



The Equal Rights Review

*Promoting equality as a fundamental human right
and a basic principle of social justice*

In this issue:

- The new Equality Act 2010 in Britain
- Islam and Homosexuality
- Constitutional Reform and Equality in Kenya
- Testimony from a Chinese Health Rights Activist
- Equality law in the EU and the USA



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The Integrated Approach to Equality in Kenya

This issue of *The Equal Rights Review* is devoted to recent equality developments in Kenya, where The Equal Rights Trust is working with its partners towards a comprehensive equality law reform. The Trust pursues its goals from the unified perspective on equality, expressed in the 2008 Declaration of Principles on Equality. We have made the unorthodox decision to devote this issue to equality in one particular country, rather than to a specific theme related to equality, in an attempt to illustrate how our approach works in practice at the national level, and how the theoretically well established advantages of the unified framework translate into practical project activities.

The unified (integrated) framework on equality is a holistic approach which, while keeping in view the specificities of the different strands of equality and the different types of discrimination, seeks more effective implementation of the right to equality through strengthening also the overarching aspects of these different strands and types. The unified framework brings together: a) the types of inequalities based on different grounds, such as race, gender, religion,

nationality, disability, sexual orientation and gender identity, among others; b) the types of inequalities in different areas of life, such as the administration of justice, employment, education, provision of goods and services, etc. The unified framework resolves the tensions and inconsistencies between international human rights and equality law approaches to non-discrimination. It also embraces progressive efforts to bridge the gaps between legal approaches to reducing status inequalities on one hand and socio-economic disadvantages on the other.

As an organisation based in the UK, ERT is encouraged by developments at home, where the Equality Act 2010 was passed last April, following 14 years of campaigning by equality and human rights advocates and experts. The Equality Act shortens the distance between the current British status quo and the values enshrined in the Declaration of Principles on Equality. In this issue, Professor Sir Bob Hepple QC analyses the new Equality Act, showing how it builds on several generations of previous equality legislation, and how the key concepts of equality law have been slowly developed through jurisprudence, pushed forward

by real and urgent needs of disadvantaged groups. The wisdom of his historic perspective contains a cautionary tale, however. If it took decades in Britain to arrive at today's version of modern, progressive equality legislation, in a society which does not tolerate wide rifts between a law and its practical implementation, why should we believe it will take less time in Kenya, or any other country? And even if Kenya adopts an equality law as good as that of Britain, what will be the impact on people's lives? Kenya already has some strong fragments of the otherwise missing mosaic of equality law. If it completes the mosaic, will the law translate into policies and practice?

It can be argued that the unified perspective on equality, if utilised sensitively and strategically, can itself serve as a catalyst and accelerator in the development of a comprehensive national equality regime in some countries. There are positive examples. In the new members of the European Union such as Bulgaria and Hungary, for example, where the unified approach was adopted by lawmakers and politicians when internalising the EC equality Directives, progress towards effective realisation of the right to equality has been much faster than it would have been if these countries had replicated the long stages of development of equality law in Britain. It appears that many countries around the world, and notably Kenya, can benefit from putting the concept of an integrated equality regime at the foundation of reform, rather than arriving at it through assembling dozens of

pieces that do not match, and modelling them to fit in the ever evolving puzzle of making equality identical with justice. Indeed, Kenya has already gone quite far toward a fragmented, patchy model of non-discrimination provisions. But the earlier these are integrated and upgraded, the better for everyone in Kenya. And in that country, the best time is now.

ERT could not have wished for a better timing to be working in Kenya together with its partners, the Kenyan Human Rights Commission and FIDA. Following a thorough and inclusive constitutional review process, on 4 August the Kenyans voted in a referendum and said "yes" to a new Constitution. Over the last year, ERT and its partners' advocacy has been advancing step by step against the backdrop of these developments, gaining strength from the winds of pro-reform sentiment felt at most quarters. Under our current project, a report on which is presented in the Special section, we have pushed for a comprehensive legal reform in the field of equality and non-discrimination, enhancing the capabilities of civil society to shape change. ERT Consultant Barbara Cohen, a senior expert on discrimination law, assisted by Kenyan lawyer Jacqueline Mogeni, has trained several groups of advocates in different cities across Kenya. The project brings together, in the format of various initiatives, disparate groups representing different sections of the disadvantaged public: women with specific agendas and issues, ethnic and religious minorities, LGBTI persons, and persons with different types of disability,

including the stigmatising condition of albinism. They are encouraged to articulate the areas of common interest and work out a common agenda for legal and policy reform. With regard to LGBTI persons, this has not always been a smooth process, as David Kuria, the Chair of the Gay and Lesbian Coalition of Kenya, hints in the interview published in this issue. But at the same time, projects of this type, pursuing equality from a unified perspective, have been seen as particularly beneficial by exactly those groups that have been most marginalised. Sexual orientation issues, including the continued criminalisation of homosexual conduct, have been brought to the centre of the debate and can no longer be ignored. At this stage, this is no longer just an LGBTI agenda item but a legitimate pressing concern for all groups who purport to promote equality in Kenya. The unified perspective has certainly played a key role in achieving this. Under two or three new projects which are currently

at an inception stage, ERT will continue to support aspects of that progressive change.

In the previous issue of *The Equal Rights Review* Wan Yanhai, the most prominent health rights activist of China and one of the original signatories of the Declaration of Principles on Equality described his work for equal rights of people living with HIV/AIDS, hepatitis and other disabling conditions in China. In this issue, he recounts the last chapter of this work and how it came to an end. Wan has been forced to leave China, as the authorities have chosen to spend limitless funds from the public purse to stifle independent human rights organisations, and have made Wan's life and work inside China impossible. ERT expresses its solidarity with Wan Yanhai and his colleagues, and wishes them to find ways to continue their human rights work, and – one day in the not too distant future – to find the way back home open and waiting.

Dimitrina Petrova

ARTICLES



"The streamlining and broadening of the public sector equality duty and the provisions on permissible positive action are the core of the new approach to transformative equality."

Bob Hepple

The New Single Equality Act in Britain

Bob Hepple¹

Introduction

The Equality Act 2010 was one of the last measures to be enacted under the Labour Government which lost office in the U.K. in May 2010. It is the outcome of 14 years of campaigning by equality specialists and human rights organisations. Remarkably, there was eventually cross-party support for nearly all of its provisions, and the new Conservative-Liberal Democrat Coalition Government is committed to bring it into operation in stages from October 2010. The Act covers Great Britain (England, Wales and Scotland) but not Northern Ireland which has devolved powers on these matters, and appears to be set to continue its own patchwork of anti-discrimination legislation rather than enact a single Act, because of disagreements within the power-sharing government of that province. However, Northern Ireland has since 1989 been the pathfinder of new ways to combat inequality, some of which are reflected in the British Act.

Some features of the Act may serve as a model for other countries, in particular:

- Adopting a unitary or integrated perspective of equality law enforced by a single Commission;
- Clarifying the definitions of discrimination, harassment and victimisation and applying them across all protected characteristics;
- Expanding positive duties on public authorities to advance equality in respect of all protected characteristics;

- Widening the circumstances in which positive action is allowed; and
- A new duty on public authorities to have due regard to socio-economic disadvantage when taking strategic decisions.

Of course, legal models cannot simply be transplanted from one jurisdiction to another. Account has to be taken of the precise historical, political, and socio-economic circumstances in which equality legislation is made and enforced. This article, therefore, aims to explain the history and context of the British Act, and then to assess its content against the benchmark of the Declaration of Principles on Equality (the Declaration) launched by The Equal Rights Trust (ERT) which represents a “moral and professional consensus among human rights and equality experts.”² It will be seen that, despite its promise, there are still some important gaps between the Act and the vision of the Declaration.

1. Five Generations of Legislation

The Equality Act 2010 is part of the fifth generation of equality legislation in Britain. Social legislation of this kind is not the “gift” of enlightened rulers. It is the outcome of struggles between different interest groups and competing ideologies. As Abrams has said, “what any particular group of people gets is not just a matter of what they choose, but what they can force or persuade other groups to let them have.”³ The first generation of British legislation was based on the

notion of *formal equality* – likes must be treated alike. The Race Relations Act 1965 was the response of a Labour Government to campaigns by, among others, members of the Movement for Colonial Freedom and the Campaign Against Racial Discrimination to deal with the then widespread overt discrimination against recent immigrants from the Caribbean and the Indian sub-continent. The Act was a kind of *quid pro quo* for the Commonwealth Immigrants Act 1962 which had made it more difficult for Black and Asian immigrants to come to the U.K. It covered direct racial discrimination but only in places of public resort, such as public houses and hotels. It established a Race Relations Board which investigated complaints through conciliation committees. If conciliation failed and the discrimination was likely to continue, the Board could refer the matter to the Attorney-General to seek an injunction.

The second generation, the Race Relations Act 1968, was also a measure of *formal equality*. It was limited to direct racial discrimination but extended coverage to employment, housing, goods and services. Enforcement was still through local conciliation committees, and voluntary bodies in 40 industries, but if conciliation failed the Race Relations Board could itself bring proceedings in a designated county court. Campaign groups managed to mobilise political pressure for this new Act by commissioning two reports, one on the extent of racial discrimination (whose existence many then denied) and the other on anti-discrimination legislation in the USA and Canada. A Labour Home Secretary, Roy Jenkins, whose special adviser was Anthony Lester (later Lord Lester of Herne Hill QC, first Chair of the Equal Rights Trust), steered the measure through Parliament, but once again the *quid pro quo* was a restrictive Commonwealth Immigrants Act 1968 to halt the influx of East African Asian refugees.

The third generation started with the extension of legislation to discrimination on grounds of sex (Equal Pay Act 1970 and Sex Discrimination Act 1975 (SDA)). This had long been fought for by the trade union and feminist movements and the Labour and Liberal parties. The unique features of the SDA 1975, passed under a Labour Government, were the introduction of the concept of indirect or adverse effects discrimination (borrowed from the USA), and provisions permitting positive action. This marked the beginning of a transition from formal equality to *substantive equality*. Moreover, there was an individual right to claim compensation for unlawful discrimination in industrial (later called employment) tribunals and courts. An Equal Opportunities Commission (EOC) was created to undertake strategic enforcement and to assist individuals. This model was followed in a new Race Relations Act 1976, deliberately introduced later than the SDA because women's rights were more popular than those of ethnic minorities. There was now a separate Commission for Racial Equality (CRE) in place of the Race Relations Board and Community Relations Commission (CRC). The SDA was enacted soon after the UK joined the European Economic Community (EEC) under the Treaty of Rome which laid down the principle of equal pay for women and men and later issued directives on equal opportunities. There was a radical development of European law on gender equality as a result of test cases brought by the EOC before the European Court of Justice (ECJ). A further step towards substantive equality occurred with the Disability Discrimination Act 1995 (DDA). Growing political activism by disability organisations had been seeking "rights not charity." Disabled people increasingly saw the welfarist approach as paternalistic and oppressive. It was under a Conservative Government that the 1995 Act established individual rights for disabled people to claim

equal treatment. It was recognised that disability discrimination is asymmetrical, and measures to achieve substantive equality therefore included a duty to make reasonable adjustments for a disabled person. From 2000, a Disability Rights Commission (DRC) was established.

The fourth generation resulted from Article 13 of the Treaty of Amsterdam (1997) and the implementing Race Directive⁴ and Framework Employment Directive⁵ (covering age, disability, religion or belief, and sexual orientation) and subsequently the Equal Treatment Directive⁶ (covering sex). There were growing pressures within Britain for an extension of anti-discrimination legislation to the new strands from LGBT groups, religious groups – particularly Muslims – and those concerned with age discrimination. But without the Article 13 EC Directives it is unlikely that any domestic legislation would have been introduced at that time. A series of regulations implemented the Directives between 2003 and 2007. The Government chose to do this by secondary rather than primary legislation, with the result that the British regulations could not go beyond the provisions of the Directives. For example, the age, religion or belief and sexual orientation regulations had to be confined to employment and related fields because that was the scope of the Framework Employment Directive. Despite the gaps and shortcomings, this generation of EU-inspired legislation marks the start of *comprehensive* equality.

The fifth generation continues the move towards comprehensive equality and starts a period of *transformative equality*. This was first sparked by pressures from US and Irish Catholic activists who wanted to promote fair representation in Northern Ireland, and was based on American models. In 1989, the Fair Employment (Northern Ireland) Act imposed

positive duties to achieve fair participation of the Catholic and Protestant communities on certain employers. This has resulted in significant improvements in fair employment for both Catholics and Protestants without the use of quotas.⁷ The Northern Ireland Act 1998 (implementing the Belfast/Good Friday Agreement) went further imposing positive duties on public bodies to have due regard to the need to promote equality of opportunity not only between Protestant and Catholic communities, but also in respect of age, disability, race, religion, sex, marital status, and sexual orientation. In other words, public bodies had to mainstream equality into the exercise of all their functions. This approach crossed the Irish Sea to Britain in 2000 in respect of race equality, following the inquiry into the death of a black teenager, Stephen Lawrence, which exposed “institutional racism” in the Metropolitan Police.⁸ Amendments to the Race Relations Act not only extended anti-discrimination law to police and similar functions, but also imposed both general and specific public sector equality duties.⁹ Similar public sector positive duties were introduced in respect of disability in 2005¹⁰ and gender in 2007.¹¹

2. The Campaign for a Single Act and Single Commission

By 1997 when the Blair Labour Government was elected, anti-discrimination legislation was widely criticised for being outdated, fragmented, inconsistent, inadequate, inaccessible, and at times incomprehensible. Shortly before the 1997 election, Lord Lester and I brought together a small group of human rights specialists under the auspices of Justice and the Runnymede Trust.¹² We set out the main reforms that were needed. After the election we met the Labour Home Secretary (Jack Straw) and proposed that the new Government should review anti-

discrimination law and practice. He said the Government had too much else to do, but he was sympathetic and supported our application to funding bodies for a one-year Independent Review (the Cambridge Review).¹³ We undertook targeted case studies in Britain, Northern Ireland and the USA to examine how employers and others acted under different types of legislative regime. We interviewed individuals and organisations responsible for enforcement, and conducted widespread public consultation. Our report proposed that there should be a single Equality Act adopting a unitary or integrated approach covering all protected characteristics, and based on clear principles. We also advocated a single Commission. We made detailed recommendations on discrimination, harassment, and positive action, proposed a duty on public authorities to promote equality, a duty on all large employers, including the private sector, to undertake employment and pay equity reviews, and the use of contract and subsidy compliance to promote equality. There were also recommendations to make enforcement procedures and remedies more effective.

The report was sympathetically received by the Labour Government but no concrete action followed, apart from the establishment of a single Equality and Human Rights Commission (EHRC) from October 2007, merging the existing commissions and covering all the strands of discrimination. In order to stimulate reform, Lord Lester, a Liberal Democrat member of the upper House, introduced a Private Member's Bill in 2003. This Bill passed through all its stages in the House of Lords, with cross-party support, and over 200 Members of the House of Commons signed a motion calling on the Government to introduce such a Bill. In its manifesto for the 2005 elections, the Labour Government followed the

Liberal Democrats in pledging to introduce a Bill, but it took another two years before it published an *Equalities Review*,¹⁴ examining the extent of discrimination, and a *Discrimination Law Review* with proposals for a single Equality Bill.¹⁵ Over 4,000 individuals and organisations responded to the consultation.¹⁶ After a number of "false starts, empty announcements and delays",¹⁷ the Government's Equality Bill was finally presented, in April 2009, by Harriet Harman, Minister for Women and Equalities. The Conservative Party, while supporting the main principles in the Bill, opposed some of the provisions on grounds that they were "unworkable and overly bureaucratic", and "unnecessarily onerous" on business in a time of recession.¹⁸ The Liberal Democrats supported the Bill but thought it should go further especially in respect of equal pay.¹⁹ The Bill was the product of intense scrutiny and debate by the House of Commons over a period of one year, fuelled by human rights and equality organisations that presented evidence to the Public Bill Committee and gave detailed briefs to parliamentarians. The debate could have continued even longer, when the Bill reached the upper House, but Lord Lester persuaded his fellow peers to exercise restraint so as to ensure that the measure was passed before the election due to be held in May 2010. The Bill received the royal assent on 8 April 2010, just before the dissolution of Parliament.

3. Unitary or Integrated Perspective

The overriding aim of the Equality Act 2010 is to achieve harmonisation, simplification, and modernisation of equality law. This in effect expresses several principles in the Declaration, in particular the right to equality of all human beings (principle 1), equal protection from discrimination regardless of the grounds concerned (principle 6), and the

obligation on states to give “full effect” to the right to equality in all activities of the state (principle 11).²⁰ There must be no hierarchy of equality. The same rule should be applied to all strands unless there is convincing justification for an exception. To a large extent, the Act achieves this aim, although some of the exceptions in respect of particular strands remain controversial. Examples are the retention of a mandatory default retirement age of 65²¹ (although the Coalition Government have promised to phase this out), the exclusion of some discriminatory immigration decisions from protection,²² and the limitation of protection from harassment on grounds of religion, belief or sexual orientation to employment and related fields.²³ There is bound to be continuing argument at the margins, particularly where the principle of equality has to be reconciled with the freedom of religion and freedom of expression, but broadly speaking, the drafters have managed to limit the exceptions.

The judges have been given the power to decide whether indirect discrimination on any ground, and direct discrimination on grounds of age or arising as a consequence of disability, is justified as being “proportionate to a legitimate aim.”²⁴ This will enable them to balance apparently conflicting values on the basis of evidence as to whether a provision, criterion, or practice is appropriate and necessary. British judges are, in fact, showing an increasing awareness that there should be no hierarchy of equality. For example, in a recent case in which a counsellor employed by a relationship counselling service was dismissed for refusing to provide services to same sex couples because of his particular Christian beliefs, Lord Justice Laws, refusing leave to appeal against a decision that the dismissal was not unfair, made it clear that the law’s protection of the right to hold and

express a belief does not mean that priority must be given to that belief’s substance or content where it is incompatible with the principle of equality.²⁵

The Act replaces nine previous major pieces of legislation²⁶ and seeks to implement fully four main EU Directives.²⁷ There is a question as to how far a single Equality Act can successfully “simplify” this very complex area of law, and make it more accessible. Lord Lester’s Bill in 2003 had 94 clauses and 8 schedules in 111 pages. The new Act has 218 sections, organised in 16 Parts, and 28 schedules, in 239 pages, and there will also be some detailed regulations in secondary legislation, and guidance in codes of practice. By contrast, the Dutch Equal Treatment Act of 1994 has only 35 sections, and the Swedish Discrimination Act of 2008 has 71 sections. The British Act, like those in Ireland, reflects the different drafting conventions of the Anglo-Saxon common law systems and the Continental civil law systems. Within those constraints, the British drafters have provided a model which may influence other common law jurisdictions. The Act is complemented by a very helpful set of Explanatory Notes which make the turgid legal language more accessible to the ordinary reader. Guidance and codes of practice will be issued by the EHRC. But professional legal advice will still often be needed by those who wish to institute legal proceedings.

4. Clarification of the Definitions of Discrimination, Harassment, and Victimisation and Applying Them across All Protected Characteristics

Principle 4 of the Declaration states that “the right to non-discrimination is a free-standing, fundamental right subsumed in the right to equality”, and Principle 5 contains a

definition of discrimination. Broadly speaking, the British Act is compatible with these principles. However, unlike the European Convention on Human Rights and most other international instruments, it does not adopt an open-ended approach to defining the kinds of status or identity that are protected. The Act covers only eight of the characteristics mentioned in Principle 5. These are: age, disability, gender reassignment (which is possibly narrower than gender identity), marriage or civil partnership, pregnancy and maternity, race (which includes colour, nationality and ethnic or national origins; caste may be added later by secondary legislation), religion or belief, sex (man or woman), and sexual orientation. The Act does not mention descent (although ethnic descent is included in “ethnic origins”), language, political or other opinion (a “belief” has to be of a philosophical nature and not simply political), birth, social origin, economic status, health status, genetic or other disposition toward illness. The new definition of direct discrimination is broad enough to cover mistaken perception that a person has any one of the protected characteristics (e.g. that he or she is thought to be HIV-positive).

The Government refused to give specific protection to carers, saying that this is not a “status” and is better protected by other legislation such as that allowing some carers to request time off work or flexible working arrangements. However, association with a person with any one of the protected characteristics is protected, for example association with a national minority. The Act gives effect to an ECJ decision that less favourable treatment of a person because of the disability or age of the person for whom they care must be covered,²⁸ nonetheless carers who are discriminated against because of their position as carers rather than the characteristics

of the person for whom they care, is still ambiguous. The position of carers is important. It has been estimated that half of women are likely to be providing care by the age of 59; carers are less likely to be in paid work or in education than the general population; and caring reinforces gender inequalities because it has a disproportionate impact on women.²⁹

The Act deals only partly with the issue of what Principle 12 of the Declaration calls “multiple discrimination” that is discrimination on more than one ground.³⁰ The Act allows claims where because of a combination of *two* relevant protected characteristics a person treats another less favourably than they treat or would treat a person who does not share either of those characteristics.³¹ The limitation to two grounds was a compromise made by the Equality ministers in the Government in the face of the opposition of the Business lobby, supported by Business ministers, who opposed any provision on multiple discrimination. The new provision only allows a combination of two claims of direct discrimination, and a claim of direct and indirect discrimination cannot be combined. So if a disabled woman is denied flexible working and she alleges indirect discrimination on grounds of sex and direct discrimination because of disability, she will not be able to combine these in a single claim where it is unclear which of them caused the unfavourable treatment. Again the reason given for this was that it would be “unduly burdensome” to business.

Principle 5 says that “direct discrimination may be permitted only very exceptionally when it can be justified against strictly defined criteria.” The Act does not allow a defence of justification of direct discrimination except in the case of age discrimination. In

that case, the burden of proof is on the respondent to show that the discrimination is “a proportionate means of achieving a legitimate aim.” For example, policies which draw a “bright line” for certain benefits (e.g. educational grants) at a particular age may be justified, depending on the circumstances. But mere generalisations and prejudiced assumptions about age should not be accepted without satisfactory proof.

The definition of discrimination because of disability differs significantly from that of other protected characteristics.³² This is, in effect, an application of Principle 2: “equal treatment, as an aspect of equality, is not equivalent to identical treatment.” The law does not expect disabled people to be treated in exactly the same way as those who are not disabled. The Act recognises the special needs of disabled people. More favourable treatment of disabled people than others is allowed, and a new provision improves protection for disabled people who are treated unfavourably because of “something arising in consequence” of their disability.³³ So a visually disabled person who is not allowed to bring a guide dog into a restaurant does not have to show that they were less favourably treated than other dog owners. There is a defence of justification in respect of this kind of discrimination using the proportionality test. For example, the licensee of a public house who ejects a person because of violent conduct arising from a disability, might be able to show that this was a proportionate means of achieving the legitimate aim of protecting other customers.

There is also, as in earlier legislation, a duty to make reasonable adjustments for a disabled person.³⁴ This fulfils the aims of Principle 13 of the Declaration: “to achieve full and effective equality it may be necessary to re-

quire public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.” Although the Act now provides some consistency in regard to reasonable adjustments, for example requiring the disabled person to show a “substantial disadvantage”³⁵, it is necessary to consult no less than six schedules to the Act to ascertain the precise circumstances in which the duty to make reasonable adjustments arises. For example, there are different requirements in respect of different types of public transport vehicle. Broadly speaking, the requirements are of two kinds. Some are *reactive*, that is they are triggered when a provision, criterion or practice substantially disadvantages a particular disabled person, for example that a job applicant has particular needs. Others are *anticipatory*, requiring proactive steps to make services available, for example the manager of a large retail store might be expected to install automatic doors and lifts for wheelchair users.

The new Act, implementing the Framework Employment Directive 2000/78/EC, also applies the concept of indirect discrimination to disability.³⁶ This is likely to encourage service providers to identify and remove barriers for disabled people in advance. The previous law focused only on providing individual solutions to individual problems.

The new Act provides a single, uniform definition of unlawful harassment, which goes further than the definitions in EU law. There are three types of harassment in British law. The first is similarly worded to the definition in Principle 5 of the Declaration. This covers unwanted conduct which is related to a relevant protected characteristic and has the purpose or effect of violating the dignity of a person *or* of creating an intimidating, hostile,

degrading, humiliating, or offensive environment.³⁷ The second type is conduct of a sexual nature or related to gender reassignment or sex, which has the same purpose or effect as the first type of harassment.³⁸ The third type is treating someone less favourably because they have either rejected or submitted to conduct of a sexual nature or related to gender reassignment or sex. Controversially, the Act excludes harassment related to religion or belief, or related to sexual orientation, from its application to the provision of services, the exercise of public functions, and the disposal, management, and occupation of premises. In effect the prohibition of harassment related to religion or belief or sexual orientation is confined to the workplace.³⁹ This limitation reflects concerns about freedom of religion and freedom of expression which are protected by articles 9 and 10 of the European Convention on Human Rights. For example, it was feared that a cartoon “offensive” to some Muslims, or a Christian preaching against homosexuality in a way “offensive” to gays and lesbians, would constitute harassment. These concerns could probably have been met by applying a *conjunctive* definition of harassment, as in EU law, in non-work fields (that is requiring both an invasion of dignity *and* objectively offensive conduct), rather than the *disjunctive* one favoured in work-related British law. Applying the Declaration’s definitions to verbal conduct does not have to mean neglecting other human rights such as freedom of religion and freedom of speech. A sensible balance has to be struck, but the British law still goes too far in allowing the verbal bullying of gays and lesbians – a particular problem in schools.

A welcome change made by the new Act is that victimisation is no longer treated as a species of discrimination. Under previous legislation, a person complaining of victimi-

sation had to establish that there was a comparator who would not have been unfavourably treated in comparable circumstances. There is no longer a need for a comparator. There is victimisation if a person is subjected to a detriment because they do a “protected act”, such as bringing proceedings under the Act or giving evidence in good faith.⁴⁰

5. The Expansion of Positive Duties on Public Authorities to Advance Equality

The vision of *comprehensive and transformative* equality is embodied in the extension of what is now a single general public sector equality duty to all protected characteristics. As mentioned above, earlier public sector equality duties applied only to race, sex and disability, and there were differences between them. The single duty now applies as well to age, gender reassignment, pregnancy and maternity, religion or belief, and sexual orientation.⁴¹ The duty has three elements:

- Eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by the Act;
- Advancing equality of opportunity between persons who share a relevant characteristic and persons who do not share it;
- Fostering good relations between persons who share a relevant characteristic and persons who do not share it.⁴²

This general duty is placed on most central and local government authorities, health authorities, schools, and the police. For example, the duty could lead a local authority to provide funding for a black women’s refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women and, in particular, meeting the different needs of women from different groups. It could also lead a local authority to focus

council services on older people, or it may lead a school to review its anti-bullying policy to prevent homophobic conduct.⁴³ In addition, a Minister may, after consultation, make regulations placing specific duties on certain public authorities to enable them to carry out the public sector equality duty more effectively. Perhaps the most important of these specific duties will be those that fall within the EU law public procurement regime, for example when buying goods and services from private firms. These specific duties may allow public bodies to require their contractors in the private sector to ensure equal opportunities.

The extended and strengthened public sector equality duty is compatible with Principle 11 of the Declaration which requires States to “take the steps necessary to give full effect to the right to equality in all the activities of the State”, and in particular to “promote equality in all relevant policies and programmes”, and to “take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality.” However, there are weaknesses. First, the general duty, as under previous legislation, is to have “due regard to the need” to achieve the three stated objectives mentioned above. Although there has been some clarification of what this means (for example, it may involve treating some people more favourably than others where this is permitted by the Act), the words have encouraged a “tick-list” approach, with an emphasis on procedures rather than outcomes. Consequently, it is enough for the authority to *consider* the equality impact but then to move on, without achieving fairer representation. It would have been better to replace “due regard” with an obligation to “take such steps as are necessary and proportionate for the progressive realisation of equality.”⁴⁴

A second weakness is the extent of the exceptions. For example, the duty does not apply to age in respect of functions relating to schools and children’s homes; indeed children are also excluded from protection against age discrimination, which appears to be in violation of provisions of the UN Convention on the Rights of the Child that recognise the rights of children to be protected from unequal treatment and discrimination. Another example is that the public sector duty does not apply to immigration functions – a field in which discrimination is endemic – in respect of the protected characteristics of age, race (except as it applies to colour), religion or belief. Thirdly, the public sector equality duty does not give rise to any enforceable private law rights.⁴⁵ It is enforceable only by way of judicial review. So if a local authority decides to stop funding a women’s refuge, a woman would not be able to sue the local council. Judicial review proceedings may be brought by any person with sufficient interest (including the EHRC) and may result in a decision being set aside, but there will only rarely be an order for compensation. Moreover, the grounds on which a review can be sought are limited.⁴⁶ The usual way of enforcing a specific public sector duty will be by the EHRC issuing a compliance notice; if the authority fails to comply, the EHRC may then seek a court order requiring the authority to comply.

6. Widening the Circumstances in Which Positive Action Is Allowed

Principle 3 of the Declaration states that:

“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.”

International human rights standards view positive action measures as permissible if they are necessary, proportionate, and time-limited.⁴⁷ The new British Act contains three mainly new provisions which appear to be in compliance with these principles.

First, section 158 provides that the Act does not prohibit a person from taking any action which is a proportionate means of achieving any one of three aims:

- Enabling or encouraging persons who share a protected characteristic to overcome or minimise a disadvantage connected to the characteristic;
- Meeting needs of persons who share a protected characteristic that are different from the needs of persons who do not share it; or
- Enabling or encouraging persons who share a protected characteristic to participate in an activity where participation by persons who share that characteristic is disproportionately low.

For example, measures including training can be targeted to particular disadvantaged groups to enable them to gain employment or health services. Previous legislation allowed positive action but this applied to different protected characteristics in different ways. The new section brings consistency and extends what is permissible to the extent allowed by EU law. It applies to all protected characteristics.

Secondly, section 159 of the Act allows an employer to take a protected characteristic into consideration when deciding who to recruit

or to promote in a so-called “tie-break” situation. This can only be done where persons who share the protected characteristic suffer a disadvantage connected to the characteristic, or their participation in an activity is disproportionately low. For example, a police service which employs a disproportionately low number of people from an ethnic minority background may give preferential treatment to a candidate from that background. However, the candidates must be equally qualified to be recruited or promoted, and the comparative merits of other candidates must also be taken into consideration. The employer must not have a policy of treating people who share a protected characteristic more favourably than those who do not, and the action must be a proportionate means of achieving the aims mentioned above.

Thirdly, section 104 allows registered political parties to make arrangements in relation to the selection of candidates for election where there is under-representation of people with particular protected characteristics in elected bodies such as Parliament and local government. This can include single-sex shortlists. A party cannot specifically shortlist only Black or Asian candidates, but it may reserve places on relevant electoral shortlists for people with a specific protected characteristic such as race or disability.

7. Public Bodies’ Duty to Have Due Regard to Socio-economic Disadvantage

Finally, mention must be made of the controversial new provision which requires some public authorities when making decisions of a strategic nature about how to exercise their functions to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.⁴⁸ The purpose of this duty was said to

be to “reduce the gap between rich and poor”, and ensure “that public bodies systematically and strategically take account of people who are poor and clearly disadvantaged.”⁴⁹ Examples given included a health authority allocating money to fund geographical areas with the worst health outcomes; or a regional development agency encouraging more bids for funding from deprived areas; or local education authorities taking steps to ensure that children from deprived areas have a better chance of securing a place at a school of their choice. The Solicitor-General (Vera Baird MP) said – in terms not dissimilar to those in Principle 14 of the Declaration – that “poverty and powerlessness make it much harder to battle with discrimination and discrimination itself can undoubtedly generate poverty and powerlessness.”⁵⁰ The provision was opposed by the Conservative Party, then in opposition, on the grounds that “the remedies and powers to prevent discrimination are quite different from solutions to socio-economic disadvantage.”⁵¹

This novel duty is unlikely to be implemented by the new Coalition Government. Even if it were to be implemented in its present form, it would not confer any private right of action on individuals, and there would be formidable obstacles in the way of seeking judicial review for an abuse of the public body’s use of discretionary powers. However, although only aspirational at present, this provision reminds us that social disadvantage is a complex, multidimensional problem with many causes not limited to discrimination. These include lack of opportunities for poor persons to work or to acquire education and skills, childhood deprivation, disrupted families, inequalities in health and poor access to social housing. The long-term issue – which remains unresolved – is how to develop socio-economic rights through the avenue of equality law.

Conclusion

The Act is a major achievement for the equal rights movement. Over the past 45 years, struggles for equality in Britain have resulted in the gradual recognition of the legal rights of a wider range of disadvantaged groups and the expansion of the law from *formal* to *substantive* equality to deal not only with individual acts of discrimination, harassment and victimisation, but also subtler forms of indirect discrimination. It has also been recognised that equal treatment does not mean identical treatment, and that full and effective equality entails accommodating differences.

The new fifth generation, embodied in the Equality Act 2010, goes even further than this. First, it is based on the principle that equality is an indivisible fundamental human right, and that there can be no hierarchy of equality. Although its early performance has been disappointing, the EHRC has the potential to speak with a strong voice on behalf of all disadvantaged groups on the basis of an over-arching principle of equality, rather than representing only sectional interests. Secondly, the Act recognises that members of disadvantaged groups will not have equal life chances or enjoy respect for their equal worth unless institutions take proactive measures to ensure equality. The streamlining and broadening of the public sector equality duty and the provisions on permissible positive action are the core of the new approach to *transformative* equality.

Unfortunately, there are still major gaps. In particular, the Act does not implement the proposals made by the Cambridge Review and many activists that every employer with more than 10 employees should be required to conduct periodical employment and pay equity reviews for the purpose of deter-

mining whether members of disadvantaged groups are enjoying, and are likely to continue to enjoy, fair participation and equal pay for work of equal value in the undertaking, and to take positive measures to achieve these aims. In this respect British legislation still falls a long way behind countries such as South Africa and Canada, and is not compliant with the Declaration.⁵² In view of

the fact that over 80 per cent of workers are employed in the private sector, and that the delivery of public services is increasingly being outsourced to private companies, there is a serious risk that the positive duties will become marginalised and ineffective. In other words, the new Act is not the end of the struggle for equality, but it is an important new beginning.

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² *Declaration of Principles on Equality*, published by The Equal Rights Trust, London, October 2008, p. 2.

³ Abrams, P., *Historical Sociology*, Sheptom Mallet, Open Books, 1982, p. 15.

⁴ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

⁵ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁶ European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

⁷ McCrudden, C., Muttarak, R., Hamill, H., Heath, A., "Affirmative Action without Quotas in Northern Ireland", *Equal Rights Review*, Volume 4, 2009, pp. 7-14.

⁸ See *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Stationary Office, February 1999.

⁹ Section 71 of the Race Relations (Amendment) Act 2000.

¹⁰ Section 49A of the Disability Discrimination Act 2005.

¹¹ The public sector positive duties for gender were introduced by sections 84 and 85 of the Equality Act 2006 and came into force in 2007.

¹² Hepple, B., Lester, A., Ellis, E., Rose, D., and Singh, R., *Improving Equality Law: the Options*, Justice and Runnymede Trust, 1997.

¹³ Hepple, B., Coussey, M., Choudhury, T., *Equality: a new Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Oxford, Hart Publishing, 2000.

¹⁴ Department of Communities and Local Government, *Fairness and Freedom. The Final Report of the Equalities Review*, February 2007.

¹⁵ Department of Communities and Local Government, *Discrimination Law Review: a Framework for Fairness*.

Proposals for a Single Equality Bill for Great Britain, June 2007.

¹⁶ *The Equality Bill - Government Response to the Consultation*, Cm 7454, 2008.

¹⁷ House of Commons Debates, 11 May 2009, cols. 565-7. Theresa May MP, Conservative Party, who later became Home Secretary in the Coalition Government.

¹⁸ House of Commons Debates, 11 May 2009, cols. 565-7 – Theresa May MP.

¹⁹ This was stated by Lynn Featherstone MP, Liberal Democrat, who later became Minister of State for Women and Equalities in the Coalition Government.

²⁰ See above, note 2, pp. 5, 8 and 9.

²¹ Schedule 9, Part 2.

²² Schedule 3, Part 4.

²³ Section 29 (8).

²⁴ Section 13 (2) and section 15 of the Act.

²⁵ *McFarlane v Relate Avon Ltd* [2010] EWCA CivB1, 29 April 2010.

²⁶ Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Equality Act 2006, Part 2, Equality Act (Sexual Orientation) Regulations 2007.

²⁷ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive), see above, note 4; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Framework Employment Directive), see above, note 5; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (Equal Treatment Amendment Directive); European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Recast Equal Treatment Directive), see above, note 6. Also relevant is article 157 of the Treaty on the Functioning of the EU. Account was taken of the new Draft Directive (July 2008) on discrimination because of disability, religion or belief, sexual orientation and age, in access to goods and services, housing, education, social protection, social security and social advantage.

²⁸ *Coleman v Attridge Law* [2008] ECR I-5603.

²⁹ National Equality Panel, *An Anatomy of Economic Inequality in the UK*, London, Government Equalities Office, 2010, pp. 238-9.

³⁰ For detailed analysis see, Uccellari, P., "Multiple Discrimination: How Law Can Reflect Reality", *Equal Rights Review*, Volume 1, 2008, pp. 24-49.

³¹ Section 14.

³² Section 15.

³³ Section 15 (1) (a).

³⁴ Section 20.

³⁵ Section 20 (3).

³⁶ Section 19.

³⁷ Section 26 (1).

³⁸ Section 26 (2).

³⁹ Section 26 (3).

⁴⁰ Section 27.

⁴¹ Marriage and civil partnership are not included in respect of the second and third elements. It was believed this could be better dealt with through the other strands.

⁴² Section 149.

⁴³ These examples are taken from the Explanatory Notes, Para 492.

⁴⁴ This was proposed by the Joint Parliamentary Committee on Human Rights, 26th Report Session 2008-9, Para 263.

⁴⁵ Section 156.

⁴⁶ See Schedule 18.

⁴⁷ See, for example, UN Human Rights Committee, General Comment 18: Non-Discrimination, 1994, U.N. Doc. HRI/GEN/1/Rev.1 at 26, Para 13; Article 4(1) of the UN Convention on the Elimination of All Forms of Discrimination Against Women; Article 1(4) of the UN Convention on the Elimination of All Forms of Racial Discrimination; *Belgian Linguistics* case (1979-80) 1 EHRR 252 (Article 14 of European Convention on Human Rights).

⁴⁸ Section 1.

⁴⁹ House of Lords Debates, 15 December 2009, col. 1407.

⁵⁰ Public Bill Committee (Equality Bill), 6th sitting, 11 June 2009, col. 156. Principle 14 of the Declaration states: "As poverty may be both a cause and a consequence of discrimination, measures to alleviate poverty should be coordinated with measures to combat discrimination, in pursuit of full and effective equality."

⁵¹ Public Bill Committee (Equality Bill), 5th sitting, 11 June 2009, col.129.

⁵² In particular Principle 3 (Positive Action), and Principle 11 (Giving Effect to the Right to Equality).

The Equality Act 2010: Main Concepts

Sue Ashtiany¹

Well it happened. In the last days of the UK Labour administration in April 2010, Parliament managed to complete the passage of the Equality Act and get it onto the statute book. This doesn't necessarily mean that the whole Act will actually come into force: the new Coalition Government has hinted that it doesn't like some aspects, such as compulsory reporting of gender pay in companies. But it does look as though most of it will be in force by October 2010 or April 2011.

The background for this immense piece of legislation was the government White Paper in 2008, "*Framework for a fairer future*".² The paper set out the Labour Government's belief that equality was "necessary" for individuals, society and the economy. The aim was to declutter the law bringing together 9 major pieces of legislation³ and around 100 statutory instruments and more than 2,500 pages of guidance and codes of practice. The aim was also to strengthen the law. The White Paper identified persisting equality gaps. The gender pay gap stood at 12.6%, disabled people were 2½ times more likely to be out of work, people from minority ethnic communities were 15.5% less likely to find work than their "white" counterparts, 62% of people over 50 felt discriminated against in the job market and 60% of lesbian and gay school children experienced homophobic bullying; we needed to step up progress to meet equality goals. The "*New Opportunities*" White Paper published in January 2009 committed the then Government to considering

legislation to address social disadvantage associated with socio-economic inequality.⁴ So the Act was intended not only to restate, clarify and harmonise the law, but also to provide more powers and responsibilities towards greater equality.

The Act is big: 218 Sections and 28 Schedules. It creates a unified framework based around key concepts which it then applies across the whole piece. Many of the 28 Schedules contain important substantial provisions dealing with specific issues. In addition, there is a 215 page Guidance Booklet which is intended to assist users of the Act in navigating their way through it. The Guidance does not have statutory force. The first Commencement Order has given powers to the Equality and Human Rights Commission to introduce statutory Codes of Practice under the Act which do not have the force of law but will be taken into account in tribunals and courts for determining whether there has been compliance.

One of the most interesting and potentially wide ranging reforms is the new public law duty to have due regard to socio-economic disadvantage when making strategic decisions about how to exercise public functions.⁵ This duty only applies to core government and administrative bodies and there is some doubt as to whether it will be brought into force by the new Government as the Conservatives do not support it.

The Act establishes key concepts which are applied uniformly across state, commercial and civil society bodies. Apart from some exceptions for national security and some completely private spaces, nothing is excluded in principle from the ambit of the Equality Act. There are eight "characteristics" which are "protected" (PCs): age, disability, gender re-assignment, marriage and civil partnership, race (there is power to include 'caste'), religion or belief, sex, and sexual orientation.⁶ The Act also protects from discrimination because of pregnancy and maternity, but this special category is treated differently from the PCs as the protection derives from a separate legal basis in EU law. So for example there is protection for breastfeeding mothers in public⁷, and a specific provision that treating pregnant women and those on maternity leave *more* favourably than men is permitted.⁸ But indirect discrimination protection does not apply.⁹

In addition, the Act protects against discrimination because of "dual characteristics" where neither PC alone has led to discrimination.¹⁰ So an Asian woman who is unable to show that she has been discriminated against either as a woman or as an Asian, may be able to show that she suffers discrimination because of being both a woman and Asian. This dual characteristic discrimination is specifically intended to make it easier for "minorities within minorities" to bring claims. Two thoughts: first, it may not come into force -- it has caused some unease about burden of litigation. Second, if it does, there is a real and perhaps unforeseen litigation consequence. Many people who have one protected characteristic also have another and surely it would be almost irresponsible of a legal adviser supporting the best interest of his/her client not to claim dual discrimination in all such cases?

There are a number of categories of prohibited conduct. Direct discrimination is now less favourable treatment **because of** a PC.¹¹ The old definition was "**on grounds of**" a PC.¹² Although no substantive change is intended, the two concepts are not necessarily contiguous, and it could be argued that a "because of" test supports the line of authorities that are focussed on the reason for the treatment as against a "but for" proximity test.¹³ Equality legislation is principally binary, so that preferential treatment of one sex, or one religion, etc. is outlawed except in very narrow circumstances. However there is no prohibition on more favourable treatment of the disabled as against those who are not; and justification of direct discrimination because of age is permitted where it is a proportionate means of achieving a legitimate aim ("PROMALA").¹⁴ "Associative discrimination" protection is now extended to all PCs. So if A experiences discrimination not because of their own status but because of the PC of someone of sufficiently close proximity to them, A now has a claim even if he/she does not have any claim based on their own status.

The Act also sharpens and arguably extends the indirect discrimination provisions where the application of a provision, criterion or practice has or would have a detrimental effect. They specifically include disability cases and they are wider in scope because they apply even in cases of anticipatory discrimination, where the detriment has not yet been felt by the complainant. The PROMALA defence is replicated as before.¹⁵

An important conceptual change is in the provisions for harassment and victimisation which are in separate sections outside the definition of "discrimination", because neither requires a comparator, whether actual or hypothetical.

Harassment provisions are strengthened and broadened. Under the Act any unwanted conduct that is "relevant to" a PC and has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment will be unlawful.¹⁶ The test is not person-specific and is broader than hitherto. "Relevant to" is potentially very broad.

As before, harassment also includes sexual harassment, i.e. "conduct of a sexual nature"¹⁷, and also either sexual harassment or conduct "related to" sex or gender reassignment which occurs as a result of rejection of or submission to sexual conduct.¹⁸ In deciding whether the conduct has the effect referred to, all of the following must be taken into account:

- a) The perception of the complainant;
- b) The other circumstances of the case;
- c) Whether it is reasonable for the conduct to have that effect.¹⁹

This test is arguably more robust than under the current laws.

The victimisation provisions have changed completely. Victimisation occurs where the complainant suffers retaliatory detriment for doing something in connection with the Act (a "protected act"). The new provisions no longer require the complainant to show that they have been treated "less favourably" than someone who has not done a protected act. Instead they now provide that victimisation occurs where A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act.²⁰ So there is no need to find an actual or hypothetical comparator. Protected acts are defined broadly to include any action under or by reference to the Act; and it is made clear

that corporate entities cannot claim victimisation.

At sections 108-112 there are a set of important and somewhat new definitions of ancillary discrimination provisions. These also deal with specific situations involving more than one alleged discriminator. Section 108 covers relationships that have ended. It provides protection from unlawful discrimination, harassment and victimisation arising out of or in connection with a previous association, such as employment. So this means that without limitation in time, an individual should be protected from retaliatory action that is closely connected with the previous relationship. In addition, the requirement to make reasonable adjustments for the disabled will continue after the end of the relationship if the substantial disadvantage continues and the relationship is treated as still existing.²¹

Section 109 replaces similar provisions in previous legislation. It is intended to make employers and principals legally liable for acts of those over whom they have control. Other than offences under the Act, where there is strict liability, the employer or principal has a defence if it can show that it took "all reasonable steps".

Section 110 is new. It makes the employee (or agent) who does something unlawful under the Act *personally* liable as well as the employer/principal unless he/she can show that s/he reasonably acted in reliance on a statement that the act in question was not a contravention. There is a new offence of "knowingly or recklessly" making the statement in question, which attracts a fine not exceeding level 5 of the standard scale (currently GBP 5000).²²

Under Section 111 it is unlawful for A to cause, instruct or directly or indirectly induce B to do something unlawful towards C provided that A is in a position to commit an unlawful act under the Act: *both* B and C can complain.

Knowingly helping someone else to contravene the Act is itself unlawful under Section 112. There is a defence of reasonable reliance on a statement by the other person, and an offence if the statement is made knowingly or recklessly.

All these ancillary provisions apply in all situations and are not limited to the world of work. Together with the primary provisions they arguably provide a very comprehensive framework of protection.

The Act makes big changes on disability protection. First, in addition to protection from direct discrimination, the Act now provides for protection from indirect disability discrimination.²³ In addition, the Act sets out to make it easier for a disabled person to show unlawful discrimination in other circumstances. So there is a new provision that unfavourable treatment of a disabled person which is not a PROMALA and is "*because of something arising in consequence of B's disability*" is unlawful discrimination. The section does not apply if A can show that he/she did not know and could not have been "expected to know" that B had the disability.²⁴ This is intended to remove the problems created by the 2008 decision of the House of Lords in the case of *Malcolm v Lewisham*.²⁵ The court found that to determine whether a disabled person had been discriminated against for a "disability-related" reason, you had to compare him/her with someone to whom the same reason applied but not related to disability. So for example if a blind person want-

ed to take a guide dog into a restaurant, the fact that the guide dog was closely associated with the blindness was irrelevant: the question was how the restaurant treated other people who just wanted to take their dogs in with them.

Finally, the Act prohibits pre-employment health questions unless they are to assist the selection process or in respect of an intrinsic element of the post or for diversity management.²⁶ And the duty to make reasonable adjustments is overhauled very thoroughly to make it both clearer and more effective. There are now three requirements:

- where a provision, criterion or practice puts a disabled person at a substantial disadvantage, reasonable steps have to be taken to avoid the disadvantage;
- where a physical feature (widely defined) puts a disabled person at a substantial disadvantage, reasonable steps have to be taken to avoid the disadvantage;
- where a requirement would, but for the provision of an auxiliary aid, put a disabled person at a substantial disadvantage, reasonable steps have to be taken to provide the auxiliary aid.²⁷

There are new provisions for positive action and new and revised exceptions.²⁸ The general positive action provision applies to all situations in and out of the workplace. If A reasonably thinks that:

- people who share a PC suffer a disadvantage connected to the characteristic;
- people who share a PC have needs that are different from the needs of persons who do not share it; or

- participation in an activity by persons who share a PC is disproportionately low, then that person or body can take any action which is not direct/indirect discrimination and is a proportionate means of achieving the aim of:

- enabling or encouraging people who share the PC to overcome or minimise that disadvantage;

- meeting those needs; or

- enabling or encouraging persons who share the PC to participate in that activity.

This is permissive only, save that there is also a positive *duty* for public bodies to eliminate disadvantage and promote equality. Therefore the existence of the power coupled with the duty may lead to more active changes than hitherto. There is also a specific provision permitting the recruitment or promotion of an equally qualified person in situations where people with that PC are disadvantaged or are not participating sufficiently, provided there is no general policy to favour such people.

Finally, regarding the exceptions, there is a general exception for an occupational requirement (OQ) the application of which is a PROMALA, where the person to whom it is applied either does not meet it or there are reasonable grounds for being satisfied that s/he does not meet it. This applies across all the PCs.²⁹

There are specific religion or religion-related exceptions. Some exceptions in respect of certain PCs are permitted for employment "for the purposes of" an organised religion.³⁰ They must engage the compliance principle, i.e. so as to comply with the doctrines of the religion and also the non-conflict principle, i.e. so as not to conflict with strongly held convictions of a significant number of the religion's followers. So for example a church can specify that it will not have a priest who is female or one who has re-married while his first wife was still alive.

In addition, there is a further religious belief OQ which "has regard" to the "ethos" of a particular organisation. In these cases, having a particular religious belief can be an OQ provided that the application of the requirement is a PROMALA and the person to whom it is applied does not have the belief or is reasonably seen as not having it.³¹

Apart from these cases, the only other exceptions relate to age discrimination.³² These range from permitting a default retirement age, to age-related provisions in pensions schemes and age-related national minima in wages.

The Equality Act 2010 is an accomplished and potentially far-reaching reform of equality law in Britain. We wait to see how much of the Act is actually brought into force in the coming months.

¹ Trustee of The Equal Rights Trust; Government Ambassador for Diversity in Public Office; Vice President of the Industrial Law Society; former Equal Opportunities Commissioner.

² Presented in June 2008 Cm 7431.

³ Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act

1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Part 2 of the Equality Act 2006, and Equality Act (Sexual Orientation) Regulations 2007.

⁴ *New Opportunities: Fair Chances for the Future*, Presented to UK Parliament by the Minister for the Cabinet Office by Command of Her Majesty, January 2009.

⁵ Section 1 of the Equality Act 2010.

⁶ Section 4.

⁷ Section 13 (6) (a).

⁸ Section 18.

⁹ Section 19 (3).

¹⁰ Section 14.

¹¹ Section 13.

¹² See, for example, section 1 of the Sex Discrimination Act 1975 or section 1 of the Race Relations Act 1976.

¹³ See, for example, the decision of the House of Lords in *Shamoon v Northern Ireland Constabulary* [2003] UKHL 11.

¹⁴ Section 13 (2) of the Equality Act 2010.

¹⁵ Section 19.

¹⁶ Section 26 (1).

¹⁷ Section 26 (2).

¹⁸ Section 26 (3).

¹⁹ Section 26 (4).

²⁰ Section 27.

²¹ Section 108 (4).

²² Sections 110 (4) and 110 (5).

²³ Section 19.

²⁴ Section 15.

²⁵ *Malcolm v Lewisham* [2008] UKHL 43. The House of Lords was the UK's highest court which has been renamed the Supreme Court since December 2009.

²⁶ Section 60.

²⁷ Section 20.

²⁸ See sections 158 and 159.

²⁹ See Schedule 9, part 1.

³⁰ See Schedule 3, part 7, sub-schedule 29.

³¹ Schedule 9, part 1, sub-schedule 3.

³² See, for example, section 197.

Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society

Muhsin Hendricks¹

1. Introduction

Queer² Muslims face a multitude of challenges, of which one is rejection. This is anchored by the belief that homosexuality is a major sin in Islam and punishable by death under Shariah law.³ The Inner Circle⁴ has documented through engaging with the local Muslim community of Cape Town that most people who react harshly towards queer Muslims do so from a position of fear and ignorance of the challenges facing queer Muslims.

There have been attempts in the past to raise the topic of homosexuality within Islam and to highlight homoeroticism within Muslim communities.⁵ Yet there is a lack of literature on the issue from a theological perspective. This perspective is necessary as most clients who approach the Inner Circle for help seek a theological answer for their inability to reconcile their faith with their sexuality.

Scott Siraj al-Haqq Kugle⁶ examines this need in his book "Homosexuality in Islam"⁷ and braves the waters of addressing the issue from a theological point of view. However, the book is an academic piece of work and it does not provide uncomplicated answers to the ordinary Muslim. This article therefore attempts to meet this need.

Islam, its sacred texts and their authenticity have been under more scrutiny in the West since 11 September 2001. This, coupled with

the international queer sector's demand for human rights, has placed pressure on orthodox Muslim clergy to defend its religious texts and to publicly authenticate their position on non-hetero normative sexualities. These events provided an opportunity for progressive Muslim thought to re-emerge. Hence, we observe progressive Muslim individuals and organisations re-opening the discourse on Islam, gender and sexual diversity in the last decade. Scholastic work such as that of Scott Siraj al-Haqq Kugle and Kecia Ali⁸ was possible due to the re-emergence of progressive Muslim thought around homosexuality and sexual ethics in Islam.

"And say: Truth has now arrived, and falsehood perished: for falsehood by its nature is bound to perish."⁹

It is an Islamic belief that the trajectory towards unravelling matters is a universal process through which truth authenticates itself over falsehood. Those who perceive themselves to be the custodians of the truth would attempt to justify and defend their position as if it were the only truth, until such a time when new information is presented to them, compelling them to change their stance.

Orthodox Muslims who justify their condemnation of homosexuals often use verses

from the Quran¹⁰ and *hadith*¹¹ to support their position. While Islam, through the very meaning of the word, promotes peace in all spheres of life, many queer Muslims struggle to find peace with a representation of Islam that does not include them. This often instils feelings of alienation from their communities and rejection by God, friends and families. Research undertaken by the Inner Circle reveals that for many queer Muslims, casual sex, alcohol and substance abuse, attempted suicide and apostasy have become outlets for negotiating the dilemma between Islam and their sexuality.¹²

This article attempts to reveal that Islam, at its very core, does not condemn non-heterosexual sexual intimacy. Instead, it is embraced as part of a divine plan. Islam, in its true meaning of peace and justice, accommodates the individual's sexual orientation as an intrinsic part of their biological and psychological makeup. Kecia Ali alludes to the fact that the prohibition on same-sex marriages in Islam do not stem from the Quran, but from the legal construction of marriage and that sexual relationships are both gendered and hierarchical.¹³ However, her study does not focus on the Quranic texts that can be interpreted to support non-heterosexual marriages. This article highlights some of these verses and presents their positive interpretations.

The Quran through its poetical form of expression is itself open to numerous interpretations and meanings that are divinely intended to accommodate scientific discovery, human development and diversity within humanity. Muslims who limit themselves to one interpretation, or oppose different interpretations of the Quran inhibit the potential of the Quran to promote social and spiritual growth.

Quran 39:55 makes it clear that Muslims are instructed to extract, out of the many possible interpretations, the interpretation that achieves the greatest good. If divine guidance is ignored and interpretations are personally motivated and unconsciously made, it can lead to both individual and social distress.

“We have indeed sent our messengers with the evidence and we sent down with them the Book and the Balance so that humankind can continue to exist in equity.”¹⁴

This article explores alternative interpretations of divine texts and develops their potential to reinforce the Quran's inclusive nature which promotes equality and freedom of choice. All Muslims agree that no other laws, extrapolated from secondary sources, may contradict the Quran. Consequently, this article also zooms in on some of the contradictions in secondary sources such as *hadith* that contradict the Quran on the issue of homosexuality and the punishment for public sexual offenses. It challenges the Shariah law which criminalises homosexuality and demonstrates that such law is inconsistent with the Quran.

Hadith were collected in the second half of the second century of Islam's existence. Their late development as a source of Islamic law is due to the Prophet Muhammad's (pbuh)¹⁵ prohibition of their collection. Numerous *hadith* collections report on these prohibitions.¹⁶ The companions and followers of the Prophet (pbuh), such as the first four Chaliphs¹⁷ Abu Bakr, Umar, Uthmaan and Ali, as well as the Prophet's personal scribe, Zaid bin Thaabit, refused to record sayings of the Prophet (pbuh) in compliance with the Prophet's order. In the second century AH,¹⁸ the Chaliph Umar Ibn Abdul-Aziz issued an order to permit the writing of *ha-*

dith believing that it would put an end to the widespread lies about the Prophet Muhammad (pbuh). Although this might have been a noble exercise at that time, *hadith* collection has been and remains a challenging science for most progressive Muslims and progressive Islamic thought today.

Hadith contain many inconsistencies, contradictions and distortions of facts. As definitive and reliable sources of Islamic law they are deeply problematic. It is no surprise that hate crimes against homosexuals, including the justification for their execution, stems largely from the *hadith*. Nonetheless, it does present an interesting window into the history of Islam, the mindset of early Muslims and the kind of early leadership that shaped the face of Islam. Therefore, I would not discard this source in its entirety and many progressive Muslim scholars would agree that *hadith* which do not contradict the Quran present a useful elaboration on Quranic verses.

The Inner Circle has noted that there is a residing belief amongst Muslim clergy that homosexuality is a phenomenon which is non-existent in the Islamic world both past and present. In places where it does exist, it is either an idea imported by the West, or practiced by ignorant or uneducated Muslims:

“Homosexuality is a moral disorder. It is a moral disease, a sin and corruption... No person is born homosexual, just like no one is born a thief, a liar or a murderer. People acquire these evil habits due to a lack of proper guidance and education.”¹⁹

This article demonstrates the implausibility of this belief by showing that the act of men having sex with men existed during the time of the Prophet Muhammad (pbuh) and during the golden period (first two centuries of

the existence of Islam). It also corroborates that the current interpretation of the story of Sodom and Gomorrah is a flawed result of the influence of patriarchal perceptions of masculinity.

Apart from the Hanafi²⁰ school of thought in Sunni Islam, there is unanimity among mainstream Sunni and Shi’a scholars that homosexuality is an adulterous act for which *Hadd*²¹ punishment applies. There is also a consensus that this sin is punishable by death. Scholars only differ in the style of execution. This author argues that stoning to death is not a Quranic concept and that instead the Quran adopts a pro-life stance.

It should be pointed out that Islam is not a homogeneous faith. Although the fundamentals of Islam extrapolated from the Quran remain unchanged, diverse cultures and geography influenced different manifestations and perceptions of Islam. Popular Muslim belief holds that the Quran remains the only book in history that has not undergone changes in the last 1400 years. Unlike the *hadith*, which has a more complicated and sometimes questionable history of compilation, the Quran is believed by most Muslims to be the direct word of God to Muhammad (pbuh).

2. “The Best of What Was Revealed”

“And follow the best of what was revealed to you from the One who has authority over you, before distress takes you by surprise and while you are in a state of unconsciousness.”²²

Let’s make no apology that there are verses in the Quran that left even the Prophet Muhammad (pbuh) uncomfortable. While the Quran gives a husband polarised options for

dealing with his wife's disobedience, from effectively communicating with her to beating her, the Prophet (pbuh) never adopted the latter option. Even though such verses may appear to critics of the Quran as being problematic, there is wisdom in its revelation.

Muslims approach the Quran as individuals of diverse temperaments and worldviews who are shaped by our own experiences. In spite of the multiple interpretations revealed in a particular Quranic verse, Muslims often accept those observable through their personal experiences. Consider that one of the reasons for the revelation of the Quran is to make communities workable. Exercising extreme measures for social problems does not contribute to creating workable communities; instead it more naturally leads to social distress. In order for humanity to be successful, polarised extremes are presented in the Quran as a criterion by which individuals are reminded to assess, evaluate and keep things in the balance. However, these extremes are not divine licences to exercise wanton desires.

"And from everything we created in contrasting duo so that perhaps you would be reminded."²³

It is through contrast that we come to appreciate the positive things in life. We can only appreciate light when we have experienced darkness. Similarly we appreciate love and justice with the knowledge of what rejection and injustice feels like.

As the following verses make clear the Quran places great emphasis on equality, justice and the saving of life.

"In the Law of Equality there is the saving of life to you, o you men of understanding; that you may restrain yourselves."²⁴

"O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear God. For God is well-acquainted with all that ye do."²⁵

"And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated and oppressed? – Men, women and children, whose cry is: "Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from Thee one who will protect; and raise for us from Thee one who will help!"²⁶

Traditional, patriarchal views on gender and masculinity are one prominent historical reason why women and effeminate men have been marginalised and rejected in different societies. Through its commitment to the principles of equity and justice the Quran makes it clear that it offers no justification for male authority over ostensibly weaker actors in society. Islamic history is filled with examples of the emancipation of peoples from slavery, the social advancement of women and the care for the most vulnerable, including orphans. It is consistent with the teachings of the Prophet Muhammad (pbuh), that the vulnerable and discriminated against should be protected. It seems evident that, had homosexuality, as a sexual orientation and identity, been a pressing social issue during the time of the Prophet Muhammad (pbuh), he would have spoken for the rights of homosexuals.

The Quran was revealed in a patriarchal, male chauvinistic seventh century AD Arabian society. Thus, its principal addressees are the aristocratic males of a society that contributed to the appalling status of women and innately effeminate men. In a span of twenty three years, the Prophet Muhammad (pbuh)

managed to raise the status of women and lay the foundations for improving gender equality. A common mistake that most Muslims make is to consider that the process started by the Prophet (pbuh) was conclusive. This has stifled the equity initiative begun by the Prophet (pbuh) which aimed to elevate and maintain the status of women and sexual minorities as we evolve over time.

Most Islamic historians agree that *Ijtihad*,²⁷ once a prized possession of Muslims and a key process in achieving a workable society, has been lost to religious control and political agenda. *Ijtihad* was still in practice until the tenth century AD. By the twelfth century, believing that *Ijtihad* led to human error and excess, most Sunni authorities declared that the doors of *Ijtihad* have been closed. Minority views continued to discuss and support *Ijtihad*, but with little effect. *Taqleed*²⁸ replaced *Ijtihad* as a means of controlling religious liberalism. Progressive Muslim scholars today suggest that Islam is unable to adequately respond to many contemporary social problems because the doors of *Ijtihad* have been declared closed. The independent reasoning promoted by the principle of *Ijtihad* which permits a clearer examination of the relationship between Islam and homosexuality has been used extensively to arrive to some of this article's conclusions.

3. Freedom of Choice and Expression

Verse 2: 208 and verse 2:256 of the Quran state:

“O you who have attained to faith! Enter into Islam whole-heartedly; and follow not the footsteps of the evil one; for he is to you an avowed enemy.”²⁹

“There is no compulsion in religion: Truth stands out clear from error. Whosoever

rejects evil and has faith in God has indeed grasped the most trustworthy hand-hold that never breaks. And God hears and knows all things.”³⁰

Although these two verses generally encourage people to adopt faith and reject disbelief, they clearly set out that the system of Islam cannot be forced upon anyone. At the same time neither should an individual pursue Islam half-heartedly. Islam, therefore, provides humankind the freedom to choose how they wish to live their lives, yet this freedom is not unfettered.

“And if they accuse you of falsehood, say: “My work to me and yours to you! You are free from responsibility for what I do and I for what you do!”³¹

Assuming responsibility for one's actions precedes the freedom of choice and expression Muslims are afforded in the Quran. It places responsibility on Muslims and gives those with different beliefs the freedom to responsibly express their difference. In effect this Quranic injunction promotes a healthier, more tolerant understanding and appreciation of others.

Verses 109: 1-6 of the Quran also acknowledge freedom of belief:

“Say: O you who have denied faith! I do not worship that which you worship and neither do you worship that which I worship and I will not worship that which you worship and neither will you ever worship that which I worship. So therefore, unto you your way and unto me mine!”³²

The Prophet Muhammad (pbuh) was persecuted by the Quraishi³³ regime at the beginning of his mission through denying his freedom of speech and belief. It was the Quran

that gave him freedom to spread his own beliefs and to employ the measures through which his vision can be realised. Those who followed his beliefs did so out of their own free will and in spite of the persecution they suffered. It would be insincere for any Muslim to ignore the fact that Islam came into existence through similar struggles for freedom of expression. Indeed, to deny the rights and freedoms to others which enabled the Prophet (pbuh) to undertake his mission would be inconsistent with his teachings.

God instructed the Prophet Muhammad (pbuh) not to use force as a measure in his mission:

“We know best what they say; and you are not to subdue them by force, but through reminders in the Quran and to such who fears My warning.”³⁴

In addition, Muslims believe that they are the people God chose to bring guidance to the modern world:

“You are the best of people evolved for mankind. You enjoin what is right and you forbid what is wrong and you believe in God. If only the people of the book believed (in this message) it would have been better for them; amongst them are believers, but most of them are iniquitous.”³⁵

Consequently, Muslims face the challenge of demonstrating to humanity that Islam is a good model for overcoming current social problems without using force. There is also a need to explore and consider the following sub-challenges: (i) How can Islam be instrumental in a technologically advanced information era, while there is resistance to transformation on the part of its leadership? (ii) What answers will Islam present to

the questions of gender, sexual diversity and choice of religion without diverting from its constitution? (iii) Are Muslims re-enacting the past fears and mistakes of their early Quraishi adversaries when they were confronted with change?

4. The Quran and Diversity

“And among His signs is the creation of the heavens and the earth, and the variations in your languages and your colours: Verily in that are signs for those who possess knowledge.”³⁶

“O mankind! Verily We have created you male and female, and have made you into nations and tribes that you may come to know. Truly, the noblest of you, in the sight of God, is the most God-conscious amongst you. Verily God is the Knower, the All-Aware.”³⁷

The Quran illustrates the diverse nature of human beings in order to contrast it with the uniqueness of God. Language, culture, race and ethnicity were the obvious elements of diversity by which seventh century Arabs were challenged. However, modern global diversity is evidently more extensive. Diversity is therefore a divinely intended phenomenon that challenges humanity to pursue a unifying trajectory.

“Glory be to God who have created all the different pairs/partners from what the earth produces and from themselves (humankind) and from that of which they possess no knowledge.”³⁸

Scientists and psychologists broadly concur that homosexuality has existed since time immemorial and occurs naturally in the animal and plant world.³⁹ The argument made by some orthodox Muslims is that, unlike

animals and plants, human beings have the capacity to make choices. To lust after one's own sex is a choice that can and should be disconnected from one's identity:

“Homosexuality as a predisposition can be disconnected from one's identity when one makes the choice to abandon that predisposition.”⁴⁰

Although there might be psychological help available for compulsive social behaviour today, most psychologists believe that homosexuality is not pathological and cannot be cured. A research study conducted by the National Association for Research and Therapy of Homosexuality (NARTH) failed to prove that their reparative therapy for homosexuality was successful. The study showed that only 34.3% of the 882 men in the study showed some change in sexual preference after therapy. Yet, the study's findings remain questionable and it failed to examine the long term effects of such treatment.⁴¹

Most scientists would also agree that homosexuality is harmless and poses no threat to humanity. Indeed techniques employed to combat homosexuality, such as reparative or aversion therapy, cause serious harm to the individual.⁴² It can thus be inferred that as homosexuality poses no harm or threat to humanity it is a natural and divinely intended diversifying factor which challenges humanity's fear of others.

Other orthodox Muslims take a different stance on homosexuality, advocating that one must hate the *sin* and not the *sinner*. This perspective views homosexuality not in terms of sexual orientation, but rather as a sexual act which involves anal penetration. Therefore, some orthodox Muslim clergy would preach that it is acceptable for someone to have an

attraction to a person of the same sex, but it is sinful to act upon that attraction.

All civilisations and cultures throughout history have discriminated on the grounds of gender and sexual orientation. Patriarchal religion, often operating through the link between the church and the state, has had a great influence in justifying and supporting this discrimination through conservative interpretations of ambiguous scriptural verses. I would like to present a few examples of how Quranic verses pertaining to sex and sexual behaviour have been used to justify the condemnation of homosexuality.

5. The Homosexuality That Is Not in the Quran

Terms such as homosexuality, bisexuality and heterosexuality, by which modern society classifies human sexuality, are not used in the Quran. Nonetheless, a theme of sexuality, sexual permissibility and sexual prohibition pervades the Quran. It addresses a heterosexual audience, and is largely silent about non-heterosexual sex. It is important to recognise that this does not automatically imply condemnation of the latter.

Traditionalists often justify the blanket condemnation for homosexuality through reference to the parable of Prophet Lot (pbuh) contained in the Bible and the Quran and drawing parallels between the sexual perversities of his people and homosexuality.

In order to appreciate and do justice to this beautiful Quranic parable, one has to take in consideration the milieu against which this parable is recounted.

“Do you approach the men and cut off the highway and commit atrocities in

your councils (circles)? But his people gave no answer but this: they said: "Bring us the wrath of God if you are telling the truth."⁴³

"And he warned them of Our power, but they disputed about the warning and attempted to seduce his guests: whereupon We obliterated their sight. So taste then My retribution after the warning."⁴⁴

Sodom was undoubtedly the wealthiest city on the biblical Vale of Siddim in Babylon. According to Verse 15:16 of the Quran, the city was situated directly on the trade highway known today as the Arava highway. Archaeological findings and historical usage of the highway confirm that merchants often traded with Sodom and passed from opposite sides through this highway. Sodom, known for its amenities and location on the highway, was a necessary resting point for travellers.

Prophet Abraham (pbuh), the uncle of Prophet Lot (pbuh), enunciated the divine law of honouring visitors and showing hospitality to guests and foreigners and thus Sodomites were compelled to give rest to travellers. Because of the selfish nature on the part of the aristocratic male rulers of Sodom and Gomorrah, they refused to share resources and common space with foreigners. They carved for themselves luscious hidden gardens for personal enjoyment and enjoyed the best of what Sodom had to offer, while common people and foreigners were subjected to harsh social and economic treatment.

Flavius Josephus, a Jewish historian, has written:

"Now, about this time the Sodomites, overwhelmingly proud of their numbers and the extent of their wealth, showed themselves insolent to men and impious to the Divinity,

insomuch that they no more remembered the benefits that they had received from Him, hated foreigners and avoided any contact with others. Indignant at this conduct, God accordingly resolved to chastise them for their arrogance, and not only to uproot their city, but to blast their land so completely that it should yield neither plant nor fruit whatsoever from that time forward."⁴⁵

It would not be correct to single out male-to-male sex as the sole purpose for destruction of Sodom. Sexual practices in historical Babylon should also not be seen in isolation from idolatrous beliefs and patriarchal pursuits for power and dominance. Sex under repressive conditions and in exploitive societies has often been used to assert dominance by patriarchal chauvinistic men. Non-consensual sex which is tantamount to rape has much more to do with an associated need to dominate rather than sexual gratification. In the case of Sodom the victims were not only virgin girls but also young men coerced into having sex with temple priests as part of their idolatrous rituals. According to the Quran, Sodom stands to be the first nation ever to commit the crime of subjecting vulnerable men to coercive sex with the aristocrats.

Temple prostitution was seen as an offering to the Gods. Every father in Babylon was compelled to offer his virgin daughter to the Temple of Ishtar. The virgins were then compelled to have sex with strangers as an offering to the God Ishtar so that the virgins may be purified and made ready for marriage. Prophet Lot (pbuh) defied this custom by repeatedly deferring the ritual when he was approached by the rulers to offer his daughters to the temple. As a last resort, and in compromise and utter hopelessness, he offered his daughters to the aristocrats to protect his guests who were God's angels sent to

warn him of the coming destruction of the cities. He responded, with a frail heart, that perhaps in this hopeless situation his daughters would be purer for their rituals than the rape of the angels of God.⁴⁶

To quote the Greek historian Herodotus:

"The worst Babylonian custom is that which compels every woman of the land once in her life to sit in the temple of love and have ... intercourse with some stranger ... the men pass and make their choice. It matters not what be the sum of money; the woman will never refuse, for that were a sin, the money being by this act made sacred."⁴⁷

Ishtar was the primary goddess of love and war. Ritual prostitution was performed in her name. In Cyprus where Ishtar was known by the name Aphrodite, it was the custom that unmarried women should prostitute themselves at the goddess' sanctuary and give the profit to the goddess. In Ishtar's temple in Babylon, all women, without regard to their class, acted as a prostitute at least once.⁴⁸

This indicates that the questionable sexual interactions amongst the people of Sodom and Gomorrah, as the two leading cities in ancient Mesopotamia, were not just among men. Hence, it would be incorrect to draw the conclusion that the cities were destroyed primarily due to same-sex conduct or orientation. In the entire Quranic parable, which spans over seventy verses, there is no allusion to sexual orientation or that the aristocratic men in question were having consensual sex with one another. Strong Quranic terminologies however suggest that the acts were deeply rooted in coercion and sexual primacy as opposed to consensual heterosexual or homosexual sex.

In fact, considering the parable in its entirety, it may be deduced that the justification for the destruction of Sodom and Gomorrah related to other factors, including:

1. The people of Sodom were not monotheists and their idolatrous beliefs dictated sexual proclivity and social and economic injustice.
2. Their inhospitality to foreigners and guests confirms social discrimination and xenophobia.
3. The robberies on the trade highway are indicative of voracity and disregard for foreigners.
4. The people of Sodom exercised coercive power through sexual gratification.
5. The unjust laws and practices in their councils were constituted to serve the patriarchal elite.

It can thus be concluded that the parable of Lot in the Quran cannot be used as a blanket condemnation of homosexuality. To do so would contradict the many verses in the Quran which promote the idea of unity within human diversity. Moreover, a spiritual path towards the Creator requires a complete acceptance of diversity and difference without judgment. This is not to say that same-sex conduct or orientation should operate in a social or moral vacuum. It merely disproves the belief that the parable of Prophet Lot (pbuh) condemns homosexuality. Scott Siraj al-Haqq Kugle's recent analysis draws similar conclusions: that the parable of Prophet Lot (pbuh) in the Quran does not suggest that consensual same-sex conduct is a sin.⁴⁹

In addition to the parable of Prophet Lot (pbuh), orthodox Muslim scholars have also quoted other verses from the Quran to support their contempt for homosexuality.

“If any of your women are guilty of lewdness, you must produce four reliable witnesses from amongst you against them; and if they testify, then they should be confined to houses until death does claim them, or God ordain for them some (other) way.”⁵⁰

“If two men are guilty of lewdness, both of them should be reprimanded. If they repent and amend, leave them alone, for God is oft returning, Most Merciful.”⁵¹

The imprecision of these verses weaken any conclusion that they refer to sexual violations among homosexuals. In reality, it makes more sense to appropriate these verses to cover a wide range of possible public indecencies regardless of gender and sexual orientation. The word “faahishah” used in the above verses is loosely translated from Arabic as “lewdness” or “public indecency”. It is a term which can be used to describe many acts of a shameful and sexual nature for which four witnesses are required in order to prove guilt. The high standard of proof required to prosecute such conduct operates more as a deterrent to people from randomly or spuriously accusing individuals of such public indecency.

6. The Recognition of Non-heterosexuals in the Quran

“Say: Everyone acts according to his own disposition (nature): But your Lord knows well who is best guided on the way.”⁵²

Verse 17:84 is a profound divine statement that recognises a deeper sense of diversity beyond religion, race and gender. Sexual ori-

entation operates within this deeper sense of diversity and such phenomena often cause us to fear these diverse characteristics of “other” people of whom we have little understanding. This verse speaks to our own natures calling us to be true to ourselves and to return to the very core of who we are as spiritual beings. It places judgment in the hands of the Creator and confirms the divine intention to permit freedom of choice.

“And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, and to draw their veils near to them, and not to reveal their adornment save to their own husbands or fathers or husbands’ fathers, or their sons or their husbands’ sons, or their brothers or their brothers’ sons or sisters’ sons, or their women, **or the followers (of Muhammad) amongst the men who have no desires for women**, or children who know naught of women’s nakedness. And let them not stamp their feet so as to reveal what they hide of their adornment. And turn unto God together, O believers, in order that ye may succeed.”⁵³

Verse 24:31 of the Quran may be considered by many in the West as dictating the modesty of women and denying them the right to choose their own modesty. Yet, it has been extremely liberating for women at the advent of Islam when they were perceived as mere chattels of desire. By lowering their gaze and donning an extra piece of garment in public, women were demonstrating their desire to be appreciated for more than just their physicality. This demonstration would be unnecessary in front of the category of men “who have no desires for women” and poses no threat to them. One such category of men would be the men who have no natural inclination towards women as they would clearly

not pose a threat to their womanhood. In this way the Quran makes it clear that such a category of men do exist in society.

“As for women who sit inactive and have no hope for marriage, it is no sin for them if they discard their (outer) clothing in such a way as not to show adornment. But to refrain is better for them. God is Hearer, Knower.”⁵⁴

There are different categories of women who do not actively seek to marry. Undoubtedly these categories of women include those who have no sexual attraction towards men. Rabi’a Al-Adawiyyah, a venerated Sufi saint, refused to marry her entire life. Although this choice might not have been related to her sexual orientation, she still defied a social norm which she struggled to relate to – even though marriage by orthodox Muslims has been proclaimed as a prophetic command. Her refusal to marry could also have been attributed to her earlier experience with men. At a tender age, Rabi’a was kidnapped and sold to a rich slave master. Part of her services to this master was to offer sexual favours against her will. This, as can be observed in many cases of women coerced into sex today, may have had a significant psychological impact on her relations with men.

Although the Quran largely, and rightfully so, addresses heterosexuals, it is not completely unmindful of the diversity on the continuum of sexuality. Had there been a case of homosexuality that necessitated a legal response from the Prophet (pbuh), the Quran would have mentioned it. However, the Prophet (pbuh) rarely engaged with *mukhannathun* (effeminate men) in the hetero-normative society of Medina. Often his reprove for some individuals amongst them, as can be observed in some *hadith* narrations, was

attributed to their behaviour as opposed to their sexual orientation.

7. Homosexuality and the Prophetic Teachings (*hadith*)

There are numerous recordings of *hadith* in which the Prophet Muhammad (pbuh) forbade the collection of his traditions for fear that they might be (i) held in higher regard than the Quran and (ii) fabricated. It should also be noted that Islam today is significantly influenced by tradition as opposed to the Quran. As described above, the traditions collected during the Prophet Muhammad’s time were all discarded at his command and they only resurfaced in the latter part of the second century after his death. The fact that these traditions were collected through secondary sources and through an eliminatory process raises significant questions about not only their validity but also the science of the collection of *hadith*.

It is beyond the scope of this article to venture into the *hadith* discourse, but it is noteworthy that Imam Bukhari (265 AH), the major contributor to the collection of authentic *hadith*, stated that he only selected 7,300 out of 600,000 narrations for fear that the others may have been fabricated.⁵⁵ The mere fact that such a huge number of fabricated *hadith* may have existed puts the authenticity of the remaining *hadith* in doubt. Unlike the Quran, *hadith* has many contradictions with respect to sexual offences. One such contradiction is striking.

A narration by Abdullah ibn Abbas, states:

“The Prophet Muhammad (pbuh) said: If anyone has sexual intercourse with an animal, kill him and kill it along with him. I (Ikrimah) said: I asked him (Ibn Abbas):

What offence can be attributed to the animal? He replied: I think he (the Prophet) disapproved of its flesh being eaten when such a thing had been done to it."⁵⁶

In a subsequent narration Abdullah ibn Abbas, states:

"There is no prescribed punishment for one who has sexual intercourse with an animal."⁵⁷

The stark contrast in both narrations which were collected and narrated by the same person and recorded one after the other in the same book of collections illustrate the problematic nature of the *hadith*. One consolation is that there are no references to homosexuality in the more authentic *hadith* collections of Imam Bukhari and Imam Muslim (regarded by Muslims as the two most authentic collections out of the six famous compilations of *hadith*). Furthermore, no *hadith* report an actual incidence in which the Prophet Muhammad (pbuh) ordered the killing of homosexuals. The other four authentic compilations of *hadith* do record, in various forms, his condemnation of the "act of the people of Lot" usually in the form of a command to "kill both the active and passive partner." However, in light of the beautiful character of the Prophet Muhammad (pbuh) so portrayed in the Quran, it is unthinkable that he could have given such an unyielding order.⁵⁸

8. Homosexuality in the Midst of Prophet Muhammad (pbuh)

Transvestites or effeminate men were recorded to be present in the city of Medina at the time the Prophet Muhammad (pbuh) came to make it the centre of Islam. These men were called *mukhannathun*⁵⁹ and had

similar characteristics with modern day transvestites and effeminate gay men, however not exclusively so. According to Everett Rowson, it should not be assumed that all these men were transgendered or castrated. They had influence in the arts of poetry and music and were socially identifiable through their attire. It is interesting to note the duality in the reports on how the Prophet Muhammad (pbuh) related to these men.⁶⁰

"A'isha reported that a *mukhannath* used to come to the wives of God's Apostle (pbuh) and they did not find anything objectionable in his visit, considering him to be a male without any sexual desire. God's Apostle (pbuh) one day came as he was sitting with some of his wives and he (the *mukhannath*) was busy describing the bodily characteristics of a lady and saying: As she comes in front four folds⁶¹ appear on her front side and as she turns her back eight folds appear on the back side. Thereupon God's Apostle (pbuh) said: I see that he knows these things; do not, therefore, allow him to enter. She (A'isha) said: Then they began to observe the veil in front of him."⁶²

This *hadith* narration is commonly used by orthodox Muslim scholars to justify contempt for effeminate men and transsexuals and is used as proof that Muslims should not allow them in their houses. However, this narration makes it plain that the Prophet Muhammad (pbuh) did not find any objection in the *mukhannath* working for his wives while they were unveiled. His condemnation of one particular *mukhannath* is neither an indictment on all of the *mukhannathun* nor was it based on the *mukhannath's* sexual orientation. Rather the Prophet's condemnation was a response to his actions in this particular situation.

Abu Dawud's collection of *hadith* provides another interesting narration. It states that: "A *mukhannath*, who had dyed his hands and feet with henna, was brought to the Prophet Muhammad (pbuh). He asked, 'What is the matter with this one?' He was told, 'O Apostle of God, he imitates women.' He ordered him to be banished. They said, 'O Apostle of God, shall we not kill him?' He replied, 'I have been forbidden to kill those who pray.'"⁶³

Again a number of interpretations can be read into this *hadith*. Nonetheless, it must be read in light of the Quran which teaches that life is sacred.⁶⁴ The Prophet Muhammad's final response in this narration indicates this commitment to the sacredness of life. A number of themes surface when we piece together the many such narrations that relate to the *Mukhannathun*. One theme is the Prophet Muhammad's prioritisation of social justice and public morality over the private or the sexual orientation of the individual.

Female homosexuality is not mentioned in the Quran and is only hinted to in some *hadith*. This is attributed to patriarchal perceptions of masculinity and femininity, with the latter being inferior to the former. Islamic law is almost exclusively patriarchal in influence and interpretation. Masculinity and its perception even before the advent of Islam have shaped how Muslim men perceive themselves and how they perceive femininity in society. More attention is given to the disgust in male homosexuality due to the fact that the sexual act between two men directly impacts on a man's masculinity. While homosexuality was socially accepted, it was only accepted to the extent that the masculinity of the man is not threatened. In other words, he becomes the penetrator and not the penetrated. Under these social circumstances it is understandable why female homosexual-

ity would be seen as less problematic. While females having sex with one another was deemed to be insignificant because there is no penetration involved, a man having sex with a group of females at the same time was considered to be prolific. It is therefore understandable why there is little said about female homosexuality in Islamic law.

Quranic verse 4:15 quoted above is used by some orthodox Muslim scholars to refer to female homosexuality. However, most progressive Muslim scholars would disagree, believing that the verse must be interpreted to include all forms of sexual indecencies that are publically staged and for which four witnesses can be produced. Ultimately, there is only one *hadith* narrated in Al-Tabarani's collection of *hadith*⁶⁵ which explicitly reports on lesbianism. It reports that the Prophet Muhammad (pbuh) apparently stated that lesbianism is adultery between women. Again, this *hadith*, as many others discussed above, which have elaborated Islam's condemnation of homosexuality, has questionable authenticity and the fact that it is mentioned so explicitly reinforces the impression that even the sexuality of women and the perception of that sexuality was controlled by men.

Themes in the Quran such as social justice, gender equity, inclusiveness of different faiths, diversity in humanity, the prophetic example and a forgiving and merciful God, make it difficult to dismiss people of different sexual orientation or gender identity who have played a significant role in many civilisations. Taking stock of the contribution that homosexuals and transgendered people have for centuries had to the growth of humanity, it is a mistake and contrary to the core principles of the Quran to perceive these classes of people as detrimental to social institutions such as marriage, the family and even soci-

ety as a whole. There are certainly many incidences in Islamic history that point to the social contributions which homosexuals and transgendered people have made, whether it is in the arts, entertainment or politics. Their presence was felt by many before the advent of Islam, during the Umayyad⁶⁶ and Abbasid⁶⁷ dynasties, and after the demise of the Prophet Muhammad (pbuh), and are felt, respected and sought after today.

9. Execution of Homosexuals Based on the Quran

Homosexuality is criminalised in Shariah law under *Hadd* punishment. It therefore falls within the same category of offense as adultery. Under Shariah law the punishment for homosexuality is death, although there are some differences in opinion regarding the style of execution. This view is held by most Islamic schools of thought in the Sunni and Shi'a world.⁶⁸ Execution through stoning has been justified on the basis that God used brimstone to destroy the notorious cities of Sodom and Gomorrah. I would like here to examine the concept of stoning to death for adultery and in light of the Islamic principle that Shariah law may not contradict Quranic injunctions prove that the death penalty for any sexual offense is not a Quranic concept. By implication, the killing of homosexuals is therefore also un-Islamic.

Before we can do this, it would make sense to identify the Quran's position on the sacredness of life. Various Quranic statements considered collectively emphasise the Quran's pro-life stance.

"And for you, in the Law of Equality, there is saving of Life, O you with understanding; so that you may restrain yourselves."⁶⁹

"And thus have We ordained for the Children of Israel that if any one killed a person, except in retaliation for murder or for spreading mischief in the land - it would be as if he had killed the whole of mankind: and if any one saved a life, it would be as if he saved the whole of mankind. Verily there came to them Our Messengers with clear signs, yet, even after that, many of them continued to commit excesses in the land."⁷⁰

"Say: "Come, I will rehearse what God hath (really) prohibited you from": Join not anything as equal with Him; be good to your parents; kill not your children on a plea of want - We provide sustenance for you and for them; come not nigh to shameful deeds, whether open or secret; take not life, which God made sacred, except in justice: thus doth He command you, that you may learn wisdom."⁷¹

"Nor take life which God has made sacred except in justice. And if anyone is killed wrongfully, we have given their heir recourse for justice. But let him not exceed bounds in the matter of taking life, because he is being assisted."⁷²

Consequently, on the Quranic continuum of punishment for sexual offenses there are at least three distinguished levels – none of which decree the death penalty. First, on the personal level, those who have committed an offense and ask God for forgiveness will find forgiveness and a pleasant eternal abode:

"(forgiveness and heaven is for)... those who, having committed a shameful deed, or wronged their own souls, earnestly bring God to mind, and ask for forgiveness for their sins, and who can forgive sins except God - and are never obstinate in persisting knowingly in what they have done."⁷³

At the second level, where the sexual offense has been witnessed by at least four men, the punishment is dependent on the degree of the offense and is at the discretion of a judge:

“If any of your women are guilty of lewdness, you must produce four reliable witnesses from amongst you against them; and if they testify, then they should be confined to houses until death does claim them, or God ordain for them some (other) way.”⁷⁴

“If two men are guilty of lewdness, both of them should be reprimanded. If they repent and amend, leave them alone, for God is oft returning, Most Merciful.”⁷⁵

The third and most extreme level points out the limits of punishment for sexual offenses: “Do not approach *zina*⁷⁶; for it is a shameful deed and a way abating!”⁷⁷

“The woman and the man guilty of *zina* – flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day: and let a party of the Believers witness their punishment.”⁷⁸

Based on the Quranic system of equity and the prophetic teaching of moderation, a balance should always be struck between the polarities the Quran points out. Even though complete justice, an eye for an eye, is practical in the case of retaliation, the Quran favours forgiveness.⁷⁹ Muslim scholars would agree that a hundred lashes are not definitive because the number of lashes can differ depending on the severity of the crime. The status of the person also influences punishment handed down in the judgment:

“O Consorts of the Prophet! If any of you were guilty of a shameful deed, the pun-

ishment would be doubled to her, and that is easy for God.”⁸⁰

“If any of you have not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: And Allah hath full knowledge about your faith. You are one from another: Wed them with the leave of their owners, and give them their dowers, according to what is reasonable: They should be chaste, not lustful, nor taking paramours: when they are taken in wedlock, if they fall into shame, their punishment is half that for free women. This is for those among you who fear being compelled; but it is better for you that ye practise self-restraint. And Allah is Oft-forgiving, Most Merciful.”⁸¹

The word “stoning” (*rajm*)⁸² does not appear in the Quran. Throughout Islamic history attempts have been made to claim that such a verse was revealed to Muhammad (pbuh) but was either lost or abrogated. For example, some *hadith* have narrated:

“Umar said: ‘I am afraid that after a long time has passed, people may say, ‘We do not find the Verses of the Rajm (stoning to death) in the Holy Book,’ and consequently they may go astray by leaving an obligation that Allah has revealed. Lo! I confirm that the penalty of Rajm be inflicted on him who commits illegal sexual intercourse, if he is already married and the crime is proved by witnesses or pregnancy or confession.’ Sufyan added, ‘I have memorized this narration in this way.’ Umar added, ‘Surely Allah’s Apostle carried out the penalty of Rajm, and so did we after him.’”⁸³

Furthermore, it is recorded in Sunan Ibn Majah that the Prophet Muhammad’s wife Ayesha said:

“When the verse on “Rajm” (Stoning) descended, it was written on a piece of paper and kept under my pillow. Following the demise of Prophet Muhammad (pbuh) a goat ate the piece of paper while we were mourning.”⁸⁴

These *hadith* narrations contravene verse 2:106 of the Quran:

“None of Our revelations do We abrogate or cause to be forgotten, but We substitute something better or similar: Know you not that God has power over all things?”⁸⁵

If these *hadith* were in fact some two of the many thousands of fabrications identified by Imam Bukhari, then it would suggest that there was a conscious attempt to preserve and continue the practice of stoning to death as a form of capital punishment. In the event of such a case, the following Quranic verse would apply:

“But there are, among men, those who purchase idle tales (*hadith*), without knowledge (or meaning), to mislead (men) from the path of God and throw ridicule: for such there will be a humiliating penalty.”⁸⁶

There seems to be no Quranic support for the notion of stoning to death. Those who justify stoning to death of people who commit the offense of adultery do so in direct contradiction of verses 33:30 and 4:25 of the Quran. Both of these verses describe scenarios in which the women in question are married, yet they prescribed that their punishment is either halved or doubled. While it is possible to half or double the number of lashes a person may receive, the absolute nature of the death penalty makes implementing halving or doubling of the punishment prescribed by the Quran impossible.

Conclusions and Recommendations

Muslims would agree that the Quran serves a personal and a social purpose. The Quran is a vehicle towards God-consciousness and the criteria to judge between what is appropriate and what is destructive for society. Hence, the Quran should be instrumental in building a healthy society in which everyone is free to choose as God intended, but at the same time co-exist inter-connectedly and in harmony. Muslims are not asked to take responsibility for the world’s problems, but they are chosen according to the Quran to be the community that is instrumental in the workability of society through encouraging what is appropriate and discouraging what is not.⁸⁷

Iran is a good example of an Islamic state which has a system that is not in the best interest of its people or the society. The emigration of Iranians to the West due to irreconcilable issues with religion such as forced marriages, sexual orientation and *Hadd* punishments has left Iran’s Islamic model questionable. The Iranian government has not “purified” its society from the perceived evil of homosexuality; neither has it assisted individuals on the path of salvation by executing them. It is evident that the purpose for which the Quran was intended is not manifested in this society or other Islamic states.

It can only be concluded that there is another face of Islam, other than the one propounded through the Quran, that has taken power through the employment of secondary Islamic sources. The Islam we are engaging with today seems to be an Islam that has usurped religious power for political gain. This has a huge impact on the lives of Muslims who are afraid to utter their discomfort with certain issues pertaining to Islam, as the religion itself teaches blind-following and obedience to authority.

This article has argued that sexual expressions are only punishable when an evidently private expression of sexual intimacy becomes a public one which was witnessed by at least four people. This injunction is to safeguard individuals from being falsely accused of public indecency. There are many institutions these days that pass *fatwa* (religious judgment) which dictates actions around personal issues such as masturbation, sex with one's legal partner and contraception and which many progressive Muslims have started to question.

The poetic nature of the Quran is such that it can be interpreted in many ways. It depends on the personality and disposition of the interpreter. However, the liberty of interpretation that this noble book affords us was never intended to disregard diversity or to exploit its subject's freedom of choice, right to life and freedom to co-create.

Islam will continue to grow as a way of life for many millions of people across the globe. It is one of the most influential world religions. As such, polarising the debate on sexual orientation and directly opposing Islam will likely only create stronger opposition within the Islamic world. It is important that structures are promoted which enable progressive Muslim thought to flourish. Organisations such as The Inner Circle in South Africa, Sisters in Islam in Indonesia, Muslims for Progressive Values in the USA and indeed organisations that have the capacity to bring forth alternative understandings of Islam that value human rights offer important pathways into starting this process.

Some Muslims consider that anything emanating from the West is a ploy to destroy Islam. Even something that could be beneficial to humankind can be criticised simply because it has Western origins. These charges

could be alleviated by increasing dialogue between Western and non-Western Muslims; this would enable many projects which seek to promote LGBTI rights to achieve a sense of legitimacy in the Muslim world. It is also important for non-Muslims to ally with Muslims on common social issues.

The Inner Circle's research and alternative interpretation of the Quran is perhaps one way in which Muslim authorities can re-evaluate Islam's position on the matter of sexual orientation and gender identity in order to bring about an equal and workable Islamic world. It is imperative that funders who seek to create transformation within Muslim communities enable progressive Muslim organisations to publish and disseminate their views to those who have not had access to alternative interpretations of Islam.

Other religions such as Christianity and Judaism have similar issues with homosexuality and it is no surprise that their progressive clergy developed similar conclusions as that of The Inner Circle and other queer Muslim organisations. An interfaith voice creating dialogue in the hope of bringing forth progressive religious interpretations on the issue of sexual orientation and gender identity could have a stronger impact in the transformation process. At the same time human rights organisations should collaborate with progressive Muslims who are open and sensitive to human rights issues. Building coalitions with Muslim feminists who feel marginalised in a similar way to queer Muslims would allow the progressive Muslim voice to be amplified and the destructive voice exposed.

Many conservative Muslim organisations that operate in the West are selective in their human rights work and are hesitant to engage with topics such as homosexuality, safe sex and abortion. Such organisations should

be co-opted to accept public debate and re-evaluate their stance and its effects on the rights of individuals.

It is important to remember that Muslims are not opposed to reason, logic, scientific (including biological) and historical evidence. Indeed, Muslims pride themselves on the belief that science continues to prove the au-

thenticity of the Quran. In the last five years of The Inner Circle's engagement with Muslim clergy, it was noted that there is much ignorance around homosexuality in their arguments. It is thus crucial that conclusive evidence on the nature of homosexuality and on the psychology behind this sexual orientation is made available to Muslim clergy.

¹ Imam Muhsin Hendricks is the Director of the Inner Circle, a queer Muslim organisation based in Cape Town, South Africa. Established in 2006, the Inner Circle gives support to queer Muslims locally and internationally and has a number of empowerment programs for queer Muslims and the communities they come from. It also hosts an Annual International Retreat that brings together queer Muslim activists from different queer Muslim organisations across the globe.

² The term "queer" is controversial as it may be considered a derisive and derogatory term by many people. However, it saw substantial changes over the course of the 20th century. Many LGBTI people have reclaimed the term as a means of self-empowerment and embraced the term to describe a sexual orientation and gender identity or gender expression that does not conform to hetero-normative society.

³ The Shariah is a code of law derived from the Quran and from the teachings and example of Muhammad's lifestyle. The Shariah is developed through consensus of early Muslim scholars. Muslims are subjected to this law specifically in Islamic countries.

⁴ See above, note 1.

⁵ See Murry, S. and Roscoe, W., *Islamic Homosexualities: Culture, History, and Literature*, New York University Press, 1997; see also Wright Jr., J. W. and Rowson, E. K. (Eds.), *Homoeroticism in Classical Arabic Literature*, Columbia University Press, New York, 1997.

⁶ Scott Siraj al-Haqq Kugle is the first Muslim to publish widely on the issue of homosexuality and transgender identity in Islam. He is an independent research scholar in Islamic studies and has taught at Swarthmore College, Pennsylvania, and the University of Cape Town.

⁷ Kugle, S., *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims*, Oneworld Publications, 2010.

⁸ See, for example, Ali, K., *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence*, Oneworld, Oxford, 2006. Kecia Ali teaches religious studies at Boston University. She previously held research and teaching fellowships at Brandeis University and Harvard Divinity School.

⁹ *Quran* 17:81.

¹⁰ The Quran is the revealed book of God and regarded as the direct word of God to the Prophet Muhammad. It is also the primary source of law on which the Shariah law is based.

¹¹ The *Hadith* are oral narrations originating from the words and deeds of the Prophet Muhammad and later recorded as normative text. Muslims view *Hadith* as a secondary source to the Quran.

¹² This research was conducted by Core Krystal (Cape Town) after The Inner Circle saw a need to establish local Muslim responses to homosexuality, sexual practices and HIV. See also Kugle, S., *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims*, above, note 7.

¹³ See above, note 8.

¹⁴ *Quran* 57:25.

¹⁵ Pbih stands for Peace be upon him, an acronym used with the name of Prophets of Islam as a sign of respect.

¹⁶ Al-Khatib Al-Baghdadi, *Taqyid al Ilm*, pp. 29-44.

¹⁷ The word Caliph comes from the Arabic word "khalifah" which means "head of state", "successor" or "representative". It is also the title of the leader of an Islamic community under Shariah law. The early leaders of the Muslim nation following the Prophet Muhammad's death were called "Khalifah rasullallah" – the political successors to the messenger of God (referring to Muhammad).

¹⁸ AH stands for "after the Hijrah". The Hijrah is the migration of the Prophet and his followers from Mecca to Medina. This incident marks the start of the Islamic calendar and is equivalent to 622 A.D.

¹⁹ See Robinson, B.A., "Islam and Homosexuality: All Viewpoints", available at: http://www.religioustolerance.org/hom_isla.htm, 16 November 2002.

²⁰ One of the four major schools of thought in Sunni Islam started by Imam Abu Hanifa (150 AH).

²¹ *Hadd*, meaning limit, usually refers to the class of punishments fixed for certain crimes that are considered to be "claims of God." They include theft, fornication, consumption of alcohol, and apostasy.

²² *Quran* 39:55.

²³ *Quran* 51:49.

²⁴ *Quran* 2:179.

²⁵ *Quran* 5:8.

²⁶ *Quran* 4:75.

²⁷ *Ijtihad* means independent reasoning – the endeavour to derive a rule of divine law from the Quran and *Hadith* without relying on the views of other scholars.

²⁸ *Taqleed* means imitation – the acceptance of a legal precedent without questioning. It is the opposite of independent reasoning (*Ijtihad*).

²⁹ *Quran* 2:208.

³⁰ *Quran* 2:256.

³¹ *Quran* 10:41.

³² *Quran* 109: 1-6.

³³ "Quraishi" means belonging to the ruling tribe of Quraish in seventh century AD Arabia during the time of the Prophet Muhammad and before the advent of Islam.

³⁴ *Quran* 50:45.

³⁵ *Quran* 3:110.

³⁶ *Quran* 30:22.

³⁷ *Quran* 49:13.

³⁸ *Quran* 36:36.

³⁹ Soble, A. and Power, N., *The Philosophy of Sex: Contemporary Readings*, Fifth edition, Rowman & Littlefield, 2008, pp. 11-12.

⁴⁰ Alexander, S. A., "Homosexuality", *Burhanol Islam*, Volume 35, April 2000.

⁴¹ Nicolosi, J., Byrd, D., Potts, R. W., "Retrospective Self-reports of Changes in Homosexual Orientation: A Consumer Survey of Conversion Therapy Clients", *Psychological Reports*, Volume 86, June 2000, pp. 1071-1088.

⁴² Lamberg, L., "Gay is Okay with APA—Forum Honors Landmark 1973 Events", *Journal of the American Medical Association*, Volume 280, 1998, pp. 497-499.

⁴³ *Quran* 29:29.

⁴⁴ *Quran* 54:36-37.

⁴⁵ Jewish Antiquities, 1:194-195, available at: <http://www.hup.harvard.edu/features/kugbib/chapter.html>.

⁴⁶ *Quran* 11:78.

⁴⁷ Denning, S., *The Mythology of Sex*, Macmillan General Reference, 1996.

⁴⁸ Harding, E., *Woman's Mysteries: Ancient and Modern*, Perennial Library, New York, 1976.

⁴⁹ See above, note 7.

⁵⁰ *Quran* 4:15.

⁵¹ *Quran* 4:16.

⁵² *Quran* 17:84.

⁵³ *Quran* 24:31.

⁵⁴ *Quran* 24:60.

⁵⁵ Ahmad, N., *Qur'anic and Non-Qur'anic Islam*, Second Edition, Vanguard, 1997.

⁵⁶ Dawood, Sunan Abu Dawud, Book 38, Report 4449.

⁵⁷ *Ibid.*, Report 4450.

⁵⁸ Other *Hadith* compilations that are regarded as secondary add a little more detail. Some have set out that sexual relations between women constitute a form of fornication. Some have declared that men marrying boys is a sign of satanic power prevailing. Others offer varied views on the appropriate form of punishment for sodomy, as well as purported (but mutually inconsistent) reports of actual cases of execution for the offense by the early Caliphs, beginning with Abu Bakr. It is interesting to note however that the reporters of these *Hadith* are either questionable or not very well known and that the offenders are invariably anonymous.

⁵⁹ *Mukhannathun*, meaning "effeminate ones", or "men who resemble women", is the classical Arabic term for people who would now be called transgender women, perhaps poorly distinguished from eunuchs. *Hadith* often makes mention of them. Outside of the religious text they are strongly associated with music and entertainment.

⁶⁰ Rowson, E. K., "The Effeminates of Early Medina", *Journal of the American Oriental Society*, Volume 111, Number 4, 1991, pp. 671-693.

⁶¹ Arabs in seventh century Arabia found fat women attractive. The folds that fat creates on the woman's body were seen as desirable and desert women with fat were seen as healthy.

⁶² Abu Dawud, *Adab*, Number. 4928, 4:282.

⁶³ *Ibid.*

⁶⁴ *Quran* 2:179.

⁶⁵ Abu al-Qasim Sulaiman ibn Ahmad ibn Al-Tabarani (360 AH). He narrated numerous *Hadith*.

⁶⁶ The Umayyads, headed by Abu Sufyan, were a merchant family of the Quraish tribe centred at Mecca. They had initially resisted Islam, not converting until 627 AD, but subsequently became prominent administrators under Muhammad and his immediate successors. Following the murder of 'Uthman, civil war ensued, and although Ali was initially triumphant, eventually Abu Sufyan's son Mu'awiyah, then governor of Syria, emerged victorious, establishing himself as the first Umayyad caliph.

⁶⁷ The Umayyads were considered too secular and discontent erupted into major revolts in Syria, Iraq, and Khorasan (745-746 AD). In 749 AD, Abu al-'Abbas as-Saffah was proclaimed as caliph who thereby became first of the Abbasid

dynasty.

⁶⁸ Peters, R., *Crime and Punishment in Islamic law*, Cambridge University Press, Cambridge, 2006, p. 61.

⁶⁹ *Quran* 2:179.

⁷⁰ *Quran* 5:32.

⁷¹ *Quran* 6:151.

⁷² *Quran* 17:33.

⁷³ *Quran* 3:135.

⁷⁴ *Quran* 4:15.

⁷⁵ *Quran* 4:16.

⁷⁶ *Zina* is a term used in orthodox Islam for extramarital and premarital sex for which there is a punishment of either stoning to death or up to a hundred whip lashes. Progressive Muslims would prefer to view *zina* as sexual relationships with someone outside of a longstanding commitment, contract or mutual agreement, be it verbal or written.

⁷⁷ *Quran* 17:32.

⁷⁸ *Quran* 24:2.

⁷⁹ *Quran* 5:45.

⁸⁰ *Quran* 33:30.

⁸¹ *Quran* 4:25.

⁸² *Rajm*, meaning stoning, is a punishment that has been prescribed as proper for married men and women who commit adultery when proof is established, or there is pregnancy, or a confession. However, this is not a term found in the Quran and hence this practice is justified through secondary Islamic sources.

⁸³ Al-Bukhari, *Sahih Al-Bukhari*, Volume 8, Book 82, Number 816.

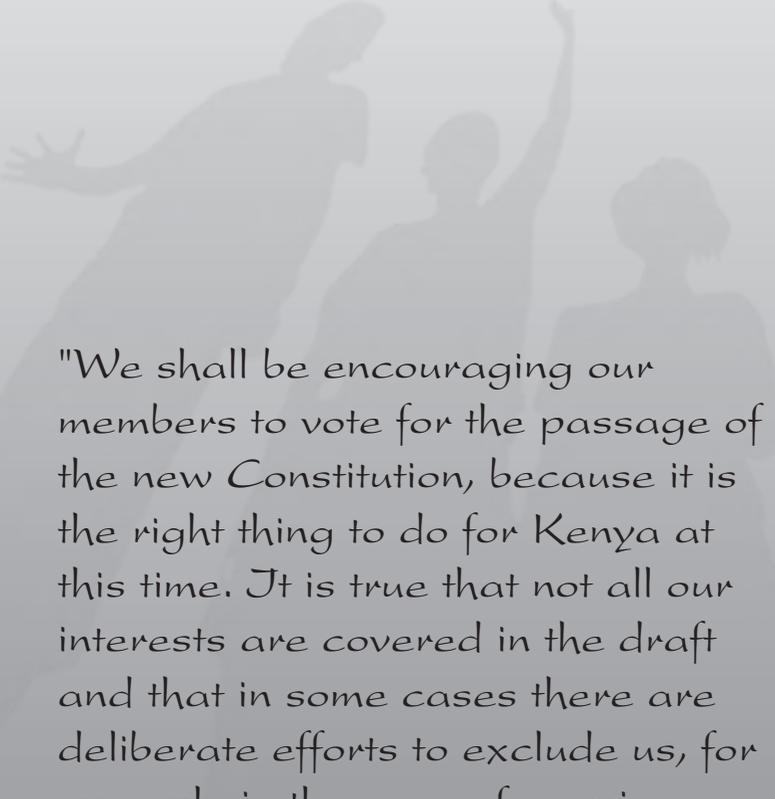
⁸⁴ Ibn Majah, *Sunan Ibn Majah*, Volume 2, p. 39.

⁸⁵ *Quran* 2:106.

⁸⁶ *Quran* 31:6.

⁸⁷ *Quran* 3:110.

SPECIAL



"We shall be encouraging our members to vote for the passage of the new Constitution, because it is the right thing to do for Kenya at this time. It is true that not all our interests are covered in the draft and that in some cases there are deliberate efforts to exclude us, for example in the area of marriage. But LGBTI Kenyans will benefit from a stable and prosperous Kenya, and the draft Constitution lays the ground for this."

David Kuria,
Chair of the Gay and Lesbian Coalition of Kenya

The Road to Equality? The Right to Equality in Kenya's New Constitution

Jim Fitzgerald¹

On 4 August 2010, the people of Kenya voted – by a margin of 67% to 31% - to adopt a new Constitution. After more than 20 years of debate, the constitutional review process which has taken place over the last three years has focused on addressing complex and contentious issues of governance, devolution and the separation of powers. This said, the Constitution which has emerged contains a substantially improved Bill of Rights and could represent a real step change in the protection of the right to equality and non-discrimination in Kenya.

Kenya's previous Constitution came into force in December 1964, with the country's establishment as an independent republic. Within a year of its adoption, the Constitution had been amended to remove the office of Prime Minister and vest power in the President. Subsequent amendments passed during the presidency of Daniel Arap Moi served to centralise power in the office of the President and institute single-party government.

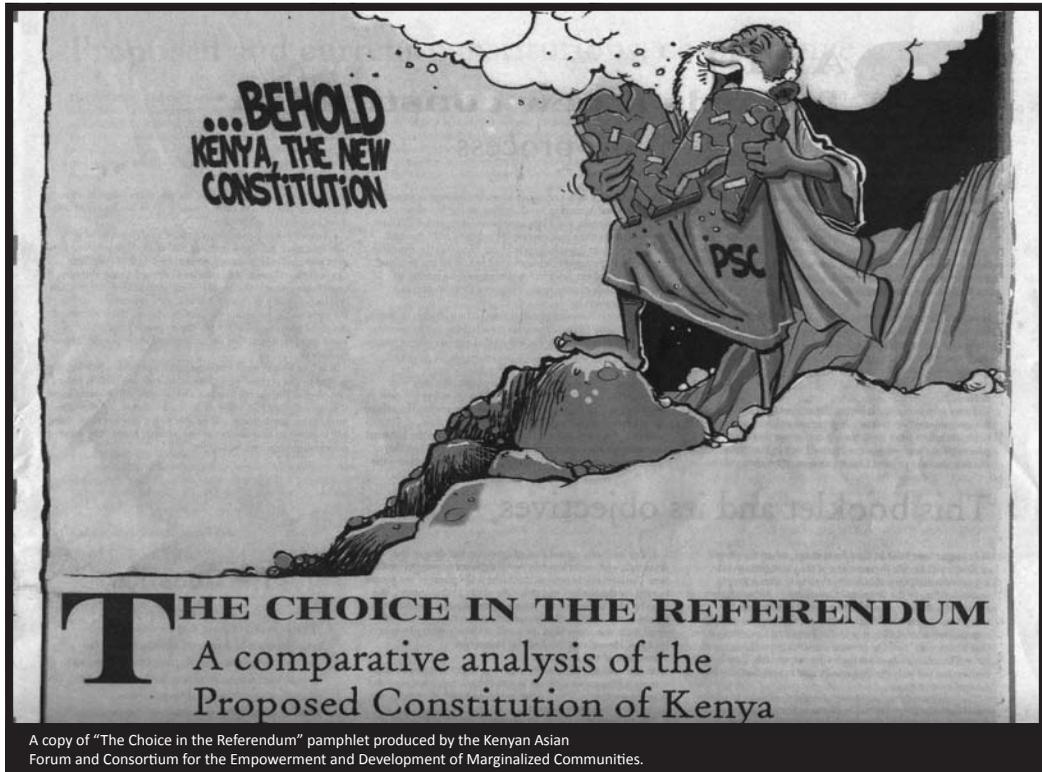
Efforts towards constitutional reform² began in earnest in 1997, with the passing of the Constitution of Kenya Review Commission Act. The Commission, chaired by respected constitutional lawyer Yash Ghai, produced a draft which was presented to a Constitutional Review Conference in Bomas in 2003. This process led to the emergence of three competing drafts: the original draft submitted to the Conference, the draft produced at the Conference (the Bomas draft) and a revised

draft produced by the Attorney General (the Wako draft). The Wako draft was submitted to a referendum in 2005 and was rejected, with 58% of the population voting against.

The current review process has its origins in the 2007 post-election violence which ravaged the country and left 1,133 people dead and a further 3561 injured after supporters of the two largest parties took to the streets in protest at the outcome of a disputed election.³ The review process was instituted as part of the Kenya National Dialogue and Reconciliation (KNDR) process which was established to seek resolution to the violence and instability. The KNDR framework identified four critical areas for addressing the causes of the crisis:

- Agenda 1: Immediate action to stop violence and restore rights and liberties;
- Agenda 2: Immediate action to address the humanitarian crisis and promote reconciliation;
- Agenda 3: Overcoming the political crisis; and
- Agenda 4: Addressing long term issues, including constitutional and legal reform.⁴

Under the auspices of Agenda 4, the Constitution of Kenya Review Act was adopted in 2008, setting out a detailed process for the development, drafting and adoption of a proposed Constitution. A Harmonized Draft Constitution written by a Committee of Experts was released to the public for consulta-



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tion on 17 November 2009. The consultation received almost 40,000 responses, making an estimated 1.7 million substantive recommendations.⁵ On 7 January, the Committee of Experts passed a revised draft to a Parliamentary Select Committee (PSC) to consider the draft and build consensus on contentious issues. The PSC submitted their recommendations to the Committee of Experts on 2 February and the Committee submitted a final draft to the National Assembly on 21 February. Following debate in the National Assembly, a final Proposed Constitution of Kenya was published by the Attorney General on 6 May 2010.

While the new Constitution contains a number of serious problems in terms of achieving equality in Kenya - including notably the definition of the right to life, which in-

cludes the phrase "life begins at conception",⁶ and prohibits abortion in all except emergency medical cases,⁷ it nevertheless represents a significant change for the better. This article aims to examine some of the ways in which the new Constitution could improve protection from discrimination and promote greater equality.

1. General Treatment of Equality

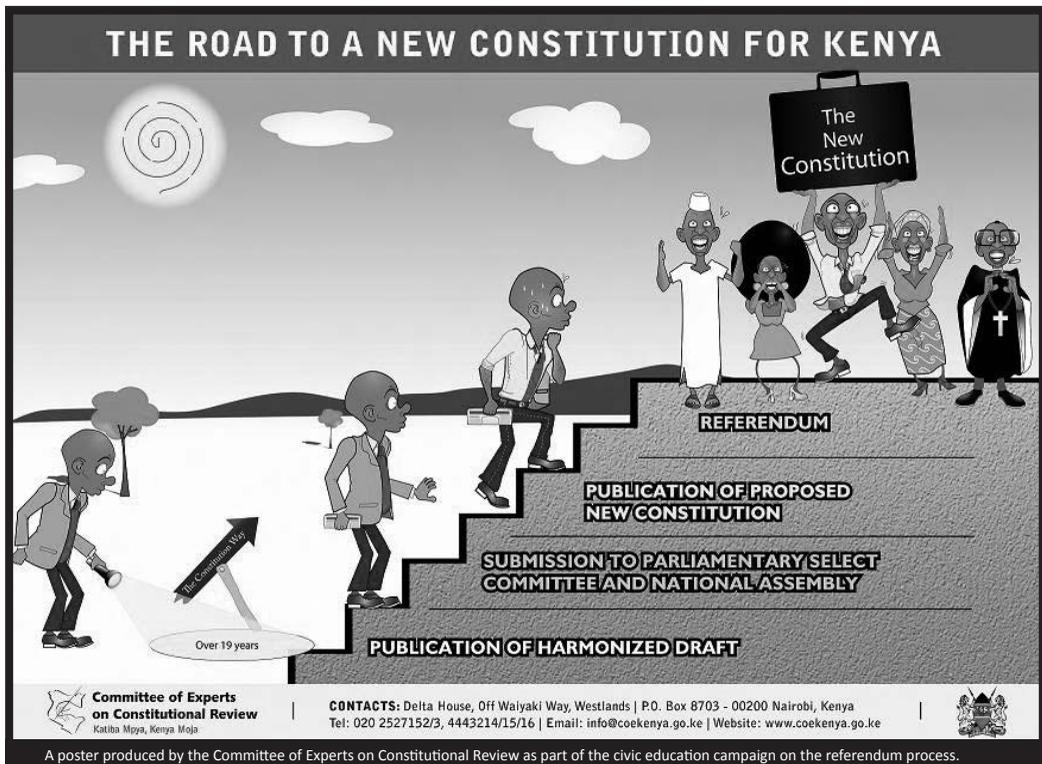
A commitment to the principles of equality and non-discrimination is woven throughout the Constitution, driven at least in part by a desire to counteract the ethnic and regional tensions which played such a decisive and destructive role in the 2007 post-election violence. The Constitution reflects a widely-held belief that guarantees of equality, equitable distribution of resources and balance

of power represent the best way to reduce the influence of ethnicity on political decision making and thereby secure a peaceful future for the country.

Thus, the preamble to the Constitution matches a recognition of Kenya's "ethnic, cultural and religious diversity" with a "determination to live in peace and unity", and equality is listed as one of six essential values upon which governance should be based.⁸ These expressions of principle are given legal force in Article 10, which includes equity, social justice, equality, non-discrimination and "protection of the marginalised" among the national values and principles of governance that are to be used in applying and interpreting the Constitution and other laws, and in making or implementing policy decisions.⁹ This is further emphasized in Article

20 (4)(a) which lists equality and equity as values to be promoted in interpreting the Bill of Rights and Article 21 (3) which creates a duty on state actors to address the needs of vulnerable groups in society.

Thus, it appears that the drafters believed that equality, the protection of groups vulnerable to discrimination and respect for ethnic, religious, cultural and linguistic diversity are fundamental principles to be taken into account both when interpreting the Bill of Rights and the wider Constitution. This stands in stark contrast to the previous Constitution, which presents – as is examined below – the right to non-discrimination in negative terms, largely defining it by reference to its non-application. Indeed, the very discussion of guiding principles in the new Constitution has been welcomed by those



who have argued that the previous Constitution placed too much emphasis on establishing the mechanisms of government rather than expressing vision or principles for governance.¹⁰

2. The Right to Equality and Non-Discrimination

The right to equality and non-discrimination as expressed in Article 27 of the new Constitution represents a substantial improvement on the right as provided in Article 82 of the previous Constitution. The Article begins with a guarantee of equality before the law and equal protection and benefit of the law,¹¹ a guarantee which is not present in the previous Constitution. Moreover, equality is defined as including “full and equal enjoyment” of all rights and freedoms.¹² These provisions provide important additional protection which goes beyond the protection from discrimination provided in Article 27 (4).

The new Constitution significantly expands the list of protected grounds from that found in the previous Constitution. Article 27 (4) prohibits discrimination on an extensive list of specified grounds: “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”). The list grants substantially increased protection to women, who are likely to benefit from protection on grounds of pregnancy and marital status. In addition, it prohibits discrimination on grounds of disability and age, neither of which is included in the list of protected grounds in the previous Constitution.¹³

Notably, the list does not include either sexual orientation or gender identity, issues which are highly sensitive in a country where

homosexual conduct remains illegal. The Gay and Lesbian Coalition of Kenya (GALCK) criticised the Harmonized Draft and in December 2009 issued a statement calling for these grounds to be recognised and for the protection of sexual minorities to be included in the mandate of the Equality and Human Rights Commission which the Constitution seeks to establish.¹⁴

Discrimination against LGBTI persons remains a serious problem in Kenya. Male homosexual sex is illegal and gay men report being harassed by police seeking to blackmail or extort money from them. As recently as February 2010, a number of sexual health workers and men suspected of being homosexual were attacked by members of the public in Mombasa and were subsequently arrested, ostensibly for their own protection.¹⁵

Further, Article 27 (4) does not provide an explicit protection for discrimination on grounds of albinism, something which has caused concern among those advocating greater protection for people with albinism. Ms Mumbi Ngugi of the Albinism Foundation of East Africa believes that the Constitution could have included a specific ground of “genetic inheritance” to cover people with albinism, whom she says suffer discrimination in employment and education, and as a result of denial of reasonable accommodation for their visual impairments.¹⁶

Yet it is clear that the list of protected grounds provided in the new Constitution is indicative rather than exhaustive, beginning with the phrase “The State shall not discriminate directly or indirectly on any ground, including...” This creates the possibility of legal challenge by those suffering discrimination on grounds which are not explicitly listed in

Article 27 (4), a possibility which is strengthened by the definition of “includes” provided in Article 259 (4)(b).¹⁷ However, the section does not establish a test for the inclusion of new grounds as has been adopted in South African anti-discrimination legislation,¹⁸ and established as best practice in the *Declaration of Principles on Equality*.¹⁹ Consequently, it remains to be seen how progressively the judiciary will interpret the provision and civil society actors have raised concerns about whether the judiciary will be prepared to make progressive judgments without reference to a test of this type.

In common with the previous Constitution, the new Constitution prohibits both direct and indirect discrimination, though no definition of either term is provided in the document. The Constitution does not cover segregation, harassment, or victimisation, despite the fact that some of these forms of discrimination are covered in other Kenyan legislation governing specific areas of life.²⁰ Article 27 (5) extends the prohibition on discrimination to natural and legal persons.²¹

Article 27 (6) creates a duty of affirmative action, a concept which is defined in Article 260, which states that “[...] the State shall take legislative and other measures, including but not limited to affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.” This represents a substantial improvement on the previous Constitution, which makes no reference to positive or affirmative action measures. While subsequent legislation has introduced positive action in certain areas of the law,²² the extension of affirmative action to all grounds under Article 27 (6) represents a significant increase in scope. Part 3 of the Bill of Rights in the new Constitu-

tion imposes specific affirmative action requirements on the state in relation to groups with particular characteristics, including the youth and marginalised groups.²³

3. Removal of Exceptions

Arguably the most important change introduced by the new Constitution arises as a result of exclusion, rather than inclusion. Article 27 (the right to equality and non-discrimination) takes a different approach to formulating the right than that adopted in Article 82, its parallel in the previous Constitution, which expressed the right to non-discrimination negatively, defining its scope by reference to exceptions and limitations. As such, Article 27 does not reproduce Article 82 (4), which provides significant exceptions to the application of the right to non-discrimination. Article 82 (4) limited the application of the right to non-discrimination significantly in four critical areas. Looked at in more detail, there was even greater cause for concern as one considers both the impact of and the motive behind limiting the law’s application in each case.

Paragraph 82 (4)(a) excluded all laws applying to non-citizens. This exclusion was particularly significant when viewed in light of the difficulties faced by some groups – such as Kenyan Nubians – in acquiring citizenship. As many as 100,000 Kenyan Nubians are effectively stateless as a result of discrimination in access to citizenship, including arbitrary denial and repeated delays in the provision of passports.²⁴ As a result of their ineffective nationality, Kenyan Nubians face severe challenges in the acquisition of land and property, employment and access to government services. While under the Citizenship Act (1963) these persons are entitled to full citizenship as naturalised residents of

Kenya, practical obstacles in obtaining land rights, proof of residence, permanent work and identity papers such as passports mean that this right is often denied.²⁵ The removal of this exception, in tandem with progressive changes to the law governing the acquisition of citizenship introduced in chapter 3 of the new Constitution, will ameliorate this situation, though some members of this group will still face difficulty in gaining citizenship.²⁶

Paragraph 82 (4)(b) of the 1964 Constitution excluded all matters of personal law, such as “adoption, marriage, divorce, burial, devolution of property on death”, while 82 (4)(c) exempted all systems of customary law from the application of the section. These provisions have had a significant impact in limiting the rights of women, particularly those living in rural or remote areas of the country, where traditional systems of law and justice are more likely to operate. Women’s land rights are largely guaranteed through marriage and in many rural communities, land is closely associated with livelihood, meaning that the death of a husband, separation and divorce can put women in a vulnerable position. For many of these women, therefore, inequality in areas subject to personal law and customary law are at the root of the disadvantage they face. Traditional views about women’s role in marriage and the inability to inherit property are sufficient in many cases to bind them into subservient relationships for life.²⁷ Extending the scope of the right to non-discrimination into these areas of law could therefore have a significant impact on the rights of rural women and the disadvantages they suffer.

Elsewhere, in Article 2 (4) of the new Constitution, the drafters have gone further in seeking to guarantee the supremacy of the Constitution’s rights over systems of custom-

ary law. Article 2 (4) expressly states that “any law, including customary law, which is inconsistent with this Constitution, is void to the extent of its inconsistency [...]”. This provision, together with the removal of specific exceptions provided under Article 82 (4)(b) and (c), offers a genuine opportunity to extend the protection from discrimination into areas which are of crucial importance to women.

Paragraph 82 (4)(d) of the previous Constitution provided a catch-all exception, excluding discrimination in cases where this is “reasonably justifiable in a democratic society”. While Article 27 does not contain any similar exception specific to the right to equality and non-discrimination, Article 24 of the new Constitution creates a public interest limitation applicable to almost all rights contained in the Bill of Rights.²⁸ It states:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom [...]”²⁹

This provision is noteworthy in respect of the right to equality and non-discrimination in two principal ways. Firstly, it is not specific to the right to Article 27, but is part of a limitation provision which is deliberately narrow in scope. Indeed, Article 24 (2) and 24 (3) set out detailed requirements applicable to legislation, the state or persons seeking to justify the limitation of a freedom. Secondly, it includes dignity, equality and freedom as the bases of a democratic society, raising the possibility that the equality impact of an exception would be one of the key factors in determining its justifiability.

4. Specific Rights for Vulnerable Groups

In addition to the general protection from discrimination offered by Article 27, Part Three of the Bill of Rights makes specific provision for particular vulnerable groups and persons, with the aim of ensuring “greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons”.³⁰ The part covers the application of rights to children, persons with disabilities, the youth, “minorities and marginalised groups” and older persons.

Articles 53, 55 and 57 provide specific rights for children, youth and older people respectively. Article 260 defines children as those under 18, youth as those between the ages of 18 and 35 and older persons as those over the age of 60. The articles provide a range of specific rights for each group, including guarantees of the right to access education (children and youth), access to employment (youth) and to receive reasonable care and assistance from their family and the state (older persons). The range of guarantees for each group represents a welcome addition to the protection from discrimination provided under Article 27 and should provide a useful basis to secure equal participation for each group in areas of particular concern.

Article 54 focuses on the rights of persons with disabilities, with 54 (1) providing a list of specific rights including the right to be treated with dignity and respect. Disability is defined in Article 260 as including physical, sensory, mental, psychological or other impairment that affects a person’s “ability to carry out ordinary day-to-day activities”. The range of impairments which are classified as forms of disability compares favourably to that presented in the UN Convention on the Rights of Persons with Disability, though the

reference to ability to conduct ordinary activities arguably results in a narrower definition than that provided by the Convention, which refers to “full and effective participation on an equal basis with others”.³¹

Article 54 creates specific rights of access to educational institutions and to public places, transport and information.³² It also contains a right to use sign language, Braille or other means of communication and to materials or devices to overcome constraints arising from disability.³³ This supplements provisions elsewhere in the new Constitution, where the state is required to promote Kenyan sign language, Braille and “other communication formats and technologies accessible to persons with disabilities”.³⁴ Article 54 confirms the duty on the state to ensure progressive implementation of the principle that persons with disabilities should occupy five percent of positions on appointed and elected bodies.³⁵ These provisions represent a substantial improvement to the previous Constitution, which does not recognise disability as a ground of discrimination. The specific rights supplement the protection guaranteed under the Persons with Disabilities Act, which prohibits direct discrimination in employment, education, health, accessibility and mobility, public buildings, public service vehicles, sports and recreation, polling stations and voting and creates reasonable accommodation duties in employment, education and access to public buildings.³⁶

Article 56 provides additional rights and protections for “Minorities and Marginalised Groups”, a classification which potentially encompasses all those vulnerable to discrimination. The term “Minority” is not defined by the Constitution but Article 260 defines “Marginalised Groups” as all those disadvantaged by discrimination on one or

more of the grounds provided in Article 27 (4).³⁷ The article requires the state to undertake measures – including affirmative action – to ensure the participation of these groups in governance, education and employment, to have access to water, health services and infrastructure and to develop their cultural values, languages and practices. As such, the article guarantees significant additional rights on all prohibited grounds and may form a useful guide to the interpretation of Article 27 (6) in specific areas of life.

Interestingly, Part 3 does not elaborate specific rights for the more tightly-defined “Marginalised Communities”, a group which is defined in Article 260 as including small, traditional, indigenous or pastoral communities.³⁸ Nor does this group feature in the list of protected grounds in Article 27, though it seems likely that most forms of discrimination against them could be related to an explicitly protected ground (race, ethnic or social origin, culture and language are all listed under Article 27) or through a legal challenge using the open list.

A section on the rights of women is notably absent from Part 3 of the Bill of Rights, though this may be because of the special place which gender equality occupies elsewhere in the new Constitution. Article 27 (3) provides a broad guarantee of equal treatment of women and men “including the right to equal opportunities in political, economic, cultural and social activities”. Elsewhere in the Constitution, gender equality features prominently: equal rights for men and women are guaranteed during a marriage and at its dissolution;³⁹ equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage;⁴⁰ and the “elimination of gender discrimination in law, customs and

practices” related to land is included among the principles of land policy.⁴¹ As mentioned above, the supremacy of the Constitution as established under Article 2, in particular its supremacy over customary law, will significantly extend the right to non-discrimination in a range of areas of law governing personal and family relationships and property rights.⁴²

The new Constitution also introduces substantial guarantees to increase the representation of women in public life. Article 27 (8) requires the state to take measures to ensure that “not more than two-thirds of the members of elective or appointive bodies” are of the same gender. Separate provisions create reserved places for women in the National Assembly, Senate and County Assemblies.⁴³ These provisions should have a substantial positive effect on women’s representation and role in the decision-making process at all levels of government.

5. Ethnic, Religious and Cultural Diversity

Kenya is home to more than 40 different ethnic groups or tribes, including the Kikuyu (22%), Luhya (14%), Luo (13%), Kalenjin (12%), Kiisi (11%), Kamba (6%), Meru (6%) and Maasai (1%)⁴⁴ and ethnicity, tribe and region continue to play a decisive and divisive role in national politics. As Yash Ghai and Jill Cottrell Ghai state in a recent pamphlet comparing the previous and new Constitutions:

“Our politics have become largely the politics of ethnicity. Politicians find that an easy way to build support is by playing on ethnicity, by stirring up ethnic loyalties on one hand, and ethnic animosities on the other. [...] They promise their tribe development and other benefits if they have their vote [...] Ethnic politics have influenced peo-

ple's attitude to state institutions: either they are 'ours' or they are the 'enemy'. The lack of trust in government is pervasive."⁴⁵

The role of ethno-regional identity in the escalation of the 2007 post-election violence meant that providing a settlement which addressed the concerns of different ethnic groups, without heightening ethnic tensions, was central to the National Dialogue and Reconciliation process and therefore to the Constitutional review.⁴⁶ Attempts to provide an equitable settlement between different ethno-regional groups are therefore embedded throughout the new Constitution, in particular in provisions related to representation, devolution and access to resources. It is also reflected in the prominent place given to the prohibition of hate speech: Article 33 limits freedom of expression, stating that it does not extend to hate speech and "advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm".⁴⁷

The importance of recognising Kenya's cultural, ethnic and religious diversity is reflected in the Preamble to the new Constitution and throughout Chapter Two, which sets out the foundational principles of the Republic. The commitment to recognising diversity while emphasising unity is reflected in the sections on languages, which recognises two official languages (Kiswahili and English) but requires the state to promote and protect the "diversity of language of the people of Kenya",⁴⁸ and religion, which states that there shall be no state religion.⁴⁹ The new Constitution also recognises the importance of Kenya's varied cultural heritage, again emphasising national unity and diversity.⁵⁰

In respect of representation, the new Constitution requires that all political parties

should have a national character and states that parties shall not be founded on a religious, linguistic, ethnic, gender or regional basis or "seek to engage in advocacy of hatred on any such basis".⁵¹ The potential limits which this provision might place on ethnic minorities who feel their interests cannot be effectively represented by a larger party are somewhat mollified by the requirement under Article 100 (d) and (e) that Parliament pass legislation to promote the representation of ethnic minorities and marginalised communities, though how well these requirements function in practice remains to be seen.⁵² Parliament is also required to pass legislation to ensure that cultural and community diversity is reflected at county level and that mechanisms are put in place to protect minorities within counties.⁵³

Devolution to county governments is perceived as an important measure to ensure the fair distribution of resources throughout the country and reduce the role of ethno-regional factionalism in national politics. According to the new Constitution, state power will be executed at both the national and county level.⁵⁴ The Constitution establishes 47 powerful counties, with the objects of "fostering national unity by recognising diversity" and ensuring equitable sharing of resources.⁵⁵ The structure of counties is to reflect the structure of the national government, with an assembly of members representing wards, an executive Governor and an executive committee.⁵⁶ Counties are given a wide range of functions⁵⁷, though arguably many of these functions are either heavily regulated by central government or already performed at a local level.

Most importantly, the new Constitution contains a number of guarantees that counties should be properly resourced to undertake

their functions. Article 202 states that revenue will be shared “equitably” among national and county governments, and Article 203 establishes a detailed list of criteria for determining these equitable shares, including the need to ensure that county governments have adequate resources to perform their functions, economic disparities within and between counties and the need for affirmative action for disadvantaged areas and groups.⁵⁸ Article 203 (2) provides a minimum guarantee that 15% of annual national revenue should be allocated to county governments. In recognition of the disparities in the provision of basic services between different regions, the new Constitution establishes an Equalisation Fund to accelerate progress towards equality in marginalised areas. The Fund is established as 0.5% of annual national revenue and is established for twenty years from the Constitution coming into effect, though this period may be extended if parliament enacts legislation which achieves the support of half the members of the National Assembly and half the members of the Senate.⁵⁹

Equitable access to resources, public services and infrastructure is a highly contentious issue in Kenya, particularly given the role which regional patronage has played in national politics. The Equalisation Fund is therefore a particularly important development for the country’s most marginalised regions. Article 6 (3) also provides avenues to improve access for these areas and communities by creating a duty on the state to ensure reasonable access to government services throughout the country. Further, equitable access to land is listed as the first principle of land policy.⁶⁰

6. Establishment of a Regulatory Body

In practical terms, one of the most significant changes introduced by the new Constitution comes at Article 59, which establishes a Kenya National Human Rights and Equality Commission (KNHREC), which is set to supersede the Kenya National Human Rights Commission and the National Commission on Gender and Development.⁶¹ It remains to be seen whether the Act establishing the unified Commission would also dissolve the recently-formed Commission on Cohesion and Integration or the Council on Persons with Disability in order that the new body can effectively deal with all aspects of equality and non-discrimination. The government is required to bring forward legislation to establish the Commission within one year from the adoption of the Constitution.⁶²

Article 59 (2) sets out the extensive list of functions of the KNHREC, which include promotion of human rights and gender equality, monitoring and reporting and the power to receive and investigate individual complaints, undertake investigations on its own initiative and act as the “principle organ of the state in ensuring compliance with obligations and treaties relating to human rights”. The KNHREC’s powers largely replicate those of the current Kenya National Human Rights Commission⁶³ but are substantially broader than those of the National Commission on Gender and Development, which is an essentially advisory body, with no investigative powers.⁶⁴

Concerns remain over the lack of reference to the National Cohesion and Integration Commission, established in 2008, and the Council on Persons with Disability, and more generally over the lack of clarity about the role of the new Commission in enforcing the right to equality and non-discrimination. Despite the reference to equality in the Commission’s

title, Article 59 (2) makes scant reference to equality, save for a specific reference to gender equality in paragraph (b). No other ground of discrimination is referred to directly and the functions of the Commission are in almost all cases defined with reference to human rights rather than equality. As a result, the role of the KNHREC in promoting and enforcing the right to equality and non-discrimination will be largely defined in the legislation which is required to establish the Commission.

7. Problems

Despite the genuine improvements to the protection of the right to equality and non-discrimination introduced by the new Constitution, a number of areas remain seriously problematic. These include in particular the failure to address discrimination against LGBTI persons and a number of provisions which allow for continuing discrimination against women.

In addition to the failure to recognise sexual orientation as a prohibited ground of discrimination, the definition of marriage in Article 45 dealing with family life states that: “Every adult has the right to marry a person of the opposite sex”,⁶⁵ thereby denying the legitimacy of same-sex civil marriages. Further, despite the general commitment to equality evidenced in both the preamble and the interpretative articles, the law does not materially change the situation with regards to the criminalisation of consensual same-sex conduct between men.⁶⁶

As discussed above, the right to life states that life begins at conception and that abortion is only permitted in cases of medical emergency. The provision does not change the situation under the law as it is currently defined under the Penal Code,⁶⁷ despite evi-

dence which shows that as many as 300,000 women die every year in Kenya as a result of unsafe abortions.⁶⁸ Despite the fact that the new Constitution will not materially change the law in this area, the provision caused significant controversy, in particular attracting the opposition from the church, and abortion became a central plank of the “No” campaign.⁶⁹

Another cause of concern is the establishment, under Article 170, of *Kadhis’* courts with jurisdiction to determine questions of “personal status, marriage or divorce or inheritance” in proceedings in which all parties are Muslims. While Article 170 (5) states that all parties must submit to the jurisdiction of the *Kadhis’* courts, concerns remain over coercion of women to submit to these courts and research suggests that *Khadhi* judgments have discriminated against women in determining questions of family law.⁷⁰ Concern about the potential for discriminatory judgments in these courts is heightened by the specific qualification of the right to equality and non-discrimination “to the extent strictly necessary for the application of Muslim law before the *Kadhis’* courts” provided in Article 24.⁷¹

Conclusion

These and other not insignificant problems aside, the new Constitution contains a wealth of progressive measures in respect of the right to equality and non-discrimination. However, the new Constitution does not provide all of the answers. Rather, it presents a question: how will Kenyan civil society use this document to secure greater equality in practice?

The new Constitution presents an array of opportunities which must be seized if genuine progress is to be made. Public infor-

mation campaigns must begin to educate women that they have a constitutional right to non-discrimination which can be used to challenge the distribution of family property on their father's death. Strategic litigation must begin to challenge discrimination against LGBTI persons using the open list which could enable the admission of sexual orientation and gender identity as protected grounds through the courts. Training must begin for law students, lawyers and judges to help them understand how to interpret and apply these new provisions in line with the intention of the drafters and in a manner which is fair and consistent.

Arguably however, the greatest opportunity presented by the adoption of the Constitu-

tion also poses the greatest challenge. The 2010 Constitution provides a firm foundation for the right to non-discrimination and equality in 21st Century Kenya. However, it is - of necessity - light on detail. If the right to equality and non-discrimination is to be entrenched, comprehensive anti-discrimination legislation and progressive jurisprudence is needed to provide definitions of key terms and concepts, to provide detail on the right to non-discrimination in different areas of life, to create specific duties on government and other sectors and to establish the remit of the Kenya National Human Rights and Equality Commission.

The new Constitution represents a significant step. But a first step all the same.

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² For a detailed discussion of the history of Kenya's constitutional development, see Committee of Experts on Constitutional Review, *The Preliminary Report of the Committee of Experts on Constitutional Review Issued on the Publication of the Harmonized Draft Constitution*, November 2009, available at: http://www.coekenya.go.ke/images/stories/Resources/preliminary_report.pdf.

³ Kenya National Dialogue and Reconciliation, Report of the Commission of Inquiry into Post-Election Violence, October 2008 - February 2008, available at: <http://www.dialoguekenya.org/docs/PEVReport1.pdf>.

⁴ Kenya National Dialogue and Reconciliation, *Annotated Agenda for the Kenya National Dialogue and Reconciliation*, February 2008, available at: http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf.

⁵ Committee of Experts on Constitutional Review, *The Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Reviewed Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review*, January 2010, available at: http://www.coekenya.go.ke/images/stories/Resources/Final_Report_on_the_Reviewd_Draft.pdf.

⁶ Constitution of Kenya, Article 26 (2).

⁷ *Ibid.*, Article 26 (4).

⁸ *Ibid.*, Preamble.

⁹ *Ibid.*, Article 10 (2) (b).

¹⁰ Ghai, Y. and Cottrell Ghai, J., “The Choice in the Referendum: A comparative analysis of the Constitution of Kenya and the Current Constitution”, July 2010, p. 3.

¹¹ Constitution of Kenya, Article 27 (1).

¹² *Ibid.*, Article 27 (2).

¹³ Article 82 (3) of the 1963 Constitution of Kenya states: “In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex”.

¹⁴ Gay and Lesbian Coalition of Kenya, *Memorandum to the Committee of Experts on the Constitution*, 11 December 2009, available at: http://galck.org/index.php?option=com_content&view=article&id=50:const&catid=18:constitution&Itemid=18.

¹⁵ Human Rights Watch, *Halt Anti-Gay Campaign*, February 2010, available at: <http://www.hrw.org/en/news/2010/02/17/kenya-halt-anti-gay-campaign>.

¹⁶ The Equal Rights Trust, Interview with Mumbi Ngugi, 18 July 2010.

¹⁷ Constitution of Kenya, Article 259 (4) (b): “the word ‘includes’ means ‘includes but is not limited to”.

¹⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 2000, Article 1 (xxii) (b).

¹⁹ The Equal Rights Trust, *Declaration of Principles on Equality*, London 2008, Principle 5, p. 6.

²⁰ The National Cohesion and Integration Act 2008 prohibits segregation, harassment and victimisation. The Sexual Offences Act creates a criminal offence for sexual harassment.

²¹ Constitution of Kenya, Article 260.

²² Including the Persons with Disabilities Act 2003, the National Cohesion and Integration Act 2008 and the Employment Act 2007.

²³ Constitution of Kenya, Part 3 of the Bill of Rights, Articles 52 – 57. These rights are discussed in the section “Specific rights for vulnerable groups”.

²⁴ Hussein, A., “Kenyan Nubians: standing up to statelessness”, *Forced Migration Review*, Vol. 32, April 2009, pp. 19-20.

²⁵ For a detailed discussion of the situation of stateless Kenyan Nubians, see: The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London, 2010, pp. 75-76.

²⁶ Under Article 15 (2) of the Constitution of Kenya, persons who have been “lawfully resident” for a continuous period of at least seven years may apply to be registered as a citizen, a requirement which may exclude Kenyan Nubians and others from acquiring citizenship.

²⁷ For a detailed discussion of women’s land rights and poverty, see Njoki Wamai, E., “Women and Poverty (Land Rights and Ownership)”, *African Women’s Rights Observatory (AWRO)*, 2008, available at: <http://awro.uneca.org/downloads/Women%20Land%20Rights%20and%20Poverty%20in%20kenya%20policy%20issue.doc>.

²⁸ Article 25 of the Constitution of Kenya states that the rights to freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, fair trial and the right to an order of *habeas corpus* cannot be limited.

²⁹ Constitution of Kenya, Article 24 (1).

³⁰ *Ibid.*, Article 52 (2).

³¹ United Nations Convention on the Rights of Persons with Disabilities, Article 1.

³² Constitution of Kenya, Article 54 (1) (c) and (d).

³³ *Ibid.*, Article 54 (1) (e) and (f).

³⁴ *Ibid.*, Article 3 (b).

³⁵ *Ibid.*, Article 54 (2).

³⁶ The Persons with Disability Act, Act 14/2003.

³⁷ Article 260 of the Constitution of Kenya provides: "...‘marginalised group’ means a group of people who, because of law or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)".

³⁸ *Ibid.*

³⁹ Constitution of Kenya, Article 45 (3).

⁴⁰ *Ibid.*, Articles 14 (1) and 15 (1).

⁴¹ *Ibid.*, Article 60 (1) (f).

⁴² *Ibid.*, Article 2 (4).

⁴³ *Ibid.*, Articles 97 (1) (b), 98 (1) (b) and 177 (1) (b).

⁴⁴ All statistics taken from the CIA World Fact Book, 2009, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

⁴⁵ See above, note 10, p. 6.

⁴⁶ See for example: Kenya National Dialogue and Reconciliation Monitoring project, *Project Context and Summary of Findings*, 2009, available at: <http://www.dialoguekenya.org/docs/project%20context%20and%20summary%20of%20findings.pdf>.

⁴⁷ Constitution of Kenya, Article 33 (2) (c) and (d).

⁴⁸ *Ibid.*, Article 7 (3) (b).

⁴⁹ *Ibid.*, Article 8.

⁵⁰ *Ibid.*, Article 11 (2).

⁵¹ *Ibid.*, Article 91 (2) (a).

⁵² Schedule 5 of the Constitution of Kenya requires that such legislation must be passed within 5 years of the Constitution coming into force.

⁵³ Constitution of Kenya, Article 197 (2).

⁵⁴ *Ibid.*, Article 1 (4).

⁵⁵ *Ibid.*, Article 174 (b) and (g).

⁵⁶ *Ibid.*, Chapter 11, Part 2.

⁵⁷ *Ibid.*, Schedule 4, Part 2.

⁵⁸ *Ibid.*, Article 203 (1)(d), (g) and (h).

⁵⁹ *Ibid.*, Article 204.

⁶⁰ *Ibid.*, Article 60 (1)(a).

⁶¹ Schedule 6, Article 26 of the Constitution of Kenya states that the commissioners of the Kenya National Human Rights Commission and National Commission on Gender and Development will become members of the unified Commission created under Article 59.

⁶² Constitution of Kenya, Schedule 5.

⁶³ The Kenya National Commission on Human Rights Act 2002, Section 16 (1).

⁶⁴ Act 13/2003, National Commission on Gender and Development 2003, Section 6.

⁶⁵ Constitution of Kenya, Article 45 (2).

⁶⁶ Penal Code 1963, Sections 162, 163 and 165.

⁶⁷ Penal Code 1963, Sections 158, 159 and 160 prohibit “procurement of miscarriage” by a woman herself or by any other person. Section 240 provides an exception on health grounds: “A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.”

⁶⁸ Federation of Women’s Lawyers, *Shadow Report to the 5th and 6th Combined Report of the Government of Kenya, On the International Convention on the Elimination of All Forms of Discrimination Against Women*, 2007, p.22, available at: <http://www.iwraw-ap.org/resources/pdf/Kenya%20SR%20final.pdf>.

⁶⁹ See, for example, Poghiso, S., “The proposed constitution has too many flaws to pass the test of time”, *The Nation*, 17 July 2010, p. 13.

⁷⁰ See above, note 10, p. 9: “[i]ssues likely to arise are things like favouring the father in custody [...] limited provision for maintenance of wives after divorce, and the difference in inheritance by women and men under Muslim law”.

⁷¹ Constitution of Kenya, Article 24 (4).

Empowering Disadvantaged Groups in Kenya through Combating Discrimination and Promoting Equality - First Year Project Report

In July 2009, The Equal Rights Trust (ERT) started work on a two-year project based in Kenya, “Empowering disadvantaged groups through combating discrimination and promoting equality”. The project is funded by the Department for International Development (DFID) through its Civil Society Challenge Fund which aims to build the capacity of civil society organisations (CSOs) in developing countries through partnership with organisations based in the UK. ERT is working with two local partner organisations: the Federation of Women Lawyers (FIDA), a national association of female advocates and other legal professionals undertaking a range of advocacy, training and legal advice services on behalf of women, and the Kenya Human Rights Commission (KHRC), the leading non-governmental human rights organisation in Kenya.

The aim of the project is to enable Kenyan civil society organisations (CSOs) to become key players in building a national anti-discrimination regime. ERT and its partners are cooperating on a range of activities with a view to supporting Kenyan civil society to develop, draft and advocate the adoption of comprehensive anti-discrimination legislation in the country. In meeting this overall objective, the partners have a number of complementary aims and objectives, including the development of expertise in anti-discrimination law among civil society actors, raised awareness of the prevalence of discrimination among political and other

stakeholders and the fostering of collaboration and cooperation between CSOs.

Background and Context

In planning for the project, ERT and its partners aimed to build on a civil society-led initiative to introduce an Equal Opportunities Bill in 2009. The Bill emanated from the work of a 1993 Legal Taskforce established to review laws relating to women, which recommended the introduction of legislation to give effect to the equality provisions of the Constitution and institute affirmative action measures. Subsequently, an Equality Bill was drafted by a group of civil society organisations in 2001. This draft did not make significant progress, incurring opposition from Christian and Muslim leaders who condemned it as being “based on western values.” However the Kenya Law Reform Commission (KLRC) took up the Bill, making several changes including changing the title to the “Equal Opportunities Bill.”

In 2008, the Committee on Equal Treatment was formed to facilitate further discussions on the content of the Bill. The Committee, which was made up of a broad coalition of civil society organisations, held monthly meetings from February to December 2008. However, meetings of the Committee on Equal Treatment ceased in 2009 while members awaited information from the Kenya National Human Rights Commission and the Law Reform Commission on the Bill’s



Interactive game during ERT training, Nairobi 2010

progress. The Bill was among the group of 4 “Gender Bills” which were presented to the Minister for Gender, Children and Social Development in order that they might be presented in cabinet for debate. Among the Gender Bills (Family Protection Bill, 2007; Matrimonial Properties Bill, 2007; Marriage Bill, 2007), only the Equal Opportunities Bill was not introduced to Cabinet.

The ERT project was launched against the backdrop of an ongoing Constitutional review process instituted by a 2008 Act of Parliament.¹ A Harmonised Draft Constitution was published by a Committee of Experts six months after the project’s start, in November 2009. The draft was subjected to public consultation, review by a specially-constituted Parliamentary Select Committee and debate in the National Legislature before a final draft was published on 6 May 2010. On 4 August 2010 Kenyans have voted in a referendum to accept the draft Constitution.

Baseline Study and Legal Audit

The partners began the project by undertaking desk-based research and meetings in September 2009 to fully understand the context in which the project activities would take place. This led to the development of two papers, an Audit of Laws relating to equality and non-discrimination and a Baseline Study assessing civil society attitudes and competence and the role and attitude of other key stakeholders.

The Legal Audit confirmed the view of ERT and its partners that Kenyan anti-discrimination law is underdeveloped and that there is significant scope for legal reform. The assessment revealed that while in some areas – such as the National Cohesion and Integration Act, Employment Act and the Persons with Disability Act – there are robust legal protections, a number of gaps and inconsistencies remain. In particular, significant exceptions to the Constitutional right to non-



Barbara Cohen, ERT Consultant, conducting training seminar, Nairobi, January 2010

discrimination, the continuing operation of discriminatory laws on citizenship, succession and sexuality and the lack of protection in key areas such as health and education highlighted the need for the introduction of comprehensive anti-discrimination law.

The Baseline Study identified a large number of organisations which had been involved in attempts to develop and adopt the Equal Opportunities Bill, in the period 2005-7. The study revealed three inter-related problems: 1. Lack of knowledge about the content of the draft Bill; 2. Lack of information about the process by which the Bill was developed, finalised and proposed to Cabinet, even among the key stakeholders; and 3. Lack of involvement of some key stakeholders in the process of developing the Bill. Together with identifying this “knowledge gap”, the Baseline also provided important insight into the reasons for the failure of the attempts to secure adoption of the Bill. The key finding in this respect was that among members the Committee on Equal Treatment, engagement was not at a sufficiently senior level to ensure continued organisational commitment. This lack of senior endorsement led to insufficient human, financial and organisational resources being dedicated to the advocacy effort, which was further exacerbated by high staff turnover at some of the key organisations.

Initial Roundtable – January 2010

Taking into account the findings of the Baseline Study in respect of civil society needs, the partners convened a roundtable event in Nairobi in January 2010 to discuss challenges, priorities and opportunities for legal reform on equality. The roundtable was intended as an opportunity to engage senior civil society, political and governmental stakeholders in discussions about the need for legislative re-

form to improve protection from discrimination in Kenya and the role of participants in bringing about such reform. It was intended that this event would provide the foundation for establishing a broad-based coalition of actors to cooperate on these issues, thereby avoiding the difficulties which affected the Equal Opportunities Bill. The roundtable was attended by over 30 people from 15 different organisations, including the Law Reform Commission, the Parliamentary Equal Opportunities Committee and a range of civil society organisations. The objectives of the meeting were four-fold:

1. To develop a common understanding of the effectiveness of existing law for combating discrimination in Kenya;
2. To consider the potential of proposed draft law (including the Harmonised draft Constitution, the Gender-related bills and the Equal Opportunities Bill) in combating discrimination in Kenya;
3. To identify needs for legislative reform in the field of equality and seek agreement on priorities;
4. To identify opportunities for legislative reform in the field of equality.

In the first session of the day, Tom Kagwe, Deputy Executive Director of KHRC, presented a paper which provided an overview of the legal framework on discrimination in Kenya. Using the Legal Audit as a basis, Mr Kagwe discussed, *inter alia*, Kenya’s obligations under international treaties, the right to non-discrimination in the Constitution, specific anti-discrimination laws and non-discrimination provisions in other areas of law and discriminatory laws and regulations.

Participants discussed the presentation and agreed that discrimination is a major issue in Kenya and is a root cause of other serious

societal problems, including poverty and political tension. It was generally agreed that inconsistent laws, weak enforcement and a lack of common agreement about the content of key concepts, such as reasonable accommodation or what constitutes a ground of discrimination all contributed to poor protection from discrimination. Participants were of the view that despite the multiplicity of remedies and enforcement mechanisms available to victims of discrimination, in many ways legal protections were ineffective. They agreed on the need for Kenya to develop comprehensive anti-discrimination law, with clear legal concepts and definitions and strong, effective remedies. The group also agreed that a working group should be appointed to take forward the outcomes of the roundtable, developing policy or drafting amendments to the Equal Opportunities Bill.

In the next session, Hilary Muthui, Programmes Officer at FIDA, introduced a paper on recent legal and policy developments and forthcoming opportunities which would be of relevance to the discussions. Participants discussed Mr Muthui's presentation and agreed that two fundamental opportunities presented themselves: the Constitutional review process and the draft Equal Opportunities Bill. It was agreed that the Constitutional review process presented both immediate threats and a significant opportunity in presenting a number of avenues for consequential legal reform. Participants agreed that the right to equality and non-discrimination in the draft Constitution produced by the Committee of Experts was strong and that existing attempts to alter the equality protections in the Constitution should be opposed. It was felt that the draft Equal Opportunities Bill should be the basis for any new legislation and that the decision by Cabinet not to table the Bill in parliament presented an excellent

opportunity for civil society to review, revise and re-table the Bill.

In the final session of the day, participants were invited to engage in a round-the-table discussion, in which participants provided specific examples of discrimination affecting them or another vulnerable group. The discussion covered an extensive list of grounds and a wide range of areas of life, including employment, education, citizenship, access to services and criminal justice. It was agreed that the facilitators would use the results of this session to frame the discussion on discrimination law, needs and priorities in particular areas of life which would be the subject of the first session on day two.

The second day began with a session focussed on identification of specific needs in respect of protection from discrimination. The facilitators summarised the results of the discussion in the previous day's final session, and used the findings to generate a list of nine areas of life where participants had identified discrimination (Criminal Justice, Property, Politics and Public Office, Access to Justice, Employment, Policing, Health Services, Citizenship and Education). Participants were asked to form groups and consider each of the areas of discrimination which had been identified, analysing as many examples of discrimination as possible in the chosen area of discrimination and selecting one issue to investigate further. Each group was asked to identify what the current law prescribes on the particular issue and recommend how the law might be improved to address this issue.

The final session of the roundtable involved the development of an action plan for all participating organisations. It was agreed that participating organisations would continue to work together as part of an informal coa-

lition focussed on securing improved anti-discrimination law and that a working group should be established to review the Equal Opportunities Bill, undertake a study tour to the UK and lead the detailed development of comprehensive anti-discrimination law. Given the immediacy of the Constitutional review process, it was agreed that advocacy to maintain the equality provisions in the draft Constitution should begin immediately, in the form of a communiqué from KHRC, FIDA and ERT. It was agreed that KHRC and FIDA should establish and maintain links with the parliamentary committee on Equal Opportunity and with the media.

Training on Key Concepts in Anti-discrimination Law

Following the roundtable, the partners delivered an intense two-day training course to staff from over 20 Nairobi-based CSOs on how to apply discrimination law and concepts in their advocacy and awareness raising activities. Two further training courses were delivered in March 2010 for organisations based in and around Kisumu and Mombasa, taking the total number of CSO staff trained to 60. A variety of NGO staff, lawyers, human rights activists and representatives from statutory bodies attended the training workshops, representing a wide range of organisations, including the Gay and Lesbian Coalition of Kenya, Tomorrow's Child Initiative and the Law Society of Kenya.

Delivered by Barbara Cohen, ERT's consultant on the project, and Jacqueline Mogeni, a Kenyan consultant engaged through FIDA, the training used the Declaration of Principles on Equality² as the basis to familiarise staff from civil society organisations with some of the key concepts in anti-discrimination law. Topics covered in the training

included legal definitions of discrimination, analysing the concepts of direct and indirect discrimination, harassment, victimisation, reasonable accommodation, positive action, exceptions, access to justice, burden of proof and remedies.

Stakeholder Engagement

In the period January – May 2010, ERT's project partners undertook a number of meetings with key stakeholder groups to build on the achievements of the initial project roundtable. Among others, representatives from FIDA and KHRC met with Mohammed Affey MP, the Chair of the recently-formed Committee on Equal Opportunities and other members of the Committee. The Committee stated that legal reform on equality issues was one of their key strategic priorities and that they wished to cooperate closely with organisations involved in the initiative. The group also met with Nancy Baraza, Deputy Chair of the Law Reform Commission, who offered the support of the Commission and expressed a willingness to engage with CSOs on a review of the Equal Opportunities Bill.

UK Study Tour

Participants at the January 2010 roundtable agreed that a working group would be created to develop key concepts for comprehensive anti-discrimination legislation and a strategy for addressing difficult issues. The working group undertook a study tour to the UK in May 2010 in order to meet a range of equality law experts and undertake research on how a number of difficult issues in equality law had been addressed in the UK and other jurisdictions. The group met with respected equality law experts, including Professor Sir Bob Hepple QC, Lord Lester of Herne Hill QC and Karon Monaghan QC,

as well as the Equality and Human Rights Commission, Government Equality Unit and the Equality and Diversity Forum. The group also met with disability law expert Caroline Gooding and with Stonewall, the leading LGB rights organisation in the UK, to discuss how UK law had developed in these strands.

The objective of this visit was for the working group to generate recommendations for the wider coalition of CSOs in five key areas for a comprehensive anti-discrimination law: Legislative structure; Grounds; Prohibited Conduct; Material scope; and Enforcement and Institutions. Each of the individuals or organisations which the group met with was asked to provide their perspective on one or more of these issues. Participants were also provided with comparative examples from Canada, South Africa, Australia and the UK, showing how contentious or complex issues had been addressed in these jurisdictions.

At the end of the study tour, the working group met to consider their recommendations to the roundtable group on each issue. The group agreed to recommend that there should be a single, comprehensive Anti-Discrimination Bill which should set out both the substantive elements of anti-discrimination law and incorporate the legislative elements necessary for the establishment of the Kenya National Human Rights and Equality Commission as required under the draft Constitution. It was agreed that the provisions of the Bill when enacted should, in the event of any conflict or inconsistency, supersede the provisions of any other legislation relating or incidental to the prohibition of discrimination and the promotion of equality.

In respect of protected grounds, the group agreed that the Bill should use the list of grounds provided in the draft Constitution, with consideration to be given as to wheth-

er a ground of “genetic inheritance” should be added to the list to cover discrimination against people with albinism. The group agreed that the Bill should provide a conditionally open list, with the use of a test for admission of new grounds, to be based on Principle 5 of the Declaration of Principles on Equality.

The group agreed that any new legislation should prohibit direct and indirect discrimination, multiple discrimination, harassment, victimisation and failure to make reasonable accommodation, that these concepts should be defined in the Bill and that where possible, definitions of prohibited conduct should be adopted from existing Kenyan law. It was agreed that positive action should be permitted in the Bill and that exceptions should be limited and blanket exclusions of the type found in the current Constitution, should be avoided.

In respect of remedies, the group concluded that any new legislation should use a combination of civil and criminal remedies, with criminal remedies reserved for persistent offenders or gross offences. It was agreed that the Bill should provide the structure for a single new combined Commission for Human Rights and Equality, as envisaged under Article 59 of the draft Constitution.

The working group agreed that it was important to seek endorsement from the wider coalition on the content of the Bill before progressing further and that a workshop should be held in Nairobi to develop a complete “Legislative Map” outlining the content of a Bill. The group also felt that it was necessary to engage key stakeholder groups, including the Kenya National Human Rights Commission, the Gender and Development Commission and the Council for Persons with Disability, the judiciary and the parliamentary

Committee on Equal Opportunity at the earliest opportunity.

Legislative Map Workshop

In mid-July 2010, the partners convened a second roundtable for civil society and other stakeholders to discuss the recommendations made by the working group and undertake further work to develop a Legislative Map for an Anti-Discrimination Bill. Participation was high, with over 20 different organisations attending, including representatives the National Gender and Development Commission and the Council for Persons with Disability, as well as a diverse range of civil society organisations.

The workshop began with an initial presentation by Tom Kagwe of KHRC (and a member of the working group) who spoke about the UK study tour, the formulation of the working group's recommendations and the policy context in which the work was taking place, in particular the impending referendum on the draft Constitution. This was followed by a presentation from Nancy Baraza, Deputy Chair of the Law Reform Commission, who provided a critique of the Equal Opportunities Bill and re-iterated the Commission's willingness to seek the views of civil society on how the Bill could be improved.

In the next session, members of the working group presented the recommendations in each of the five areas of work which had been covered during the Study tour. Each set of recommendations was subjected to discussion and a number of amendments were made to the substance of the recommendations. It was agreed that these revised recommendations should form the basis of the Legislative Map.

In the third session, the participants split into four groups to engage in further discussion on elements of the law. Three of the groups focussed on issues of substance (exceptions, affirmative action and the establishment of an enforcement body) while the fourth group discussed advocacy strategy and tactics. Each group was asked to table recommendations for discussion.

The group focussed on exceptions proposed that the starting point of any legislation should be that all forms of discrimination are prohibited and that as such, exceptions should be limited. It was agreed that any exception, permitting discrimination on one or more grounds, must be reasonable and justifiable and that an exception will be justifiable only if it can be shown to be necessary for the achievement of a legitimate purpose and where there is no alternative which is less discriminatory.

The group examining affirmative action agreed that the Bill should permit affirmative action and should enshrine certain principles. It was agreed that affirmative action should be clear, targeted and specific; should be time-bound and subject to periodic review to assess its impact; should be designed to address past disadvantage and accelerate progress towards equality; should not disproportionately disadvantage others; should be targeted in areas of life where participation of disadvantaged groups is low; and should be used to meet particular needs of disadvantaged groups. It was agreed that affirmative action should be a requirement for all state bodies and that the Bill should encourage affirmative action by all non-state bodies.

The group discussing how the Bill should establish an independent equality body developed detailed recommendations. They

agreed that the Bill should provide for the establishment of independent and well-funded National Human Rights and Equality Commission as envisaged by the draft Constitution and that its powers and functions should be clearly defined. The group proposed that the Commission should have the power to hear complaints of discrimination or abuse of human rights, undertake investigations, make findings and require remedial action and that it should have the powers of a court. There was agreement that the Commission should be well funded, that it should have sufficient funds to operate effectively at a local level and that its funding should be a directly linked percentage of the national budget, not subject to government or departmental oversight.

The recommendations of the three working groups were agreed and the meeting went on to address a number of other issues of significance for the development of a Comprehensive Anti-discrimination Bill. Thus, it was agreed that the Bill should cover all areas of life regulated by law in the private and public sectors, that the burden of proof should shift to the respondent once a *prima facie* case of discrimination has been established and that it should provide for civil remedies which should be effective, proportionate and dissuasive.

The final working group discussed issues of advocacy strategy and recommended four areas of work. It was agreed that the partners should seek to establish a broad-based coalition of support for the introduction of a Comprehensive Anti-discrimination Bill in Kenya. This should include a range of civil society actors, but potentially also trade unions, academic institutions and others. In order to achieve this, it was proposed that a set of key principles should be developed ex-

pressing the position of the roundtable participants on the need for and requirements of a Bill and that this should be used to secure endorsements from potential allies.

It was agreed that the partners needed to understand the likely role and attitude of all potential stakeholders in an attempt to introduce a Bill and that a “stakeholder mapping” exercise should be undertaken to identify potential allies, opponents, partners, ambassadors and decision-makers. The participants agreed that attempts should be made to engage the government, commissions and other government bodies, and to ensure that civil society is engaged at every opportunity in the legislative process to lobby parliamentarians. These proposed approaches were agreed and KHRC, FIDA and ERT planned the necessary joint work.

Next Steps

The first year of ERT’s project in Kenya has exceeded expectations, as much because of highly favourable environmental factors as the work undertaken by ERT and its partners. The Constitutional review process and the ongoing referendum campaigns have created a zest for legal reform among civil society, parliamentarians and the wider public. ERT and its partners have been able to seize this opportunity, working with civil society to reinvigorate a moribund process around the Equal Opportunities Bill. What is more, the new Constitution adopted in August 2010 offers a number of opportunities to introduce comprehensive anti-discrimination legislation as part of the consequential legislation programme.

Over the course of the project’s final year, the partners intend to seek to build a broad-based coalition of civil society organisations, trade

unions, education institutions and development organisations to lobby for the introduction of comprehensive anti-discrimination law in Kenya. At the same time, the Legislative Map developed over the course of the UK Study Tour and Legislative Map session will

be further refined and used as the basis for direct engagement with government, parliamentarians and quasi-governmental bodies. It is hoped that a draft Bill will be published by the end of 2010 and that efforts to secure its adoption will be at an advanced stage.

¹ For a discussion of the Constitutional review process and the impact which the draft Constitution could have on the enjoyment of the right to non-discrimination and equality in Kenya, see Fitzgerald, J., "The Road to Equality? The Right to Equality in Kenya's New Constitution", in this issue.

² The Equal Rights Trust, Declaration of Principles on Equality, London 2008, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>

ERT Interview with Mumbi Ngugi, Managing Trustee of the Albinism Foundation of East Africa

1. Can you explain a little about your personal experiences of discrimination?

I cannot talk with certainty about discrimination in the sense that is recognised by the law.

In the area of education, I think the greatest problem was the failure to recognise – and therefore make reasonable accommodation for – my visual limitation, which typically accompanies the condition of albinism. I think that the way our system deals with visual challenges for children with albinism is in itself discriminatory. The state places children with albinism in schools for the blind, forcing on them the study of Braille and, from my experience, one is better off not attending such an institution.

In the area of employment, I suspect, but again I cannot say with certainty, that I was discriminated against. Despite good qualifications, I had great difficulty securing employment. Of the many jobs I was interviewed for after I left university and before deciding to go into private legal practice, I was successful in only one. In legal practice, I have had occasion to wonder whether certain negative treatment that I have encountered in the courts and in dealing with government officers has been caused or influenced by perceptions of my condition and therefore of my abilities, but again it's hard to tell. I think the social challenges are the greatest problem – the name calling, the staring, the

superstitions and the misconceptions. These tend to inform how potential employers perceive one and judge one's ability.

2. Would you say your experiences are typical of people with albinism in Kenya or are they more or less severe than the discrimination suffered by others?

I think my experiences of discrimination are less severe than the experiences most people with albinism have had. The circumstances in which I grew up, the schools I went to and my professional training all helped to make my life and experience less difficult than it would otherwise have been. The fact that I am also in a profession where I have been able to fit in despite my condition has made a big difference. I think that those with albinism who have been able to get a good education, professional training and employment, probably experience less discrimination and mistreatment than others because of the environment in which they operate.

3. What would you say are the biggest challenges facing people with albinism in Kenya? What are the most common forms of discrimination which people living with albinism face?

While the condition itself presents considerable challenges – poor vision does tend to limit one's capacity and the photo-sensitivity poses major health risks if one has to work in the sun – the biggest challenge is the so-

cial isolation and exclusion that people with albinism face.

Albinism is a condition that is little understood in most of our communities. People believe that one is either bewitched, has supernatural powers (beliefs that people with albinism do not die remain common) or that

a child with albinism is the result of infidelity on the part of the mother. People fear that albinism is contagious, so there are those who will recoil from contact with a person with albinism. Such fears and misconceptions, of course, translate into discrimination in access to education and employment in particular.

Due to the misconception that all people with albinism are blind, most children with albinism, probably about 90%, are educated in schools for the blind. In these schools they are required to learn in Braille, but because they can see, albeit not as well as people without visual impairments, they tend to perform worse in school than even their blind schoolmates. This means that their access to tertiary education is limited, and without professional qualifications, access to employment is correspondingly limited.

Negative perceptions of albinism further limit access to employment. While no employer will tell you directly that the reason you did not get a job was because of your genetic condition, you are left with the very strong impression that that is precisely the reason why.

4. What made you decide to begin working on the protection of people with albinism? Was there a single event which acted as a catalyst or was it something that you had always wanted to do?

From my experience as a child growing up with albinism, I have always felt that it was necessary to express the feelings and concerns of people with albinism, to ensure that the challenges I faced as a child in school – the eye problems and inability to see the board, the sun burn, the insults from strangers – did not continue to affect young people with albinism.



Photo credits: Mumbi Ngugi



Photo credits: Mumbi Ngugi

However, I think what really made me want to work on the issues was the continued negative portrayal of albinism in the media. The cases were always of miserable, hopeless situations of people with albinism living on the fringes of society, sunburnt and prone to cancer, with poor vision, no education and no employment. I always felt that presenting albinism from a different perspective was critical, both for the people, especially children with albinism themselves, but also for their parents and for society in general. Full participation in society by people with albinism was going to be impossible for as long as the condition was viewed with these kinds of misconceptions and contempt. In addition, from talking with my own mother, I came to realise that the way albinism was viewed by society imposed an extremely heavy burden on women – even if not abandoned by their spouses as I came to find out later was often the case – the treatment they received made life extremely difficult for them.

5. Can you explain a little about the Albinism Foundation of East Africa and how the organisation operates?

We started the Albinism Foundation of East Africa (AFEA) in 2008 with a view to raising awareness about the challenges facing people with albinism in the region. While we are based in Kenya, our thinking is that the challenges that people in Kenya face are similar to those faced throughout the region, and it would be more effective in the long term to work on programmes that bring change in the entire region.

The Trustees of AFEA include people with albinism, parents of children with albinism, and friends from diverse sectors interested in addressing the challenges faced by people with albinism. Due to lack of resources, we have been operating a skeleton secretariat,

with two core staff, volunteers and contacts in various areas in Kenya.

6. What are your current advocacy priorities and how does the organisation go about achieving these aims in a difficult environment?

Our operations have centred mainly on public education and awareness on albinism, directed at persons with albinism themselves, their parents and society in general. The purpose of the awareness campaigns is to demystify the condition and begin to reduce the social isolation and exclusion that people with albinism face. We have also engaged policy makers in the areas of health and education to encourage them to put in place policies to improve access to education and health care for persons with albinism. This has required carrying out education campaigns in public institutions such as schools and hospitals, and when possible, holding public forums such as open days to sensitise the public about albinism. We have also been seeking engagement with critical government ministries such as the ministries of Health, Education, Youth, Gender and Children Services and Internal Security.

We hold quarterly meetings for people with albinism and the parents of children with albinism, where people can meet and discuss the challenges they face. The aim is to create a support group, while older people with albinism mentor and encourage the youth and children with albinism.

7. What are the biggest challenges you face as an organisation?

Resource mobilisation has proved to be the biggest challenge, particularly because there is very limited understanding of albinism. Getting funding organisations to understand

Photo credits: Mumbi Ngugi



that people with albinism face insuperable challenges that greatly limit their enjoyment of fundamental human rights has been very difficult. The challenge has been to locate issues of albinism within the human rights discourse in Kenya. While issues related to access to education, health care, employment and social acceptance of people with albinism are clearly human rights issues, most organisations do not see albinism as a special need that merits attention. In addition, the fact that people with albinism form a minority means that provision for their material needs – such as sun screen – are seen as unsustainable and that few organisations have been willing to give us a hearing.

Most organisations – wrongly, I think – don't see albinism as falling within the issues that they focus on. Indeed, issues pertaining to

albinism are a novelty – until the killings of people with albinism in Tanzania hit the media in 2007, there was very little interest or concern about people with albinism.

8. What level of support or cooperation does the organisation get from a) human rights organisations; and b) other organisations working on the protection of discriminated groups, such as women's organisations?

We do get some limited support from human rights, women's rights and disability rights organisations such as the Federation of Women Lawyers, Urgent Action Fund, Ford Foundation, Kenya National Commission on Human Rights, Kenya Society for the Blind and the African Braille Centre. Such support is limited in most cases to participation

in our activities such as open days or consultative forums on the human rights issues directly affecting persons with albinism. As yet, no organisation has incorporated violations of the rights of persons with albinism in any of their projects, in the way that the Kenya Human Rights Commission has taken on LGBT or reproductive health rights issues. This, again, could be because of the limited understanding and appreciation of the challenges that those with albinism face, and it emphasises the need for AFEA to articulate the issues.

9. What single change to Kenyan law or government policy do you think would have the biggest impact on the lives of people with albinism? Why?

Currently, government policy and practice place people with albinism within the category of those with visual disabilities. This means that their peculiar visual challenges – low vision, but not low enough to require Braille, yet not good enough to fall within the “normal” category – are not addressed. It also means that their other health challenges – photo-sensitivity which can lead to skin cancer – and the social stigma that they are exposed to, are never addressed. Consequently, there are no statistics on the numbers and situation of those born with albinism, and so no policies to address their peculiar needs. Policy changes that recognise persons with albinism as a group with special needs, inclusion in laws such as the Persons with Disability Act and prohibition of discrimination on the basis of genetic inheritance could have a major impact on persons with albinism as it would place them on the radar of the law. Currently, persons with albinism are invisible.

10. Kenya is nearing the end of a constitutional review process and a draft constitution will be the subject of a referendum in early August. Article 27 (the right to non-discrimination) in the draft Constitution does not explicitly prohibit discrimination on grounds of albinism or genetic inheritance, which you favour. However, as the list is non-exhaustive it provides the opportunity for legal challenge on these grounds through the courts. Do you think this will present an opportunity to extend protection for people with albinism?

The anti discrimination provisions in the proposed constitution probably present the best opportunity ever for us to extend protection to those with genetic differences such as albinism and to address the challenges that people with albinism face. We could, for example, lodge legal challenges against education and examination rules that fail to make reasonable accommodation for children with albinism and require them to learn in Braille. The recognition of the right to health in the constitution gives us an opportunity to challenge government failure to provide skin protection for persons with albinism and skin care for those who have developed skin cancer.

11. People with albinism face very severe danger in neighbouring Tanzania because of superstitious beliefs held by some groups there. Do you foresee any risk of these kinds of belief transferring to Kenya?

Initially, I was very apprehensive that the killings would spread here, for many of the misconceptions and superstitions about albinism held by Tanzanians are common here also. However, I am encouraged that, at least

to my knowledge, only one killing of a Kenyan with albinism has occurred in the two years since the killings in Tanzania began to be reported. That killing involved a kidnapping from a border village in Kenya and the

murder took place across the border in Tanzania. I am hopeful therefore that though we have similar superstitions in Kenya, they will not translate into the kinds of killings that have taken place in Tanzania and Burundi.

Interviewer on behalf of ERT: Jim Fitzgerald

This interview was conducted in July 2010 during the run-up to the referendum on Kenya's new Constitution.

ERT Interview with David Kuria, Chairman of the Gay and Lesbian Coalition of Kenya (GALCK)

1. Can you explain a little about your personal experiences of discrimination?

My personal experiences are many and varied. Before becoming an activist, I worked for a Catholic University. Though I was not fired for being gay, the working environment became so difficult that I felt I had to quit. Kenyans find it difficult to discriminate directly, so they tend to cut someone off from their social networks and one gets treated as an outcast.

Even in human rights circles, this exclusion prevailed. I've been at meetings – including one hosted by the Kenya Human Rights Commission and The Equal Rights Trust – where, even though people are friendly in the conference room, not many people want to be seen near me in informal settings such as tea breaks and meals. It seems as if people do not believe we can have a political, social or religious opinion, or maybe perhaps people fear that by being seen near us others may think they're LGBTI themselves. Since I attend a lot of meetings, whether health or human rights related, I somehow manage to make use of the exclusion in a positive way.

2. Would you say your experiences are typical of LGBTI persons in Kenya or are they more or less severe than the discrimination suffered by others?

Besides being treated as an outcast, there are a number of more direct forms of discrimina-

tion which are perpetrated daily, especially against the LGBTI who live in informal settlements and slums. Name calling is most rampant - the derogatory use of the word *shoga* which means “gay” in Swahili. This verbal abuse is found in more upmarket areas though it will often be behind one's back rather than directly to one's face.

Denial of services – in particular health services – is also a problem. In one case, a nurse in Kenyatta Hospital called six other nurses to come and examine a patient to whom she was administering treatment. The patient was then forced to narrate repeatedly how he got infected and why he got involved with other men. One of our GALCK staff members was forced to listen to a religious sermon from a doctor in Mater Hospital, even though she had a very high fever. The doctor wouldn't give her medical attention until after she promised to change – she said she was under a lot of pain and really needed medication. Mater Hospital, which is near our GALCK offices, is an expensive private institution, and we assumed that as we were paying for services, we would not be discriminated against, at least not overtly.

We took an intersex person to the same hospital after he fainted at the office. In his state of unconsciousness and because of how he was dressed, it was possible to see that he was intersex, and the examining doctor asked insensitive questions, like “Is this a man or a woman?” It so happened that although the



David Kuria, first on the left, with colleagues from GALCK.

Photo credits: GALCK

family had brought him up as a girl, in puberty he identified as a man, and at the age of 21, the family, realising he was now a man, forced him to undergo traditional circumcision and then abandoned him. At the time we took him to the hospital, the circumcision had not healed. It was bleeding, and he was also menstruating, from both organs. He was terribly anaemic, yet all the doctor was interested in was to find out whether he was a man or a woman and why we always brought strange cases to the hospital. The experience made a deep impression on my mind.

3. What would you say are the biggest challenges facing LGBTI persons in Kenya? What are the most common forms of discrimination which LGBTI persons face?

Besides denial of services, there is the ever-present risk of physical violence. Many people get beaten up. The thing is though that because the police tend to act on cases of assault, perpetrators have to make plans to get away with it. This they do by tempting people to make a mistake which becomes the instigating reason for their violence on them. GALCK offers security trainings and these cases are reducing as a result, but for those not yet reached, there is a looming cloud of physical violence.

Because they are criminalised, LGBTI persons are often forced by the law enforcement officers to prove their innocence rather than the other way round – the burden of proof is always on the LGBTI persons. Since the law provides the police with ability to arrest an

individual on suspicion of having criminal intentions, LGBTI persons are easy targets. This form of police harassment is very common. Recently a transgendered person was arrested as she waited for a *matatu* [a form of public transport in Kenya – ed.] at 9.00 pm to report to work on a night shift. She was arrested together with a group of other people, but everyone else was released. She has spent the last three weeks under police remand, until we called for a doctor’s examination which revealed that she had a “Gender identity disorder”.

4. What made you decide to begin working on the protection of LGBTI persons? Was there a single event which acted as a catalyst or was it something that you had always wanted to do?

I had a teaching job at Tangaza College at the Catholic University, which I really enjoyed. Being denied an opportunity to teach was very painful. Worse still was the way it was done, instead of firing me, the College assigned my classes to someone else. This made me think about getting involved in activism. I was already involved in anti-poverty campaigns, so the switch was quite natural. Feelings of isolation and marginalisation – a term I was used to already – created the right attitude to make me get involved. Of course during the late 1990s and early 2000s, LGBT communities in Europe and elsewhere were making major gains. This proved that such changes were also possible in Kenya, which was quite a catalyst as well.

5. Can you explain a little about the Gay and Lesbian Coalition of Kenya and how the organisation operates?

The Gay and Lesbian Coalition of Kenya - registered as the “Kenya Gay and Lesbian Trust” was established in May 2006. GALCK acts as

an umbrella organization of six LGBTI Organizations: Minority Women in Action (MWA), Ishtar MSM, Transgender Education and Advocacy (TEA), G-Kenya Trust, Artists for Recognition and Acceptance (AFRA) and the Mombasa-based PEMA Kenya. Other groups whose membership applications are being currently processed include Men Against Aids Youth Group (in Kisumu) and Kisumu Initiative for Positive Living.

GALCK provides coordination and capacity-building functions to the member groups. We provide the national voice to the LGBTI advocacy agenda. In our coordinating function, we bring together all the member groups for coordinated action on the cross cutting issues.

6. What are your current advocacy priorities and how does your organisation go about achieving them in a difficult environment?

HIV remains a major challenge among a section of our membership. The fact that there are no government-sponsored programmes around this issue causes a great deal of concern. We have worked to ensure that GALCK partners with government in provision of health services, but that is currently restricted to the HIV strategic plan. While we know that being recognised as a partner in this way, in an African country, represents a huge gain, it is the services to the people that will make the actual difference. This is a major priority for this year.

We are also working together with a group of mainstream NGOs led by KHRC, with expert input from Kenya National Commission on Human Rights, on legal reform, principally decriminalisation. Though we treat this as urgent, we are aware that it is likely to be a long term project. By mid-October we hope

to have a clear plan of engagement on legal reform.

Our third priority is ensuring that GALCK has a national coverage. We are supporting groups from across the country, principally in regional towns, to organise and possibly form regional groups which can then be centres for LGBTI communities in their regions. This has been highly successful, with some towns such as Nakuru – which is a hotbed for Kenyan politics – turning out to be even more accommodating than Nairobi and Mombasa.

7. What are the biggest challenges you face as an organisation?

The biggest challenge remains criminalisation. To the extent that the LGBTI remain a criminalised group, our existence is very much at the pleasure of the powers that be. Even while some human rights lawyers in Kenya argue that the law has not led to any successful prosecutions, many in our community live in fear of arrests, police harassment, blackmail and extortion.

HIV also remains a major challenge, which cannot be addressed when stigma and discrimination against the LGBTI community are rampant. We need space to address stigma and discrimination, which is not possible under the conditions of criminalisation. In Zimbabwe, GALZ activists were arrested on charges of possession of pornographic materials when in fact they had safe-sex informational materials. The same happened in Senegal. Decriminalisation is a necessary condition for addressing both human rights violations and securing access to health services for our community.

8. What level of support or cooperation does the organisation get from a) human rights organisations; and b) other

organisations working on the protection of discriminated groups, such as women's organisations?

Some progressive human rights organisations, such as KHRC, are extremely supportive. We rely on KHRC to support us when we have to deal with difficult police situations. We have also organised community educational forums with them. There are others who have also joined the decriminalisation efforts such as CREAW and UHAI.

The Urgent Action Fund is perhaps the only women's organisation that is quite supportive. There are other women's organisations that have taken a very hostile position even on matters relating to LBT women. The Federation of Women Lawyers for example will not even touch a rape case where the victim is a lesbian. That is extremely shocking for us.

On matters of health, and HIV in particular, while the men having sex with men (MSM) are the most affected, the coping mechanism is to engage in heterosexual relationships, often multiple and concurrent, in order to avoid social victimisation. The refusal of women's organisations to see the intersection with their own marginalisation in this context of enforced heterosexuality is mindboggling.

9. What single change to Kenyan law or government policy do you think would have the biggest impact on the lives of LGBTI persons? Why?

Right now HIV is really a major challenge, because of the rising rates of infection in a context of already high prevalence. In Mombasa, for example, people still think that anal intercourse – regardless of the gender – is safe, and there is no programming tailored to give correct information. Doing so would be

perceived to be encouraging homosexuality, which is a criminal act.

Decriminalisation would be extremely helpful in creating an opportunity to fill in this gap in health programming. After decriminalisation, the next priority would be to enact a comprehensive equality and anti-discrimination law, which will be the ground on which to build positive protective laws and policies for the LGBTI community in Kenya.

10. Kenya is nearing the end of a constitutional review process and a draft constitution will be the subject of a referendum in early August. GALCK spoke out strongly against the decision to exclude sexual orientation and gender identity from the list of prohibited grounds provided in Article 27 (the right to non-discrimination) in the draft Constitution. However, as the list is non-exhaustive, it provides the opportunity for legal challenge on these grounds through the courts. Will GALCK be encouraging its members and supporters to vote for or against the Constitution? Why?

The proposed constitution is a remarkable improvement on the current one, especially with regard to the bill of rights. We shall be encouraging our members to vote for the passage of the draft, because it is the right thing to do for Kenya at this time. It is true that not all our interests are covered in the

draft and that in some cases there are deliberate efforts to exclude us, for example in the area of marriage. But LGBTI Kenyans will benefit from a stable and prosperous Kenya, and the draft Constitution lays the ground for this.

11. Gay and lesbian people face severe discrimination in neighbouring Uganda where parliament is currently debating the Anti-Homosexuality Bill which would prohibit advocacy on behalf of LGBTI rights and introduce the death penalty for “aggravated homosexuality”. Do you foresee any risk of this kind of explicit discrimination taking hold in Kenya?

The Ugandan bill went too far. It is unlikely that the international community would just sit by and let such a bill see the light of day. Moreover, it is very likely that even the most conservative figures in our government have noticed how the Ugandan government has had to backtrack on the bill. That said, we continue to see Hon. William Ruto, the MP for Eldoret, issuing extremely homophobic threats and getting away with it. He has the sympathy of the Church, and there are other MPs who enjoy a lot of support from the Church such as the Vice President, Hon. Kalonzo Musyoka, so it is not entirely impossible to see such a homophobic bill being proposed in Kenya.

Interviewer on behalf of ERT: Jim Fitzgerald

This interview was conducted in July 2010 during the run-up to the referendum on Kenya's new Constitution.

TESTIMONY

"The spring of 2010 was a particularly difficult time for NGOs generally and for Aizhixing and me in particular. Many organisations encountered undue scrutiny and disruption, and had to carry out their work under dangerous conditions."

*Wan Yanhai,
exiled Director of the Beijing Aizhixing Institute*

My Departure from China: Testimony from a Human Rights Defender

Wan Yanhai

On 6 May 2010, Wan Yanhai, one of China's most prominent HIV/AIDS activists, fled China to the United States.¹ For over 20 years Wan has been campaigning for the rights of people with HIV/AIDS and other vulnerable groups that are stigmatised and discriminated against. Operating under constant harassment, intimidation and threat of violence from authorities, Wan and the organisation he directed, the Beijing Aizhixing Institute, worked fearlessly to raise national and international awareness about HIV/AIDS in China and combat the discrimination, inequality and human rights abuse that those associated with HIV/AIDS suffer.²

Since 2007 Wan has cooperated with ERT. He took part in the making of the Declaration of Principles on Equality and is among its original signatories. Here we publish the testimony he provided to ERT about the experience which forced him to flee his home.

In the evening of 30 April 2010, my family and I arrived in Hong Kong. A week later, in the late evening of 6 May, we left Hong Kong for the USA. It was not until we were actually leaving Hong Kong that journalists realised we were leaving for the USA, and were not returning to China. This is when our departure from China became news.

In the weeks before our departure, my wife and I took our four year old daughter from Beijing to Tianjin by train. We then took a flight to Guangzhou on 25 April – a Sunday night. We left Beijing just 3 hours after our daughter left hospital; she was sick and had been in hospital for 3 days. We felt enormously guilty and were anxious about her health – but we had no other option. We didn't know

exactly where we would go. My wife and I had visas for the USA, but our daughter did not. I had a Schengen visa,³ but my wife and my daughter did not. All of these options were contingent on whether or not we would be allowed to leave the country, yet ultimately it seemed that the government was pushing me to leave. I am Wan Yanhai, founder and director of Beijing Aizhixing Institute. Why I left my home country is a long story.

A Climate of Harassment

The Aizhixing Institute (Aizhixing) was founded in 1994 and was originally named the Beijing Aizhi Action Project. It is the largest independent NGO working on HIV/AIDS, health and human rights in China. It works

Photo credits: Wan Yanhai



with a broad range of vulnerable populations including LGBT communities, migrants, ethnic minorities, sex workers, drug users, haemophiliacs, people with HIV/AIDS, and young people. As the largest national NGO it works with about 40 groups around China each year - these groups are mostly run by and for vulnerable communities on both health and human rights issues.

Since 1994 the Institute and I have experienced severe harassment and intimidation from government authorities. As the work of Aizhixing developed, the harassment and intimidation began to manifest through the denial of many of my fundamental freedoms and rights. Throughout the 1990's I was blacklisted by the Communist Party's Propaganda Department. In April 1994, soon after we announced the establishment of Beijing

Aizhi Action Project, the Ministry of Public Security banned the media from reporting our work.

In August and September 2002 I was detained for four weeks by the State Security Department because of my role in investigating and exposing the blood scandal in Henan Province.⁴ I was detained again for three days by the Beijing Municipal Bureau of Public Security's National Security Team in late November 2006 for being involved in a meeting to gain compensation for the people who had been infected with HIV and Hepatitis C through blood transfusions or through using blood products nationwide. After that, I was forced to meet with policemen from the National Security Team every week and on three occasions I was detained, including for two days on 27 December 2007, when another HIV/AIDS activist, Hu Jia, was also officially detained.

The harassment, intimidation and threats peaked during periods in which China was in the international spotlight. A month before both the Olympic Games in 2008 and the 60 year anniversary of the People's Republic of China in 2009, Aizhixing had to shut down operations. We predicted that there would be severe government monitoring and control before these two large events. We were also concerned that there would be increased levels of harassment and violence by the police. Fearing for my own safety, I left Beijing a month before both events.

Despite the suspension of our work during these periods, our organisation experienced greater disruption and intimidation. In September 2008, Aizhixing received a tax investigation notice from the Beijing Haidian District Local Taxation Bureau. We publicised this news, made a public statement and organised a meeting among NGOs to consider

our options for dealing with this targeted harassment. We worked for a month gathering and providing the requested documentation and information to the authorities as part of their ongoing investigation. Half a year later, the Taxation Bureau said that it did not find any financial irregularities in our accounts. Yet, in June 2009, our bank stopped receiving transfers that foreign donors made to us. It took us another month of intensive efforts in order for the bank to reconsider its position and accept foreign grants made to Aizhixing.

In 2009, several other legal aid NGOs and law firms were also investigated by the Taxation Bureau, resulting in some being hit with severe fines. The burden of this financial crackdown was not merely administrative. One poignant reminder of this was that the legal aid group Open Constitution Initiative (Gongmeng) was shut down and its head arrested and detained for four weeks.

The pressure and harassment continued into 2010. From January to April 2010, Aizhixing Institute's operations were arbitrarily scrutinised by ten national or Beijing-based government agencies, including the security department, propaganda department, fire department, community administration office, and the tax department.

Aizhixing spent two months planning and preparing for its 16 year anniversary celebration which was due to take place on 17 January 2010. However, on 14 January 2010 the Beijing Public Security Bureau issued an order for us to cancel the event. The only reasons given for the cancellation were that the event invited guests from foreign embassies and that human rights activists would be attending.

On 3 March 2010, a meeting organised by Aizhixing on the health rights of sex workers was banned by the police. The next day, the Communist Party Central Committee's Propaganda Department issued a classified notice banning media from quoting both the Aizhixing Institute and me. During this period the police were constantly monitoring my activities and a police car was parked outside my apartment for two weeks.

On 18 March 2010, the Haidan Branch of the Beijing Bureau of Industry and Commerce visited Aizhixing's office for the annual inspection of "Beijing Zhaixing Information & Counselling Company Limited" (Aizhixing Institute's legally registered name). Pictures were taken, records were made and one copy of "Frequently Asked Legal Questions for Drug Users" was taken as evidence to prove that we were operating under the name Beijing Aizhixing Institute. We were given a written statement which indicated that the Aizhixing Institute was not legally registered because even though we operate and provide services to the public under the name Beijing Aizhixing Institute, it is not our legally registered name. At this point we were extremely anxious about being shut down because the same thing happened to a Beijing legal aid organisation in July 2009.

Aizhixing's and my own experiences are symptomatic of the broader discrimination, harassment and oppression which civil society NGOs experience generally in China. Yet the spring of 2010 was a particularly difficult time for NGOs generally and for Aizhixing and me in particular. Many organisations encountered undue scrutiny and disruption, and had to carry out their work under dangerous conditions.

A document released by the State Administration of Foreign Exchange effective from 1 March 2010 required all domestic companies which received or sought to receive donations from international non-profit agencies to have project contracts and other relevant project documentation notarised. However, the notary offices did not know how to do this. Consequently many domestic NGOs, including Aizhixing, could not receive overseas financial support or funding and some organisations had to suspend their work.

At the same time the authorities targeted NGOs and human rights defenders who were operating in the education sector. In early 2010, the Ministry of Education ordered colleges to stop "rights organisations," such as Oxfam Hong Kong, from recruiting volunteers on campuses. In late March 2010, Beijing University terminated its relationship with Beijing University Legal Aid and Research Institute for Women.

Similar crackdowns occurred within the media – the NGO Development and Exchange website was shut down in the second half of March.

My Decision to Leave China

When two government departments came to investigate Aizhixing in March, I realised that my time in China was coming to an end. I knew I had to relocate and find a new base from where I could fight back. On 25 March 2010, Beijing Local Taxation Bureau sent inspectors to Aizhixing's offices to deliver a "Taxation Inspection Notice". At the time I, the legal representative, was in Indonesia for an international human rights conference and the Institute's accountant was also out of the office. After some negotiation, the inspectors agreed to come again on 6 April to deliver the document. This was the second

time in a year and a half that Aizhixing was inspected on tax issues.

On 30 March 2010, I was lecturing at a gender studies programme in Guangzhou when my talk was interrupted by the police. Early the next morning, the Guangzhou police called my hotel room and then knocked on my room door. This was the first time in my life that I had been visited by the police whilst staying in a hotel. It was also the first time that I was visited by police while outside Beijing. Police ordered me not to bring Aizhixing activities to Guangzhou and that any of my lectures taking place within the universities must be reported to them first. Later in the afternoon, universities in Guangzhou received notice from the police ordering them not to invite me to speak.

When my family and I made up our minds to leave, I decided not to approach the US embassy from inside China. We initially planned to go to Europe in mid-April as I was invited to participate in a workshop in the Netherlands. However, there were complications with my daughter's visa application and we had to change our plans. Then my wife and I decided that I should leave China for Europe without them. However, this option became impossible due to the volcanic ash that disrupted and cancelled flights across Europe in mid-April.

In the weeks before we left China we experienced harassment and intimidation at the hands of government authorities on numerous occasions. The police visited my apartment and called my mobile phone dozens of times, particularly on 23 April. The fire department and the community administration office also visited my apartment without being called, on spurious fire prevention claims.

On 22 April, as I waited at Tianjin airport for a flight to Guangzhou, I wrote and published, through my network of email groups, a note about the events that were transpiring and what had happened to us. It was while waiting at the airport that I received a phone call from my wife telling me that our daughter had been taken ill. I returned to Beijing immediately. She was hospitalised late in the evening.

When my daughter was discharged from hospital, we left for Guangzhou, arriving on the evening of 25 April. We didn't exactly know where to go. I thought we would go to Hong Kong the next day. But we were tired and we all felt ill in the hot and humid weather. Arriving in Guangzhou made us all feel more relaxed. We had the comfort of friends and I also had the opportunity to communicate with friends outside China for help.

Our plan was to go to Hong Kong and then on to Bangkok. But we were lucky as our friend who hosted us in Guangzhou had been visited by US embassy officials and we had a chance of seeking support for our daughter's visa application. We went to the US consular office on 30 April and our daughter's application was approved, but we had to wait until 6 May to pick up her passport.

In the very early hours of the morning of 6 May, my wife went back to Guangzhou and collected the passport. When she informed me that she passed the China-Hong Kong

boarder security check, I started to make the final arrangements for our tickets to the USA. As I was calling the travel agency, a journalist who was interviewing me at the time realised that we were "escaping". The journalist followed us to the US and brought our "escape" to the attention of the international media.⁵

The Future

Aizhixing Institute is still operating but its future remains uncertain. More government agencies are scrutinising and investigating not only Aizhixing but also companies associated with it. A printing company which produced educational materials for Aizhixing is now under investigation. The harassment of Aizhixing staff also continues. Recently, on 7 July 2010, a colleague was summoned by China's internal security police for organising an AIDS documentary film screening in our office.⁶ More people are thinking of leaving.

As a long-term activist working with vulnerable communities, I would like to share my experience with emerging civil society and human rights activists in China. I hope to continue my work through organising and establishing services and resources outside China to support civil society groups generally but with a focus on supporting human rights defenders and human rights development in China in particular. And of course I will continue to support the Beijing Aizhixing Institute and AIDS NGOs in China.

¹ See Branigan, T., "HIV/Aids activist flees China for US", *Guardian Unlimited*, 10 May 2010, available at: <http://www.guardian.co.uk/world/2010/may/10/aids-activist-flees-china-america>.

² See Yanhai, W., Ran, H., Ran, G., Arnade, L., "Discrimination against People with HIV/AIDS in China", *The Equal Rights Review*, Volume 4, 2009, pp. 15 - 25.

³ A Schengen visa allows holders to enter and travel freely within 25 countries in Europe.

⁴ See Reuters, *Reuters Profiles "AIDS Village" in China's Henan Province*, 15 March 2004, available at: <http://www.thebody.com/content/world/art10302.html>.

⁵ See above, note 1.

⁶ See Amnesty International, *China Must Halt Harassment and Censorship of HIV/Aids Activists*, 9 July 2010, available at: <http://www.amnesty.org/en/news-and-updates/china-must-halt-harassment-and-censorship-hiv-aids-activists-2010-07-09>.

INTERVIEW

"If discrimination is approached appropriately - that is, in substantive terms against hierarchies based on race or sex or age, for example, rather than enforcing sameness or punishing difference, which is the abstract Aristotelian approach standardly applied in the US and the EU both - there is no distinction between positive/affirmative action and non-discrimination. Equality is promoted either way."

Catharine MacKinnon

Comparative Perspectives on Equality Law – A View from the United States and the European Union

The purpose, scope and approach of equality law often differ from jurisdiction to jurisdiction. Yet the legal responses to the problems of inequality in most countries are sparse – approximately 80% of countries globally having no comprehensive equality law. The European Union and the United States are two systems which have traditionally adopted legal approaches to combating discrimination and reducing inequality.

ERT spoke with Professor Catharine MacKinnon, Professor of Law at the University of Michigan and Professor Miguel Poiates Maduro, Professor of Law at the European University Institute about equality law and practice in the United States and the European Union respectively and the way forward for both jurisdictions.

ERT: What are the principal practical drivers for equality law, policy and practice in the USA? Is it litigation, equality commissions, civil society initiatives, politicians or something else?

Catharine MacKinnon: The prime movers toward equality in reality, whether through law or other forms of practice, are the unequal, often those who are most severely discriminated against. All else follows, often lagging by decades or even centuries, depending upon how little power and status the unequal have and how much stake in their inequality the powerful enjoy, how unconsciously. The media, which controls what counts as knowledge in developed societies, should be on your list.

ERT: And how about the EU?

Miguel Poiates Maduro: All those actors play a role but they often do so at different stages and in different institutions. I think that the extent to which those and other actors are driving equality law and policy is a function of different institutional settings and the information and transaction costs of participation in those settings.

With respect to litigation, for example, equality commissions are starting to play an important role and its natural for them to do so as the litigation costs and risks in this area of the law are often very high for individual litigants and often deter them from bringing cases.



Another important aspect to take into account is the extent to which equality issues have been Europeanised leads social actors to change their actions from the national to the European level. The balance of power between different actors at national level may itself pull in favour of Europeanising these issues. This is not without consequences. Actors that are not successful in promoting certain policies at national level will feel tempted to try to achieve coalitions at European level to promote them there. In this respect, the role played by the different actors is not the same at national and European level and moving from the national to the European level may change the balance of power between the relevant actors.

I am simply highlighting the variables that may determine the role played by those different actors in equality law and policy at the EU level and some of its consequences. I do not know enough however to state what are exactly the most important actors driving equality law and policy at the European

level. I will say something else, however. Initially the driving force behind equality law at European level was the promotion of the common market (so as to prevent distortions of competition) but once non-discrimination, even if for that reason, became part of EU (at the time EEC) law discourse it has gained autonomy and slowly developed into a fully fledged EU policy. The political and legal discourses on equality (perhaps better, on non-discrimination) have moved, in several respects, to Europe and are no longer functional to the internal market. This is both a product of the action of certain of those actors and also impacts on those actors' actions.

ERT: What are the key lessons that the USA can learn from EU equality law and vice versa?

Catharine MacKinnon: The US can learn from the EU that if you begin with a substantive legal commitment to sex equality, you are more likely to advance in that direction. The



EU can observe the same from some US law on race.

ERT: If you could change one aspect of the equality laws in the USA, what would it be and why?

Catharine MacKinnon: We should ratify the Convention on All Forms of Discrimination against Women without qualifications. US women need the rights in it, and US law has otherwise painted itself, and us, into a corner. It would also be refreshing to join the world.

ERT: And for the EU?

Miguel Poiates Maduro: Tentatively speaking, maybe what we need is a more articulated and sophisticated theory of non-discrimination. Judicial resources are limited. It will be impossible for courts to be involved in all discrimination issues so they will have to develop criteria for different levels of judicial scrutiny of both public and private actions. This will be mostly a jurisprudential and not legislative development. But for that we need to reflect on the areas where courts can play a more useful role in reviewing possible discriminatory actions. They won't be able to do all we would like them to do.

ERT: What do you think is the next big equality issue that the EU will have to address? Is it adequately equipped to do so?

Miguel Poiates Maduro: I think we are missing one dimension of the discourse on equality in the EU – that linked to distributive justice. The EU has now a developed non-discrimination law but it refuses to face the question of distributive justice – the other equality dimension. To what extent can an increasingly majoritarian EU, and one whose policies increasingly have redistributive effects, exist without criteria for distributive

justice? Majoritarian polities require a sense of civic solidarity among their members. The recent financial crisis has created the need for an economic government that would further see the EU imposing redistributive consequences on the Member States, which will require us to address the question of distributive justice in the EU.

ERT: And the next big equality issue that the USA will have to address?

Catharine MacKinnon: Prostitution and trafficking for prostitution, including internally, urgently need addressing. Whether the US is attitudinally equipped to do so remains an open question, given the power of the pimp lobby and its hangers-on in all sectors of society. But the issues are political rather than strictly legal.

ERT: Today many of us live in a privileged, resource plenty society which to a large extent has been built on years of acute discrimination against others. Does your understanding of discrimination necessitate the addressing of past injustices through positive/affirmative action? How far, if at all, should equality law be utilised for such purposes?

Miguel Poiates Maduro: I believe positive/affirmative action is justified to break discriminatory path dependencies and eliminate structural biases but not for purposes of group compensation. I see no normative reason for an individual of a group that has historically benefited from discrimination being discriminated against to favour another individual that “belongs” to a group that has suffered such discrimination. Past discriminations do not justify current discriminations between individuals that have not themselves benefited or been the object of such discrimination. That would simply rein-

force the “group” logic that has, for so long, promoted discrimination. On the other hand, I do believe that many of our social practices are still embedded in discrimination and that affirmative action can help to reshape those social practices and their inherently discriminatory actions (even when not expressly intended). The line may not always be easy to draw in practice but that does not mean that it is not important to keep in mind the normative difference.

Catharine MacKinnon: Most of “us” still live in societies that are not privileged, and in privileged societies, the years of acute discrimination are hardly past, nor is it only against “others.” And actually positive

action in Europe and affirmative action in the United States do not mean precisely the same things, although the fundamental notion is close. The reason we have laws against inequality is that it exists and needs to be ended and its consequences changed. In my view, if discrimination is approached appropriately – that is, in substantive terms against hierarchies based on race or sex or age, for example, rather than enforcing sameness or punishing difference, which is the abstract Aristotelian approach standardly applied in the US and the EU both – there is no distinction between positive/affirmative action and non-discrimination. Equality is promoted either way.

Interviewers on behalf of ERT:
Jarlath Clifford and Amal De Chickera

ACTIVITIES

- **The Equal Rights Trust Advocacy**
- **Update on Current ERT Projects**
- **ERT Work Itinerary: January-June 2010**

Equal Rights Trust Advocacy

Jarlath Clifford¹

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>.

Update on Current ERT Projects

Project “Law Enforcement Discrimination and Death in Custody”

Launched in December 2007, this project has three main objectives: (i) to systematise the existing knowledge on the relationship between deaths in custody and discriminatory policy or conduct by law enforcement bodies; (ii) to enhance the global understanding of the nexus between deaths in custody and discrimination; and (iii) to develop and promote new advocacy tools to complement existing investigation techniques and standards.

ERT has worked with researchers in Nigeria, India and the US to prepare materials for publication. The publications will fill a gap in existing writings and analysis on deaths in custody – raising questions on the links between deaths in custody, the identities of those who are dying and equality and discrimination – including discrimination in law enforcement. They will demonstrate that the analytical framework of discrimination and equality can assist law and policy makers, practitioners and campaigners to identify changes that will contribute to more effective prevention of deaths in custody. The publications will focus on widespread patterns of human rights violations in Nigeria and the USA, in which victims’ vulnerability are combinations of race, socio-economic status, nationality and mental health status.

In the first half of 2010, ERT has built on its work under this project to develop further steps in the area of discriminatory torture and cruel, inhuman or degrading treatment. Lessons learnt are being transferred onto projects currently under development, in-

cluding in India, Moldova, Nigeria and Yemen.

Project “Detention of Stateless Persons”

This project started in May 2008 with the aim of strengthening the protection of stateless persons who are in any kind of detention or imprisonment due at least in part to their being stateless, and to ensure they can exercise their right to be free from arbitrary detention without discrimination. UNHCR and others have expressed the view that stateless persons should not be detained only because they are stateless. If detention has no alternative, its maximum length should be specified, based on strict and narrowly defined criteria. However, this principle has not been translated into international or national legal standards or into practice. Progress is hampered by a lack of information on cases of detention, including prolonged and indefinite detention, of stateless persons.

The project therefore pursues two interrelated objectives: (i) to document the detention, or other forms of physical restriction of stateless persons (*de jure* and *de facto*) around the world; (ii) to use this information to develop detailed legal analysis as a basis for international and national advocacy against the arbitrary detention of stateless people.

Below is a summary of ERT’s activities in this project since the publication of ERR Volume 4 (December 2009):

The year began with the publication of two country reports, based on ERT’s field research:

1. *“Trapped in a cycle of flight: Stateless Rohingyas in Malaysia”*, on 5 January 2010.

2. *“From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained Under U.S. Authority”*, on 19 January 2010.

During the course of this reporting period, the final project report was developed through many stages of editing and expert review. After an internal review process, the report was shared with a group of experts in the fields of nationality and statelessness, refugee law, equality, non-discrimination and human rights, and detention. This was followed by a further stage of review and editing in order to finalise the report for publication in July 2010.

In July 2010, ERT published a 300-page report entitled *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*. The report is also available online at the ERT website.

During January-June 2010, ERT project staff participated in and contributed to many related activities. Lead researcher and project coordinator Amal De Chickera conducted a session on the detention of stateless persons at the University of Oxford, Refugee Studies Centre’s Short Course on Statelessness on 18 April 2010. Senior project advisor Stefanie Grant and Amal De Chickera participated in the UNHCR Expert Meeting on the Concept of Statelessness under International Law on 28–29 May 2010. The meeting which was held in Prato, Italy, focussed on the definitions of *de jure* and *de facto* statelessness. On 15 June 2010, Amal De Chickera spoke at launch of the UNHCR photography exhibition *“Living Silence: Rohingya Refugees in Bangladesh”* in London. He also participated in the Annual UNHCR NGO Consultation in Geneva, at which he acted as Rapporteur for the ses-

sion on statelessness on 30 June 2010. ERT also joined the Detention Forum – a forum of organisations in the UK which work on behalf of immigration detainees – to further its advocacy work on behalf of stateless persons in immigration detention in the UK.

Project “Promoting Better Implementation of Equality and Non-discrimination Law in India”

This project started in May 2009 with support from the UK Foreign and Commonwealth Office and in partnership with the Delhi based Human Rights Law Network (HRLN). The project will run until March 2011 and its purpose is to build the capacity of NGOs and lawyers to implement equality and non-discrimination law and policy in India through the promotion of national, regional and international standards and best practice.

ERT and HRLN have continued to work on comprehensive handbook for paralegals and human rights lawyers on equality and non-discrimination law in India, presented from an international and comparative perspective, and will deliver a second training session for lawyers and activists on the same subject. A team of researchers are drafting sections of the handbook covering, gender, disability and sexual orientation discrimination. First drafts have been received and are currently being edited internally. Work has also begun on drafting chapters on sections of the handbook covering race/ethnicity, religion, and caste.

On 12 - 13 December 2009 the project delivered the first of its two planned training workshops, reported in a separate material in *The Equal Rights Review, Volume 4*. Workshop Two will take place on 20 – 21 November 2010 in Delhi and is currently under preparation. It will focus on training judges

and some lawyers from India on equality law concepts, enforcement, discrimination on grounds of race and ethnicity, discrimination on grounds of religion and belief and discrimination on grounds of caste.

Project “Empowering Disadvantaged Groups in Kenya through Combating Discrimination and Promoting Equality”

This project started in July 2009 with the aim of enabling Kenyan civil society organisations (CSOs) to be key players in building a national anti-discrimination regime. ERT is working with two local partner organisations on a range of activities with the view to promoting the adoption of comprehensive anti-discrimination legislation, including the development of draft comprehensive anti-discrimination law and adoption of a joint lobbying strategy.

A detailed report on the project is included in the Special section of this issue of *The Equal Rights Review*.

Project “Promoting LGBT Rights in a Unified Equality Framework”

This project started in October 2009. Benefitting from the conceptual framework of the Declaration of Principles on Equality, the purpose of the project is to draft a study which maps out the different existing and possible advocacy approaches to advancing LGBTI rights, particularly in countries with strong Islamic cultures, on the basis of the integrated framework of equality of rights. The project will produce a study which will explore:

1. Are there any advantages in applying the unified perspective on equality in defending LGBTI rights?

2. If the answer above is positive, are these advantages relevant to countries with Islam and other (particularly African) countries where there exists strong resistance to a liberal rights approach?

A draft study was finalised in May 2010. The study examined (i) the challenges in the LGBTI struggles; (ii) defending LGBTI rights through Islamic principles; (iii) legal strategies for defending LGBTI rights using the Declaration of Principles on Equality and progressive Islamic principles; and (iv) political and practical strategies for defending LGBTI rights using the Declaration of Principles on Equality and progressive Islamic principles. The draft study is currently going through a cycle of expert reviews.

Project “Malaysia: Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation”

This project started in March 2010 with support from the European Commission in partnership with the Malaysian based NGO Tenaganita. The project will run until September 2011 and its purpose is to strengthen the role of Malaysian civil society in implementing equality and anti-discrimination provisions enshrined in the Federal Constitution, in line with international law.

The project has two specific strategic objectives. They are:

1. To increase the capacity of civil society organisations and other professionals to improve the implementation of the right to equality and non-discrimination under the Federal Constitution and build a national anti-discrimination regime through litigation and public advocacy work;

2. To create an institutional framework for civil society dialogue and strategic intervention on equality and discrimination issues through establishing an Equality Forum.

Since the start of the project, the project team have been conducting a baseline study through drafting an equality law and policy questionnaire and disseminating it to civil society organisations in Malaysia. Preparations are also underway to establish an Equality Forum – the second strategic objective of the project. Over the 18 month period the project will:

- Publish a review of national equality and non-discrimination jurisprudence;
- Establish a bi-monthly NGO Equality Forum;
- Conduct an intensive training workshop on equality and non-discrimination law;
- Intervene in strategic litigation cases involving the right to equality and non-discrimination;
- Conduct a roundtable discussion with civil society organisations, government stakeholders, judiciary and prosecutors on the current status of equality law in Malaysia.

Project “Strengthening Legal Protection from and Raising Awareness of Discriminatory Ill-Treatment in Republic of Moldova, including Transnistria”

This project started in March 2010 with support from the European Commission, in partnership with the Moldovan NGO Promo-LEX. The purpose of this 18-month project is to contribute to strengthening the legal protection from discriminatory ill-treatment and raising awareness of stakeholders on discriminatory ill-treatment.

The project has nine specific strategic objectives. They are:

1. To develop key litigation partnerships with other national NGOs specialised in promoting respect for the rights of vulnerable groups;
2. To increase the application of the international human rights principles of prohibition of ill-treatment and non-discrimination in domestic litigation;
3. To provide legal representation to victims of discriminatory ill-treatment before domestic and international courts;
4. To provide assistance in litigation to local partners;
5. To undertake legal capacity building efforts to develop knowledge and understanding of the civil society actors of the nature and extent of the discriminatory ill-treatment;
6. To engage in dialogues with partners and key state institutions;
7. To contribute to *The Equal Rights Review*;
8. To produce and disseminate a report on discriminatory ill-treatment in the Republic of Moldova, including Transnistria.

The project aims to achieve these objectives through the following activities; (i) Identifying and developing strategic litigation cases, (ii) publishing a report on discriminatory ill-treatment in the Republic of Moldova, including Transnistria; (iii) translating and disseminating *The Equal Rights Review* to Moldovan stakeholders; and (iv) undertaking advocacy action through intervening with letters of concern before law enforcement bodies and local authorities to support individuals re-

questing investigation of the alleged discriminatory ill-treatment.

In the period since March 2010, a monitoring network was established and a training course on discriminatory ill-treatment was

prepared and delivered in early August by ERT in Chişinău. The course trained 25 human rights advocates on issues in the intersection between equality law and the right to be free from torture and other ill-treatment.

ERT Work Itinerary: January – June 2010

January 5, 2010: Published report entitled “Trapped in a cycle of flight: Stateless Rohingya in Malaysia”. In the report, ERT called on the government of Malaysia to grant legal residency to the estimated 30,000 stateless Rohingya refugees currently living in the country.

January 19, 2010: Published report entitled “From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority”. The report 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.

January 25-30, 2010: Hosted a two-day roundtable for Kenyan civil society, political and institutional stakeholders to discuss needs, priorities and opportunities for legal reform on equality, and delivered training on anti-discrimination law and concepts to staff from civil society organisations, in Nairobi.

February 1-2, 2010: Served as expert on defining the mandate of the newly appointed UN Independent Expert on Cultural Rights and presented a paper “Diverse Cultural Identities: the Challenges of Integrating Cultural Rights in Policies and Practices”, in a meeting organised by the UN Office of the High Commissioner on Human rights, in Geneva.

March 4, 2010: Participated in Roundtable meeting on Gender Mainstreaming, Sexual Orientation and Gender Identity, organised by ILGA-Europe, in Brussels.

March 11-16, 2010: Delivered training on anti-discrimination law and concepts to staff from local civil society organisations, in Mombasa and Kisumu, Kenya.

March 13, 2010: Presented a lecture on “Islam, Equality and Human Rights: the Application of Equality Principles in Muslim Countries” at a Conference “Islam and Human Rights” organised by Al-Mahdi Institute, in Birmingham.

April 18, 2010: Conducted a session at the University of Oxford’s Refugee Studies Centre Short Course on Statelessness on the detention of stateless persons, in Oxford.

May 17-21, 2010: Hosted a UK study tour for a six-person working group of Kenyan human rights lawyers and activists to learn about the development of comprehensive anti-discrimination law from comparative perspectives and begin development of a legislative map for a Kenyan comprehensive anti-discrimination bill.

May 18-20, 2010: Participated in the Global Meeting of LGBT leaders, organised by Arcus Foundation, in Berlin.

May 27, 2010: Co-hosted, in conjunction with the UCL Institute for Human Rights, a public lecture on the topic “Will Obama Deliver on Equality?” by Professor Theodore Shaw, London.

May 28 – 29, 2010: Participated in UNHCR Expert Meeting on the Concept of Statelessness under International Law, in Prato, Italy.

May 31, 2010: Presented the report “Religion and Healthcare in the European Union: Policy Issues and Trends” at a session organised by the Network of European Foundations entitled “Religion and Democracy in Europe – Religious Plurality and Implications for Social Cohesion” in Brussels.

June 15, 2010: Spoke at launch of UNHCR photography exhibition “Living Silence: Rohingya Refugees in Bangladesh”, in London.

June 17, 2010: Spoke at a symposium “Equality and Diversity Issues in the Workplace”, organised by Oxford Brookes University, in Oxford.

June 29 – July 1, 2010: Participated in the Annual UNHCR NGO Consultation and acted as Rapporteur for the session on statelessness, in Geneva.

Erratum

The article “Affirmative Action without Quotas in Northern Ireland” published in Volume 4 of *The Equal Rights Review* incorrectly cited the sole authors as Christopher McCrudden, Raya Muttarak, and Anthony Heath. The correctly cited authors for this article are Christopher McCrudden, Raya Muttarak, Heather Hamill and Anthony Heath.

Note to Contributors

The Equal Rights Review is currently being restructured. From Volume 6 onwards it will have an Editorial Advisory Board and will adopt a peer review process of publishing authored articles. The Equal Rights Trust invites original unpublished articles for the future issues of *The Equal Rights Review*. We welcome contributions on all aspects of equality law, policy or practice. We encourage articles that examine equality in respect to cross-cutting issues. We also encourage articles that examine equality law policy or practice from international, regional and national perspectives. Authors are particularly welcome to submit articles on the basis of their original current or past research in any discipline related to equality.

Peer Review Process

Each article will be peer reviewed prior to being accepted for publication. We aim to carry out the peer review process and return comments to authors as quickly as possible.

Further Information and Where to Submit

Articles must be submitted by email attachment in a Microsoft Word file to: info@equalrightstrust.org

For further information regarding submissions, please email: nicola.simpson@equalrightstrust.org

Submission Guidelines

- Articles should be original, unpublished work.
- Articles must be written in United Kingdom English.
- Articles must contain footnote or endnote referencing.
- Articles should be between 5,000 and 10,000 words in length.
- Articles must adhere to the **ERT style guide, which is available at: <http://www.equalrightstrust.org/ertdocumentbank/ERR%20STYLE%20GUIDE.pdf>**



The Equal Rights Trust

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 think tank, ERT focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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