Effective and Independent Structures for Promoting Equality

Expert workshop organised by Council of Europe Commissioner for Human Rights

National Human Rights Institutions Promoting Equality beyond the EU

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Under the system for protecting human rights in the Republic of Ireland - and it is similar for our colleagues in Northern Ireland – we have separate national human rights bodies to deal with equality issues (the Equality Authority) and broader human rights standards as set out in the European and UN conventions (the IHRC). However, equality is also a key element in almost everything that the IHRC does.

Non-EU Institutions:

We have been hearing this morning about pursuing equality within the important and powerful structures of the European Union and we will be hearing later from representatives of a number of national equality bodies. I would like, instead, to say a little about how National Human Rights Institutions, including equality-specific bodies, can make use of non-EU regional and international human rights mechanisms to combat racism, sexism and other forms of prejudice and intolerance that exclude and discriminate against vulnerable minorities.

I will not be expressing the views of the European Group of NHRIs or even the official policy of the IHRC. I will be simply expressing some ideas on how NHRIs can best relate to these bodies.

We are almost spoiled for choice these days in the number and variety of human rights mechanisms available at Council of Europe and UN level. Some of these mechanisms accept and adjudicate upon individual complaints. Others periodically review reports by governments on their compliance with international human rights treaties. And some, particularly in the UN system, do both.

Where bodies perform both functions, it facilitates a two-pronged strategy where NHRIs can take, or assist, or intervene in, individual complaints and then use the examination of their government's periodic reports to raise the issue again and apply additional pressure on the government in question to remedy the offending policy or practice.

Complaints Handling Bodies:

The European Court of Human Rights

I want to look first at the bodies that consider and adjudicate on complaints. The most powerful and sophisticated mechanism is, of course, the European Court of Human Rights, whose decisions are binding to a greater or less degree in all Council of Europe states. Article 14 of the European Convention on Human Rights (the ECHR) prohibits discrimination on a wide, but not exhaustive, range of grounds: "*Sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth, or other status*".

For years Article 14 was thought to be pretty ineffective because it only prohibited discrimination in relation to the other 'substantive' rights set out in the Convention, and it was felt that there could not be a breach of Article 14 without a breach of a substantive right at the same time. And if there was a breach of the substantive right, the Court often said there was no point in considering whether there was a breach of Article 14 as well.

Over the last few years, however, the Human Rights Court has expanded the role of Article 14. It has held that there can be a breach of Article 14 even if there is no breach of the substantive right, so long as the matter complained of is connected with a substantive right, see ***E. B v. France***[1]**.** In that case, in 2008, the Grand Chamber of the Court found a violation of Article 14 in conjunction with Article 8 of the Convention where a woman was prevented from adopting a child because she was a lesbian, but it did not find a violation of Article 8.

And a year earlier, in the key case of ***D. H. v Czech Republic***[2], which dealt with a policy of placing Roma children in inferior special schools, the Grand Chamber of the Court held that Article 14 covered indirect discrimination as well. It also accepted statistical evidence to show the discriminatory effect of an ostensibly neutral policy, and took account of findings by other Council of Europe bodies such as the Commission Against Racism and Intolerance and the Advisory Committee of the Framework Convention on National Minorities.

In both these cases, and in others as well, the Court also accepted and considered *amicus curiae* briefs by interested parties.

In another striking case last year, ***Opuz v. Turkey***[3], which concerned the murder of a Turkish woman by her ex-husband, the court held that domestic violence against women could also

[1] E. B v. France [2008] ECHR 55

[2] D. H. & Others v Czech Republic, Application No. 57325/00, November 2007

[3] Opuz v. Turkey, Application No. 33401/02, June 2009

amount to discrimination in breach of Article 14, as well, of course, in this case as a breach of Article 2, protecting the right to life.

In the meantime, a new Protocol 12 to the ECHR, which creates a free-standing right against discrimination has come into force for those states which are party to it. Sadly, they are still a minority and they do not include Ireland[4].

The European Group of NHRIs filed an amicus brief in 2008 in the case of ***D. D. v. Lithuania***[5], which concerned a woman who had been placed in a home for the intellectually disabled without her consent. And our colleagues in the Northern Ireland Human Rights Commission have also intervened in some cases before the Court.

But overall NHRIs have been surprisingly slow to use the Court of Human Rights either by way of filing amicus briefs or assisting vulnerable people to take cases raising significant human rights concerns. Some may be prevented from doing so by their mandate and others may be concerned that by actually taking cases against their own government, or even intervening in them, they could be seen to be taking a partisan position.

It does not seem to me, however, that taking a case in the European court is substantially different from taking cases in the domestic courts which many NHRIs, especially the equality-specific ones do regularly. And filing an amicus brief does not amount to taking sides in a particular case, but may be of significant assistance to the Court and may also serve to get a clear determination on some issue that the NHRI in question wishes to ventilate.

The IHRC, which has a broad legal remit but limited resources, has filed amicus briefs in about a dozen domestic cases in recent years and has found it to be one of our most cost effective and productive activities, though we have not yet intervened in international fora other than through the European Groups of NHRIs.

The European Social Charter

The other major Council of Europe mechanism that adjudicates on complaints is the Committee of Social Rights established by the European Social Charter (now the Revised Social Charter). The Charter guarantees a wide range of economic and social rights and Article E prohibits discrimination on similar grounds to those set out in Article 14 of the ECHR.

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[4] The first finding under Protocol 12 was made in December 2009 in the case of ***Sejdic and Finci v. Bosnia and Herzegovina***, Application Nos. 27996/06 and 13469/06. The court held that laws which prevented Jews and Roma from contesting certain elections were in breach of both Article 14 and Protocol 12.

[5] D. D. v. Lithuania, Application No. 13469/06. This case has not been decided yet.

In recent years, the Committee of Social Rights has upheld claims of discrimination against children with intellectual disabilities in Bulgaria[6], and in the availability of health care to Roma, also in Bulgaria[7]. And late last year, it found that France was guilty of discrimination in the provision of accommodation for Travellers and because of provisions that effectively deprived Travellers of the right to vote.[8]

The Social Charter procedure has two advantages over the Court of Human Rights. There is no requirement to exhaust domestic remedies and because it is a "collective complaints" procedure, there is no need for an individual complainant, which eliminates the pressure and fear of victimisation that individual complainants often feel.

The downside is that complaints can only be made by registered NGOs and trade unions and employers' organisations and the Committee does not seem to have developed a policy of accepting amicus briefs. However, as the committee tends to follow the procedure of the Court of Human Rights, it seems unlikely that it would refuse a request by an NHRI to file an amicus brief and there is nothing to prevent NHRIs, or the European Group applying to be registered to lodge complaints.

The Social Charter also requires State parties to report regularly on their implementation of its provisions and NHRIs are free to submit shadow reports or comment on government reports and on whether governments are acting on the Committee's findings on complaints submitted against them.

It is also, of course, open to NHRIs to make submissions to the Committee of Ministers of the Council of Europe in their role of supervising the execution of the judgments of the Court of Human Rights.

The UN Treaty Bodies

On the UN front, the monitoring bodies for four of the "core" human rights treaties currently consider complaints by individuals or groups of individuals. The treaties in question are the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention Against Torture (CAT), though the Convention Against Torture is less relevant to this discussion.

[6] Mental Disability Advocacy Centre v. Bulgaria, case no. 41.2007, June 2008
[7] European Roma Rights Centre v. Bulgaria, case No. 46/2007, December 2008
[8] European Roma Rights Centre v. France, Case no. 51/2008, October 2009

The Optional Protocol to the Convention on the Rights of Persons with Disabilities also provides for the making of complaints and hopefully the monitoring body will shortly begin to hear such complaints. Optional Protocols have been opened for signature in relation to the Convention on the Rights of Migrant Workers and their Families (MWC) and the International Convention on Economic, Social and Cultural Rights (ICESCR) but have not yet gathered enough signatures to come into force.

NHRIs could make it part of their strategy to encourage ratification of these protocols and indeed ratification of the actual Migrant Workers Convention, which seems to have been ignored by most Euroepan states.

In contrast to the ECHR, Article 26 of the ICCPR, which prohibits discrimination, is not limited to the rights set out in the Covenant but covers all rights protected by law in the state concerned. In addition, there is no fixed time limit for making a complaint, though domestic remedies must be exhausted first. As a result, despite their ready access to the Court of Human Rights, a significant number of complaints continue to be made from European countries to the UN Human Rights Committee (HRC), which monitors compliance with the Covenant as well as deciding on the individual complaints.

Decisions of the Human Rights Committee have included findings of gender discrimination in relation to social welfare benefits and immigration laws[9]; discrimination re: pension entitlements on the basis of sexual orientation[10]; racial discrimination in relation to military pensions[11]; and discrimination in relation to the restoration of confiscated property in a whole series of cases taken by persons who had left the former Czechoslovakia under Communist rule[12].

And in July 2009, in an important case on racial profiling, the Human Rights Committee condemned Spain for singling out persons for identity checks on the basis of their skin colour or ethnic characteristics[13].

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[9] Zwaan De Vries v. The Netherlands, Communication No. 182/1984, April 1987. Rajja Hanski and Martin Scheinin, "Leading Cases of the Human Rights Committee", Institute of Human Rights, Abo Akademi University, 2007, pp. 366-372; Aumeeruddy-Cziffra & Others v. Mauritius, Communication No. 35, 1978, April 1981, ibid, pp. 36-366

[10] Young v. Australia, Communication No. 941/2000, August 2003, ibid pp. 405-415

[11] Gueye & Others v. France, Communication No. 196/1985, April 1989, ibid pp. 372-377

[12] Simunek & Others v. Czech Republic, Communication No. 516/1992, July 1995, ibid pp. 385-391, and many other cases

[13] Rosalind Williams Lecraft v. Spain, Communication No. 1493/2006, July 2009

The CERD and CEDAW conventions are specifically aimed at eliminating discrimination on two key grounds. The CERD Committee has made findings of discrimination against Roma in Slovakia and Serbia[14], and has condemned Denmark and Norway for failing to take action over racist and pro-Nazi speeches[15]. It has also taken the view that even where it does not find an actual violation of the Convention, it can still make recommendations to the State Party if the complaint has raised matters of concern.

The Optional Protocol allowing complaints to be made under CEDAW only came into force in 2000 so there have been less decisions made under it than under the ICCPR and CERD. Nevertheless, the monitoring committee has found a violation of the Convention by Hungary in relation to the coerced sterilisation of a Roma woman[16], and violations by Austria and Hungary for failure to protect women from assaults by their husbands[17], which were fatal in the two cases from Austria.

A disadvantage about the UN mechanisms is that their decisions are not legally enforceable in most countries but the monitoring committees have considerably improved their follow-up procedures in recent years and, as with the European Social Charter, findings made in relation to complaints can be raised during the examination of the relevant country reports, which is done by the Committee which made the decision on the complaints.

Another disadvantage from the point of NHRIs is that the UN committees do not accept amicus briefs but it is still open to NHRIs, providing it is authorised by their mandate, to assist individuals or groups to make complaints about important issues to the monitoring bodies and they could also subsequently make submissions to the committees when they are following up their decisions and to the examination of the country reports.

And the NHRIs, through the International Coordinating Committee, could take up the issue of accepting amicus curiae briefs with the UN bodies as their procedures are frequently reviewed and they have made significant changes in recent times. They have allowed NHRIs to address some of the committees during the examination of country reports. And they have begun to follow up the recommendations arising out of the examination of the country reports by sending questionnaires to the state parties 12 months after the issue of the Concluding Observations or sending a rapporteur to follow up on key issues.

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[14] Anna Koptova v. Slovakia, Communication No. 13/1998, decided in 2000; L. R. v. Slovakia, Communication No. 31.2003, March 2005; and Durmic v. Serbia and Montenegro, Communication No. 29/2003, March 2006

[15] Mohammed Hassan Gelle v. Denmark, Communication No. 34/2004, March 2006; and Jewish Community of Oslo v. Norway, Communication No. 30/2003, August 2005

[16] A. S. v. Hungary, Communication No. 4/2004, august 2006

[17] A. T. v. Hungary, Communication No. 2/2003, January 2005; Fatma Yildirim (deceased) v. Austria, Communication No. 6/2005, August 2007; and Sehide Goecke (deceased) v. Austria, Communication No. 5/2005, August 2007

The European Monitoring Bodies:

Looking more generally at the whole system of country reports and monitoring, we have, of course, at the European level, the European Commission Against Racism and Intolerance (ECRI), the Framework Convention for the Protection of National Minorities, and the periodic visits to Council of Europe member states by Commissioner Hammarberg. Most NHRIs make good use of these mechanisms.

Certainly the IHRC has engaged very actively with them in relation in particular to the position of the Traveller minority in Ireland and the position of asylum-seekers and the large numbers of migrant workers who have come to Ireland in recent years with the very welcome effect of making it a much more diverse society.

There have also, however, been issues of prejudice and racism, and insensitive and heavy handed official policies and we have found that the visits of the Commissioner and the monitoring committees have been very helpful in this context. They have provided a welcome opportunity for a sort of moderated dialogue with government on issues where we were not getting very far domestically. And the reports by the Commissioner and the monitoring bodies have helped to validate the issues raised by us and others and have put some added pressure on our government to bring its policies into line with human rights standards.

The Commissioner's visit to Ireland in late 2007 and his subsequent report also raised wider issues of equality for the disabled and for the lesbian, gay, bisexual and transgendered community and left us with a very useful agenda of issues to be raised in the intervening years.

A Valuable Process:

We and most of the other European NGOs have also participated fully in the general UN treaty monitoring process, not only before the bodies I have mentioned earlier but also the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights. Unfortunately, Ireland has not yet ratified the Convention on the Rights of Persons with Disabilities and we have not even signed the Migrant Workers Convention.

We have found the process of examination of country reports extremely positive and have submitted shadow reports to all the committees and attended the subsequent hearings. It has proved a very valuable area of work, requiring both ourselves and government to regularly audit our laws and practices against developing international best practice and the General Recommendations issued by the various committees. It has forced government to consider the human rights implications of its policies, knowing that they will be questioned about them by

international experts who cannot be simply dismissed as political opponents or activists with a particular agenda.

We in the IHRC also have a more particular reason for our strong support for the regional and international mechanisms. In the name of the economic crisis, there has been a quite disproportionate assault on the equality and human rights infrastructure in Ireland. The main anti-racism body has been closed down. The Equality Authority has had its budget so badly slashed that its chief executive, who is the rapporteur for this workshop, was forced to resign and it is questionable if it can carry out its functions effectively any longer.

The IHRC has also been badly affected and were it not for the strong support of Commissioner Hammarberg and the knowledge that the Government would have to answer to the various monitoring bodies for any further cuts to our budget, we might have been unable to function.

On the more positive side of things, however, as they have grown more used to the system of regular monitoring, some in government have also come to see this as a valuable exercise where they can learn from the experience and advice of the international experts who may have already dealt with and learned from problems that are only now emerging in our jurisdiction.

The growing dialogue and cross-fertilisation across the human rights bodies, regional and international, has greatly increased their standing and authority. Where one monitoring body refers to the findings of another and where they are then taken on board by the adjudicative bodies, particularly the European Court of Human Rights and, through it, sometimes accepted by the European Court of Justice, they can become unstoppable.

That, I think is clearly the case with transgender rights. Ireland was one of the last countries in Europe to agree to officially recognise the identity and rights of transgender persons. The IHRC and the Equality Authority had called for change on this issue. Eventually, faced with the clear and unambiguous rulings of the European Court of Human Rights on transgender rights and strongly urged to change the law by the UN Human Rights Committee and Commissioner Hammarberg, the Irish Government two weeks ago withdrew its opposition to a legal action by a transgender woman (whom I had the honour of representing), opening the way to full recognition for all transgender persons.

The same process is happening with the rights of same sex couples. After many years of opposition, the growing consensus across Europe in favour of equality for gay and lesbian couples at last persuaded the Irish Government to introduce civil partnership legislation which just last week was passed by the lower house of the national parliament with all-party support. It does not grant gay couples full equality with heterosexual couples but it demonstrates a sea-change in Irish attitudes and it does not foreclose on further change in the future.

Conclusion:

While the core work of National Human Rights Institutions in the area of equality, or other human rights issues, will always be in the domestic arena, supporting the vulnerable and marginalised, raising consciousness, proposing change and perhaps taking or supporting legal action, or in the EU arena with its legally binding powers, there is another arena out there in the shape of the Council of Europe and UN human rights mechanisms, which can be hugely influential in persuading for and achieving social change.

We cannot afford to ignore it.