



The Equal Rights Review

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

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Vote for Equality!

As the Universal Declaration of Human Rights turned 60 in the early winter of global recession, governments worldwide must put equality at the centre of human rights legislation. The ideals of the UN Declaration, launched in the wake of severe repression and economic hardship, will never become a reality unless equality is defined and implemented as a basic human right.

60 years on, we cannot let the hardships of recession blur a vision of a fairer society. Across the world, anti-discrimination law puts individuals into rigid boxes, often serving to reinforce stereotypes rather than breaking them down. The Equal Rights Trust (ERT) is urging a wiser and fairer international and national law approaching equality and human rights from a unified perspective, built on the recognition of difference and on the presumption that human rights are only possible to realise when we have equality.

In the autumn of 2008, ERT launched a global campaign, 'Vote for Equality!', which seeks mass support for new equality and human rights principles to ensure persons and groups around the world are not victimised, excluded and denied equality. The campaign is seeking one million pledges of support for the *Declaration of Principles on Equality*, drawn up by leading human rights lawyers and equality experts, in a bid to get governments to endorse 27 principles which:

- **Define equality as a basic human right** - stating that equality should be seen as an au-

tonomous human right in itself, rather than as subsidiary to other rights.

- **Redefine positive action** - departing from the concept of formal equality and construing positive action as inherent in substantive equality rather than as an exception or a temporary special measure.

- **Ensure consistency and fairness** - enabling stake holders in all nations to enshrine the right to equality in a way that addresses the gaps, inconsistencies and hierarchies of current equality regulations.

Among the intellectual achievements of the *Declaration* is that it breaks and melts two historically constructed dichotomies that today stand in the way of making good law and implementing good practice: the Cold War division of human rights into civil and political on one hand and economic, social and cultural on the other; and the even deeper division created by modernity between identity-based equality (such as gender, race, religion, etc.) and equality of economic status.

The 'Vote for Equality!' campaign is calling for endorsements from individuals and organisations who want to publicly demonstrate their support of the *Principles* set out in the *Declaration*. In this issue, we reproduce the *Declaration* and publish my commentary, in which I provide background on the process of elaborating it, and comment on several of the remarkable legal aspects of the *Declaration*.

To sign up visit this link:

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The *Principles* were drafted and signed initially by 128 prominent legal practitioners, academics and human rights activists from 44 countries. The list of the initial as well as subsequent individual signatories and endorsing organisations reveals an exciting potential for an increasingly strong consensus on a future covenant on equality.

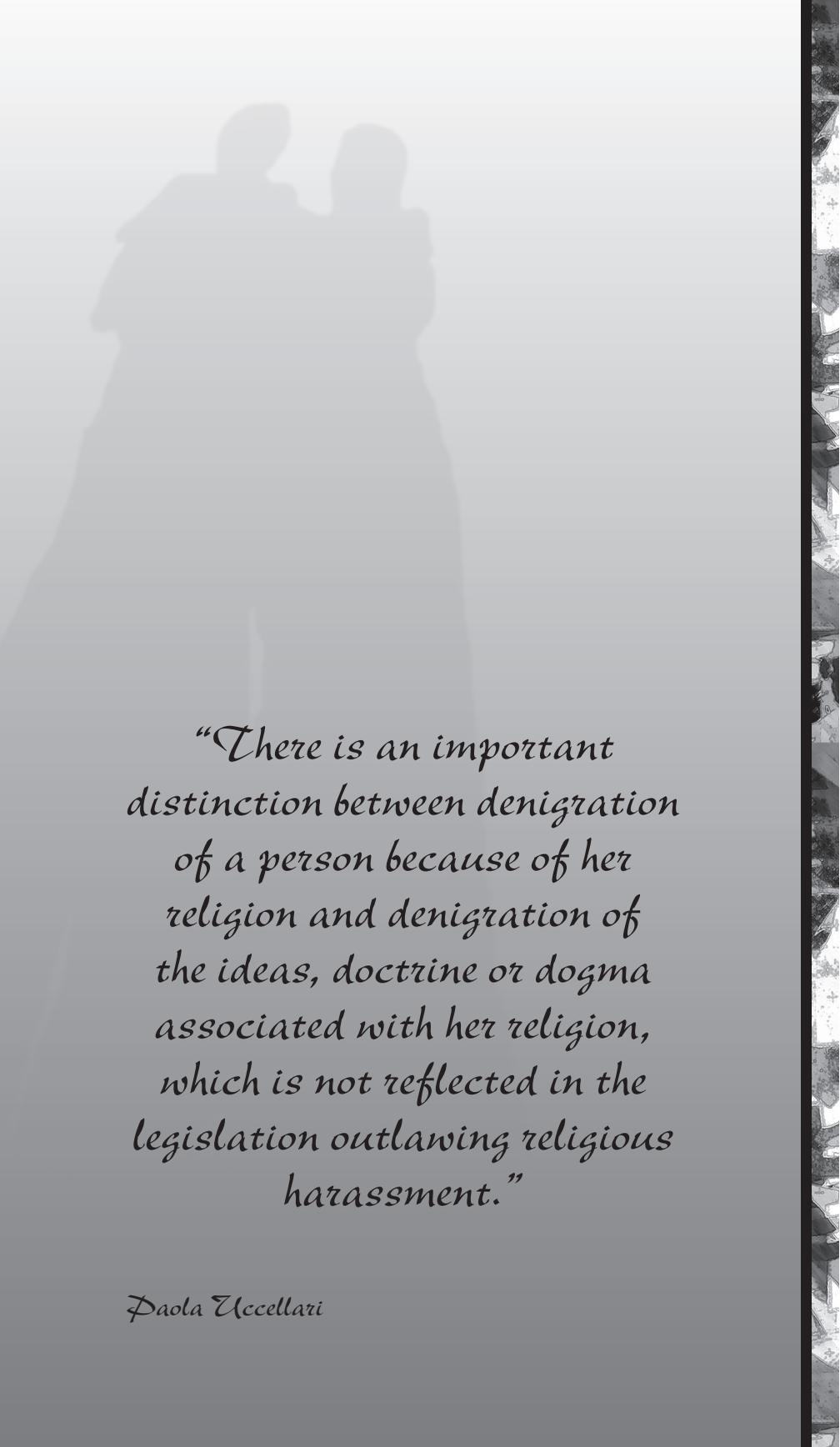
Two of the articles in this volume consider ways in which law can provide protection against religious harassment. Protecting the right to freedom of thought, conscience and religion, including the right to manifest one's religion or belief, in a way that does not impose unwarranted restrictions on the right to freedom of opinion and expression ap-

pears to be among the most difficult issues of equality and human rights law. The first article is written from the perspective of an equality law expert with a specific focus on UK legislation and the European legal framework. The second article reflects views of a human rights activist who is also an accomplished artist from Malaysia, a country with a complex mix of ethnic and religious groups. The third article in this volume takes stock of the legal protection against discrimination in the Pacific Islands states.

In the section dedicated to testimonies of victims of discrimination we put on record the voices of internally displaced civilians in the ongoing armed conflict in northern Sri Lanka. And to mark the coming into force of the UN Convention on the Rights of Persons with Disabilities, ERT interviewed two key experts who contributed to its drafting.

Dimitrina Petrova

ARTICLES

A large, faint, grayscale silhouette of two people embracing, positioned in the upper left quadrant of the page. The background is a light gray gradient.

“There is an important distinction between denigration of a person because of her religion and denigration of the ideas, doctrine or dogma associated with her religion, which is not reflected in the legislation outlawing religious harassment.”

Paola Ucellari

Banning Religious Harassment: Promoting Mutual Tolerance or Encouraging Mutual Ignorance?

Paola Uccellari¹

“Ronny approved of religion as long as it endorsed the National Anthem, but he objected when it attempted to influence his life. Then he would say in respectful yet decided tones, ‘I don’t think it does to talk about these things, every fellow has to work out his own religion,’ and any fellow who heard him muttered, ‘Hear!’”

(E.M. Forster, A Passage to India)

1. Introduction

When lawmakers introduce equality legislation to encourage mutual tolerance between different religious and secular groups they must find a way of promoting respect for the rights of groups to exist and express their beliefs, without necessarily requiring respect for the beliefs themselves. The achievement of this balance in the law prohibiting religious harassment has proved a difficult task for legislators.

In the United Kingdom in 2005, the House of Lords removed a clause from the Equality Bill² which would have extended protection against religious harassment beyond the employment sphere. This reflected experiences in the USA, where guidelines which defined religious harassment in the same way as harassment on other grounds met with such criticism that they were dropped.³ In more recent proposals to overhaul discrimination law, and seemingly learning from its 2005 experiences, the UK Government announced that it would not extend the reach

of religious harassment provisions.⁴ Weeks earlier, however, the European Commission had adopted a proposal for a Directive which would require Member States to provide this very protection.⁵ This article explores why religious harassment provisions cause such controversy and considers how UK legislators can approach this issue in order to avoid the problems faced in the past.

Broadly, the article argues that just as with other grounds, highly insulting slurs directed against people on the grounds of religion or belief should be prohibited in certain areas. A ban on direct discrimination on the grounds of religion would be of little use if a service provider were to carry out her discrimination, not by refusing to serve a person of a particular religion, but by making the service experience so unpleasant that the service user’s position becomes untenable. It explains, however, that the sweep of harassment provisions, when applied to religion and belief, can be far broader than this and far broader

than when applied to other grounds, if not carefully drafted. The second part of this analysis will examine the scope of the British definition of religious harassment and the type of activity it prohibits.

In Britain, broadly the same definition of harassment applies to all protected grounds, but it has particular implications in relation to religion and belief. There are good reasons to aim for uniform protection across the main protected grounds. However, the grounds have their own specificities which militate against uniform treatment in all respects. The third part of the article will identify the specificities of religion and belief which mark it out as a ground requiring different treatment under equality legislation, particularly with regard to provisions outlawing harassment.

The fourth and fifth parts explore the close relationship between religion and belief and the fundamental rights to liberty of conscience and expression. It explains why these human rights demand caution in legislating to protect people against religious insult and to restrict religious expression. Reference will be made to the requirements of international human rights law, particularly European human rights law. Analysis of the compatibility of British provisions with human rights law is used to draw lessons as to the appropriate scope of legislation banning religious harassment.

The member states of the European Union are already obliged to outlaw religious harassment in employment and related fields.⁶ It was in the context of a proposal to extend protection against religious harassment to education, the disposal and management of premises and the carrying out of public functions that the UK government was forced to back down in 2005. It had itself decided not

to provide protection against religious harassment in relation to goods, facilities and services. The proposed EC Directive would offer protection in all those fields. The fifth part of the article will consider whether governments are justified in affording different treatment to religious harassment in different areas of activity.

2. What Is Religious Harassment?

The implications of a prohibition of religious harassment can only properly be understood if the scope of such provisions is explored. Regulation 5 of the British Employment Equality (Religion or Belief) Regulations 2003⁷ (the Religion and Belief Regulations) defines harassment in the following way:

“(1) a person (“A”) subjects another person (“B”) to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of -

(a) violating B’s dignity; or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.”⁸

In applying harassment provisions relating to all grounds, the British courts have applied a subjective standard in determining whether conduct is unwanted and whether or not it causes an intimidating, hostile, degrading, humiliating or offensive environment or violates a person’s dignity:

“Because it is for each individual to determine what they find unwelcome or of-

fensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.”⁹

According to Lucy Vickers, it is the terms “humiliating” and “offensive” which allow claimants to argue that conduct constitutes harassment even where others would not consider it so.¹⁰ The term “dignity” has also been much criticised for its vagueness, which leaves it open to diverse interpretations.¹¹ This means that it is very difficult to refute a claim that conduct has violated an individual’s dignity. Subject to the reasonableness test in Regulation 5(2), if the victim finds conduct offensive or feels that her dignity has been violated on the grounds of religion, it will constitute harassment. On this basis a person can harass another without having any idea that her behaviour is likely to do so.

The reasonableness test enshrined in Regulation 5(2), which is intended to rule out claims from oversensitive victims, is of little impact in relation to religion. “Religion” is a broad and undefined ground and British equality law forbids discrimination not only on religious grounds, but also on the ground of someone’s belief or lack of belief.¹² A wide range of belief systems and philosophies could potentially therefore claim the protection of a prohibition on religious harassment. Even adherents to the same faith can have different understandings of its requirements. Judges will find themselves in great difficulty trying to establish what is reasonably offensive on the grounds of every religion and it is inappropriate that they should attempt to do so. Lord Nicholls of Birkenhead has said:

“[E]mplicitly, it is not for the court to embark on an inquiry into the asserted be-

lief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual... [R]eligious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.”¹³

The personal and subjective nature of belief means that, just as a court cannot determine that a practice or belief is outside the ambit of a particular religious creed, it is impossible to say what is “reasonably” offensive or humiliating to a person of a particular religion. Regulation 5(2) specifically requires particular regard to be had to the perception of the victim and this must be correct. It would be highly inappropriate for judges to elaborate the doctrine of a religion or belief system in order to determine what is reasonably offensive according to it. Indeed, “the defining aspect of most religious views is their lack of susceptibility to proof or reason”.¹⁴ If courts and tribunals are to respect the subjectivity of religious feeling they must also avoid imposing their own or majority views as to the level of offence a comment is likely to cause. The Parliamentary Assembly of the Council of Europe has noted that,

“... there are considerable differences both between religions and within them, in what is considered religiously insulting behaviour or action. What makes the situation difficult is that even though on an abstract theological level religious insults can often be relatively easily identified, in practice the understandings, responses and reactions to

such insults do not follow a consequent logic, but are rather intertwined with many other issues. For instance, the reactions to Salman Rushdie's book *The Satanic Verses* among the many Muslim and ethnic communities were remarkably different. The same happened again in regard to the Jyllands-Posten Muhammad cartoons controversy."¹⁵

Vickers too highlights a lack of common understanding regarding the likely effects of conduct related to religion, which leads to difficulty in applying an objective standard in cases of religious harassment.¹⁶ On this basis the reasonableness test, when applied to religion, offers little scope for the introduction of objectivity, other than in the case of patently inoffensive conduct.

The conduct need only have the "effect" in question and so a perpetrator will not be able to escape liability by pointing out her innocent intentions. Whether the speaker intended to create a hostile environment, was merely careless, or was even unaware that this would be the result of her words, her speech will constitute harassment if it, in effect, does so. There is no requirement that the offensive conduct be directed at the victim of discrimination and harassing "conduct" can include a broad range of behaviour, including assault, speech, or the display of signs or objects. Harassment is not limited to the "obvious" case of abuse of a religious person by a non-believer. It might also be carried out by a believer against the non-religious, people of a different religion, or people of the believer's own religion, perhaps those who do not live according to the speaker's own interpretation of the faith.¹⁷ Importantly, particularly harmful conduct need only occur once in order to satisfy the definition of harassment.¹⁸

The prohibition of religious harassment in the Religion and Belief Regulations was intended to implement the European Community Employment Directive (the Directive).¹⁹ National authorities do, of course, have a choice as to the form and methods of transposition, so long as they give effect to the substance of the Directive. However, in one respect the Religion and Belief Regulations provide more limited protection than is required.²⁰ Under the Religion and Belief Regulations a victim must show that she engaged in the harassing conduct *on the grounds of* religion, whether her own or her victim's.²¹ Under the Directive, conduct should be prohibited where *it relates to* religion and violates dignity or creates the relevant environment, whether or not the person's actions are motivated by religion. A person who discusses abortion with a colleague, not because of her own or her colleague's religion or belief, but because she is interested in her colleague's views, is not acting on grounds of, or because of, religion. If, however, her colleague holds religious beliefs in relation to abortion which conflict with the views she has expressed, her words may well create an offensive environment "related to" religion. Amendment or interpretation of British law in line with the Directive will broaden further the scope of religious harassment by catching the discussion of secular subjects, which are offensive to religious people, but where the discussion is in no way motivated by religion.

The British definition of harassment is broad and in relation to religion it loses all objectivity. This situation is exacerbated by the particular features of religion and belief as a ground, discussed in the following section, which mean that discussion of almost any subject could potentially cause religious offence and those affected by a prohibition will struggle to know whether they are at risk of doing so.

3. What Makes Religion Special?

Unlike membership of other protected groups, adherence to a religion or belief implies affinity with a set of ideas and opinions. This has significant implications for the scope of religious harassment provisions. Negative discussion of the tenets of a religion or belief system might well create a hostile environment, and therefore be caught by the British ban on religious harassment, where the speaker acts on the grounds of religion or belief. This hurdle would be satisfied, for example, where the speaker is motivated by her own religious beliefs or because she knows that discussion of the subject will be offensive to her listener. Some of the ideas linked to a religion will be theistic. The assertion or denial of such beliefs could be said to create a hostile environment for others. The expression of approval of Richard Dawkins' book, *The God Delusion*, may well offend those who believe in God.²² A unilateral declaration of faith or the display of a poster praising God's love might create an intimidating environment for those who do not. Religious teachings and non-religious beliefs are not, though, restricted to matters of spirituality. Believers will also hold strong views on secular subjects, such as the consumption of alcohol, sexual behaviour, the use of violence, etc., as a result of their beliefs. Discussion, criticism, or ridicule of these views or behaviour related to these beliefs will be restricted where the speaker acts on the grounds of religion or belief. A person might be motivated by her religion to criticise the "secular" behaviour of a colleague which conflicts with her beliefs, such as the conduct of sexual relationships outside of marriage or the use of contraception. Mocking approval of war in order to upset a pacifist colleague might equally fulfil the definition. The scope for causing offence on grounds of religion or belief is enormous.

There is an important distinction between denigration of a person because of her religion and denigration of the ideas, doctrine or dogma associated with her religion, which is not reflected in the legislation outlawing religious harassment.

The range of religions and beliefs protected under discrimination legislation, each with their own creeds and doctrines, presents huge potential for conflict between belief systems and thus huge potential for harassment. One person's creed is another's blasphemy. Atheists might object to all religious expression. Religious diversity can bring mutual enrichment, but is also a potential source of social division and tension.²³ Like no other ground, equality legislation in relation to religion must encourage tolerance not only of people, but also their ideas. For this reason religion demands a specific approach under the law of discriminatory harassment. Mutual respect among different people might best be achieved through the suppression of abuse and insult, but mutual tolerance of ideas is more likely to be achieved through open debate.²⁴

Unlike other protected groups, religions and belief systems seek to recruit new followers. Adherents to certain religions consider themselves bound by their faith to spread the word and convince others to join their faith or to change their behaviour. Under British legislation, attempts by a speaker to convert others to his or her religion or belief will be prohibited if the target of such attempts considers that her dignity is thereby violated or if they create an intimidating or hostile environment. Atheists might consider a workplace adorned with posters spreading the word to be offensive. A Muslim might find her doctor's surgery intimidating if she is repeatedly urged to attend church by the receptionist.

Some argue, controversially, that, unlike the other grounds, which are immutable personal characteristics, religious and other beliefs are chosen.²⁵ On that basis, they contend that an attack on a person's life-choices, their chosen religion, just as their chosen career, is not as harmful as an attack on the very essence of their being and does not require the same protection. Further, since beliefs are chosen and subject to change, they should be open to criticism and debate in order that the "right" beliefs are chosen by the majority of people in society.²⁶ The Venice Commission²⁷ has stated:

"The Commission observes that when it comes to freedom of expression, there appears to be a difference between racist insults and religious insults: while race is inherited and unchangeable, religion is not, and is instead based on principles and values which the believer will tend to hold as the only truth. This would seem to admit as lawful a wider scope of criticism in respect of a religion than of disrespect in respect of a race."²⁸

Such arguments are of course open to challenge. Those adhering to a religion or belief might well argue that their beliefs define their identity in a way that race and gender do not, and are far more important to their sense of self.²⁹ An attack on those beliefs will therefore be extremely harmful to their right to be who they are and to live according to their identity. They would surely argue that a faith or belief of the type to gain protection under discrimination legislation is not chosen through a process of analysis, but is rather an inherent faith gained through divination. Such beliefs can only be changed at such cost that they should be considered "constructively immutable."³⁰

There are practical reasons why religion and belief should be treated differently as a ground. Unlike most other protected characteristics (though similar considerations apply in relation to sexual orientation and disability) a person's religion or belief is, in itself, invisible. Further, a person's beliefs are highly personal and private and may not be readily divulged. It is therefore possible to cause offence on religious grounds without knowledge of a listener's sensibilities.³¹

The difficulty of identifying the sensibilities of an audience and the broad range of potentially offensive subjects, make it difficult for even the most careful person to avoid liability. These considerations make a prohibition of religious harassment, as defined in Britain, unworkable. The following section will explain that these factors will also make it unlikely that such religious harassment provisions are compatible with human rights law.

4. Competing Rights: Religious Harassment and Freedom of Expression

Article 10(1) of the European Convention on Human Rights (ECHR) provides:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) is in similar terms.³² The prohibition of discriminatory harassment, irrespective of the ground in question, requires a balance to be struck between the right to freedom of expression and the right to be free from discrimination.

To ban harassment restricts certain types of speech, in order to protect a victim's right to be free from discrimination. States are, however, permitted to interfere with the right to free speech in order to protect the rights of others.³³ In Europe, it is generally accepted that when the two rights are placed in the balance, the public interest in protecting the victims of discriminatory harassment outweighs the right of discriminators to free speech.³⁴ It would, however, be wrong to assume that because this conclusion is correct in relation to other grounds, it is correct in relation to religion.

The conflict between religious harassment provisions and freedom of speech will only arise if the right to free speech is engaged. In a decision which has been described as "the paradigmatic example of balancing"³⁵ the Canadian Supreme Court emphasised that, "[a]ny potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved".³⁶ If the type of speech caught by a prohibition on religious harassment is such that it does not enjoy the protection of free speech provisions there will be no interference with that right and the prohibition will not be subject to scrutiny under human rights law.

The European Court of Human Rights (ECtHR) has repeatedly stressed that Article 10 ECHR protects the right to impart "not only 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population".³⁷ Sedley J. has said that, "[f]reedom only to speak inoffensively is not worth having".³⁸ However, the right to engage in offensive speech has been held, in view of Article 17 ECHR, not to extend to hate

speech.³⁹ The ECtHR's decision in *Norwood v. United Kingdom* is particularly relevant to a discussion of religious harassment:

"The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14 ...

"Where words, signs, etc., are used with the intention of stirring up religious hatred, we cannot imagine circumstances in which such behaviour would fall outside Article 17."⁴⁰

Similarly, the United Nations Human Rights Committee has stated that Article 20(2)⁴¹ of the ICCPR, which requires States to prohibit hate speech, is "fully compatible with the right of freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities".⁴² This suggests that a prohibition of harassment affecting only that discriminatory speech which constitutes hate speech would not interfere with the right to freedom of speech. Most speech made unlawful by a prohibition of religious harassment would, however, gain the protection of the right to freedom of expression and its restriction will, therefore, require justification.

Article 10(2) of the ECHR allows states to

interfere with the right enshrined in Article 10(1), so long as the restrictions are proscribed by law, they pursue a legitimate aim, including the protection of the rights of others, and the interference is necessary in a democratic society,⁴³ that is, it corresponds to a pressing social need and the measures taken are proportionate to the legitimate aim pursued.⁴⁴

The ECtHR considers protection of the religious sensibilities of others to be a legitimate reason to limit the rights of others. In *Wingrove v UK* it held:

“The Court notes at the outset that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner ‘as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented’...

“This is an aim which undoubtedly corresponds to that of the protection of “the rights of others” within the meaning of paragraph 2 of Article 10 (art. 10-2). It is also fully consonant with the aim of the protections afforded by Article 9 (art. 9) to religious freedom.”⁴⁵

Protection against religious discrimination is likely to meet with similar approval as a legitimate aim.

The requirement that any interference with the right in Article 10(1) be proscribed by law is intended to ensure legal certainty as to the scope of the restriction. It is not sufficient that the relevant interference be the subject

of legislation. Individuals must also be able to determine the extent of the restriction. An individual must be able to foresee, to a reasonable degree, the consequences which any given action may entail.⁴⁶ This condition is important because it allows individuals to exercise their remaining Article 10 rights in the confidence that they are not falling foul of the restriction. If laws of uncertain scope were considered legitimate restrictions on the right to free speech, those wishing to ensure compliance would censor their speech to the maximum possible extent required by the law.⁴⁷ Unclear provisions would therefore have a significant chilling effect on exercise of the right. Britain’s statutory prohibition of discriminatory harassment sets out in law a restriction on the right to speak freely. The largely subjective nature of the test of harassment, when applied to religion, and the broad and uncertain scope of subject matters which could be considered “offensive” or to undermine “dignity”, make it far from clear, though, that it meets the legal certainty test.

The vagueness of the definition will also be relevant to application of the proportionality test. In considering whether a restriction is proportionate, the ECtHR will consider whether the restriction was drafted so as to minimise interference with the right.⁴⁸ The scope of the British prohibition of religious harassment is expansive and unclear. This might be expected to undermine claims that it is proportionate. However, the ECtHR has shown latitude in similar cases. In *Kokkinakis v Greece* it rejected the claim that the very existence of a provision criminalising proselytism breached Article 9 ECHR,⁴⁹ even though the contested provision was vague and “such as to make it possible at any moment to punish the slightest attempt by anyone to convince a person he is addressing”⁵⁰

so long as its *application* was restricted to “improper proselytism”.⁵¹ Further, in *Wingrove v UK* [t]he Court recognises that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence”.⁵² It seems that in legislating to prohibit religious harassment States will enjoy a wide margin of appreciation in assessing what is necessary to protect domestic religious sensibilities, so long as courts and tribunals can be relied upon to apply the provisions appropriately. In Britain, courts are required, so far as possible, to interpret harassment provisions to be consistent with the rights protected by the Human Rights Act 1998.⁵³ This might, on the basis of these cases, save the provisions from breach of international human rights law. It is, though, infinitely preferable to exclude inappropriate consequences in legislation than to rely on the restraint of judges, given the chilling effect that is likely to result from the mere existence of broadly drafted provisions.

In considering whether a restriction on the right to freedom of expression is proportionate, the ECtHR has emphasised that the value of the restricted speech will be determinative. Given the importance of political speech to a democracy, matters of public interest⁵⁴ are afforded the highest level of protection.⁵⁵ It is particularly difficult to justify interference with such speech. Neither racial nor religious direct insults serve the public interest and a ban on these is unlikely to be difficult to justify. However, the definition of religious harassment explored in Part 1 potentially restricts not only intentionally insulting speech, but also criticism of the tenets of a

faith, criticism of the views of a religion in relation to secular subjects and even, potentially, discussion of secular subjects for reasons unrelated to religion, which nevertheless offend on religious grounds. A prohibition of religious harassment which is drafted so as to catch this “political” speech is the factor most likely to render the prohibition disproportionate.

It is true that certain political speech is potentially caught by prohibitions on racial or gender harassment. The scope of these prohibitions is, though, far less broad. It is possible to think of only a very limited number of subjects which do not constitute direct insults or abuse but which would nevertheless have the effect proscribed by harassment provisions. Discussion of a belief that women should not be in the workplace but should stay at home might well be offensive on grounds of sex. Expression of a negative attitude towards immigration or approval of a foreign policy decision to go to war with a certain country might be considered to create a hostile or intimidating environment on grounds of race.⁵⁶ These are rare examples, though, when compared to the range of subjects which would fall foul of the British ban on religious harassment. Further, while the reasonableness test is likely to save those accused of racial or gender harassment from liability, its limited impact in religious discrimination cases means that claims of religious harassment related to political speech are more likely to be successful.

The banning of politically valuable speech will only be justifiable where a state can point to particularly important reasons for doing so. The low threshold of harm in British religious harassment cases and the subjective nature of the test, such that a claimant

need only show that she found the speech “offensive”, means that such weighty reasons will certainly not be present in all cases in which liability for religious harassment will arise. This point was illustrated in a recent case. The author of an article which linked a Papal encyclical to the origins of the Holocaust had been convicted of defamation. The ECtHR held that:

“Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian.”⁵⁷

On this basis it held that the conviction did not meet a pressing social need and therefore violated Article 10 ECHR. The article was politically valuable. Offence felt by Catholics at the negative portrayal of their religious doctrine was an insufficient reason to justify its restriction. Similarly, in *Klein v Slovakia*, a case concerning the conviction for defamation of a journalist who criticised an archbishop, the Court held that:

“Contrary to the domestic courts’ findings, the court is not persuaded that by his statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith.

“The fact that some members of the Catholic Church could have been offended by the applicant’s criticism of the archbishop and by his statement that he did not understand why decent Catholics did not leave that church since it was headed by Archbishop J Sokol cannot affect the position...

“For the above reasons, and despite the tone of the article..., it cannot be concluded that by its publication the applicant interfered with other persons’ right to freedom of religion in a manner justifying the sanction imposed on him. The interference with his right to freedom of expression therefore neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim pursued. It thus was not ‘necessary in a democratic society’”⁵⁸

Where a ban on religious harassment restricts the criticism of ideas or persons linked to a religion of belief, rather than the religion or religious people themselves, it is likely to fall foul of the proportionality test and the need to show a pressing social need. The cases also suggest that the intentions of the speaker will be highly relevant to whether the restriction of her speech is proportionate.

In addition to making it possible to justify interference with free speech, Article 10(2) specifies that the right to free expression carries with it certain responsibilities. In this regard, the ECtHR has said:

“As paragraph 2 of Article 10 (art. 10-2) expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, *gratuitously offensive* to others...

“[T]he Court observes that the English law of blasphemy does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit. As the Eng-

lish courts have indicated (see paragraph 27 above), *it is the manner in which views are advocated* (emphasis added) rather than the views themselves which the law seeks to control.”⁵⁹

The ECtHR suggests that individuals do have a right to question and criticise the beliefs of others, but are under a responsibility to do so in a way which avoids unnecessary offence. A definition of harassment which is restricted to reflecting this responsibility – that is by excluding unintentionally offensive speech – might, on this basis, be legitimate.

Notwithstanding the wide margin of appreciation that Contracting States are normally afforded when regulating speech pertaining to religion, the compatibility of a broadly drafted ban on religious harassment with the right to freedom of expression is questionable. The British definition is too vague to allow confident exercise of the right and too wide in scope to be considered a proportionate means of protecting others from discrimination. The value of the speech caught by the prohibition means that particularly weighty reasons are necessary to justify its restriction, which are not met in the case of religious harassment. These features do not apply in the same way to harassment on other grounds.

This analysis of the compatibility of British religious harassment provisions with the right to free speech points to several lessons for legislators. A prohibition could legitimately prohibit the most serious forms of religious harassment, which are expressed in a gratuitously offensive manner, so long as this is done in a way which provides

greater legal certainty as to the scope of the restriction. This should preserve politically valuable speech and avoid the chilling effect of a prohibition which is both broad and vague.

5. Competing Rights: Religious Harassment and Freedom of Conscience

The most significant factor requiring religious harassment to be treated differently from harassment on other grounds is the need to take into account the fundamental right to freedom of religion. Article 18(1) of the ICCPR provides:

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Article 9(1) of the ECHR is in similar terms.⁶⁰ Both those seeking to express their views and those who claim a right to be free from harassment enjoy the right to religious freedom. The right comprises a right to hold a belief and the right not to hold a belief.

Victims of religious harassment will point to their right to “have or adopt a religion of his choice” in support of their claim that the law should protect them from abuse or insults on the basis of their religion, or aggressive attempts to convince them to abandon their faith or lack of faith. The argument would be that there is no genuine freedom to hold a belief, or not to hold a belief, if the lives of those who do so are rendered untenable.⁶¹ This argument appears to find support in international human rights law. Article 18(2) of

the ICCPR states that no-one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. Similarly, the ECtHR has held that Article 9 of the ECHR includes a right to be free from “improper proselytism”.⁶² Overzealous attempts to convert someone should, on this basis, legitimately be prohibited. Further, in *Otto Preminger Institut* the ECtHR concluded that the convention imposes a positive obligation on states to secure the peaceful enjoyment of the right to freedom of religion, which can imply a duty to regulate the expression of opposition to religious beliefs. The court said:

“Those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to them. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to holders of those beliefs and doctrines.”⁶³

Again, the Court emphasises the States’ obligation to regulate the *manner* in which potentially offensive speech is expressed, rather than the expression of that belief itself, as the essential element to protecting the religious sensibilities of victims of harassment under Article 9.

The right to religious freedom can, though, also be relied upon by those faced with liability for religious harassment. Freedom of conscience encompasses not only a right to hold a belief, but also the right to manifest

one’s religion or belief, in worship, teaching, practice and observance. A ban on religious harassment, if not appropriately tailored, will greatly inhibit the manifestation of religion.

An explanation of the scope of the right to manifest religion and belief will illustrate the potential conflict.

It has been argued that, “freedom to practice one’s religion or belief must be understood as protecting, in principle, every act of the individual when he obeys the dictates of his own conscience”.⁶⁴ Again, this reflects the subjective nature of religion. If the right to religious freedom is to be of value, it should not be subject to majoritarian views as to how religious beliefs are properly manifested. This view is supported by the House of Lords in *Williamson*.⁶⁵ The right to manifest religion and belief does not, though, “cover each act which is motivated or influenced by a religion or a belief”.⁶⁶ In *Arrowsmith v. the United Kingdom* the ECtHR held that the distribution of leaflets which were critical of government policy, though motivated by a pacifist belief, was not a manifestation of that belief.⁶⁷ Many decisions as to whether speech relating to religion constitutes a “manifestation” of religion, will, therefore, depend on the particular beliefs and what behaviour they require, but several general comments can be made.

The right to manifest religion certainly does include a right to try to convince others of that belief:

“Bearing witness in words and deeds is bound up with the existence of religious convictions... freedom to manifest one’s religion... includes in principle the right to try to convince one’s neighbour, for example through ‘teaching’, failing which, moreover,

‘freedom to change [one’s] religion or belief’, enshrined in Article 9 (art. 9), would be likely to remain a dead letter.”⁶⁸

And yet when proposing to introduce a ban on religious harassment outside of the workplace, the UK Government admitted that it would restrict the right to proselytise:

“Posters which are clearly aimed at converting others to a particular faith, rather than celebrating a faith, could be considered harassment if they were deliberately brought or put in a situation to deal with B’s religion... On balance, we believe it is right that people attending public functions should be able to do so free from fear of unwelcome proselytisation.”⁶⁹

Declarations of faith will clearly constitute the manifestation of religion, including the display of religious artefacts or the wearing of religious dress. It is less clear that criticism of the way of life of others, that is criticism either of their religious beliefs, their lack of belief, or their secular life choices, will be protected by the right. This will depend on whether the facts of the case show that this amounts to expression of a belief. This certainly will be the case when the acts are required by religion⁷⁰ or are an integral part of proselytism. General Comment 22 on Article 18 ICCPR makes it clear that, “[i]n accordance with Article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.⁷¹ Again, the right to be free from religious hate speech can legitimately be protected.

The right to manifest religion will, then, be engaged in relation to a great deal of speech caught by the British prohibition on religious

harassment. Again, though, this right is not absolute and interferences can be justified.⁷² Similar considerations will apply in the justification of restrictions on religious harassment as those explained above in relation to the limitation of freedom of expression. The UK could successfully argue that its ban on religious harassment pursues a legitimate aim, but the vagueness and broadness of the definition is likely to satisfy neither the requirement of legal certainty nor the requirement of proportionality. This will be particularly so to the extent that it restricts declarations of faith or non-aggressive attempts to convert others or change their behaviour. The restriction of behaviour which is mandated by a person’s religion will involve a significant infringement of their dignity;⁷³ yet there is nothing within the definition to ensure that such activity will only be prohibited when it is particularly harmful.

Religious harassment must be considerably more narrowly defined than it currently is under British legislation if it is to avoid unlawful interference with the fundamental right to freedom of religion. It must be drafted so as to restrict only that speech which is of such severity and expressed in such a manner that it would cause significant harm to the listener, particularly if it constitutes the restriction of an activity which a person considers herself bound by her faith to engage in.

It seems likely that international human rights law would allow only a lightweight prohibition of religious harassment. However, when conflicting human rights are balanced against each other it is particularly important to carry out a contextual analysis. There is merit, therefore, in considering whether the conclusions reached above apply equally to all fields of activity usually subject to discrimination law.

6. The Importance of Context

Context can be relevant to the question of whether it is proportionate to ban religious harassment in several respects. The context can determine the relative weight of both the speaker's right to do so freely or to manifest her religion and the victim's right to be free of discrimination. It can also determine the impact that the harassment is likely to have on an individual. The area of activity in which harassment takes place can also be significant from a practical point of view as it may determine the extent to which those potentially liable for harassment are able to take steps to avoid causing offence.

One might distinguish between "open" and "closed" environments in considering whether harassment should be prohibited. An environment is open if individuals can choose freely whether or not to expose themselves to it. Generally, it will be less important to ban harassment in open environments because a victim can escape the discriminatory behaviour. This distinction has been made by the Strasbourg court. It has sought to achieve a balance between Article 9 ECHR and conflicting rights by holding that a person who can take steps which will avoid any conflict between his beliefs and sources of interference with those beliefs but does not do so cannot complain of an interference with his freedom to manifest his beliefs.⁷⁴ This may be correct as a principle, though I would respectfully contend that the Strasbourg court misapplied the principle when it identified the employment context as an open environment.⁷⁵

The categorisation of an activity as either giving rise to open or closed environments should take account of how essential it is to take part in the activity and whether it is easy

to switch between different environments. The more important a particular activity is to participation in society, the more "closed" it will be. Most people must work. Any suggestion that a person is free to avoid religious harassment by becoming unemployed is a fallacy. Where there are barriers to switching between environments, this will reduce the extent to which those environments can be considered "open". To change employer is not a straightforward matter. Once again, the idea that an individual could easily distance herself from harassment by changing jobs is misconceived. It is right, then, that there should be a high level of protection against discrimination in closed environments.

On the other hand, many places where goods, services and facilities are offered are more open environments. To partake of many commercial goods, facilities and services is a matter of choice. Further, the nature of commercial goods, facilities and services is that they are subject to competition. Customers are not usually locked-in to one supplier and so alternative sources are readily accessible to consumers. If the environment in one restaurant, bar or shop is hostile because of the display of religious objects or the playing of religious music, there are likely to be others which are not so offensive.

It is not, though, possible to categorise all goods, facilities and services in this way. While many commercial goods, facilities and services might well be considered non-essential, this is not true of public services. Provisions outlawing discrimination by public authorities will not apply to discrimination regulated by another provision of the discrimination legislation.⁷⁶ Therefore, where a public authority is providing goods, services or facilities, its actions will be regulated under corresponding provisions and will not

fall within the scope of the public functions provisions. The provision of health services would, therefore, be subject to provisions outlawing harassment in the provision of goods, facilities and services, yet this service is undoubtedly essential. Further, there are barriers to accessing alternative health care “environments”. In the UK, the provision of health services is dominated by the local National Health Service (NHS) provider. There are relatively few alternative providers of healthcare and accessing their services is expensive. This makes the NHS provider a comparatively closed environment and suggests that the highest level of protection against discrimination should be applicable in this context. The British Humanist Association has stressed that while the cost to free-speech of anti-harassment provisions generally outweighs the benefits of such legal protection, this is not the case in relation to public services.⁷⁷ On this basis the UK Government should be wary of classifying activities as giving rise to “open” or “closed” environments on the basis of dividing lines it has created in existing discrimination legislation.

The proportionality of a ban on harassment will depend in part on the harm that is likely to result from discriminatory speech if it is allowed to continue. Where the nature of a particular activity is such that it typically gives rise to hierarchical relationships, harassment in such an environment, by a person with authority, would potentially have great impact upon its victims. If an employer were to urge an employee to stop her sinful behaviour, or, conversely, to abandon her irrational religious beliefs, this would arguably impede the freedom of an employee to maintain, or at least manifest, her own religion or lack of belief. The employer’s position of authority will exert considerable pressure on an

employee to comply with instructions, even where they are not directly related to work. The providers of commercial goods, facilities and services are, on the other hand, rarely in a position of formal authority over consumers and their religious or other beliefs are unlikely to influence those of their customers. In contrast, doctors, police officers and teachers have obvious sources of influence and authority. This factor has influenced the reasoning of the ECtHR. In *Larissis* the Court found that “the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.”⁷⁸ This factor may, therefore, legitimately be taken into account in deciding whether or not to protect against religious harassment in a particular activity.

Certain environments produce ongoing relationships, whereas others give rise to brief moments of contact, which are not necessarily repeated. In the employment context prolonged contact between employees and their employer and colleagues provides the opportunity to acquire knowledge of a person’s religious sensibilities. This makes it easier for people in the workplace who might otherwise cause religious offence to modify their speech and avoid liability for religious harassment. The contact between “harasser” and “victim” in service delivery is far more likely to be transient and to occur on a single occasion. Those engaged in the supply of ser-

vices will not have sufficient knowledge of the sensitivities of their clients to be able to adjust their speech accordingly. They would be best advised to avoid all potentially offensive speech, with significant chilling effect. This might suggest that it is more reasonable to prohibit harassment on the grounds of religion and belief in the employment context than in the provision of goods, facilities and services. However, there are countervailing arguments which suggest that the tort of religious harassment might just as easily be constituted in the employment context. Since a victim will normally need to point to an accumulation of offensive speech in order to show that she has been harassed, harassment is more likely to occur in the extended contact in the employment sphere than in relation to goods, facilities and services.⁷⁹ An employer could be liable for harassment constituted over a period of time, by a series of mildly offensive comments, made by different employees within earshot of one offended employee. In order to avoid liability an employer would be forced to ban all discussion related to any potentially offensive subjects. The duration of relationships does not, therefore, appear to justify a distinction between the different fields in the treatment of harassment as currently drafted.

In certain environments, it will be particularly important to ensure freedom of speech and the right to manifest religion. Case law in Canada suggests that context can be relevant to whether an activity is at the core of a right, in which case it should be protected at the expense of more peripheral activities of a competing right.⁸⁰ In education, which is aimed at the discovery of the truth and discussion of ideas, legislators should be hesitant in imposing restrictions on these freedoms. In contrast, the Ontario Superior Court has held that,

“[T]he further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of protection. Service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion.”⁸¹

Similarly, the Ontario Human Rights Commission has argued that “secular service providers that hold personal religious beliefs cannot claim that the performance of their job functions is an expression of their deeply held religious beliefs.”⁸² This may well be true of some faiths and if true of all, would suggest that religious harassment could legitimately be prohibited in the provision of commercial goods, facilities and services. However, this reasoning asserts an objective view of what is central to the manifestation of religion and appears to conflict with the remarks made above which argued that such decisions are very much personal and subjective matters. It ignores the fact that for many religions, their religious beliefs permeate every aspect of the lives of believers and require them to conduct themselves in accordance with their faiths in all areas of activity.⁸³ In such cases, prohibition of religious harassment in the provision of goods, facilities and services will constitute a significant interference with religious freedom.

If governments were to prohibit religious harassment in certain fields and not others, this should only be to exclude the provision of commercial goods, facilities and services from the scope of the ban. It is important that essential public services and the activities of public authorities are subject to the maximum level of protection available under equality legislation. However, a better outcome would be for a more narrowly tailored prohibition of religious harassment to apply

equally in all environments subject to discrimination legislation.

7. Conclusion

The definition of religious harassment employed in British legislation is too broad, too subjective and too vague. It must be tightened and clarified if it is not to breach the fundamental rights to freedom of speech and freedom of conscience. It should be limited so that it catches only severe insults against people because of their religion, belief, or lack of belief, and excludes perceived insults against their religious ideas and opinions, unless these are expressed in a “gratuitously offensive” manner. In particular, it should not penalise “political” speech. Provisions banning religious harassment must not inhibit proselytism, unless it is “improper”.

Some might argue that the response to this analysis would be to repeal provisions banning religious harassment and not to legislate in this area in the future. Provisions prohibiting direct discrimination on the grounds of religion will address offensive speech where this constitutes less favourable treatment of a person on the grounds of religion. The criminalisation of religious hate speech will prevent the most reviling insults against a religious group. Aggressive and persistent proselytism may fall foul of public order offences which prevent or punish insulting and abusive behaviour in public places.

Alternatively, these objectives could be met by requiring a victim to show that the speaker intended to cause the proscribed effect. In the context of a protected activity, if there is evidence that a person intends to create an offensive or hostile environment, it is right that this should be prohibited where it is tantamount to direct discrimination. Where speech is so objectively offensive that it is

bound to have the prohibited effect, the requisite intention can be inferred. Declarations of faith and the display of religious articles will not convey any malicious intent and so will not fall foul of such a ban. Discussion of the tenets of a religion, or secular subjects, will not be caught unless the manner in which the criticism is expressed is sufficiently insulting to infer intention. Attempts to convert others will intend to proselytise and not to harass.

In any event, harassment which reaches the requisite level of severity for its prohibition to be legitimate should be outlawed in all areas in which direct and indirect discrimination is prohibited.

Whichever approach is taken, the most important conclusion of this discussion is that legislators should not continue to apply the same definition of harassment to religion as to all other grounds. Lucy Vickers agrees that religion requires different treatment, but argues that, thanks to the openness of terms such as “dignity”, “reasonably” and “in all the circumstances”, the definition can be interpreted and applied in a way that avoids its potential pitfalls.⁸⁴ This approach does not, though, overcome the fundamental problems outlined above. It is based on the very fact that the terms which make up the definition are so vague that they can be used to support opposing sides of the same argument. This does nothing to recommend its continuing use, but rather confirms that it provides insufficient legal certainty. The chilling effect of such a vague definition on freedom of speech and manifestation of religion is unacceptable.

Even worse, the openness of the terms to varying and subjective interpretations will inevitably lead to litigation and encourage, rather than heal, divisions within society.

The former Attorney-General of India, Soli Sorabjee comments in relation to India's religious hatred legislation are instructive:

“Experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of

expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.”⁸⁵

¹ Paola Uccellari is Parliamentary Legal Officer at the Odysseus Trust. This article resulted from research commissioned to her by The Equal Rights Trust in 2007.

² Equality Bill [HL] (2005-06).

³ Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (1993).

⁴ Government Equalities Office, *The Equality Bill – Government Response to the Consultation* (Cm 7454, July 2008), para. 13.24.

⁵ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final, available at <<http://ec.europa.eu/social/BlobServlet?docId=477&langId=en>>, accessed on 30 July 2008.

⁶ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, Article 2(3).

⁷ Statutory Instrument No. 1660.

⁸ Regulation 5.

⁹ *Reed & Bull Information Systems Limited v Stedman* [1999] IRLR 299, para. 28. These comments related to the notion of harassment developed under direct discrimination provisions but reflect interpretation of the statutory prohibitions.

¹⁰ Vickers, Lucy. *Religious Discrimination at Work*, The Institute of Employment Rights, February 2008, p. 35.

¹¹ Grabham, Emily. “*Law v Canada: New Directions for Equality under the Canadian Charter?*” (2002) *Oxford Journal of Legal Studies*, Volume 22, No. 4, pp. 641-61, p. 654.

¹² See section 44 of the Equality Act 2006.

¹³ *Regina v. Secretary of State for Education and Employment and others ex parte Williamson and others* [2005] 2 All ER 1, para. 22.

¹⁴ Vickers, Lucy. “Approaching Religious Discrimination at Work: Lessons from Canada”, *The International Journal of Comparative Labour Law and Industrial Relations*, 2004, Volume 20/2, pp. 177-200, p. 183.

¹⁵ Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe. *Explanatory Memorandum to Resolution 1510 (2006) on freedom of expression and respect for religious beliefs*, Doc. 10970, 24 June 2006, para. 20.

¹⁶ Vickers, Lucy. “Is All Harassment Equal? The Case of Religious Harassment”, *Cambridge Law Journal*, November 2006, Volume 65(3), pp. 579-605, p. 595.

¹⁷ Vickers, footnote 16, p. 594.

¹⁸ *In situ Cleaning v Heads* [1995] IRLR 4.

¹⁹ See Council Directive 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. Article 2(3) provides: "Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States".

²⁰ In one respect the definition in the Directive is narrower than that under the Religion and Belief Regulations. The Directive definition requires that the conduct has the purpose or effect both of violating the dignity of the victim and creating an intimidating, hostile, degrading, humiliating or offensive environment.

²¹ The provision in the Equality Bill 2005 which would have extended protection against religious harassment excluded conduct based on the harasser's religion and so would have caught only conduct related to the religion of others. Section 47(2) (a) provided, "[I]n subsection (1) 'religion or belief' means a religion or belief of B or of any other person except A." However, this provision dealing with religious harassment was removed in its entirety from the Bill and there is no such restriction in the Religion and Belief Regulations.

²² Bantam Press, 2006.

²³ Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, footnote 15, para.5.

²⁴ See Dworkin, Ronald. "The Right to Ridicule", *The New York Review of Books*, 23 March 2006, Volume 53, Number 5, p. 44.

²⁵ Hare, Ivan. "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred", *Public Law*, 2006, p. 521, p. 538.

²⁶ Hare, footnote 25, p. 540.

²⁷ The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the Commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage.

²⁸ Preliminary report on the national legislation in Europe concerning blasphemy, religious insults and inciting religious hatred, adopted by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), study 406/2006, document CDL-AD(2007)006, para. 28.

²⁹ See Dworkin, footnote 24.

³⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203, para. 13.

³¹ Vickers, footnote 16, p. 592.

³² It provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

³³ Article 10(2) of the ECHR provides: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Article 19(3) of the ICCPR makes similar provision.

³⁴ Vickers, footnote 16, p. 587.

³⁵ Ontario Human Rights Commission. *Balancing Conflicting Rights: Towards an Analytical Framework*, August 2005, p.16. For criticism of this case, see the compelling arguments of Sandra Fredman in Fredman, Sandra. "The Future of Equality in Britain", *EOC Research Discussion Series & Working Paper Series*, Equal Opportunities Commission, 2002, pp. 30-31.

³⁶ *Trinity Western University v. College of Teachers* (British Columbia) 2001 SCC 31.

³⁷ *Handyside v UK* (1976) 1 EHRR 737, para. 49.

³⁸ *Redmond-Bate v DPP* (1999) 163 JP 789.

³⁹ Article 17 provides: “Nothing in this Convention may be interpreted as implying for any state, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

⁴⁰ Application Number 23131/03 (16 November 2004) para. 2.61.

⁴¹ It provides: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

⁴² Human Rights Committee. General Comment 11, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U. N. Doc. HRI/GEN/1/Rev. 6, 2003, para. 2.

⁴³ See note 33.

⁴⁴ *Silver v United Kingdom* (1983) 5 EHRR 347, para. 97.

⁴⁵ *Wingrove v United Kingdom* (1996) 24 EHRR 1, para. 48.

⁴⁶ *Gaweda v Poland* (2002) 12 BHRC 486, para. 39.

⁴⁷ Volokh, Eugene. “What Speech Does ‘Hostile Work Environment’ Harassment Law Restrict?”, available at <<http://www.law.ucla.edu/volokh/harass/BREADTH.HTM>>, accessed 1 July 2008.

⁴⁸ *Murphy v Ireland* (2004) 38 EHRR 13, para. 74.

⁴⁹ The case related to Article 9, but is nevertheless relevant to a consideration of proportionality in this context.

⁵⁰ *Kokkinakis v Greece* (1993) 17 EHRR 397, see the partly concurring opinion of Judge Pettiti.

⁵¹ *Kokkinakis*, footnote 50, para. 48.

⁵² *Wingrove*, footnote 45, para. 49.

⁵³ Section 3.

⁵⁴ Matters of public interest are considered to be equivalent to pure political speech by the ECtHR in *Thorgeirson v Iceland* (1992) 14 EHRR 843.

⁵⁵ *Wingrove*, footnote 45, para. 58.

⁵⁶ *Vickers*, footnote 16, p. 588.

⁵⁷ *Giniewski v France* (2007) 45 EHRR 589, para. 51.

⁵⁸ *Klein v Slovakia* (2006) 21 BHRC 457, paras. 51-54.

⁵⁹ *Wingrove*, footnote 45, paras. 52-60.

⁶⁰ Article 9 (1) ECHR provides : “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

⁶¹ *Vickers*, footnote 16, p. 584.

⁶² *Kokkinakis*, footnote 50, para. 48.

⁶³ *Otto Preminger Institut v Austria* (1995) 19 EHRR 34, para. 47.

⁶⁴ Martínez-Torrón, Javier and Navarro-Valls, Rafael. “Facilitating Freedom of Religion and Belief: Perspectives, Impulses and Recommendations from the Oslo Coalition”, cited in Moon, Gay and Allen QC, Robin. “Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards A Better Understanding of the Rights, And Their Im-

plications", available at <<http://www.justice.org.uk/images/pdfs/religiousdiscrim.pdf>>, accessed on 1 July 2008, p. 17, note 55.

⁶⁵ *Williamson*, footnote 13, para. 32.

⁶⁶ *Arrowsmith v United Kingdom* (1978) 3 EHRR 218, at 228-229, para. 71.

⁶⁷ *Ibid.*

⁶⁸ *Kokkinakis*, footnote 50, para. 31.

⁶⁹ Hansard HL vol 674 col 826 (19 October 2005) available at <<http://www.publications.parliament.uk/pa/ld200506/ldhansrd/v0051019/text/51019-25.htm>>, accessed on 1 July 2008.

⁷⁰ In *Williamson*, footnote 13, Lord Nicholls said: "If, as here, the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice."

⁷¹ General Comment 22 on Article 18, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U. N. Doc. HRI/GEN/1/Rev. 6, 2003, para. 7.

⁷² Article 9(2) provides: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

⁷³ *Vickers*, footnote 16, p. 603.

⁷⁴ The ECtHR found that an employer's terms and conditions which prevented time off for religious worship caused no interference with the right to freedom of religion in *Stedman v UK* (1997) 23 EHRR CD 168. See also *Kalac v Turkey* (1997) 27 EHRR 552.

⁷⁵ Rix L. J. also doubts the validity of this line of jurisprudence, arguing that "[t]he rulings are difficult to square with the supposed fundamental character of the rights. It hardly seems compatible with the fundamental character of Article 9 that a person can be told that his right has not been interfered with because he is free to move on, for example, to another employer, who will not interfere with his fundamental right, or even to a condition of unemployment in order to manifest the fundamental right." See R (*on the application of Williamson and others*) v *Secretary of State for Education and Employment* [2003] 1 All ER 385; [2002] EWCA Civ 1820.

⁷⁶ Religion and Belief Regulations, Regulation 2(3).

⁷⁷ British Humanist Association. *Quality and Equality: Human Rights, Public Services and Religious Organisations*, p. 14-15.

⁷⁸ *Larissis v Greece* (1998) 27 EHRR 329, para. 51.

⁷⁹ Volokh, Eugene. "What Speech Does 'Hostile Work Environment' Harassment Law Restrict?", available at <<http://www.law.ucla.edu/volokh/harass/BREADTH.HTM>>, accessed on 1 July 2008.

⁸⁰ See, for example, *Ontario Human Rights Commission v Brockie* [2002] O. J. No. 2375 and the discussion by the Ontario Human Rights Commission, footnote 34, p. 20.

⁸¹ *Ontario Human Rights Commission v Brockie* [2002] O. J. No. 2375, para. 51.

⁸² Ontario Human Rights Commission, footnote 35, p. 26.

⁸³ Moens, Gabriël. "The Action-Belief Dichotomy and Freedom of Religion", (1989) 12 *Sydney Law Review*, pp. 195-217, as referred to in *Vickers*, Lucy, footnote 16, p. 590.

⁸⁴ *Vickers*, footnote 16, p. 601.

⁸⁵ Sorabjee, Soli. "Freedom of Expression in India", *Developing Human Rights Jurisprudence*, Commonwealth Secretariat, 1999, Volume 7, pp. 129-142, cited in House of Lords Select Committee on Religious Offences in England and Wales, HL Paper 95-1 (2002-03), Volume 1, para. 52.

Freedom of Expression and Religious Harassment: An Artist's Perspective

Shanon Shah¹

In 2003, Malaysia's Instant Café Theatre (ICT) staged a political satire, a revue called "The 2nd First Annual Bolehwood Awards". The show was sold out, playing to packed house night after night. In one of the skits, a character responded to the claim by an Islamist leader that the Islamic state was not to be feared – the Islamic state promised a kind of paradise on Earth. "A paradise", joked that character, "where our hands and heads would grow back if chopped off". A Muslim member of the audience was so offended by this that he wrote a letter to the press condemning the play as blasphemous. The letter was published in *Utusan Malaysia*, a leading Malay language daily, on 11 July 2003. The writer chose to go by a pen name, "The Real Malay Critic"². Within a week, the Kuala Lumpur City Hall revoked the license for the show and announced that it would not issue any performing licenses to ICT.³

The year before, the Ulama Society of Kedah submitted a complaint to Kuala Lumpur City Hall regarding the Malaysian staging of "The Vagina Monologues". City Hall was swift to react. Amid cries that the play was vulgar and 'un-Islamic', City Hall refused permits for a second run of the play. The decision by City Hall was supported by people who were offended that the Malaysian version critically examined verses from the Qur'an and Hadith (the recorded traditions of the Prophet Muhammad), and that the word 'vagina' was used in the title.⁴

I remember these two incidents very clearly, because they happened at a time when I was trying to break into the Malaysian arts scene.

As an artist, freedom of speech is dear to me. The very nature of great theatre is that it pits together memorable characters in conflict, and very often this conflict is in values, beliefs or aspirations. The unfolding of the conflict unsettles not only the characters onstage, but the audience watching them. This is the delight of theatre, and many great plays have simultaneously delighted and offended both the performers and the audience.

But as a Muslim, I do know that I am also hurt and offended when people make awful remarks about Muslims and Islam. I have a problem, however, with the formulation and assumptions behind the phrase 'religious harassment'. Because to me, criticising a religion is different from assaulting the security and basic rights of its adherents. Besides, Islam's positions on several issues are not as clear-cut as people assume.

Take for example the crime of blasphemy in Islam. On the surface, the literature developed by classical Islamic jurists more than 1,000 years ago seems pretty unanimous that only the death penalty is fit for someone who blasphemes. But upon closer scrutiny, it is clear that these jurists also took great pains to narrow the definition of blasphemy. First of all, they painstakingly tried to delink

blasphemy from the sin of apostasy, because the latter did not involve as many political implications.

After that, they tried to pull apart the components of blasphemy. If a person insulted God, they thought, only the rights of God have been violated. Thus they debated as to whether the punishment should be death or a lesser form of worldly punishment, since God would know if the offender genuinely repented. However, an insult to the Prophet Muhammad was a violation of the rights of Muhammad, and needed to be treated differently.⁵

They then tried to define exactly what constituted so grave an insult as to require the death penalty. They referred to a famous *hadith*, which relates that a Muslim approached Muhammad and said, “Muhammad, they tell me you’re a liar and a fake and that the Qur’an is false. What do I do?” To which Muhammad replied (and I’m paraphrasing here), “Tell them you have faith in Islam and tell them to go to Hell.” So the jurists even tried to distinguish between attributing a lie to the Prophet and actually insulting him.⁶

In this sense, the classical jurists tried to find numerous safeguards and justifications to interpret as broadly as possible freedom of religion and speech within their own socio-historical contexts, while narrowing as much as possible the definition of blasphemy. Modern Islamic jurists have gone a step further – they say that in the era of the nation-state, blasphemy and apostasy can no longer be considered political crimes, and thus should not carry capital punishment.⁷

When read in this light, Islamic jurisprudence makes a lot of sense. However, it is not often that we are exposed to this kind of

scholarship on Islam. In Malaysia especially, several books on Islam are routinely banned by the Home Ministry. In fact, the Ministry regularly releases a list of books that have been banned under the Printing Presses and Publications Act. In the past, banned titles have included Karen Armstrong’s “A History of God” (although the bans on some of Armstrong’s books were reversed after her visit to Malaysia upon the invitation of the Malaysian Government), “Sea Sale: SpongeBob Square Pants” and “Divine Secrets of the Ya-Ya Sisterhood”.⁸

Why? Apart from the fact that there are several secular laws that restrict freedom of expression and information in Malaysia, the self-designated custodians of Islam in Malaysia do not tolerate views on Islam that differ from those of the state. It is not only ‘liberal’ titles that get banned – books by hardcore fundamentalist or conservative Muslim authors are also routinely banned.

Thus, I go back to my initial discomfort about the concept of ‘religious harassment’. Even if we were to say that some speech or idea is a harassment of Islam, whose and which Islam are we talking about?

Is it the ‘Islam’ of those in positions of social and political power? Even in communities where Muslims are the minority, a hierarchy often becomes entrenched in which the minority community dares not question the most powerful within its ranks.

Is it textual Islam we are talking about? Textual Islam in all its wonderful diversity and pluralism of ideas?

Is it Islam as defined by forces that hold deep and irrational prejudices against Islam, for example the Jerry Falwells, Pat Robertsons

and the Hindutva fundamentalists of the world?

Is it the lived experiences of Muslims we are talking about? Muslim women who wear the *hijab*? Muslim women who do not wear the *hijab*? Gay Muslims? Devout Muslims who pray five times a day and fast faithfully every year? Relaxed Muslims who pray only occasionally and fast only when the fancy takes them? Muslims who drink alcohol but do not eat pork? Muslims who refrain from drinking alcohol but have romantic relationships with non-Muslims?

Or is it political Islam we are talking about? Specifically, is it an authoritarian, chauvinistic political Islam we are talking about?

Herein lays the danger of proposing to limit freedom of speech in instances where it results in 'religious harassment'. Who defines religious harassment? Right now, religious chauvinists are still holding power in the institutions of most religions. And this observation is not limited to Islam alone: the problem is not religion, the problem is fundamentalism.

So how do we deal with fundamentalists? If we silence or repress them, we martyr them and create a new generation of more rabid and resilient fundamentalists.

If we ignore them, they will strategise around us in our sleep and take over our lives when we wake up.

If we appease them, we surrender power to them, and we accelerate their ascent to power. Conceding freedom of expression in situations of 'religious harassment', to me, falls under this category of responses.

Our only option, I believe, is to engage with them as equals. Respect and defend the fundamentalists' right to free expression, association, information and assembly. But never derogate on our own right to openly and frankly criticise their beliefs.

Speaking from my own experiences as an artist and human rights advocate, I have witnessed first-hand the value of the last option. In some of my trainings on human rights and gender, I inevitably encounter young Muslims who have been brought up to believe in a version of Islam that is quite different from mine. In fact, many participants in these workshops had been overwhelmingly Islamist in orientation. And when I introduce modules on human rights and gender, I know that a lot of these ideas confront the values and sentiments of these participants. Many of them are unsettled to the point of wishing to defend their beliefs during the workshop.

As a human rights trainer, I was mentored by the late Toni Kasim,⁹ who taught me to design workshops precisely for such discussions to take place. Let the participants defend their beliefs, she taught me, let other participants respond, but moderate the discussion so that no one makes any personal threats or attacks. And it's true - no matter how emotional things got in the past, the participants invariably stayed until the end, because they became committed to discussing ideas instead of launching into personal attacks.

Toni also taught me to ask participants to evaluate the workshop after it is over. In response to the question "What did you like about the workshop?", virtually everyone, religious or secular, invariably said: "I really liked that my freedom of speech and freedom of opinion was protected."

So to me, 'religious harassment' is not formulated from an ethic of equality and non-discrimination. It is a red herring, a strategy and process that is premised on a power struggle – either between religionists and secularists, or among religionists, where the power struggle could be inter-religious or intra-religious. Thus, any legislation to outlaw 'religious harassment' actually plays into this power struggle and serves to reinforce the power structures within and among religious communities, instead of categorically defending the basic rights of adherents to

any religion. Freedom of speech should only be limited when it calls for a threat to the security and basic rights of the person, and existing laws and principles already cover this adequately. However, everyone should be free to criticise a religion or a belief as much as they like. What should be stressed is also that offended followers of any religion can and should also maximise their freedom of speech to defend themselves, counter-criticise or merely sharpen the debate, because it is only in this way that societies learn to embrace diversity.

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² Khoo, E., Tikamdas, R. and Wong, E. (eds.) *Freedom of Expression in the Arts*, National Human Rights Society (HAKAM), Kuala Lumpur, 2003, p. 87.

³ *Ibid.* p. 89.

⁴ Letter to the editor, *The Vagina Monologues are anti-Muslim propaganda*, Kakiseni.com, 27 February 2002, available from: <http://www.kakiseni.com/articles/columns/MDEzNg.html/all>, last checked on 22 July 2008.

⁵ Kamali, H. *Freedom of Expression in Islam*, Ilmiah Publishers Sdn. Bhd. Kuala Lumpur, 1998, p. 231.

⁶ *Ibid.* p. 228.

⁷ *Ibid.* p. 250.

⁸ Silverfish Books, *Banned books – the saga continues*, 31 October 2006, available from: <http://www.silverfish-books.com/2006/10/banned-books-saga-continues.html>, last checked on 22 July 2008.

⁹ Women's Candidacy Initiative 2008, Candidate Profile: Zaitun Mohamed Kasim (aka Toni Kasim), available from: <http://www.wci2.org/index.php/candidate-profile>, last accessed on 22 July 2008.

Legal Protection against Discrimination in Pacific Island Countries

P. Imrana Jalal¹

Introduction²

For the purposes of this paper, commentary is confined to most of the fully independent Pacific Island countries (PICs),³ which have largely inherited the British Westminster system of governance and the British common law system. Some Pacific Island countries are still, wholly or partially, “colonised”, or under pacts of “free association” or other arrangements, by either France or the USA; or under the protection, or partial jurisdiction, of New Zealand. In those semi-autonomous countries, some of the laws of the metropolitan power prevail. In the French occupied territories, the laws of the metropolitan power wholly prevail. These legal nuances add a further layer of complexity to discrimination law. In this paper, therefore, reference will be made mainly to those PICs which are fully autonomous in passing legislation; and where there is no extra-territorial jurisdiction of the metropolitan power over them.⁴

All independent PICs have written constitutions mostly granted to them after independence from the colonial powers during the 1960s and 1970s. A number of them have made significant amendments to their constitutions in the wake of civil strife, as in Fiji’s post-coup d’état Constitution in 1997. Most PICs have a bill of rights (BOR) in their constitutions, which contain basic civil and political rights. Only very few of them, such as Fiji, have some economic, social and cul-

tural rights, for instance the right to education contained in the BOR.⁵ The principle of equality is not firmly embedded in the constitutions of most PICs even though some outlaw various forms of discrimination.

International Human Rights Law

All PICs have ratified the Convention of the Rights of the Child (CRC); all but Tonga, Palau and Nauru have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); only the Solomon Islands has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR); Samoa and Vanuatu recently (2008) ratified the International Covenant on Civil and Political Rights (ICCPR); and Fiji, Nauru, Papua New Guinea, Solomon Islands and Tonga have ratified the Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Pacific region has by far the lowest ratification rates worldwide of the core international human rights treaties.⁶ PIC governments generally perceive reporting requirements to be one of the most immediate practical constraints to ratification. The majority of PICs that have ratified various international human rights treaties have struggled to report on them in compliance with the legal obligations defined in the treaty.⁷

Some Pacific Island constitutions also have

specific mandatory provisions which allow for the use of conventions in the courts, apparently without the need for ratification.⁸

For example, Article 43 (2) of the Bill of Rights in the Constitution of Fiji states:

“In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.”

Tuvalu’s Constitution states in Article 15(5):

“In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to:

- a) traditional standards, values and practices, as well as previous laws and judicial decisions, of Tuvalu; and*
- b) law, practices and judicial decisions of other countries that the court reasonably regards as democratic; and*
- c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and*
- d) any other matters that the court thinks relevant.”*

Section 17 of Tuvalu’s Interpretation and General Provisions Act (Cap 1A) also states:

“A construction of a written law which is consistent with the international obligations of Tuvalu is to be preferred to a construction which is not.”

Despite these seemingly unequivocal empowering provisions, Tuvalu still generally follows the doctrine of non-enforceability of international law.⁹ Recently the court did not uphold the principle of non-discrimination in religion when it outlawed the establishment of a new Christian church in deeply Christian Tuvalu, on the basis that it was against Tuvaluan “values”. In *Teonea v Pule O Kaupule & Nanumaga Falekaupule*¹⁰ the High Court said that the equal right to freedom of religion was subordinate to the cohesion of Tuvaluan society as reflected in the constitutional recognition of Tuvaluan values and culture. In comparison, Samoan courts have consistently ruled in favour of freedom of religion on the basis of non-discrimination.¹¹

Anti-discrimination Laws

No PIC has standalone, comprehensive anti-discrimination legislation. However, the constitutions of all Pacific Island states have broad provisions granting all citizens equality before the law on the basis of general non-discrimination provisions. Some PIC constitutions have a general equality provision with specific definitions of discrimination. In general, all citizens are entitled to certain basic rights, regardless of their religion, race, place of origin, political opinions, colour, religion or creed and so on.¹² Apart from Fiji, no PIC constitution specifically protects people living with disabilities. No PIC constitution includes “health status” as a prohibited ground, making it problematic for discrimination on the grounds of HIV status to be challenged.

Fiji’s non-discrimination provision Section 38 is the most advanced providing that:

“(1) Every person has the right to equality before the law.

(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others; or on any other ground prohibited by this Constitution."

The Fiji Human Rights Commission Act 1999 also contains the specific grounds of unlawful discrimination found at Section 38 of the Constitution, in the areas of employment, professional accreditation, training, the provision of goods, services or facilities, public access, land, housing or other accommodation and education.¹³ The same section makes sexual harassment a civil offence by providing that "...sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination."

The Commission is empowered to investigate allegations of unfair discrimination and violations of the rights and freedoms set out in the Bill of Rights of the 1997 Constitution and to investigate other alleged violations of human rights.

The Fiji Constitution is also one of a very small number of constitutions in the world that explicitly protects sexual orientation, and is certainly the only one in the Pacific. In the landmark case of *Nadan v McCoscar*¹⁴ the Fijian High Court ruled that the Bill of Rights, supported by international human rights standards, granted protection of the

right to privacy for sexual minorities in Fiji. The Court made it clear that its decision was based on the privacy provisions of the Constitution rather than relating to the equality provisions stipulated in Section 38. Although equality was raised in submissions, it was not canvassed in the judgment. The issue of whether the relevant provisions are discriminatory awaits further argument. There is some basis for suggesting that the apparently neutral character of Sections 175 and 177 of the Penal Code is contradicted by the actual practice of applying them only in sodomy cases involving males. (The Director of Public Prosecutions could not point to any example of prosecution against a heterosexual person for sodomy and the Court accepted the argument raised by the Fiji Human Rights Commission that the law was selectively enforced against homosexuals.) Reference is made also to the case of *Balelala v State*¹⁵ where the Court held that the corroboration rule in sexual assault trials was discriminatory on the factual basis that although the law appeared to be gender-neutral, in reality, women were the main complainants of rape. Thus the corroboration warning was ruled unconstitutional on gender discrimination grounds. In this case CEDAW was also invoked to support and justify the Court's decision.¹⁶

The 1875 Constitution of the Kingdom of Tonga, a semi-authoritarian state, grants equality in the most interesting terms:

"4. There shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land."

In Vanuatu, the anti-discrimination provision is found in Section 5(1) of the Constitution of Vanuatu.

“5. (1) The Republic of Vanuatu recognises that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex, but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health...

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.”

In Vanuatu, the Penal Code¹⁷ also makes unlawful discrimination a criminal offence, an unusual provision in PICs.

“No person shall discriminate against another person with respect to his right to the supply of any goods or services, or to gain or to continue in any employment, or to be admitted to any public place, by reason of the sex, ethnic or racial origin or the religion of any such person.”

The anti-discrimination provisions of the bill of rights in most PICs appear to cover the public sector and not the private sector, therefore limiting their application to that of the relationship between state and citizen. Courts have generally opted for a horizontal application. In *Loumia v DPP*¹⁸ the majority of the Court of Appeal held that human rights concerned the relationship between the state and the individual exclusively; therefore rights are only enforceable vertically. The

ulterior purpose in this decision was to prevent the infringement of fundamental freedoms and the incorporation of *Kwaio* custom law as part of the Solomon Islands law, being inconsistent with the Constitution. The Constitution of Fiji together with the Fiji Human Rights Commission Act 1999, would appear to allow for the horizontal enforceability of rights. However, this interpretation is yet to be properly tested.

There are very few avenues for reporting rights violations in most PICs and very rarely are human rights violations reported at all. Both issues have a bearing on each other. Apart from Fiji, which has a Human Rights Commission, the only avenues to obtain remedies in most PICs are the mainstream courts. Thus the structures and mechanisms for promoting and protecting human rights are extremely limited. Existing mechanisms like Ombuds offices have limited and poor enforcement powers and are inadequately resourced and funded. Most Ombuds' powers are also restricted to investigating limited administrative malfeasance.

On the rare occasion where rights violations come before the courts, they have generally been enforced. Most PICs have independent judiciaries in general and more often than not the courts have demonstrated a willingness to make findings consistent with the bill of rights where civil or political rights violations are concerned and where victims have been persistent about asserting their rights.

Many PICs have traditional courts which exercise minor jurisdiction over village, family and personal matters. These informal courts often, unofficially and indirectly, adjudicate alleged human rights violations. For instance, many civil and criminal matters are handled by village *fono* (councils) in Samoa,

which vary considerably both in their decision making style and in the number of *matai* (chiefs) involved in the decisions. The 1990 Village *Fono* Act gives legal recognition to the decisions of the *fono* and provides for limited appeal to the Lands and Titles Court and to the Supreme Court. In 2000, the Supreme Court ruled that the Village *Fono* Act may not be used to infringe upon villagers' freedom of religion, speech, assembly, or association. More recent court decisions reinforced this principle. The *fono* concept sits uncomfortably within the formal legal system because of its dual role in administering both *fa'a Samoa* (customs) and village matters under the Act. Although its formal jurisdiction is circumscribed by the Act, the reality is that the *fono* exercises far more power than it is legally empowered to. Samoa citizens are unclear about its place in the legal system and there have been a significant amount of cases successfully challenging their rulings.¹⁹

Exceptions to Anti-discrimination Law

The general limitation on equal rights is that of what is "reasonable and justifiable in a free and democratic society". This general limitation is either explicitly stated in some PIC constitutions as in Papua New Guinea,²⁰ or read in by the courts as a matter of common law. However, almost all PIC constitutions also provide for specific exceptions to the principle of non-discrimination on the grounds of custom, titles for chiefs and aristocracy or land rights for indigenous peoples.

Custom is accepted as an exception to the principle of non-discrimination on the grounds of sex by the courts in some jurisdictions. In *Tanavalu v Tanavalu & Solomon Islands National Provident Fund*,²¹ the court took the view that the Constitution of the

Solomon Islands permitted the use of custom law even if it discriminated against women. In that case, pension funds were paid to the father of the deceased, rather than to the deceased's widow. The father then distributed the funds in his discretion, giving nothing to the widow. The court ruled that this was in accordance with the relevant custom, where inheritance was by patrilineal succession. The widow could not object on the ground that the custom was discriminatory, as Section 15(5)(d) of the Constitution specifically exempted custom law from the general prohibition on discriminatory laws.

In comparison, a custom not allowing widows to have relationships was held to be *ultra vires* the equality provisions of the Constitution of Papua New Guinea in *Raramu v Yowe Village*.²² Raramu was a widow convicted and sentenced by a village court to a term of six months imprisonment for being involved with another man. The customary practice in many areas did not allow widows to have subsequent relationships. One of the issues for consideration was whether the custom contravened the Constitution of Papua New Guinea in that it was discriminatory towards women. The court refused to recognize such a practice because it was oppressive and discriminatory towards women. Prohibiting widows from relationships struck at the equality provision provided at Section 55 of the Constitution. The custom failed to recognise the inherent dignity of humankind. The village court erred in imprisoning people for breach of what was only custom and not codified as law. Accordingly, Raramu was to be released forthwith together with her four month old child.

In *Attorney-General v Olamalu*²³ a Samoan electoral law limiting candidacy in national elections and voting rights to title holders/

chiefs or Samoan *matai*, and excluding non-*matai* (or commoners) was held to be non-discriminatory on the grounds of, broadly speaking *fa'a Samoa* (the custom of Samoa), despite Samoa's Constitution having a standard anti-discrimination provision. The court made the point that Samoans had themselves chosen this form of discrimination knowingly, and that change had to be evolutionary and would come in good time.

On the other hand, the right to equality guaranteed in the Constitution of Fiji was held not to entitle or permit a traditional titled chief to argue that he must only be tried before a jury or assessors of his peers. The court said that jury members do not have to be selected from persons of equivalent rank and paramount chiefly status.²⁴

Notably missing from the prohibited grounds in some constitutional definitions of discrimination, however, is sex discrimination. In Nauru, Kiribati, Tonga and Tuvalu, it appears to be lawful to discriminate against women on the basis of their gender. In Tuvalu, it is not an oversight that Section 27 of the Tuvalu Constitution defines discrimination, but does not forbid sex discrimination. It is an omission deliberately made since the definition does forbid discrimination on the grounds of race or religion. Similarly, in Kiribati, Section 15 of the Constitution defines discrimination, although one class of discrimination notably missing is sexual discrimination. The result of this omission is that it has been virtually impossible to challenge the legislative-based discrimination against women in the courts in these countries.

In *Minister for Provincial Government v Guadalcanal Provincial Assembly*,²⁵ in discussing the possibility that women were discriminated against because they were not able

to be chiefs, the Court of Appeal held that discrimination against women was not unconstitutional if the Constitution itself legitimated that gender discrimination. There is very little discussion in the Solomon Islands courts of the discriminatory effect of laws and practices on women. In this case, two members of the court recognised the effect of the particular constitutional provisions in reinforcing the traditional power structures. At the same time there was an acknowledgement that society was changing and not static and in time there was every likelihood that the question of male traditional chiefs would be re-evaluated. Solomon Islands has ratified CEDAW. Although there was no reference to international instruments ratified by the Solomon Islands, these conventions would have been modified by the constitutional provisions in place.

The exclusion of sex discrimination from the definition of discrimination in the constitution, being the supreme law, allows citizenship and immigration laws to discriminate against women in Kiribati, Nauru, Tonga and Vanuatu. Citizenship and immigration laws prohibit citizenship and automatic residency for female citizen's foreign husbands, forcing women to leave their countries. Similar legislation in Kiribati and Tonga discriminates against their children, if born abroad to foreign husbands, by denying their children citizenship.²⁶ The same restrictions do not apply to male citizens of those countries.

In *the Fiji Human Rights Commission v Suva City Council*²⁷, *Fijian Teachers Association v AG of Fiji*²⁸ and *Kirisome v AG & Police*²⁹ (Samoa) Pacific Island courts finally ruled on the legality of retirement ages which had no specific link to an employee's fitness, or any other reason. Age discrimination is prohibited in the constitutions of both Fiji and

Samoa. In the *Fijian Teachers Association* case, the defendant had arbitrarily made the decision to reduce the retirement age pursuant to a policy made by the unelected Interim Government. The equality provisions of Section 38 of the Constitution of Fiji had been found to be breached and the justification for the policy made by the respondent was rejected. It was held not to have met the threshold requirement in that the justification for the decision, i.e. savings and employment generation, was not proportional or sufficiently connected to those ends.³⁰ Previously, in 2000, the court had briefly referred to the fact that under Section 16 of the Fiji Constitution 1990, restriction based on age was not unlawful, as it is the case under Section 38(6)(d) of the Constitution Amendment Act 1997.³¹

In considering discrimination in Samoa in *Kirisome v AG & Police*, the courts applied a

test to determine whether a limitation on the prohibition on age discrimination could be justified on an objective and reasonable basis. It said that the inequality challenged must exist for a legitimate purpose, and the manner in which those ends are achieved must be proportionate. In practice, a balancing exercise is undertaken; therefore, the relationship or connection between the two (i.e. the means and the ends) have to be reasonable or affect the other in a way that bears relevance to what is appropriate in the circumstances. Where this cannot be established then the apparent inequality will be struck down.³²

Surprisingly, despite the racial polarisation of Fiji's two major racial groups, indigenous Fijians and ethnic Indian Fijians, racial discrimination cases do not appear to make it to the courts, at least on the basis of alleged race discrimination.

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² The paper covers the following PICs: Cook Islands, Fiji, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

³ The larger grouping recognized by the South Pacific Community includes American Samoa, Cook Islands, FSM, Fiji Islands, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands (CNMI), Palau, PNG, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, and Wallis & Futuna.

⁴ Jalal, P. Imrana. *Good Practices in Legislation on Violence Against Women: A Pacific Islands Regional Perspective*, Undaw/Unodc Expert Group Meeting On Good Practices In Legislation On Violence Against Women, Vienna, 26-30 May 2008.

⁵ Section 39.

⁶ Includes also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

⁷ Jalal, P. I. *Ratification of International Human Rights Treaties: Added Value for The Pacific Region*, Paper prepared

for the Office of the High Commissioner for Human Rights, 2006.

⁸ Article 43(2) of the Constitution of Fiji, Article 15(5)(c) of the Constitution of Tuvalu and Section 17 of the Tuvalu Interpretation and General Provisions Act (Cap 1A) and Article 39(3) of the Constitution of Papua New Guinea.

⁹ This section is extracted directly from Jalal, P. I. and Madraiwiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1, p. 10. See the Digest for comprehensive summaries of Pacific Island cases that have applied international human rights conventions in domestic courts.

¹⁰ Civil Case No: 23/03, 11th October 2005.

¹¹ *Lafaialii & Ors v Attorney General*, Civil Case No. 8 of 2003, 24 April 2003, High Court of Samoa.

¹² Cook Islands 1975 (s. 64); Fiji 1997 (s.38); Solomon Islands 1978 (Art. 15); Kiribati 1979 (Art. 15); Nauru 1968 (Art.3); Tonga 1875 (Art. 4); Tuvalu 1978 (Art. 27); Vanuatu 1980 (Art. 5); Samoa 1960 (Art. 15); PNG 1975, s. 55.

¹³ Fiji Human Rights Commission Act 1999, Section 17.

¹⁴ Criminal Appeal Case Nos: HAA 85 & 86 of 2005, 6 August 2005 (Fiji) analysed in Jalal, P. I. and Madraiwiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1, p. 30.

¹⁵ Criminal Appeal No. AAU0003 OF 2004S, 8 November 2004, Court of Appeal, Fiji Islands.

¹⁶ Jalal, P. I. and Madraiwiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1, p. 16.

¹⁷ Penal Code, Cap.135: Offenses against the public interest, s. 150.

¹⁸ [1986] SBCA 1; [1985-1986] SILR 125, 24 February 1986.

¹⁹ Jalal, P. I. and Madraiwiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1.

²⁰ Section 39, PNG Constitution.

²¹ [1998] SBHC 4, affirmed [1998] SBCA 8.

²² [1994] PNGLR 486 N1262, 22 November 1993.

²³ 1980-93] WSLR 41.

²⁴ *State v Ratu Takiveikata*, Cr Case 005.04S, 20-22 October 2004, High Court, Fiji Islands.

²⁵ (1997) SBCA 1, 11 July 1997.

²⁶ Jalal, P. I. *Law for Pacific Women: a Legal Rights Handbook*, Fiji Women's Rights Movement, 1998, p. 38.

²⁷ Civil Action No 73 of 2006, Fiji High Court.

²⁸ Judicial Review No HBC 3J of 2007S, 20 December 2007.

²⁹ [2002] WSSC 3, 25 February 2002.

³⁰ See Jalal, P. I. and Madraiwiwi, J., (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 2 (2008).

³¹ *Susana Tusawau v Fiji Institute of Technology Council* [Court of Appeal], Civil Appeal No. ABU 0044 of 2000S.

³² For a recent analysis of case law see Jalal, P. I. and Madraiwiwi, J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 2 (2008).

SPECIAL



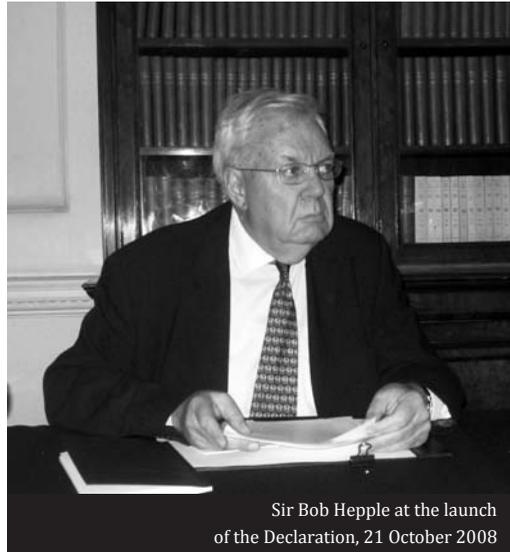
THE RIGHT TO EQUALITY
IS THE RIGHT OF ALL HUMAN BEINGS
TO BE EQUAL IN DIGNITY, TO BE TREATED WITH
RESPECT AND CONSIDERATION
AND TO PARTICIPATE ON AN EQUAL BASIS WITH
OTHERS IN ANY AREA OF ECONOMIC, SOCIAL,
POLITICAL, CULTURAL OR CIVIL LIFE.
ALL HUMAN BEINGS ARE EQUAL BEFORE THE LAW
AND HAVE THE RIGHT TO EQUAL PROTECTION
AND BENEFIT OF THE LAW.

DECLARATION OF PRINCIPLES ON EQUALITY

The *Declaration of Principles on Equality*: A New Covenant for the 21st Century

On 21 October 2008, in London, The Equal Right Trust (ERT) launched the *Declaration of Principles on Equality*, a document signed by 128 experts from 44 countries, which establishes, for the first time, general legal principles on equality as a basic human right. The *Declaration* is intended to assist efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality, setting the ground for a more progressive set of equality norms and policies in the 21st century.

Speaking at the launch, Professor Sir Bob Hepple Q.C., Chair of the ERT Board of Directors, emphasised the timeliness and relevance of this document. Noting that the *Declaration* was being launched in the midst of a global financial crisis and the ensuing economic turmoil, he warned that the emerging political, economic and social conditions could “lead to exclusion and, at worst, persecution of the most vulnerable groups within society”. Appealing to all states to adopt the *Principles* and harmonise relevant laws and policies with them, he said: “Nations must act now to ensure that everyone – regardless of wealth, ethnicity, sex or religion – has the same rights and that these rights are enshrined in laws at the time they are made.” (See the full text at <http://www.equalrightstrust.org/hepple-universal-recognition/index.htm>)



Sir Bob Hepple at the launch of the *Declaration*, 21 October 2008

Drafting the *Declaration*: The Equal Rights Trust’s First Milestone

The launch of the *Declaration* marked the completion of the first stage of ERT’s long-term project, *Legal Standards on Non-discrimination and Equality*. The project is a frontal attack on some of the major problems that ERT was established to address: (i) the pervasiveness of discrimination and the weaknesses in the protection of the right to equality at both international and national levels, including the absence of comprehensive equality legislation in over 160 countries around the world; (ii) the drifting apart of the fields of equality and human rights; (iii) the fragmentation of the anti-discrimination struggle.

Work on this core project began in July 2007. ERT reviewed existing normative standards

related to the protection against discrimination and the promotion of equality scattered across international and regional law, with a view to push in the direction of harmonising, streamlining and modernising existing international and national legal standards. Rather than formulating and advocating its own views, ERT sought to work towards articulating a common ground on which to base a set of basic principles, bringing into this process experts and advocates from a broad range of professional and geographic backgrounds. Hence, the preferred strategy was facilitation of dialogue and building of consensus among prominent experts and advocates, both from the fields of human rights and equality law. The work was guided by an Advisory Committee composed of prominent experts in the field of equality and human rights.



Jarlath Clifford and Tiyanjana Maluwa in the session "The Unified Perspective on Equality"

which was held on 3-5 April 2008 in London. The aim of the conference "Principles on Equality and the Development of Legal Standards on Equality" was to help make progress towards two separate though inter-related goals: (i) finalising the *Principles on Equality*; and (ii) discussing selected issues to enable further work on legal standards related to equality.



Shami Chakrabarti moderating the session "Positive Action"

In early February 2008, a draft document was prepared under the guidance of the project's Advisory Committee, and circulated to experts who had been invited to participate in this process. Having incorporated numerous subsequent comments and suggestions, a new draft of the *Principles on Equality* was prepared for a conference organised by ERT,

At the conference, 75 participants from 35 countries reviewed the *Principles* in two plenary sessions and four working groups. The debates provided invaluable comments, suggestions and agreements on how to finalise the *Principles*.

Regarding the second goal of the conference, the participants took part in lively debates - in six thematic sessions - on some of the most complex and controversial issues that would arise in any attempt to systematise equality standards in the future. The first session discussed concepts of discrimination and equality. Participants were encouraged to draw on their different legal, policy and practical experiences in responding to the question of how the right to non-discrimination relates to the right to equality. The session also considered the grounds on which discrimination must be prohibited: should the right to non-discrimination apply



Andrea Coomber, speaking on Interights' anti-discrimination litigation

to a closed list of grounds? Are new grounds emerging that should command equal protection? How should multiple discrimination be reflected in the law?

The second thematic discussion concerned positive action and positive duties and explored whether it is possible to formulate universally applicable standards related to positive action and positive duties. This session took account of the existing concepts of affirmative action, positive action, special measures and related notions. In the third session exploring the nexus between non-discrimination and equality and international law, participants considered how equality and non-discrimination are presented



Claire L'Heureux-Dubé

in legal fields other than international human rights law, including humanitarian law, international criminal law, international trade law, law related to development, security and anti-terrorism, environmental law and climate change, and migration law.

The fourth theme concerning the balance between non-discrimination and other human rights inspired a discussion on whether it was possible to formulate a principle, a standard or a test on how to balance competing human rights when one of these is the right to non-discrimination. The participants also examined what other aspects relating to the conflicts of rights would benefit from a general formulation. The fifth thematic session addressed the question of standards related to enforcement and the role of specialised bodies. The discussion was initiated by four



Christopher McCrudden

speakers, each from a different jurisdiction, who provided an overview and personal insight into the function and effectiveness of national mechanisms in implementing equality.

Lastly, the discussion on the unified perspective on equality and standard development focused on the practical aspects of advancing the harmonisation and modernisation of legal standards on equality from an integrated perspective. The speakers and interveners discussed opportunities to bridge the gap between the fields of equality and human rights on the one hand, and to overcome fragmentation within the equality and non-discrimination field on the other, with a view to exploring the potential for taking a unified approach to equality.



James Goldston in the session
"Enforcement and Specialised Bodies"

After the conference, ERT continued to facilitate communication with all experts who wished to be involved in the process, sending out new versions of the text for comments.

At every stage, all suggestions were carefully considered and incorporated, as appropriate, into updated versions. Maximum efforts were made to achieve consensus on every issue. In cases where full consensus could not be achieved, the ERT Board of Directors had the last say.

The Campaign: Vote for Equality!

In November, ERT launched the campaign "Vote for Equality!", aimed at achieving universal recognition of the *Declaration of Principles on Equality*. ERT appealed to individuals and organisations to endorse the *Declaration* online and to send electronic links to the *Declaration* to others. (See: <http://www.equalrightstrust.org/endorse/index.htm>). A web-page was created to keep track of the campaign. (See: <http://www.equalrightstrust.org/campaign/index.htm>). Spanish, Russian and other language translations of the *Declaration* are already available on the ERT website and translations into further languages are expected in the near future. Individuals and organisations from different parts of the world are signing up every day. In the forthcoming period ERT will avail itself of every opportunity to promote the *Principles* and to engage as many people as possible.

DECLARATION OF PRINCIPLES ON EQUALITY

Introduction

The right to equality before the law and the protection of all persons against discrimination are fundamental norms of international human rights law. But in the year which marks the 60th anniversary of the adoption of the Universal Declaration of Human Rights, the recognition and enjoyment of equal rights still remains beyond the reach of large sections of humanity.

In the second half of the 20th Century international human rights law emerged as a major legal framework for the protection of individual rights and freedoms. However, most countries in the world lack effective legal protection against discrimination and legal means to promote equality. Even in countries where such provisions are in force, much remains to be done to ensure the realisation of the right to equality.

In certain national and regional legal systems, equality legislation has evolved in the last few decades. It contains legal concepts, definitions, approaches and jurisprudence, some of which have taken the protection against discrimination and the realisation of the right to equality to a higher level. However, the disparity between international human rights law and national as well as regional approaches to equality hinders progress. Therefore, a major effort is required to modernise and integrate legal standards related to the protection against discrimination and the promotion of equality.

The *Principles on Equality* were agreed by a group of experts in several stages of consultations. They were discussed at a conference entitled “Principles on Equality and the Development of Legal Standards on Equality”, organised by The Equal Rights Trust on 3 - 5 April 2008 in London. Participants of different backgrounds, including academics, legal practitioners and human rights activists from all regions of the world took part in this event. Participants debated a version of the draft that had incorporated their comments on an earlier document. They subsequently contributed comments. A number of further experts participated in various stages of drafting and deliberation.

The result, the *Declaration of Principles on Equality*, reflects a moral and professional consensus among human rights and equality experts. This publication seeks to broaden the consensus, generate interest and debate and thus contribute to reaffirming and developing the right to equality. The principles formulated and agreed

by the experts are based on concepts and jurisprudence developed in international, regional and national legal contexts. They are intended to assist efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality. They might serve as a compass to orient legislative, judicial and policy efforts towards a more progressive set of equality norms and policies in the 21st century. Ultimately, it is hoped that the formulation of universally applicable principles on equality will encourage further efforts to fulfil equality as a fundamental human right enjoyed by everyone.

Bob Hepple, Chair
Dimitrina Petrova, Executive Director
The Equal Rights Trust

WE, THE UNDERSIGNED HUMAN RIGHTS ADVOCATES AND EXPERTS IN
INTERNATIONAL HUMAN RIGHTS LAW AND EQUALITY LAW

Preamble

Recalling the principles proclaimed in the Charter of the United Nations which recognise the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world;

Recalling Article 1 of the Universal Declaration of Human Rights proclaiming that all human beings are born free and equal in dignity and rights;

Recalling that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on human rights and other universal treaties, has proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, committing States to take all possible measures to ensure non-discrimination in the enjoyment of all human rights;

Noting the recognition, in Article 26 of the International Covenant on Civil and Political Rights, of the right to non-discrimination as an autonomous human right and the correlative obligation of States to realise this right;

Observing that discrimination by its nature harms human capabilities in unjust ways, creating cycles of disadvantage and denials of freedom which hinder human development;

Recognising the importance of combating every form of discrimination, including the need to take appropriate action to enable people who are disadvantaged to realise their full potential, and contribute to their full participation in economic, social, political, cultural and civil life;

Convinced that comprehensive anti-discrimination legislation and its effective enforcement are necessary to promote equality and eliminate discrimination;

Concerned that the vast majority of States do not have effective legal protection, including comprehensive legislation, to promote equality and combat discrimination;

Understanding that States may need guidance and assistance in introducing effective legal protection, including legislation, to promote equality and combat discrimination;

Noting that while legal provisions relating to equality should provide legal certainty, those responsible should be willing to improve and interpret legislation in order to reflect the changing experiences of all people disadvantaged by inequality;

Resolved to take further steps to promote the equality of all persons through the effective enforcement of prohibitions of discrimination in international human rights law as well as in national legislation;

Aiming to eliminate unjust inequalities and to promote full and effective equality;

HAVING PARTICIPATED IN A MEETING HELD IN LONDON, IN THE UNITED KINGDOM, FROM 2 TO 5 APRIL 2008 AND/OR IN SUBSEQUENT CONSULTATIONS FACILITATED BY THE EQUAL RIGHTS TRUST, HEREBY ADOPT THE FOLLOWING

DECLARATION OF PRINCIPLES ON EQUALITY

PART I EQUALITY

1 THE RIGHT TO EQUALITY

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

2 EQUAL TREATMENT

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

3 POSITIVE ACTION

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.

PART II NON-DISCRIMINATION

4 THE RIGHT TO NON-DISCRIMINATION

The right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality.

5 DEFINITION OF DISCRIMINATION¹

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

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

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

Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

¹ Throughout this Declaration the term "discrimination" is used as defined in this Principle and the term "prohibited grounds" refers to the grounds or combination of grounds described in this Principle.

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An act of discrimination may be committed intentionally or unintentionally.

6 RELATIONSHIP BETWEEN THE GROUNDS OF DISCRIMINATION

Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.

7 DISCRIMINATION AND VIOLENCE

Any act of violence or incitement to violence² that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts.

PART III SCOPE AND RIGHT-HOLDERS

8 SCOPE OF APPLICATION

The right to equality applies in all areas of activity regulated by law.

9 RIGHT-HOLDERS

The right to equality is inherent to all human beings and may be asserted by any person or a group of persons who have a common interest in asserting this right.

The right to equality is to be freely exercised by all persons present in or subject to the jurisdiction of a State.

² Certain signatories have endorsed the Principles on the basis that “incitement to violence” means “incitement to imminent violence”.

Legal persons must be able to assert a right to protection against discrimination when such discrimination is, has been or would be based on their members, employees or other persons associated with a legal person having a status or characteristic associated with a prohibited ground.

PART IV OBLIGATIONS

10 DUTY-BEARERS

States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction. Non-state actors, including transnational corporations and other non-national legal entities, should respect the right to equality in all areas of activity regulated by law.

11 GIVING EFFECT TO THE RIGHT TO EQUALITY

States must take the steps that are necessary to give full effect to the right to equality in all activities of the State both domestically and in its external or international role. In particular States must

- (a) Adopt all appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality;
- (b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality;
- (c) Promote equality in all relevant policies and programmes;
- (d) Review all proposed legislation for its compatibility with the right to equality;
- (e) Refrain from adopting any policies or engaging in any act or practice that is inconsistent with the right to equality;
- (f) Take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality;

(g) Take all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation.

12 OBLIGATIONS REGARDING MULTIPLE DISCRIMINATION

Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground. Particular positive action measures, as defined in Principle 3, may be required to overcome past disadvantage related to the combination of two or more prohibited grounds.

13 ACCOMMODATING DIFFERENCE

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

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

14 MEASURES AGAINST POVERTY

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 the pursuit of full and effective equality.

15 SPECIFICITY OF EQUALITY LEGISLATION

The realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.

16 PARTICIPATION

All persons, particularly those who have experienced or who are vulnerable to discrimination, should be consulted and involved in the development and implementation of laws and policies implementing the right to equality.

17 EDUCATION ON EQUALITY

States have a duty to raise public awareness about equality, and to ensure that all educational establishments, including private, religious and military schools, provide suitable education on equality as a fundamental right.

PART V ENFORCEMENT

18 ACCESS TO JUSTICE

Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.

19 VICTIMISATION

States must introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.

20 STANDING

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own

behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

21 EVIDENCE AND PROOF

Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (*prima facie case*), it shall be for the respondent to prove that there has been no breach of the right to equality.

22 REMEDIES AND SANCTIONS

Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.

23 SPECIALISED BODIES

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.

24 DUTY TO GATHER INFORMATION

To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures

to promote equality. States must not use such information in a manner that violates human rights.

25 DISSEMINATION OF INFORMATION

Laws and policies adopted to give effect to the right to equality must be accessible to all persons. States must take steps to ensure that all such laws and policies are brought to the attention of all persons who may be concerned by all appropriate means.

PART VI PROHIBITIONS

26 PROHIBITION OF REGRESSIVE INTERPRETATION

In adopting and implementing laws and policies to promote equality, there shall be no regression from the level of protection against discrimination that has already been achieved.

27 DEROGATIONS AND RESERVATIONS

No derogation from the right to equality shall be permitted. Any reservation to a treaty or other international instrument, which would derogate from the right to equality, shall be null and void.



To see the 128 individual original signatories of the Declaration, go to:
<http://www.equalrightstrust.org/ertdocumentbank/declaration%20signatories%20no%20page%20numbers.pdf>

To see further individual signatories as of 15 December 2008, and all endorsing organisations, go to:
<http://www.equalrightstrust.org/ertdocumentbank/2008-11-13%20Endorsers.pdf>

To see news on the Vote for Equality campaign, go to:
<http://www.equalrightstrust.org/campaign/index.htm>

THE *DECLARATION OF PRINCIPLES ON EQUALITY*:
A CONTRIBUTION TO
INTERNATIONAL HUMAN RIGHTS

**Commentary by Dimitrina Petrova, Executive Director
The Equal Rights Trust**

The *Principles on Equality* are based on legal concepts that have evolved in international, regional and national human rights or equality jurisprudence. Although many of the terms employed in the *Declaration* are sufficiently well established, the resulting conception of equality in its entirety opens a new space for standard development in the international human rights system. The purpose of this note is not to detail the linkages between the *Principles* and existing jurisprudence. Instead, it provides background and draws attention to some of the strengths of the *Declaration* which would allow it to be described as a step forward in promoting equality and human rights.

The group of signatories to the *Declaration of Principles on Equality* consists of prominent equality and human rights experts and advocates from many countries around the world. The majority of signatories took part in the drafting process facilitated by The Equal Rights Trust, an independent human rights organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Some signatories decided to endorse the *Declaration* after seeing the final version. The process of drafting lasted for about twelve months. It took the form of consultations, meetings, long-distance communications, an international conference convened by The Equal Rights Trust in April 2008 in London, analysis and incorporation of numerous comments and subsequent consultations in order to agree every formulation. The staff of The Equal Rights Trust facilitated communication and sought to achieve consensus on every issue, consistent with the mission and approach of the organisation. This was not an easy task, given the gaps and discrepancies between the frameworks of equality law and international human rights law; the differences in the meanings of key legal terms across jurisdictions; and the fragmentation of the global equality movements, broken down into narrower co-existing agendas. In some cases where full consensus could not be achieved, the international Board of Directors of The Equal Rights Trust had the last say. The work benefitted greatly from the guidance provided by a small Advisory

Committee, comprising Bob Hepple (Chair of the Board of The Equal Rights Trust), Barbara Cohen, Andrea Coomber, Sandra Fredman, Alice Leonard, Christopher McCrudden, Gay Moon, Colm O’Cinneide, and Michael O’Flaherty.

While the professional profile of the group of endorsers is representative of the field of equality and human rights (academics, activists, experts and practitioners with a diverse set of backgrounds and expertise), the same cannot be said with regard to the group’s geographic profile. Signatories from Europe and especially from the United Kingdom prevail. This is because The Equal Rights Trust, based in London, had limited human and technical capacity to involve experts and advocates from regions outside Europe, and reach out to non-English speaking communities. The geographic imbalance, however, reflects solely the limitations inherent in the facilitating organisation, and should not prejudice in any way judgement regarding the potential for experts’ and advocates’ endorsement from Africa, Asia, the Middle East, or South America. The Equal Rights Trust believes that there is a strong interest and support for equality everywhere, and is committed to doing whatever it can to include experts and advocates from the “global South” in promoting and elaborating further legal standards on equality.

In view of the above, the present publication is the beginning, and not the end of the endorsement process. The *Declaration of Principles on Equality* is open for further endorsements from both individuals and institutions. Everyone who wishes to support the *Declaration* is invited to send a message to info@equalrightstrust.org, or visit the website www.equalrightstrust.org to sign up to the *Declaration* online.¹ The Equal Rights Trust is committed to initiating and coordinating manifold efforts for a universal recognition of the *Declaration*.

The *Declaration of Principles on Equality* proclaims a universal right to equality. It expresses in the terms of general legal principles an integrated view of substantive equality, deriving the right from the universal recognition of equality as a value in itself, as well as a necessary aspect of a fair society. The *Declaration* shares the basic assumptions of human rights philosophy: for example, that as a human right, equality is an entitlement and not a benefit, and must be legally enforceable, like every other human right. The *Declaration* follows a similar logic to that found in numerous pre-existing human rights instruments encoding rights, as regards the content of the right, the definitions of key terms, the scope of the right’s application, right-holders, duty-bearers, obligations to give effect to the right, etc.

Throughout the *Declaration*, the concept of equality, as well as its equivalent, “full and effective equality”, has a content which is larger than that of “non-discrimination”. In Principle 1 [The Right to Equality], the “right to equality” is given a meaning which is richer than the notions of equality before the law and equality of opportunity. Similar general references to full equality are not absent from modern documents setting legal standards: for example, the European Union’s equal treatment Directives² refer to “ensuring full equality in practice”. But the similarity of terms may be only a rhetorical one, as the protection against discrimination emerging on the basis of the EC Directives is too limited to fulfil the right to equality as defined in the present *Declaration*. For example, the EC Directives’ protection applies only in respect to discrimination on the grounds of racial or ethnic origin, sex, religion or belief, sexual orientation, disability and age, while the present *Declaration* recognises a number of other grounds which should be prohibited.

Principle 1 [The Right to Equality], reaffirms the inter-relatedness of equality and dignity articulated in Article 1 of the Universal Declaration of Human Rights which asserts that: “All human beings are born free and equal in dignity and rights”. Principle 1 further implies a vision of a just and fair society as one in which all persons participate on an equal basis with others in economic, social, political, cultural and civil life.

The content of the right to equality includes the following aspects: (i) the right to recognition of the equal worth and equal dignity of each human being; (ii) the right to equality before the law; (iii) the right to equal protection and benefit of the law; (iv) the right to be treated with the same respect and consideration as all others; (v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.

Defining the right to equality as requiring participation on an equal basis with others in any area of economic, social, political, cultural or civil life is consistent with international human rights law in delineating the areas in which human rights apply. But the *Declaration* defines the areas of application of the right to equality without drawing the distinctions between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, which have for so long bedeviled international human rights law. At the same time, the *Declaration* goes beyond the understanding of discrimination and equality as necessarily related to an existing legal right (or to “any right set out by law”, as Protocol 12 to the European Convention on Human rights puts it). In the drafters’ view, the right to equality (and

non-discrimination) can be claimed in any of the listed five areas of social life, even in the absence of certain legal rights within them. In a country where national law does not recognise a right to employment, for example, one should still have the right to equality (and non-discrimination) in access to and conditions of employment. This non-subsidary approach to the definition of equality was preferred in the *Declaration* to the approach taken by international human rights law, the law of the European Convention on Human Rights and other legal systems that understand discrimination as discrimination in the exercise and enjoyment of a legal right. The definition in Principle 1 does not require the right to equality to be based on or related to the enjoyment of any other human right.

Principle 2 [Equal Treatment] requires treating people as equals in respect of their dignity, in light of the purpose “to realise full and effective equality”. The understanding of “equal treatment” in this Principle abandons the framework of formal equality,³ whereby individuals would be treated in identical ways regardless of their relative capabilities for participation in economic, social, political, cultural or civil life. As the right to equality defined in Principle 1 requires ensuring such participation “on an equal basis with others”, non-identical treatment is justifiable and indeed necessary in order to achieve such participation. Principle 2 requires treating people according to their unique circumstances as far as possible, with a view to moving in the direction of equal participation in the sense of Principle 1. Treatment that would be detrimental to those who are the least well-off in society would therefore clearly violate the object and purpose of the *Declaration*.

According to Principle 3 [Positive Action], positive action measures do not constitute discrimination as long as the difference in treatment is aimed at achieving full and effective equality and the means adopted are proportionate to that aim. Positive action measures are not defined as an exception to the principle of equal treatment but as part of its implementation. The concept of positive action in Principle 3 goes further towards substantive equality than the concepts of special measures related to specific categories of persons found in international and regional human rights instruments.⁴ But it should be noted that the *Declaration* captures the growing tendency of interpreting “special measures” as part of, rather than an exception to equal treatment. For example, the Committee on the Elimination of Discrimination against Women (CEDAW) in its General Recommendation No. 25 states that under the Convention, temporary special measures “should target discriminatory dimensions of past and current societal and cultural contexts which impede women’s enjoyment of their human rights and fundamental freedoms. They should aim at the elimination of all forms of discrimination against women, including the elimination of the

causes and consequences of their de facto or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.”⁵ Furthermore, the Committee recommends that States should “give women an equal start and empower them by an enabling environment to achieve equality of results. In pursuit of the goal of substantive equality, States should develop an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.”⁶

The definition of the right to non-discrimination in Principle 4 as a free-standing right is meant in two senses: (i) in the sense that it is a separate right, which can be violated even if a related right is not: for example, a person’s right to non-discrimination in the enjoyment of the right to education may be violated, while no breach of her right to education has been found; (ii) in the sense of an autonomous right, not related to any other right set out by law. In this second sense, the free-standing status of the right to non-discrimination means that this right does not depend on whether another legal right actually exists.⁷

It should be noted that, as defined in Principle 1, the right to equality is also a free-standing right in the two senses specified above. It is not dependent on or related to the recognition of any other civil, cultural, economic, political or social right. Accordingly, the definitions of direct and indirect discrimination in Principle 5 do not link discrimination to any other right set out by law. In this respect, therefore, the *Declaration* goes considerably further than international human rights law in proclaiming a free-standing right to equality.

The practical implications of this approach, recognising equality as larger than non-discrimination and as not necessarily related to another legal right, are far-reaching. People are entitled to equality in this understanding without having to construct themselves as victims of direct or indirect discrimination, and without having to rely on the individualistic and reactive nature of enforcing anti-discrimination law. Rather, this understanding entails a strong and serious positive obligation of the duty-bearer (the State) to take steps to realising equality in a proactive way and with societal reform in mind. This approach does not diminish the role of legal enforcement of the right to non-discrimination by individual or group claimants but enables more comprehensive measures of improving the position of disadvantaged groups in society.

In Principle 5 [Definition of Discrimination], the definition's terms "treatment", "provision", "criterion" and "practice", taken together, cover the same or broader range of actions and states of affairs as the aggregate of the terms "distinction", "exclusion", "restriction" and "preference" used in several definitions of discrimination in the UN International Convention on the Elimination of All Forms of Racial Discrimination (Article 1), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Article 2(2)), the UN Convention on the Elimination of All Forms of Discrimination against Women (Article 1), the UN Disability Convention (Article 2) and other instruments.

The definition of discrimination in Principle 5 includes an extended list of "prohibited grounds" of discrimination, omitting the expression "or other status" which follows the list of characteristics in Article 2 of the Universal Declaration of Human Rights.⁸ While intending to avoid abuse of anti-discrimination law by claiming discrimination on any number of irrelevant or spurious grounds, the definition nonetheless contains the possibility of extending the list of "prohibited grounds" and includes three criteria, each of which would be sufficient to recognise a further characteristic as a "prohibited ground". This approach is inspired by the solution to the open versus closed list of "prohibited grounds" dilemma provided by the South African Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

Legal provisions relating to equality must combine legal certainty with openness to improvement in order to reflect the lived experiences of those disadvantaged by inequality. Grounds which historically have been related to the most egregious forms of discrimination and are significant factors in a society, including race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, association with national minority, belonging to an indigenous people, age, disability, sexual orientation or health status, should be explicitly referred to in legislation. However, when other grounds of discrimination become significant in a society, they should also be explicitly referred to in legislation, and Principle 5 provides guidance in efforts to legislate to cover new "prohibited grounds".

The term "characteristic" in Principle 5 as well as Principles 7 and 9, used with reference to people who have been subjected to discrimination, is not meant to denote a metaphysical property of the person. Rather, it denotes the perceptions of others as well as the self-description of the ground on which one has been discriminated against. "Characteristic" should be understood to mean a feature that is not necessarily of a permanent or immutable nature, and can sometimes be short-lived or blend into other characteristics.

According to Principle 6 [Relationship between Grounds of Discrimination], legislation should ensure equal levels of protection against discrimination on each of the prohibited grounds. This means that while exceptions, justifications and limitations to the principle of non-discrimination will certainly differ with regard to different grounds, the victim of discrimination is entitled to an effective remedy irrespective of the ground (or combination of grounds). For example, if any occupational requirements related to race are provided as justifications for direct discrimination in a certain legal system, these requirements and the related exceptions would be very different as compared to those related to language, or age. But once a certain treatment, provision, criterion or practice is found to constitute discrimination, the persons concerned should be entitled to an equally effective remedy, regardless of the prohibited grounds.

In Principle 8 [Scope of Application], the *Declaration* provides the broadest possible scope of application: the right to equality applies “in all areas of activity regulated by law”. This means that it encompasses activities by public and private actors, including transnational corporations and other non-national legal entities. The phrase ‘regulated by law’ covers, in any particular country, not just the areas that are in fact regulated but also those that under national constitutions or international human rights law are subject to legal regulation. This approach has a solid basis in international human rights jurisprudence. The Human Rights Committee, interpreting the scope of the right to be protected against discrimination, stated that Article 26 of the International Covenant on Civil and Political Rights “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.⁹ Furthermore, the Human Rights Committee noted that: “the right to equality before the law and freedom from discrimination, protected by Article 26, requires States to act against discrimination by public and private agencies in all fields”.¹⁰ With specific reference to State obligations to protect against human rights violations by private actors, the Human Rights Committee noted that: “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”.¹¹

The second sentence of Principle 9 [Right-holders] extends the right to equality to “all persons present in or subject to the jurisdiction of a State”. This means that the right to equality is to be freely exercised by all individuals, irrespective of nationality or statelessness, including asylum seekers, refugees, migrant workers, irregular migrants and other persons who may find themselves in the territory or subject to the jurisdiction of a State. The right to equality is also to be freely exercised by those

within the power or effective control of the forces of a State acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State assigned to an international peace-keeping or peace-enforcement operation.¹²

The State's duty formulated in Principle 10 [Duty-bearers] should apply also in respect to privatised functions of the State. As a general rule, the State should not be able to escape its positive duties through privatisation. The Inter-American Court of Human Rights, for example, has established this principle with respect to health care and private health care institutions in the case of *Ximenes-Lopes v. Brazil*, Judgment of 4 July 2006. The European Court of Human Rights has also held that where a State relies on private organisations to perform essential public functions, in particular those necessary for the protection of Convention rights, it retains responsibility for any breach of the Convention that arises from the actions of those private organisations.¹³ Secondly, contractual means can be used to enforce positive duties against private contractors entering into procurement arrangements with public bodies.¹⁴ Finally, the State may place the obligation directly on the body carrying out the privatised function. For example, the Human Rights Act 1998 in Great Britain provides that human rights duties should apply to private or voluntary sector bodies when performing functions "of a public nature".¹⁵ A public function is one for which the government has assumed responsibility in the public interest.

Principle 11 [Giving Effect to the Right to Equality] is consistent with the way in which the State's obligations are defined with respect to the range of human rights provided in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. States' obligations are explained, *inter alia*, in General Comment 3 of the UN Committee on Economic, Social and Cultural Rights, entitled "The nature of States parties' obligations", and the Committee's observations are relevant, *mutatis mutandis*, in interpreting this *Declaration*. For example, the Committee observes that the nature of the general legal obligations undertaken by States in respect to the rights provided in the Covenants is understood as containing both "what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result."¹⁶ The same observation applies with regard to the State's obligation to fulfil the right to equality.

By analogy with the interpretation of States' obligations set out in General Comment 3 of the UN Committee on Economic, Social and Cultural Rights, States are required

to take all necessary steps, including legislation, to give effect to the right to equality in the domestic order and in their international cooperation programmes. The right to full and effective equality may be difficult to fulfil; however, the State does not have an excuse for failing to take concrete steps in this direction. The requirement to take such steps is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to cultural, economic, political, security, social or other factors.¹⁷

Principle 12 [Obligations Regarding Multiple Discrimination], read in the light of Principles 1, 2, 3 and 11, implies that a pattern of discrimination affecting individuals who share a particular combination of grounds of discrimination may require a unique set of specifically targeted positive action measures. This Principle addresses the need for any legal provisions promoting equality to take into account evolving social phenomena that are manifested as discriminatory acts or practices. The law should recognise that individuals have multiple identities and cannot always be classified according to or as defined by a single characteristic. Multiple discrimination is the term used to describe: a) discrimination on more than one ground in a cumulative (additive) sense, e.g. where a woman is discriminated against on grounds of her gender and, separately, also on grounds of her race (disability, age, etc), and in this case the discriminator otherwise discriminates both against women and against racial minorities; b) discrimination on more than one ground in a syncretic sense, based on a combination of grounds, where it is only the combined characteristics of, for example, gender and race that trigger discrimination, while each of them alone does not.

The concept of reasonable accommodation is well established in equality law, particularly in legislation related to disability rights. The definition of accommodation in Principle 13 [Accommodating Difference] is based on the definition contained in the UN Convention on the Rights of Persons with Disabilities,¹⁸ but it is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life.

Principle 14 of the *Declaration* [Measures against Poverty] recommends that measures to alleviate poverty should be coordinated with measures to combat discrimination. As noted by the UN Independent Expert on the question of extreme poverty and human rights in her report of August 2008 to the General Assembly: “Patterns of discrimination keep people in poverty which in turn serves to perpetuate discrimi-

natory attitudes and practices against them. In other words, discrimination causes poverty but poverty also causes discrimination. As a result, promoting equality and non-discrimination is central to tackling extreme poverty and promoting inclusion. Measures to eliminate poverty and efforts to eliminate all forms of discrimination must be understood as mutually reinforcing and complementary.”¹⁹

It is difficult to see how a State would be able to implement the right to equality without comprehensive national legislation and policy. Principle 15 [Specificity of Equality Legislation] affirms that national equality legislation, whether in the form of one unified comprehensive Act or a combination of several pieces of legislation covering specific equality strands or areas of activity, should be sufficiently detailed in order to realise the right to equality. At the time of adopting this *Declaration*, over 160 States around the world lack adequate and comprehensive national legislation. Many States rely, at best, on constitutional provisions, framework laws or other norms and policies that are so general and abstract that they render the right to equality or the right to non-discrimination illusory.

The approach taken in Principle 21 [Evidence and Proof] has been well established in European Union legislation. For example, Article 8 of *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* contains identical wording. Additionally, the Preamble to this Directive, at paragraph 15, stipulates that “[T]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.”²⁰

In Principle 22 [Remedies and Sanctions], consistent with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the term “reparation” is used to refer to a number of measures which may be adopted, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²¹

Principle 24 [Duty to Gather Information] is underlined by the acknowledgement that statistical information plays a decisive role in unmasking discrimination. The duty of the State to collect appropriately disaggregated information is frequently in-

voked in concluding observations of UN Treaty Bodies when reviewing State compliance with the provisions of human rights conventions. Many acts and patterns of discrimination cannot be successfully redressed in litigation without appropriate information which only the State or a State-authorized body has collected. Moreover, information collection is imperative for benchmarking and for self-evaluating the progress made in fulfilling the right to equality.

Experience shows that individuals are often badly or insufficiently informed concerning equality and discrimination issues. Effectiveness of the system of public information is indispensable to the protection of the right to equality. The enforcement of Principle 25 [Dissemination of Information] should ensure that laws and policies concerning equality are understood and accepted by the public.

The *Declaration of Principles on Equality*, as its title indicates, provides only the most general and abstract synthesis of legal standards on equality. Those who would be looking for guidance on specific issues and would expect to find more detailed recommendations would be disappointed. Some may see generality as a weakness, and in a sense they will be right. The *Declaration* lacks the richness of normative detail that would be so important in practice, whether in combating domestic violence, or defending stateless persons, or setting out policies within any specific area of social life. But the *Declaration's* significance consists in the fact that it documents a degree of consensus among global experts at the most fundamental level, reflecting both basic values shared by the signatories and a negotiated agreement on exactly how to express these values in the form and the language of universal legal principles. As an established common ground, the *Declaration* can serve as the basis for further elaboration of specific standards related to equality issues. It is the intention of The Equal Rights Trust to promote and facilitate further dialogue towards this goal.

Finally, I must note that the above comments do not bind in any way the signatories of the *Declaration of Principles on Equality*. The moral and professional consensus documented by the endorsements refers solely to the text of the *Declaration*. I simply had the privilege to author the first published remarks about it.

¹ Both individual and organisational endorsements are welcome. Individual signatories are requested to provide their preferred institutional affiliation, which will be mentioned in publications for identification purposes only.

² Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

³ The departure from a formal conception of equal treatment is in progress in present-day international, regional and national legislation and jurisprudence. See, for example, Council of Europe, Explanatory Report to Protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted by the Committee of Ministers of the Council of Europe on 26 June 2000, which states: "While the equality principle does not appear explicitly in the text of either Article 14 of the Convention or Article 1 of this Protocol, it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists."

⁴ See, for example, Article 1, paragraph 4 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 2, paragraph 1(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

⁵ United Nations, Committee on the Elimination of Discrimination against Women, General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, Thirtieth session, 2004, para. 14.

⁶ *Ibid.*, para. 8.

⁷ See comment to Principle 1 *supra*.

⁸ United Nations, Universal Declaration of Human Rights, Adopted and proclaimed by United Nations General assembly resolution 217 A (III) of 10 December 1948, Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁹ United Nations, Human Rights Committee General Comment No. 18: Non-discrimination, Thirty-seventh session, 1989, para. 12.

¹⁰ United Nations, Human Rights Committee, General Comment No. 28: Equality of Rights between Men and Women (Article 3), Sixty-eighth session, 2000, para. 31.

¹¹ United Nations, Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Eightieth session, 2004, para. 8.

¹² *Ibid.*, para. 10; see also para. 12.

¹³ See *Van der Mussel v Belgium* (1984) 6 EHRR 163 (European Court of Human Rights); see also *Costello-Roberts v UK* (1995) 19 EHRR 112 (European Court of Human Rights).

¹⁴ See C. McCrudden. *Buying Social Justice Equality, Government Procurement, and Legal Change*, OUP 2007.

¹⁵ Human Rights Act 1998, s. 6(3b).

¹⁶ United Nations, Committee on Economic, Social and Cultural Rights, General Comment 3: The Nature of States Parties Obligations, Article 2, Paragraph 1 of the Covenant, Fifth session, 1990, para.1.

¹⁷ Compare Human Rights Committee General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 14.

¹⁸ United Nations, Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, Article 2: "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

¹⁹ Report of the UN Independent Expert on the question of extreme poverty and human rights, UNGA 63rd Session, 2008, Para. 29-30.

²⁰ See, re. the use of statistics as proof, the European Court of Human Rights' Grand Chamber Judgment in *D.H. and Others v. the Czech Republic* of 13 November 2007 (Para. 188): "In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence."

²¹ United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by United Nations General Assembly Resolution 60/147 of 16 December 2005.

TESTIMONY

*"This is such a hard time
for all the people in the Vanni.*

*All are constantly moving
and are afraid, we don't have work
and the children cannot study well.*

*How can I teach children
who are so frightened?*

*They have no concentration for
education, whenever they
hear a fighter jet or shelling they
all run to the bunker..."*

*Dillai, 59, School Principal,
Doonakary, Sri Lanka*

Violence, Extreme Poverty and Inequality: the Voices of Civilians Trapped in Conflict in Northern Sri Lanka

Throughout 2008, in parts of northern Sri Lanka controlled by the Liberation Tigers of Tamil Eelam (LTTE), the conflict between the government forces and LTTE intensified.¹ Civilians in the region known as the Vanni have been effectively trapped in the conflict, with tens of thousands forcibly displaced, often repeatedly, as the Sri Lankan military advanced further towards the centre of LTTE-controlled territory. Access to the region is severely restricted and, as the situation has deteriorated, very little reliable information has been available. In September 2008, the Sri Lankan government ordered United Nations and non-governmental aid workers to leave northern Vanni.² One former aid worker who was forced to leave the Vanni worked with The Equal Rights Trust to record the voices of civilians trapped between the parties to the conflict.

Following the collapse of a ceasefire agreement in January 2008,³ the Sri Lankan military launched a major offensive to reclaim areas of the north and east of the country previously controlled by the LTTE.⁴ Tens of thousands of people have been forcibly displaced, trying to escape the aerial bombardment and shelling by the Sri Lankan forces.⁵ Many families have been displaced repeatedly as the Sri Lankan armed forces pushed further towards the town of Kilinochchi, the LTTE stronghold. Civilians trapped in the conflict are denied their basic right to equality.⁶ They are subject to violence and repeated forced displacement; their livelihoods are severely restricted, many are subject to extreme poverty.

Pillai, 59, School Principal:

"I am a school principal in Poonakary. In the last few months 24 of the 27 schools in my district have been displaced. That's over 7,000 students and 225 teachers. We have all moved closer to Kilinochchi town but many have yet to find a safe place and they move every seven days or so. Many of us are living under trees



and looking for shelter. How do I look after my students in this situation? I have no school for them to attend and I have no idea where many of them are. We need time to regroup and find temporary school buildings to begin teaching again. All the families are farmers and fishermen, they have all lost their livelihoods. This is such a hard time for all the people in the Vanni. All are constantly moving and are afraid, we don't have work and the children cannot study well. How can I teach children who are so frightened? They have no concentration for education, whenever they hear a Kfir (fighter jet) or shelling they all run to the bunker, many

start crying or shaking with fear and we have to spend so much time consoling them... but we are also scared. Last year my eldest daughter was taken by the LTTE to fight. She was 19 years old. For a year I had to console my wife. She cried and cried every night. In June this year she was given back to us, but she was dead. I have no words for my wife, what can I say to her. If we get any chance I want to leave here with my family. We cannot go on like this, it is breaking our hearts.”

Selva, 32, Bicycle Repair Man:

“My family and I were displaced from Pallai in 1995 due to heavy shelling. We have been living in Jeyapuram for the past 13 years and I have built a reputation for repairing bikes. In Jeyapuram I can earn between Rs. 300 - 500 per day. On August 3rd this year we had to leave Jeyapuram due to the shelling again. My family and I were very upset and ran away, throughout the night. I understood that something may happen in my area so I had arranged my tools in a way that I could collect them quickly. Now we are here in Selvanagar and I am still trying to make a living. It is very hard as the people around me have no money and we are all in the same position. In the past three days I have only made Rs. 20. This is not enough to buy anything. Everything in the Vanni is now



so expensive and we are living hand to mouth. I continue to work and fix bicycles because I don't want to just sit and think about my life and how I will support my family. When I am working I am happy and I don't think. But I need to earn money to look after my wife and children. I'm very afraid of the army coming to this area. I am not sure if I would leave if given the chance. If all the people from my village leave and go to the government area then I will take my family. But we are all afraid, we have never been out there and we don't know what to expect.”



As the conflict further intensified in the second half of 2008, civilians have been effectively trapped between the two warring parties: afraid to remain in LTTE-controlled territory and afraid or unable to flee to government-controlled territory. Civilians who stay behind are at risk of aerial bombardment on one hand, and forced recruitment into the ranks of the LTTE, on the other.⁷ Thousands of families trying to flee to government-controlled areas have been reportedly hindered by the operation of a strict pass system by the LTTE.⁸ Those that have managed to flee to government-controlled territory are often reportedly ‘warehoused’ in camps that can operate as *de facto* detention centres.⁹

Similar human rights abuses suffered by the civilians in northern Sri Lanka have been ex-

tensively documented in the past. For example, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has described the systematic efforts by various armed groups, and particularly the LTTE, to kill Tamils who refuse to support the LTTE.¹⁰ According to his report, '(m)any Tamil and Muslim civilians have been killed primarily because they have sought to exercise their freedoms of expression, movement, association, and participation in ways that are not supportive of one or other of the factions fighting the Government. And many others have been killed in retaliation or because they are deemed to be "sympathisers":'¹¹ The Special Rapporteur also reported the perception that state actors enjoy impunity in relation to extra-judicial executions of Tamils, highlighting 'the paucity of cases in which a government official – such as a soldier or police officer – has been convicted for the killing of a Tamil.'¹²

Mary, 42, Mother of Two:

"With the situation here it is very difficult to be a mother. I have two children, a 16 year old son and a 13 year old daughter. There are many problems I face but my biggest fear is the recruitment of my children by the LTTE. My son often comes home from school and tells me that another student, from the grade above his, has been taken to fight. This is very hard for the children and they all discuss their birthdays and work out who will be taken first, when the time comes. Another major problem we have is the jealousy of our community. When a child is taken from a home the parents will begin to tell the LTTE of other children that are hiding in neighbours' homes. There is a sense of jealousy amongst our community that makes us tell on each other. I know a girl who hid in a pit for six months. Her father brought her food and water every night and she stayed there

out of sight. One hot day a neighbour spotted her taking water from the well and returning to the pit. The next day the LTTE came and took her from the pit. My children are also so scared of the Kfirs. My son walked home from school one evening and a Kfir swooped out of the sky and bombed an LTTE base close to our house. The sound was terribly loud and put so much fear inside me. I realised that my son would be walking in that area at the time and I screamed, in fear that he may have been hit. We met on the path running towards each



other. I was so scared and happy to see him. But now he is so scared about the Kfirs. He hears them before any of us at home. I want my children to receive the best education and study hard but when we hear the Kfirs in the morning I don't want them to leave for school. I get so worried that they will be killed that day, so I tell them to stay at home. They sometimes miss a day or two every week because of my fear and that makes me very sad, like I'm being a bad mother, but I'm just trying to protect my children."

Non-discrimination is a basic principle of international humanitarian law¹³ and human rights law. All parties to the conflict in Sri Lanka are bound by customary international humanitarian law rules concerning non-international armed conflict.¹⁴ Both the government of Sri Lanka and the LTTE are obliged to treat those not taking active part in the hostilities humanely at all times, and without discrimination.

Sandra, 25, Displaced Person, Uruthirapuram, Kilinochchi:

"I have been displaced from my homes seven times over the past three years. In 2005 we had a good life in Parapan Kandal, (LTTE controlled) Mannar District until the Sri Lankan Army began to shell the area near our homes. My husband was a fisherman and we lived well. At the time of the shelling I was pregnant and had to run through the night to safety, since then I have been moving every six months due to the shelling. I am now sat here under this tree and it's the seventh time. I am tired of running. This situation is so hard for us now, my baby is one and a half years old and my husband has no work. We are living hand to mouth and having to take charity from NGOs and family. I feel very sad about this situation. I have been happy living under the LTTE for many years, but the fighting needs to stop, we are all suffering here. I cannot go out to the



government areas as I fear that they will kill me or take me to prison, so I am stuck here with my family. This morning we heard that the army are shelling closer; this is very scary as we now have nowhere to go. My family has no food, no money and no transport, where can I run to now?"

Civilians from LTTE-controlled areas, including those displaced, are extremely vulnerable to rights abuses by all parties to the conflict, a vulnerability that is often heightened for those displaced, or those who are very young or old. People feel that whatever they do, whatever action they take – they will be exposed to risk.



Kanthai, 72, Widow:

"I had to leave my home in Jeyapuram two months ago due to the shelling. It was very frightening that night, the shells came and we all panicked. I am a grandmother of five and a great-grandmother of eight. I was so worried for the little ones that night as they are small and did not understand what was happening in our village. We managed to make our way here to Selvanagar and have been here ever since. It's very difficult for me as I am old and find it hard to live out in the open like this, under trees. We will get help soon from some of the agencies here and I will share a shelter with my grandson and his family. I feel very sad about this situation as he has his own fam-



Kfirs, and now this displacement. Under a tree is no place for a child to grow up. I don't want to leave this area as it's all I know nowadays and I am scared that the army will target us if we leave. All we know is the Vanni, the outside is a mystery to us. Most of all, I just want peace in my community and in my mind, and to be able to watch my grandchildren grow into healthy adults."

UN agencies estimate that by November 2008, the number of internally displaced persons had risen to some 230,000 persons in the Kilinochchi and Mullativu districts as a result of intensified government military operations to regain the last stronghold of the LTTE.¹⁵ Access by humanitarian aid agencies is severely restricted. Many of the displaced are living in the open in make-shift camps. At

ily and I feel like I am a burden on them. I try and help as much as I can, with the cooking and playing with his children, but still I feel bad. Our fear is growing day by day as it feels like the shelling has followed us here. Every-day it gets closer and we are all worried and confused as to what to do if we have to move again. It feels like the army are all around us now. I grew up in Kandy with my family, but we moved to the Vanni nearly 30 years ago because of the problems then. I really like the Vanni, but since I have been here there have been constant battles and our lives have been one struggle after the other. I'm very sad for my grandchildren who have not known peace in their lives. When I was a child I had the chance to be free and enjoy my childhood. I went swimming, climbed trees and had great adventures. All my grandchildren and great-grandchildren know the sound of bombs and



a time of seasonal rains, the UN has identified an urgent need for shelter and sanitary supplies in addition to improved access for food convoys.¹⁶ The testimony of Stella, a thirteen-year-old girl whose family was displaced by aerial bombardment three times between January 2007 and October 2008, reveals how the coping mechanisms of civilians, repeatedly displaced and caught in the conflict, have been severely restricted.

Stella, 13:

My home is in Illuppakadavai. On the 2nd of January 2007, at nine in the morning, the Kfirs came. When they bombed my village the ground shook and shrapnel flew everywhere. Many people were injured, and so was I. That's how I lost my leg. I had to be in Kilinochchi hospital for one month, and return there once a month to visit the doctors. After the bomb-

ing, I fled with my family to Kumulamunai. On the 20th of June 2008, there was shelling close to our new home, and we had to run away because we were afraid. We could not take many things and I had to run as fast as I could with my crutches, with help from my family and neighbours. I travelled all the way from Kumulamunai to Jeyapuram like this; it was very difficult. From Jeyapuram to Maniyankulam we were able to get a tractor. We have been in this place for one week, and we have only one shelter; six families live there; that's around 23 people. There are no proper toilets here, and for me it is very difficult... because of my leg.

I'm on school holidays at the moment, but when school starts again I don't know how I'll go; to walk there I'll always need help from someone. More than that, if we have to move from this place also, I don't know how I'll manage; I'll



have to run like last time. I have a prosthetic leg, and I can ride a bicycle; if I had a bicycle, life would be much easier for me. I'll be happy if we can get more shelters, to sleep comfortably, and a proper toilet; but more than that, what I want most is a bicycle. We'll stay here if the shelling doesn't come close; otherwise we'll have to move again. If there was peace in this country, we wouldn't have to go through all this; we need peace.

A second interview with Stella took place on 20 August 2008, this time in Manipuram.

The shelling started at 7:30 in the evening and we ran immediately to Konavil School, about 5km away. Our family had to spend the night in the school as I couldn't go on with my crutches. My family were carrying all our be-

longings and could not help me. I felt sad for my family that I was slowing them down. That night was very loud due to the shelling. Other families had managed to get further away, but we had to stay there because of my injuries. We are now here in the school and again I feel bad. This school is like my old school, but we are using it for a home and the children in the area will suffer. I am very scared that shelling will happen again in this area and we will have to run again. I am tired of always running from place to place and I do not know of any safe place anymore. If the Government and the LTTE allow us, I would be very happy to escape this area. I just want peace to come to me and my family and I don't want to run anymore. I still have very bad dreams about the Kfir attack and when I hear the Kfir these days I get so scared.



¹ Fighting between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lanka government started in the 1980s. For an overview of the conflict, see ICRC web pages on Sri Lanka.

² The government announced on Monday 8 September 2008 that "it could no longer ensure the safety of aid workers in the area and requested that United Nations and humanitarian agencies staff move out to government-controlled territory". See Amnesty International. *Blocking aid workers in Sri Lanka endangers trapped civilians*, 10 September 2008.

³ In January 2008, the government of Sri Lanka withdrew from a 2002 ceasefire, which had begun to collapse in 2005.

⁴ See Amnesty International. *Sri Lanka: Attacks against civilians must cease*, 6 October 2008.

⁵ For example, according to Amnesty International, more than 70,000 people were forcibly displaced by government aerial bombardment and artillery shelling between May and August 2008. See Amnesty International. *Tens of thousands at risk in Sri Lanka as fighting escalates*, 19 August 2008.

⁶ See: *Declaration of Principles on Equality*. The Equal Rights Trust, London, 2008. Principle 1 (The Right to Equality) states: "The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life". See also Principle 7 (Discrimination and Violence).

⁷ According to some reports, the LTTE is actively recruiting minors in camps for the newly displaced. See Amnesty International. *Blocking aid workers in Sri Lanka endangers trapped civilians*, 10 September 2008.

⁸ According to Amnesty International, "(s)ome individuals have been forced to stay behind [in LTTE controlled terri-

tory] as guarantors, to ensure the return of other family members". See Amnesty International. *Tens of thousands at risk in Sri Lanka as fighting escalates*, 19 August 2008.

⁹ *Ibid.*

¹⁰ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Addendum: Mission to Sri Lanka, UN Doc. E/CN. 4/2006/53/Add. 5, 27 March 2006, Para. 3. The Special Rapporteur visited Sri Lanka from 28 November to 6 December 2005, at a time when, according to the report, 'the Ceasefire Agreement (CFA) of February 2002 between the Government and the LTTE was under unprecedented stress'. The ceasefire ended in January 2008.

¹¹ *Ibid.*, Summary, p. 2.

¹² *Ibid.*, Para. 59.

¹³ See, for a discussion: Pejic, Jelena. "Non-discrimination and armed conflict", *International Review of the Red Cross*, No. 841, pp. 183-194.

¹⁴ The Government of Sri Lanka and the LTTE are bound by the provisions of Article 3 Common to the four Geneva Conventions of 1949, which applies to non-international armed conflicts. The LTTE has formally taken upon itself obligations under the Geneva Conventions. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the UN High Commissioner for Human Rights, in 2006 and 2008 respectively, highlighted that international human rights law and international humanitarian law apply to the conflict in Sri Lanka. See Human Rights Council. Working Group on the Universal Periodic Review, Second session, Geneva, 5-16 May 2008, UN Doc. A/HRC/WG. 6/2/LKA/2, 8 April 2008, Para 1.

¹⁵ United Nations High Commissioner for Refugees (UNHCR), Overshadowed by displacement in Sri Lanka's north, people return home in the east, 6 November 2008, online: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/VDUX-7L5MX5?OpenDocument&query=sri%20lanka> See also: United Nations Country Team in Sri Lanka. WFP convoy departs for Vanni, November 2008, online: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/MCOT-7L2K34?OpenDocument&rc=3&emid=ACOS-635PHK> (accessed 10 November 2008).

¹⁶ United Nations Office for the Coordination of Humanitarian Affairs - Integrated Regional Information Networks (IRIN). Sri Lanka: Fourth WFP convoy travels to Tiger-held areas, 5 November 2008, online: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/LSGZ-7L4EM5?OpenDocument&query=sri%20lanka> (accessed 10 November 2008).

INTERVIEW

On 3 May 2008, the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol permitting individual communications to the Committee on the Rights of Persons with Disabilities came into force. ERT spoke to Gábor Gombos, Senior Advocacy Officer at the Mental Disability Advocacy Centre, and Professor Gerard Quinn of the National University of Ireland, Galway, about the Convention and their experience of participating in the work of the Ad Hoc Committee which drafted the Convention.

Promoting a Paradigm Shift

On 3 May 2008, the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol permitting individual communications to the Committee on the Rights of Persons with Disabilities came into force. ERT spoke to Gábor Gombos, Senior Advocacy Officer at the Mental Disability Advocacy Centre, and Professor Gerard Quinn of the National University of Ireland, Galway, about the Convention and their experience of participating in the work of the Ad Hoc Committee which drafted the Convention.

ERT: You were a member of the UN Ad Hoc Committee which drafted the Convention on the Rights of Persons with Disabilities. Can you tell us what were the most contentious issues and any other major challenges of the drafting process?

Gerard Quinn: There were a few! The one that might be most interesting was the debate on equality and non-discrimination. This was quite fascinating because it was clear that some delegations saw equality as a Trojan horse that could hide issues of

redistribution, substantive justice and economic, social and cultural rights. Because non-discrimination is an obligation that is to be immediately achieved, primarily through judicial means, they saw it as a side-door into the judicial enforceability of economic, social and cultural rights. That is why delegations sought to delink the notion of reasonable accommodation from the definition of discrimination. Unfortunately, it was the EU Presidency in 2004 that took the lead role on this. In the original draft the EU Council Directive 2000/78/EC (on non-discrimination in employment) reasonable accommodation and discrimination were together, but for elegance of drafting the reasonable accommodation section was moved to a separate Article. This gave the EU Presidency in the working group a plausible case to argue that when reasonable accommodation is not achieved it is regrettable, but it is not discrimination, so that was an unnecessary link. To a certain extent, in the Disability Convention this has been solved and the link was restored. However, because that debate took place it, shows the uneasiness that exists with the idea of equality and non-discrimination and how the idea can be applied to more substantive issues to leverage resources.

The debate regarding legal capacity under Article 12 [see box] was also quite fascinating. There are genuine differences around the world on how to conceptualise legal capacity. For example, the Chinese Civil Code draws an interesting distinction between capacity to hold rights (a baby would have the capacity to hold rights as a human being), and the capacity to exercise rights (which a baby obviously doesn't have). In



fact China and a number of Arab countries argued for the inclusion of a footnote to Article 12 – which they later dropped. The Arab group insisted on reading a letter to the Ad Hoc Committee explaining its inclusion of the footnote was due to the two sides of legal capacity. The European Union responded by saying that there was such fundamental difference on this issue that the adoption of the Convention should be postponed, which would have delayed the process by three to four years. What the European Union delegation did was quite clever; they accepted and

welcomed the dropping of the footnote by the Arab group on the understanding that legal capacity is the same thing everywhere in the world. Now clearly it isn't! Clearly there are different models at play. I think we have our own favourite model, but I think you will see the emergence of alternative views in the next few years. It is going to be a difficult call for the new Committee to try and arbitrate between those competing models and to arrive at something which will have everybody on board. So this is still a very contentious issue.

Article 11 - Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The civil society side in the discussion was driven by the idea that at one extreme there is no such thing as incapacity, therefore there is no need for legal incapacity. A lot of the discussion in the negotiations focused on the idea that people with a disability have a legal capacity equal to others. This all depends on how you view difference and how you discount human difference. So this only restates the issue and does not provide a solution! It is no surprise that for most states this is the issue that will cause most problems in the internal process of preparing for ratification. For example, this will be the last remaining obstacle for Ireland to ratify the Convention.

Article 11 (on situations of risk and humanitarian emergencies) was initially also contentious because people viewed it as a Palestine versus Israel issue. While that is how it was originally envisaged, it was skilfully grafted out of this political context. Article 11 is really important when you think of the implications of climate change, pollution or civil wars. As a consequence of Article 11 you could even see organisations like NATO adopting a disability perspective in terms of emergency management. In fact, I think there are one or two NATO documents on exactly this issue!

Gábor Gombos: It is quite easy to identify the most contentious issues because they were the issues that were not resolved until the very last day of the Committee negotiations. Legal capacity under Article 12 had been a contentious issue in the entire process of negotiation. Basically, two options were expressed before the Ad Hoc Committee. One, which is now in the Convention text, expresses the paradigm shift from substitute decision-making to a supportive decision-making scheme. The other, which did not receive strong enough support in the Ad Hoc Committee, was the inclusion of a personal

or legal representative approach. Of course, the legal capacity issue concerns mostly two groups: people with intellectual disabilities and people with psycho-social disabilities. It is important to name these groups because we think that part of the contentious nature of this particular issue is strongly rooted in the prejudices against these two groups of people.

Another very contentious issue was the right to education. Different positions existed not only amongst the states, but within civil society organisations themselves. We wanted to ensure that education without segregation at all levels will be accessible to all people with disabilities. Therefore, we wanted the Convention to have a clear message that segregation or relegation of people with disabilities to special educational systems was no longer an option. At the same time there are groups of people with disabilities, especially blind people, deaf people and deaf blind people, for whom special education systems are



very important to acquire and learn the basic skills for their further learning, because without learning the basic skills they would find it impossible to develop further academic skills. Colleagues with these types of impairments convinced us that this particular learning can be most effectively achieved in special groups. So the question was how

Article 6 - Women with disabilities

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

to make a transitive balance between the legitimate need of certain groups of disabled people with the clear message that sending people with disabilities to a sidetrack special education system is no longer an option in those countries that want to respect the rights of people with disabilities. It was not an easy task, but we are quite happy with the text of the Convention.

Another very contentious provision was the special standalone article (Article 6) on women with disabilities. Until the very last stages of negotiations it was not clear whether states were going to adopt the proposed 'twin-tracked' approach which meant integrating women with disability issues into all

Article 25 - Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

- a. Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
- b. Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
- c. Provide these health services as close as possible to people's own communities, including in rural areas;
- d. Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- e. Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
- f. Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

relevant articles and having a stand-alone article about women with disabilities. Similarly, the right to health (Article 25) was very contentious because it relates to the right to reproductive and sexual health-care debated by several groups of countries. Frankly, it was a positive surprise that this provision made it into the final text.

ERT: The new Convention does not set out a definition of disability. Do you see this as an opportunity or a challenge to its implementation and what implications do you think this will have for individuals seeking protection under the Convention?

Gábor Gombos: I slightly disagree with this view. Whilst it is definitely true that there is no definition of disability under Article 2 (Definitions) and that there is no strict formal definition within the Convention as a whole, I think it is important to note that in Article 1 (Purpose) there is a ‘non-definition’, an indirect and inclusive definition of disability. Read in conjunction with the Preamble, it gives a very clear understanding that the Convention adopted a social model of disability rather than a medical model. Further, Article 1 sets out groups, often forgotten in national legislation, in an exemplary list, for instance people with mental impairments. If civil society and advocacy organisations and groups utilise this ‘non-definition’ of disability in Article 1 in a smart way, we are in a better situation than if we had a definition within Article 2.

Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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

Article 2 - Definitions

For the purposes of the present Convention:

- “Communication” includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;
- “Language” includes spoken and signed languages and other forms of non spoken languages;
- “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;
- “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;
- “Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

It is very clear within the text of Article 1 of the Convention that it was not the intention of the drafters to exclude any group of people with disabilities. In fact, the opposite is true. The Convention wanted to have an inclusive approach to disability and people with disabilities and that is why the drafters were unable to provide a formal definition of disability. Advocates who understand this inclusive evolving approach to disability are in the position to demand from governments substantive explanations, if they exclude some groups of people who experience barriers in their participation on an equal basis with others in society. Therefore, the 'non-definition' enables advocates to be proactive and demand from governments explanations why they understand disability in a narrower sense than the very inclusive approach inferred in the Convention.

Gerard Quinn: It was very interesting because almost up until the last fence the European Union and the Canadians were insisting that there was no need for a definition. In the Canadian context this was due to some really outstanding Canadian Supreme Court decisions. My impression is that the definition that was inserted (within Article 1) was put in to satisfy the African group. They were very concerned about their exposure in terms of resource allocation given their relatively impoverished states. So they wanted to include a definition and I think that was the original motivation. The only way it got merit was to try and cast it in terms of the social model of disability. I think that it has been pretty successful in doing that.

However, I think that if you stand back and look at this as an equality convention, which aims to achieve the full enjoyment of human rights for people with disabilities, and which utilises non-discrimination as a formal tool for reaching this goal, the focus should not be on what is the actual definition of a disability: the focus should be on the definition

of discrimination. This definition is of discrimination that is 'based on the ground of disability', it does not say 'for a person with a disability', and that opens up many more possibilities. It would thus include within protection mothers who have children with a disability and who were discriminated against in employment due to the care needs of their child. Indeed this is exactly how the European Court of Justice ruled in *Coleman v. Attridge Law and Steve Law* (Case C-303/06) this summer.

For me that is the core. I think people are missing the target by focusing obsessively on the actual definition of disability, when what they should be doing is focusing on the capaciousness of this definition of discrimination and how in fact it can protect far beyond the person who actually has the impairment. Therefore, I am not actually motivated by the detailed definition of discrimination argument very much. There are going to be a range of items to be clarified by the Committee to this Convention, and if they are of the mind to do so robustly when considering non-discrimination, they are going to open up a lot more possibilities than if they are of the mind to 'cabin' the actual definition of disability.

ERT: The Preamble to the Convention expresses concern in regard to multiple discrimination on disability plus a range of other grounds. However, the Convention text only provides that States Parties are required to take measures to combat multiple discrimination in relation to women. Does this inhibit access to social justice for persons with disabilities who face multiple discrimination on other grounds?

Gerard Quinn: One view is that the big missed opportunity was age. It was fascinating because there where people at the Ad Hoc Committee who argued the case for indig-

enous communities and disability, children with disabilities and women with disabilities, the latter two occupying most of the debate. For me, that age wasn't more expressly included was a big missed opportunity. It is certainly an opportunity for the Committee on the Rights of Persons with Disabilities to do this.

The fact that women and children received special attention was due to the fact that this issue was a function of the material arguments for most of the groups that had physical, mental or intellectual disabilities. Also some of the groups happened to be represented by individuals who were experts on gender discrimination as well as children's rights, but because other discriminated groups were not afforded the time for the merits of the arguments to be heard, these other discriminated grounds didn't make it into the final text.

To my mind it is a real disappointment that age didn't receive the recognition that women and children did because most people with disabilities acquire them through life and toward the latter end of life. Moreover, notions and principles contained in the Convention are fairly well-grounded in the disability sector, but they are not grounded at all in the age sector. It's as if the age sector is twenty years behind the disability sector and for this reason they could have also benefitted from more explicit cross-referencing. One good example of this is the concept of independent living, which has a lot of currency in disability, but is only beginning to gain ground in the ageing sector.

Gábor Gombos: I think it is really significant, at least in the Preamble, that there is a clear recognition of multiple discrimination as an important phenomenon which can undermine the equal enjoyment of fundamental freedoms and human rights. Examining the *travaux préparatoires* to the Convention,

it is very clear that the majority of the States within the Ad Hoc Committee were very reluctant to pay attention to the multiple discrimination phenomenon. Their reasoning was that this Convention cannot remedy all the injustices in the world and that it was a convention about the rights of persons with disabilities.

At the same time some very strong lobby groups from civil society organised around special groups like women with disabilities or children with disabilities, managed to convince the Ad Hoc Committee that even if this Convention is mandated only to look at human rights from the disability perspective, at least women with disabilities and their particular multiple discrimination issues could not be left out. The reason that only women with disabilities and children with disabilities are treated through this twin tracked approach is partly due to the fact that there was not effective enough lobbying for other discriminated groups. Looking through the *travaux préparatoires* I could not find any substantive civil society lobbying for the inclusion of multiple discrimination protections for people of different sexual orientation, for example.

There was a group, towards the end of the Ad Hoc Committee discussions, who advocated strongly for a separate Article on indigenous people with disabilities. Due to their late intervention you can see that indigenous groups are only mentioned in the Preamble. From this you can conclude that if the negotiations had lasted longer, it is likely that indigenous people would have been included in the main text of the Convention. But there are many other grounds of multiple discrimination that do not find a place in the Convention.

Although at the textual level there is no explicit reference to other groups facing multiple discrimination, referring to multiple

discrimination in the Preamble will make the struggle long but doable at the national level.

ERT: Let us now go back to the difficult issue of legal capacity. What are the implications of Article 12 of the Convention, which relates to the exercise of legal capacity, and to what extent can it secure the effective participation in society of persons deprived of legal capacity?

Gerard Quinn: Article 12 was more contested. There are two or three different ways to determine legal incapacity. One is called the status-based approach, wherein law is generally concerned with making a determination of whether or not a person has the mental capacity solely on the basis of that person's status as a disabled person. The Convention sets its stall against that and looks at incapacity in terms of functionality. For example, in instances where 'human-made' capacities are diminished, the Convention requires a tailor-made response which actually tries to restore capacity or to maintain capacity for as long as possible, and if a robust intervention is necessary in terms of some entity making decisions for a person with mental incapacity, it has to make sure that the decisions are genuinely made in the person's best interests and they are narrowly tailored to what is required.

So incapacity is not really a black and white issue, it is very much an individualised process. The first thing that a political authority should look to do is to put in the supports to enable individuals to make decisions, rather than take away this opportunity and do the easier thing of letting another person make the decision for them.

Cynics say that this is why countries like China don't like this approach to legal capacity because they are in fact used to treating people with disabilities as objects rather than

subjects. I don't think the cynics are right on that one. I think that the Chinese have their own reasons. If we viewed the significance of the Convention in line with the notion that we are moving from objects to subjects, it is completely encapsulated in Article 12. Part of the Convention is about protecting people in vulnerable situations. That is the traditional classical function of human rights. Also, it is partly about restoring autonomy of decision-making, so you can take charge for your own life in accordance with your own conception of the good life. And that's exactly what Article 12 gets at. Only after this restoration do rights like participation rights, accessibility rights and economic and social support come into play, but they are all tapered to underpin the autonomous decisions of the person.

Therefore, I would say that Article 12 is the absolute core of this convention! Within the scope for reservations and interpretative deliberations this is going to become an extremely hot issue as a number of countries have already at least put in an interpretative definition of Article 12. I would see any reservation, or declaration that has the same effect, to Article 12 as fundamentally irreconcilable with the object and purpose of the Convention. To me the object and purpose of the Convention is to view the person as a subject and everything else follows from that. This issue is going to come before the Committee for sure.

Gábor Gombos: The intellectual disability community and the psycho-social mental health community welcomed Article 12 as a whole. It is the first Article about which the Ad Hoc Committee started using the term paradigm shift. Article 12 really goes against a 2000 year old deep-rooted prejudice-based paradigm which says that there are people who are so disabled in their cognitive decision-making functions that they cannot exercise their autonomy, or their right to make their own choices, and that this right should

be delegated to another person who will make decisions on their behalf. If you look at Article 12 (2) it states, “*States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*”

What that legal capacity means is not so clear from the text itself. But if you look at the *travaux préparatoires*, it is clear that the drafters’ intent was not only to provide that people with disability enjoy the capacity to have rights on an equal basis with others, but also wanted to include the capacity to act. Article 12(3) clearly says that if the person cannot make his or her decisions in certain areas of life on their own, then he or she is entitled to receive support for his or her decision-making and that this supportive arrangement is a legitimate form of exercising your autonomy. This is a real breakthrough – a real paradigm shift!

Answering the question, I would say that Article 12 challenges the old idea of depriving people with disabilities of their legal capacity. For instance, in Hungary the government and civil society have, as part of our general civil code reform, incorporated within new draft laws the concept of supportive decision-making and other forms of decision-making which have no influence on the individual’s legal capacity, which is also recognised in the draft law. I think that similar legal reforms will be needed in other countries that still rely on the depreciation of legal capacity in the form of full guardianship.

ERT: The Convention marks a ‘paradigm shift’ from viewing persons with disabilities as ‘objects’ towards viewing persons with disabilities as ‘subjects’ with rights. What advice could you offer to the Committee on the Rights of Persons with Disabilities on ways to accelerate this paradigm shift in most parts of the world where the paternalist approach prevails?

Gábor Gombos: I think this is a very complex question. Let me start by saying that for me, as a human rights advocate working in the disability arena, the text of the Convention is only an instrument and that the text, its adoption and even ratification will not automatically bring about any change. In the Ad Hoc Committee, civil society understood from the very beginning that the process through which we reached the Convention was at least as important as the outcome of the negotiations. Therefore, the Convention negotiations did not really end with the Ad Hoc Committee adopting the text. The real work starts now in the national arenas and the international arenas. Certainly the operation of the Committee on the Rights of Persons with Disabilities in its first years will be vital in setting the standards that will be followed by states, trying to comply with the Convention. I would recommend the Committee emphasises the importance of the obligations on the State to consult and include civil society, in particular disabled persons’ organisations, in all the decisions which affect their lives. I think that if the Committee will be strong enough in convincing the states to comply with this obligation in a meaningful way, this will be the best way to promote the adoption of the rights-based approach to disability.

Basically, the important fact that we must not forget when we speak about the Convention is that this is the first international human rights treaty where civil society, in particular disabled peoples’ organisations and their communities, played a leading role in its creation. They were not just there as observers. The Chair of the Ad Hoc Committee, the High Commissioner for Human Rights and many leading international authorities recognised unanimously that this Convention is mainly a product of civil society. So the ownership is shared between the state and civil society. I think that this makes a difference if you compare this process to the adoption of the

Convention of the Rights of the Child or the Convention on the Elimination of All Forms of Discrimination against Women.

The disability community was much more proactive and states had to learn that the disability community were important allies without whom they could not do their job. Now we need to transpose this process to the national arenas. If the Committee demands that states meaningfully include civil society, under the leadership of disabled persons' organisations, in the implementation of the Convention, then ownership will be with the disabled peoples' community and civil society in the national arenas. That is the only guarantee that the rights-based approach will really prevail in the long run.

ERT: Can the Convention ratification process provide a means for disparate disability groups to harmonise agendas not only among themselves, but also with other organisations promoting the right to equality and the non-discrimination agenda?

Gábor Gombos: I foresee a long process. I don't think that these changes could and should be made overnight. In Hungary we observed our government's fast ratification, but we also noted that the government did not understand the extent of the work they will need to undertake after ratifying the Convention. For me as an advocate, the really important part of the question is: can the Convention be used to facilitate better cooperation between various disability groups in the national arenas and also between disability groups and other equal rights groups, be they human rights groups or groups of people belonging to other marginalised segments of society? Again, I think that the very successful and positive experience that civil society had in the Ad Hoc Committee should be transferred into the national arena. The

message is very simple: social injustice and inequality can be effectively fought only if all those groups who face exclusion, inequalities, marginalisation and discrimination in society cooperate and fight together. If they do not learn how to do this in the national arenas, then the Convention will just become another nice piece of paper with a vision which will not be realised.

I would advocate that human rights and marginalised groups should look at the Convention as a human rights treaty rather than a specialised human rights treaty. This Convention recognised the interdependent nature of human existence as well as its independent nature. For people with disabilities this is vital! You cannot guarantee the same rights on an equal basis for people with disabilities if you do not recognise that personal individual autonomy can be exercised in an interdependent context too. The mere fact that I am receiving support to exercise my right does not negate my right. This is true not only for people with disabilities, but applies across a range of matters in society.

Gerard Quinn: The interesting thing is that the disability groups who lobbied the UN had a lot of differences. They managed to not just find a common denominator, but, in working through their differences, they managed to find a common position that they could all stand on. So the very fact of that process of having to engage in dialogue constructively, rather than merely selectively, forced that dynamic upon them. It is very positive and I think it will continue. I hope it will! But the natural default setting is to fall back to your own position whether it is physical disability, mental disability or even impairment-specific.

In a way, state delegations ended up competing against each other for ever more sophisticated ideas of equality and disability, so there

was an educational component to the Ad Hoc Committee process itself. It would be useful to see this replicated at the national level in terms of the pre-ratification process, as governments are going to have to evolve their legislation. Hopefully, that should prompt civil society organisations to come together to bring about a collective critique of the best way to implement the Convention from the perspective of their own states. I don't know whether this will happen or not, but logically it should.

ERT: Finally, what arguments would you put forth to encourage countries that have not ratified the Convention to do so as soon as possible?

Gábor Gombos: First of all, I would say that it is the interest of the society at large to implement this Convention because it is only through social inclusion, equality and non-discrimination that large sections of society who now do not contribute to the creation of societal values, can overcome these barriers and become productive (by which I mean not only economically productive) members of society. For instance, until societies recognise sign language as a language with all its consequences, people whose mother tongues are their national sign languages will not be in a position to contribute to national sciences, arts or political life.

All the resources that exist within those marginalised and excluded groups of people, even in the most inclusive societies, are currently lost resources of society. The only way to use these resources to achieve societal common goals is to end exclusion and to proactively fight for inclusion through non-discrimination and positive measures. The best way to do this is to join those countries which have ratified the Convention and to enable this Convention to become a universal instrument.

Gerard Quinn: There are different cultures around the world, for example the Spanish or the Mexicans, who ratify international treaties quickly without using them as a tool to conduct an in-depth analysis of the law. Ireland ratifies things very slowly because it tries to take the time to identify where the gaps are and to close them. And to protect ourselves. I actually think that this way is better because this is a good use of international law. It isn't using international law reactively; it is using it proactively to stimulate the process of implementing international law into domestic law.

In the Irish context, they were taking their time over the legal capacity issue and people were hesitant to criticise the government over taking its time because the last thing you want is for them to rush toward ratification when dealing with such a complex issue. So I would perhaps be in an unusual position in that I don't think that delay is a bad thing. Particularly if it is used as a cue for wide consultation domestically about where law and policy needs to be brought up to speed. Even then, that is not the important point. The important point is that the state builds that dynamic of dialogue that will sustain the Convention's future. So I would prefer that a state took longer to ratify, if this leads to more strategic ratification.

Interviewer on behalf of ERT:
Jarlath Clifford

ACTIVITIES

- **ERT Urges Czech Parliament Not to Delay Adoption of Anti-discrimination Bill**
- **ERT Pushes for a New EU Equality Directive**
- **Update on Current ERT Projects**

Equal Rights Trust Advocacy

Ivan Fišer¹

In the period between May and November 2008, since the publication of Volume 1, The Equal Rights Trust (ERT) advocacy efforts were mostly concentrated on the promotion of the Declaration of Principles on Equality. This work is reported in the special section of this journal. In addition ERT has undertaken some further advocacy actions.

ERT Urges Czech Parliament Not to Delay Adoption of Anti-discrimination Bill

On 30 May ERT wrote to the Speaker of the Czech Parliament urging him and his colleagues to adopt at their session on 3 June 2008 the Law on Equal Treatment and Legal Measures of Protection from Discrimination and Amendments to Some Laws (the anti-discrimination bill). Developed with active participation of the Czech public institutions and civil society organisations, the anti-discrimination bill provides a new and more effective framework for protection from discrimination in the Czech Republic. Furthermore, the bill has transposed into the Czech legal system the EC equal treatment directives: Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. This was a commitment that the Czech Republic voluntarily entered into when joining the European Union in May 2004.

The anti-discrimination bill had initially been adopted by the Czech Parliament on 24 April 2008, but was vetoed on 16 May 2008 by President Václav Klaus. When exercising his veto, President Václav Klaus stated in an open letter addressed to the Speaker of the Parliament that he considered this law to be useless, counter-productive and of low quality and its consequences very problematic. President Klaus also stated that the current legal protection against discrimination in the Czech Republic was adequate. ERT believes that this position is in stark contrast with the results of studies carried out by leading Czech and international anti-discrimination experts. These studies had in fact motivated the need for adopting a comprehensive anti-discrimination law. They had demonstrated that the existing system: (i) lacks legal definitions of forms of discrimination; (ii) does not provide even minimal protection against discrimination in certain fields of activity, such as education, social security, and access to health; (iii) does not contain a consistent system of sanctions; and (iv) lacks specialised bodies to protect against discrimination.²

In October 2008, it was reported that the European Commission was preparing to file an infringement action against the Czech Republic for failure to incorporate the EC Anti-Discrimination Directives into its legislation. The Lower House was expected to take a repeat vote on the bill to override the unfortunate presidential veto after the regional and Senate elections to of late October. At the end of November 2008, Parliament had not yet voted on the bill.

ERT Pushes for a New EU Equality Directive

In October 2007 the European Commission, empowered under Article 13 to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, sent to the European Parliament its Legislative and Work Programme for 2008. The Commission indicated that it was necessary to implement a new European Directive to ensure the same level of protection for all grounds and promote harmonisation throughout Europe in this field.

On 30 April 2008, ERT wrote to José Manuel Barroso, the President of the European Commission, to express its views about the proposed Directive. ERT letter was prompted by concern shared by civil society organisations, national equality authorities, national and European politicians and eminent practitioners that the legislative proposals being formulated by the European Commission were too narrow in scope and that by covering only disability and not also age, religion and belief, sex and sexual orientation it will dilute the vision of Article 13 of the Amsterdam Treaty.

In its brief, ERT set out its concerns and made the following recommendations in relation to the Commission's legislative proposals:

1. The European Commission in its legislative proposals should introduce a single non-discrimination directive covering all grounds referred to in Article 13: age, disability, race, religion and belief, sex, and sexual orientation.
2. The single non-discrimination directive should provide protection against discrimination on all Article 13 grounds covering

all areas outside employment, which are specified in Council Directive 2000/43/EC in respect to race or ethnicity, and level up protection on all grounds to – at minimum – the level afforded on the ground of race or ethnicity.

3. The principles and obligations contained in the UN Convention on the Rights of Persons with Disabilities should be incorporated into the single non-discrimination directive.

4. The single non-discrimination directive should be supplemented with a separate document providing guidelines on the application of the directive in respect to disability and focusing on meeting the specific challenges facing persons with disabilities.

5. A prohibition of multiple discrimination should be expressly set out within the single non-discrimination directive.

6. It should be set out plainly within the single non-discrimination directive that positive action and positive duties are not exceptions to, but are an integral part of implementing the principle of non-discrimination set forth by Article 13.

7. The exceptions within the single non-discrimination directive should be limited, covering a range of circumstances and subject to a strict justification test.³

On 2 July 2008, the European Commission published a Proposal for a Council Directive to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation.⁴ ERT assessed the Proposal as an important step towards combating discrimination and ensuring social justice in many areas of life for people living in the European Union.

The proposed Directive which essentially levels up protection from discrimination on grounds of religion or belief, disability, age or sexual orientation to that afforded to race or ethnic origin through Council Directive 2000/43/EC sends a clear message that discrimination in many social areas is not only unjust, but is unacceptable in today's European Union.

Among the many strengths of the Proposal is the definition of reasonable accommodation in respect to persons with disabilities as a form of discrimination (Article 2(5)). Furthermore, Article 4(1)(a) provides that in order to guarantee compliance with the principle of equal treatment, anticipatory measures are necessary. Both these aspects of the proposed Council Directive follow the progressive approach contained in the UN Convention on the Rights of Persons with Disabilities which the European Community has signed.

Despite this and other important steps forward made by the Proposal, it contains certain unfortunate limitations and leaves some issues to be addressed in a future EU equality agenda. In particular:

1. Discrimination on grounds of gender is still legal in a number of areas including edu-

cation – a gap that needs to be filled as soon as possible.

2. Multiple discrimination has still not been dealt with adequately in the Proposal: while mentioning it in the preamble in relation to women, the Proposal does not provide a legal definition of this phenomenon and leaves victims of multiple discrimination without adequate protection.

3. Positive action conceptually remains an exception to equal treatment and is only allowed but not regarded as required in certain cases: an effort should be made in the future to overcome the limitations of this anachronistic approach and to see positive action as an integral part of implementing the principle of non-discrimination.

4. The limitations to the material scope of the directive and in particular Article 3(1)(d) are too broad and ambiguous. The decision to reduce the application of non-discrimination in the area of provision of goods and services to “individuals only in so far as they are performing a professional or commercial activity” is unclear and will inevitably lead to greater confusion among Member States and goods and service providers that have to implement and adhere to the law.⁵

¹ Ivan Fišer is Research and Advocacy Director at The Equal Rights Trust.

² The text of the ERT letter is available at: <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20letter%20to%20Speaker%20of%20the%20Czech%20Chamber%20of%20Deputies.pdf>

³ The text of the ERT letter to José Manuel Barroso is available at: <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Letter%20to%20President%20Barroso%20re%20Art%20%202013%20Directive.pdf>

⁴ The text of the Proposal is available at: <http://www.equalrightstrust.org/ertdocumentbank/europa%20directive.pdf>

⁵ The text of the ERT press release is available at: <http://www.equalrightstrust.org/newsstory2july2008/index.htm>

Update on Current ERT Projects

Project “Law Enforcement Discrimination and Deaths in Custody”

Launched in December 2007, this project has three main objectives: (i) to systematise the existing pool of knowledge on the relationship between deaths in custody and discriminatory policy or conduct by law enforcement bodies; (ii) to further enhance the global understanding of the nexus between deaths in custody and discrimination; and (iii) to develop and promote new advocacy tools that will complement existing investigatory standards into custodial deaths by adding a distinct anti-discrimination component.

From December 2007 to March 2008, ERT carried out research into the issues and created a country-by-country database, as well as a legal file. In March, a detailed concept paper was developed, dealing with all aspects of law (international, regional and national) and law enforcement practices as well as with political, economic and social circumstances which are relevant to deaths in custody. This formed the basis for methodology and questionnaires for first-hand research work in case study countries. By May 2008 the research team had determined seven countries in which in-depth work will be conducted, including extensive first-hand field research in Brazil, India, Nigeria and Russia.

In July 2008 ERT travelled to Nigeria to gather preliminary information on discriminative policies and practices and deaths in custody in Nigeria; to establish contact with relevant civil society actors and organisations; to identify a consultant to conduct in-depth country

research; and to establish constructive dialogue with relevant government institutions. The team travelled to three major cities: Abuja, Enugu and Lagos and held consultations with eleven prominent NGOs and relevant independent and governmental institutions. In Abuja, the team met with representatives from the Constitutional Rights Centre, Open Society Justice Initiative, Ashoka and CLEEN Foundation, as well as representatives from the National Human Rights Commission and the Legal Aid Council. In Enugu, the team had meetings with Prisoner Rehabilitation and Welfare Action (PRAWA), an NGO that has done extensive research on prison conditions, and the Centre for Victims of Extra-judicial Killings and Torture (CVEKT). Also in Enugu, the team observed a group therapy session organised by PRAWA for those who had been released from prison asylums and were currently either in the federal psychiatric hospital or at home. Finally, in Lagos, the team met with lawyers working for the Civil Liberties Organization, the Network on Police Reform in Nigeria, Partnership for Justice, Access to Justice and Legal Defence and Assistance Project (LEDAP). Everyone provided the team with extensive information about their work, including detailed information about cases or extra-judicial killings or other suspicious deaths in custody that they had taken up in the past. They also discussed with the ERT team possible grounds and patterns of discriminative treatment that need to be further examined and investigated. Extensive information was also provided on the broader context in which these grave human rights violations take place and measures that are needed to remedy the situation. There was unanimity that ERT is engaged in

a very important project that all relevant civil society organisations should support.



Uchena Emenike tells ERT about his seven-year long detention in Enugu Prison Asylum

From 18 November to 4 December 2008 ERT visited Mumbai, Hyderabad and New Delhi in India to gather information on discriminative policies and practices and deaths in custody in India. In the preliminary research, the team had identified Maharashtra (state capital Mumbai) and Andhra Pradesh (state capital Hyderabad) as the two states on which to focus in this project, consistent with project methodology to conduct in-depth research in a small number of representative regions rather than in the entire country. Maharashtra was selected because Mumbai, the state capital and home to 20 million inhabitants, has a broad range of custodial facilities and provides an opportunity to examine in these settings a range of possibly discriminative practices. Andhra Pradesh was chosen for its history of developed civil society engagement in human rights protection as well as for being a state where more reforms have been initiated than in most other parts of India.

In the course of the visit, the team met with: (i) Lawyers working in human rights associations: the Human Rights Law Network, the

Committee for People's Democratic Rights (CPDR), the Human Rights Forum, the Andhra Pradesh Civil Liberties Committee (APCLC), People's Union for Civil Liberties (PUCL) and People's Union for Democratic Rights (PUDR); (ii) High court advocates who have worked on important public interest cases concerning deaths in custody and "encounter killings" and those who have chaired national commissions of inquiry into discrimination of Muslims and the drafting of an Equal Opportunities Act; (iii) Representatives of national human rights organisations, including the Asian Centre for Human Rights, the Commonwealth Human Rights Initiative, the South Asia Research and Documentation Centre and the International Environmental Law Research Centre; (iv) Academics who have conducted research into prison conditions or issues relevant to the project such as the provision of mental health care in custodial facilities; (v) Activists working for the protection of specific vulnerable groups, including disadvantaged caste or tribal based communities, children, people living with HIV/AIDS, Muslims and other religious minorities, women, people of different sexual orientation or gender identify and victims of commercial sexual exploitation. (Update: Ivan Fišer)

Project "Religious Diversity and Healthcare in Europe"

This project started in June 2008 with the aim of producing a thematic dossier mapping out the problem field on "The State, Religious Diversity and Healthcare in Europe". The project aims to provide better knowledge, identify problems, indicate possible solutions and give access to a range of strategies in relation to religious diversity and healthcare in Europe to facilitate and benefit practitioners, policy makers and civil society actors. In respect of religious discrimination

in healthcare provision, the project will scan and formulate the state of the play in respect to general healthcare (dietary requirements, clothing, burial ritual, male circumcision, equitable public facilities, organ/tissue donation, blood transfusion, smoking, etc.), sexual and reproductive health (contraception, abortion, infertility treatment, access to information, female genital mutilation, HIV/AIDS, STDs), and mental health. The project will also examine the thematic field from the angle of the healthcare implications of religious observance.

On 17 September 2008, in London, ERT organised a roundtable discussion attended by 20 national and thematic experts who have worked on the issue of religious diversity and healthcare or related discourses (such as migrant healthcare). The group was made up of nationals from a broad range of EU member states and two experts from the United States. The group included medical practitioners, human rights activists, religious leaders, lawyers, sociologists and anthropologists. The purpose of the roundtable discussion was to think critically about the issue at hand and to identify the major issues that are of central importance to the European Union context.

The discussion focused on four broad themes: (a) religious diversity and general healthcare; (b) religious diversity and mental healthcare; (c) religious diversity and sexual and reproductive healthcare; and (d) the State, religious diversity, healthcare and discrimination. The information gathered from the roundtable discussion will inform the main planned output of the project, a paper on religion and healthcare in Europe. (Update: Jarlath Clifford)

Project “Detention of Stateless Persons”

The project “Detention of Stateless Persons” 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 and 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) and to use this information to develop detailed legal analysis as a basis for international and national advocacy against the arbitrary detention of stateless people.

Between May and September 2008, the ERT team, under the supervision of Stefanie Grant, a senior expert who has been engaged as an advisor on this project, conducted a wide ranging consultation with international and national NGOs, lawyers and other experts in the human rights, forced migration and equality fields. Consultations confirmed that despite the lack of published information on the detention or physical restriction of stateless persons, the arbitrary detention of stateless persons, including

long-term detention, affecting those within the borders of a state in which they were born or habitually reside as well as those outside their country of residence (stateless refugees, asylum-seekers and migrants) is of concern in many countries.

In September-October 2008, ERT produced two discussion papers to guide work on the project, one legal mapping paper, which outlines the legal and conceptual framework for the project and a preliminary research paper, which draws upon information obtained through consultation to highlight cases of stateless persons in detention and put forward key research questions. On 29 October 2008, ERT presented the two working papers

to a group of fifteen experts specialising in equality law, human rights law, and refugee law. The purpose of this meeting was to develop the legal framework and strategic direction for the project. The meeting focused on three questions: (i) what is the definition, value, scope and limits of '*de facto* statelessness'; (ii) how can principles of equality be effectively used to strengthen protection of stateless persons in detention or restriction; and (iii) what value do the human rights treaties add to the statelessness regime? In the subsequent weeks, ERT adapted its project strategy to reflect the lessons learned in the consultations process. (Update: Katherine Perks)

ERT Work Itinerary: May - December 2008

May 2008: Launched project “Stateless Persons in Detention”.

July 2008: Travelled to Nigeria for a preliminary research visit as part of the “Law Enforcement Discrimination and Death in Custody” project.

September 17, 2008: Hosted roundtable on “The State, Religious Diversity and Healthcare in Europe” in London. Participants included experts from EU member states and the United States.

September 29, 2008: Moderated session on the use of statistics in fighting discrimination, at the Equality Summit held by the European Commission and the French Government, in Paris.

October 21, 2008: Launched the *Declaration of Principles on Equality* at a specially organised event in London.

October 24-25, 2008: Meeting of the international Board of Trustees of the Equal Rights Trust, in New York.

October 29, 2008: Held a consultation meeting on “Detention of Stateless Persons” in London.

November 4, 2008: Spoke at the conference “Gay Rights are Human Rights”, organised by Ukrainian LGBT organisations, in Kiev.

November 6, 2008: Delivered a lecture on the *Declaration of Principles on Equality* to a virtual seminar (webinar) on human rights taught by Human Rights Education Association (HREA).

November 11, 2008: Launched a campaign entitled “Vote for Equality!”, expanded its website to enable collecting signatures online for the *Declaration of Principles on Equality*, and created a page offering information and news on the campaign.

November 16-20, 2008: Held a series of advocacy meeting with journalists, NGOs and experts to promote the *Declaration of Principles on Equality*, in New York.

November 18-December 4, 2008: Travelled to India for a preliminary research visit as part of the “Law Enforcement Discrimination and Death in Custody” project.

November 25, 2008: Delivered a keynote speech at a Legal Seminar on the implementation of EU law on equal opportunities and anti-discrimination, organised by the European Commission in cooperation with the European Network of Legal Experts, in Brussels.

November 26, 2008: Participated in the launch of the European Consortium of Foundations in Human Rights and Disability, in Brussels.



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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