

Equal Rights Trust Advocacy

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In the period since the publication of ERR Volume 4 (December 2009), ERT has been continuing with its work to expose patterns of discrimination globally and to combat inequality and discrimination both nationally and internationally. A major component of ERT's advocacy work has been advocating for the Declaration of Principles on Equality by using the Principles as a basis for assessing legislative and judicial developments. Below is a brief summary of some of the most important ERT advocacy actions.

ERT Calls on Malaysian Government to Grant Residency to Rohingya

On 5 January 2010, ERT called on the government of Malaysia to grant legal residency to the estimated 30,000 stateless Rohingya refugees living in the country. On the basis of research published in its report entitled "Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia"², ERT praised the government for the recent steps it had taken to improve the immigration regime but urged it to go further, reversing the current policy which treats the Rohingya as illegal migrants.

In the report ERT gathered first hand testimony from Rohingya who had been subjected to arbitrary arrest, detention, violence, extortion, human trafficking and forced labour in Malaysia. The report revealed for the first time the patterns of movement by Rohingya across South East Asia, providing an unprecedented insight into the cycle of flight, detention and deportation which affects tens of thousands of Rohingya in the region. According to the ERT findings:

- An estimated 25-32,000 Rohingya live in Malaysia and between 90 and 115

Rohingya are in detention in Malaysia at any one time;

- A combination of factors – including common religion, economic prosperity and the chance to acquire even basic identity documents – draw thousands of Rohingya to Malaysia, despite the fact that they remain under constant threat of arrest, detention and deportation;

- Rohingya arrested in Malaysia are often detained for months in inadequate conditions with little access to healthcare. Those convicted of immigration offences can face up to 4 months imprisonment and corporal punishment, which is still a legal penalty in Malaysia;

- Until recently, Malaysian immigration officials routinely sold deportees to human traffickers at the Thai-Malay border, who then either demanded payment from victims' families to release them and transport them illegally back to Malaysia, or re-sold them as bonded labourers on fishing boats or in plantations.

ERT called on the Malaysian government to recognise the unique status of the Rohingya as stateless refugees and to formalise their

position as residents in Malaysia. In addition, it recommended that the government:

- Investigate the conduct of Malaysian immigration officials in respect of the Rohingya;
- Establish procedures for determining refugee status and statelessness;
- Cease detention of Rohingya and other refugees in cases where deportation is not possible;
- Institute a formal policy to minimise deportation of Rohingya to Thailand; and
- Ban the use of caning as a punishment, including against immigration detainees.

ERT Urges President Obama to Release 103 Potentially Stateless Detainees

On 19 January 2010, ERT called on US President Barack Obama to release 103 potentially stateless detainees who had been cleared for release from Guantanamo Bay, but remained in detention solely because it was not possible to resettle them.

In December 2009, US Defence Secretary Robert Gates confirmed that a total of 116 detainees had been cleared for release from Guantanamo. Only 13 people had been freed since the announcement. Almost all of the remaining 103 – more than half the total Guantanamo population – are stateless, meaning they lack effective nationality either because their country of origin refuses to recognise them or because concerns for their safety or other security considerations make it impossible to repatriate them. Many faced potential imprisonment, torture and other abuses if returned to their country of origin as a direct consequence of their association with Guantanamo. The group included potentially stateless people from Algeria, Azerbaijan, China, Egypt, Kuwait, Libya, Saudi Arabia,

Syria, Tajikistan, Tunisia, Uzbekistan, the West Bank, and Yemen.

ERT undertook research which was published in the report “From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority”.³ This report contained a comprehensive investigation into the issue of stateless persons in detention in the USA. In the report, ERT called on President Barack Obama to mark the first anniversary of his pledge to close Guantanamo Bay (22 January 2010) by announcing the immediate release of all detainees cleared for release on U.S. soil. Since January 2010, developments have confirmed the validity of ERT’s approach, arguing that the lack of effective nationality is the unaddressed problem at the centre of the U.S. security and immigration detention policies.

ERT Urges Moldova to Amend Constitutional Clause on Equality

On 27 January 2010, ERT submitted an expert opinion to Mihai Ghimpu, Acting President of the Republic of Moldova and Chairperson of the Moldovan Commission on Constitutional Reform, arguing that Article 16 (Equality of Rights) of the Constitution of the Republic of Moldova (the Constitution) fell short of international human rights standards.⁴

On 1 December 2009 a Commission for Constitutional Reform was established by a Presidential decree. The Commission was tasked with considering the need for constitutional reform, submitting proposals to Parliament for any necessary reform and elaborating amendments to the Constitution. On 11 January 2010 the Commission was instructed to undertake analysis of the content of the Constitution, 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.

ERT also made recommendations for amendments which would better reflect the Republic of Moldova's commitment to human rights. ERT argued that as it stood Article 16 of the Constitution contravened international law by limiting the application of the right to equality before the law to "citizens of the Republic of Moldova", thereby excluding non-citizens. It further argued that the list of grounds on which discrimination is prohibited under Article 16(2) was too narrow to be consistent with Moldova's international obligations.

ERT urged Acting President Mihai Ghimpu to address these concerns and to propose amendments which would ensure that the right to equality enshrined in Moldova's Constitution complies with international law.

On 5 May 2010, ERT submitted its opinion and recommendations to the UN Committee on Social, Economic and Cultural Rights in order for the Committee to take this issue into consideration while assessing Moldova's second periodic report.

ERT Joins Leading Kenyan NGOs in Call for Equality To Be Put at Centre of New Constitution

On 29 January 2010, ERT joined the Kenyan Human Rights Commission (KHRC) and the Federation of Women Lawyers Kenya (FIDA) in calling on Kenya's parliamentarians to put the rights to equality and non-discrimination at the heart of the country's new Constitution.⁵ The three organisations issued a joint communiqué amid fears that the Parliamentary Select Committee (PSC) appointed to

resolve controversial issues in the draft Constitution might remove or amend key equality provisions in the Harmonised draft of the Constitution in the search for compromise with conservative critics. On the same day the PSC published its report and passed it to the Committee of Experts who will undertake a further review before a final draft is debated in parliament.

The communiqué was issued following a successful roundtable meeting in Nairobi at the beginning of the week with human rights organisations, politicians and officials on the subject of priorities and opportunities for legislative reform on anti-discrimination. The roundtable was the first activity in ERT's two year project in Kenya, "Empowering disadvantaged groups through combating discrimination and promoting equality", which contains training for NGOs in anti-discrimination law, development of draft legislation and the creation of a joint advocacy strategy.

During the roundtable participants agreed on the need to retain the improved equality and non-discrimination provisions in the draft Constitution and on the need to introduce comprehensive legislation to give effect to the right to non-discrimination. Participants also agreed to work together to implement a five-strand joint advocacy strategy to raise awareness of different forms of discrimination and of the need for comprehensive anti-discrimination legislation.

On 6 May 2010, the Attorney-General of Kenya published the Proposed Constitution of Kenya which retained the significantly improved commitments to the rights to equality and non-discrimination that were published in the Harmonised Draft in November 2009.⁶

ERT Supports Albanian Civil Society Efforts for a Comprehensive Anti-discrimination Law

On 4 February 2010, the Albanian parliament adopted Law No. 10 221 “On Protection from Discrimination”. It was signed into law by Albanian President Bamir Topi on 24 February 2010.

During October and December 2009 ERT provided support and advice on international and comparative equality law to a group of Albanian NGOs who worked tirelessly to draft the law and secure its adoption. In particular, ERT provided support and guidance in respect to:

- The legal definitions contained in the draft Bill;
- The meaning and scope of “Justified different treatment”;
- The scope of the “Prohibition of discrimination during application for employment”;
- The scope of the prohibition of discrimination for “Commercial Companies”;
- The mandate and functions of the Office of the Commissioner for Protection from Discrimination and the scope of its obligations in respect to the “right to complain”;
- The procedure for bringing a claim before courts.

The entry into force of the law was a significant step forward for the protection of equality and non-discrimination in Albania. It put in place a solid legal foundation guaranteeing the rights to equality and non-discrimination.

The most noteworthy elements of the new law⁷, include:

1. Purpose

Article 2 states that the aim of the law is to ensure the right of every person to equality before the law and to equal protection of the law. It stresses the importance of promoting equality of opportunity and ensuring that every person is able to fully participate in public life. It states that the law seeks to ensure effective protection not only from discrimination, but from every form of conduct that encourages discrimination.

2. Definitions

2.1 Prohibited Grounds of Discrimination

Article 1 prohibits discrimination based on gender, race, colour, ethnicity, sexual orientation, gender identity, language, political beliefs, religious beliefs, philosophical beliefs, economic status, social status, education level, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, disability, affiliation with a particular group or any other ground.

2.2 Forms of Discrimination

Article 5 sets out a general prohibition of discrimination on all of the grounds listed in Article 1. It also provides that the denial of adaptations and modifications for people with disabilities constitutes discrimination.

Article 3 provides detailed definitions of various forms of discrimination which are prohibited under the law. The prohibited forms of discrimination include direct and indirect discrimination, discrimination by association, harassment, instruction to discriminate and victimisation.

The definitions of the various forms of discrimination contained in the law appear to be largely consistent with European Union Directives and good practices. However, the definition of direct discrimination under the law does not explicitly permit the use of hypothetical comparators, which is explicitly permitted under the definition of direct discrimination under European Union law -- for example, Article 2 (2)(a) of Council Directive 2000/43/EC (Racial Equality Directive). As such, a challenge remains for the courts to progressively interpret Article 3(2) and permit the use of hypothetical comparators to ensure that the law is consistent with EU law.

To its merit, the Albanian law extends the scope of protection from discrimination beyond that provided under EU law in two important ways. Firstly, it stresses that the denial of reasonable accommodation is discrimination under Article 3(7). This approach is currently being debated by EU member states in the negotiation for a new EU Equality Directive. Secondly, Article 3(4) builds on the jurisprudence of the European Court of Justice developed in *Coleman v. Attridge Law and Steve Law* (Case C-303/06) by explicitly stating that “discrimination because of association” is a prohibited.

3. Areas in Which Discrimination is Prohibited

The law is broad in scope: as stated above, Article 2 provides the purpose of this law is to assure the right of every person to: a) equality before the law and equal protection of the law; b) equality of opportunities and possibilities to exercise rights, enjoy freedoms and take part in public life; and c) effective protection from discrimination and from every form of conduct that encourages dis-

crimination. This broad scope of application is complemented by a focus on areas where discrimination is particularly prevalent, such as employment, education, and the supply of goods and services (including housing and health).

In respect to employment, Article 12 provides that any distinctions, limitations or exclusions based on any of the protected grounds are prohibited in the field of employment. This includes any adverse treatment relating to job opportunities, the recruitment of staff and the treatment of staff within the workplace. Article 12 (2) states that all types of harassment, including sexual harassment, are prohibited in the workplace.

Article 13 places a range of positive obligations on employers to encourage the principle of equality and facilitate its promotion within the work place. This Article creates a duty on employers to investigate any complaints of discrimination made by their employees within one month of receiving them.

Article 17 sets out the scope of the prohibition of discrimination in relation to education. It provides that discrimination is prohibited in: the creation of public or private educational institutions; the financing of public education institutions; the content of principles and criteria of educational activity, including teaching; and the treatment of students or pupils, including admission, evaluation, discipline or expulsion. The denial of access to an educational establishment on the basis of a prohibited ground is also specifically outlawed (Article 17(2)).

Under Article 20, the prohibition of discrimination in respect to goods and services includes housing, health services, banking, entertainment facilities and transport. The

law provides that people should not be denied goods or services based on any of the grounds laid out in Article 1, nor should they be provided with goods or services in a different manner to the way in which they are provided to the public in general. The law applies to any natural or legal person who offers goods or services to the public.

4. Positive Action and Positive Duties

Article 11 permits positive action, which it defines as a “particular temporary measure that aims at speeding up the real establishment of equality”. The Article states that this measure must be suspended on achievement of the equality objective.

In addition, Article 14 places particular positive duties on the Council of Ministers, the Minister of Labour, Social Issues and Equal Opportunities and the Interior Minister. Each Ministry has a general duty to take measures of a positive nature in order to fight discrimination in connection with the right to employment. Moreover, two specific measures are prescribed in order to fulfil this general duty:

- Raising consciousness about Law No. 10 221 with employees and employers by, among other things, providing information about it;
- Establishing special and temporary policies, on the basis of the characteristics mentioned in Article 1, for the purpose of encouraging equality, in particular between men and women as well as between fully physically able persons and those who are of restricted ability;
- In respect to education, Articles 18 and 19 place specific duties on the Minister of Education and Science and the directors of educational establishments to combat

discrimination by taking positive measures to raise awareness about the law in the educational system. Article 18 further specifies that the Minister of Education and Science must, among other things, take measures for:

- Including concepts and actions against models of discriminatory behaviour in teaching programmes;
- Educating the entire population, in particular, by taking measures in favour of women and girls, minorities, persons of restricted ability as well as persons who are or have more possibility of being the object of discrimination for the causes mentioned in Article 1 of this law;
- Respecting and assuring the right to education in the languages of minorities, as well as in appropriate manners for persons with restricted ability.

5. Enforcement

5.1 The Commissioner for Protection from Discrimination

In line with Article 13 of the EU Council Directive 2000/43/EC (Racial Equality Directive) which requires that states must designate a body or bodies for the promotion of equal treatment, Articles 21 to 33 set out the structure, mandate and powers of the Commissioner for Protection from Discrimination (the Commissioner), an independent legal person, subject only to the Constitution and the law. The Commissioner is elected by the government assembly and has a five year mandate.

The Commissioner is entrusted with monitoring the implementation of the law and proposing the approval of new legislation or the amendment or reform of existing legis-

lation. The Commissioner is required to provide information on equality law and to take an active role in monitoring the implementation of such law, as well as make recommendations for legislative reform. The Commissioner is also entrusted with ensuring that all persons and bodies are properly informed about their right to protection from discrimination and the legal remedies available to them in this regard.

The Commissioner has the power to investigate complaints from persons, or groups of persons, who allege they have been victims of discrimination. If it is found that there has been a violation of the law then the Commissioner has the power to impose administrative sanctions on culpable persons and organisations.

5.2 Enforcement through the Courts

Under Article 34, cases of discrimination can be brought before the civil courts, as an alternative to lodging a complaint with the Commissioner. Such cases are subject to a limitation period of five years from the time of the alleged discrimination, or three years from the time the injured party had knowledge of the discrimination.

The procedural requirements in relation to the burden of proof are explained in Article 36(6) which states:

“After the plaintiff submits the evidence on which he bases his claim and on the basis of which the court may presume discriminating behaviour, the defendant is obligated to prove that the facts do not constitute discrimination according to this law.”

ERT Provides Supporting Legal Arguments for the Defence of Men Prosecuted Under Sodomy Laws in Malawi

On 6 April 2010, ERT submitted a legal brief to the Centre for the Development of People (CEDEP), a Malawian human rights organisation which funded the legal defence of Tiwonge Chimbalanga and Stephen Monjeza in order to support the defendant’s case.

Tiwonge Chimbalanga and Stephen Monjeza were charged with “unnatural practices and gross indecency” on 28 December 2009 for organising a traditional civil marriage ceremony in Malawi. The defendants were being prosecuted under sections 153 and 156 of the Penal Code.

ERT argued that any application of these sections of the Penal Code to prosecute actual and suspected gay men constituted discriminatory treatment on grounds of sexual orientation that directly contravened the prohibition of discrimination provided under Article 20(1) of the Malawian Constitution.

In its submission ERT showed that sections 153 and 156 of the Penal Code, under which Messrs Chimbalanga and Monjeza and others were charged, are contrary to:

1. The Constitution of the Republic of Malawi: in particular that these sections are contrary to Article 20 (the right to equality) of the Constitution.
2. Malawi’s international legal obligations, particularly provisions under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Rights of the Child.

ERT Calls for LGBTI Equality on International Day against Homophobia and Transphobia

On 17 May 2010, the occasion of the International Day against Homophobia and Transphobia, ERT called upon all countries to repeal laws that perpetuate LGBTI discrimination and for human rights organisations to put LGBTI equality among their strategic priorities.

ERT has engaged on the theme of this year's international day – which focused on exposing and opposing the negative impact of religious fundamentalist discourses and giving visibility to voices who are working for inclusion, tolerance and peace, by developing a position paper on combating religiously motivated barriers to sexual diversity and LGBTI rights.⁸

¹ Jarlath Clifford is Legal Officer at The Equal Rights Trust.

² The Equal Rights Trust, *Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia*, January 2010, available at: <http://www.equalrightstrust.org/ertdocumentbank/ERTMalaysiaReportFinal.pdf>.

³ The Equal Rights Trust, *From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority*, January 2010, available at: http://www.equalrightstrust.org/ertdocumentbank/Statelessness_in_USA_17_Jan.pdf.

⁴ The text of the ERT submission to acting President Mihai Ghimpu is available at: <http://www.equalrightstrust.org/ertdocumentbank/ERT%20Expert%20Opinion%20to%20Moldova%20on%20Article%2016%20English.pdf>.

⁵ The text of the joint *communiqué* is available at: http://www.equalrightstrust.org/ertdocumentbank/Communique_on_Kenyan_Constitution.pdf.

⁶ On subsequent ERT activities and advocacy impact, see in more detail the Special Section in this issue.

⁷ The text of Law No. 10 221 "On Protection from Discrimination" is available at: <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20English%20NDL.pdf>.

⁸ See the ERT statement at <http://www.equalrightstrust.org/newsstory17may2010/index.htm>.