Doc. E/C.12/CHN/CO/2, 2014, Para 15; Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations of the Committee on the Elimination of Racial Discrimination*, UN Doc. CERD/C/CHN/CO/10-13, 2009, Para 14.

186 British Institute of International and Comparative Law, *Protecting Education in the Middle East and North Africa Region*, 2016, p. 219, available at https://www.biicl.org/documents/1263_protecting_education_in_the_mena_region_-_full_report_-_june_2016_web_version_v2.pdf?showdocument=1.

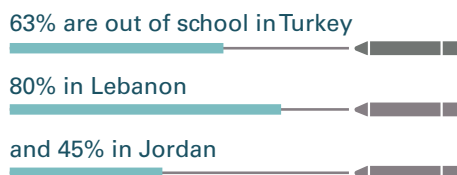
assessments in order to enrol in school, which these children do not possess.¹⁸⁷ Schools in **Iraq** also tend to require refugee children to produce documents from their former school in order to register.¹⁸⁸ Jordan requires both parental documentation and a Ministry of Interior card in order for children to register in schools, and also bars children who have been out of school for three or more years from enrolling, thus posing significant barriers for refugee children seeking access to primary education.¹⁸⁹ In **Egypt**, the authorities only permit refugee children from Syria and Sudan to enrol in government-run schools (thus directly discriminating against refugee children from other countries),¹⁹⁰ and many such children do not have the paperwork they need to enrol in school in any event.¹⁹¹ In **Iran**, around half a million Afghan children were out of school in 2015 due to the fact that they lacked identity documents; whilst the government issued an order in May 2015 requiring all schools in Iran to enrol Afghan children in school (including undocumented children of refugees and migrants),¹⁹² it has been reported that children without valid documentation still face difficulties in accessing education.¹⁹³

Refugee children out of school

The majority of Syrian refugees are hosted in Turkey, Lebanon and Jordan



Significant numbers of Syrian refugee children cannot attend school:



Children who are **stateless** – meaning they are “not considered as a national by any state under the operation of its law”¹⁹⁴ – can face significant difficulties in

187 See above, note 20, Human Rights Watch, p. 84.

188 See above, note 186, p. 116.

189 *Ibid.*, p. 224.

190 UNESCO, *No more excuses: Provide education to all forcibly displaced people*, 2016, p. 8, available at: <https://en.unesco.org/gem-report/no-more-excuses>.

191 See above, note 65, UNICEF, p. 81.

192 See above, note 186, p. 225.

193 See above, note 20, Human Rights Watch, pp. 84–85.

194 Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, 1954, Article 1. For further information, please see Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010, pp. 17–52, available at: <http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>.

enrolling in primary school, with this also giving rise to an inference of indirect discrimination on the grounds of nationality. In **Nepal**, for example, children are increasingly required to produce a birth certificate in order to register in schools, thus causing difficulties for children who have been unable to secure nationality through their mothers.¹⁹⁵ Research conducted by the Trust in **Indonesia** has also evidenced the difficulties in accessing education faced by stateless children who have not been granted identity documentation due to discriminatory nationality laws, with parents explaining that these children could not be enrolled in normal schools.¹⁹⁶ The Trust's research has also shed light on the significant difficulties faced by Rohingya children in gaining access to formal education, as they are unable to satisfy registration requirements due to their protracted situation of statelessness.¹⁹⁷ In **Thailand**, for example, stateless Rohingya parents are unable to register the births of their children unless they have a right of stay,¹⁹⁸ meaning that their children lack the birth registration documentation needed to enrol in schools. One parent explained:

*None of my four children got birth certificates, no documentation. We have tried to get birth certificates but are always rejected. My first two children went to school for 3 years, but the younger kids couldn't go to school because both parents are from Burma. Instead, they work in a market, informal labour that is not consistent, and sometimes they get arrested.*¹⁹⁹

The children of Kenyan Nubians, who are not traditionally registered as Kenyan at birth, have also faced difficulties in accessing educational services as a result of uncertainty surrounding their nationality. Their position was considered by the African Committee of Experts on the Rights and Welfare of the Child in the 2011 case of *Nubian Minors v Kenya*, in which the Committee found that there was a “*de facto* inequality” in Nubian children’s access to education as a result of their uncertain legal status as Kenyan nationals, meaning that their right to education had not been effectively recognised or adequately provided for.²⁰⁰

195 Equal Rights Trust, *My Children's Future: Ending Gender Discrimination in Nationality Laws*, 2015, p. 33, available at: <http://www.equalrightstrust.org/ertdocumentbank/My%20Children%27s%20Future%20Ending%20Gender%20Discrimination%20in%20Nationality%20Laws.pdf>.

196 *Ibid.*, p. 34.

197 Equal Rights Trust, *Confined Spaces: Legal Protections for Rohingya in Bangladesh, Malaysia and Thailand*, 2017, p. 50, available at http://www.equalrightstrust.org/ertdocumentbank/Confined%20Spaces_0.pdf.

198 *Ibid.*, p. 17.

199 Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, October 2014, p. 66, available at: <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Thailand%20-%20Full%20Report.pdf>; see above, note 197, pp. 200 and 211.

200 African Committee of Experts on the Rights and Welfare of the Child, *Nubian Minors v Kenya*, Communication No. Com/002/2009, 2011, Para 65.

In Focus:

Discrimination Faced by the Children of Haitian-Dominicans

In the *Dominican Republic*, many children of Haitian-Dominican descent face **discrimination** on the grounds of **nationality** in accessing primary education.

Whilst Dominican domestic law stipulates that children must not be denied education due to a lack of documentation proving their identity,²⁰¹ not all schools understand or apply this policy, and many continue to require documentation before allowing children to access education services.²⁰² This has a prejudicial effect on **Dominican children of Haitian descent**, who face difficulties obtaining government-issued birth certificates as a result of discriminatory nationality legislation which had the effect of depriving many Haitian-Dominicans of Dominican citizenship.²⁰³

The discrimination faced by Haitian-Dominican children in accessing education was challenged before the Inter-American Court of Human Rights (IACtHR) in the 2005 case of *Yean and Bosico Children v. the Dominican Republic*.²⁰⁴ The two complainants were children of Haitian-Dominican mothers who had been denied birth certificates, and so were unable to enrol in school. The IACtHR held that the state had violated the children's rights to equality and non-discrimination (*inter alia*) by refusing to issue birth certificates, and required the state to adopt measures to address this discrimination and to guarantee access to free education for all children regardless of background or origin. However, the ruling was denounced as "unacceptable" by the Dominican government and senate,²⁰⁵ and the discriminatory nationality legislation was upheld as valid by the Dominican Supreme Court in the same year.²⁰⁶ In 2013, the Constitutional Court ruled to retroactively remove

201 Law 130-03, Code for the System of Protection of the Basic Rights of Children and Adolescents 2003.

202 Georgetown Law Human Rights Institute, *Left Behind: How Statelessness in the Dominican Republic Limits Children's Access to Education*, 2014, p. 28, available at: http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/Left-Behind_HRI_Report-2014_English_Final.pdf.

203 See above, note 39, pp. 139-140; Georgetown Law Human Rights Institute, *Left Behind: How Statelessness in the Dominican Republic Limits Children's Access to Education*, 2014, p. 21, available at: http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/Left-Behind_HRI_Report-2014_English_Final.pdf.

204 Inter-American Court of Human Rights, *Case of the Yean and Bosico Children v. the Dominican Republic*, (Ser. C) No. 130, 2005.

205 European Network on Statelessness, "Inter-American Court condemns unprecedented situation of statelessness in the Dominican Republic", *European Network on Statelessness*, 17 October 2014, available at: <http://www.statelessness.eu/blog/inter-american-court-condemns-unprecedented-situation-statelessness-dominican-republic>.

206 *Ibid.*

citizenship from tens of thousands of people of Haitian descent, including children who were born in the Dominican Republic.²⁰⁷

Whilst sustained national and international advocacy efforts led the Dominican state to adopt a new naturalisation law in 2014 aimed at reinstating Dominican citizenship for those who lost it,²⁰⁸ rights organisations have criticised its effectiveness: the process requires notarised documents to be provided to the civil registry under strict deadlines, and many of the individuals affected do not have the economic means to access the process.²⁰⁹ As such, children of Haitian descent continue to suffer discrimination in education arising from their lack of documentation. Many such children continue to face obstacles to registering in schools,²¹⁰ with the lack of official documentation reportedly still posing a major barrier to education for children of Haitian descent.²¹¹

Disability

Formal enrolment requirements may also indirectly discriminate against **children with disabilities**, where such requirements cannot be objectively justified: children with disabilities are often vulnerable to non-registration at birth as a result of societal stigma surrounding disability,²¹² making them prone to exclusion from education on the basis that they lack the required documentation. This societal stigma can make parents reluctant to register the birth of a child with a disability, thus rendering that child “invisible” to educational providers.²¹³ In *Laos*, for example, research has found that many families do not

207 Human Rights Watch, “We Are Dominican Arbitrary Deprivation of Nationality in the Dominican Republic”, *Human Rights Watch*, 1 July 2015, available at: <https://www.hrw.org/report/2015/07/01/we-are-dominican/arbitrary-deprivation-nationality-dominican-republic>.

208 Human Rights Watch, “We Are Dominican Arbitrary Deprivation of Nationality in the Dominican Republic”, 1 July 2015, *Human Rights Watch*, available at: <https://www.hrw.org/report/2015/07/01/we-are-dominican/arbitrary-deprivation-nationality-dominican-republic>.

209 European Network on Statelessness, “No nationality, no rights – Statelessness affecting Dominicans of Haitian descent”, 15 October 2015, *European Network on Statelessness*, available at: <http://www.statelessness.eu/blog/no-nationality-no-rights-%E2%80%93-statelessness-affecting-dominicans-haitian-descent>.

210 Minority Rights Group International, *MRG statement to UN Human Rights Council on situation of Dominican children of Haitian descent in the Dominican Republic*, 2016, available at: <http://minorityrights.org/advocacy-statements/mrg-statement-to-un-human-rights-council-on-situation-of-dominican-children-of-haitian-descent-in-the-dominican-republic>.

211 See above, note 203, pp. 17–26.

212 Committee on the Rights of the Child (CRC), *General Comment No. 7: Implementing child rights in early childhood*, U.N. Doc. CRC/C/GC/7/Rev.1, 20 September 2006, Para 25; UNESCO and UNICEF, *A Human Rights-Based Approach to Education for All*, 2007, p. 58, available at: https://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf.

213 Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Birth registration and the right of everyone to recognition everywhere as a person before the law*, UN Doc. A/HRC/27/22, 17 June 2014, Para 68.

register the birth of a child with a disability due to the high degree of social stigma surrounding disability,²¹⁴ which can then be an impediment to subsequent school enrolment.

Socio-Economic Disadvantage

Children of **low socio-economic status** are also at an increased risk of lacking the formal documentation needed to enrol in school, meaning that the requirement to submit formal documentation is *prima facie* indirectly discriminatory on the grounds of socio-economic disadvantage. For example, poor children living in urban slums will often lack the residential papers required for school enrolment, and may not possess a birth certificate either.²¹⁵ Households surveyed in **Sri Lanka** cited “affordability and lack of knowledge of how to obtain documents” as being the principal causes of failures to enrol children in school,²¹⁶ whilst research from **India** suggests that poverty is a significant factor in the non-registration of births, with many families lacking the means to pay for birth registration.²¹⁷ Whilst the introduction of the RTE Act in India attempted to guarantee school enrolment for children lacking birth certificates, this legislation has not been fully implemented, with many schools still insisting that children submit birth certificates and other documentation.²¹⁸

In Focus: Primary Education for Street Children

Making access to services, such as primary education, contingent on providing formal identification documents may be detrimental to the realisation of the right to education of **street children**. The Committee on the Rights of the Child (CRC) has noted that the requirement to provide identification for school enrolment may be **indirectly discriminatory**, as it is liable to reduce access to education for street children who often cannot produce such documents.²¹⁹

It is difficult to gauge the number of street children in the world, due to “the transient lifestyle they lead” as well as the fact that the term “street child” is itself contested:²²⁰ according to the UN, this includes “those who

214 See above, note 26, Grimes, P., Kumar, K. and Stevens, M., p. 27.

215 See above, note 26, Kielland, A., p. 10.

216 See above, note 82, p. 62.

217 Human Rights Council, *IIMA and VIDES International Joint Stakeholders' Submission on The Situation on the Rights of the Child in India*, Universal Periodic Review of India, 13th Session (June 2012), p. 3, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session13/IN/JS3_UPR_IND_S13_2012_JointSubmission3_E.pdf.

218 See above, note 16, p. 52.

219 CRC, *General comment No. 21 on Children in Street Situations*, UN Doc. CRC/C/GC/21, 21 June 2017, Para 26.

220 Right to Education Project, “Street Children”, *Right to Education Project*, visited 4 August 2017, available at: <http://r2e.gn.apc.org/node/624>.

work on the streets as their only means of getting money, those who take refuge on the streets during the day but return to some form of family at night and those who permanently live on the street without a family network".²²¹ The UN estimates that there are up to 150 million street children around the world,²²² with studies indicating that many of these children have limited access to primary education. Given the challenges in identifying the number of street children, it is also difficult to provide reliable figures regarding the number of street children who are out of school. However, certain studies shed light on this: for example, a survey conducted in Nairobi, **Kenya**, which has an estimated population of 60,000 street children, indicated that only 39.5% of the interviewed street children were attending school, with the overwhelming number of children not participating in any kind of education.²²³

Whilst there are a number of factors that impede street children's access to education – including their increased risk of abuse, social stigma, and exploitation (including prostitution or trafficking)²²⁴ – they are also vulnerable to **lacking identity documents**, which poses a barrier to school enrolment. Street children disproportionately lack legal identification, such as ID-cards and birth certificates, which has been attributed to the tendency of parents not to register their children, in addition to bureaucratic and practical barriers.²²⁵ In **Indonesia**, for example, rates of civil registration amongst street children are very low: of the 94,000 street children living in Indonesia, 78% are reported to be unregistered.²²⁶ This affects their ability to access education, and compounds their vulnerability to exploitation and abuse.²²⁷

3.3.2 Testing and Assessment Procedures

Historically, the approach taken in relation to educating **children with disabilities** has been to segregate them into "special" schools, whereby children are assessed and classified according to their particular impairment, and then allo-

221 UNESCO, *Street Children*, visited 4 August 2017, <http://www.unesco.org/new/en/social-and-human-sciences/themes/fight-against-discrimination/education-of-children-in-need/street-children>.

222 *Ibid.*

223 Smile Foundation Kenya, *Analytical discussion - The street children of Kenya*, visited 20 September 2017, available at: <http://www.smilefoundationkenya.com/background/statistics-of-street-children.html>.

224 See above, note 221.

225 Consortium for Street Children, *Briefing Paper 2016: I move, Therefore I am Not – Exploring different conceptualizations of street-connected children's Identities*, 2016, p. 8, available at: http://streetchildren.org/wp-content/uploads/2016/05/CFSC_Briefing-Paper_April-2016_FINAL-Hi-res.pdf.

226 Plan International, "Registering Births Gives Access to Education", *Plan International*, visited 12 September 2017, available at: <https://plan-uk.org/donate/partnerships/private-sector/aviva/birth-registration-for-street-children>.

227 *Ibid.*

cated to a school that is “designed” to accommodate their impairments. This practice of segregating children with disabilities into special schools is **directly discriminatory**: as discussed in Chapter 1, the CRPD has made clear that the right to non-discrimination under the UNCRPD “includes the right not to be segregated”, and that states must instead ensure realise the right of persons with disabilities to education through an “inclusive education system”.²²⁸ Research indicates that good equality inclusive education “can remove learning barriers for every child, reduce out-of-school populations (...) and generally help tackle discrimination”.²²⁹

There is also evidence that children from ethnic and racial minorities who do not have any mental or intellectual impairments are at risk of being diverted into special schools, which can amount to **indirect discrimination**. For example, in the *United States*, African American students have been found to be over-represented in special education, often as a result of the misidentification of disability;²³⁰ some researchers have argued that this over-representation is a product of racialised notions of ability and merit, whereby students of colour are perceived as less capable than their white peers and are thus segregated into special education classes, which would amount to **direct discrimination**.²³¹ An Organisation for Economic Co-operation and Development (OECD) policy brief looking at equity in education across its 35 member states noted that migrant and minority children are disproportionately streamed into special schools, with concerns being raised regarding “cultural bias” in school selection processes.²³² In *England*, research suggests that the children of migrants are over-represented in special schools, with ethnic and cultural differences sometimes being interpreted by schools as learning disabilities.²³³ In *Germany*, migrant children are also over-represented in special schools, with difficulties in speaking the German language being cited as a cause for children being diverted into special education.²³⁴ It has been argued that the disproportional representation of migrant children in special education globally can be attributed to the “attempt to assimilate or colonialise groups by pathologising differences and treating them with special education interventions”.²³⁵

228 CRPD, *General Comment No. 6, Article 24: Right to inclusive education*, UN Doc. CRPD/C/GC/4, 2016, Paras 8 and 13.

229 See above, note 42, IDDC p. 14.

230 Gabel, S., Curcic, S., Powell, J., Khader, K. and Lynn, A., “Migration and ethnic group disproportionality in special education: an exploratory study”, *Disability & Society*, Vol. 24, No. 5, p. 628, citing Blanchett W. J., et al, available at: <http://www.tandfonline.com/doi/pdf/10.1080/09687590903011063?needAccess=true>.

231 Ferri, B.A. and Connor, D., “Tools of Exclusion: Race, Disability, and Resegregated Education”, *Teachers College Record*, 2005, available at: <https://tcrecord.org/library/abstract.asp?contentid=11795>; and Martin, C.E., “Disproportionality of African American students in special education: the influence of aversive racism on referrals”, *Iowa Research Online*, 2014, p. 26, available at: <http://ir.uiowa.edu/cgi/viewcontent.cgi?article=5400&context=etd>.

232 Organisation for Economic Co-operation and Development (OECD), *Policy Brief: Ten Steps to Equity in Education*, 2008, p. 5, available at: <http://www.oecd.org/education/school/39989494.pdf>.

233 Dyson, A., and Gallannaugh, F., “Disproportionality in Special Needs Education in England”, *The Journal of Special Education*, Vol. 42, No. 1, 2008, p. 36, citing Oswald D. P., et al.

234 See above, note 230, p. 635, citing Wagner S. J. et al.

235 *Ibid.*, p. 626.

In Focus: Segregation of Roma children

As explored in this Chapter, Roma children across Europe face a number of different forms of discrimination in primary education, with the Council of Europe describing the Roma community as “the most persecuted minority in Europe.”²³⁶ One of the most pernicious forms of discrimination against Roma children is the ongoing practice of school segregation, which is considered to be a major impediment to Roma children’s access to and quality of education.²³⁷

The issue of the segregation of Roma children in education has been considered by the European Court of Human Rights (ECtHR) in a number of cases (involving the Czech Republic, Hungary, Croatia and Greece), with the Court finding that racial segregation in schools amounts to **unlawful discrimination**.²³⁸ Nevertheless the practice persists.

The practice of segregation stems from the widely-held view that Roma children are less educated than non-Roma children, arising in part from their difficulties in understanding the language of instruction in schools (see section 3.5 below).²³⁹ It results in Roma children being sat separately from other students in class (**intra-class segregation**), being taught in Roma-only classes or units (**intra-school segregation**), or being placed in different schools to other non-Roma children (**inter-school segregation**).²⁴⁰ Where children are taught in separate classes or schools, they tend to have a substandard curriculum, under-qualified and fewer teachers, inadequate and unsafe infrastructure, and poor materials.²⁴¹

The practice of **inter-school segregation** can arise as a result of biased testing of Roma children before their entry into primary school. The placement tests for schools can be linguistically and culturally insensitive to the Romani culture, and are sometimes designed to distort evaluation scores.²⁴² In some contexts, this can result in Roma children being misdiagnosed as having an intellectual or learning **disability**, and

236 See above, note 40, 2016, p. 25.

237 European Commission, European Network of Legal Experts in the Non-Discrimination Field, *Report on discrimination of Roma children in education*, 2014, p. 5, available at: http://ec.europa.eu/justice/discrimination/files/roma_childdiscrimination_en.pdf.

238 See European Court of Human Rights (ECtHR), *D.H. and Others v Czech Republic*, Application No. 57325/00, 2007; ECtHR, *Oršuš and Others v. Croatia*, Application No. 15766/03, 2010.

239 See above, note 76, p. 44.

240 See above, note 237; Council of Europe, Commissioner for Human Rights, *Human rights of Roma and Travellers in Europe*, 2012, p. 123, available at: http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf.

241 See above, note 240, pp. 124–125; see above, note 26, p. 40.

242 See above, note 237, p. 5–6; See above, note 240, p. 125.

thus being diverted from mainstream schools into **special schools**.²⁴³ In **Turkey**, for example, it is reported that a disproportionate number of Roma children are judged not to be mentally “fit” for education in mainstream schools, and are sent to special education institutions with a diagnosis of mental disability.²⁴⁴ In **Serbia**, Roma children are stated to be overrepresented in special schools for children with intellectual disabilities, in what was described in 2010 as an “endemic problem”.²⁴⁵

In the case of *D.H. and Others v Czech Republic*, a number of Roma children complained that they had been discriminated against by being placed in separate special schools for children with mental deficiencies, even though they did not have mental disabilities. In 2007, the ECtHR noted that there was “a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them”,²⁴⁶ and went on to find that the disproportionate placement of Roma children in special schools amounted to **indirect discrimination** on the grounds of ethnic origin.²⁴⁷ In the more recent case of *Horváth and Kiss v Hungary*, relating to the misdiagnosis of two Roma children as having mental disabilities, the ECtHR noted in 2013 the importance of **positive action** in remedying the historic and systemic disadvantages faced by Roma children in education, stating that “the state has specific **positive obligations** to avoid the perpetuation of past discrimination or discriminative practices”.²⁴⁸

Research conducted by the Equal Rights Trust in **Moldova** found that Roma children are also subject to both **intra-class** and **intra-school segregation**, with one Roma mother explaining how her children had been sat at the back of the class and neglected by the teacher:

*I had a discussion with the teacher and told her to change her attitude towards Roma children, to mix them in different rows and benches, so that Roma children could learn from non-Roma. Unfortunately, the situation remained the same. The teacher explained that the parents of non-Roma do not want their children to sit with Roma children on the same benches. Also, my children often tell me that they feel humiliated and do not want to attend the school, because the teacher does not motivate and encourage them.*²⁴⁹

243 *Ibid.*, note 237; *Ibid.*, note 240, p. 123.

244 See above, note 76, p. 63.

245 Open Society Institute, *Roma Children in “Special Education” in Serbia: overrepresentation, underachievement and impact on life*, 2010, p. 18, available at: <https://www.opensocietyfoundations.org/sites/default/files/roma-children-serbia-20101019.pdf>.

246 See above, note 238, *D.H. and Others v Czech Republic*, Para 201.

247 See above, note 40,

248 ECtHR, *Horváth and Kiss v Hungary*, Application No. 11146/11, 29 January 2013, Para 116.

249 See above, note 41, pp. 50–51.

Similar practices have been reported in a number of countries across Europe, including in **Slovakia**, where Roma children are reportedly separated during both classes and breaks, with Roma children being given different (inferior) food to non-Roma children;²⁵⁰ in **Turkey**, where Roma students are placed in separate Roma-only classes in certain schools;²⁵¹ and in **Romania**, where non-Roma parents refuse to enrol their children in classes attended by Roma children.²⁵² In **Serbia**, the practice of intra-school segregation is reportedly justified on the grounds that Roma children do not understand or speak the official language in school; that they enrol in class late, and are therefore older than their classmates; and that parents of non-Roma children object to the presence of Roma children in class.²⁵³ In a survey of non-Roma children in **Bosnia and Herzegovina**, only 2.4% of students stated that they would be prepared to sit next to a Roma child in school.²⁵⁴ These discriminatory practices in schools reflect and reinforce the societal stigma faced by the Roma community, and perpetuates their position of socio-economic isolation and disadvantage.

3.3.3 Uniform Requirements

As discussed in section 3.1.1 above, the indirect costs of schooling, such as the requirement to wear an expensive uniform, can impact on children's primary education enrolment and drop-out rates, since such costs can impose a significant financial burden on families with limited resources. Research indicates that such indirect costs have a disproportionate impact on children from **low socio-economic backgrounds**, with girls, children with disabilities, and children from racial or ethnic minorities facing particular disadvantage.

Obligations to comply with a strict uniform policy may also be **indirectly discriminatory** on the grounds of **religion or belief** where the policy restricts or prohibits children from wearing items of clothing or symbols that are worn for religious or cultural reasons, and where it is not a proportionate means of achieving a legitimate aim. Whilst the discriminatory impact of uniform policies, such as the banning of the hijab, niqab and/or headscarf in schools, has received more attention in the secondary school setting,²⁵⁵ such policies also affect children in primary education. In the **UK**, for example, a Roman Catholic school was criticised in early 2017 for banning a four-year-old Muslim girl from

250 See above, note 39, pp. 19–20.

251 See above, note 76, p. 63.

252 See above, note 26, p. 40.

253 See above, note 245, pp. 41–42.

254 See above, note 175, p. 36.

255 See, for example, the ECtHR cases of *Dogru v France*, Application No. 27058/05, 2008, and *Kervanci v France*, Application No. 31645/04, 2008, which concerned the expulsion of two Muslim students from state secondary school after refusing to remove their headscarves during physical education classes.

wearing a religious headscarf in class,²⁵⁶ whilst an eight-year-old Sikh boy was recently reportedly threatened with exclusion from his primary school if he did not remove a Kara bangle, which was worn for religious reasons, on the grounds that he was in breach of the school's "no jewellery" uniform policy.²⁵⁷

In considering whether a particular uniform policy is indirectly discriminatory, the question of whether a child is put at a particular "disadvantage" as a result of the policy can be controversial where the wearing of the item in question is alleged not to be a "compulsory" requirement of the child's religion or culture. This issue was explored in the 2008 case of *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School & Anor*, which related to a secondary school in the UK's refusal to allow a Sikh girl to wear a Kara bangle at school.²⁵⁸ The UK High Court refused to accept the argument that a "particular disadvantage" could only be established where "a member of the group is prevented from wearing something which he or she is *required* by his or her religion to wear",²⁵⁹ finding that "the wearing of this item can be shown subjectively and objectively to be of exceptional importance to her religion and race as a Sikh even if not a requirement of the religion or race".²⁶⁰ The High Court also refused to accept the justifications put forward by the school, which included the fear that granting an exemption to the pupil in question would create further exceptions to the uniform policy, that it would be difficult to explain to other pupils, and that the policy was rigid so as to prevent bullying.²⁶¹

There may, however, be cases where uniform restrictions that are *prima facie* indirectly discriminatory can be justified; this must be determined on a case-by-case basis, looking at the reasoning behind the policy in each case, and scrutinising whether the policy is a proportionate means of achieving the aim in question.

3.4 Inadequacy of Physical and Human Resources

The discriminatory nature of many aspects of inadequate school infrastructure – including the inadequacy of school buildings and classrooms, poor sanitation facilities, and a lack of skilled teachers – contributes to children who share certain protected characteristics being out of primary education.

Addressing these issues is crucial to tackling the issue of out-of-school children: whilst eliminating the costs of schooling and formal entry requirements may result in an increase in enrolment rates, children will still be at risk of dropping out of pri-

256 Pells, R., "Catholic primary school bans four-year-old Muslim girl from wearing a hijab", *The Independent*, 24 January 2017, available at: <http://www.independent.co.uk/news/education/education-news/catholic-school-hijab-ban-headscarf-muslim-girl-birmingham-st-clares-primary-four-year-old-a7542926.html>.

257 Cranmer, F., "Kara bangles at school – again", *Law & Religion UK*, 4 October 2017, available at: <http://www.lawandreligionuk.com/2017/10/04/kara-bangles-at-school-again>.

258 *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School & Anor* [2008] EWHC (Admin) 1865.

259 *Ibid.*, Para 51.

260 *Ibid.*, Para 66.

261 *Ibid.*, Paras 78–79.

mary education unless sufficient and non-discriminatory investment is also made in school infrastructure and teaching resources. Indeed, an increase in the numbers of children participating in schools (resulting from the removal of fees, for example) puts pressure on existing school structures, meaning that investment in those structures is imperative.²⁶² Furthermore, even if education is “free”, parents are unlikely to consider the time investment to be worthwhile if the quality of school infrastructure and teaching is low.²⁶³ Inadequacy in school infrastructure also exacerbates problems arising in relation to geographical accessibility: where the most easily accessible schools are of a very poor quality, children may be required to travel long distances to reach schools that have adequate infrastructure and facilities, and the challenges – whether environmental, physical or social – that they face in undertaking such journeys may contribute to poor attendance and drop-out rates.

Direct Discrimination

Poor primary school infrastructure is often attributable to a failure on the part of the state to allocate sufficient resources towards quality school facilities and resources. Such a failure may amount to **direct discrimination** where a state has invested *unequally* in school infrastructure, and where the unequal allocation of state resources is related to one or more protected characteristics, such as **ethnicity** or **race**. In such circumstances, this inequality in state investment means that children sharing certain protected characteristics are treated less favourably than other children when it comes to accessing schools with adequate, quality infrastructure.

The unequal investment in education by the Israeli government, and the way in which this leads to certain children being out of school, provides an example of this type of discrimination in action:

In Focus: Direct Discrimination in School Infrastructure in Israel

According to data from the UNESCO Institute for Statistics, there were **20,605 children** of primary school age out of school in 2015.²⁶⁴ Given that statistics regarding out-of-school children in *Israel* also indicate that 0% of Israel-born Jewish children are out of school, whilst 1% of Israel-born Muslims are out of primary school,²⁶⁵ it can be inferred that

262 See above, note 26, Kielland, A., p. 27.

263 See above, note 20, UNESCO, p. 49; *UNESCO, EFA Global Monitoring Report 2009: Overcoming inequality: why governance matters*, 2009, available at: <http://unesdoc.unesco.org/images/0017/001776/177683e.pdf>; See above, note 14, p. 190.

264 UIS, *Education: Number of out-of-school children of primary school age*, visited 25 October 2017, available at: <http://data.uis.unesco.org>.

265 World Inequality Database on Education, *Israel Country Profile*, visited 25 Oct. 17, available at: <http://www.education-inequalities.org/countries/israel#?dimension=ethnicity&group=all&year=latest>.

a significant proportion of the population of out-of-school children are non-Jewish. This is supported by research indicating that many Palestinian Arab and Bedouin children are denied access to quality primary education in Israel,²⁶⁶ which puts these children at increased risk of dropping out of school and means that they complete fewer years of schooling than Jewish children.²⁶⁷ These disparities appear to be related to **directly discriminatory** governmental policies,²⁶⁸ which treated the Arab sector less favourably than other sectors (notably the orthodox Jewish, Druze and Circassian sectors) in terms of investment in school infrastructure.

In East Jerusalem, which was annexed by Israel in 1967, Palestinian children have a right to free public education under Israel's Compulsory Education Law. However, in practice, many of the 90,000 school-age Palestinian Arab children are denied access to schools,²⁶⁹ with around four thousand children reportedly not attending school at all.²⁷⁰ In the Naqab, Arab Bedouin villages have very few primary schools, and where they do exist they are reportedly overcrowded and lacking in basic amenities and facilities such as lavatories, electricity and telephone connections.²⁷¹ As noted in section 3.2 above, children in these villages are not provided with transportation to better-resourced schools in neighbouring towns, meaning many Bedouin children reportedly simply do not attend school.²⁷² Sikkuy, the Association for the Advancement of Civic Equality, has reported on the severe shortage of classrooms in the Arab education system generally, with evidence that some Arab students have to study in caravans, libraries, and laboratories that have been converted into classrooms.²⁷³

Official state data from 2004 indicated that the Israeli government provided three times as much funding to Jewish students as to Arab pupils, despite the fact that Arab children account for 25% of all children in Israel, thus resulting in poor school infrastructure and facilities for Arab children.²⁷⁴ This funding disparity derived from the use of "National Pri-

266 See above, note 20, Human Rights Watch, pp. 29–30.

267 See above, note 92, p. 33.

268 See above, note 20, Human Rights Watch, pp. 29–30.

269 See above, note 20, UNESCO, p. 157.

270 Ecumenical Accompaniment Programme in Palestine and Israel (EAPPI), *Education under occupation*, Factsheet No. 6, 2010, p. 1, available at: <http://wcc2006.info/fileadmin/eappi/files/resources/factsheets/006%20-%20Education%20under%20Occupation.pdf>.

271 See above, note 92, p. 14.

272 See above, note 93.

273 Arlozoroff, M., "An Arab child is equal to a ninth of a Jewish child", *The Marker*, 5 January 2016, available at: <http://www.themarker.com/news/1.2814645>.

274 See above, note 92, p. 5.

ority Areas” (NPAs), a system introduced in 1998 by Decision No. 3292, which classified certain towns and villages as being deserving of priority status when determining budgetary allowances, including for education. Of the 535 towns and villages defined as NPAs for the purpose of receiving benefits in education, only four were Arab, and all of these were small towns.²⁷⁵ Decision No. 3292 was challenged before the Israeli Supreme Court by Adalah, The Legal Center for Arab Minority Rights in Israel, an NGO which sought the cancellation of the Decision on the grounds that it divided the country into NPAs in an arbitrary and discriminatory manner.²⁷⁶ Adalah argued that, whilst the purpose of designating certain towns and villages as NPAs was ostensibly to help the economic development of poorer towns, Arab towns and villages were almost completely excluded from the NPA scheme, despite the fact that they ranked lowest in all socio-economic indices.²⁷⁷ Adalah argued that the “benefits in education should be universal and independent of ethnicity” and that the Decision had the effect of **discriminating on the basis of ethnicity** by giving benefits to certain sectors (the orthodox Jewish, Druze and Circassian sectors) whilst excluding the Arab sector.²⁷⁸

The Israeli Supreme Court ruled that the Decision constituted unlawful discrimination against Arab towns and villages, and ordered the government to set out clear rules and criteria regarding the classification of NPAs. After some delay, in 2009 the government enacted a new law regarding the designation of NPAs,²⁷⁹ which appeared to indicate a more equitable division of resources in Israel due to the inclusion of areas with high Arab populations in the southern and northern regions.²⁸⁰ However, this 2009 law provides that individual government ministers have discretion to decide which towns located within a NPA region will receive additional funding, which Adalah has argued is “liable to increase inequality between Jewish and Arab towns in relation to the allocation of NPA benefits”.²⁸¹

Concerns regarding discrimination in the funding of schools remain. In 2017, the education budget for Arab schools in East Jerusalem was 18

275 Adalah, *On the Israeli Government's New Decision Classifying Communities as National Priority Areas*, 2010, p. 3, available at <https://www.adalah.org/uploads/oldfiles/newsletter/eng/feb10/docs/english%20lay-out.pdf>.

276 *The High Follow-up Committee for the Arab Citizens in Israel, et. al. v. the Prime Minister of Israel*, HCJ 2773/98 and H.C. 11163/03, 2006.

277 *The High Follow-up Committee for the Arab Citizens in Israel, et. al. v. the Prime Minister of Israel*, HCJ 2773/98 and H.C. 11163/03, 2006, Para 3.

278 *The High Follow-up Committee for the Arab Citizens in Israel, et. al. v the Prime Minister of Israel*, HCJ 2773/98 and H.C. 11163/03, 2006, Para 3.

279 Israel, Government Decision No. 1060 of 13 December 2009.

280 See above, note 92, p. 16.

281 See above, note 275, p. 7.

million shekels, whereas the Jewish secular sector in the city received 54 million shekels, and the ultra-Orthodox Jewish schools were endowed with 37.4 million.²⁸² Similar disparities exist in classroom construction funding, with Arab schools receiving only 1.5 million shekels, compared to 9.5 million for the Jewish secular schools and 21 million for ultra-Orthodox schools.²⁸³ As a result, Arab schools in Jerusalem continue to be disadvantaged in funds allocation.²⁸⁴

There are other examples of states failing to allocate sufficient state resources to schools attended by children belonging to certain groups. In *Japan*, for example, research from 2009 reports that the government does not provide any subsidies to schools attended by what it considers to be “non-national” communities, including Japan’s ethnic Korean community.²⁸⁵ In recent years, both the CESC and CERD have expressed concern about the lack of funding allocated by local governments to Korean schools, with the CERD noting that this hinders the right to education of children of Korean origin.²⁸⁶ In *Malaysia*, primary schools are segregated into three types: national schools, type C schools for Chinese nationals, and type T schools for Tamil nationals.²⁸⁷ The distribution of state resources towards these schools has historically been “skewed”: national schools received most of the allocated state budget from 1972 until 2010, with type C and T schools receiving considerably less funding and investment in proportion to the student distribution ratio.²⁸⁸ The infrastructure of type C and T schools has suffered as a result, with many schools being in disrepair and lacking in basic facilities.²⁸⁹ Following his visit to Malaysia in 2007, the Special Rapporteur on the right to education noted that Chinese and Tamil communities expressed concern about the inequality in funding of national schools and type C and T schools.²⁹⁰

282 Hasson, N., “Enlarged Jerusalem Budget Gives Little to Local Arabs”, *Haaretz*, 9 March 2017, available at: <http://www.haaretz.com/israel-news/premium-1.776101>.

283 *Ibid.*

284 The New Arab, “Jerusalem’s Arab students ‘receive less funding than Jewish counterparts’”, *The New Arab*, 24 August 2016, available at: <https://www.alaraby.co.uk/english/society/2016/8/24/jerusalem-arab-students-receive-less-funding-than-jewish-counterparts>.

285 See above, note 39, p. 16.

286 CERD, *Concluding observations on the combined seventh to ninth periodic reports of Japan*, UN Doc. CERD/C/JPN/CO/7-9, 2014; CESC, *Concluding observations on the third periodic report of Japan*, UN Doc. E/C.12/JPN/CO/3, 2013.

287 Equal Rights Trust, *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia*, 2012, pp. 29–30, citing United Nations Human Rights Council, available at: <http://www.equalrightstrust.org/content/washing-tigers-full>.

288 Chee, A., *Institutions and Social Mobilization: The Chinese Education Movement in Malaysia, 1951–2011*, 2014, p. 74, available at: <https://bookshop.iseas.edu.sg/publication/2041>.

289 *Ibid.*

290 See above, note 287.

Indirect Discrimination

State policies regarding investment in school infrastructure may also be **indirectly discriminatory** where such policies are neutral at face value, but where they disproportionately affect the education of children who share certain protected characteristics without any objective justification. Whilst the question of objective justification must be determined on a case-by-case basis, it is worth noting that any argument based on the availability of state resources will be unlikely to succeed “unless every effort has been made to use all resources that are at the [state’s] disposition in an effort to address and eliminate the discrimination, as a matter of priority”.²⁹¹

Race and Ethnicity

Research indicates that there are often regional or localised disparities in the quality of school infrastructure, with schools in certain areas – such as rural or remote areas – lacking quality schools and/or teaching resources; this can impact on school attendance and drop-out rates. Where those areas are solely or predominantly populated by minority or other marginalised groups – such as children from certain ethnic or racial groups – the children belonging to those groups suffer disproportionately from poorly resourced schools, thus giving rise to an inference of **indirect discrimination** in school infrastructure.

A well-publicised example of this is the disparity in school infrastructure seen in **South Africa**, which disproportionately affects black children. This racial disparity has been described as a “legacy of the apartheid education system”, under which the apartheid government deliberately allocated significantly more resources to white schools than to schools attended by black children.²⁹² Whilst this directly discriminatory apartheid policy no longer exists, poor quality infrastructure remains a significant problem in former black-only schools: they suffer from extremely poor physical infrastructure, inadequate school supplies, and serious understaffing.²⁹³ These schools are situated in rural villages that are predominantly inhabited by poor black families, meaning that the pupils attending these schools are predominantly black children.²⁹⁴ The failure to provide these schools with adequate and safe infrastructure was challenged by the Legal Resources Centre (LRC) in what is known as the “Mud Schools” litigation. All of the schools under scrutiny had been classified as “mud schools” by the Department of Education due to the fact that they consisted of community-built classrooms made from mud and

291 See above, note 12.

292 Legal Resources Centre, *Ready to Learn? A Legal Resource for Realising the Right to Education*, 2013, p. 41, citing the Founding Affidavit in *Equal Education v Minister of Basic Education*, available at: <http://lrc.org.za/lrcarchive/publications/booklets/item/ready-to-learn-a-legal-resource-for-realising-the-right-to-education>; Spaull, N., “Poverty & privilege: Primary school inequality in South Africa”, *International Journal of Educational Development*, Vol. 33, No. 5, 2013, p. 436.

293 Open Society Justice Initiative, *Strategic Litigation Impacts: Equal Access to Quality Education*, 2017, p. 49, available at: <https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-education-20170322.pdf>.

294 See above, note 292, pp. 19 and 33.

branches; they also suffered from serious shortages of equipment, including desks and chairs, had no potable water, and were exposed to the elements, all of which had a significant impact on school attendance.²⁹⁵ In a series of two cases, the LRC sought to address the inadequacy of the mud-structure classrooms in primary schools in the Eastern Cape, arguing (*inter alia*) that the “the state’s provision of inadequate infrastructure at schools overwhelmingly affects black learners”, thus amounting to “**unfair indirect discrimination** on the grounds of race and ethnic and social origin” (emphasis added).²⁹⁶ The cases were ultimately settled, with the LRC subsequently overseeing the implementation of the government’s commitment to replace inadequate school structures across the country under the Accelerated Schools Infrastructure Development Initiative.²⁹⁷

Sri Lanka provides another example of potential indirect discrimination in relation to school infrastructure, whereby children descended from South Indian Tamil immigrants continue to suffer from historic disparities in educational infrastructure. Many children from these communities live in the Central Province of Sri Lanka, where their relatives previously worked as tea plantation labourers, and the infrastructure of the former plantation schools in this area remains highly inadequate compared to other schools.²⁹⁸ The percentage of children out of primary school in Sri Lanka is reportedly at its highest in plantation schools, standing at 9% as compared to the national average of 2%.²⁹⁹

Discriminatory disparities in school infrastructure extend beyond inadequate school buildings and facilities to encompass marked inequalities in teaching resources. In **Turkey**, for example, research indicates that the eastern and southern-eastern regions of the country – which are home to a number of different ethnic groups, including Kurds, Armenians, Chaldean Christians, Doms, Syrians and Yazidis – have more out-of-school children than Turkey as a whole; teachers noted that, given the reluctance to work in the poorly resourced schools in these regions, these schools ended up with the most inexperienced teachers.³⁰⁰ As such, the most marginalised children – who already face a number of barriers in education – are often taught by the most inexperienced teachers, increasing their susceptibility to school drop-out.³⁰¹

Gender

Inadequate investment in school water and sanitation facilities can sometimes be a significant factor in non-attendance and school drop-outs: an absence of sani-

295 See above, note 292, p. 19; Legal Resources Centre, *Fighting to Learn... A Legal Resource for Realising the Right to Education*, 2015, p. 7, available at: http://lrc.org.za/lrcarchive/images/pdf_downloads/publications/books/LRC_Fighting_to_Learn.pdf.

296 See above, note 295, p. 18, citing the Founding Affidavit of the Centre for Child Law in Mud schools.

297 See above, note 292, p. 20; *Ibid.*, p. 8.

298 See above, note 24, pp. 3–44.

299 *Ibid.*, p. 7.

300 See above, note 76, pp. 67–68.

301 See above, note 14, p. 196.

tary and hygienic conditions at school can increase susceptibility to disease, with studies evidencing the high levels of school absenteeism arising from illnesses caused by inadequate sanitation facilities.³⁰² Such issues affect all children; however, evidence indicates that poor school facilities and teaching resources have a disproportionate impact on **girls'** school attendance and drop-out rates. In particular, significant research has been undertaken regarding the way in which a lack of basic, quality school sanitation facilities (such as clean, private toilets and washing facilities) places girls at a particular disadvantage as compared to boys when it comes to school attendance.³⁰³ For example, research conducted in South East Asia has found that girls are less likely than boys to participate in primary education where school buildings are not clean and safe,³⁰⁴ with lack of water and sanitation facilities being cited as factors inhibiting school attendance.³⁰⁵ Research conducted by the Society for the Protection of the Rights of the Child in South Punjab, **Pakistan**, found that two thirds of schools in the area lacked functional washrooms, and that girls who lived near to school would go home to use the toilet and would sometimes not return to school, thus leading to absenteeism amongst girls.³⁰⁶

A lack of adequate sanitation facilities has a more pronounced discriminatory impact on girls' attendance rates when they reach puberty and start menstruating.³⁰⁷ Whilst this is more of an issue for girls in the secondary school context, it is nonetheless an issue in primary education settings. In some countries, children from marginalised groups, such as girls from ethnic minorities or indigenous communities, reportedly enrol in school later than their male peers, or have to repeat classes due to missing periods of schooling, and so may reach puberty whilst still in primary education.³⁰⁸ There is evidence that a lack of adequate sanitation facilities contributes to these girls dropping out of primary education; in **Vietnam**, for example, a lack of toilets can reportedly be "a great barrier that [makes girls from the J'rai ethnic minority] feel uncomfortable".³⁰⁹ Poverty can also exacerbate these difficulties, with research from East Africa indicating that girls who do not have access to adequate, private sanitation facilities at school, and who are also unable to buy sanitary products, may be more likely to stay at home and thus eventually drop out of school.³¹⁰

302 UNICEF, *WASH for School Children: State-of-the-art in Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka*, 2012, p. 2, available at: https://www.unicef.org/wash/schools/files/UNICEF_WASH_for_School_Children_South_Asia_Report.pdf.

303 See above, note 56, 2016, p. 36; UIS and UNICEF, *Fixing the Broken Promise of Education for All: Findings from the Global Initiative on Out-of-School Children*, 2015, p. 59, available at: https://www.unicef.org/education/files/allinschool.org_wp-content_uploads_2015_01_Fixing-the-Broken-Promise-of-Education-For-All-full-report.pdf.

304 See above, note 82, p. 59.

305 *Ibid.*

306 Khalti, S. A., "Education in Transition", *The News International*, 10 January 2016. available at: <http://tns.thenews.com.pk/education-transition-girls-dropout-increase-in-punjab>.

307 See above, note 3, p. 38.

308 See above, note 39, p. 73.

309 *Ibid.*

310 Abuya, B., Oketch, M. and Musyoka, P., "Why do pupils dropout when education is 'free'? Explaining school dropout among the urban poor in Nairobi", *Compare*, Vol. 43, No. 6, 2013, p. 753, available at: <http://www.tandfonline.com/doi/abs/10.1080/03057925.2012.707458>.

As above, it is not only poor physical infrastructure that impacts on the numbers of out-of-school girls: the availability of teachers can also have a particular impact on girls' school attendance and drop-out rates. Firstly, in some cultures, parents will only allow their daughters to attend school if they are taught by female teachers. In **Pakistan**, for example, parents living in rural areas allegedly prefer their daughters to be educated by women; however, the legacy of gender inequality in education, coupled with the difficulty in attracting high-skilled female teachers to teach in rural areas, means that there is a lack of qualified female teachers, thus affecting girls' school attendance.³¹¹ Secondly, teacher absenteeism can have a greater impact on the school attendance of girls than boys. In the case of *Constitutional Petition No. 37 of 2012 (Petition Regarding Miserable Condition of the Schools)*, in which the inadequacy of school infrastructure in Punjab, Pakistan, was challenged, the Supreme Court of Pakistan noted that the attendance of teachers in girls' schools was very low in some provinces,³¹² with the Court highlighting that "[t]he impact of teacher absenteeism is much stronger on girls than on boys because the demands for girls' education are more responsive to whether any learning actually takes place".³¹³

Disability

It is widely acknowledged that school infrastructure is often inadequate to ensure the inclusion of children with disabilities. This is indirectly discriminatory against **children with disabilities** where they are unable to physically access the school buildings and other facilities on an equal basis with other children. School classrooms and sanitation facilities are often inaccessible to children with physical disabilities, due to narrow doorways and a failure to install ramps and lifts.³¹⁴ Children with sensory impairments, such as children who are partially sighted or deaf, can also find that school buildings are inaccessible to them; for example, children with visual impairments may be unable to navigate their way around a school building without appropriate signage (including tactile signs), floor markings, hand rails and suitable lighting.

When considering the adequacy of school infrastructure, it is also important to consider the extent to which not only classroom facilities but also recrea-

311 See above, note 14, p. 68.

312 *Constitutional Petition No. 37 of 2012 (Petition Regarding Miserable Condition of the Schools)*, Supreme Court of Pakistan, 2013, Para 63.

313 *Ibid.*, Para 169, citing King, Orazem, and Paterno.

314 See above, note 130, p. 27. For example, a survey conducted in Zimbabwe with teachers, parents and caregivers indicated that the inaccessibility of classrooms and toilets were significant barriers to education for children with disabilities (see above, note 124, pp. 65), whilst research from India and Sri Lanka has also found that primary schools lack basic facilities such as ramps and toilets for children with disabilities (Singal, N., "Education of children with disabilities in India and Pakistan: An analysis of developments since 2000", *Background Paper for EFA Global Monitoring Report 2015*, 2015, p. 19, available at: <http://unesdoc.unesco.org/images/0023/002324/232424e.pdf>; See above, note 24, p. 41. In Kyrgyzstan, school buildings and classrooms are frequently inaccessible to children with disabilities; research suggests that teachers have difficulties including children with wheelchairs in their classes, and that toilets lack facilities for children with disabilities (See above, note 18, *Kyrgyzstan Country Study*, p. 47).

tional facilities are accessible to children with disabilities. The CRPD has made clear that states must promote accessibility “in play, recreation and sport” as well as in “extra-curricular activities”.³¹⁵ The CRC has also emphasised the importance of “inclusive play” for children’s educational development, with research indicating that play is a significant means through which children learn, particularly during the early stages of schooling.³¹⁶ Studies have shown that where children with disabilities are able to participate in “play” – including in extra-curricular activities – they are less likely to drop out of school.³¹⁷ Conversely, “inclusive play” can encourage school enrolment: an inclusive sports programme implemented in Northern *Uganda* in 2011, which aimed to increase access to support for children with disabilities, was found to increase local awareness of disability and, through changing perceptions and stigmas and fostering inclusion, encouraged many children with disabilities to enrol in school for the first time.³¹⁸

Failure to Make Reasonable Accommodation

Barriers arising from inadequate school infrastructure extend beyond issues of physical access: schools often lack the teaching facilities and resources – including properly trained teachers, and appropriate educational materials – to ensure the inclusion of all **children with disabilities**, including children with intellectual, mental or sensory impairments.

The failure to make physical and human resources available which accommodate the needs of children with disabilities is in breach of states’

What are “Reasonable Accommodations”?

According to the CRPD, “reasonableness” is “understood as the result of a contextual test that involves an analysis of the relevance and the effectiveness of the accommodation, and the expected goal of countering discrimination”.³¹⁹

Examples of accommodations can include changing the location of a class; providing materials in a different format or larger print; providing a note-taker or language interpreter; or allowing students to use assistive devices.³²⁰

315 See above, note 121, Para 56.

316 CRC, *General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts* (art. 31), UN Doc. CRC/C/GC/17, 2013, Para 27.

317 See, for example, Fisher, K., “The Importance of Extracurricular STEM Activities for Students with Disabilities”, *Proceedings of the Interdisciplinary STEM Teaching and Learning Conference*, Vol. 1, No. 2, p. 5, available at: http://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1002&context=stem_proceedings; Massoni, E., “Positive Effects of Extra Curricular Activities on Students”, *ESSAI*, Vol. 9, No. 27, 2011, p. 86, available at: <http://dc.cod.edu/cgi/viewcontent.cgi?article=1370&context=essai>.

318 Langford, T., “Building an inclusive community through disability sport”, *Bond*, 6 April 2017, available at: <https://www.bond.org.uk/news/2017/04/building-an-inclusive-community-through-disability-sport>.

319 See above, note 121, Para 27 (emphasis added).

320 *Ibid.*, Para 29.

duty to provide education free from discrimination. Under the UNCRPD, states' duty to promote equality and eliminate discrimination entails a duty to ensure that **reasonable accommodation** is provided for children with disabilities, meaning that states must make necessary and appropriate adjustments to facilitate the ability of children with disabilities to participate in school on an equal basis with others.³²¹ This includes "identifying and removing legal, physical, communication and language, social, financial and attitudinal barriers within the educational institutions and the community".³²² The CRPD has made clear that a failure to provide reasonable accommodation constitutes discrimination on the grounds of disability.³²³

Research suggests that a significant proportion of children with disabilities who are out of school could participate if school environments and facilities were adapted to accommodate their specific needs; according to Grimes et al, only 2-3% of all children with disabilities, who have more severe disabilities, require additional specialised support.³²⁴ However, in many countries, schools are simply not accommodating of children with disabilities, thus constituting a significant barrier to the realisation of their right to education.

Failures to ensure that teachers are adequately trained to teach children with disabilities are widespread. For example, in **India**, it is reported that teachers have not received training on how to be inclusive of children with disabilities – with a study conducted in Delhi finding that 70% of teachers had not received any such training and had no experience of teaching children with disabilities³²⁵ – and that educational materials for children with disabilities were "non-existent".³²⁶ In **Sri Lanka**, a 2011 survey found that, in addition to lacking facilities such as Braille equipment, teachers were insufficiently trained in inclusive education.³²⁷ Head teachers surveyed by the National Gender and Equality Commission in Kenya reported that they did not have enough teachers trained to teach children with disabilities, or that they had teachers trained in areas that were not relevant to the school, and that the government had failed to provide sufficient textbooks and learning aids for children with disabilities.³²⁸

As has been noted, the CRPD has made clear that the right to non-discrimination under the UNCRPD "includes the right not to be segregated".³²⁹ How-

321 United Nations Convention on the Rights of Persons with Disabilities, (UNCRPD), 2515 U.N.T.S. 3, 2006, Article 5(3); see Chapter 1, section 1.1.2, for a discussion of inclusive education.

322 *Ibid.*, Para 13.

323 *Ibid.*, Para 40(b).

324 See above, note 26, Grimes, P., Kumar, K. and Stevens, M., p. 17.

325 See above, note 314, Singal, N., pp. 22–23.

326 *Ibid.*, p. 19.

327 See above, note 24, p. 42.

328 National Gender and Equality Commission, *Access to Basic Education by Children with Disability in Kenya*, August 2015, p. 16, available at: <http://www.ngeckenya.org/Downloads/Access%20to%20Basic%20Education%20by%20Children%20with%20Disability.pdf>.

329 See above, note 228, Para 13.

ever, the failure – and sometimes, refusal – by schools to provide reasonable accommodation for children with disabilities in mainstream schools means that parents often have no choice but to send children to segregated schools or special boarding schools that are presented as catering for children with disabilities. As a result, many children with disabilities find themselves allocated to special-needs schools or institutions, which can have the effect of reinforcing the stigmatisation faced by children with disabilities.³³⁰ In Central and Eastern Europe and the Commonwealth of Independent States, for example, UNICEF reports that whilst there has been a trend towards inclusive education policy in the region, segregation of children with disabilities in special schools remains the norm in practice, meaning that most children with disabilities remain excluded from mainstream education.³³¹ In **Ukraine**, the Equal Rights Trust's research has found that the absence of inclusive education limits the choice of parents, who may have no option but to send their children to special boarding schools, where the quality of education is often extremely poor.³³² When conducting research in **Jordan**, a number of parents of children with Down's Syndrome told the Trust that few provisions, if any, are made for their children to attend public schools, with segregation being "the norm".³³³ However, such special schools may not be equipped to accommodate children with disabilities either. For example, a report by Section 27 looking at education provision for blind and partially sighted learners in **South Africa** found that certain special schools do not meet the infrastructural needs of visually impaired learners, and also lack the human resources and materials needed to teach these pupils effectively.³³⁴

Funding is a significant obstacle to ensuring that primary education accommodates the needs of children with disabilities: states and policymakers often perceive that it is simply too costly to accommodate children with disabilities in mainstream schools (despite evidence that inclusive education is in fact more cost-efficient than segregated or special schools),³³⁵ or consider that injecting funds into the education of children with disabilities is a bad investment.³³⁶ In the South African province of Kwa-Zulu Natal, where there are significant barriers to children with disabilities enjoying the right to education, Section 27 has reported that this may be due to "systematic problems" in obtaining the state funding needed to adapt "full-service" mainstream schools to accommodate

330 See above, note 14, p. 182.

331 UNICEF, *The Rights of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education in the CEECIS Region*, 2011, p. 12, available at: [https://www.unicef.org/ceecis/Background_NoteFINAL\(1\).pdf](https://www.unicef.org/ceecis/Background_NoteFINAL(1).pdf).

332 See above, note 173, p. 104.

333 Equal Rights Trust, *Shouting Through the Walls: Discriminatory Torture and Ill-Treatment. Case Studies from Jordan*, 2016, p. 54, available at: http://www.equalrightstrust.org/ertdocumentbank/Jordan%20report_ENG_0.pdf.

334 Section 27, *Left in the Dark: Failure to Provide Access to Quality Education to Blind and Partially Sighted Learners in South Africa*, 2015, available at: <http://section27.org.za/wp-content/uploads/2016/07/S27-left-in-the-dark-2015-accessible.pdf>.

335 See above, note 42, IDDC, p. 18.

336 See above, note 130, p. 28.

children with disabilities, with some schools reportedly receiving as little as 22,000 ZAR (approximately 1,635 USD) for spending on inclusive education.³³⁷

As with the indirect discrimination faced by girls in this context, the discrimination faced by children with disabilities in relation to school infrastructure is often exacerbated in conflict and other humanitarian crises:

In Focus: Children with Disabilities in Conflict and Humanitarian Crises

During conflict and humanitarian crises, the barriers faced by children with disabilities in accessing and completing primary education are exacerbated, with the CRPD noting that “[s]ituations of armed conflict, humanitarian emergencies and natural disasters disproportionately impact the right to inclusive education.”³³⁸

Whilst comprehensive data on the effects of such crises on the education of children with disabilities is limited,³³⁹ evidence indicates that these children tend to be overlooked in the registration systems of humanitarian aid providers, making them less likely to receive essential services such as education.³⁴⁰ Where temporary learning environments are established, they often do not have the facilities to accommodate children with disabilities. For example, in 2015, Human Rights Watch found that temporary schools set up by humanitarian actors in the **Central African Republic** did not provide reasonable accommodation for children with sensory, psychosocial and intellectual disabilities, and that schools also lacked adequate facilities for children with physical disabilities.³⁴¹ The difficulties faced by children with disabilities in conflict settings can be exacerbated by the fact that children who previously had access to support services and devices (such as wheelchairs) may lose them during conflict or other humanitarian disasters, which can further inhibit their access to education.³⁴² Interviews conducted by Handicap International in 2015 with a wide range of humanitarian actors showed that only 41% of the respondents found education services provided in the context of humanitarian aid to be accessible to children with disabilities.³⁴³

337 See above, note 125, p. 17.

338 See above, note 228, Para 14.

339 International Disability and Development Consortium (IDDC), *Access to Quality Educational Activities for Children with Disabilities in Conflict and Emergency Situations*, visited 10 May 2017, p. 4, available at: https://iddcconsortium.net/sites/default/files/resources-tools/files/inclusive_education_in_emergencies_august_18th_2008.pdf.

340 *Ibid.*, pp. 3–4.

341 See above, note 20, Human Rights Watch, p. 78.

342 See above, note 339, pp. 3–4.

343 Handicap International, *Disability in humanitarian contexts Views from affected people and field organisations*, 2015, p. 18, available at: <https://www.handicap-international.org.uk/publication/disability-in-humanitarian-context-views-from-affected-people-and-field-organisations>.

As a result of these issues, there is a high level of school drop-out amongst children with disabilities in conflict settings.³⁴⁴ Girls with disabilities appear to be disproportionately affected by education barriers during crises, with research showing that their drop-out rate is higher than that of boys.³⁴⁵ A lack of funding for dedicated disability projects has been cited as one of the main reason for these shortcomings.³⁴⁶ In addition, consultation with Disabled People Organisations at all levels of aid and crisis emergency planning is rare, resulting in knowledge and capacity gaps among humanitarian actors.³⁴⁷

3.5 Issues Surrounding Language, Curricula and other Educational Materials

As noted in Chapter 1, the form and substance of primary education must be “acceptable” if the right to education is to be fulfilled. This includes the requirements that education be culturally appropriate and respects diversity.³⁴⁸ However, in many contexts, the form and substance of education perpetuates discrimination and exclusion through being taught in a language that is inaccessible to some children, and through school curricula and other teaching materials being inflexible, irrelevant to, or disrespectful of the needs of particular children.

3.5.1 Language Barriers

Indirect Discrimination on the Grounds of Language

Whilst states are entitled to determine the language of instruction in primary schools,³⁴⁹ this must be compatible with states’ international human rights obligations, including their obligation to provide primary education to all children without discrimination. Certain children – in particular, children from ethnic and linguistic minorities – may suffer **indirect discrimination** on the grounds of **language** where the state’s policy regarding the language of instruction means

344 Women’s Refugee Commission, *Disabilities Among Refugees and Conflict Affected Populations*, 2008, p. 3, available at: <https://www.womensrefugeecommission.org/resources/document/609-disabilities-among-refugees-and-conflict-affected-populations>. See also: Global Partnership on Children with Disabilities, *Background Note for the Global Partnership on Children with Disabilities – Inclusive Humanitarian Action*, visited 10 May 2017, p. 2, available at: http://www.gpcwd.org/uploads/2/6/0/9/26097656/background_note_emergencies_for_gpcwd.pdf.

345 *Ibid.*, Women’s Refugee Commission, p. 26.

346 See above, note 343, p. 22.

347 International Disability and Development Consortium (IDDC), *Emergency & Humanitarian Assistance and the UN Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, visited 10 May 2017, pp. 4–5, available at: https://www.ucl.ac.uk/lc-ccr/lccstaff/maria-kett/iddc_conflict_and_emergencies_taskgroup.

348 Tomasevski, K., “Human rights obligations: making education available, accessible, acceptable and adaptable”, *Right to Education Primers*, No. 3, 2001, pp. 12–15, available at: http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf.

349 See above, note 212, UNESCO and UNICEF, p. 76.

they are unreasonably disadvantaged or excluded from participating in primary education on an equal basis with other children and that policy cannot be objectively justified.

Most education systems are designed to cater for the needs of the dominant group in society, with the language of instruction in schools therefore being the language of the dominant group; this means that children from non-dominant (usually minority) groups may either fail to enrol in school altogether, or be susceptible to drop-out.³⁵⁰ The Global Campaign for Education has noted that approximately 221 million children of primary school age from minority ethnic communities do not have access to education in a language they are able to understand.³⁵¹ This can have a significant impact on non-enrolment and drop-out rates, due to the disadvantage and exclusion children can face where they do not understand the language in school.³⁵²

The exclusionary nature of language is particularly evident in indigenous communities in Central and South America, where significant gaps exist between the educational attendance and completion rates of indigenous and non-indigenous communities.³⁵³ The mean number of years of schooling differs between indigenous and non-indigenous children by five years in Paraguay, 3.7 years in **Bolivia**, and 3.3 years in **Mexico**,³⁵⁴ with language barriers arising out of a failure to integrate indigenous languages into the education systems.³⁵⁵ In Bolivia, research indicates that indigenous children are three times more likely to drop out of primary school than non-indigenous children due to language barriers,³⁵⁶ resulting in only 55% of indigenous children completing primary school as compared with 81% of non-indigenous children.³⁵⁷

Indigenous and ethnic minority children living elsewhere in the world are also disadvantaged by the lack of access to primary schooling in their mother-tongue. In **Australia**, for example, significant numbers of indigenous children speak an indigenous language at home (as many as 58% in very remote areas of the country), with language barriers at school often causing difficulties for Aboriginal children in understanding classes, absorbing information and developing their

350 Benson, C., "School access for children from non-dominant ethnic and linguistic communities", *Background paper for Fixing the Broken Promise of Education For All*, 2014, p. 4, available at: <http://allinschool.org/wp-content/uploads/2015/01/OOSC-2014-Ethnic-linguistic-minorities-final.pdf>.

351 Global Campaign for Education, *Mother-Tongue Education: Policy Lessons for Quality and Inclusion*, 2013, p. 3, available at: http://www.campaignforeducation.org/docs/reports/GCE%20Mother%20Tongue_EN.pdf.

352 *Ibid.*, p. 4; See above, note 3, p. 40.

353 Lopez, L. E., "Reaching the unreached: indigenous intercultural bilingual education in Latin America", *Background Paper for the EFA Global Monitoring Report 2010*, 2010, pp. 6–7, available at: <http://unesdoc.unesco.org/images/0018/001866/186620e.pdf>.

354 *Ibid.*, pp. 33–34.

355 *Ibid.*, pp. 6–7.

356 See above, note 56, p. 44.

357 *Ibid.*, p. 37.

literacy and numeracy skills.³⁵⁸ In **Ukraine**, the majority of Crimean Tartar children are unable to receive an education in their native language, with only 15 out of 576 schools in Crimea being Crimean Tartar,³⁵⁹ and in **Kyrgyzstan**, ethnic Uzbek children are finding it increasingly difficult to be educated in Uzbek due to a reduction in the number of Uzbek language schools (which decreased from 141 in 2002 to 92 in 2012).³⁶⁰ In **Malaysia**, indigenous children have been marginalised by the replacement in schools of English and indigenous languages (such as Iban) with Malay,³⁶¹ whilst in **Thailand**, there are high drop-out rates among indigenous children due to a Thai-language policy in schools and the refusal of officials to implement mother-tongue education reforms.³⁶² In **Mongolia**, Kazakh and Tsaatan minorities are geographically isolated in the westernmost part of the country, and state policy to ensure that these minority communities receive education in their mother tongue is poorly implemented, with insufficient minority-language teachers and shortages in minority-language textbooks.³⁶³

Accommodating language difference can be a particular challenge in countries that have high levels of ethnic and linguistic diversity, and where multiple languages are therefore spoken. In **India**, for example, there are 234 mother-tongues, with the children of Scheduled Tribes often speaking different dialects to those spoken at regional or state level.³⁶⁴ Whilst the 2005 National Curriculum Framework recommends that local languages be used in the early stages of education, Sedwal and Kamat note “there has been no real attempt to develop educational materials using words and phrases from the local language or dialect”.³⁶⁵ Research indicates that these failures to adapt educational materials and to provide education in mother-tongue languages have had a detrimental impact on school attendance, with children from certain ethnic backgrounds being particularly affected.³⁶⁶ In **Laos**, where 27% of the population do not speak Lao as their mother-tongue, the constitution provides that the official language of instruction in schools is Lao.³⁶⁷ This poses a significant barrier to ethnic groups who do not speak Lao as their first language; there is a high drop-

358 See above, note 14, p. 201; National Children and Youth’s Law Centre, *Listen to Children*, 2011, pp. 25–26, available at: <http://www.ncylc.org.au/images/2011report.pdf>.

359 See above, note 173, pp. 150–151.

360 Equal Rights Trust, “Looking for Harmony: Addressing Discrimination and Inequality in Kyrgyzstan”, 2016, pp. 154–155, available at: http://www.equalrightstrust.org/ertdocumentbank/Kyrgyzstan_EN_0.pdf.

361 See above, note 287, p. 44.

362 See above, note 168, p. 143.

363 Mongolian Minorities NGO Coalition, *Submission to the Ninth Round of the Universal Periodic Review for Mongolia*, 2010, p. 1, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session9/MN/LGBTC_LGBTCenter_JS.pdf.

364 See above, note 82, p. 3; Sedwal, M. and Kamat, S., “Education and Social Equity: With a Special Focus on Scheduled Castes and Scheduled Tribes in Elementary Education”, *Consortium for Research on Educational Access, Transitions and Equity*, 2008, p. 36, available at: http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1023&context=cie_faculty_pubs.

365 *Ibid.*, Sedwal, M. and Kamat, S.

366 See above, note 82, p. 60.

367 See above, note 14, p. 200.

out rate at primary school level amongst these groups, and very few children transition to secondary school where Lao is not their first language.³⁶⁸ In **Turkey**, where there are a number of minority communities – including Armenian, Greek, Jewish, Syriac, Bosniak, Chechen, Georgian, and Kurd (not all of which are officially recognised) – the constitution provides that “[n]o language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of education”.³⁶⁹ As such, primary education is provided in Turkish, with the exception of 24 minority schools within the Greek, Jewish, Syriac and Armenian communities, which do not receive any state funding.³⁷⁰ Kurdish children face particular difficulties in learning in their mother tongue: whilst three Kurdish primary schools were opened in 2014, these do not have official status and there have been a number of attempts at closure.³⁷¹

The rights to equality and non-discrimination under international human rights law do not automatically oblige states to make education available to all children in their mother-tongue: as noted at a regional level by the ECtHR in the seminal *Belgian Linguistics* case, the right to non-discrimination in the enjoyment of the right to education “does not have the effect of guaranteeing to a child or to his parent the right to obtain instruction in a language of his choice”, since this would mean that it is “open to anyone to claim any language of instruction”.³⁷² Whether a state’s language policy is unlawful indirect discrimination will depend heavily on an assessment of whether its impact on minorities can be justified as proportionate. As part of this assessment, it is important to weigh the extent of the disadvantage and exclusion suffered by children as a result of not having access to education in a language that they can understand against the reason for having the language policy in question.³⁷³

As discussed above, there is significant evidence of the way in which language barriers impact upon children’s ability to participate in primary education. Conversely, research has shown that “the **proportionate** use of the language of minorities in education, combined with quality teaching of the official language” has a number of pedagogical benefits, including reducing drop-out rates, improving academic results, and improving literacy and fluency in both the mother tongue and the official or dominant language.³⁷⁴ Studies conducted in a number of countries have shown the significant benefits of mother tongue-based bilingual education

368 See above, note 212, p.76; see above, note 26, Grimes, P., Kumar, K. and Stevens, M., p. 23.

369 See above, note 76, p. 25.

370 *Ibid.*, p. 31.

371 *Ibid.*, pp. 40–41.

372 ECtHR, *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium*, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 1968, Para 11.

373 This will be central to the proportionality analysis that must take place in determining whether a state’s language policy can be justified by a legitimate aim, and whether the means of achieving that aim are appropriate and necessary: see United Nations Special Rapporteur on minority issues, *Language Rights of Linguistic Minorities: A Practical Guide for Implementation*, 2017, p. 18, available at: http://www.ohchr.org/Documents/Issues/Minorities/SR/LanguageRightsLinguisticMinorities_EN.pdf.

374 *Ibid.*

programmes, particularly where children receive bilingual education for at least the first six to eight years of schooling before transitioning to being taught in the official language.³⁷⁵

As noted in UNESCO's 2016 Policy Paper on language in education, it is imperative that such programmes be accompanied by efforts to ensure that teachers receive appropriate training in bilingual education, that children from ethnic minorities are provided with appropriate classroom support, and that curricula and teaching materials are inclusive of children from non-dominant language groups.³⁷⁷ For example, whilst **Paraguay** has a policy of educational bilingualism in primary education (Spanish/Guarani), it has been criticised in the past for failing to ensure that educational materials and school curricula address children's bilingualism, with educational materials being written predominantly in Spanish.³⁷⁸ Since then, the Paraguayan government has elaborated plans to develop educational materials in both indigenous and non-indigenous languages, and to design curricular and pedagogical proposals that are appropriate to different cultural needs.³⁷⁹

In assessing the question of **proportionality** in this context, the United Nations Special Rapporteur on minority issues has noted that countries effectively providing public education in minority languages have taken account of "the number and concentration of speakers of the language, the level of demand, prior use of the language as a medium of instruction and therefore availability of resources".³⁷⁶

Multiple Discrimination

Gender

There is evidence that language barriers intersect with gender inequalities to exacerbate disadvantage and exclusion, such that **girls** suffer multiple discrimination on the grounds of language and gender. It has been suggested that girls from minority language groups may have fewer opportunities than boys to learn the "official" language for reasons including gendered divisions of labour at home.³⁸⁰ In **Vietnam**, for example, boys from the H'mong ethnic group may be exposed to the Vietnamese language before they start school by virtue of accompanying their fathers during social activities, whereas H'mong girls are usually

375 *Ibid.* p. 7; UNESCO Global Education Monitoring Report, *If you don't understand, how can you learn?* Policy Paper 24, 2016, pp. 3–4, available at: <http://unesdoc.unesco.org/images/0024/002437/243713E.pdf>.

376 *Ibid.*, p. 14.

377 *Ibid.*, UNESCO Global Education Monitoring Report. See also the discussion of positive action at the end of this Chapter.

378 See above, note 353, p. 29.

379 Paraguay Ministry of Education, *Plan Nacional de Educación*, 2011, p. 69, available at: <http://www.becal.gov.py/wp-content/uploads/2015/10/2.%20Plan%20Nacional%20de%20Educacion%202024.pdf>.

380 See above, note 56, p. 37.

assigned to help with domestic and agricultural work and so do not have the same opportunities to learn Vietnamese.³⁸¹ Gendered assumptions regarding male and female educational attainment may also mean that girls from minority language groups who do not participate very much in class as a result of not understanding the language receive less support than their male counterparts due to teachers having lower expectations regarding their ability.³⁸² Research has shown that mother tongue language programmes having a higher impact on the attendance and drop-out rates of girls than boys,³⁸³ with girls' performance improving significantly when they are taught in their mother tongue, thus increasing the likelihood of continued education.³⁸⁴

Failure to Make Reasonable Accommodation

The UNCRPD requires states to take steps to ensure that **children with disabilities** can participate equally in education, and goes on to provide that states must ensure that the education of children who are blind, deaf or deafblind "is delivered in the most appropriate languages and modes and means of communication".³⁸⁵ This means that states must facilitate alternative means and formats of communication, including the learning of sign language.³⁸⁶ Research has indicated that the failure by states to make reasonable accommodation for the language needs of children with disabilities has a direct impact on enrolment and dropouts. In *Nepal*, for example, deaf children are more likely to drop out of schools because of the lack of sign language instruction,³⁸⁷ whilst in *Uganda*, deaf children are reported to drop out of school due to a lack of specialist support including teachers who are trained in sign language.³⁸⁸ The failure by mainstream schools to accommodate the needs of these children means that many are sent to special schools, thus increasing their marginalisation through school segregation.

3.5.2 Curricula and Educational Materials

Direct Discrimination

Research indicates that, in some contexts, the discriminatory content of school curricula and educational materials can impact on children's school attendance and drop-out rates. Where these materials treat or portray children who share

381 See above, note 39, p. 75.

382 *Ibid.*, p. 83.

383 See above, note 350, p. 73.

384 See above, note 373, p. 8.

385 UNCRPD, 2515 U.N.T.S. 3, 2006, Article 24(3)(c).

386 UNCRPD, 2515 U.N.T.S. 3, 2006, Article 24(3)(a).

387 Human Rights Watch, *Futures Stolen: Barriers to Education for Children with Disabilities in Nepal*, 2011, p. 38, available at: <https://www.hrw.org/sites/default/files/reports/nepal0811ForWebUpload.pdf>.

388 Chi, H., "Deaf Students Face Bullying and Lack of Sign Language in Uganda", *One World*, 2016, available at: <http://oneworld.org/2016/08/15/deaf-students-face-bullying-and-lack-of-sign-language-in-uganda>.

certain protected characteristics – such as ethnicity, or gender – less favourably than other children, this can amount to unlawful **direct discrimination**.

Ethnicity

There is evidence that school curricula and other teaching materials may create or perpetuate negative stereotypes surrounding ethnic minorities in a way that is **directly discriminatory** by, for example, denigrating, excluding or misrepresenting the history and contribution of minority populations. This can contribute to a sense of alienation and cause children belonging to these minority groups to question the relevance of – and thus the need for – formal education, thus making them more susceptible to dropping out of school.³⁸⁹

In some contexts, school curricula and resources are overtly denigrating of minorities; in **Turkey**, for example, non-Turkish communities are referred to negatively in teaching materials, with the Armenians portrayed as a group that once harmed and betrayed Turkey's national existence, and the Kurds being featured in textbooks under the heading "Harmful Societies".³⁹⁰ In **China**, whilst the Chinese authorities introduced a bilingual education system in 2011 to allow children from the Uyghur ethnic group to receive education in their mother-tongue and Mandarin, this has not been accompanied by equivalent curriculum reforms; the curriculum still affords little weight to Uyghur culture and history, and has thus been criticised for undermining Uyghur cultural identity.³⁹¹ A study conducted in **Chile** found that the representation of indigenous people in school textbooks failed to recognise their role as politicians, writers, ambassadors and researchers, thus obscuring and marginalising their participation and contribution to the country's current context.³⁹² In **India**, whilst primary education enrolment amongst children belonging to Scheduled Tribes has improved through the provision of schools near to tribal hamlets, the irrelevance of the curriculum to these children's culture – coupled with the inadequacy of school infrastructure – contributes to a sense of disillusion with formal schooling.³⁹³

Gender

Whilst discussion regarding the discriminatory nature of curricula and other educational materials tends to focus on the impact on ethnic minorities and indigenous communities, research has also indicated that gendered curricula and teaching materials can influence girls' retention rates.³⁹⁴ The CRC has noted

389 See above, note 39, p. 124.

390 See above, note 76, p. 23.

391 See above, note 168, pp. 156–157.

392 Cariman, G. A., *Intercultural Bilingual Education: Education and Diversity*, 2015, p. 7, available at: <http://www.unesco.org/fileadmin/MULTIMEDIA/FIELD/Santiago/pdf/APUNTE09-ING.pdf>.

393 See above, note 364, pp. 4–5.

394 See above, note 3, p. 41.

the fact that “gender discrimination can be reinforced by practices such as a curriculum which is inconsistent with the principles of gender equality”.³⁹⁵

For example, research conducted in Central and West Africa noted that teaching materials may contain both ethnic and gender biases, thus perpetuating discrimination and stereotypical gendered assumptions regarding women (in particular, regarding their domestic and reproductive roles) and men (in particular, regarding male aggression and violence).³⁹⁶ In **Armenia**, research has evidenced the discriminatory nature of school textbooks: women are portrayed in textbooks performing domestic chores such as cooking, sewing and cleaning, and are described as “introverted, timorous, submissive, gentle”; by contrast, men are described as “heroic” and “assertive”.³⁹⁷ As such, Armenian children are “introduced with the stereotype of a stratified system” and therefore “identify themselves in traditional gender roles”.³⁹⁸ Highly gendered teaching materials that present a narrow view of the expectations of girls’ educational attainment may inhibit girls’ completion of education, particularly when taken in conjunction with other discriminatory barriers faced by girls in accessing and completing primary education.

Failure to Make Reasonable Accommodation

Under the UNCRC states are required to ensure that reasonable accommodation of individual’s requirements are provided in education,³⁹⁹ meaning that states must ensure that school curricula and education materials are “adapted to different strengths, requirements and learning styles” such that all children are able to fulfil their potential.⁴⁰⁰ However, in many contexts, schools fail to adapt their curricula and educational material for **children with disabilities**, including children with mental, intellectual or sensory impairments, meaning that these children are not able to participate on an equal basis with other children. This impacts on primary school attendance and drop-out rates: in **Nepal**, for example, research conducted by Human Rights Watch highlighted that many children with disabilities were unable to attend school due to, amongst other reasons, a lack of adequate teaching materials (such as Braille materials) and failures to adapt the curriculum to address different learning needs, with all children being expected to follow the same lessons regardless of their learning abilities and needs.⁴⁰¹

395 CRC, *General Comment No. 1, The Aims of Education*, U.N. Doc. CRC/GC/2001/1, 17 April 2001, Para 10.

396 See above, note 107, p. 34.

397 Open Society Foundations Armenia, *Equity in General Education*, 2016, p. 3, available at: http://www.osf.am/wp-content/uploads/2017/01/OSFA_policy-paper_social-inequality_en_14-11-2016_LM_Final.pdf.

398 Open Society Foundations Armenia, *Equity in General Education*, 2016, p. 3, available at: http://www.osf.am/wp-content/uploads/2017/01/OSFA_policy-paper_social-inequality_en_14-11-2016_LM_Final.pdf.

399 UNCRPD, 2515 U.N.T.S. 3, 2006, Article 24(2)(b).

400 *Ibid.*, Paras 12(c), 21.

401 See above, note 387, pp. 9–10.

3.6 School-Based Violence and Harassment

School-based violence, bullying and harassment are prevalent in a number of primary education settings across the world, with the nature of the violence ranging from systemic sexual violence and abuse perpetrated by teachers, to in-school fighting between classmates. Research indicates that such violence can affect children's attendance at school, and thus contribute to drop-out rates, as well as causing serious psychological harm.⁴⁰² Where school-based violence occurs, children may drop out of school due to the fear of further violence, loss of motivation, and/or depression,⁴⁰³ and where parents are aware of such violence they may choose to withdraw children from school or not enrol them at all. For example, research conducted in **Cambodia** found that school-related violence increased the risks of drop-out, with one third of student victims reporting sadness or depression, and 15% reporting that they were afraid to attend school.⁴⁰⁴ Studies conducted in **Nigeria**, **Senegal** and **Benin** have evidenced the connection between school-based violence and drop-out rates, with children who are victims of sexual and other abuse being more likely to be absent from school.⁴⁰⁵

Research indicates that particular patterns of school-related violence and harassment can be identified, with children who share certain protected characteristics being especially vulnerable to such violence.⁴⁰⁶ This violence and harassment constitutes a state failure to protect those children from all forms of violence whilst in school under the UNCRC, and is also contrary to the purposes of education, which include "[t]he development of respect for human rights" and "[t]he preparation of the child for responsible life (...) in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples".⁴⁰⁷

Furthermore, where such conduct relates to a protected characteristic – such as gender, ethnicity, or disability – it can amount to **direct discrimination** and/or **harassment**, regardless of the intent behind such actions. As a matter of discrimination law, unlawful harassment may occur when unwanted conduct related to a protected characteristic takes place with either the purpose *or effect* of violating the dignity of a person, or of creating an intimidating, hostile, degrading, humiliating or offensive environment. Schools are not only responsible for discriminatory conduct or harassment carried out by their own personnel but also have an obligation to take appropriate action to prevent and deter such conduct

402 See above, note 107, p. 4.

403 *Ibid.*, p. 6.

404 Nandita, B., Achyut, P., Khan, N. and Walia, S., *Summary Report: Are Schools Safe and Gender Equal Spaces? Findings from a Baseline Study of School Related Gender-based Violence in five countries in Asia*, 2014, p. 38, available at: https://www.icrw.org/wp-content/uploads/2016/10/ICRW_SRGBV-Report--2015.pdf.

405 See above, note 107, p. 7.

406 Pinheiro, P. S., *World Report on Violence Against Children*, 2006, p. 17, available at: [https://www.unicef.org/lac/full_text\(3\).pdf](https://www.unicef.org/lac/full_text(3).pdf).

407 UNCRC, 1577 U.N.T.S. 3, 1989, Articles 19 and 29(1)(b) and (d). See also the World Declaration on Education for All, which stipulates that education should be designed to develop the capacities of children to "live and work in dignity": World Declaration on Education for All, 1990, Article 1.

and appropriately penalise it when it does take place. Accordingly, the school is not absolved of responsibility for discriminatory conduct or harassment by *pupils* or other third parties within the school context.

The patterns of violence and harassment identified in this section are reflective of broader societal discrimination and prejudice against marginalised groups, with schools thus creating an environment for further marginalisation of already vulnerable children, rather than providing a safe space for their learning and development. As such, the issues discussed in this section engage states' duty to take **positive action** both to protect vulnerable children from discriminatory violence and harassment and to eliminate the systemic conditions giving rise to such broader societal discrimination.

3.6.1 School-Related Sexual Violence

School-related sexual violence is a serious issue in a number of countries.⁴⁰⁸ In **Bolivia**, for example, a study found that there are at least 100 cases of sexual attacks on children at schools each day,⁴⁰⁹ whilst a recent study conducted in **Liberia** found that almost one fifth of children were subject to abuse (including sexual abuse) by school staff.⁴¹⁰ School-related sexual violence constitutes a grave violation of human rights and, where it is targeted at children who share certain protected characteristics, it is also in breach of the right to non-discrimination.

Gender

The rates and forms of violence that affect girls and boys differ,⁴¹¹ and it is not always the case that girls are more vulnerable to such violence than boys: the CRC has noted that “[g]ender discrimination can result in different patterns of risk and abuse suffered by boys and girls”.⁴¹² However, there is evidence that **girls** are more susceptible to school-related sexual violence and harassment than boys, and that this places them at a particular risk of dropping out of school.⁴¹³

Whilst girls are often at an increased risk of sexual violence once they reach puberty,⁴¹⁴ meaning that sexual violence is perhaps more prevalent in secondary school settings, it is still an issue in primary school settings and can lead

408 See above, note 406, p. 119.

409 See above, note 45, p. 5.

410 IBIS, Concern Worldwide, Norwegian Refugee Council and Save the Children, *Passing the test: the real cost of being a student*, 2014, available at: http://ibisliberia.org/sites/default/files/media/pdf_global/liberia_pdf/final_brochure-srghv-education_research_consortium-2014.pdf.

411 See above, note 56, p. 35.

412 CRC, *Report on the Twenty-Eighth Session*, UN Doc. CRC/C/111, 28 November 2001, Para 727.

413 Stromquist, N., “Out-of-school children: Why gender matters”, *Background Paper for Fixing the Broken Promise of Education for All*, 2014, p. 7, available at: <http://allinschool.org/wp-content/uploads/2015/01/OOSC-2014-Gender-and-education-final.pdf>.

414 See above, note 107, p. 26.

to absenteeism and eventual drop-outs. A study conducted in **Benin** found that 43% of girls in primary school knew of other female students who had left school because of gender-based violence perpetrated within schools,⁴¹⁵ whilst in the **Central African Republic**, teachers have been found to be perpetrating sexual abuse against girls in primary schools.⁴¹⁶ In **Nigeria**, some parents have been found to have withdrawn young girls from school due to fears that they will be sexually abused by male teachers and pupils.⁴¹⁷ Furthermore, as noted above in section 3.4, children may in fact reach puberty whilst still in primary education due to late enrolment and the repetition of classes, thus exacerbating the risks of sexual violence occurring in primary school settings. This can be a particular issue where adolescent children return to school to continue their education that has been disrupted by conflict: in **Liberia**, research indicates that the presence of adolescent boys in schools can render young girls vulnerable to sexual abuse and coercion.⁴¹⁸

Sexual violence in and around schools has also been found to increase in conflict settings more generally, creating a continuum with the violence taking place outside the classroom. Research conducted by Antonowicz in West and Central Africa noted that “authoritarian attitudes, gender and ethnic hierarchies are exacerbated due to the climate of violence” and that “traditional protection mechanisms” provided by families and communities may be disrupted,⁴¹⁹ thus increasing girls’ susceptibility to violence within schools. The presence of armed actors in and around schools during conflict can increase the vulnerability of girls to sexual harassment and abuse,⁴²⁰ and parental and student fears of sexual harassment by military actors can lead to girls dropping out of school prematurely and pre-emptively as a result of fears of becoming victims of gender-based and sexual violence.⁴²¹

Multiple Discrimination: *Disability*

Girls with **disabilities** may be particularly vulnerable to sexual violence in schools.⁴²² Antonowicz notes that it is difficult to determine the prevalence of sexual abuse against children with disabilities, since parents may be reluctant to report such abuse due to societal stigma surrounding disability.⁴²³ However, some research has been undertaken that sheds some light on this issue. For example, a study conducted in Luwero District, **Uganda**, found that children

415 *Ibid.*, 36, citing Sodjinou, E., Houeto-Tomety, A. and Tomety, S.

416 *Ibid.*, p. 23.

417 See above, note 48, p. 43.

418 Parkes, J., “Gender-based Violence in Education”, *Background Paper for EFA Global Monitoring Report 2015*, 2015, pp. 13-14, available at: <http://unesdoc.unesco.org/images/0023/002323/232399e.pdf>.

419 See above, note 107, pp. 26 and 34.

420 See above, note 143, p. 38.

421 *Ibid.*, pp. 38 and 45.

422 See above, note 107, p. 26.

423 *Ibid.*

with disabilities were three to four times more likely to suffer violence than children without disabilities,⁴²⁴ with boys with disabilities reporting twice as much sexual violence as boys without disabilities, and girls with disabilities reporting nearly twice as much sexual violence as boys with disabilities.⁴²⁵

3.6.2 Corporal and other Physical Punishment

Direct Discrimination and Harassment

The CRC has noted that education “must be provided in a way that respects the inherent dignity of the child (...) respects the strict limits on discipline (...) and promotes non-violence in school”, and has emphasised that corporal punishment is incompatible with the Convention.⁴²⁶ However, corporal punishment remains prevalent, despite the fact that it has now been widely prohibited, with laws banning corporal punishment often being poorly enforced.

Given that corporal punishment is only applied to or permitted in respect of children, it is arguably discriminatory on the grounds of age, since it allows the application of physical punishment and violence which would otherwise be prohibited were the person an adult. Research also indicates that children who share certain protected characteristics are more vulnerable to experiencing corporal punishment than other children.

Research suggests that children who are subject to corporal punishment in schools are more likely to drop out,⁴²⁷ with this often being cited by children as a reason for failing to attend or dropping out of school.⁴²⁸ In **Kenya**, a study of schools in two slum areas found that violence was being perpetrated by teachers against students, despite Kenya having banned corporal punishment in 2001, thus contributing to pupil drop-outs.⁴²⁹ Research conducted in a number of Sub-Saharan African countries also found that corporal punishment was stated to be a reason for children dropping out of school,⁴³⁰ whilst children in **Sri Lanka** cited “harsh punishments” – including being made to kneel outside in the sun –

424 Devries, K., Kyegombe, N., Zuurmond, M., Parkes, J., Child, J., Walakira, E. and Naker, D., “Violence against primary school children with disabilities in Uganda: a cross-sectional study”, *BMC Public Health*, Vol. 14, 2014, pp. 1–2, available at: <https://bmcpublihealth.biomedcentral.com/track/pdf/10.1186/1471-2458-14-1017?site=bmcpublihealth.biomedcentral.com>.

425 *Ibid.*, p. 5.

426 CRC, *General comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, CRC/C/GC/8, 2007, Para 7.

427 See above, note 20, Human Rights Watch, pp. 42–44.

428 Global Initiative to End All Corporal Punishment of Children, *Corporal punishment of children: summary of research on its impact and associations*, 2016, p. 8, available at <http://www.endcorporalpunishment.org/assets/pdfs/research-summaries/Summary-research-effects-corporal%20punishment-June-2016.pdf>.

429 Mudege, N. N., Zulu, E. M. and Izugbara, C., “How insecurity impacts on school attendance and school drop out among urban slum children in Nairobi”, *International Journal of Conflict and Violence*, No. 1, 2008, p. 107.

430 Humphreys, S., “Gendering corporal punishment: beyond the discourse of human rights”, *Gender and Education*, Vol. 20, No. 5, 2008, p. 527, available at: <http://www.tandfonline.com/doi/full/10.1080/09540250701797150?scroll=top&needAccess=true>.

as reasons for non-attendance at school.⁴³¹ In **Yemen**, corporal punishment is widespread in schools – in particular beatings with sticks – with such punishment affecting pupil retention.⁴³² A recent study by the Global Initiative to End All Corporal Punishment of Children has also shed light on the negative effects of school corporal punishment on children’s learning and their psychosocial well-being more generally.⁴³³

Gender

Statistics suggest that **boys** are likely to experience more and harsher forms of corporal punishment than girls.⁴³⁴ Research from **Mauritania**, **Senegal** and **The Gambia** has indicated that over half of primary school children have been subject to corporal punishment,⁴³⁵ but that Koranic scholars (who are predominantly boys) are particularly at risk.⁴³⁶ In **Mongolia**, boys are more likely to be victims of corporal punishment by teachers due to cultural perceptions that they are “tough or unruly” and therefore in need of physical discipline, thus increasing the chances that they will drop out of school prematurely.⁴³⁷ Research conducted in **India** found that 82% of seven to eight year old boys had experienced corporal punishment in the previous week at school, as compared with 72% of girls, with physical punishment being associated with “toughening up” boys.⁴³⁸ In Sub-Saharan Africa there is evidence that boys and girls are subject to different forms of corporal punishment, with girls being caned on the backs of their calves and palms, whilst boys may be caned on the buttocks.⁴³⁹ Gendered differences in the infliction of corporal punishment have also been highlighted in research conducted in **Egypt**, **Barbados**, **China** and **Botswana**.⁴⁴⁰

Race, Ethnicity and Descent

There is also evidence to suggest that children from **racial and ethnic minorities** are targeted for punishment in schools, or are subject to more severe or degrading punishments than other children.⁴⁴¹ In the **United States**, where corporal punishment is still lawful in 19 states, there is evidence that African-Amer-

431 See above, note 24 p. 41.

432 See above, note 57, p. 71.

433 Global Initiative to End All Corporal Punishment of Children, *Corporal punishment of children: review of research on its impact and associations*, 2016, p. 8, available at <http://endcorporalpunishment.org/research/impact-corporal-punishment.html>.

434 See above, note 101, p. 173; See above, note 406, p. 112.

435 See above, note 107, p. 5.

436 *Ibid.*

437 Hepworth, F., *Why are Boys Under-Performing in Education? Gender Analysis of Four Asia-Pacific Countries*, 2013, p. 3, available at: https://www.unicef.org/eapro/report_why_are_boys_underperforming_FINAL.pdf.

438 See above, note 418, pp. 11–12.

439 See above, note 430, p. 531.

440 See above, note 406, p. 118.

441 *Ibid.*

ican children are disproportionately subject to corporal punishment;⁴⁴² statistics from the states that use corporal punishment on more than 1,000 students per year have shown that African-American students are more likely to be beaten than white students, with African-American girls being 2.07 times as likely to be beaten than white girls.⁴⁴³ In **Malaysia**, children from the Orang Asli ethnic group are reportedly subject to increased physical abuse and punishment than other children, with one report noting that an Orang Asli student had been forced to eat broken glass as a punishment for accidentally breaking a glass window in a school.⁴⁴⁴

Children from **lower castes** are also more likely to experience corporal punishment than other children. In **India**, Dalit and Adivasi primary school children are vulnerable to abuse and corporal punishment by upper-caste teachers as a result of endemic social and cultural discrimination against lower-caste children.⁴⁴⁵ Sedwal and Kamat give the following example of the discriminatory treatment of some lower-caste children who were admitted to a school in Lucknow:

*A few months later, all of them had dropped out. The teacher beat them. Called them stupid. And rarely taught them anything. None of them could read or write after six months in school. They were now out every morning collecting plastic from garbage dumps. Earning Rs. 20-30 a day, they went to the movies sometimes. School was a distant dream, with not very pleasant memories.*⁴⁴⁶

In **Bangladesh**, Dalit children are also reported to be given degrading punishments that are “considered befitting for them”, such as cleaning toilets.⁴⁴⁷

Disability

Children with **disabilities** are also at greater risk of being victims of corporal or other forms of cruel and degrading punishment than children without disabilities. In West and Central Africa, evidence indicates that children with intellectual disabilities – such as autism and dyslexia – are vulnerable to being physically punished due to their poor performance in school.⁴⁴⁸ Research from the **United States** also suggests that children with disabilities are at greater risk of being

442 Anderson, M. A., “Where Teachers Are Still Allowed to Spank Students”, *The Atlantic*, 15 December 2015, available at: <https://www.theatlantic.com/education/archive/2015/12/corporal-punishment/420420>.

443 Human Rights Watch and ACLU, *A Violent Education: Corporal Punishment of Children in U.S Public Schools, Executive Summary*, 2009, p. 6, available at: https://www.aclu.org/files/pdfs/humanrights/aviolenteducation_execsumm.pdf.

444 PUSAT KOMAS, *Malaysia Racial Discrimination Report 2016*, 2017, p. 8, available at: <http://komas.org/v2/wp-content/uploads/2016/03/Malaysia-Racial-Discrimination-Report-2016.pdf>.

445 See above, note 418, pp. 11–12; See above, note 20, UNESCO, p. 5.

446 See above, note 364, p. 35, citing Thekaekara, M.M.

447 See above, note 39, p. 18, citing Buhathakurta, M., available at: <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-649-Full-text.pdf>.

448 *Ibid.*, p. 19, citing Bih, E., et al.

subject to corporal punishment, with this increasing the likelihood of school avoidance and drop-out.⁴⁴⁹ Human Rights Watch and American Civil Liberties Union have noted that students in the United States with physical and intellectual disabilities are disproportionately subject to corporal punishment, which can in some cases exacerbate the child's underlying condition.⁴⁵⁰ In **Australia**, reports have noted the use of physical and other degrading punishments against children with disabilities, including the physical restraining of children and the use of solitary confinement, with the Western Australia Department of Education approving the confinement of 19 primary school children with intellectual disabilities in unfurnished "time out" rooms in 2012.⁴⁵¹ In 2015, a 10 year-old primary school child with autism was reported to have been put inside a cage-like metal structure in a classroom in Australia that served as a "time out" space, which resulted in widespread condemnation.⁴⁵²

3.6.3 Harassment, Bullying and other Abuse

In addition to experiencing physical violence, many marginalised children are subject to psychological violence, harassment, bullying and other degrading treatment by their teachers and fellow classmates, including through teachers' classroom attitudes and teaching methods, which can affect their school attendance and increase their vulnerability to dropping out of primary education. Where such conduct relates to a protected characteristic, it can amount to **direct discrimination** and **harassment**.

Race, Ethnicity and Descent

Children from **ethnic minorities** are reported to face bullying and harassment at school by both teachers and fellow pupils. There is evidence that they are often sat at the back of the class, ignored by teachers during classes, and neglected during the distribution of school materials.⁴⁵³ In **Vietnam**, research conducted regarding the Bahnar, H'mong, J'rai and Khmer ethnic groups found that children from these groups are bullied at school and told they are "very ugly",⁴⁵⁴ whilst children from the Orang Asli ethnic group in **Malaysia** are also reportedly abused and neglected by teachers.⁴⁵⁵ In the **Central African Republic**, children report being subject to bullying on the basis of ethnicity, with this particularly affecting children from indigenous communities,⁴⁵⁶ whilst in **Botswana**, children from the

449 See above, note 20, Human Rights Watch, pp. 42–44.

450 See above, note 443, p. 7.

451 Global Initiative to End All Corporal Punishment of Children, *Corporal punishment of children in Australia*, 2017, p. 7, available at: <http://www.endcorporalpunishment.org/assets/pdfs/states-reports/Australia.pdf>.

452 See above, note 20, Human Rights Watch, p. 44; The Journal.ie, "Child with autism 'kept in cage-like structure' inside classroom", *The Journal.ie*, 2 April 2015, available at: <http://www.thejournal.ie/special-needs-cage-australia-2027374-Apr2015>.

453 See above, note 39, p. 18, citing Buhathakurta, M.

454 *Ibid.*, p. 76, citing Buhathakurta, M.

455 See above, note 444.

456 See above, note 107, p. 32, citing Bih, E. and Acka, C.

Basarwa group have unusually high drop-out rates as a result of the prejudice and bullying they face.⁴⁵⁷ Research from **Australia** indicates that Aboriginal students and students of Torres Strait Islander descent are susceptible to verbal abuse and bullying due to their indigenous status, with this having a significant influence on school attendance.⁴⁵⁸

Bullying and harassment of Roma children and other Traveller children is also prevalent across Europe. There is evidence that Roma students in **Ukraine** are often subject to abuse in schools, which may result in children failing to attend school. In research conducted by the Trust, one mother described how her daughter was treated “coldly” and humiliated by some teachers, with both teachers and classmates also mocking her clothing and appearance and calling her “stupid gypsy”.⁴⁵⁹ Similar abuse and harassment has been reported in **Turkey**, where children are verbally abused by other children because of their appearance, being called “dirty gypsy”.⁴⁶⁰ In **Bosnia and Herzegovina**, the bullying and verbal aggression suffered by Roma children means they are often afraid to speak in class.⁴⁶¹ A case was reported of a Roma brother and sister who were continuously bullied by other students in a school in central Sarajevo, including being forced to eat out of a rubbish bin, with these students receiving no assistance from teachers despite asking for help.⁴⁶² In the **UK**, Roma and Irish Traveller children are much more likely to be absent from school than children from other ethnic groups;⁴⁶³ research regarding Irish Traveller children in Northern Ireland has found that children are bullied and suffer hostile treatment from teachers,⁴⁶⁴ with teachers failing to take steps to address such bullying.⁴⁶⁵ One primary school child explained that she had not been attending school “because all the people were shouting at me and I don’t like it”.⁴⁶⁶

There is ample evidence regarding the discrimination and harassment suffered by children on the grounds of **descent**, with evidence of children being verbally abused, made to perform menial and degrading classroom chores, and physically separated from other children. In **India**, there is extensive research regarding

457 See above, note 406, p. 135.

458 *Ibid.*; The Conversation, “Indigenous students skipping school to avoid bullying and racism”, *The Conversation*, 10 April 2014, available at: <https://theconversation.com/indigenous-students-skipping-school-to-avoid-bullying-and-racism-25433>.

459 See above, note 173, p. 139.

460 See above, note 76, p. 65.

461 See above, note 175, p. 40.

462 See above, note 175, p. 44.

463 Department for Education, *Improving the outcomes for Gypsy, Roma and Traveller pupils: final report*, 2010, p. 24, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181669/DFE-RR043.pdf.

464 Bloomer, F., Hamilton, J., Potter, M., “Challenges and barriers in primary school education: the experiences of Traveller children and young people in Northern Ireland”, *Education, Citizenship and Social Justice*, Vol. 9, No. 1, 2014, p. 4, available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.979.2089&rep=rep1&type=pdf>.

465 *Ibid.*, p. 7.

466 *Ibid.*, p. 12.

the discrimination and neglect suffered by lower-caste children within schools, and the way in which such humiliating and degrading treatment can lead to children dropping out of primary education.⁴⁶⁷ Studies suggest that Scheduled Caste children are often made to sit separately from other children in the classroom,⁴⁶⁸ and to wait until other children have had lunch before being allowed to eat.⁴⁶⁹ Research conducted in Harda, India, found that primary school children from the Korku Scheduled Tribe were tasked with menial chores such as sweeping the school, whilst other lower-caste children were required to serve water to the teacher.⁴⁷⁰ Lower-caste children have also been reported to suffer from verbal abuse from teachers, who manifest deeply entrenched social prejudices against children from Scheduled Castes and Scheduled Tribes, with children being called “untouchable” or “stupid”.⁴⁷¹ Research conducted by Human Rights Watch found that children belonging to the Ghasiya tribal community have reported being called “dirty” by both their teacher and by other children, sometimes on a daily basis.⁴⁷² There is evidence of similar harassment and demeaning attitudes towards low-caste children in *Bangladesh*⁴⁷³ and *Nepal*.⁴⁷⁴

In *Yemen*, Muhamasheen children also face discrimination based on **descent** or **colour** in primary schools, where they experience harassment and abuse from teachers and students.⁴⁷⁵ There have also been reports that Muhamasheen children are made to collect the rubbish in schools “due to their perceived role as garbage collectors”.⁴⁷⁶ One child interviewed by the Equal Rights Trust in 2015 explained that he experiences bullying from his teachers and peers at primary school on a daily basis because he is a member of the Muhamasheen.⁴⁷⁷ Other Muhamasheen children interviewed by the Trust described the fact that they had left primary school as a result of being subjected to degrading treatment because of their darker skin colour.⁴⁷⁸

I was forced to leave by one of my teachers. He would kick me out of class saying that because I was Muhamasheen I did not deserve to study with white people. My white classmates would avoid sitting next to me and refuse to play with me. (...) I was the best behaved

467 See above, note 364, pp. 20 and 34.

468 *Ibid.*, p. 5.

469 See above, note 20, Human Rights Watch, pp. 30–31.

470 See above, note 39, p. 29, citing Buhathakurta, M.

471 See above, note 364, pp. 5 and 33.

472 See above, note 20, Human Rights Watch, p. 26.

473 See above, note 39, p. 18, citing Buhathakurta, M.

474 See above, note 20, Human Rights Watch, p. 33–34.

475 See above, note 57, p. 53.

476 *Ibid.*

477 Equal Rights Trust interview with Khalid, Dali, Yemen, 3rd August 2015.

478 Equal Rights Trust interview with Rahman and his family, Aden, Yemen, 14th October 2015; Equal Rights Trust interview with Zara, Aden, Yemen, 21st October 2015; Equal Rights Trust interview with Ibrahim, Sana, Yemen, 14 September 2015; Equal Rights Trust interview with Zara, Aden, Yemen, 21st October 2015.

*one in my class. I never hit anyone or caused any problems. (...) I hate school, I hate the discrimination and the marginalisation I faced there. The teacher expelled me because he said I said a bad word, but I didn't. He said to me, "You don't belong here, you Khadim [Servant]" (...) I was five years old.*⁴⁷⁹

In **Turkey**, Afro-Turkish children are also reported to suffer harassment based on **colour**, leading to children dropping out of school:

*[W]hen they go to school other children don't sit next to them, they don't sit next to a black child. They don't want to sit next to him, or their parents [say] "I don't want my child sitting next to him, for example. Why? Because he's dirty. Being considered dirty because of their colour is one of the things these children complain of the most, being unclean. (...) I've actually heard stories of these children who leave class crying, who still wet themselves even after primary school and don't want to go to school because of the traumas they experienced over such a long period.*⁴⁸⁰

Nationality and National Origin

There is also evidence of migrant and refugee children being subject to bullying and harassment at school on the grounds of **nationality** or **national origin**. Research undertaken by Antonowicz in **Cote d'Ivoire** found that refugee children were subject to abuse, with one primary school girl explaining that other pupils "yell at them to 'go back home!'" and that "[t]hose of us who can't take these insults don't come to school".⁴⁸¹ In **Turkey**, **Lebanon** and **Jordan** – countries with high numbers of refugees from neighbouring Syria – refugee children are reportedly bullied by teachers and classmates. In Jordan, research suggests that teachers relegate Syrian refugee children to the back of the class and ignore their questions,⁴⁸² and there is evidence of Syrian children being physically and verbally abused by fellow pupils in Turkey and Lebanon.⁴⁸³ Human Rights Watch reports that the father of a Syrian child who was beaten by classmates in a Turkish school was simply told by the school director that he "should stop sending her [his daughter] to school if you're worried about it".⁴⁸⁴

Sexual Orientation and Gender Identity

There is also evidence of primary school children being bullied and harassed on the grounds of **sexual orientation** and **gender identity** (SOGI), with increasing

479 Equal Rights Trust interview with Abdullah, Al-Masbah, Taiz Province, Yemen, 13th December 2016.

480 See above, note 76, pp. 65–66.

481 See above, note 107, p. 32, citing Bih, E., et al.

482 See above, note 20, Human Rights Watch, p. 26.

483 *Ibid.*, p. 37; See above, note 186, p. 177.

484 See above, note 20, Human Rights Watch, p. 37.

recognition of the detrimental impact of homophobic bullying on school attendance and drop-out rates.⁴⁸⁵ A recent report by UNESCO has noted that, whilst there is insufficient data on the levels of homophobic and transphobic violence in schools, “psychological violence” (in the form of social exclusion and verbal bullying) against lesbian, gay, bisexual and transgender (LGBT) students is common, with this increasing as children enter adolescence.⁴⁸⁶ There is little data or research regarding the extent to which this occurs in primary education settings, although there is some evidence that children – and in particular, boys – can be subject to bullying, taunting and even violence where they do not conform to societal or cultural expectations of “masculinity” or “femininity”.⁴⁸⁷ For example, a study conducted in a primary school in KwaZulu-Natal province, **South Africa**, found that boys were subjected to bullying and abuse where their behaviour or physical characteristics meant that they were considered to be gay.⁴⁸⁸ Students were reported as stating that they “hate gays”, explaining that “[t]hey behave funny (...) [t]hey walk and talk like girls, they are not real boys”, and noting that these boys are beaten up and abused.⁴⁸⁹ The study also found that the cultural expectations of masculinity experienced by boys led to them subjecting girls to misogynistic bullying.⁴⁹⁰

In the **UK**, homophobic bullying is reported to be widespread, with over 40% of primary school teachers reporting that homophobic harassment and bullying occurs in their schools, and 30% of primary school teachers reporting hearing homophobic remarks made by other members of staff.⁴⁹¹ There is a distinct lack of education on SOGI issues in UK schools,⁴⁹² with schools and teachers lacking knowledge and understanding of how to address matters such as recording a change of name and gender; bullying on the grounds of gender identity; inclusion in sports; and access to toilets.⁴⁹³ These deficiencies have left transgender children isolated, with concerns being raised regarding

485 See above, note 101, p. 179; UNESCO, *Education Sector Responses to Homophobic Bullying*, 2012, p. 20, available at: <http://unesdoc.unesco.org/images/0021/002164/216493e.pdf>.

486 UNESCO, *Education sector responses to violence based on sexual orientation and gender identity/expression*, 2016, p. 34, available at: <http://unesdoc.unesco.org/images/0024/002447/244756e.pdf>.

487 See above, note 406, p. 121; Greene, M. E., Robles, O. J., Stout, K. and Suvilaakso, T., *A Girl's Right to Learn Without Fear: Working to End Gender-Based Violence at School*, 2013, pp. 12–13, available at: <https://plan-uk.org/file/plan-report-learn-without-fearpdf/download?token=HMORNNVn>.

488 Bhana, D. and Mayeza, E., “We don’t play with gays, they’re not real boys ... they can’t fight: Hegemonic masculinity and (homophobic) violence in the primary years of schooling.” *International Journal of Educational Development*, Vol. 51, 2016, pp. 39–41.

489 *Ibid.*

490 *Ibid.*, p. 40.

491 See above, note 485, pp. 18 and 39.

492 Turner, C., “Teach toddlers about transgender issues, National Union of Teachers say”, *The Guardian*, 17 April 2017, available at: <http://www.telegraph.co.uk/education/2017/04/17/teach-toddlers-transgender-issues-national-union-teachers-say>.

493 United Kingdom Government, Women and Equalities Committee, *Transgender Equality*, 2015–2016, p. 72, available at: <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, p. 72; Weale, S., “Rise in trans children puts British schools to the test”, *The Guardian*, 12 July 2016, available at: <https://www.theguardian.com/society/2016/jul/12/rise-in-trans-children-puts-british-schools-to-the-test>.

the negative impact on their mental health, ability to learn, and commitment to education.⁴⁹⁴

There is also evidence of children being subject to **discrimination by association** where they have LGBT parents or family members. A study conducted on the experiences of LGBT parents and their children in the *United States* found that 40% of students interviewed reported being verbally harassed in school because of having LGBT parents, with 38% also reporting being subject to harassment due to their peers perceiving or presuming them to be gay simply because they had LGBT parents.⁴⁹⁵ The study cites the example of a 9 year old girl who was “verbally abused and physically threatened by her classmates” after telling them that her mother was a lesbian.⁴⁹⁶ There have been similar findings from research conducted in Australia⁴⁹⁷ and the UK, with leading UK LGBT rights organisation Stonewall reporting that primary school children in the UK with same-sex parents or homosexual family members can be targets for bullying.⁴⁹⁸ According to the survey, 12% of primary school teachers who are aware of homophobic bullying reported pupils whose parents or carers are homosexual as being bullied,⁴⁹⁹ with one seven year old girl recounting that “a girl in year five said ‘you’ve got no dad and you’ve got two mums and I think you’re really weird’”.⁵⁰⁰

Disability and Health Status

The societal stigma surrounding disability in many countries often translates into bullying and abuse in schools. Research indicates that children with disabilities are at an increased risk of bullying, alienation and maltreatment by both teachers and pupils,⁵⁰¹ which can increase vulnerability to school drop-out.

A UK study, for example, found that primary school children in England with intellectual disabilities are twice as likely to be bullied than children without dis-

494 *Ibid.*, p. 73; Pugh, R, “Lonely road: why school is hell for transgender pupils”, *The Independent*, 23 April 2008, available at: <http://www.independent.co.uk/news/education/schools/lonely-road-why-school-is-hell-for-transgender-pupils-814378.html>.

495 Gay, Lesbian and Straight Education Network, *Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in Our Nation’s K-12 Schools (Executive Summary)*, 2008, p. 10, available at: <https://www.glsen.org/sites/default/files/Involved%2C%20Invisible%2C%20Ignored%20Executive%20Summary.pdf>.

496 *Ibid.*, p. 3.

497 BMC Public Health, Crouch S., Waters, E., McNair, Power, J., Davis, E., *Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey*, 13 February 2014, available at: <https://bmcpubhealth.biomedcentral.com/articles/10.1186/1471-2458-14-635>.

498 Stonewall, *The Teachers’ Report 2014: Homophobic Bullying in Britain’s Schools*, 2014, p. 5, available at: http://www.stonewall.org.uk/sites/default/files/teachers_report_2014.pdf.

499 *Ibid.*

500 Stonewall, “Primary Schools”, *Stonewall*, visited 1 August 2017, available at: <http://www.stonewall.org.uk/get-involved/education/primary-schools>.

501 Global Campaign for Education and Handicap International, *Equal Right, Equal Opportunity: Inclusive Education for Children with Disabilities*, 2013, p. 26, available at: http://www.campaignforeducation.org/docs/reports/Equal%20Right,%20Equal%20Opportunity_WEB.pdf.

abilities.⁵⁰² Research from North America also indicates that children with disabilities can be the targets of bullying and exclusion.⁵⁰³ In **Uganda**, research from Luwero District found that children with disabilities reported being subject to psychological violence and neglect by staff and peers, with girls with disabilities reporting more such treatment from fellow female students.⁵⁰⁴ Studies conducted in West and Central Africa have also found that children with disabilities are frequently bullied as a result of societal stigma; in **Nigeria** and **Burkina Faso**, researchers found that epileptic children were particularly stigmatised due to concerns by teachers and pupils that their illness was supernatural.⁵⁰⁵ In **South Africa**, research undertaken regarding the inclusive education system found that children with disabilities were subject to degrading treatment in both special schools and mainstream schools adapted for children with disabilities, with teachers “calling them ‘lunatics’ and being impatient with them”.⁵⁰⁶ Research conducted by the Equal Rights Trust in **Yemen** found that primary school children with disabilities faced bullying and mockery, with one deaf child’s parents explaining that she had left her primary school in Al-Hodaidah prematurely due to the bullying she was subjected to as a result of being deaf.⁵⁰⁷

Research also indicates that children can be vulnerable to bullying and harassment on the grounds of **health status** where they are suffering from HIV/AIDS. Studies in **Kenya** and **South Africa** show that children suffering from HIV/AIDS are subject to harassment, physical abuse, and social isolation, making them more vulnerable to drop-out in primary school than children without the disease.⁵⁰⁸ For example, when a Kenyan HIV-positive primary school student was asked how her friends and schoolmates would treat her if they knew about her health status, she replied that “they would not care about me anymore. They would ignore me and leave me alone. They would form their own group and that would make me feel very bad”, and stated that she would prefer “to stay at home than go to school”.⁵⁰⁹ Children are also at an increased risk of being teased and bullied during school by their peers, and sometimes even by teachers, where their parent suffers from HIV/AIDS, thus amounting to **discrimination by association**.⁵¹⁰ Research conducted in **Bangladesh** has shown that children with parents who suffer from HIV/

502 Sellgren, K., “Disabled children ‘more likely to be bullied’”, *BBC News*, 20 June 2014, available at: <http://www.bbc.co.uk/news/education-27902500>.

503 See above, note 406, p. 133.

504 See above, note 424, p. 6.

505 See above, note 107, p. 32.

506 See above, note 125, p. 14.

507 Equal Rights Trust interview with Dunya and her family, Al-Hodeida, Yemen, 20th October 2015.

508 Ness, D. and Ching, C.L., *International Education: An Encyclopaedia of Contemporary Issues and Systems*, Taylor & Francis, 2013, p. 75; Kamau, M. N., The University of Western Ontario, *Aids and Stigma in Public Schools: A case study of HIV-positive children in Kenya*, 2012, p. 9, available at: <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1703&context=etd>; Deacon, H. and Stephney I., *HIV/AIDS, stigma and children – a literature review*, HSRC Press, 2007, p. 32.

509 *Ibid.*, Kamau, M. N., p. 152.

510 Human Rights Watch, “Letting Them Fail Government Neglect and the Right to Education for Children Affected by AIDS”, *Human Rights Watch*, Vol. 17, No. 13, 2005, p. 25, available at: <https://www.hrw.org/reports/2005/africa1005/africa1005.pdf>.

AIDS are more likely to avoid school out of shame and fear of abuse.⁵¹¹ Moreover, student orphans have been reported to conceal the fact that their parents have died due to HIV/AIDS because of the risk of discrimination and abuse.⁵¹² As will be discussed in Chapter 4, a case was brought in *Sri Lanka* concerning a five year old boy who was denied enrolment in his local school due to a rumour that his father had died of AIDS-related causes and that he himself was HIV-positive, with the Sri Lankan Supreme Court ruling that the state was required to take measures to eliminate discrimination against persons with HIV/AIDS.⁵¹³

3.7 The Duty to Take Positive Action

The issues described in this Chapter not only engage the right to non-discrimination – which encompasses direct and indirect discrimination, the failure to make reasonable accommodation, and harassment – they also engage the broader **right to equality**. As explained in Chapter 1, in order to be effective, the right to equality requires states to take **positive action** to overcome the past disadvantage faced by historically marginalised groups and to accelerate progress towards equal participation in education.⁵¹⁴

The patterns of discrimination discussed in this Chapter are, in many cases, linked to historic and systemic inequalities:

- As discussed in section 3.1.1, the disadvantage faced by **girls** in accessing and completing primary education is clearly linked to issues of systemic gender inequality. As such, efforts to address discriminatory disparities in the numbers of boys and girls out of school must be accompanied by specific measures to tackle outdated gender norms and other forms of pernicious gender discrimination (including harassment and violence against girls) that impede girls' equal participation in education. The CEDAW Committee has emphasised that states have an obligation "to address prevailing gender relations and the persistence of gender-based stereotypes that affect women" and that "[t]he position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed".⁵¹⁵
- Violence in and around schools is also inherently linked to deeply rooted social and cultural norms which reinforce gender and other inequalities. These norms legitimise violent behaviour, often making it difficult to mon-

511 Islam, M. S. et. al., "Children's Experiences of Living with HIV- Positive Parents Within the Family Context of Bangladesh" in Liamputtong, P. (ed.), *Children and Young People Living with HIV/AIDS, Cross-Cultural Research in Health, Illness and Well-Being*, Springer International Publishing Switzerland, 2016, p. 50.

512 See above, note 508, Kamau, M. N., pp. 151–152.

513 *De Soya and de Silva (Minor) v Minister of Education and ors*, S.C. FR. No. 77/2016, Supreme Court of the Democratic Socialist Republic of Sri Lanka, 2016.

514 See Chapter 1, section 1.3.

515 See above, note 61, Paras 7 and 10.

itor the levels of abuse and violence taking place in schools. In certain contexts, teachers, parents and children have been socialised to tolerate a level of violence at school, especially gender-based violence, which they therefore consider to be “normal” and thus not worthy of reporting.⁵¹⁶ For example, the World Report on Violence against Children noted that “[s]exual aggression by male teachers is often dismissed as ‘just boys being boys’”.⁵¹⁷ Other forms of discriminatory violence and harassment stem from harmful social and cultural norms that make certain children – such as children with disabilities, and children from ethnic and racial minorities – susceptible to discriminatory bullying and harassment.

- The racial and/or ethnic dimension to many of the barriers discussed in this Chapter also stems from entrenched and historic inequalities: for example, racial disparities in the quality of school resources and infrastructure may result “from the circumstances of history”,⁵¹⁸ with states being required to take positive action in order to remedy “persistent or structural disparities and *de facto* inequalities”.⁵¹⁹
- Many of the barriers faced by children with disabilities stem from the systemic societal discrimination and disadvantage faced by persons with disabilities:

Spotlight: Education and Societal Attitudes Towards Children with Disabilities

UNICEF estimates that there are at least 93 million children with disabilities in the world,⁵²⁰ meaning that one in every 10 children worldwide has a disability.⁵²¹ A 2011 World Health Organization survey conducted in 51 countries showed that persons with disabilities reported lower primary school completion rates and mean years of primary education than persons without disabilities,⁵²² with statistics showing a 10% gap in primary completion rates between children with and without disabilities. However, the gap could well be greater than this given that censuses often fail to collect data regarding persons with disabilities.⁵²³ In certain countries, the population of out-of-school children is largely

516 See above, note 486, p. 37; See above, note 107, p. 27.

517 See above, note 406, p. 112.

518 CERD, *General Recommendation No. 32 on The Meaning and scope of special measures*, UN Doc. CERD/C/GC/32, 2009, Para 22.

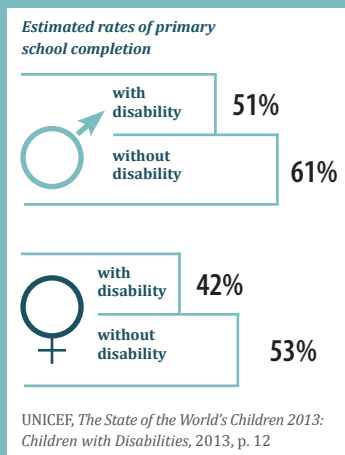
519 *Ibid.*

520 UNICEF, *Disabilities*, visited 10 August 2017, available at: <https://www.unicef.org/disabilities>.

521 UNICEF, *Including Children with Disabilities in Humanitarian Action*, visited 10 August 2017, available at: <http://training.unicef.org/disability/emergencies/index.html>.

522 See above, note 6, pp. 206–207.

523 See above, note 101, p. 101.



composed of children with disabilities: in *Nepal*, for example, approximately 85% of children out of primary school have disabilities.⁵²⁴

The CRPD has noted that one of the barriers impeding the realisation of the right to education for children with disabilities is the “**attitudinal**” barrier found within educational institutions and communities.⁵²⁵ There remains a high degree of societal stigma surrounding disability, meaning that the discrimination faced by children with disabilities is deeply rooted and widespread. Indeed, such

negative attitudes have been described as “the single most significant barrier to the inclusion of children with disabilities in school”.⁵²⁶ The Special Rapporteur on the Right to Education has commented on the need to combat “habitual and discriminatory attitudes and misconceptions about persons with disabilities” if their right to education is to be realised.⁵²⁷

This stigma and prejudice manifests itself in a number of ways, all of which hinder inclusivity in education and contribute to low levels of enrolment and high levels of drop-out amongst children with disabilities, as discussed above:

Firstly, the sense of shame felt by the families of children with disabilities can mean that these children are isolated within their communities from birth,⁵²⁸ with parents sometimes failing to register the birth of children as noted in section 3.3.1 above. Parents can also be too ashamed, or too fearful of being ostracised within their community, to allow a child with a disability to attend school. The National Gender and Equality Commission (NGEC) in *Kenya* has noted that children with disabilities face discrimination from both their families and their communities, due to high levels of societal stigma in Kenya; in Isiolo, children born with disabilities are considered to be an “abomination” and can face extremely inhuman treatment, including being tethered outdoors away from the family home, whilst in Kisii, women who give birth to a child with a disability can be banished

524 See above, note 20, Human Rights Watch, p. 32.

525 *Ibid.*, Para 13.

526 See above, note 26, Grimes, P., Kumar, K. and Stevens, M., p. 10.

527 Human Rights Council, *Report of the Special Rapporteur on the right to education, Vernor Muñoz, on the right to education of persons with disabilities*, UN Doc. A/HRC/4/29, 2007, Para 29.

528 See above, note 14, p. 182.

from the matrimonial home.⁵²⁹ The NGEC has explained that the associated shame can mean that parents hide their children and are too embarrassed to send them to school, with some parents believing that their children are incapable of being educated.⁵³⁰ In **Romania**, some parents of children with special educational needs who are eligible for inclusive schooling have refused to allow their children to be assessed for disability because “they can’t accept this label, that their son or daughter is this way”.⁵³¹ Negative cultural perceptions of disability can also mean that the education of children with disabilities is not prioritised by their families where resources are limited. In **Bangladesh**, if parents cannot afford to send all of their children to school, the stigma surrounding disability – which is considered to be a curse – can mean that children with disabilities are more vulnerable to being kept at home (see section 3.1.1 above).⁵³²

Many societies also have low expectations regarding the learning abilities of children with disabilities, meaning that investment in their education is deprioritised by both parents, education providers and policymakers. A study undertaken in a number of low and middle income countries found that teachers underestimated the learning capacity of children with disabilities, leading to the attitude that their inclusion would inhibit the progress of other children.⁵³³ In **Ghana**, a qualitative study undertaken regarding attitudes towards children with autism found that such children were considered to be “useless and not capable of learning”.⁵³⁴ In **Kenya**, it has been noted that children with disabilities are perceived “as persons who can never excel in education or life”, meaning that investment in their education is considered futile.⁵³⁵ Similar attitudes are displayed in **Australia**, where low expectations regarding the capability of students with disabilities have been reported to exacerbate the other barriers to education that they face.⁵³⁶

As discussed in section 3.2, The CRPD has made clear that issues surrounding accessibility often result from a lack of information and awareness regarding the needs of persons with disabilities, and has noted that “it is necessary to change attitudes towards persons with disabilities” in order to ensure that persons with disabilities have physical access to all public services – including education – on an equal basis with others.⁵³⁷

529 See above, note 328, p. 14.

530 *Ibid.*

531 See above, note 26, pp. 42–43.

532 See above, note 44, pp. 103–104.

533 See above, note 130.

534 See above, note 14, p. 182.

535 See above, note 328, p. 14.

536 See above, note 358, p. 26.

537 CRPD, *General Comment No. 2 (Article 9: Accessibility)*, UN Doc. CRPD/C/GC/2, 11 April 2014, Para 3.

Where children with disabilities do attend school, the attitudes and prejudices found in the wider community are often replicated inside the classroom, resulting in violence, bullying and harassment. In **Kyrgyzstan**, for example, children with disabilities are reportedly frequently bullied in schools, which is closely connected to public perceptions of disability in the country.⁵³⁸ In **Vietnam**, where the Buddhist concept of karma has been interpreted such that disability is often perceived as arising from mistakes committed in past life, children with disabilities can face verbal and physical aggression in schools.⁵³⁹ The violence and harassment faced by children with disabilities, and its connection to lack of enrolment and school drop-out, is considered further at section 3.6 below.

Under the UNCRPD (to which 173 states are parties), states are required to promote the equality of persons with disabilities, and eliminate all discrimination on the grounds of disability.⁵⁴⁰ The obligation to promote equality encompasses the requirement to take “[s]pecific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities”.⁵⁴¹ This includes **positive action** to address the societal discrimination faced by persons with disabilities. Given that many of the barriers discussed in this Chapter stem from systemic discrimination and prejudice against persons with disabilities, it is imperative that positive action is taken by states to remedy the negative stereotypes and stigmatisation that underlies the disadvantage and marginalisation faced by children with disabilities in primary education, in order to enable their equal participation in primary education.

Examples of Positive Action Measures

The CESCR has emphasised the importance of taking **positive action** to remove the disadvantage caused to particular groups by systemic inequalities, and has recognised that this may require “devoting greater resources to traditionally neglected groups” in order to redress such disadvantage.⁵⁴² This is a fundamental aspect of the right to equality, which requires states to take “legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups”.⁵⁴³ Non-exhaustive examples of such measures are set out below.

538 See above, note 303, p. 80.

539 See above, note 26, Grimes, P., Kumar, K. and Stevens, M., p. 34.

540 UNCRPD, 2515 U.N.T.S. 3, 2006, Article 5.

541 UNCRPD, Article 5(4).

542 See above, note 12, Paras 9 and 39.

543 *Declaration of Principles on Equality*, Equal Rights Trust, London, 2008, Principle 3.

Language and Communication Barriers

States have a duty to take positive action to achieve the full and effective participation of all children in primary education by taking measures to remedy the marginalisation suffered by children who are unable to speak, understand or communicate in the official or dominant state **language**. This may involve introducing mother-tongue bilingual education programmes, coupled with the creation of a more inclusive curriculum (see below), and the recruitment and effective training of teachers who are able to speak both the minority/non-dominant and official language, including teachers from the non-dominant or minority language groups.⁵⁴⁴ There is often a paucity of qualified teachers from such groups, given the historic disadvantages these groups have faced in accessing or completing formal education, meaning that the positive action taken by states should also include measures to redress these broader systemic disadvantages by establishing effective teacher-training programmes.⁵⁴⁵

In Focus: Mother Tongue Bilingual Education in Cambodia

According to its 2008 census, **Cambodia** has a population of over 13 million, although this number is estimated to have increased by approximately 2–3 million since then.⁵⁴⁶ Out of this population there are thought to be around 200,000 indigenous persons speaking approximately 25 different minority languages,⁵⁴⁷ two thirds of whom live in rural Monduliri and Ratanakiri provinces.⁵⁴⁸ Evidence indicates that children belonging to these indigenous groups have historically been left behind in primary education: statistics from 2000 show that 50% of children in Monduliri province were out of primary school, as compared to 7% in Phnom Penh (the capital), and that only 19% of children from Ratanakiri and 25% of children from Monduliri completed primary education as compared to 71% from Phnom Penh.⁵⁴⁹ Research from 2002 also found that only 32% of villages in upland Ratanakiri province had schools, and classes were

544 See above, note 376, p. 5.

545 *Ibid.*, pp. 5–6.

546 CERD, *Eights to Thirteenth periodic report: Cambodia*, UN Doc. CERD/C/KHM/8-13, 2009, Para 4.

547 Moul, P. and Seng, S., *Country technical note on indigenous peoples issues: Kingdom of Cambodia*, 2012, p. 1, available at: <http://www.ifad.org/english/indigenous/pub/documents/tnotes/cambodia.pdf>; Lenhardt, A. et al, *Anti-discrimination measures in education: A comparative policy analysis*, 2017, p. 8, available at: <https://www.wider.unu.edu/sites/default/files/wp2017-78.pdf>.

548 *Ibid.*, p. 7.

549 World Inequality Database on Education, *Cambodia Country Profile 2000*, available at: http://www.education-inequalities.org/countries/cambodia/indicators/edu_out_pry/regions#?dimension=region&group=|Phnom%20Penh|Monduliri%20and%20Rattanakiri|Monduliri&dimension2=sex&group2=|Female|Female&dimension3=wealth_quintile&age_group=edu_out_pry&year=2000.

conducted solely in Khmer (the official state language) which children were unable to understand.⁵⁵⁰

Language has been identified as a major barrier to the fulfilment of the right to education of indigenous children in Cambodia, with the first pilot **bilingual education projects** beginning in the country 1997.⁵⁵¹ In 2002 the government expanded these pilot projects, acknowledging that a bilingual education programme was needed to reach the indigenous population in Ratanakiri and Mondulhiri provinces, and in 2006 it finally made an official commitment to providing bilingual education up to the third grade to indigenous students in five provinces.⁵⁵² The scope of the bilingual and multilingual education programmes has since been expanded, with Cambodia's 2016 **Multilingual Education National Action Plan** noting that around 4,000 children currently attend multilingual education primary schools.⁵⁵³ The National Action Plan sets out strategies for increasing the number of multilingual primary schools, for the training of teachers from ethnic minority communities (so that they are able to teach in two languages), and the publication of teaching and learning materials in indigenous languages.⁵⁵⁴

The National Action Plan expressly acknowledges "that all children from ethnic minorities have the *right to access education in their mother tongue* and that this is the *best approach* for students to succeed" (emphasis added).⁵⁵⁵ Whilst there are still disparities in primary completion rates and numbers of out-of-school children between provinces with large indigenous communities and those without, statistics from 2014 indicate that the mother tongue education programmes have had some success: 57% of children from Mondulhiri and Ratanakiri now complete primary education (an increase of around 35% since 2000), and 28% of children are out of primary school (a decrease of around 22%).⁵⁵⁶ Whilst progress has been relatively slow, it is hoped that the **positive action** taken by the government to tackle the disadvantage faced by children speaking minority languages will see a continuation of these positive trends.

550 See above, note 547, Lenhardt, A. et al.

551 *Ibid.*

552 *Ibid.*, pp. 6–8.

553 UNICEF, *Cambodia's Multilingual Education National Action Plan: Fact sheet*, 2016, p. 1, available at: [https://www.unicef.org/cambodia/MENAP_launch_fact_sheet_final_\(002\).pdf](https://www.unicef.org/cambodia/MENAP_launch_fact_sheet_final_(002).pdf).

554 *Ibid.* p. 2.

555 *Ibid.*

556 See above, note 549.



In Cambodia there are around

200,000

indigenous persons

speaking approximately
25 different minority languages



Two-thirds of whom live in rural **Mondul Kiri** and **Ratanakiri** provinces

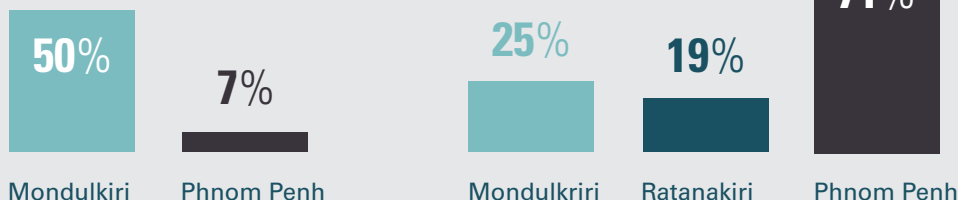


HISTORIC POSITION

Evidence indicates that children belonging to these indigenous groups have historically been left behind in primary education. Statistics from 2000 show:

50% of children in Mondul Kiri province were out of primary school, as compared to 7% in Phnom Penh – the capital

Only **19% of children from Ratanakiri and 25% of children from Mondul Kiri completed primary education** as compared to 71% of children from Phnom Penh.



AFTER MOTHER-TONGUE EDUCATION

Comparing statistics from 2000 and 2014



28% of children from Mondul Kiri and Ratanakiri are out of primary school **a decrease of around 22% since 2000**



57% of children from Mondul Kiri and Ratanakiri now complete primary education **an increase of around 35% since 2000**

Similarly, as regards children with **disabilities** who have specific communication needs, the CRPD makes explicit that states must take “appropriate measures” to recruit teachers who are skilled in sign language and/or Braille and provide suitable training for all professionals and staff working in education, including training on disability awareness and “alternative modes, means and formats of communication”.⁵⁵⁷

School Curricula and Teaching Materials

States must not simply rectify curricula and teaching materials that perpetuate stereotypical or negative attitudes regarding ethnic minorities and/or girls, they must also take positive action measures in this area in order for *de facto* equality for these historically disadvantaged groups to be achieved and for the right to equality to be fulfilled.

As far as ethnic minorities are concerned, the CRC has noted that states should “ensure that the curricula, educational materials and history text books provide a fair, accurate and informative portrayal of the societies and cultures of indigenous peoples”.⁵⁵⁸ This is important not only in making schooling relevant and beneficial to marginalised minority children – and thus in encouraging school attendance – but also in influencing the attitudes of other children through rectifying the invisibility of many cultures in school curricula.⁵⁵⁹

The CEDAW Committee has also emphasised the importance of addressing “prevaling gender relations and the persistence of gender-based stereotypes that affect women”,⁵⁶⁰ which should include not only taking steps to eliminate gender discrimination in school curricula and textbooks, but also integrating “gender equality content into curricula at all levels of education (...) [in order to] target stereotyped gender roles and promote values of gender equality and non-discrimination”.⁵⁶¹ Without taking such action, teaching materials will not only continue to perpetuate stereotypical attitudes that discriminate against girls and women but will also continue to provide a narrow view of girls’ educational potential, thus entrenching structural gender inequality and affecting school attendance retention rates amongst girls.

Violence and Harassment

States have an obligation under the UNCRC to “take all appropriate legislative, administrative, social and educational measures to protect the child from all

.....
557 *Ibid.*, Para 34(b) and 35.
558 See above, note 7, Para 58.
559 See above, note 14, p. 201.
560 See above, note 61, Para 7.
561 CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35, 2017, Para 35(a).

forms of physical or mental violence, injury or abuse”; this includes a “strict” obligation to take all appropriate measures aimed at the prevention, identification, reporting and investigation of discriminatory violence or abuse,⁵⁶² physical and psychological bullying and harassment by adults and other children, and violence amongst children.⁵⁶³

Ensuring that such violence is prohibited under national law is clearly an important first step; however, additionally, measures must be taken to ensure not only that such legal prohibitions are enforced in schools but also that these issues are less likely to persist. This may involve governments taking steps to improve school governance through training school management committees and parent-teacher associations on how to prevent and address violence in schools;⁵⁶⁴ establishing effective independent reporting and investigative mechanisms; and engaging with teachers, supporting and training them to develop non-violent discipline strategies.⁵⁶⁵ However, in order to ensure that **positive action** measures are integrated in this approach to tackling inequality, states should ensure that strategies involve engaging with teachers and schools to change the discriminatory societal and cultural attitudes that make certain children particularly susceptible to corporal punishment.

As regards to school-related sexual violence, states must ensure that they not only take measures to protect children from school-related sexual violence, but that they also take steps to make the structural, social and cultural changes needed in order to eliminate the harmful discriminatory norms underlying such violence. In its recently adopted General Recommendation on gender-based violence, the CEDAW Committee has emphasised that gender-based violence against women is “a critical obstacle to achieving substance equality between women and men”,⁵⁶⁶ and has recommended that states adopt and implement effective measures to address the underlying causes of gender-based violence against women, “including patriarchal attitudes and stereotypes, inequality in the family and the neglect or denial of women’s civil, political, economic, social and cultural rights”.⁵⁶⁷

562 UNCRC, Articles 19(1) and (2).

563 See above, note 89, Part IV.

564 See above, note 107, p. 49.

565 Global Initiative to End All Corporal Punishment of Children, *Prohibiting corporal punishment in schools: Answers to frequently asked questions*, 2017, pp. 17, 33, available at: http://srsg.violenceagainstchildren.org/sites/default/files/2017/corporal_punishment_in_schools.pdf.

566 See above, note 561, Para 10.

567 *Ibid.*, Para 34.

Spotlight: The Role of School Inspection Systems in Tackling School Violence

As noted in this section, the UNCRC provides that states “shall take **all appropriate** legislative, administrative, social and educational measures” to protect children from all forms of violence.⁵⁶⁸ The CRC has emphasised that “[s]hall take’ is a term which leaves no leeway for the discretion of states parties” in the fulfilment of this obligation.⁵⁶⁹ In primary education settings, this requires the establishment of effective systems to **monitor** the treatment of children in schools and to **report** and **investigate** cases of suspected ill-treatment or violence; states must ensure that they allow “full access to facilities and records and **inspection** of all schools and other institutions, permit unannounced visits, and include the holding of private consultations with children and staff”.⁵⁷⁰

State-established **school inspection systems** can play an important role in monitoring and evaluating the extent to which discriminatory violence and harassment are occurring in schools, and ensuring that the effectiveness of a school’s prevention and protection strategies is independently scrutinised. According to the OECD, a school inspection is a “mandated, formal process of external evaluation with the aim of holding schools accountable” which “involves one or more trained inspectors to evaluate quality based on a standard procedure”.⁵⁷¹ However, school inspection practices and procedures vary across different countries; according to the OECD’s 2015 study of education indicators in its 35 member states, 27 states require some form of primary school inspection as part of the country’s accountability systems, although the frequency of such inspections varies.⁵⁷²

In the **UK**, the Office for Standards in Education, Children’s Services and Skills (Ofsted) is a non-ministerial department of the UK government mandated with carrying out state school inspections, with the frequency of such inspections depending on a school’s previous inspection grading.⁵⁷³ In its work, Ofsted is bound to have due regard for the need to eliminate unlawful discrimination and harassment and to advance equality of opportunity in accordance with the public sec-

568 UNCRC, Article 19(1).

569 See above, note 89, Part IV.

570 CRC, *Day of Discussion: Violence Against Children, Within the Family and in School*, Committee on the Rights of the Child, Excerpted from UN Doc. CRC/C/111, 2001, Para 733.

571 OECD, *Education at a Glance 2015: OECD Indicators*, 2011, p. 434, available at <https://www.oecd.org/edu/skills-beyond-school/48631428.pdf>.

572 *Ibid.*

573 Ofsted, “About Us”, *Gov.UK*, visited September 2017, available at: <https://www.gov.uk/government/organisations/ofsted/about>.

tor equality duty under UK law.⁵⁷⁴ In this context, the Ofsted inspection framework looks at how schools “ensure pupils are free from bullying in all its manifestations including all types of prejudice-based bullying” and analyses schools’ “strategies for tackling any discriminatory or oppressive behaviour”, considering whether the schools’ policies are sufficiently robust and adhered to.⁵⁷⁵ However, despite the introduction of the public sector equality duty in 2011, media reports have suggested that racial abuse in schools, including primary schools, is a significant issue, with derogatory racist statements, bullying, taunting and harassment reportedly having risen by 20% between 2009 and 2016.⁵⁷⁶ According to a 2016 report of the British Youth Council, there has been an issue of schools underreporting incidents of racism and religious discrimination in order to avoid receiving a poor Ofsted grading, meaning that the scale of the problem of discrimination in schools cannot be properly understood and addressed by inspectorates.⁵⁷⁷ The British Youth Council has recommended that schools be placed under a legal duty to record and report data on incidents of discrimination in order to provide Ofsted with the information needed to properly assess the extent to which discriminatory bullying and harassment is occurring in schools.⁵⁷⁸

Positive Action and Poverty Alleviation

Addressing systemic inequalities on the grounds of characteristics such as gender, race, ethnicity, language and disability will not be sufficient to ensure equal participation in primary education for all children unless measures are also taken to redress socio-economic disparities which feed so centrally into many of the barriers discussed in this Chapter. In addition to certain barriers – primarily the direct and indirect costs of schooling – being indirectly discriminatory on the grounds of socio-economic disadvantage, socio-economic disadvantage can increase children’s susceptibility to discrimination on other grounds, leading to multiple discrimination.

In order to ensure that children from lower socio-economic backgrounds are able to participate in primary education on an equal basis with other children,

574 Equality Act 2010, s. 149(1); Ofsted, *Inspecting equalities: Briefing for section 5 inspection*, 2012, p. 6, available at: https://www.egfl.org.uk/sites/default/files/imported/categories/data/danda/guidance/_docs/equality/Ofsted_inspecting_equalities_briefing.pdf.

575 *Ibid.*, Ofsted, pp. 6–7.

576 Pells, R., “Surge of racist incidents in schools sees 20 children excluded every day for discrimination”, *The Independent*, 8 August 2016, available at: <http://www.independent.co.uk/news/education/education-news/racism-schools-stats-children-excluded-per-day-rises-racist-incidents-a7178746.html>.

577 British Youth Council, *Youth Select Committee 2016: Young people and the issues of racism and religious discrimination*, 2016, pp. 17–18, available at: <http://www.byc.org.uk/wp-content/uploads/2016/11/BYC-Rport-2016-WEB.pdf>.

578 *Ibid.*, p. 18.

states need to ensure that measures to alleviate poverty are central to any action taken to eliminate inequalities in primary school attendance and completion. This is essential, given the role that socio-economic deprivation plays in reinforcing and perpetuating discriminatory structures.

3.8 Conclusion

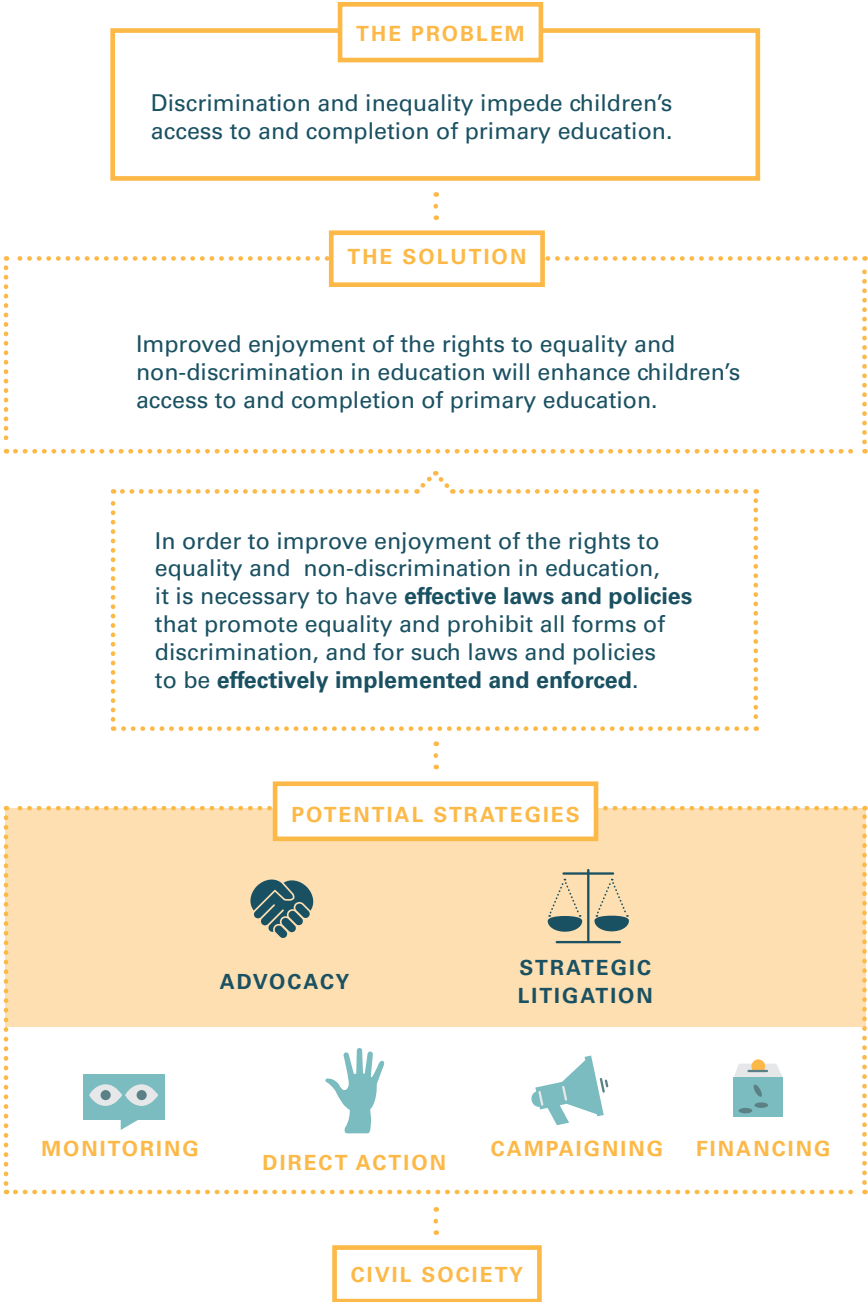
As this Chapter has demonstrated, the discriminatory barriers that children face in accessing and/or completing primary education are multifaceted and wide-ranging, and the evidence that children who possess certain protected characteristics are disproportionately disadvantaged by these barriers is overwhelming:

- The failure by states to eliminate the **direct and indirect costs of schooling** is *prima facie* indirectly discriminatory on the grounds of socio-economic disadvantage, with research demonstrating that children with disabilities, children from ethnic or racial minorities, and girls face particular disadvantage.
- The **geographical inaccessibility of schools** also has a discriminatory impact, with children who possess certain identity characteristics – girls, children from particular ethnic, religious or social groups, as well as children with disabilities – being particularly disadvantaged by the need to travel long distances to primary school.
- **Enrolment requirements and procedures** can have a discriminatory impact on primary education attendance and completion rates: documentation requirements may be directly or indirectly discriminatory on the grounds of ethnicity, disability, nationality and socio-economic disadvantage; testing and assessment procedures can result in unlawful school segregation; and requirements to comply with a strict uniform policy may also be indirectly discriminatory on the grounds of religion or belief.
- The **inadequacy of physical and human resources** within schools contributes to children being out of primary education and, where the failure to allocate sufficient resources towards quality school facilities and resources is related to one or more protected characteristics (such as race or ethnicity) this may be directly discriminatory; at the same time, seemingly neutral policies regarding investment in school infrastructure may be indirectly discriminatory where they disproportionately affect the education of children who possess certain protected characteristics.
- The form and substance of education perpetuates discrimination and exclusion through being taught in a **language** that is inaccessible to some children, and through **school curricula** and other **educational materials** being inflexible, irrelevant to, or disrespectful of the needs of particular children.
- Finally, **school-based violence, bullying and harassment** can affect children's attendance at school, with research indicating that children who possess certain characteristics are particularly vulnerable to such violence, bullying and harassment.

Given that many of these barriers are linked to historic and systemic discrimination, it is imperative that states not only remove such discriminatory barriers, but that they also take **positive action** to remedy the structural inequalities that underlie them. Chapter 4 will discuss strategies for civil society interventions to ensure improved enjoyment of the rights to equality and non-discrimination in primary education.

4. STRATEGIES FOR CIVIL SOCIETY INTERVENTION

Theory of change strategies for civil society intervention



As the Theory of Change and Introduction indicate, there are numerous strategies which different change actors can employ to improve enjoyment of the rights to equality and non-discrimination in education, and thus resolve the ongoing issue of inequality and discrimination in access to and completion of primary education.

This Chapter focuses in on **advocacy** and **litigation** strategies that may be adopted by civil society in particular. This is due to a combination of the Trust's long-standing experience in employing these strategies to effect legal and policy change in the sphere of equality and non-discrimination, and the level of demand we have seen from civil society actors working to further primary education access and completion rates for approaches to ensuring inclusive education. However, these two strategies should be seen as complementary to other intervention tools and strategies, identified in the Introduction, such as the use of data as a tool for change,¹ campaigning to change public opinion and direct action² – all of which might take place as part of a broader strategy.

Whilst **advocacy** and **strategic litigation** are discussed separately below in order to allow for an analysis of the specific considerations that arise in relation to each, it is crucial to consider these two strategies as symbiotic rather than separate. For example, litigation may be a key component of a broader advocacy campaign, since it can be a tool for putting a spotlight on a particular issue and thus mobilising public support and debate; at the same time, advocacy will often precede strategic litigation by paving the way for a legal challenge, and a successful litigation strategy should include advocacy elements, in particular in relation to follow-up and enforcement of successful court judgments. As such, advocacy and strategic litigation are not standalone strategies, but rather should be situated alongside each other as mutually reinforcing tools for achieving change.

The Chapter is structured with the intention of introducing civil society actors to these two particular strategies, before illustrating how they may operate in practice for the greatest realisation of the Theory of Change.

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- 1 For a discussion of statistical data as a tool with which to combat discrimination, see for example European Commission, *Measuring Discrimination: Data Collection and EU Equality Law*, 2006; for a discussion of data collection for advocacy purposes, see also United Nations Girls' Education Initiative, *A Learning Guide: Evidence-Based Advocacy for Gender in Education*, 2009, available at: https://www.unicef.org/eapro/advocacy_guide_FINAL4.pdf.
 - 2 For further information on campaigning and direct action, see Lamb, B., *Good Guide to Campaigning and Influencing*, NCVO, 2011; Campaigning for International Justice, *Learning Lessons (1991–2011): Where Next? (2011–2015)*, 2011, available at: https://www.bond.org.uk/data/files/Campaigning_for_International_Justice_Brendan_Cox_May_2011.pdf; and The Ruckus Society, *Action Strategy: a how-to guide*, 2012, available at: <http://www.toolsforchange.net/wp-content/uploads/2012/03/RuckusActionStrategy9.pdf?4c19cd>.

4.1 Advocacy

4.1.1 Introduction to Advocacy

The word “advocacy” is one with many different uses, interpretations and meanings. For our purposes, when we discuss **advocacy** in this publication, we are referring to *the act of achieving legislative or policy change through the political process*. As this definition indicates, advocacy can take many and various forms, given that there are myriad ways in which the political process – and political decision-makers – can be influenced.

The Equal Rights Trust’s particular focus is on how advocacy can be used to change, improve and enforce laws and policies in ways that will improve enjoyment of the rights to equality and non-discrimination. Advocacy is one of the primary means by which civil society can ensure that effective laws and policies to promote equality and eliminate discrimination are adopted, implemented and enforced, thus improving enjoyment of the rights to equality and non-discrimination, including in respect of access to primary education.

There are many different approaches to advocacy, taken by different public, private and civil society actors. The Equal Rights Trust’s approach to advocacy – which we accept is neither unique nor universal – has three central tenets:

1. Our approach is centred on achieving legislative and policy change through identifying and influencing key decision-makers.
2. Therefore, we consider effective advocacy to require strategic planning, following from thorough analysis of the context in which advocacy takes place and of the position and influences on the aforementioned decision-makers.
3. Therefore, we consider effective advocacy to be context specific. Advocacy strategies cannot simply be “borrowed” or “translated” from one context to another. Nevertheless, there are key questions which should be asked and answered in the process of developing an advocacy strategy.

With this in mind, the aim of the discussion below is to assist individuals or organisations advocating to tackle the issue of out-of-school children to apply approaches that are grounded in the rights to equality and non-discrimination. As discussed in Chapters 1 and 2 of this report, the rights to equality and non-discrimination provide a powerful framework that entails legally binding obligations for states, including the immediate obligation to refrain from discriminating against certain groups, and to promote, protect and fulfil the right to equality; states must ensure that they fulfil these obligations in the formulation of state legislation and policy, and in the allocation of state resources. We refer to strategies or approaches that are grounded in this rights framework as “**equality law**” approaches.

The application of an equality law approach to advocacy on the issue of out-of-school children has two elements. Firstly, in accordance with the Theory of

Change described above, an **equality law approach is necessary** if state actors involved in the provision of education and the formulation of education policies and relevant legislation are to reach all of those out of primary education, since the policies and laws themselves must be grounded in equality law. Secondly, there may be **tactical and strategic advantages to applying an equality law approach** in advocacy for increased access to primary education, in terms of the way in which an equality law approach can influence the messaging and framing of the issues, the identification of key stakeholders, and the fora in which those key stakeholders can be engaged. There is thus both a **need** and an **opportunity** for advocacy regarding children's access to and completion of primary education to be grounded in the rights to **equality and non-discrimination**.

4.1.2 Considerations for Advocacy

There are a number of issues to be considered by any individual or civil society organisation thinking about formulating an advocacy strategy to tackle the issue of out-of-school children in a particular context or country. As noted above, the Trust's approach to the development of an advocacy strategy is to address a set of questions, and to use these questions as a framework to conduct a context analysis to develop the answers to these questions. This technique is of course not the only approach to planning advocacy, but one which we have found useful for advocates looking to develop a strategy which is properly responsive to the context in which they are working.

In planning any advocacy campaign, the starting point for advocates is to focus on establishing what their overall objective is. It can be useful to break down an overarching **objective** into several subsidiary **outcomes**, which might represent steps towards the objective, or necessary elements in the achievement of the objective. This approach can assist in identifying which kinds of activities will, together and over time, lead towards the achievement of the objective. After the objective and outcomes have been identified, there are a number of general questions that advocates may wish to consider in developing a clear advocacy strategy. These questions involve identifying who has the power to influence the achievement of these outcomes; who and what influences these decision-makers; and what the political, policy and legislative, media, civil society, public, and international climate context is in which advocacy is taking place:

- Who are the decision-makers that hold the substantial power to influence change?
- Who are the actors that can influence those decision-makers?
- Who are the other relevant stakeholders?
- What is the current political situation in the country in question, and how does it impact upon your ability to advocate?
- What are the strengths and weaknesses of your organisation and its allies?
- What opportunities exist that may help to advance your cause?
- What threats exist that might derail your advocacy efforts?

- Which theory/theories of change are you proposing to adopt? This may include taking advantage of opportunities in the political agenda, such as planned government reforms (policy windows) or external factors which can “push” government policy (levers); effectuating change through appropriate messaging and framing of the issues; engaging in coalitions and collaboration; or effectuating change through a bottom-up process involving local or community movements (grassroots strategies).
- Which methods of implementation are you proposing to adopt?

Developing an Equality Law Approach to Advocacy

When developing an advocacy strategy that is based on an equality law approach, the above questions must be considered through an equality law lens. As such, the first question to be considered is:

- (i) How does an equality law approach influence the identification of objectives and outcomes?*

Having identified the objective(s) and thought about the outcomes that will help lead to this objective, advocates can move to consider how an equality law approach influences answers to the other questions. For example:

- (ii) How does an equality law approach affect the mapping of and engagement with key decision-makers and stakeholders?*
- (iii) How does an equality law approach influence the levers or policy windows that may help to advance your objectives?*
- (iv) How does an equality law approach influence messaging and framing of the issues?*
- (v) What does an equality law approach require by way of evidence and analysis?*
- (vi) What opportunities for partnering or collaboration are presented if an equality approach is adopted?*

In the following sections, we consider: (i) the tactical advantages and strategic considerations for civil society actors undertaking an equality law approach to **national advocacy**, using the approach described above; and (ii) the opportunities for **international and regional advocacy** that arise when an equality law approach is adopted.

4.1.3 National Advocacy

National advocacy strategies for utilising the unified framework on equality to tackle the issue of out-of-school children will necessarily need to be tailored to the domestic legal and political context; states will differ in terms of the com-

prehensiveness of their anti-discrimination legislation and policies, and also in the attitudes towards and levels of knowledge regarding the substance of the rights to equality and non-discrimination amongst key stakeholders. In some states, improved implementation of the rights to equality and non-discrimination might necessitate advocacy in relation to legal reform (i.e. the adoption of more comprehensive anti-discrimination laws); in other states, improved implementation maybe possible through effective advocacy within the existing legal framework, through influencing policy, institutional, programmatic or financial decisions. However, in certain states, the use of an equality law approach may not, in fact, be the best strategy from a tactical point of view, as arguments regarding universal access to education based on the right to education or the Sustainable Development Goals (SDGs) might have more weight. As such, an equality law approach may – but will not always – provide tactical advantages to advocates by providing particular opportunities to undertake advocacy in different ways or with different audiences at the national level. However, there will always be a need, from a policy perspective, for advocates to ensure that policies relating to out-of-school children comply with the rights to equality and non-discrimination.

As such, the discussion below applies the steps and questions set out above in order to highlight both the **need** and **opportunity** for national advocacy regarding children's access to and completion of primary education to be grounded in equality law.

- **How does an equality law approach influence the identification and formulation of objectives and outcomes?**

As this report has made clear, and as the Theory of Change set out above clarifies, improved enjoyment of the rights to equality and non-discrimination in education is crucial to tackling the issue of out-of-school children. In order for this to be achieved, it is necessary to have laws and policies that identify, address and remove discriminatory barriers to access and promote equality, and for such laws and policies to be effectively implemented and enforced. Thus, when advocates are establishing their overall objectives, and the particular outcomes they wish to achieve in pursuance of those objectives, an equality law approach demands that the substance of any policy or legislative reforms sought comply with the state's obligations regarding equality and non-discrimination. For example, if an organisation's overall objective is to reduce the number of out-of-school children in a particular region, one more targeted outcome might be to change education policy in order to ensure that it addresses the discriminatory barriers that children face in primary education. In working towards this outcome, any engagement with the Department for Education on increasing educational participation should involve calling for the application of an equality approach, in which the state should identify the particular groups which are at risk of educational exclusion, identify the discriminatory barrier(s) which prevent these groups from participating in primary education on an equal basis with other children, and then take steps to address these barriers.

- **How does an equality law approach affect the mapping of and engagement with key decision-makers and stakeholders?**

When formulating any advocacy strategy, it is necessary to identify the relevant decision-makers, which actors can influence those decision-makers, and which other stakeholders can influence those with influence on decision-makers. Where an equality law approach is adopted to tackle the issue of out-of-school children, this will identify decision-makers and stakeholders that hold power or influence in respect of equality and non-discrimination – and thus who should be targeted in any advocacy campaign relating to the discriminatory denial of primary education – but who would otherwise be overlooked in a strategy that views the issue through a purely education lens. For example, the use of the unified framework on equality to identify discriminatory barriers to primary education may result in the identification of a range of state entities that make policy decisions affecting children’s access to and completion of education beyond Departments of Education, such as Ministries relating to Health, Social Welfare and Transportation.³ The Treasury, which will make decisions regarding state investment in primary education, will likely be a key stakeholder in any campaign to address the issue of out-of-school children, but an equality law approach may change how advocates engage with this stakeholder. In addition, adopting an equality law approach may make it relevant to engage National Human Rights Institutions (NHRI) where they have not been before, or to engage such institutions in a very different way than previously. Given the importance of obtaining properly disaggregated data in order to tackle the issue of out-of-school children (see below), it may also be necessary to engage in advocacy with national statistics agencies so as to ensure that data is collected and disaggregated in a way that is not only useful but which also complies with the unified framework on equality.

Engagement with National Human Rights Institutions

In adopting an equality law approach, advocates may find that significant opportunities for engagement arise through identifying a new stakeholder to whom they can advocate on issues regarding educational participation and exclusion. One such key influencer and stakeholder may be the **NHRI**: NHRIs are independent bodies established by the state to protect and promote human rights. In many countries, NHRIs play an important role in helping to shape laws and policies and in holding governments to account for fulfilling their human rights obligations, including their obligations in respect of the rights to equal-

3 For example, research undertaken by Kett and Deluca in Zimbabwe regarding transport-related exclusion of children with disabilities from school has highlighted the need for “joined up” dialogue between representatives from departments of transport, roads and planning when discussing inclusive education, as well as engaging the Ministry of Education in discussions regarding urban planning and transportation: Kett, M. and Deluca, M., “Transport and Access to Inclusive Education in Mashonaland West Province, Zimbabwe”, *Social Inclusion*, Vol. 4, No. 3, 2016, p. 70.

ity and non-discrimination. NHRIs can also be influential in the state reporting process under the various international human rights treaties (see below, section 4.1.4), meaning that engagement with the NHRI may have a subsequent impact on the issues of concern brought to the attention of the relevant treaty body.

In states where there is no constitutional or legislative guarantee of the right to education, actors working in the education sphere may not previously have considered the possibility of engaging with the NHRI. However, the adoption of an equality law approach may allow national actors to engage with the NHRI through emphasising the way in which the rights to equality and non-discrimination are engaged in their particular context, thus providing a valuable avenue for education advocates that have not previously been able to access or engage with the international human rights framework at the domestic level.

- **How does an equality law approach influence the identification of policy windows that may help to advance your objectives?**

The adoption of an equality law approach in national advocacy efforts may mean that certain new policy windows can be identified. For example, planned government reforms in areas that do not, at first glance, appear to relate to education policy may be relevant if an equality law approach is applied; these could include proposed legislative or policy reforms or government strategies in relation to historically disadvantaged groups, such as women and girls, or persons with disabilities. Another potential approach could be to engage with the development, monitoring or review of a state's National Human Rights Action Plan, which is a plan developed by the state (in collaboration with civil society) setting out goals and guidance regarding the improved protection of human rights. Such plans should, *inter alia*, "promote broad national goals such as (...) elimination of inequalities and poverty alleviation", and should therefore contain programmes specifically directed towards alleviating or addressing the human rights situations of vulnerable and marginalised groups in society.⁴

- **How does an equality law approach influence the identification of levers that may help to advance your objectives?**

Advocates may find that an equality law approach leads to the identification of new levers that can be used to exert pressure on the government. For example, international advocacy mechanisms such as the Universal Periodic Review (UPR) and the examination of state reports

4 Office of the United Nations High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action*, 2002, pp. 10 and 81, available at: <http://www.ohchr.org/Documents/Publications/training10en.pdf>.

by Treaty Bodies (discussed further at section 4.1.4 below) may provide new opportunities for national level advocacy campaigns, since an equality law approach will give opportunities for engagement with a much broader range of supervisory mechanisms at the UN level. These UN level reviews can exert crucial additional pressure on national governments to change domestic legislation or policy, and advocates may wish to consider integrating the review processes under these mechanisms into their national advocacy campaigns. The post-2015 development agenda can also provide “leverage” for advocates seeking to use an equality law approach in tackling the issue of out-of-school children. As discussed in Chapter 2, equality law is key to achieving the SDGs, since equality is central not only to the SDGs that relate to education but to the whole SDG framework. Many governments have made firm commitments to making progress against the SDGs, and as such, the SDG review process provides a significant potential lever for advocacy. Advocates may therefore wish to take advantage of the political weight and status of the SDGs in order to put equality and non-discrimination in primary education on the domestic or international agenda in a different way than before.

Advocacy and the SDGs: IDDC’s #CostingEquity Campaign

The **#CostingEquity** campaign developed by the Inclusive Education Task Group of the International Disability and Development Consortium (IDDC) provides an example of the way in which an advocacy strategy was developed and designed in order to take advantage of a particular window of opportunity presented by the SDGs and the international legal and political context.⁵

As explained by Nafisa Baboo, chair of the Inclusive Education Task Group, the members of the Task Group had long been considering the factors that were impeding the implementation of inclusive education for children with disabilities: their research indicated that this human rights issue was barely on the radar of most national decision-makers, who considered that inclusive education was not a priority investment area, or that it would bring low returns on their investment; furthermore, most governments have not historically collected data on the number of children with disabilities in their country, nor do they share information on what resources (if any) they allocate towards the education of children with disabilities. The Inclusive Education Task Group of the IDDC considers that the system-wide reform needed to ensure inclusive education for all children with disabilities is possible if the **investment** needed is secured at both the domestic (state) and donor level.

5 The IDDC is a global consortium of 28 disability and development non-governmental organisations (NGOs), mainstream development NGOs and disabled people’s organisations that together support disability and development work in more than 100 countries.

In 2016, the Task Group felt that the “stars had aligned” politically on an international level, meaning that there was an opportune moment for advocacy regarding inclusive education:

- The post-2015 development agenda, as set out in the SDGs, is disability inclusive, with its underpinning principle of “**leaving no one behind**”.
- **Sustainable Development Goal 4 (SDG4)** and the **Education 2030 Framework for Action** were both focussed on ensuring inclusive and equitable education for all, with children with disabilities being given specific attention.
- In September 2016, the Committee on the Rights of Persons with Disabilities (CRPD) adopted a new **General Comment on the right to inclusive education** under Article 24 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD),⁶ thus providing much-needed guidance for governments and other stakeholders regarding the implementation of inclusive education.

An advocacy campaign was developed to take advantage of this window of opportunity – entitled **#CostingEquity**. This campaign is an advocacy and research project that focusses on raising awareness of the current status of the financing of disability-inclusive education by international donors and governments, and highlighting what needs to change in order for education financing to effectively support the realisation of SDG4 and Article 24 of the UNCRPD. A report entitled **#CostingEquity** – which makes “the case for disability-responsive financing” – forms the basis of the campaign; it was launched in October 2016 at the UN General Assembly in New York.⁷

The campaign seeks to bring the importance of financing disability-inclusive education to the attention of two key stakeholders: firstly, it aims to bring the issue to the attention of “**mainstream**” NGOs in order to gain their support and backing; and secondly, it seeks to target key **donors and foundations** (with the support of other “mainstream” NGOs) to convince them of the need to make disability inclusion a compulsory criterion for the allocation of education funding. In April 2017, the Inclusive Education Task Group launched a “Call to Action to Invest in Disability-Inclusive Education”, calling on governments and donors to deliver on the promise of the SDGs by investing in inclusive education, and advocating for better donor financing for inclusive education.⁸ To date, over 120 organisations have endorsed the Call to Action, and it is beginning to be used as a tool in national advocacy.

6 Committee on the Rights of Persons with Disabilities, *General Comment No. 4 on the right to inclusive education*, UN Doc. CRPD/C/GC/4, 2016.

7 International Disability and Development Consortium (IDDC), “*#Costing Equity: The case for disability-responsive education financing*”, 2016, available at: http://iddcconsortium.net/sites/default/files/resources-tools/files/iddc-report-short_16-10-17.pdf.

8 Read more at IDDC, *Call to Action to Invest in Disability-Inclusive Education*, 2017, available at: <https://iddcconsortium.net/resources-tools/call-action-invest-disability-inclusive-education>.

- **How does an equality law approach influence messaging and framing of the issues?**

The Equal Rights Trust's experience in working to promote equality in a number of countries worldwide has been that the language of equality and fairness – and, conversely, discrimination and disadvantage – can be extremely powerful in communicating and achieving consensus around controversial issues. As such, arguments regarding the need to tackle inequality in education may have more resonance than arguments simply calling on the state to increase spending or investment in education. Framing the issue of out-of-school children by reference to the rights to equality and discrimination may therefore be an effective way of communicating with the decision-makers and stakeholders being targeted. Furthermore, applying an equality law approach means that the issue of out-of-school children may be more easily framed as a human rights violation, rather than a matter of social policy; this may be of particular significance or import in countries that do not recognise or guarantee the right to education in their national constitutional or legislative frameworks.

The Significance of Equality-Focused Legal and Policy Discourse

A comparative study reviewing the role of anti-discrimination measures and positive action policies in eradicating inequalities in education found that one of the factors that contributed towards achieving reductions in inequalities was “equity-focused political discourse”.⁹

When considering the “common features” of effective anti-discrimination measures in *Cambodia, Ethiopia, Ghana, Nigeria, Peru* and *Uganda*, the authors of the study observed that political discourses that “directly acknowledge group-based disadvantages and which enshrine commitments to tackle those disadvantages in formal processes and legal instruments” played an important role in reducing inequalities in education in Ghana and Ethiopia.¹⁰ In Ghana, the study noted that the government had “consistently remarked on inequality in education as a policy focus area”, and that Ghana was therefore “characterised by an inclusive national discourse on education that emphasises equal access to schooling”.¹¹ In Ethiopia, there was a political and policy discourse that focused on “enhancing the participation of discriminated-against groups”. By contrast, the study noted that the countries that were not successful in reducing inequalities in education (Nigeria, Peru and Uganda) did not have equality-focused discourse regarding education policy.¹²

9 Lenhardt, A. et al, *Anti-discrimination measures in education: A comparative policy analysis*, 2017, available at: <https://www.wider.unu.edu/sites/default/files/wp2017-78.pdf>.

10 *Ibid.*, p. 24.

11 *Ibid.*, p. 12.

12 *Ibid.*, p. 23.

■ What does an equality law approach require by way of evidence and analysis?

In order to be effective, an advocacy campaign based on the rights to equality and non-discrimination needs to be evidence-based. The research for this report has shown that, whilst there is significant research regarding the issue of out-of-school children, targeted research and data regarding discriminatory barriers in primary education are lacking, meaning that work is likely required to collect the data or evidence needed to support an advocacy campaign. It is important to follow best practice in collecting any such data or evidence, including ensuring that the data is disaggregated by reference to all protected grounds under international human rights law, that consideration is given to monitoring all forms of discrimination (direct, indirect, harassment, and failure to make reasonable accommodation), and that multiple discrimination is recorded and presented as evidence to support the arguments being made in the advocacy campaign.¹³

Assessing Children's Learning Through Household-Based Surveys: Uwezo

Tackling the issue of out-of-school children necessitates consideration not only of equality in access, but also equality in the *quality* of education: insufficient and poorly trained teachers, overcrowded classrooms and a lack of teaching materials can play a role in children dropping out of primary education. The organisation **Uwezo**, which means “capability” in Kiswahili, looks beyond school enrolment to ask “*Are Our Children Learning?*”. Uwezo does this through monitoring basic literacy and numeracy levels of children aged five to 16 years across at least 50% of the districts in **Kenya, Tanzania** and **Uganda** through a household-based survey. The findings from these surveys are presented in Annual Learning Assessment Reports for each country,¹⁴ and such findings are then communicated widely in order to foster informed public understanding and wider public policy debates in the media, and thus encourage governments to improve the quality of education. As noted in Uwezo’s theory of change:

*Building a solid evidence base is necessary, but usually insufficient for changes in policy and practice. Uwezo believes that concerned actors – whether parents or politicians, teachers or technocrats – will do the right thing when they are compelled to do so or have a clear incentive to act. Uwezo therefore places great emphasis on communication of findings (...).*¹⁵

13 For a discussion of statistical data as a tool with which to combat discrimination, see above, note 1, European Commission.

14 See, for example, Uwezo, *Are our children Learning? The State of Education in Kenya in 2015 and Beyond*, 2015, available at: <http://www.twaweza.org/uploads/files/kenya.pdf>.

15 Uwezo, *About Us: Theory of Change*, 2017, available at: <http://www.uwezo.net/about-us/theory-of-change>.

The surveys highlight **inequalities** in primary school enrolment rates and learning outcomes by reference to characteristics and factors such as sex, socio-economic status, language, and the region in which children live. The survey findings also present children's relative enrolment rates and learning outcomes by reference to their mother's age and level of educational attainment, thus allowing consideration of the effects of systemic gender inequalities.¹⁶ Whilst the data collected by Uwezo is not disaggregated by reference to all grounds protected under international law (with some notably missing, such as disability), their work is an example of how an evidence-based approach can support the identification of particular groups of children that are at risk of being out-of-school, and how such evidence can be used to engage relevant stakeholders.

- **What opportunities for partnering or collaboration are presented if an equality approach is adopted?**

An equality law approach to advocacy may present opportunities for collaboration between stakeholders that would not otherwise have considered themselves to be "allies". For example, development actors may find that it strengthens their cause if they partner with human rights organisations or lawyers whose work focuses on issues of equality and non-discrimination. At the same time, human rights organisations and lawyers may benefit from working closely with civil society organisations that have formed partnerships with local communities and other actors on the ground, since this may improve their ability to access relevant information and data from those affected.

Building Civil Society Coalitions: All For Education in Mongolia

In 2010, a national coalition for education – known as **All For Education (AFE)** – was established in **Mongolia** to advocate for the full implementation of Education for All goals. The AFE coalition brings together a diverse range of civil society actors working on education from the perspective of different groups, including women's organisations, child rights networks, disability organisations, education NGOs, human rights organisations, teachers' unions, and other groups representing marginalised groups such as ethnic minorities; together, these organisations "[amplify] the voices of the marginalised".¹⁷

16 See above, note 14, pp. 16 and 20.

17 See All4Education, "'All for Education!' National Civil Society Coalition", *All4Education*, 26 December 2016, available at: <http://all4education.mn/en/?p=53>.

The AFE coalition adopts a human rights-based approach to achieving the Education for All goals, looking at how to “continuously influence education policy reform to ensure every person’s right to life-wide and life-long quality education”.¹⁸ One of the AFE coalition’s stated goals is to institutionalise “regular communication between government, donors, NGOs and other actors”, and it has implemented a series of Annual National Civil Society forums since 2010 in order to provide a space for a diverse range of civil society representatives to constructively engage with the government and donors. The coalition is now recognised as a key player in policy discussions, and is a member of ministry level committees and working groups on education policy development.¹⁹ The work of the coalition is seen as a “model” for civil society in Mongolia in terms of providing a “consensus-based, inclusive, mutually supportive and shared-power process towards a common goal”.²⁰

The above discussion is by no means an exhaustive exposition of the ways in which an equality law approach may influence the development of national-level advocacy campaigns; however, it should provide inspiration for advocates who are considering how any advocacy campaign aimed at tackling the issue of out-of-school children can maximise the chances of reaching *all* those out of primary education. As noted above, an equality law approach will often – but will not always – carry strategic and tactical advantages through opening up new opportunities for and means of engagement with key stakeholders. However, regardless of any potential tactical advantages, there will always be a need for the substantive policies or reforms advocated for to be grounded in equality law if “Education for All” is to be achieved. As such, the latter should always be borne in mind when formulating the objectives and outcomes of the advocacy campaign at the outset.

4.1.4 International and Regional Advocacy

In addition to influencing national advocacy strategies, an equality law approach also opens up a range of international and regional advocacy opportunities for civil society actors, in terms of opening up new forums and stakeholders, as well as new ways to engage with existing stakeholders. These provide opportunities to reinforce, support, and strengthen domestic advocacy campaigns, with international or regional advocacy being seen as part of an overarching strategy.

18 *Ibid.*

19 *Ibid.*

20 Irgen-Tur, “All for Education, National CSOs coalition (AFE Mongolia)”, *Irgen-Tur*, 2017, available at: <http://www.irgen-tur.mn/en/all-education-national-csos-coalition-afe-mongolia> (emphasis added).

International Advocacy Opportunities

Engagement with Treaty Bodies

As noted in Chapter 1, in ratifying human rights treaties, states agree to be subject to the supervision of an international “**treaty body**”. A treaty body is a committee of independent experts that is tasked with reviewing states’ compliance with their obligations under the treaty in question through the **state reporting** process, and with elaborating on the scope, content and interpretation of the rights contained within the relevant treaty through issuing **General Comments** or **Recommendations**. For example, the Committee on Economic, Social and Cultural Rights (CESCR) is tasked with monitoring compliance with the rights contained within the International Covenant on Economic, Social and Cultural Rights, including the right to a free primary education.

As explained in Chapter 1, there are a number of international human rights treaties that specifically protect equality in education (including the United Nations Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the UNCRPD), whilst the International Covenant on Civil and Political Rights protects the rights to equality and non-discrimination as free-standing rights.²¹ In adopting an equality law approach, the host of opportunities for civil society to engage with a number of treaty bodies beyond the CESCR is evident.

Firstly, the **state reporting** process can be used by civil society actors as a way in which to exert pressure on a state to ensure that its education laws and policies are grounded in equality law. States are obliged to submit “periodic reports” to the treaty body (usually every four to five years) in which they explain the measures adopted to implement their obligations under the treaty in question. Civil society organisations have the opportunity to submit Shadow Reports in order to supplement the information that the state presents to the treaty body when it provides its periodic report. Shadow Reports play a crucial role in providing reliable, independent, and alternative information to the treaty body committees, and thus provide an important advocacy opportunity for civil society to expose the reality of the situation in the country in question in an international forum. Shadow Reports can be submitted jointly, and so can provide opportunities for collaboration between organisations working to tackle the issue of out-of-school children. Adopting an equality law approach ensures that advocates engage with the full range of treaty bodies concerned with equality in education, including the Committee for the Elimination of all Forms of Discrimination against Women, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the CRPD and the Human Rights Committee.

Civil society actors can also make use of other **supervisory processes** under the treaty body system in order to strengthen the policy framework on equality

21 See Chapter 1, section 1.1.2.

in primary education at the international level; whilst these processes will not have a direct impact on states, they may indirectly influence future state policy and practice:

- **Commenting on General Comments or Recommendations:**

One of the supervisory mechanisms adopted by treaty bodies is the publication of General Comments or Recommendations, in which the treaty bodies clarify the nature and scope of states' obligations under the treaty in question, and provide guidance on the interpretation of substantive provisions of the treaty. These General Comments and Recommendations have been crucial in developing our understanding of the content of the right to education, and in clarifying what is required in order to ensure *equal* enjoyment of the right to education. Where a treaty body is drafting a new General Comment or Recommendation, it will usually seek comments from civil society regarding the contents of the draft. For example, when the CRPD was drafting a new General Comment on the right to inclusive education in 2016, it called for "interested parties" to provide written input on the draft and received over 80 submissions from civil society organisations and governments. Such participation gives civil society the opportunity to influence the content of the treaty body's jurisprudence and recommendations regarding the steps that states are required to take in order to comply with their obligations to promote equality in education.

- **Days of general discussion/thematic debates:**

Treaty bodies occasionally hold general discussion days or thematic debates on particular issues of concern, which are usually open to external participants such as civil society organisations. These can sometimes prompt the treaty body to draft a new General Comment or Recommendation. For example, in 2014, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) held a general discussion day on girls'/women's right to education, with a view to subsequently elaborating a General Recommendation on girls'/women's right to education. The Committee invited civil society organisations to participate in the general discussion through providing both oral and written contributions.

Engagement with the Universal Periodic Review Process

The UPR is an oversight mechanism of the UN Human Rights Council through which the human rights records of all UN member states are reviewed. Under the UPR, states are required to report to the UN Human Rights Council once every four to five years regarding the steps they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The reviews are conducted by a Working Group consisting of members of the UN Human Rights Council, meaning that the UPR operates as

a peer-review mechanism. NGOs and other civil society organisations have the opportunity to engage in the UPR process through participating in any national consultations that take place at the domestic level; submitting a stakeholder report to be considered as part of the review; lobbying the states that form part of the Working Group in order to ensure that certain issues are addressed in the review; making statements at the regular session of the UN Human Rights Council when the outcomes of the state reviews are considered; and lobbying the state under review to accept the recommendations made by the Working Group.

The UPR assesses the extent to which states respect the obligations set out in *all* human rights treaties to which the state is party. As such, adopting an equality law approach means that civil society actors should engage with the process on much broader terms, looking at states' compliance with their obligations under all treaties under which the rights to equality and non-discrimination in education are protected.

Regional Advocacy Opportunities

There are a number of opportunities for civil society to engage in advocacy at the regional level through mechanisms that complement the international treaty body and UPR processes. For example:

- The **Inter-American Commission on Human Rights (IACHR)** has a mandate to promote and protect human rights in the American hemisphere, including the right to education and the rights to equality and non-discrimination. It does this through a number of mechanisms, including the consideration of individual petitions regarding alleged human rights violations, the conduct of in-country visits, and the issuance of *ad hoc* country reports and thematic reports. There are a number of opportunities for civil society actors to engage with the IACHR in order to exert pressure on national governments to tackle discrimination and inequality in primary education. Firstly, the IACHR holds regular **thematic hearings** in order to compile information about a particular human rights issue in one or more states; these hearings are scheduled in response to requests from civil society, with civil society organisations often requesting such hearings as part of a broader advocacy strategy to focus the IACHR's attention on a particular human rights issue. Such hearings can play an important role in bolstering domestic and international advocacy through creating momentum around national-level campaigns, providing a platform for mobilisation, and providing a venue for discussion with government officials.²² The IACHR has also appointed a number of different **thematic rapporteurs** that are devoted to monitoring compliance with specific human rights, and considering the situation of certain groups, communities and peoples that are at risk of human

22 Columbia Law School Human Rights Initiative, *Using Thematic Hearings at the Inter-American Human Rights Commission to Advance U.S. Human Rights Accountability: A Resource for the Bringing Human Rights Home Lawyers' Network*, 2016, p. 4, available at: http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/iachr_thematic_hearings_resource_1_0.pdf.

rights violation due to issues of historic discrimination. The rapporteurs may issue requests for the submission of information from civil society and other non-state actors in order to enable civil society to assist with their work, including the preparation of thematic reports. Adopting an equality law approach to the issue of out-of-school children – rather than a pure right to education approach – provides new opportunities for advocates to engage with the Rapporteur on the rights of indigenous peoples, the Rapporteur on the rights of women, the Rapporteur on the rights of migrants, and the Rapporteur on the rights of afro-descendants and against racial discrimination, rather than focussing their efforts solely on the Special Rapporteur for Economic, Social and Cultural Rights.

- The **African Commission on Human and Peoples' Rights** has a periodic reporting process, whereby all countries that have ratified the African Charter on Human and Peoples' Rights must submit periodic reports to the Commission regarding the steps the government has taken to implement and comply with its obligations under the Charter, including in respect of the right to education and the rights to equality and non-discrimination. Civil society organisations may submit Shadow Reports to the Commission, and can engage with the Commission before, during and after the Commission's consideration of a particular government report, through making submissions in relation to states' compliance with the obligation to provide education free from discrimination. The African Commission has also created a number of "subsidiary mechanisms", including special rapporteurs, committees, and working groups, with opportunities existing for civil society actors to engage with such mechanisms as part of a broader advocacy campaign.²³ These thematic special rapporteurs, committees and working groups focus on issues including economic, social and cultural rights; the rights of women; the rights of refugees, asylum seekers, migrants and internally displaced persons; the rights of indigenous populations; the rights of persons with disabilities; and the rights of people living with and affected by HIV. As above, in adopting an equality law approach to the issue of out-of-school children, it becomes clear that advocates may need to engage with this full range of subsidiary mechanisms, rather than focussing solely on the working group on economic, social and cultural rights.
- At the European level, there are opportunities for engagement with both the **EU** and the **Council of Europe** in relation to the right to education and the rights to equality and non-discrimination under relevant regional instruments, such as the Charter of Fundamental Rights of the EU²⁴ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). As far as the **EU** is concerned, there are

23 The precise modes of engagement vary depending on the mechanism in question; however, there are generally opportunities for civil society organisations to provide country-specific information on particular human rights violations, with such information then feeding into the recommendations made by the rapporteurs, committees or working groups.

24 Charter of Fundamental Rights of the European Union C326-391, 2000.

a number of ways for advocates to influence state policy and practice through engaging with different EU institutions. For example, the **European Commission** (the executive body of the European Union) has an important role to play in monitoring member states' fulfilment of their obligations under EU law – which include a number of directives on equality and non-discrimination, and the rights to education and equality under the Charter of Fundamental Rights of the EU – and has the power to bring issues before the Court of Justice of the European Union in the event of non-compliance. Lobbying the European Commission to take action regarding state failures to fulfil their equality and non-discrimination obligations under EU law can provide a means of exerting pressure on states to implement these obligations. The **Council of Europe** (CoE) is an international organisation in Strasbourg comprising 47 countries in Europe, which was established to promote democracy and protect human rights and the rule of law in Europe. There are various opportunities for civil society to engage with the CoE under its mandate for promoting human rights, and thus exert pressure on national governments. For example, civil society organisations are able to provide information regarding country-specific human rights violations to the Commissioner for Human Rights, with such information being used by the Commissioner in subsequent dialogue with national authorities. There are also opportunities for civil society to engage with the Commissioner's thematic work on equality and non-discrimination (including on gender equality, racism, the rights of persons with disabilities, Roma rights and migrants' rights) in order to draw the Commissioner's attention to issues of inequality and discrimination in primary education.

- The **Association of South-East Asian Nations (ASEAN) Intergovernmental Commission on Human Rights (AICHR)** is the overarching human rights institution in ASEAN with overall responsibility for promoting and protecting human rights in ASEAN, including the rights to equality and non-discrimination and the right to education. It does this through (*inter alia*) developing strategies for the promotion and protection of human rights and fundamental freedoms, preparing studies on thematic issues of human rights in ASEAN, and engaging in dialogue with ASEAN civil society organisations and other stakeholders. It is possible for civil society organisations and institutions to apply for consultative status with the AICHR, thus allowing them to provide their views and advice on certain matters via lectures and discussions; to provide regular reports or briefs to the AICHR (including policy recommendations); and to carry out specific studies or prepare papers to support the work of the AICHR.²⁵ It is worth noting, however, that the AICHR is a much weaker mechanism than the regional mechanisms discussed above, given that there is no binding human rights instrument in ASEAN; as such, the op-

25 Association of South-East Asian Nations Intergovernmental Commission on Human Rights (AICHR), *Guidelines on the AICHR's Relations with Civil Society Organisations*, 2015, available at: <http://aichr.org/news/consultative-relationship-with-the-aichr-5>.

portunities for engagement and the leverage arising from such engagement is more limited.

4.2 Strategic Litigation

4.2.1 Introduction to Strategic Litigation

There is no single, authoritative definition of “strategic litigation”: for the purposes of this report, it is considered to be synonymous with “public interest litigation”, and thus referring to legal action that has the aim of creating a broader societal transformation to the benefit of the marginalised within society. As a strategy for change, strategic litigation is concerned with engaging the power of the judicial branch of the state, or with using international or regional judicial mechanisms, to: ensure that existing laws are enforced; challenge existing laws or policies; or clarify existing laws and their application in specific contexts.

Strategic litigation may be better seen as an art than a science. Two individuals who have undertaken significant strategic litigation in the field of equality and non-discrimination have elaborated on this. As Petrova has said “[s]trategic litigation is...a venture into unknown territory”, “an attitude”, “wishful thinking about social change combined with the talent to turn a social problem into a vision of an actionable court case”.²⁶ Similarly, Goldston wrote:

*Social change litigation – legal action in court aimed at achieving concrete and lasting transformation in structures of injustice and/or inequality – can take place only when people are willing to take risks. (...) Among these is the risk that a lawyer will develop a theory of a case – a way of articulating the wrong done and the remedy required – so new, so at odds with conventional ideas in the profession, as to be misunderstood, ignored or even laughed at by her colleagues. It is a risk worth taking.*²⁷

The nature of the litigation pursued will depend on the broader strategy adopted by civil society to achieve this goal in the particular context. Accordingly, what follows is a starting point, outlining the key considerations to be borne in mind by anyone looking to embark on strategic litigation, and providing some guidance which may assist in collecting your thoughts and elucidating your specific strategy.

26 Equal Rights Trust, *Economic and Social Rights in the Courtroom: A Litigator's Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights*, 2014, Foreword, available at: http://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf.

27 Goldston, J., “Race discrimination litigation in Europe: problems and prospects”, *Roma Rights*, Autumn 1998.

4.2.2 Strategic Litigation for Equality in Education

In the context of out-of-school children, strategic litigation can be used as a means to ensure that the rights to equality and non-discrimination are respected, protected and fulfilled by the state in law and policy, and thus improve enjoyment of the rights to equality and non-discrimination in education. This can be through, for example:

- challenging discriminatory policies or practices that cause or contribute to children being out of primary school on the grounds that such policies are in breach of the rights to equality and non-discrimination as protected under the state's constitution or national legislation (such as in the cases of *Plyler v Doe*²⁸ and *Antoine et al v Winner School District*,²⁹ discussed below);
- challenging discrimination or inequality in state policies regarding the provision of school resources, such as desks, chairs, and textbooks (such as in the case of *Minister of Basic Education v Basic Education for All*,³⁰ discussed below);
- challenging discrimination or inequality in state policies regarding investment in the education of specific groups (such as in *The High Follow-up Committee for the Arab Citizens in Israel, et al v the Prime Minister of Israel*³¹ discussed in Chapter 3 at section 3.4, and *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*³² discussed below); and
- ensuring that states implement the right to equality by taking positive action to secure the equal participation of all children in primary education (such as in the Colombian case of *Decision T-025 of 2004*,³³ discussed below).

4.2.3 Considerations when Embarking on Strategic Litigation

This section identifies a number of issues to be considered by any individual or civil society organisation thinking about embarking on strategic litigation. Given

28 *Plyler v Doe*, 457 U.S. 202, 1982.

29 *Antoine et al v Winner School District*, Civ. 06-3007, United States District Court, South Dakota Central Division, 2007.

30 *Minister of Basic Education and others v Basic Education for All and others*, Case No. 20793/2014, ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA), 2015.

31 *The High Follow-up Committee for the Arab Citizens in Israel, et al v the Prime Minister of Israel*, HCJ 2773/98 and H.C. 11163/03, 2006.

32 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Government of the Province of Western Cape*, Case no: 18678/2007, High Court of South Africa (Western Cape High Court, Cape Town), 2010.

33 *Republic of Colombia Constitutional Court, Third Review Chamber, Decision No. T-025 of 2004*, 2004.

that claims based on the rights to equality and non-discrimination are available, applied and interpreted to varying extents and in varying ways across different jurisdictions, the issues discussed in this section are intended to provide **general guidance and inspiration** for litigators in developing strategies that are tailored to their own legal and factual contexts. For a more detailed exploration of the issues discussed below, readers are referred to the Equal Rights Trust's guide on *Economic and Social Rights in the Courtroom*.³⁴

A. Is Litigation Appropriate?

Prior to considering the various issues discussed below, potential litigants should consider carefully whether it is appropriate in all of the circumstances to pursue strategic litigation. Litigation can be extremely time-consuming – often continuing for many years – and can consequently be resource-intensive, both in terms of the funding that is required to pursue a case to its conclusion (including any follow-up litigation or other action required to ensure the implementation of a successful judgment), as well as in terms of the staff time required to support the lawyers with the conduct of the case. Furthermore, litigation may not fit within broader social movements, or the timing may not be appropriate in the particular political context. Importantly, and as noted at the outset of this Chapter, strategic litigation is not a standalone strategy for achieving change: of particular note, it sits closely alongside advocacy, given that advocacy will often precede the commencement of litigation, and an advocacy strategy should be developed as part of the overall litigation strategy in order to ensure effective follow-up and implementation of any successful court judgments.³⁵ As noted by the Open Society Justice Initiative in its recent report on Strategic Litigation Impacts:

*Strategic litigation is neither a panacea nor an invitation to disaster (...) it is one tool among many, a tactic that – under the right circumstances and in combination with other efforts – can contribute to positive social change.*³⁶

In considering the relationship between strategic litigation and other strategies for change towards a particular objective, litigators will be able to recognise that, in some cases, litigation may not be appropriate in a given case.

B. Mapping out your Objectives

It is important to emphasise the complexity of achieving “positive social change” through strategic litigation. Such litigation varies from the broader provision of legal services, in that litigators must be careful only to take on a case which they consider will best advance their wider objectives. Accordingly, from the outset,

34 See above, note 26, p. 23 onwards.

35 See below, section 4.2.2.G.

36 Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, 2016, p. 19, available at: <https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-roma-school-desegregation-20160407.pdf>.

it is important for litigators to remain clear on these objectives; 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; and what type of remedy do they want the court to order and with what scope?

It is noteworthy in this context that, unlike in broader legal services, strategic litigation will not always be undertaken with the goal of “winning” the case. Assessing the success or otherwise of strategic litigation should be done by reference to the objectives that have been set, which are focused on positive social change rather than, necessarily, a judgment in the claimant’s favour. Accordingly, traditional notions of winning and losing a case may be misleading:

For example, even where the underlying claims themselves are not successful (i.e. where the case is “lost”), the case may nonetheless generate progressive jurisprudence regarding the state’s obligations in respect of the rights to equality and non-discrimination,³⁷ which can also be influential for future national or international litigation. Where the “lost” case does not result in progressive jurisprudence, the case may nonetheless prompt the government to take action by identifying issues that had previously not been scrutinised, or by highlighting the inadequacy or unfairness of current law and/or policies. Regardless of whether a case is “won” or “lost”, the litigation process can have important tangential consequences – for example, by uncovering or forcing the disclosure of key information and data regarding out-of-school children; and by building the capacity of the domestic judiciary to adjudicate on future discrimination cases, particularly where litigators and any intervening NGOs cross-refer to relevant comparative jurisprudence and best practice from other jurisdictions (see section 4.2.2.H below).

In setting your objectives, it is also critical to think not only about reaching a court judgment but also about what needs to happen after that point in terms of an implementation strategy to achieve your objectives. As well as contingency planning for an unintended “loss”, it will be necessary to consider the possibility that a judgment of the court does not go on to be implemented by the state. The non-implementation of court judgments (both national and regional) is a considerable problem in practice, and can occur for a number of reasons, including political apathy. This can constitute a significant barrier to achieving change through strategic litigation, and it is therefore imperative that litigators consider potential implementation strategies when developing their broader case strategy.³⁸ That said, the non-implementation of a court’s judgment does not necessarily mean that a case will not have any positive impact or effect: even where a judgment is not implemented, a case can still have “significant intangible impacts” through prompting or influencing policy discussions, or through positively contributing to national and/or international jurisprudence in relation to a particular issue.³⁹

37 *Ibid.*, p. 52.

38 See the discussion of implementation strategies at section 4.2.2.G below.

39 Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, 2010, p. 13, available at: <https://www.opensocietyfoundations.org/reports/judgment-justice-implementing-international-and-regional-human-rights-decisions>.

C. Identifying an Available Forum

One of the first steps to be taken is the identification of an available forum for bringing a claim based on the rights to equality and/or non-discrimination. In this context, the “forum” is the place where the case or complaint will be heard and decided, and could include bodies or courts at the domestic, regional and international levels:

- At the **domestic level**, this could include the national courts, Education Tribunals or other administrative bodies that have jurisdiction to hear claims or complaints relating to primary education.
- At the **regional level**, this could be a regional court such as the European Court of Human Rights (ECtHR), the European Committee of Social Rights, the Inter-American Court of Human Rights, the African Court on Human and People’s Rights, or the ECOWAS Court of Justice (the judicial organ of the Economic Community of West African States).
- At the **international level**, this could be the international treaty body tasked with hearing complaints under one of the international human rights conventions discussed in Chapter 1 (such as the CEDAW Committee).

In choosing a forum, there are certain questions and considerations that potential litigants should take into account:

Firstly, litigators must consider whether the forum is **legally available**. This means that the claimant must have standing to bring a claim in the forum in question, and the rules governing the forum must enable an equality and/or discrimination claim to be brought.

- When considering these factors in relation to **national forums**, litigators will need to determine whether the rights provided in international or regional treaties are directly enforceable at the national level,⁴⁰ or whether it is necessary to rely on rights guaranteed in national constitutions or national legislation. These issues are highly context-specific, and litigators must reflect on the legal framework of the national jurisdiction in which they are seeking to litigate.
- When considering the legal availability of regional or international forums, litigators will need to consider the fact that it is often necessary to “exhaust domestic remedies” first, meaning that claimants are normally required to pursue judicial channels available at the domestic level (including the appeals process) before the regional or international forum will hear the case.

Secondly, litigators must consider whether the forum is **practically appropriate**, taking into account factors such as: (i) the way in which the rights to equality and non-discrimination have previously been applied and interpreted in the forum in question (if at all); (ii) the rules of evidence in the forum; (iii) the costs

40 See Chapter 1, section 1.2, regarding the domestication of regional and international law.

of litigating in the forum, including the applicable costs rules; (iv) the time it will take for the case to be heard; (v) the likelihood of success before the forum; (vi) the remedies available; and (vii) the history of state compliance with and implementation of the judgments issued by the forum.

D. Claimants

Lawyers or civil society organisations wishing to pursue strategic litigation to tackle the discriminatory denial of primary education may already have a potential claimant (or claimants) in mind. However, in certain circumstances, litigators may need to identify and select a suitable claimant for a particular case – for example, where they have identified a particular discriminatory policy or practice that they wish to challenge or overturn, and need to look for the “ideal” claimant to bring the case. In those circumstances, strategic litigators will need to consider the following:

1. Would an individual or collective complaint be more appropriate?

- In some jurisdictions, a **collective complaint** may be possible. This involves a small group of individuals suing on behalf of a much larger group (often known as a “class action”). The **advantages** of collective complaints cases include the fact that they may be more likely to address systemic issues than individual complaints; they can reduce the burden faced by individuals involved in the complaint; and they can illuminate the broader impact of a particular set of facts.
- That said, **individual complaints** may be more appropriate in many circumstances. They carry certain **advantages**, including the fact that they may be logistically simpler (and thus less costly); they can bring issues into focus, allowing adjudicators to consider how particular circumstances violate legal obligations, which is particularly important in jurisdictions where the courts are wary of intervening in what are perceived to be areas of policy; and any remedies granting specific relief to individuals are likely to be easier to enforce than structural remedies which may more likely be sought in collective complaints.⁴¹

2. Should the claim be brought by a representative organisation?

- Depending on the rules governing the forum in question, it may be possible for a representative organisation – such as an NGO – to file the individual or collective complaint on behalf of the individuals who have suffered the wrong. In addition to minimising the strains of litigation on affected individuals, some argue that where the complaint is filed by a representative organisation, it may bring the advantage of generating more publicity for the case,⁴² which can be particularly important where the case is part of a broader advocacy strategy.

41 Provided, of course, there is a strategy in place to ensure the implementation of any remedies awarded: see below, section 4.2.2.G.

42 Child Rights Information Network, *Children’s Rights: A Guide to Strategic Litigation*, 2009, p. 15, available at: https://www.crin.org/en/docs/Childrens_Rights_Guide_to_Strategic_Litigation.pdf

Claimants in Equality and Non-Discrimination Claims

As Chapter 1 explains, the right to equality is:

[T]he 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.⁴³

Any individual who suffers an adverse impact as a result of education provision leaving them out-of-school is a potential claimant. Equal access to education is a fundamental requirement of ensuring that all human beings may “participate on an equal basis with others in any area of economic, social, political, cultural or civil life” being in itself an element of that life, but also a facilitator of participation later in life. Further, any individual who is not treated equally before the law and afforded equal protection and benefit of the law is a potential claimant. In the context of claims seeking to address the issue of out-of-school children, potential claimants will include children who have not received equal protection and benefit of laws relating to the provision of primary education.

In a claim based on the **right to non-discrimination**, it is necessary to consider the extent to which the potential individual claimant or group of claimants’ complaints relate to one or more protected characteristics. Where a potential claimant shares a number of protected characteristics, and it is possible to claim that discrimination has occurred on multiple grounds (such as sex and socio-economic disadvantage), it will be necessary to consider whether to argue the case based on traditionally recognised grounds (such as sex) – or on less recognised grounds (such as socio-economic disadvantage), or on both.

For example, children from low socio-economic backgrounds who belong to ethnic minorities can be denied entry to primary school due to their lack of birth certificates or other identity documents. These children suffer multiple discrimination on the grounds of both ethnicity and socio-economic disadvantage. Litigants considering pursuing a case to challenge this indirect discrimination would need to decide whether to frame the discrimination claim on the grounds of ethnicity or socio-economic disadvantage, or on the grounds of both.

When determining which ground(s) of discrimination to rely upon, litigators should consider the following:

- Whilst the extent to which particular grounds of discrimination are prohibited in national jurisdictions varies (as discussed in Chapter 1), cer-

43 Declaration of Principles on Equality, Equal Rights Trust, London, 2008, Principle 1.

tain grounds of discrimination are **widely recognised and prohibited** – such as sex, race, disability and nationality. There is a particularly long history of cases being brought on the grounds of sex and race. Whilst disability is not one of the original “protected characteristics” recognised under international law, it is now widely accepted to be a protected ground.⁴⁴ In relying on such “**traditional**” grounds of discrimination, litigators will have the advantage of being able to draw upon existing jurisprudence at the national, regional and international levels, and can cross refer to comparative jurisprudence from other jurisdictions where cases have been brought to challenge the denial of or lack of access to primary education on these grounds.

- Certain grounds of discrimination are **less well-recognised** at the national level – in particular, social origin and socio-economic disadvantage – and it may therefore be more **challenging** to base a discrimination claim on these grounds due to the scarcity of jurisprudence and positive precedents. This is not to say that arguments relating to discrimination on the grounds of socio-economic disadvantage should not be made by litigators: such arguments are to be encouraged in order to make progress towards the acceptance of socio-economic disadvantage as a ground of discrimination, and thus ensure that the socio-economic inequalities permeating the patterns of discrimination discussed in Chapter 3 are addressed by the courts. Furthermore, given that socio-economic disadvantage may be a decisive factor in a case, pursuing the claim on another ground of discrimination risks “[hiding] the socio-economic nature of the discrimination”.⁴⁵

Given these challenges, litigators may wish to consider: (i) making arguments based on socio-economic disadvantage *in conjunction with* arguments relating to discrimination on other more traditional grounds (such as gender, race, disability and nationality) where multiple discrimination can be identified; and (ii) extrapolating from existing precedents based on more established grounds, such as gender, when formulating arguments relating to socio-economic disadvantage.

In determining which ground(s) of discrimination to rely upon, depending on the goal of the case in question, litigators may need to take a pragmatic approach, weighing the broader and longer-term benefits of pursuing arguments based on socio-economic disadvantage against the prospects of achieving success in the case in hand through invoking a more traditionally accepted protected characteristic.

44 See the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), 2515 U.N.T.S. 3, 2006, discussed in Chapter 1.

45 Kadar, T., Equality & Rights Alliance, *An analysis of the introduction of socio-economic status as a discrimination ground*, 2016, p. 19, available at: <http://www.eracampaign.org/uploads/Analysis%20of%20socio-economic%20status%20as%20discrimination%20final.pdf>.

In the case of *R (Hurley & Moore) v Secretary of State for Education*,⁴⁶ a claim was brought by two students to quash the **UK** government's regulations increasing university tuition fees on the grounds that they were unlawful. One of the arguments made by the claimants was that the regulations **indirectly discriminated against those from lower socio-economic groups** on the basis that it would have a "chilling effect" on their ability to take up university places. Whilst this aspect of the claim was not ultimately successful, the UK High Court recognised that the relevant provisions of the ECHR **prohibited discrimination on the grounds of socio-economic status in the context of the right to education**, which was a significant jurisprudential development that could have significance for future education-related litigation in the UK courts.⁴⁷

E. Claims

When bringing a claim for **non-discrimination**, a person seeking to show that they have been discriminated against will generally have to show unjustifiable less favourable treatment because of a protected characteristic (direct discrimination); a particular disadvantage resulting from a neutral criterion, rule, policy, or practice which cannot be justified (indirect discrimination); a failure to make reasonable accommodation; or harassment.⁴⁸ In some jurisdictions it is also possible to claim that the state has violated a person's **right to equality** by failing to take **positive action** to achieve substantive equality. Examples of successful cases are explored below.

Cases Challenging Discriminatory Policies and Practices

As discussed in Chapter 3, discriminatory policies can cause or contribute to children being out of primary education, such as those requiring children to submit certain identification documents as a condition of school enrolment, or school language policies. Depending on the relevant legal framework, litigation can be used to challenge such policies on the grounds that they are in breach of the rights to equality and non-discrimination.

46 *R (Hurley & Moore) v Secretary of State for Education*, EWHC 201 (Admin), 2012.

47 *Ibid.*, Paras 46 onwards.

48 See Chapter 1, section 1.3, for more detailed definitions of these different forms of discrimination.

Direct Discrimination: Exclusion of Undocumented Children in *Plyler v Doe* (1982)⁴⁹

Facts: In 1975, the Texas legislature passed a law (i) authorising local school districts to deny enrolment in public schools to foreign born children who were not “legally admitted” to the **US**, and (ii) withholding funds for the education of such children. Two years later, the Tyler Independent School District implemented this legislation by instituting a policy requiring foreign-born undocumented students to pay a “full tuition fee” in order to enrol in school. A class action was filed on behalf of school-aged children of Mexican origin residing in Smith County, Texas, who were unable to establish that they had been legally admitted to the US and so were excluded from the public schools of the Tyler Independent School District. Central to the claim was the question whether the state’s exclusion of undocumented children from its public schools was discriminatory and in breach of the Equal Protection Clause of the US Constitution.

Outcome: The Texas statute was held to impose a “discriminatory burden on the basis of a legal characteristic over which children can have little control”, with the court noting that the children in question could neither affect their parents’ conduct in entering the US illegally, nor their own undocumented status. The court emphasised that education “provides the basic tools by which individuals might lead economically productive lives to the benefit of us all”, and that the statute imposed “a lifetime hardship on a discrete class of children not accountable for their disabling status”. In considering whether the discrimination contained in the statute was justified, the court noted:

If the state is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.

Accordingly, the Texas statute and the Tyler Independent School District policy were struck down as unlawful. This was a landmark decision that paved the way for the future protection of the right to education of immigrant children in the US.

It is not only formal policies that can be discriminatory: as discussed in Chapter 3, unwritten policies and practices – such as those which see certain children being disproportionately targeted for disciplinary action – can also be discriminatory. The case of *Antoine et al v Winner School District* provides an example of racially discriminatory disciplinary policies being challenged through the

49 See above, note 28.

courts, and how positive change was achieved through the agreement of an out-of-court settlement.

**Direct Discrimination and Harassment:
Racially Discriminatory Disciplinary Policies and Bullying
in *Antoine et al v Winner School District* (2006)⁵⁰**

Facts: This was a class action lawsuit filed on behalf of Native American families with children in South Dakota's majority-white Winner School District.⁵¹ The lawsuit claimed that schools were discriminating against Native American students by targeting them for minor disciplinary infractions more harshly and more frequently than white students engaging in similar conduct, and by requesting the arrest and prosecution of Native American students for minor misconduct, with a view to pushing Native American students out of schools into the juvenile and criminal justice systems.⁵² The School District was also accused of creating an environment that was hostile to Native American families, with claims that the District permitted "racially derogatory name-calling, teasing, bullying and pushing to go unpunished".⁵³ Amongst other repercussions, there was evidence that Native American students were dropping out of school at a far higher rate than white students:

*The District's racially hostile educational environment, racially discriminatory disciplinary policies, and police-referral customs and practices serve to push Native American youth out of Winner schools. The students become demoralised and disengaged. They act out in school, they do poorly academically, they do not attend class, and ultimately they drop out.*⁵⁴

The purpose of the claim was "to compel the Winner School District to eradicate the racially hostile educational environment" that had existed for the previous decade, and to prohibit the District from "engaging in racially discriminatory disciplinary practices and from coercing confessions from Native American students".⁵⁵

Outcome: A negotiated settlement was agreed in 2007 and a consent decree was approved by the federal court, requiring the authorities to enact policies and practices to ensure that the rights of Native American students were not violated. These included: the appointment of a full-

⁵⁰ See above, note 29.

⁵¹ *Ibid.*

⁵² *Ibid.*, Paras 1–4.

⁵³ *Ibid.*, Para 3.

⁵⁴ *Ibid.*, Para 9.

⁵⁵ *Ibid.*, Para 1.

time ombudsperson to act as a liaison between Native American families and school officials, particularly on disciplinary issues; the guarantee that an educational expert would work with school officials and Native American families to improve graduation rates amongst Native Americans, reduce the number of suspensions and school-based arrests, and improve the overall climate for Native American students in school; the provision of training for teachers on “unconscious racial bias and educational equity”; and the inclusion of Native American themes in mainstream curricula and school activities.⁵⁶

In 2014, the 2007 consent decree was amended in order to “balance the need for the School District to continue improving how Native American students are treated with the School District’s limited resources and improvements made since this action was filed”.⁵⁷ The amended decree revised some of the goals originally agreed upon, with new outcome measures and actions agreed in respect of Native American student graduation rates, suspensions, student achievement, attendance rates and drop-out rates (amongst other metrics).⁵⁸ Many of the goals set by the amended consent order were reported to have been achieved by the end of 2015, including benchmarks relating to academic achievement, school attendance and discipline.⁵⁹

Cases Challenging Discrimination or Inequality in State Policies Regarding the Provision of School Resources

A number of cases have been litigated in **South Africa** to combat discriminatory disparities in the provision of school resources arising as “a result of centuries of racial discrimination”.⁶⁰ in the case of ***Madzodzo and Others v Minister of Basic Education and Others***,⁶¹ which challenged the failure to provide essential school resources, such as desks and chairs, to public schools in Eastern Cape Province,

56 United Nations Educational, Scientific and Cultural Organization (UNESCO), *EFA Global Monitoring Report 2010: Reaching the Marginalized*, 2010, p. 205; ACLU, “Native American Families and Winner School District Announce Settlement in Case Alleging Discrimination”, *ACLU*, 18 June 2007, available at: <https://www.aclu.org/news/native-american-families-and-winner-school-district-announce-settlement-case-alleging?redirect=cpreldirect/30155>.

57 Notice of Proposed Amendment to Consent Decree in School Discrimination Lawsuit *Antoine et al v Winner School District*, 2014, available at: https://www.aclu.org/sites/default/files/field_document/combined_notice_and_amended_consent_decree_-_court_headers.pdf.

58 *Ibid.*

59 Lakota Country Times, “Winner School District Reports to Education Committee”, *Lakota Country Times*, 24 December 2015, available at: http://www.lakotacountrytimes.com/news/2015-12-24/Front_Page/Winner_School_District_Reports_to_Education_Commit.html.

60 Open Society Justice Initiative, *Strategic Litigation Impacts: Equal Access to Quality Education*, 2017, p. 48, available at: <https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-ed-ucation-20170322.pdf>.

61 *Madzodzo and Others v Minister of Basic Education and Others*, Case No. 2144/2012, ZAECMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM), 2014.

the High Court noted that “[a]partheid education has left a profound legacy (...) in the unequal and inadequate distribution of resources (...) as a consequence of decades of unequal and inadequate education”.⁶² However, significant progress has been made in challenging this legacy through strategic litigation, with the Open Society Justice Initiative’s recent Strategic Litigation Impacts report noting that some of the “greatest litigation successes have been in material improvements, such as to school infrastructure.”⁶³

**Indirect Discrimination: Failure to Provide Textbooks
to Learners from Poor Communities in *Minister of Basic
Education v Basic Education for All (2015)*⁶⁴**

Facts: This case challenged the failure to provide textbooks to learners in Limpopo province in South Africa, a mainly rural province, by the Department of Basic Education and the Limpopo Department of Education. The case was brought by Basic Education for All (BEFA), a voluntary organisation working in Limpopo, 22 members of school governing bodies, and the South African Human Rights Commission. In 2012, the Department of Basic Education adopted a new curriculum which was to be introduced incrementally over a three-year period across South Africa. New textbooks were required as a result of the curriculum changes, and each provincial Department of Education was required to procure the textbooks for the forthcoming academic year. In the Limpopo province, procurement of the relevant course materials was not conducted efficiently (despite the intervention of the courts through previous litigation), with many children in the province – who were predominantly poor black children – lacking access to the required textbooks. The claimants argued that this breached the students’ rights to equality, human dignity and a basic education under the South African Constitution. In relation to the right to equality, it was argued that this amounted to “unfair discrimination” that could not be justified by budgetary constraints.

Outcome: The Supreme Court of Appeal found that the Department of Basic Education and the Limpopo Department of Education had violated the rights to equality, human dignity and basic education by failing to provide learners in Limpopo with “every prescribed textbook before commencement of the teaching of the course for which they were prescribed”.⁶⁵ As far as the right to equality was concerned, the Court noted that the South African Constitution prohibits direct or indirect discrimi-

62 *Ibid.*, Para 19.

63 See above, note 60, p. 23.

64 See above, note 30.

65 *Ibid.*, order Para 3.

nation on the grounds of race.⁶⁶ The Court emphasised that even conduct that appears neutral and non-discriminatory may result in discrimination, and noted that the students without access to textbooks were being discriminated against:

*Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.*⁶⁷

The Court also made a point of noting the racial inequality and segregation upon which the education system was originally built, and the state's obligation to remedy this past injustice.⁶⁸

Cases Challenging Discrimination or Inequality in State Policies Regarding Investment in the Education of Specific Groups

As noted in Chapter 3, there are numerous examples of inequalities in state investment in education – such as the policies of the *Israeli* government, which treat the Arab sector less favourably than other sectors in terms of investment in education, and *Japan's* failure to allocate sufficient state resources to schools in “non-national” communities.⁶⁹ As discussed in section 4.1.3, there are also systemic issues in states failing to invest adequately in the education of persons with disabilities, with such failures being challenged through the IDDC's advocacy campaign. The failure to provide sufficient funding for the education of children with disabilities in *South Africa* has also been challenged in the case of *Western Cape Forum for Intellectual Disability*:

66 Constitution of the Republic of South Africa 1996, Chapter 2: Bill of Rights, section 9(3).

67 See above, note 30, Para 49.

68 *Ibid.*, Paras 48.

69 See Chapter 3, section 3.4.

Direct Discrimination: Unequal Funding for the Education of Children with Profound Intellectual Disabilities in Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another (2010)⁷⁰

Facts: This case challenged the failure by the Western Cape government to provide children with intellectual disabilities with appropriate and adequate education: the state allocated more funding to children with a “moderate intellectual disability” than to children who were classified as having a “severe and profound intellectual disability”. The only education available for children with profound intellectual disabilities was at “special care centres” operated by NGOs, and there were insufficient centres to cater for the educational needs of all such children. Those children who were unable to access a special care centre consequently received no education at all. The claimants argued (*inter alia*) that this breached these children’s right to equality.⁷¹

Outcome: The High Court held that the respondents were infringing the right to equality of the affected children, finding that these children had been “singled out for manifestly less favourable treatment than others”.⁷² The Court also rejected the respondents’ justification regarding the insufficiency of state resources, noting that they had failed to explain why the available funds were allocated in such a manner that the affected children were “cut out of the picture entirely”.⁷³ The Court ordered the respondents to take reasonable measures to give effect to the rights of severely and profoundly intellectually disabled children in the Western Cape, including ensuring that every such child had affordable access to basic education of an adequate quality; giving adequate funds to the NGOs providing education at the special care centres; providing appropriate transport for the children to attend such centres; enabling the staff of such centres to receive proper training and pay; and making provision for training persons to provide education for profoundly intellectually disabled children. The steps taken to ensure the implementation of the Court’s judgment are discussed at section 4.2.2.G below.

70 See above, note 32.

71 *Ibid.*

72 *Ibid.*, Para 26.

73 *Ibid.*, Para 30.

Cases Ensuring that States Implement the Right to Equality by Taking Positive Action to Secure the Equal Participation of all Children in Education

States' obligations in respect of the right to equality require them to take positive action to overcome the systemic disadvantage faced by marginalised groups and to accelerate progress towards equal participation in education. Whilst there are a number of cases *challenging* positive action in education (in particular, cases challenging affirmative action in the US),⁷⁴ cases requiring states to comply with their obligation to take positive action in education appear to be infrequent. There are, however, examples of cases in which the courts have made important findings regarding states' duties to take positive action in order to ensure equal and effective access to education for those belonging to marginalised or disadvantaged groups:

Positive Action to Ensure Effective Access to Education for Internally Displaced Children in Colombia in the Constitutional Court case of *Decision T-025 of 2004 (2004)*⁷⁵

Facts: This case concerned the living conditions of internally displaced persons (IDPs) in **Colombia**, who were claiming various breaches of their rights to non-discrimination, life, access to health and education services, minimum income, housing and freedom of movement. By 2003, over a thousand IDP families had submitted '*tutela* actions' to the Constitutional Court (a constitutional petition procedure), alleging that the municipal and departmental authorities had failed to protect the IDP population and had not responded effectively to their petitions in the fields of housing, access to healthcare, education and humanitarian aid. As far as IDP children's access to education was concerned, evidence showed that 25% of displaced children between 6-nine years old did not attend an educational institution. The combination of the lack of school spaces for the IDP population and the lack of books and other materials contributed to school drop-outs.⁷⁶

Outcome: The Court noted that the features of displacement are such that "the economic, social and cultural rights of those who suffer it are strongly affected".⁷⁷ The Court held that the state had "positive duties" to ensure "protection from discriminatory practices based on the condition of displacement", and recommended that the state adopt "affirmative measures in favour of special groups within the displaced population, and highlight the importance of securing equal treatment for displaced

74 See, for example, *Regents of the University of California v Bakke*, 438 U.S. 265, 1978; *Grutter v Bollinger*, 539 U.S. 306, 2003; *Grutter v Bollinger*, 539 U.S. 244, 2003; and *Fisher v University of Texas at Austin et al*, No. 14-981, 2016.

75 See above, note 33.

76 *Ibid.*

77 *Ibid.*

persons”.⁷⁸ In terms of access to education, the Court ordered the relevant Education Secretariats to carry out “all the actions which are necessary to guarantee effective access by the plaintiffs to the educational system” within one month after notification of the judgment. The case led to the development of a national plan for IDPs, ensuring that displaced children are eligible for free education and are accepted in schools without needing to provide previous proof of education. Such developments are believed to have led to an increase in the proportion of IDPs between five and 17 years old attending school, with the percentage increasing from 48% in 2007 to 85% in 2010.⁷⁹

Positive Action to Ensure the Elimination of Discrimination Against Persons Living with HIV/AIDs in Sri Lanka in *de Soyza and de Silva (Minor) v Minister of Education and Ors (2016)*⁸⁰

Facts: The case concerned a petition filed by a mother from the rural community of Illukhena, Kuliypitiya in western **Sri Lanka**, whose five-year old son was denied enrolment in their local school due to a rumour that his father had died of AIDS-related causes and that he himself was HIV-positive. The mother agreed to her son undergoing an HIV test – which confirmed that he was HIV-negative – but he was still refused admission to any school in the area.⁸¹ The mother filed a petition with the Supreme Court with support from Joint United Nations Programme on HIV/AIDS and the Positive Women’s Network, an NGO working with women living with HIV in Sri Lanka.

Outcome: Although the mother had since decided to send her son to a private school, following its offer of a full scholarship, the Court issued a decision stating that it wanted to “place on the record” that the state must ensure the right to universal and equal access to education at all levels under the Sri Lankan Constitution. The Court emphasised that the state “should ensure that the human rights of the people living with HIV/AIDS are promoted, protected and respected”. The Court added that this included taking “measures...to eliminate discrimination”

78 *Ibid.*

79 UNESCO, *No more excuses: Provide education to all forcibly displaced people*, 2016, p. 8, available at: <https://en.unesco.org/gem-report/no-more-excuses>.

80 *De Soyza and de Silva (Minor) v Minister of Education and Ors*, S.C. FR. No. 77/2016, Supreme Court of the Democratic Socialist Republic of Sri Lanka, 2016.

81 See Joint United Nations Programme on HIV/AIDS, *Sri Lanka’s Supreme Court Makes Landmark Decision Prohibiting HIV Discrimination*, 2016, available at: http://www.unaids.org/en/resources/presscentre/featurestories/2016/may/20160502_Srilanka_nodiscrimination.

against persons with HIV/AIDS. This set an important precedent for future HIV discrimination cases in Sri Lanka, and other positive judgments regarding the prohibition of discrimination in education against persons with HIV have followed in other countries in South Asia.⁸²

When formulating a claim, it is also essential that litigators consider the positions that they are advancing from the perspective of **other groups** facing discrimination in education so that they do not inadvertently entrench discriminatory structures. To take one example, the cases concerning the segregation of Roma children into special schools discussed in Chapter 3⁸³ argued that these children had been “inappropriately” placed in these special schools through “inadequate” assessments that led to them being misdiagnosed as having a learning disability; however, such arguments risk implying that it *is* appropriate to place certain children into special schools (despite such segregation being inherently discriminatory), and thus entrenching the discrimination faced by children with disabilities. As such, litigators should be mindful of the way in which the framing of their claim could impact on the discrimination and disadvantage faced by other marginalised groups.

F. Respondents

Determining who is the appropriate respondent in a case is a key strategic decision. Very often this will be a state actor, although non-state actors – such as private school providers – may also have certain responsibilities in relation to equality and non-discrimination under national law. In either case, in order to determine the appropriate respondent(s), it is necessary to identify who the duty-bearers are in relation to the rights to equality and non-discrimination in the forum in question:

- **State actors:** The state is the primary duty-bearer responsible and accountable for fulfilling the rights to equality and non-discrimination. In the context of claims seeking to tackle the discriminatory denial of primary education, and address the issue of out-of-school children, the most obvious duty-bearers will be the **national government; state or provincial governments in federal systems; national and local education authorities; and government ministries for education**. However, given the interlinking nature of many of the barriers discussed in Chapter 3, other government bodies may also be relevant to the matters at issue, such as **ministries for transport, social affairs, and health**, and the state **treasury** (which will be making determinations regarding the allocation of resources).

⁸² See, for example, *Naz Foundation (India) Trust v Union of India and Ors*, Civil Original Writ Petition 147 of 2014, 2017.

⁸³ See Chapter 3, section 3.3.2.

- **Non-state actors:** Depending on the country, non-state actors may have obligations under the national constitution, under national anti-discrimination legislation, and/or national legislation regulating certain functions or areas of life, such as the provision of education. In the **UK**, for example, the Equality Act 2010 places responsibility for non-discrimination with a number of different non-state actors, with Part 6 on Education applying not only to schools maintained by the state but also to private schools.

In deciding against whom a claim should be brought – particularly if there is a choice between pursuing a claim against a state or a non-state actor – there are a number of factors to be considered. For example, if the aim of the case is to achieve a broad transformative social change, a claim against an individual non-state actor is perhaps less likely to have this effect than a complaint against the national government, since governments have the most power to effect large-scale change. However, it is also important to consider that the state will have significant resources to defend a claim and may, therefore, be able to sustain protracted litigation.⁸⁴

G. Evidence and Proof

Whilst the precise procedural and evidential rules applicable in a case will depend on the forum, there are certain considerations that are often relevant to discrimination and equality cases.

- **Burden of proof:** Usually, claimants are required to provide some evidence of discrimination, which the respondent(s) must then rebut: the claimant must establish a *prima facie* case of the elements of discrimination, at which point the burden of proof “shifts” to the respondent to prove that the reason for the treatment in question was not discriminatory.⁸⁵

In an **indirect discrimination** case, statistics can play a crucial role in establishing a *prima facie* case of discrimination, and thus in shifting the burden of proof to the respondent(s). This was particularly evident in the case of ***D.H. and Others v. Czech Republic (2007)***. In this case, the Grand Chamber of the ECtHR found that the Czech authorities had violated the right to non-discrimination by placing disproportionately high numbers of Roma children in substandard special schools for children with learning disabilities (see Chapter 3, section 3.3.2). The Roma applicants proved their case by relying heavily on statistics, including research indicating that Roma pupils in the region were more than 27 times more likely to be placed into special schools than

⁸⁴ See above, note 42, pp. 20–21.

⁸⁵ See Interights, *Non-Discrimination in International Law: A Handbook for Practitioners*, 2011, p. 70, http://adapt.it/adapt-indices-a-z/wp-content/uploads/2014/08/interight_non-discrimination_in_international_law_2011.pdf.

non-Roma pupils.⁸⁶ The Grand Chamber noted that “when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce.”⁸⁷ Latterly, one of the judges described the case as “the first judgment where it was very largely based on the evidence of statistics”.⁸⁸

- **Evidence:** Litigators will often need to be resourceful in gathering evidence in equality and discrimination claims being brought against the state. Some types of evidence that litigators may wish to secure are: witness statements and victim statements; visual and audio evidence, if appropriate; relevant studies and reports, including by UN bodies, NGOs or third-party researchers; and statistics, including both official published data and any unofficial statistics. In order to obtain the information required to build a discrimination case, litigators may also consider taking steps pre-litigation to obtain access to relevant information or data from public bodies, including through submitting questionnaires and/or making freedom of information requests.

H. Remedies

The nature of the remedy sought and awarded is crucial to the achievement of the broader goals of the litigation; remedies for breach of the rights to equality and non-discrimination may require the elimination of discriminatory practices and the implementation of structural, institutional, organisational or policy change, thus paving the way for transformative change.⁸⁹ However, it is also important to be realistic about what remedies are achievable and enforceable in the legal and political context in question.⁹⁰

Court Ordered Remedies

As with all other aspects of litigation, the remedies available is context dependent, both in terms of the legal powers of the judiciary and the political culture. However, in general terms, when determining which remedies to pursue, litigators should consider the following:⁹¹

86 See above, note 36, p. 29.

87 European Court of Human Rights (ECtHR), *D.H. and Others v Czech Republic*, Application No. 57325/00, 2007, Para 188.

88 See above, note 36, p. 53.

89 See above, note 43, Principle 22.

90 For further discussion of the challenges, see above, note 26, pp. 96–99 onwards.

91 *Ibid.*, pp. 95–96.

- how they might seek to achieve wider social transformation, as well as compensating individual claimants;
- the legal and political limitations on the power of the adjudicating body to award certain remedies and the remedies awarded previously by the body; and
- the respondent's record in complying with and/or implementing the remedial decisions of the body in question.

There are a range of remedies that may be available, depending on the claim and jurisdiction in question.⁹²

- **Legislative remedies:** This may involve the court striking down all or part of a piece of legislation that is discriminatory; “reading in” wording to remove the discriminatory aspect of the legislation; or “reading down” the legislation such that it is interpreted in a way that is non-discriminatory. Such remedies can potentially have a far-reaching impact.
- **Structural injunctions:** These are orders instructing a government or administrative body on what they must or must not do in order to comply with constitutional or statutory requirements.⁹³ The court remains involved in supervising the implementation of the order, and may issue follow-up orders until the state has fully complied with its ruling. Structural injunctions can have particular value in cases relating to the enjoyment of socio-economic rights such as the right to education, since they require the state to take positive steps towards reform. However, they are also considered to be a particularly “coercive” form of remedy, given they involve the court stepping into the realm of the formulation of law and policy, and so are sometimes treated by courts as a remedy of “last resort”.

Structural injunctions have a long history of use in education-related litigation in the **United States**, dating back to the seminal case of *Brown v Board of Education* in which the court ordered and supervised the racial desegregation of schools.⁹⁴ Structural injunctions have also played a key role in **education finance litigation** in the United States, which has sought to challenge inequality in the funding of schools in 45 of 50 states. Such inequalities in funding have stemmed primarily from the fact that public education has largely been financed through municipal or district taxes, including local property taxes, leading to a disparity in funding for schools in wealthy and poor districts.⁹⁵

92 For a detailed discussion of the different types of remedies available, and the pros, cons and challenges in relation to each, see above, note 26, pp. 99–111.

93 Hirsch, D.E., “A Defense of Structural Injunctive Remedies in South African Law”, *Oregon Review of International Law*, Vol. 9, 2007, p. 19.

94 *Brown v Board of Education of Topeka*, 347 U.S. 483, 1954.

95 International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability*, 2008, p. 58, available at: https://www.humanrights.ch/upload/pdf/080819_justiziabilit_esc.pdf.

As such, children from low socio-economic backgrounds have suffered from a lower quality of education. This education finance litigation has resulted in court orders requiring state legislatures to redesign budgetary allocations and to redistribute state resources in order to ensure equality in public education financing – and, in certain states (such as New York), the litigation is still ongoing.

In the *Abbott v Burke* litigation in New Jersey, for example, the New Jersey Supreme Court has made detailed orders over the course of more than 30 years in order to decrease education funding disparities between wealthy and poor urban districts. In its 1990 ruling, the New Jersey Supreme Court noted that the situation of children living in poor urban areas was “often bleak”, and that “[t]heir test scores, their drop-out rate, their attendance at college, all indicate a severe failure of education”.⁹⁶ By way of remedy, the Court ordered that the Public School Education Act of 1975 be amended, or new legislation be passed,

*so as to assure that poorer urban districts’ educational funding is substantially equal to that of property-rich districts (...) [and] adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages.*⁹⁷

The Court required this new funding mechanism to be in place for the subsequent school year (1991/92). This prompted the legislature to pass the Quality Education Act, although this was later deemed not to meet the terms of the Court’s 1990 order. Following further legal challenges and the issuance of further court orders, the New Jersey legislature enacted the School Funding Reform Act in 2008, which was deemed by the Supreme Court to be a “thoughtful, progressive attempt to assist at-risk children throughout the state of New Jersey”.⁹⁸ The Education Law Center, which has served as legal counsel for the claimants over the past few decades, has described the litigation as having launched one of the United States’ “most ambitious and far-reaching efforts to improve public education for poor children and children of colour”.⁹⁹

- **Financial compensation:** “Pecuniary” and “non-pecuniary” damages may be awarded to victims of the violation in question. Pecuniary damages are awarded for any loss which can be measured in monetary terms (such as the costs of private education, where free primary education has not been available or accessible), whilst non-pecuniary damages are

96 *Abbott v Burke*, 119 N.J. 287, 1990.

97 *Ibid.*

98 *Abbott et al v Fred G. Burke, Commissioner of Education et al* (M-969/1372-07), 2008.

99 Education Law Center, “Abbott Overview”, *ELC*, visited August 2017, available at: <http://www.edlaw-center.org/cases/abbott-v-burke/abbott-v-burke-overview.html>.

awarded for the negative consequences of the violation that cannot easily be quantified in monetary terms (such as psychological harm).

- **Declaratory orders:** These are orders in which a court makes a declaration that there has been a violation of the right in question. The “coercive” nature of declaratory orders can vary: at one end of the spectrum, the court can simply declare that there has been a violation of the victim’s rights, whilst at the other end of the spectrum the court can declare that certain changes must be made by the state to prevent future violations.

Litigators will need to consider numerous tactical and strategic issues in determining which remedies to seek. They may wish to seek a combination of remedies; for example, financial compensation may be important to individual claimants, but will need to be accompanied by another form of relief – such as a legislative remedy or structural injunction – in order to lead to structural change. Of particular note, the nature of the remedy sought can have a bearing on the prospects of the court order being implemented by the respondent(s). For example, if the respondent in question has a practice of not complying with court orders, litigants may wish to seek a court order that includes easily enforceable sanctions in the event of non-compliance, including punitive damages or some form of monitoring mechanism.¹⁰⁰ There are a number of examples of innovative implementation mechanisms being incorporated into the remedies sought from the South African context:

- In the case of *Linkside v Minister of Basic Education*,¹⁰¹ which concerned the failure of the Department of Basic Education to appoint teachers to vacant posts in the Eastern Cape and to pay their salaries, the Legal Resources Centre (which represented the claimant schools) argued that a “claims administrator” should be appointed to verify and oversee the payments of salaries to the claimant schools (totalling over \$6 million).¹⁰² The judge agreed with the Legal Resources Centre and ordered a claims administrator to be appointed, which was a novel means through which to monitor and ensure the state’s compliance with the court’s judgment.¹⁰³
- In *Minister of Basic Education v Basic Education for All* (discussed at section 4.2.2.C above),¹⁰⁴ the lawyers representing Basic Education for All (BEFA) decided against seeking a structural injunction, considering that this “risk[ed] providing the [Department for Basic Education] with yet another opportunity to return to court to continue to attempt to justify

100 See above, note 42, p. 38.

101 *Linkside and Others v Minister of Basic Education and Others*, Case No. 3844/2014, ZAECGHC 111, 2014.

102 Legal Resources Centre, *Fighting to Learn... A Legal Resource for Realising the Right to Education*, 2015, pp. 66–67, available at: http://lrc.org.za/lrcarchive/images/pdf_downloads/publications/books/LRC_Fighting_to_Learn.pdf

103 *Ibid.*, p. 67.

104 See above, note 30.

its reasons for continued non-delivery” of the textbooks.¹⁰⁵ Instead, BEFA sought a final declaratory order and focussed its attention on developing a “multipronged monitoring plan to ensure textbook delivery” that involved publicising the judgment throughout Limpopo Province, encouraging parents and students to report textbook shortages, and obtaining access to schools to monitor textbook deliveries.¹⁰⁶

Settlement and Negotiated Solutions

As noted above, not all cases will reach the remedies stage due to the possibility of reaching a negotiated settlement. This can potentially provide the opportunity to negotiate remedies and solutions that are more extensive than would be ordered by the court.

Asociación Civil por la Igualdad y la Justicia v Gobierno de la Ciudad Autónoma de Buenos Aires¹⁰⁷

In 2006, the Asociación Civil por la Igualdad y la Justicia (ACIJ) – an Argentinan NGO – filed a class action against the government of the city of Buenos Aires for its failure to comply with the constitutional obligation to ensure and finance access to early education. Between 2002 and 2008 the number of children excluded from early education was steadily increasing due to the shortage of education facilities; children living in the city’s poorest districts were disproportionately affected, with children living in the six most disadvantaged districts being less likely to access initial education than those living in the six most affluent districts.¹⁰⁸ This was in breach of the Constitution of the City of Buenos Aires, which enshrined the principle of equal opportunities in education.

In order to build its case, the ACIJ made use of the city’s Freedom of Information Act in order to obtain information from the government on (*inter alia*) budget allocations, the number of existing schools offering early education, disaggregated data regarding the students who had applied for early education, and spending data on school construction and maintenance.¹⁰⁹ The ACIJ then made innovative use of budget monitoring and analysis tools to draw conclusions regarding the government’s underspending on early education facilities.

105 Veriava, F., “The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism”, *South African Journal on Human Rights*, 2016, p. 21.

106 *Ibid.*

107 *Asociación Civil por la Igualdad y la Justicia v Government of the City of Buenos Aires*, case 23360/0 of 2008.

108 Basch, F., “Children’s Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ’s Class Action”, *International Budget Partnership Case Study Series*, August 2011, p. 2, available at: <http://www.internationalbudget.org/wp-content/uploads/LP-case-study-ACIJ.pdf>.

109 *Ibid.*, p. 5.

A legally binding settlement agreement was ultimately reached by the parties, under which the government committed to: take action needed to meet the space needs at existing early educational facilities; comply with a work plan to create new spaces for children to receive early education; allocate sufficient resources to implement its obligations regarding early childhood education in each budget plan; implement a digital system in order to centralise information regarding the shortage of early education spaces; establish a bi-monthly monitoring and discussion work group to monitor implementation of the agreement; and appoint an individual charged with monitoring the execution of the work plan.¹¹⁰ Whilst there have been challenges in implementing the agreement, progress has been reported in terms of the creation of new school places and reductions in budget underspending.¹¹¹

I. Implementation Strategies

As explained at the outset of this Chapter, the fact that a positive outcome is achieved (i.e. the case is “won”) does not necessarily mean that the change sought will occur. In order for this to be possible, the remedies ordered by the court must be effectively implemented. As noted by the Open Society Justice Initiative:

*The implementation of its judgments is the central measure of a court's efficacy. Without it, the situation of those who should be helped by the court's ruling does not improve. Even the best and most profound jurisprudence may be deemed ineffective if not implemented (...).*¹¹²

Given this, litigators should consider any challenges that are likely to arise in terms of implementation throughout the planning of the case, including when determining which **remedies** should be sought (as discussed above), and when formulating the **advocacy strategy** that will accompany and follow on from the litigation.

As noted at the outset, litigation and advocacy should be seen as mutually reinforcing, and this is particularly true when it comes to ensuring the implementation of court orders. Advocacy strategies should be focussed on the individuals and/or entities who are identified as having the power to influence compliance with the judgment (or settlement agreement), and litigators should consider putting such strategies in place once the litigation process begins – if not before:

110 *Ibid.*, p. 10; ESCR-Net, *Settlement agreement between ACIJ and the Autonomous City of Buenos Aires, concerning case 23360/0 of 2008*, visited 31 July 2017, available at: <https://www.escri-net.org/caselaw/2015/settlement-agreement-between-acij-and-autonomous-city-buenos-aires-concerning-case>.

111 *Ibid.*, ESCR-Net.

112 See above, note 39, p. 11.

- **Grassroots engagement and collaboration:** Community-level engagement will often play a key role in mobilising the affected community, and thus in ensuring that they have an active interest in the outcome of the case and in the implementation of any judgment awarded. In certain contexts, the involvement of grassroots organisations in monitoring compliance with court orders has been integral to their implementation.

In speaking to the Trust, Tessa Wood – Director of the Western Cape Forum for Intellectual Disability – explained the strategies that have proven effective in advocating for the enforcement of the court’s judgment in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*.¹¹³ She explained the importance of having engaged with **key government personnel** (including individuals from the departments of transport, education, health, and social development) through establishing an intergovernmental forum to improve dialogue and collaboration, and through engaging on a monthly basis with the Department of Social Development of Western Cape. This, coupled with ongoing training and capacity-building, and strong partnerships between **lawyers** and **grassroots level actors**, led to new government policies being developed and approved.¹¹⁴

- **Local and international media:** Media coverage can generate publicity for the case, which can assist in holding the respondent(s) accountable and thus in increasing pressure to comply with the ultimate court decision.¹¹⁵
- **Parliamentarians and legislators:** The involvement of parliamentarians and legislators is reported to correlate with greater compliance with human rights decisions,¹¹⁶ meaning that litigants may wish to target members of parliament who are sympathetic to their cause in order to gain their support for the case being litigated. Where the support of influential parliamentarians is secured, this may facilitate an early settlement of the case (if this is considered desirable).
- **NHRIs:** NHRIs are state bodies that have a mandate to protect and promote human rights. NHRIs can play a unique role in facilitating the implementation of judgments (in particular judgments emanating from re-

113 See above, note 32.

114 Interview with Tessa Wood, Director at Western Cape Forum for Intellectual Disability, conducted by the Equal Rights Trust on 10 May 2017.

115 See, for example, the discussion of the role of the media in the Limpopo Textbook case in Veriava, F., *The 2012 Limpopo Textbook Crisis: A Study in Rights-Based Advocacy, The Raising of Rights Consciousness and Governance*, 2013, available at: <http://www.section27.org.za/wp-content/uploads/2013/10/The-2012-Limpopo-Textbook-Crisis1.pdf>.

116 Open Society Justice Initiative, *From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions*, 2013, p. 18, available at: <https://www.opensocietyfoundations.org/reports/rights-remedies-structures-and-strategies-implementing-international-human-rights-decisions>.

gional and international courts) through monitoring the way in which court orders have been executed on the ground, and in highlighting deficiencies in the way in which such orders have been implemented.

- **International stakeholders:** Litigators should ensure they have mapped out which international stakeholders, including international donors and organisations, may be able to influence implementation. For example, in the case of *D.H. and Others v Czech Republic*, advocacy efforts targeted at the Council of Europe and European Commission led the Commission to launch infringement proceedings against the Czech Republic for its failure to implement the ECtHR's judgment against it.¹¹⁷

J. Other Possibilities for Involvement in Strategic Litigation

Finally, it is important to note, the fact that an NGO or other interested party is not involved in initiating litigation does not mean that it cannot play an important and influential role in the case. In many forums, interested third parties may be permitted to intervene in the case through submitting a **third-party intervention** or **amicus curiae brief**, thus giving such third parties the opportunity to assist in the litigation by drawing the court's attention to arguments or information that the parties may not have presented, including relevant comparative jurisprudence. In addition to strengthening the case at hand, such interventions can play an important part in building the capacity of the judiciary to adjudicate on future equality and discrimination cases.

The rules governing when such third-party interventions are permissible will depend on the forum in question, and there may be a limit on the number of interventions that will be accepted by the adjudicating body. As such, litigators may actively wish to identify NGOs or legal experts to submit interventions, considering the mission, reputation and expertise of such third parties, and the way in which their contributions will enhance the prospects of success in the case.¹¹⁸

¹¹⁷ See above, note 36, p. 61.

¹¹⁸ See above, note 42, p. 37.

5. CONCLUSIONS AND IMPLICATIONS

Despite long-standing and near universal commitments to the importance of ensuring a child's right to learn, the goal of "Education for All" remains out of reach for millions of children. In 2017, an estimated 61 million children of primary school age are not in school.

It is widely recognised that children from marginalised groups – girls, children with disabilities, children from racial, ethnic, religious and linguistic minorities and children from socio-economically disadvantaged groups – are over-represented in the population of children excluded from primary education. As such, there is now widespread recognition in the development and education policy communities of the importance of equality and inclusion in ensuring that no child is "left behind" in primary education.

Yet despite this growing consensus on the importance of understanding inequality as a factor in exclusion from education, the relevance of equality and non-discrimination as *legally enforceable rights* – as opposed to abstract principles or aspirations – has been historically underexplored. As a result, one key framework for understanding how and why certain groups of children are excluded from education has not been fully utilised. More importantly, this means that the potential for equality law approaches to be part of the solution to the problem of out-of-school children has not been fully understood or realised.

This report seeks to build on contemporary understandings of how inequality and disadvantage limit access to education, by applying the legal framework of the rights to equality and non-discrimination to the problem. The report demonstrates that the correlation between membership of a marginalised or discriminated group and exclusion from primary education is not coincidental. Through applying the "lens" of equality law to the problem of out-of-school children, it illustrates how different forms of discrimination result in children being unable to access education. Our research identifies how not only unfavourable treatment (direct discrimination) but also the operation of unjustifiable rules, policies and procedures which apply equally but put certain groups at a particular disadvantage (indirect discrimination), as well as cases of harassment and failure to accommodate specific needs, all result in children being out of school.

This report identifies, maps and categorises different discriminatory barriers which restrict or prevent access to education, and illustrates the inadequacy of positive action measures to address inequalities in educational access, resulting in children being out of school. It also points the way to a new and important

conclusion: that equality law provides a key means to increase educational participation, by providing a mechanism to identify, challenge and remove discriminatory barriers.

5.1 Conclusions

This report demonstrates the extent to which discrimination and inequality impede children's access to and completion of primary education, and thus contribute to children being out of school. Chapter 3 identifies a range of discriminatory barriers which limit or prevent access to, or completion of, education. The evidence that children who possess certain protected characteristics are disproportionately disadvantaged by these barriers is overwhelming. As the report demonstrates, the discriminatory barriers that children face in accessing and completing primary education are many and various:

The **failure to eliminate the direct and indirect costs of schooling** – including both school fees and other costs associated with school participation – is *prima facie* discriminatory on the grounds of socio-economic disadvantage. Moreover, girls, children with disabilities and ethnic and racial minorities are disproportionately affected by costs, facing multiple discrimination as a result. The **geographical inaccessibility of schools** discriminates against girls, children from particular ethnic or religious groups and children with disabilities. There are myriad reasons for this, ranging from the fact that girls' vulnerability to abuse *en route* to school stops them attending, to the fact that areas more densely populated by ethnic and racial minorities may receive less investment in school facilities, meaning some children face long journeys to access the nearest school. Self-evidently, the lack of available and suitable transportation for children with disabilities prevents them from reaching school.

Enrolment requirements and procedures can have a discriminatory impact on primary education attendance and completion rates, on grounds including ethnicity, disability, nationality, religion or belief and socio-economic disadvantage. The obligation to provide birth certificates as part of enrolment procedures, for example, severely impedes access to education for non-national children, in particular refugees and the stateless who are least likely to have such documentation. Specific uniform requirements may indirectly discriminate against those from low socio-economic backgrounds, who are kept away from school due to being unable to afford the mandated uniform. They may also indirectly discriminate against religious minority children, where they are not sufficiently flexible to enable children to wear garments which they consider to be part of the requirements of their faith. Our research indicates that the **inadequacy of physical and human resources within schools** may arise as a result of either direct or indirect discrimination. For example, the lack of state investment in educational infrastructure in Arab-dominated areas of Israel by the national government is a directly discriminatory policy, which results in a significant disparity between the percentage of Arab children as opposed to Jewish children being out of school. Indirect discrimination also has an impact: for example, the

poor level of investment in water and sanitation facilities at schools, especially where this results in a lack of clean, private washing facilities, disproportionately impacts girls' attendance and drop-out rates.

The form and substance of education – in terms of **language, curricula and other educational materials** – can result in, and perpetuate, discrimination and exclusion. Our research found numerous examples of curricula containing harmful stereotypes about ethnic and religious minorities and girls in particular and evidence that such problems with curricula can impact on attendance. There is also a widespread problem of a failure to make adjustments to the format of curricula materials to make them accessible to certain children with disabilities, and a lack of availability of education in the mother-tongue for minority language speakers. Finally, our research finds that children face various forms of **discriminatory violence, bullying and harassment** that increase their susceptibility to school drop-out. In some cases, this violence and bullying is perpetrated by teachers themselves. For example, “low-caste” children in India reported dropping out of school as a result of being bullied by teachers who verbally abused them and forced them to do menial classroom chores. In other cases, the school authorities fail to adequately protect children from violence and harassment by other children and to follow up such behaviour appropriately.

The report further identifies that many of the barriers which prevent children from participating in primary education are linked to historic and systemic inequalities and discrimination against marginalised groups. As such, the final part of Chapter 3 outlines some of the **necessary positive action** measures that states are obliged to take to correct historic disadvantage against marginalised groups in order to realise the right to equality. From ensuring adequate teacher training for minority language speakers, to the channelling of appropriate resources to the least served parts of a country, there are many ways in which states are obligated to act but fail to do so.

Thus, Chapter 3 of this report demonstrates that many of the factors which impede access to, or completion of, primary education can be understood as manifestations of discrimination or failures to take necessary positive action measures. Indeed, our research demonstrates that in order to properly and completely understand the nature and impact of these obstacles, it is necessary to apply the framework of the rights to equality and non-discrimination. Therefore, the first overarching conclusion of our research and analysis is that **discrimination and failure to take necessary positive action measures are key factors in impeding children's access to, and completion of, education.**

The second key conclusion of this report is that **there are significant practical, tactical and strategic advantages to applying an “equality law” approach in addressing the problem of out-of-school children.** In many countries, the rights to equality and non-discrimination can have stronger legal and rhetorical force than the right to education. As such, applying an equality law approach presents a range of opportunities to those involved in promoting universal primary education. The rights to equality and non-discrimination provide a frame-

work for identifying barriers to education, and groups excluded as a result, allowing for full legal analysis of the complex and multi-faceted reasons why children are out of school. An equality law approach gives rise to new ways to frame the issue of out-of-school children, and raises the possibilities of new networks and alliances and new forums for policy discussion. More importantly, these rights provide a legal, policy and institutional framework for addressing the barriers which prevent children from accessing or completing primary education, whether through individual legal challenges or through policy advocacy aimed at guiding the allocation of state resources in favour of increasing access to primary education for marginalised groups.

Chapter 4 focuses in on two tools – advocacy and strategic litigation – that civil society may employ to ensure that effective laws and policies that promote equality and prohibit all forms of discrimination in education are in place, and that such laws and policies are effectively implemented and enforced. The report provides various examples of where equality law approaches have led to positive outcomes and advances in tackling the barriers discussed in Chapter 3, from legal challenges to state policies regarding investment in the education of children with intellectual disabilities, to the creation of multi-stakeholder coalitions from which advocates have been able to engage constructively with governments and donors.

The report's third central conclusion is that the rights to equality and non-discrimination provide more than just a framework for understanding why children are excluded from primary education: they provide an essential means to address the problem. Understanding the various barriers which prevent children from participating in primary education as manifestations of discrimination gives rise to the conclusion that **efforts to address the issue of out-of-school children must adopt an "equality law approach"** to the problem. More than merely tactically beneficial, it is imperative that those seeking to ensure "education for all" integrate an equality law approach into their interventions, if these efforts are to be coherent and effective.

As Chapter 2 of the report identifies, there are a number of conceptual and practical reasons why it is beneficial to raise equality law arguments in respect of educational exclusion. There are two central reasons why adopting such an approach is not only beneficial, but also necessary. First, states have a clear obligation, in international human rights law, to eliminate discrimination and promote equality, including in respect of education. As the evidence presented in Chapter 3 makes clear, this obligation will not be met unless and until states approach the exclusion of children from education as an issue of discrimination and inequality. Such an approach is necessary for a full understanding of why certain children are excluded from primary education. It is also necessary to ensure that measures to achieve full educational participation are appropriately targeted: the rights to equality and non-discrimination provide a legal framework within which barriers preventing access to, and completion of, education can be both identified and removed.

As this indicates, the second key reason why adopting an equality law approach is necessary is that such an approach is essential to ensuring that efforts to

address the issue of out-of-school children are to be effective in practice. As the evidence set out in Chapter 3 makes clear, efforts to increase rates of school enrolment and participation at the global or national level without addressing discrimination and historic inequalities can leave certain groups excluded. An equality law approach necessitates the assessment of barriers to school participation and the development of targeted and effective measures to remove these barriers. Only through the adoption of an equality law approach can the full range of factors which prevent certain groups from completing education be properly identified, understood and addressed.

Understanding that achieving universal participation in primary education necessitates the adoption of an equality law approach has clear implications for those involved in efforts to increase educational participation. The remainder of this Chapter examines the implications for two groups: states – the primary duty bearers under international law – and international actors involved in education policy, programming and funding.

5.2 Implications for States

There is almost universal support among states for the Sustainable Development Goals (SDGs), and for the commitment therein to ensuring “inclusive and quality education for all”. Indeed, 15 years before the adoption of the SDGs, almost all states had committed to “achieve universal primary education”, in the context of the Millennium Developments Goals.

Beyond these political commitments, states have legal obligations in respect of education. States are, after all, the primary duty-bearers under international law for ensuring the right of all children to primary education. Thus, the implication of this report for states is clear: **governments must take effective measures to ensure the realisation and enjoyment equally, without discrimination, of the right to education.** This is not a new finding or conclusion. States’ obligation to ensure the equal enjoyment of the right to education without discrimination dates back to the entry into force of the International Covenant on Economic, Social and Cultural Rights.

What this report makes clear however is that if states are to meet this obligation, taking general measures aimed at achieving universal access to and enjoyment of education is insufficient. States must take specific and targeted measures to eliminate discrimination and ensure equality in education. This requires the identification and removal of discriminatory barriers which prevent certain groups and individuals from accessing education, and the adoption of targeted positive action measures to correct historic disadvantage which keeps certain children from school.

The full scope of states’ obligations are best understood through examining the consequences for the states’ obligations to respect, protect and fulfil the rights to equality and non-discrimination in education.

Respecting the rights: In order to respect any right, states must refrain from violating that right, both in law and in practice. In respect of the rights to equality and non-discrimination in education, this means ensuring that laws and policies governing education do not discriminate, either directly or indirectly. It entails ensuring that policies and decisions regarding expenditure on education and the allocation of available resources do not discriminate, either by treating particular groups unfavourably, or, by failing to reflect difference, putting certain groups at a particular disadvantage. Respecting the right to non-discrimination in education requires states to ensure that educational facilities are physically accessible, including through the adoption of reasonable accommodation measures. It also requires states to ensure that local education authorities and education providers do not maintain policies and practices which exclude groups who share protected characteristics. Thus, meeting the obligation to respect the rights to equality and non-discrimination in education necessitates an assessment of all aspects of state law, policy and practice on education and requires the state to modify any law, policy or practice which is discriminatory in its effect.

Protecting the rights: Protecting the rights to equality and non-discrimination entails the comprehensive and effective prohibition of discrimination and the creation of a legal framework for the adoption of positive action measures. This requires the adoption of laws which prohibit all forms of discrimination (direct discrimination, indirect discrimination, harassment and failure to make reasonable accommodation) on all grounds recognised at international law. Such laws should apply to both private and public actors, in all areas of life regulated by law. While it is theoretically possible for states to effectively protect the right to non-discrimination in education through laws which apply only in the area of education, as this report demonstrates, in practice, the interconnected nature of discrimination necessitates comprehensive protection, if all discriminatory barriers to education are to be addressed. Equality laws should have strictly limited provisions for the justification of otherwise discriminatory conduct, and should provide the range of procedural guarantees necessary to ensure that victims of discrimination can effectively vindicate their rights. It should of course be noted that – as set out in Chapter 4 – it is possible to challenge and address discrimination in education through advocacy and litigation in the absence of comprehensive anti-discrimination law. However, this reality does not diminish – much less eliminate – the state's obligation to protect the right through legislation.

Ensuring that equality laws are effective in practice requires that states both implement and enforce such laws. Implementation necessitates, among other things, the adoption of policies and practices to give effect to the provisions of equality laws, the modification of existing laws and policies to align them with the equality laws, and the establishment of such institutions as are necessary for the laws to operate in practice. It also necessitates the development and adoption of such positive action measures as are necessary to address substantive inequalities. Enforcement requires that the state ensures access to justice for victims of discrimination, and that the judiciary is equipped to understand and apply equality laws. Through meeting these obligations – to adopt, implement and enforce equality laws – states will provide those whose access to education is impeded by discrimination with the means to challenge these practices.

Fulfilling the rights: States' obligations in respect of non-discrimination and equality – whether in the field of education or elsewhere – extend beyond merely refraining from discrimination and passing and enforcing equality laws. States' obligation is to ensure the enjoyment of the rights to equality and non-discrimination in practice. This requires the state to collect data on educational participation which is disaggregated on the basis of protected characteristics, in order to identify which groups are excluded from education. Having identified such groups, the state is required to identify the barriers which impede access to education, and then to take steps to remove such barriers. This could entail the removal of indirectly discriminatory laws, policies and practices or the adoption of reasonable accommodation measures. The process could equally identify directly discriminatory practices or policies, or harassment, by institutions or individuals, necessitating enforcement action. Alternatively, it could identify the need for positive action measures to accelerate progress towards equality for particular groups. Thus, fulfilling the right to non-discrimination in education requires the state to identify which groups are out of education and the reasons for this, and to take targeted and effective measures to remove discriminatory barriers, or overcome past disadvantage through positive action.

5.3 Implications for International Education Stakeholders

While state governments are the primary duty bearers under international law for ensuring the enjoyment of the rights to equality and non-discrimination and the right to education, they are far from the only stakeholders for whom this report's conclusions give rise to implications. Beyond domestic civil society actors (discussed in Chapter 4) and the state, there is another key group of actors involved in promoting access to, and participation in, education: **intergovernmental and international non-governmental organisations involved in education funding, programming and policy.** The conclusions of this report make clear that there is a need for these actors to integrate an equality law approach into their work, if their efforts are to be inclusive and effective. There are four key areas in which the findings of this report give rise to implications for these actors:

Education programme financing: Those financing education programming should ensure that they adopt an equality law approach in their funding decisions in order to ensure that funding for education programming is both targeted and effective. Financial support given to governments, civil society and education providers should include conditions on the integration of the rights to equality and non-discrimination in education programmes. This should include measures to identify excluded groups, or groups at risk of school exclusion, and the development of measures to remove discriminatory barriers. Those designing and evaluating such programmes should ensure that an equality law approach is integrated into programme design, implementation, monitoring and evaluation processes. Funding providers should ensure that these criteria and their subsequent funding decisions are fully transparent, and publish information on

how their programmes address the needs of those exposed to discrimination. Funding providers should consider the development and funding of targeted programmes – including positive action measures – designed to increase school participation among marginalised groups. Governments and civil society should ensure that funding providers are held to account for their funding decisions, in order to ensure that education financing enhances access to primary education rather than entrenching existing patterns of discrimination and inequality.

Education policy: In order for the right of all children to a free primary education to be realised, it is necessary for those involved in the formulation of education policy – at both the domestic and international levels – to adopt an equality law approach to the formulation of education policy. This extends beyond ensuring the enactment and enforcement of appropriate laws, policies and government strategies that are aimed at ensuring equal participation and the elimination of all forms of discrimination in primary education. It should include *inter alia* comprehensive monitoring through the systematised collection of disaggregated data regarding primary education access and completion, rates in order to ensure a complete picture of patterns of discrimination and exclusion; rigorous oversight of state and school policies and governance structures (including in the private education sector) to ensure the elimination of discriminatory school practices and the promotion of equal participation; and support for the development of positive action policies to accelerate progress towards equality for groups whose historic disadvantage leads to school exclusion.

Technical support to domestic actors: International actors should look to support domestic state and civil society actors, in their efforts to implement an equality law approach to educational access and completion. International organisations have an important role to play in giving not only financial but also technical assistance, for example in terms of supporting states to develop the capacity needed to collate and publish comprehensive disaggregated data. International actors working with state and civil society actors should facilitate training, policy development and other forms of technical support needed for domestic actors to develop and deliver equality sensitive programmes and policies.

Other international programmes: As this report has demonstrated, the discriminatory barriers that children face in accessing and completing primary education are wide-ranging, and do not always appear at first to be directly relevant to education policy or programmes. International actors involved in other development or humanitarian programmes (such as improvements to transport infrastructure, the elimination of child labour, access to water and healthcare, and the provision of humanitarian aid) may not necessarily perceive themselves to be education actors. However, given the patterns of discrimination inherent in the barriers described in Chapter 3 – for example, in relation to the geographic inaccessibility of schools and the costs of child labour (with many domestic chores that inhibit school attendance, such as the collection of water, being gendered) – these actors should see themselves as *education* actors insofar as their programmes can play a key role in tackling these discriminatory barriers to education. As such, these international actors should also ensure that they integrate an equality law approach into their programmes, and should ensure that they

consider the impact of discrimination and inequality in various areas of life on children's ability to enrol in and complete school.

Across the globe, the range of efforts aimed at achieving the goal of "Education for All" are myriad. Between and within states, there are a wide range of legislative, policy, programming and institutional measures aimed at increasing access to and completion of primary education. At both the domestic and international levels, non-governmental actors are involved in promoting educational participation from various perspectives and with many different approaches. As such, this chapter does not aim to provide an exhaustive list of the possible implications of our research findings for those involved in addressing the issue of out-of-school children.

Our aim in this Chapter – and in the report as a whole – is to illustrate that if the goal of "Education for All" is to be achieved, an equality law approach is an essential part of the effort. Discrimination in various forms is a key factor in preventing children with particular characteristics from accessing and completing education. As such, equality law provides a tool for those involved in increasing educational participation. The adoption of an equality law approach gives rise to a range of practical, tactical and strategic benefits for those involved in promoting educational for all. Most importantly however, our research indicates that the adoption of an equality law approach is essential, if states are to fully meet their obligations to ensure equal enjoyment of the right to education and so ensure that no child is left behind.

The overarching conclusion is clear: only by adopting an equality law approach to education can we move from learning inequality, to equality in learning.

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The Equal Rights Trust is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. The Trust focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

There has long been a global commitment – in the context of both international human rights law and development goals – to “education for all”, and to universal primary education in particular. Yet in 2017, an estimated 61 million children of primary school age are out of school. This group is made up disproportionately of children from disadvantaged groups – girls, children with disabilities, ethnic and racial minority children, refugee children and the socio-economically disadvantaged.

This report explores how both current and past patterns of discrimination lead to children being out of school. It analyses existing data from across the world to explore and map the various ways in which direct and indirect discrimination, harassment and failure to make reasonable accommodation restrict access to education for certain children and identifies government failures to rectify the issue through positive action measures. From the direct and indirect costs of schooling to formal enrolment requirements and from geographical distance to the curriculum itself, there are multiple discriminatory barriers to primary education to address.

The report provides more than a diagnosis. It also proposes a solution, illustrating how the adoption of an “equality law approach” to education is both *necessary* to achieve the goal of education for all and how such an approach can be *strategically beneficial* for those working to ensure children can access school. With a focus on advocacy and strategic litigation interventions, the report explains how the equality law approach can lead to the identification and removal of the discriminatory barriers which lead to certain children being out of school.

The report demonstrates how governments, civil society actors and all those with a stake in education, can and should integrate an equality law approach into their efforts to increase educational participation.

In so doing, the report aims to demonstrate how we can move from learning inequality, to equality in learning.



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