



The Equal Rights Trust

Working Session
Tolerance and Non-Discrimination

RC.NGO/122/10
6 October 2010

Dimitrina Petrova
Executive Director

126 North End Road
London W14 9PP
United Kingdom

Tel.: +44 (0) 207 610 2786
Fax: +44 (0)203 441 7436
info@equalrightstrust.org
www.equalrightstrust.org

Board of Directors

Bob Hepple (Chair)
Sue Ashtiany
Tapan Kumar Bose
Shami Chakrabarti
Claire L'Heureux-Dube'
Gay McDougall
Bob Niven
Kate O'Regan
Michael Rubenstein
Theodore Shaw
Sylvia Tamale

The Equal Rights Trust
is a company limited by
guarantee incorporated in
England and a registered
charity. Company number
5559173. Charity number
1113288.

ENGLISH only

STATEMENT BY THE EQUAL RIGHTS TRUST TO THE OSCE REVIEW CONFERENCE

October 2010

Statement from the Equal Rights Trust: Tolerance and Non-discrimination

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT works from the unified perspective on equality, which emphasises the right to equality as a basic human right, focussing on the inter-connected nature of discrimination and inequality and seeking to overcome the fragmentation which has occurred between equality and human rights, and between identity-based equality and socio-economic equality.

ERT believes that addressing the range of issues presented under the agenda item *Tolerance and Non-discrimination* requires the adoption of a unified approach to equality, focussed on the complex and complementary relationship between different types of discrimination and inequality. ERT therefore calls on all members of the Organisation for Security and Cooperation in Europe (OSCE) to **take steps to ensure that they have comprehensive national equality legislation and policies** in order to give effect to the right to equality enshrined in international human rights instruments.

ERT notes that levels of legislative protection of the right to equality vary across the OSCE and that a number of member states have made efforts to give effect to the right to equality. In particular, we welcome the moves towards a comprehensive model which have been taken by a number of OSCE member states which are also members of the European Union through transposition of several European Directives on implementing the principle of equal treatment. We also welcome the positive legislative developments which have taken place since the last Review Meeting, including through the introduction of a single Equality Act in the United Kingdom¹ and the introduction of a comprehensive anti-discrimination law in

¹ In April 2010, the UK parliament adopted a single Equality Act 2010 in the United Kingdom, which aims to simplify the law which, over four decades, had become complex and difficult to navigate, by replacing nine different acts and 100 other measures in a single act.

Albania.² However, ERT remains concerned that in many states, the right to equality remains theoretical and its practical implementation is very poor.

All OSCE member states have legal obligations to prohibit discrimination and promote equality arising from the International Covenants on Civil and Political³ and Economic, Social and Cultural Rights,⁴ and subsequent legally binding treaties. Certain member states have additional obligations arising from the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of People with Disabilities (CRPD), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Migrant Workers and Members of Their Families (CRMW), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR).

ERT urges all OSCE member states to give effect to the rights to non-discrimination and equality by ensuring the full implementation of the right to equality in domestic legislation and ensuring that all essential elements of equality law are enshrined in national law. The purpose of this document is to set out the most basic elements of national equality law, relying on the rights and principles contained in international human rights law and the authoritative interpretations of UN treaty bodies.

In this regard, ERT calls the attention of States and other stakeholders to the Declaration of Principles on Equality, an instrument of international best practice which formulates legal principles on equality, from a unitary perspective. The Declaration of Principles on Equality was adopted and signed in October 2008 by 128 prominent human rights and equality advocates and experts from all regions of the world. It has subsequently been endorsed by hundreds of experts and advocates, as well as organisations from all over the world. The Declaration contains 27 principles which draw on established and emerging principles of international law. It reflects a “moral and professional consensus among human rights and equality experts”⁵ about the core principles of equality law and the “current international understanding of Principles on Equality”.⁶

1. The Right to Equality

States should ensure that their Constitution contains a guarantee of the fundamental human right to equality. The Constitution or the relevant national legislation should further contain a legal definition of the right to equality, which would facilitate both members of the public and the judiciary in realizing this right.

The definition of the right to equality should contain the following aspects of the right: (i) equal dignity and equal worth of all human beings;⁷ (ii) equality before the law, and equal protection and equal benefit of the law;⁸ (iii) equal opportunity;⁹ and (iv) participation on an equal basis in areas of life regulated by

² In February 2010, the President of Albania signed Law No. 10 221 “On Protection from Discrimination” adopted by the Albanian parliament. The new law puts in place a solid legal foundation guaranteeing the rights to equality and non-discrimination.

³ International Covenant on Civil and Political Rights, Article 2 (2) and Article 26.

⁴ International Covenant on Economic, Social and Cultural Rights, Article 2 (2).

⁵ *Declaration of Principles on Equality*, The Equal Rights Trust, London 2008, Introduction, p. 2.

⁶ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, para 93.

⁷ See Universal Declaration of Human Rights, Article 1.

⁸ See, inter alia, Universal Declaration of Human Rights, Article 7, International Covenant on Civil and Political Rights, Article 26 ICCPR; International Convention on the Rights of Persons with Disabilities, Article 5(1).

law. The Declaration of Principles on Equality provides a useful definition of the right to equality:

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.

2. Equal Treatment

States should ensure that their approach to the principle of equal treatment departs from the older formal equality model and embraces a substantive understanding implying equal opportunity. Legal provisions on equal treatment should recognise the need to treat people according to their different circumstances; should recognise the need to assert the equal worth of everyone in society; and should recognise the need to enhance everyone's capabilities to participate in society as equals.

The understanding that equal treatment is not equivalent to identical treatment has been recognised by both the European Court of Human Rights¹⁰ and the UN Human Rights Committee, which in its General Comment 18 stated: "The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every case".¹¹ The Declaration of Principles on Equality states:

Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.

3. Positive Action

States should ensure that equality legislation permits positive action in any circumstance where it may be necessary and that it is presented as a necessary element of the duty to tackle discrimination and inequality.

The UN Human Rights Committee has recognized the principle that positive action is not only permissible but required as an element of effective equality law: "The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."¹² In the same spirit, the Declaration of Principles on Equality provides:

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.

⁹ This is provided in a number of human rights treaties, including CERD and CEDAW.

¹⁰ See European Court of Human Rights judgment *Thlimmenos v. Greece*, 6 April 2000, (Application no. 34369/97), para. 44: "[...] The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

¹¹ Human Rights Committee, General Comment 18: Non-discrimination, Thirty-seventh session, 1989, para. 8

¹² Human Rights Committee, General Comment No. 18: Non-discrimination, Thirty-seventh session, 1989, para. 12

4. The Right to Non-discrimination

States should ensure that equality legislation recognizes non-discrimination as a fully autonomous right, which is an aspect of the right to equality.

The importance of the right to non-discrimination as a fundamental and autonomous human right and not only as a subsidiary right is reflected throughout international human rights jurisprudence and is embedded in Article 26 of the International Covenant on Civil and Political Rights.¹³

5. Definition of Discrimination

In order to fully implement their obligations to prevent discrimination states must ensure that equality legislation defines discrimination and that the definition incorporates the following elements:

- The law should explicitly prohibit discrimination on a number of grounds, including 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.

The prohibition of discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin and birth are common to many international standards.¹⁴ The additional grounds mentioned above find their origins in international human rights instruments such as the European Convention on Human Rights, General Comments of UN treaty bodies such as the Committee on Economic, Social and Cultural Rights, or the jurisprudence of international courts.¹⁵

- As legislation should reflect changing realities, the law should enable other characteristics, which are not explicitly covered, to be protected from discrimination where such discrimination (i) causes or perpetuates systemic disadvantage, (ii) undermines human dignity or (iii) adversely affects the equal

¹³ International Covenant on Civil and Political Rights, Article 26.

¹⁴ See for example Universal Declaration of Human Rights, Article 2; International Covenant on Civil and Political Rights, Article 2 (1); International Covenant on Economic, Social and Cultural Rights, Article 2 (2)

¹⁵ **Descent:** CERD, Article 1 (1); **Ethnicity** (ethnic group/origin): CERD, Article 1(1); **Nationality** Treaty Establishing the European Community 1997, Article 12, Concluding observations of the Committee on the Elimination of Racial Discrimination, Madagascar, CERD/C/65/CO/4, 10 December 2004, para. 15; **Economic Status:** American Convention on Human Rights, Article 1(1); Concluding observations of the Committee on Economic, Social and Cultural Rights, Canada, E/C.12/CAN/CO/4, E/C.12/CAN/CO/5, 22 May 2006, para. 39; **Association with a national minority:** European Convention of Human Rights, Article 14, Protocol no. 12 to the European Convention of Human Rights, Article 1(1); **Sexual orientation:** The Human Rights Committee has recognised that the Covenant includes protection on grounds of sexual orientation in a number of cases including the following: X v. Colombia, Communication No. 1361/2005, 14 May 2007; Edward Young v. Australia, Communication No. 941/2000, 18 September 2003; Nicholas Toonen v. Australia, Communication No. 488/1992, 4 April 1994; **Gender identity:** The European Court of Justice, through reading it into the prohibition on discrimination on grounds of sex, has prohibited discrimination on the grounds of gender identity in the judgments; P v. S and Cornwall County Council (Case C-13/94); Richards v. secretary of state for Work and Pensions (Case C-423/04); **Age:** Article 1 of European Council Directive 2000/78 of 27 November 2000, Concluding observations of the Committee on Economic, Social and Cultural Rights, People's Republic of China (including Hong Kong and Macao), E/C.12/1/Add.107, 13 May 2005, para. 78; **Disability:** ICRPD Article 4 (1); **Health Status:** CESCR General Comment No. 14, E/C.12/2000/4, 11 August 2000, para. 18; **Genetic or other predisposition toward illness:** European Convention on Human Rights and Biomedicine 1997, Article 11.

enjoyment of a person's rights and freedoms in a serious manner.¹⁶

- The law should also prohibit discrimination on any combination of the prohibited grounds (**multiple discrimination**)
- The law should prohibit discrimination which is based on **association** with a prohibited ground or because of a **perception** that a person possesses a certain characteristic which constitutes a prohibited ground.

This approach has been upheld, *inter alia*, by the European Court of Justice which has ruled that discrimination on the basis of association should be prohibited.¹⁷ The UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, has emphasised the importance of protecting individuals on the basis of their perceived as well as real sexual orientation or gender identity.¹⁸

- The law should prohibit **direct discrimination** and exemptions to direct discrimination should be narrow, require strict justification and be permitted only in exceptional cases.
- The law should prohibit **indirect discrimination**, defined as any provision, criterion or practice which 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.
- The law should prohibit **harassment**, defined as 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.

These definitions of direct discrimination,¹⁹ indirect discrimination²⁰ and harassment²¹ derive from formulations in European Council Directives 2000/78/EC and 2000/43/EC.

¹⁶ This test for the admission of new grounds is taken from the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000, Article 1 (xxii) (b): "prohibited grounds." are [...] (b) any other ground where discrimination based on that other ground— (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)". This approach was considered to be the best solution to the question of admissibility of new grounds by the experts involved in drafting the Declaration of Principles on Equality, and was incorporated in that document.

¹⁷ S. Coleman v. Attridge Law and Steve Law (Case C-303/06)

¹⁸ U.N. Doc. A/56/156, 3 July 2001 ("Torture and discrimination against sexual minorities", paras. 17-25), para. 18: "The Special Rapporteur has received information according to which members of sexual minorities have been subjected, *inter alia*, to harassment, humiliation and verbal abuse relating to their real or perceived sexual orientation or gender identity and physical abuse, including rape and sexual assault"

¹⁹ Council Directive 2000/78/EC of 27 November 2000, Article 2 (2)(a); Council Directive 2000/43/EC of 29 June 2000, Article 2(2)(a).

²⁰ Council Directive 2000/78/EC of 27 November 2000, Article 2 (2)(b); Council Directive 2000/43/EC of 29 June 2000, Article 2(2)(b).

²¹ Council Directive 2000/78/EC of 27 November 2000, Article 2(3); Council Directive 2000/43/EC of 29 June 2000, Article 2(3).

Conclusions

ERT welcomes the inclusion of *Tolerance and Non-discrimination* on this meeting's agenda. We recognise that each of the subjects under discussion under this heading is an important and pressing problem which faces the members of the OSCE at the present time. This submission does not seek to understate or devalue the importance of any individual issues, but rather to emphasise the importance of a robust, unified legal approach to problems of intolerance and discrimination securing realisation of the universal right to equality.

In order to tackle problems of intolerance and discrimination, and to fulfil their legal obligations to protect the right to equality, states must ensure that comprehensive equality law is in place. This submission has sought to outline only the basic preconditions of such law, drawing on the content of international treaties and their authoritative interpretation by UN treaty bodies and international courts, and the consensus view of equality and human rights experts found in the Declaration of Principles on Equality. **It is ERT's view that in order to meet their obligations, states must ensure that domestic law rests on these basic elements.**