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PRINCIPLES ON EQUALITY AND THE DEVELOPMENT OF LEGAL STANDARDS ON EQUALITY (London, 2 – 5 April 2008)

Conference Report

Aim of the Conference

This conference has been convened in the framework of a project entitled "Legal Standards on Non-discrimination and Equality". The project aims at systematising, modernising and publicising in appropriate formats legal standards related to the protection against discrimination and the promotion of equality. The objective of the first stage of the project is to elaborate and publicise a short document reflecting a moral and professional consensus among human rights experts, entitled *Principles on Equality*. The objective of the second stage is to develop standards on equality law and policy which can be translated into national legal norms. The Advisory Committee of the project consists of the following experts: Sir Bob Hepple (Chair), Barbara Cohen, Andrea Coomber, Sandra Fredman, Christopher McCrudden, Alice Leonard, Gay Moon, Colm O'Cinneide, and Michael O'Flaherty.

The conference "Principles on Equality and the Development of Legal Standards on Equality" was organised as a way of helping the Equal Rights Trust (ERT) make progress in this project, by pursuing two separate although interrelated goals:

A. Finalising the *Principles on Equality*

B. Discussing selected issues to enable further work on legal standards related to equality

Regarding goal A, under the guidance of the project's Advisory Committee, a draft document was prepared and circulated in early February 2008 to all conference participants and other experts who had expressed a wish to take part in the process. Having incorporated numerous subsequent comments and suggestions, a new, consolidated draft of the *Principles on Equality* was developed and sent to all participants, and was included in the conference folders.

Regarding goal B, the participants were asked to discuss, in six thematic sessions, some of the most complex and controversial issues that we expected would pose a challenge when attempting to systematise non-discrimination standards in the future. ERT plans to use the results of the thematic sessions in its subsequent efforts to put together a comprehensive document on legal standards on equality.

To see the Conference programme, go to:

<http://www.equalrightstrust.org/ertdocumentbank/Programme%20ERT%20April%20Conference.pdf>

To see the list of participants, go to:

<http://www.equalrightstrust.org/ertdocumentbank/List%20of%20participants.pdf>

To see photos from the conference, go to:

<http://www.equalrightstrust.org/cms/page/previewsnapshot/855>

Thursday, 3 April 2008

Opening Session

The conference opened with a short introduction by The Equal Rights Trust's Executive Director, **Dimitrina Petrova**. She reiterated the conference goals, context and format and explained ERT's role as a facilitator in a collegial process of seeking a moral and professional consensus on equality principles. Dr. Petrova drew attention to the existing disparity between the professional networks of the international human rights experts on one hand and the equality experts on the other; and to the fragmentation of equalities legislation at present. She appealed to the participants to engage in a dialogue beyond their current professional boxes, in order to contribute to the promotion of equality as a universal human right.

Professor Sir Bob Hepple Q.C., Chair of the ERT Board of Directors, made a 30-minute presentation on the “Objectives of Equality Law”. He examined three meanings of equality in its legal sense: “equal treatment”, “equal worth or dignity”, and “a third way equality” and provided an analysis of each of these meanings. He explored the capacity of each notion to provide the basis for an acceptable modern formulation of equality law. He commented on the question of what an equal society means in today’s terms and explored the role of positive duties in enabling an equal society. Professor Hepple defined the limitations of the first two meanings of equality and argued in favour of the “third way equality”. His presentation then addressed the idea of fairness in relation to equality and whether there has been an ideological move from the concept of “fair shares” to “fair opportunities” within the equality discourse.

Ivan Fišer, ERT’s Research and Advocacy Director, presented the consolidated version of the *Principles*. Mr Fišer explained how ERT had initially formulated each principle and the ways in which they were connected to international, regional or national legal norms and jurisprudence. He also set out the process by which comments from the initial round of consultations with participants had been either incorporated as alternative formulations (where possible) or included as separate comments in the consolidated draft.

A short floor discussion followed where a number of practical comments were made regarding the *Principles*, including:

- replace the term ‘equality in practice’ with ‘equal capabilities’ or ‘equal in capability’;
- formulate a further principle about economic inequality and ground the *Principles* in the context of poverty and development;
- clarify the content and scope of ‘public interest’ within Principle 11;
- explore the possibility of integrating some further aspects the UN Disability Convention (for example Article 32 which relates to international cooperation);
- question whether it is useful to list grounds of discrimination at all in the *Principles*;
- note that the concept of dignity is necessary but too broad to constitute a primary basis for equality;
- incorporate the concept of capabilities into the *Principles* which, it was suggested, will represent more accurately what we mean, rather than the currently preferred terms ‘genuine’ and ‘substantive’ equality.

Working Groups

The participants then proceeded to discuss the draft *Principles on Equality* in four working groups. The groups engaged in detailed discussion on the substance and wording of each provision. The moderators steered the discussions on the draft, following the provisions one by one and exploring the alternative versions and the additional comments.

Session Two: Discussion on the draft *Principles on Equality* in plenary.

Session Two, moderated by **Imrana Jalal**, began with brief reports on the discussions in each working group.

Group 1 was moderated by **Veronika Szente Goldston**, with **Professor Mark Bell** as rapporteur. Professor Bell explained that the group had not worked through all the *Principles*. The group discussed in great detail the draft provisions up to Principle 7 (Definition of Discrimination), and also made comments on Principle 11 (Scope of Application) and the Preamble. The *Principles* which engaged most discussion included Principle 1 (the Universal Right to Equality), Principle 3 (Right to Non-discrimination and Right to Equality) and Principle 7. There was a suggestion that the structure of Part I and Part II of the *Principles* needed some revision.

Group 2 was moderated by **Mark Lattimer**, with **Norani Othman** as rapporteur. As with Group 1, not all the *Principles* were discussed, and the provision-by-provision debate reached only up to Principle 13 (Legal Persons). Within this group, a lengthy discussion was afforded to the Preamble consisting of twelve recitals. There was intense discussion on Principle 3, and different opinions regarding the relationship between the right to equality and the right to discrimination. Principle 7 [Definition of Discrimination], also evoked numerous reactions. One of the central preoccupations of the group was the desirability of having an open ended list of prohibited grounds of discrimination or a closed list; or whether to replace the enumeration of grounds with a general concept of a prohibited ground.

Group 3 was moderated by **Gay Moon** and had **Krassimir Kanev** as its rapporteur. Group 3 discussed the draft up to Principle 7, having spent a substantial amount of time on discussing the Preamble and concluding that much of it was unnecessary and should be replaced with a short

restatement explaining the purpose of the document. As with Group 2, Group 3 had a comprehensive discussion on Principle 7, with a range of opinions as to whether the prohibited grounds should form an open list. It was suggested that a legal definition of equality separate from discrimination should be included.

Group 4 was moderated by **Edwin Rekosh** and its rapporteur was **Patricia Prendiville**. Ms. Prendiville said that Group 4 had managed to examine each Principle and reach the end of the draft. She explained that the group felt, amongst other things, that the Preamble needed some clarification. The group suggested that Part I should solely address the right to equality and Part II should solely address the right to non-discrimination. Other specific comments made by Group 4 concerned the fusion of Principles 12 (Right-holders) and 13 (Legal Persons) and that Part IV should perhaps be incorporated into a standards document as opposed to a document on principles.

All rapporteurs submitted their notes to the ERT drafting team.

Imrana Jalal then opened the discussion to the floor accepting comments in relation to Principles 14 to 29. These comments were noted and, together with comments from the four working groups, were compiled into the working draft of the *Principles* and distributed to all participants during the closing session on 5 April.

Session Three: The Concepts of Discrimination and Equality

Session Three under the moderation of **Barbara Cohen** explored the concepts of discrimination, non-discrimination and equality. Ms. Cohen encouraged participants to draw on their different legal, policy and practical experiences. She posed questions related to issues that had dominated the previous session, namely, 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 to a closed list of grounds? Are new grounds emerging that should have equal protection? How should multiple discrimination be recognised? If the list of protected grounds is open-ended, should any grounds merit greater legal protection? In what circumstances, if any, should discrimination based on any protected ground be permitted? **Scott Long** served as rapporteur for this session.

Wan Yanhai presented an overview of several discrimination patterns within China. Focusing on the issue of Hepatitis B discrimination, he talked about the exclusion of victims from high school and university education. This exclusion was usually justified by reference to the perceived public health dangers. Wan Yanhai argued that there is a need to change the philosophy of education and the perception that exists within the education sector that 'it is useless to provide education for sick or moribund people'.

Paola Uccellari spoke on the increasingly important subject of multiple discrimination. She set out the parameters of the concept explaining that notions of identity are not static and that each of us has a gender, sexuality and race which cannot be reduced to one specific category. Ms. Uccellari went on to address the common concerns surrounding multiple discrimination, such as the dilution of protection for existing grounds, but reiterated that if discrimination is to be eliminated in all its forms then clearly multiple forms of discrimination need to be challenged.

The panel session was concluded by **Professor Sandra Fredman** who explored two issues (a) the difference between non-discrimination and equality and (b) the question of justifications. Professor Fredman offered four ways to view issue (a): firstly, one might regard the difference as just a semantic one; secondly, regard discrimination as differential treatment, in which case the concept of equality is needed in order to cover beneficial differentiation as opposed to invidious differentiation; thirdly, define the right to non-discrimination as a negative right, implying a need to identify a discriminator and ignoring institutional inequalities, whereby the idea of equality would encompass a substantive vision which enables us to accept differentiation, address disadvantage, and still retain valuable diversity; fourthly, we might describe the right to non-discrimination as based on an identity and the right to equality as related to redistribution, therefore an economic issue. Professor Fredman warned that in elaborating principles on equality, we should not be too fixated on the terminology; she said that she would like the right to non-discrimination and the right to equality to be defined not as two separate rights but as one right, where the former is an aspect of the latter. In respect to (b), three possible avenues were put forward; (i) we can say that in the case of certain grounds (for example, race or sex) discrimination cannot be justified; (ii) we can have a general justification for any ground, so that discrimination is justified when there is a legitimate aim and a proportionate means to that aim – along the lines of the jurisprudence of the

European Court of Human Rights; (iii) finally, we can construe justifications not as exceptions but as part of realising the right to equality, as long as different treatment redresses disadvantage.

Following the panellists' remarks, Ms. Cohen opened the debate to the floor. Comments or suggestions made at this time included the opinion that discrimination or distinction should be permitted in cases where the state provides redress for groups that have been historically undermined, for example, under slavery or apartheid. Other participants stated that it was important to establish a Principle that understands that different terminological solutions for differential treatment are acceptable as long as they achieve the same end, rather than becoming fixated with definitions. One participant pointed to the European context where direct discrimination is forbidden, with no open-ended distinction, on certain grounds such as race or sex. She explained however that for other grounds, such as age, direct discrimination is permissible in certain areas. Many participants felt that if the state makes a distinction between groups of citizens, there has to be a justification, particularly if it means disabling part of the population. A suggestion that a distinction is made between immutable characteristics and choice characteristics was felt by some to be problematic as throughout history the phenomenology of discrimination changes and it has been characteristics dependent on a choice by the person (such as political opinion) which have been the strongest ground for discrimination in some societies. Further, on the issue of prohibited grounds, it was noted that we should not put too much emphasis on the "ground", as discrimination occurs on basis that have not been well defined as "grounds", e.g. immigration status, or "residence", the latter being of great significance in China. Some participants stressed the importance of remembering poverty issues and that poor people's experience of the law is almost universally one of discrimination. Importantly, South Africa prohibits discrimination on the ground of socio-economic status.

Welcome Reception

The first day of the conference ended with a reception and dinner for the participants. **Lord Lester of Herne Hill Q.C.**, the Founding Chair of ERT, gave a pre-dinner talk setting out his personal and professional experiences of working in the anti-discrimination and human rights field over the last forty years. He was Special Adviser to the Home Secretary (Roy Jenkins) from 1974-76 with responsibility for anti-discrimination legislation. He introduced two Private Members' Bills in the Lords to incorporate the European Human Rights Convention into UK law and a single Equality Bill. In his talk, Lord Lester charted the story of the equalities debate in the UK and threw light on some

of the key turning points that have resulted in the current reform. He drew from his vast experience in litigating many leading equality cases, not only before English courts, but also before both European courts and Commonwealth courts. After the talk, Lord Lester replied to audience questions concerning the likelihood of the United Kingdom's adoption of Protocol 12 to the ECHR and United Kingdom policy on developments in the European Union.

Friday, 4 April 2008

Session Four: Positive Action and Positive Duties

Session Four, under the moderation of **Shami Chakrabarti**, explored the possibility 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. It addressed a number of questions related to the limits of positive action and the beneficiaries to positive action measures. **Andras Kadar** was the rapporteur for this session.

The panel contributions were opened by **Professor Chris McCrudden** who charted the spectrum of interpretations given to the concept of affirmative action in various jurisdictions. His discussion considered the origins and history of affirmative action and identified the various aims and justifications underlying affirmative action. He then brought into context wider ranging issues, for example, defining a 'preferred' group, adopting affirmative action techniques and identifying affirmative action's relationship with the law. He concluded by examining the mechanisms for securing the adoption of affirmative action and considering the impact of these measures.

Michelle O'Sullivan then talked about the implementation of positive action within the South African context. She defended the idea that positive action should not be viewed as an exception to equal rights but as part of the realisation of equality. She warned that the broad notion of positive duty in South Africa poses a challenge in terms of holding the government responsible for the enforcement of positive measures and called for thought about how such a broad concept could be effectively enforced. In her opinion positive action is more effectively enforced if regulated by special legislation rather than in general equality law. She reiterated that the State's failure to put in place positive action measures may be a form of discrimination in some circumstances and should be made actionable in court or subject to some other enforcement mechanism.

Professor Roger Raupp Rios began by setting out that the option for having one or more expressions for positive action, for example, affirmative action, positive measures, positive duties, positive action, reservations or special measures should be considered with regards to the universality and the conception of equality that each expression implies. He considered that within international human rights law the expression 'special measures' was a very good option, as it embraces a pro-active approach. Professor Rios then explained that the positive duties approach appears to be able to integrate positive measures oriented to many objectives, such as: a) remedying present effects of past discrimination; b) compensating inequalities; c) providing better services and positive models for disadvantaged communities and groups; d) promoting diversity and integrating communities. He reiterated that a standard for positive action has to be able to encompass not only individuals, but also groups as right-holders --this has important consequences in respect of quota measures and legal systems recognising group rights. He further explained that positive measures can be conceived, under certain circumstances, as compulsory measures. Finally, Professor Rios set out that any standard on positive measures should include the possibility for incorporating intersectional discrimination and the reason to adopt positive measures should be based on integrating social and economic rights.

A lively discussion involving a large number of participants followed these panel introductions. One response to a speaker suggested that positive action actually takes place in deeply fractured societies. Its aim is to bring about some degree of social cohesion in a society that is falling apart and that it was essentially a choice between two "evils". It may lead to backlash in the short term, but the society may break up unless such measures are taken. Other participants maintained that it would be important to find a uniform interpretation of the concept "positive action". It was remarked that to accept the right to equality as a positive value in which positive action is inherent, we have to recognise that in democratic societies the marginalisation of certain groups is inevitable. There was a wide-spread view in the audience that the idea of positive action should not be regarded as a special measure, instead it should be seen as an ordinary tool for achieving the aims of equality. In the words of one participant, affirmative action is simply the affirmation of the right to equality. There was a further discussion on whether a group based approach is necessary because the negative concept of equality (that we should refrain from discrimination) will never address group equality. Likewise, there were various opinions as to how wise it would be to allow judges to decide on positive measures on the basis of the strict scrutiny of proportionality. Some

were of the opinion that this would have severely detrimental effects and that the less strict test of rationality should be applied.

Session Five: Non-Discrimination and Equality in International Law

This session was moderated by **James Goldston** who also served the role of a speaker on the issue of equality and non-discrimination in international criminal law. The session rapporteur was **Professor Roberto Gargarella**. The session considered how equality and non-discrimination relates to international legal fields other than international human rights law, including humanitarian law, international criminal law, international trade law, development, security and anti-terrorism, environment and climate change, and law related to migration.

James Goldston began by explaining that, while concerns about discriminatory practices, taken to their extremes, underlay the foundation of post-World War II international criminal law, the principle of non-discrimination as such is not a common reference point for the investigation and prosecution of international crimes. To be sure, increasing recognition of gender-based crime is one manifestation of non-discrimination's continuing influence. Nonetheless, a challenge for equality advocates in coming years is to ensure that non-discrimination, within the broader framework of international human rights law, helps shape the growing field of international criminal justice.

Professor John Packer commentated on how the principles of equality and non-discrimination are reflected in international humanitarian law, international development, international trade law and international labour law. With respect to trade law for example, he stressed that trade law is blind to the issue of equality and is focussed on overcoming barriers to trade, whereas labour law, developing after World War I, is closer to the concerns of human rights law.

Mikewa Ogada discussed the negative impact that counter-terrorist legislation, policies and practices, such as extraordinary renditions, have on the right to equality and non-discrimination. He recalled that in 2002, the then High Commissioner on Human Rights, Mary Robinson, had insisted on adopting an international agreement containing guarantees that counter-terrorist measures do not infringe upon the right to non-discrimination.

Stefanie Grant considered the right to non-discrimination in the context of environmental law and climate change, as well as in the area of migration. Regarding climate change, it has been argued that it is the most vulnerable communities which are going to pay the highest price of global warming. Ms. Grant examined the current discourse at the UN level in relation to the effects of climate change on some island states in the Pacific, where rising water levels may well mean that countries such as Tuvalu are submerged in the near future. She stressed that this would inevitably create inequality and discrimination issues for those who lose their land and perhaps even their country. Finally, she stressed the need to confront this issue through international agreements. With respect to migration, Ms. Grant referred to inequalities, including gender inequality, as drivers for irregular migration. She also referred to the ways in which the principle of national sovereignty is used to justify inequalities between migrants and citizens which go far beyond those permitted in international law, and asked how principles of equality and non discrimination can be better used to protect migrants.

Tapan Kumar Bose spoke about the relationship between international refugee law and equality and non-discrimination. He focused on the question of Internally Displaced Persons (IDPs) and recalled the process of formulating principles for IDP protection and lessons which may be applied to principles on equality. In particular, he highlighted the way in which, without creating new rights, principles and standards have been articulated on the understanding that they have always been inherent to human rights.

James Goldston then led a lively floor debate which featured a range of views. Summarising the contributions, he said that we had heard a clear message: equality wins when it is seen as a part of human rights. In the UK and the USA, equality and human rights are mostly viewed as separate, but this should change. One of the participants strongly opposed the analysis of trade law and stated that trade law is based on the notion of discrimination. A discussion followed about the different notions of discrimination in human rights and trade law.

Session Six: Non-Discrimination and Other Human Rights

Session Six focused 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, and

examined what other aspects relating to the conflicts of rights would benefit from a general formulation. **Claire L'Heureux Dubé** moderated the session, with **Salim Ebrahim** as rapporteur.

Slim Ben Achour spoke first on the French experience. He described that within the French legal system, equality and non-discrimination regulations are very seldom put to use, due to a lack of public recognition that discrimination existed and was widespread in France. He also set out how very few people were approaching lawyers to file discrimination claims. Besides the fact that certain people are not aware of being discriminated, he stated that it was worth mentioning that sometimes minority communities preferred silent or non legal/judicial strategies. In 2005, the *Syndicat des Avocats de France* created an Anti-discrimination Commission to grapple with the issue of legal defence for discrimination victims. Major obstacles related to the need to define grounds and the burden of proof. While, by comparison, in the area of freedom of expression these obstacles do not exist. Regarding conflict of rights, Mr Ben Achour said that there hardly was any, as human rights are rather complementary than contradictory.

The second speaker, **Shanon Shah**, discussed the conflict between religious harassment and freedom of expression. Mr Shah framed his discussion in the context of Islam and its role in Malaysian society. He started by questioning the very concept of “religious harassment”, and regarded the concept as doing more harm than good. He thought that when weighed against freedom of expression, protection against religious harassment carries less value. Mr Shah explained also that one of the most important issues is to ensure that avenues of thought and expression are not closed off by ignorance or systems of power relations. For example, often certain Islamic interpretations of blasphemy are popularised, with the result that what is regarded blasphemy has become fixed and is no longer open to debate. He then explored why it is important to respect freedom of expression not only in relation to promoting liberal ideologies but also in permitting more fundamental interpretations of religion to be voiced. Mr Shah concluded that only by guaranteeing full respect for freedom of expression – including respecting the fundamentalists’ right to fundamentalist expression – will we be capable of creating an environment where the most challenging issues can be confronted.

The final panellist, **Professor Roman Wieruszewski**, drew on his experiences as a former member of the UN Human Rights Committee (HRC) and explored some of the cases decided by HRC which involved a conflict of non-discrimination and other rights. His view was that there should not be a

universal principle or standard related to resolving the conflict of equality and other rights, as any decision must take into consideration the circumstances of the case and the context. Potential conflicts in his view must be handled on a case by case basis.

Claire L'Heureux-Dubé then invited contributions from the floor, but first set the stage for the exchange of ideas that followed, by arguing that the issue of the conflict of rights depends on the view we take on the issue of a hierarchy of rights in the human rights framework. If there is a hierarchy of rights, then there is no problem to be resolved in each case, as it is already pre-decided by the hierarchy. However, if all human rights have the same degree of fundamentality, then in each case of conflicting rights there is a weighing to be performed on the basis of some criterion. Opinions in the audience were divided on this issue. It was suggested that the dilemma is a poisoned chalice in respect to the universality and indivisibility of human rights. It was further suggested that both opposing views are wrong. Some participants proposed alternative approaches, for example seeing the issue of balancing of rights as depending on the answer to the question whether human rights are commensurable: if they are, they should be seen as in a hierarchy, but if they are not, then hierarchy is irrelevant. Another line of discussion insisted that the balance of rights issue is best approached as a matter of process.

Session Seven: Enforcement and Specialised Bodies

Session Seven was moderated by **Professor Lisa Waddington**, with **Oliver Lewis** as rapporteur. The session addressed the question of standards related to enforcement and the role of specialised bodies. The discussion was initiated by four speakers, each from a different jurisdiction, who provided an overview and personal insight into the function and effectiveness of national mechanisms in implementing equality.

Janet Love referring to the South African experience stated that in spite of good constitutional standards barriers to enforcement still existed. Firstly, the litigation process should be less formal with greater recourse to reconciliation procedures. Although equality courts had been set up in South Africa, some judges had little understanding of equality, while others who were very committed had insufficient legal background. Secondly, international standards were not taken into account because of paucity of information about South African international commitments. Thirdly, positive action is frequently accessible though court procedure but legal aid is in practice available

only in criminal law matters. Fourthly, the poor do not see the resolution of their problems through a human rights or an equality framework but only through the indigent discourse. Finally, state authorities have failed to implement remedies aimed at structural change.

Professor Jenny Goldschmidt stressed that in setting up an equality body one should consider whether it will be mandated to deal with individual cases or only work on changing social attitudes. Furthermore, one should consider what is needed most: to support victims by deciding on as many cases as possible (leaving the judiciary inactive) or to conduct comprehensive investigations into broader issues of discrimination. Professor Goldschmidt also pointed out that improved enforcement is dependent on ways to increase accessibility to the equality body as well as to increase its expertise on equality law.

Gilberto Rincon Gallardo, President of the National Council for the Prevention of Discrimination of Mexico (CONAPRED), spoke on the development and implementation of equality law and policy in Mexico. Mr Gallardo described the process which led to the establishment of CONAPRED in 2004, following an amendment to Article 1 of the Mexican Constitution, which incorporated the right to non-discrimination as a fundamental right and as a basic principle in the performance of state and public institutions. He provided an overview of key developments since CONAPRED's inception, highlighting important advances and obstacles to the realisation and enforcement of the right to non-discrimination. CONAPRED has the mandate to address all forms of discrimination committed by federal authorities and individuals, including private sector entities.

To see his full paper, go to:

http://www.equalrightstrust.org/ertdocumentbank/Gallardo_Paper.pdf

Alice Leonard drawing from her experience at the legal enforcement division of the British Equal Opportunities Commission (EOC), described the various legal tactics the EOC used over 20 years to eliminate pregnancy discrimination in the workplace. The EOC first took legal test cases to establish that pregnancy discrimination did, in fact, constitute illegal sex discrimination. It then took a high profile challenges against Army, Navy, and Air Force policies of discharging women who became pregnant -- they had discharged over 3,000 in years prior to 1990. She described how, in 2002, the EOC did a major investigation which showed that over 30,000 workers a year lost their jobs due to their pregnancy, with enormous costs to the women, their families, employers, government, and

society -- the EOC called it a national disgrace. Ms. Leonard emphasised that eliminating discrimination can take decades and requires vigilance, and that the work of individuals and organisations in addition to the national enforcement body is crucial.

Following presentations from the four speakers, the subject of enforcement and specialised bodies was opened to the floor for discussion. A number of key threads were picked up in discussion regarding enforcement and addressing barriers in access to justice. Participants raised points regarding the need to increase awareness of rights and mechanisms and to improve accessibility to mechanisms and information on those mechanisms. Regarding accessibility, participants raised points with regards to the need for legal aid in civil as well as criminal cases; concern regarding the burden of proof in some jurisdictions; barriers to legal standing and the need to ensure standing for interest organisations. With regards to enforcement generally, some participants emphasised the need for mainstream courts to address equality issues so that equality is not viewed as a 'separate' issue, and training for mainstream and specialised bodies.

The discussion then turned to the role and characteristics of equality bodies. Participants here confirmed that we do need equality bodies, and suggested that ideally there should be one body dealing with all grounds of discrimination. With regards to formulating a principle on equality bodies, it was suggested that whilst inspiration should be drawn from the *Paris Principles* it is not sufficient to rely solely on reference to that document. Therefore explicit reference to key criteria should be made within the main body of the *Principles on Equality*. Through discussion it became clear that sufficient room should be provided within the *Principles* to accommodate for different national contexts. Interveners also highlighted that many of the criteria suggested during discussions (including adequate funding and civil society capacity building) may be unrealistic for small or poorer states and that even in economically 'developed' countries, reforms are slow and therefore persistence is needed.

Saturday, 5 April 2008

Session Eight: The Unified Perspective on Equality and Standard Development

In Session Eight, speakers were asked to focus 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 overcome fragmentation within the equality and non-discrimination field on the other, with the view to exploring the potential for taking a unified approach to equality. The session was moderated by **Professor Tiyanjana Maluwa**, with **Boris Cilevics** as rapporteur.

The first speaker, **Jarlath Clifford**, explored how and why equality should be realised as a human right. Setting out why, he compared the approaches of the European Union and the European Court of Human Rights. Using the case of *E.B. v France*, he argued that a human rights based approach was more appealing as it was capable of pervading more facets of society where discrimination occurs. He then outlined three theoretical approaches to implementing equality law, (i) formal equality, (ii) equality of opportunity and (iii) equality of outcomes. Mr Clifford argued that the three approaches were unsatisfactory to meet current and emerging discrimination issues and put forward the case for adoption of an integrated human rights approach to equality which focuses on the dignity and ability of the individual to engage in all spheres of life. The speaker finished by briefly setting out a conceptual and practical way in which the equality and human rights legal systems could be integrated.

The second speaker, **Margherita Ilieva**, considered the relationship between the various strands of equality and non-discrimination law and the fragmentation within the field, in particular focussing on tensions between different grounds of discrimination. Through this debate, the speaker posed several questions regarding identification of, and the relationship between, protected grounds. For example, is there a group of 'core' grounds which must always be protected from discrimination? How can we accommodate for an ever-increasing list of grounds and how do we develop a test for recognising those 'new' grounds? Is there a hierarchy of grounds, or should all grounds be subject to uniform protection? If there is a hierarchy, how can it be formulated? Ms. Ilieva put forward, in response to these questions, a proposal whereby a core list of grounds, including race, sex, religion, disability, sexual orientation and age would be explicitly protected, as they inevitably hurt dignity, whilst additional grounds which are less intrinsic would be subject to an additional test, allowing for judicial discretion to widen the scope of protection. Another approach would be to define the concept of "protected ground", relying on the concept of "identity", whereby identity would include characteristics that are beyond a person's control.

The final speaker, **Andrea Coomber**, explored the potential to bridge the gap between the field of equality and non-discrimination and the field of human rights and highlighted how inequality persists throughout the world and is manifested and perpetuates through structural and power relations. Applying practical experience and the litigation work of INTERIGHTS, Ms. Coomber highlighted the role of international and comparative human rights law in advancing and promoting the principle of equality and non-discrimination in domestic, regional and international jurisdictions. Litigation and submission of amicus briefs provide the opportunity to read across jurisdictions. Ms. Coomber discussed barriers such as the fear and anxiety of formal legal processes which may inhibit individuals from coming forward, and the limited capacity and familiarity with human rights law amongst the judiciary in many jurisdictions. The need to take a contextual approach when applying comparative jurisprudence was emphasised, including the need to bear in mind that local and regional jurisprudence may be more persuasive in some contexts than international jurisprudence. The speaker also highlighted problems related to single identity campaigning, whereby groups work to advance the cause of single strands of equality and non-discrimination without taking a unified approach.

The discussion which ensued following the three presentations focussed for much of the time on criteria for recognising grounds of discrimination. Participants offered insights from their own jurisdictions. Particular attention was paid to whether or not immutable characteristics can or should be incorporated into any test for identifying new or emerging grounds. Debate then moved on to a discussion of how to move forward and bridge the gap that has emerged between equality and human rights discourse within the equality field, including the potential role that The Equal Rights Trust, while developing a much needed set of standards, could play in bridging the gaps. Issues raised included the need and potential for coalition building between different interest organisations; training of judiciary in human rights and equality; information sharing and provision of information on international and comparative jurisprudence, including information on important developments at the national level in different jurisdictions.

Closing Session: The Way Forward

Dimitrina Petrova moderated the closing session. The rapporteurs Andras Kadar, Salim Ebrahim, Oliver Lewis and Boris Cilevics presented their reports, summarising the most important points made during the discussions. Following the reports, Dr. Petrova thanked everyone for their

enthusiastic participation over the three days. She then announced that a new working draft of the *Principles on Equality* had been prepared by ERT the evening before, invited participants to take a copy home, and explained the process that ERT was proposing in order to finalise and adopt the *Principles*. The new working draft of the *Principles of Equality* combines the consolidated version of the *Principles* dated 28 March 2008 with group and individual comments received in the course of the conference discussions. None of the points attributed to the groups in the new draft reflect a confirmed unanimity. ERT will use this text as a working draft from which to develop the next version of the *Principles*. The new version will attempt to reconcile as much of the feedback as possible within a consistent conceptual framework. ERT will circulate that draft to all participants and other experts, requesting further comments and edits. In a subsequent second post-conference round of incorporating comments, ERT will produce a final clean draft and circulate it to participants and other experts with a request to endorse it with their names, and then proceed to publish it. Following the publication, ERT will engage in advocacy efforts to promote the *Principles* and will continue its work on developing a comprehensive set of standards on equality.