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London, 27 January 2010

Dear Mr Ghimpu,

RE: Article 16 of the Constitution of Moldova

I write on behalf of The Equal Rights Trust to provide an expert opinion on Article 16 (Equality of Rights) of the Constitution of the Republic of Moldova. The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and a think tank, it focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. ERT is the only international human rights organisation which is entirely focused on the right to equality as such.

On 1 December 2009 the Commission for Constitutional Reform was set up by a presidential decree. On 11 January 2010 you chaired a meeting of the Commission for Constitutional Reform where the Commission was given the task of considering the need for constitutional reform, submitting to Parliament proposals for any necessary reform and elaborating amendments to the Constitution. The Commission was instructed to undertake analysis of the content of the Constitution of the Republic of Moldova, adopted on 29 July 1994, in the light of international and comparative constitutional frameworks, with the aim of identifying gaps in the current constitutional system.

The purpose of this letter is to assist the Commission in its efforts, by presenting an expert opinion on Article 16 of the 1994 Constitution in the light of constitutional and human rights law and setting out recommendations for provisions which would reflect better the Republic of Moldova's commitment to human rights. We further request that you ensure that our opinion is circulated to Members of Parliament and all members of the Commission on Constitutional Reform in order that it may inform their discussions.

Article 16 of the 1994 Constitution states:

“(1) It is the foremost duty of the State to respect and protect the human person.

(2) All citizens of the Republic of Moldova are equal before the law and the public authorities, without any discrimination as to race, nationality, ethnic origin, language, religion, sex, political choice, personal property or social origin.”

Two principle aspects of Article 16 contravene international law. First, Article 16(2) limits the application of the right to equality before the law to “citizens of the Republic of Moldova”. Second, the list of grounds on which discrimination is prohibited under Article 16(2) is inconsistent with the Republic of Moldova's international obligations.

1. Article 16(2) Restricts Equality before the Law and the Public Authorities to Citizens

Article 16(2) of the 1994 Constitution provides that “All citizens of the Republic of Moldova are equal before the law and before the public authorities”. We submit that restricting the constitutional guarantee of equality to citizens of Moldova is contrary to international human rights law as well as the Republic of Moldova's obligations under European human rights law.

International human rights law firmly establishes that the right to equality before the law applies to *all persons*. Article 7 of the Universal Declaration of Human Rights 1948 (UDHR) and Article 26 of the International Covenant on Civil and Political Rights 1966 (ICCPR)¹ both provide that everyone is equal before the law.² The obligation to guarantee a right to equality and non-discrimination to all persons under the jurisdiction of the State is provided for by most UN human rights treaties.³ A modern synthesis, which reflects the highest professional consensus on the human right to equality, has been formulated in Principle 1 of the *Declaration of Principles on Equality*.⁴ Principle 1 states:

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

¹ The Republic of Moldova ratified the ICCPR in 26 January 1993.

² Article 7 of the UDHR states: “All are equal before the law and are entitled without any discrimination to equal protection of the law.” Article 26 of the ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

³ See, for example, Article 5 (1) of the UN Convention on the Rights of Persons with Disabilities.

⁴ *Declaration of Principles on Equality*, published by The Equal Rights Trust, October 2008.

Under international human rights law therefore the right to equality before the law must apply to everyone in the territory and under the jurisdiction of the state party and not merely to its citizens. In effect this human right must be guaranteed irrespective of the citizenship status of an individual. This basic principle of international law has been reiterated by the UN Human Rights Committee in General Comment No.15:

“Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" [...]. In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”⁵

The UN Committee on Economic, Social and Cultural Rights has also recently affirmed that: “[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation,”⁶ thereby setting out that the principle of non-discrimination in relation to economic, social and cultural rights applies equally to citizens and non-citizens.

We also wish to call to your attention to the fact that the European Convention on Human Rights places additional limits on the extent to which the Republic of Moldova can exclude non-citizens from equality guarantees under its constitution. In the case of *Gaygusuz v. Austria*⁷ the European Court of Human Rights held that a social security provision which differentiated between Austrians and non-Austrians violated Article 14 (non-discrimination) of the European Convention on Human Rights in conjunction of with Article 1 of Protocol No. 1 (right to property). In its reasoning the court set out that different treatment exclusively on grounds of nationality would have to be justified by “very weighty reasons.” This means that the general legal principle to be enshrined in the constitution is that of equality and non-discrimination between citizens and non-citizens, while narrowly defined exceptions from this principle must be justified against strictly defined criteria.

Distinguishing between citizens and non-citizens in the application of the right to equality and non-discrimination therefore plainly contravenes the international obligations of the Republic of Moldova. It is well established in the text of international human rights treaties to which the Republic of Moldova is a party, as well as in the interpretation of these texts by treaty bodies, that state parties which guarantee human rights to citizens exclusively breach international law.

Moreover, Article 19(1) of the 1994 Constitution provides that:

“Except in cases where the law has different rulings, aliens and stateless persons shall enjoy the same rights and shall have the same duties as the citizens of the Republic of Moldova.”

⁵ UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, 1986, para. 1.

⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art.2 para. 2)*, 25 May 2009, para. 30. The Republic of Moldova ratified the UN Covenant on Economic, Social and Cultural Rights on 26 January 1993.

⁷ *Gaygusuz v. Austria*, (application no. 17371/90), 39/1995/545/631, judgment of 23 May 1996.

Furthermore, we recall that the Government of Moldova has relied upon this provision together with Article 4 of the Constitution⁸ to communicate to the UN Commission on the Elimination of Racial Discrimination (CERD) that the principle of equality and non-discrimination in Article 16(2) applies to non-citizens as well as citizens.⁹ The government has also communicated to CERD that Act No. 275-X111, the Aliens and Stateless Persons (Legal Status) Act¹⁰, establishes that aliens and stateless persons can exercise their rights and freedoms provided that they do not thereby infringe on the interests of the State or the lawful interest of citizens of Moldova, therefore, aliens and stateless persons are equal before the law and the state bodies.¹¹

Nonetheless the communications submitted by the government to CERD fail to address two outstanding concerns and as a result maintain the inconsistency which exists between Article 16 and international law. First, using legislation to “patch up” gaps and inconsistencies in the constitutional right to equality and non-discrimination is objectionable. Such an approach reduces the spirit and the fundamental nature of this constitutional guarantee to the status of merely a statutory right. At present, a two-tier system is in place, whereby the right to equality before the law for citizens is firmly entrenched as a constitutional right, while equality before the law for non-citizens is based on a statutory Act of Parliament and carries a presumption of lesser importance. Moreover, genuine practical difficulties arise from not recognising *all people* in Article 16(2). The legal argument required to demonstrate that Article 16(2) applies to everyone is convoluted and unclear – as demonstrated in the communication of the government to CERD. This creates uncertainty in respect to the application of both statutory and constitutional rights. Without the explicit recognition within Article 16(2) that *all people* are equal before the law and the public authorities, non-citizens will inevitably be more vulnerable to discrimination at the hands of public authorities and other administrative bodies who are likely to treat non-citizens worse than citizens or omit to treat them with the same standards as they would treat citizens.

Second, as the government has communicated, the exercise of the rights and freedoms by aliens and stateless persons (non-citizens), under Act No. 275-X111 is contingent on the assumption **that aliens and stateless persons do not infringe on the interests of the State or the lawful interests of the citizens of Moldova**. This precondition does not apply to citizens who enjoy the right to equality under Article 16(2). It distinguishes non-citizens from citizens requiring a higher level of behaviour from the former in a manner which rejects that human rights are afforded to people by virtue of the fact of their humanity. This precondition treats the right to equality before the law as a privilege given to non-citizens and prevents them from enjoying it on an equal basis with citizens. The implications of such a distinction are well observed in other jurisdictions.

⁸ Article 4 states: (1) Constitutional provisions for human rights and freedoms shall be understood and implemented in accordance with the Universal Declaration of Human Rights, and with other conventions and treaties endorsed by the Republic of Moldova. (2) Wherever disagreements appear between conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations.

⁹ Written replies by the Government of Moldova concerning the list of issues (CERD/C/MDA/Q/7) received by the Committee on the Elimination of Racial Discrimination relating to the consideration of the fifth, sixth and seventh combined periodic reports of Moldova (CERD/C/MDA/7), Committee on the Elimination of Racial Discrimination, Seventy-First Session, Geneva, 30 July – 17 August 2007, paras. 15 – 18.

¹⁰ Adopted on 10 November 1994.

¹¹ See above, note 9, paras. 21 – 22.

One prevalent example which demonstrates that abandoning the right to non-discrimination for non-citizens can lead to further violation of their human rights is the UK case of *A and Others v. Secretary of State for the Home Department (Belmarsh)*¹². The *Belmarsh* case involved a challenge against the detention policy pursued by the UK government in combating terrorism which permitted non-citizens to be indefinitely detained, which was not permitted for citizens. Not only was this policy overly discriminatory against non-citizens but it was a flagrant denial of their right to liberty. The decision of the UK House of Lords, which declared that the policy was unlawfully discriminatory, underscores the principle that there should be no discrimination between citizens and non-citizens in terms of their fundamental rights.¹³

These concerns build upon and justify the concerns expressed by CERD in its most recent report on the Republic of Moldova. In spite of the arguments submitted by the government described above, CERD stated:

“The Committee notes with concern that the State party has not adopted comprehensive legislation to prevent and combat discrimination in all areas, and **that many existing non-discrimination provisions guarantee equality before the law and equal enjoyment of human rights only to citizens.**”¹⁴

In order to ensure that the Republic of Moldova does not contravene its international human rights obligations, and with the aim of reducing the uncertainty inherent in the application of Article 16(2), we urge the Commission to put forward an amendment to Article 16(2) which states that “all persons are equal before the law and the public authorities”.

2. The Prohibited Grounds of Discrimination under Article 16(2) are Not Consistent with International Law

Article 16(2) prohibits discrimination on the grounds of race, nationality, ethnic origin, language, religion, sex, political choice, personal property or social origin. ERT is concerned that the grounds presently prohibited by Article 16(2) are too narrow and do not fulfil the Republic of Moldova’s obligations under international law. In addition, Article 16(2) appears to adopt a closed-list approach to protected grounds of discrimination, implying that expanding the scope to prohibit emerging forms of discrimination on further grounds is not possible.

Under international law Article 2(1) of the ICCPR and Article 2(2) of the UN Covenant on Economic Social and Cultural Rights (ICESCR) prohibit discrimination on **any grounds such as** race, **colour**, sex, language, religion, political or other opinion, national or social origin, property, **birth or other status**. The European Convention of Human Rights (ECHR) provides a similar list of prohibited grounds of discrimination under Article 14 which prohibits discrimination in the exercise of a convention right on **any ground** such as sex, race, **colour**, language, religion, political or other opinion, national or social origin, **association with a national minority**, property, **birth or other**

¹² *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56.

¹³ For further discussion see The Equal Rights Trust, *Legal Working Paper: The Protection of Stateless Persons in Detention under International Law*, January 2009. Available at: <http://www.equalrightstrust.org/ertdocumentbank/ERT%20Legal%20Working%20Paper.pdf>.

¹⁴ UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination for Moldova*, CERD/C/MDA/CO/7, 16 May 2008, para. 10.

status. The protection from discrimination provided by Article 2(1) of the ICCPR and Article 2(2) of the ICESCR and the analogous protection provided by the ECHR raise two important issues for the analysis of Article 16(2) of the Constitution of the Republic of Moldova. First, some prohibited grounds of discrimination are explicitly listed in the ICCPR, ICESCR or the ECHR, namely “colour”, “birth”, “association with a national minority”, and “other status”, yet they are not protected by Article 16(2) of the Moldovan Constitution. This inconsistency contravenes the obligations undertaken by the Republic of Moldova when ratifying all three treaties.

Second, as noted above, Article 16(2) adopts a closed-list approach to prohibited grounds of discrimination. This approach contradicts the open-list approach required by the ICCPR, ICESCR and the ECHR. All three treaties contain an “other status” clause to enable new and emerging grounds of discrimination to be prohibited. This flexible open-list approach is important because it recognises that the grounds on which serious discrimination manifests itself often evolve or are born anew from social events and that individuals are often victims of discrimination on grounds which do not necessarily have a link to historical oppression, victimisation or marginalisation. It therefore allows courts and other judicial bodies to expand the list of prohibited grounds of discrimination to analogous cases in which individuals can experience similar unjust discrimination. Consequently, those who are vulnerable to emerging forms of discrimination will be able to exercise their right to non-discrimination through this “other status” clause. General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights has recently demonstrated the efficacy of the “other status” clause by confirming that Article 2(2) of the ICESCR also prohibits discrimination on the grounds of disability, age, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.¹⁵ ERT is of the firm view that adopting a closed-list approach by the Republic of Moldova would mean abdicating its human rights obligations in respect of the right to non-discrimination.

Furthermore, we also note the Republic of Moldova signed the UN Convention on the Rights of Persons with Disabilities (CRPD) on 30 March 2007, thus signalling an intention to ratify CRPD in the future. As the principle of equality and non-discrimination is one of the cornerstones of the CRPD, it is critical that the Moldovan Constitution explicitly protects against discrimination on the grounds of disability.¹⁶

A stronger guarantee to equality under Article 16 would make a significant contribution to ensuring compliance with Moldova’s international human rights obligations, including the ICCPR, ICESCR and the Convention on the Rights of the Child.

However, we note that an open-list approach is not the only solution, and that it has also been criticised by some for potentially leading to frivolous inclusion of “grounds”, thus watering down the protection against discrimination. This argument may be particularly relevant to specific anti-discrimination legislation providing legal definitions to the concept of discrimination, and less relevant in regard to constitutional protections.

¹⁵ UN Economic, Social and Cultural Rights Committee, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, E/C.12/GC/20, 25 May 2009.

¹⁶ Disability is also a prohibited ground of discrimination under Article 2 of the Convention of the Rights of the Child.

ERT believes that there is a good solution which takes into account the criticisms directed at both the open-list and the closed-list approaches. We would like to call to your attention Principle 5 of the *Declaration of Principles on Equality*. In response to the sets of difficulties arising from both the open-list and closed-list approaches to grounds of discrimination, the *Declaration of Principles on Equality* has developed a compromise solution that retains the flexibility and inclusiveness of the open-list approach but encases it within a strict legal test. This ensures that the protection against discrimination is not extended to spurious or illegitimate claims of discrimination. Principle 5 of the *Declaration of Principles on Equality* states:

“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 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.”

If a closed-list approach is found to be preferable by the Republic of Moldova, incorporating such a test into the equality clause of the Moldovan Constitution would be necessary to ensure compliance with international law and to protect those who are discriminated against on grounds not expressly set out in Article 16(2). A strong social case for the expansion of the prohibited grounds of discrimination has also been demonstrated through the human rights monitoring of civil society and international organisations. In 2009, for example, the UN Committee on the Rights of the Child stated:

“The Committee is concerned that, despite the legislative guarantees against discrimination, the principle of non-discrimination is not fully respected in practice, and that children from socially disadvantaged families, children with disabilities, children with HIV/AIDS or children belonging to a different ethnic group or holding different religious views may face discrimination.”¹⁷

We, therefore, urge the Commission to recommend that Article 16(2) is amended to (i) expand the protected grounds of discrimination to the full scope required by international human rights law, and (ii) either include an “other status” clause in the list of prohibited grounds of discrimination, or add a set of criteria for including further grounds of discrimination to the list of prohibited grounds when giving effect to the constitutional right to non-discrimination.

¹⁷ UN Committee on the Rights of the Child, *Concluding Observations: Republic of Moldova*, CRC/C/MDA/CO/3, 20 February 2009, para. 25.

Conclusion

This expert opinion has argued that through applying the constitutional equality clause to citizens only and through adopting a narrow scope to the prohibited grounds of discrimination the Republic of Moldova is presently in contravention of its international legal obligations in respect to the right to equality and non-discrimination. As Article 16(2) stands, it is both inadequate for effectively combating discrimination in all its forms and inconsistent with the obligations that the Republic of Moldova has accepted as a sovereign state. The constitutional review process represents a unique opportunity for a stronger guarantee which complies with the requirements of international human rights law to be entrenched into the Moldovan Constitution.

ERT, therefore, submits this expert opinion with the aim of bringing to the attention of the Commission that amendments to Article 16 are necessary. In order to ensure that the constitutional guarantee to equality is consistent with the Republic of Moldova's obligations under international human rights law, the Commission must ensure that Article 16 is amended to provide:

- I. that ***all people*** are equal before the law and the public authorities;
- II. that the list of grounds on which discrimination is prohibited is expanded to include, at a minimum, those grounds currently prohibited by international law; and
- III. that the constitution envisages a possibility for including new grounds on the list, either by adopting an "other status" clause or by adding a set of criteria for recognising further grounds as prohibited grounds of discrimination.

Yours Sincerely,



Dr. Dimitrina Petrova,
Executive Director,
The Equal Rights Trust