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Equal Rights Trust

Shadow Report submitted to the
Committee on Economic, Social and Cultural Rights
at its 54th Session in relation to the combined
second and third periodic reports submitted by:

Tajikistan

January 2015

Statement of Interest

1. The Equal Rights Trust submits this shadow report to the Committee on Economic, Social and Cultural Rights (the Committee) commenting upon the second and third periodic reports submitted to the Committee by Tajikistan at the Committee's 54th session.
2. The Equal Rights Trust is an international non-governmental organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. It focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. The Equal Rights Trust has been actively involved in the promotion of improved protection from discrimination in Tajikistan since 2012 and has undertaken research on the legal and policy framework designed to provide protection for the rights to equality and non-discrimination.

Introduction

4. This submission focuses on the extent to which Tajikistan has met its obligations to respect, protect and fulfil the rights to equality and non-discrimination as they relate to economic, social and cultural rights. In particular, the submission is concerned with Tajikistan's performance under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (the Covenant). In assessing Tajikistan's adherence to its obligations under Article 2(2), the submission relies on the interpretation of this Article which has been provided by the Committee in its General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights).¹
5. The submission also relies upon the Declaration of Principles on Equality,² a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on Equality".³ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁴
6. This submission presents an independent analysis of Tajikistan's legal framework on equality and non-discrimination undertaken by the Equal Rights Trust relevant to the Covenant, and contains a series of recommendations which the Equal Rights Trust would invite the Committee to make to Tajikistan as part of its concluding observations.

Article 2(2): The Legal Framework on Discrimination and Inequality

7. Under Article 2(2) of the Covenant, States Parties undertake:

[T]o guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

8. The Committee, in its General Comment No. 20, noted that "non-discrimination and equality are (...) essential to the exercise and enjoyment of economic, social and cultural rights".⁵ It also made clear that "Non-discrimination is an immediate and cross-cutting obligation in the Covenant."⁶

¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009.

² Declaration of Principles on Equality, the Equal Rights Trust, London, 2008.

³ *Naz Foundation v. Government of NCT of Delhi and Others WP(C) No.7455/2001, Para 93.*

⁴ *Parliamentary Assembly of the Council of Europe, Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe, REC 1986 (2011), 25 November 2011, available at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380.*

⁵ See above, note 1, Para 2.

⁶ *Ibid.*, Para 7.

9. The Committee has further noted that the obligation arising under Article 2(2) includes an obligation to prohibit both direct and indirect discrimination,⁷ in both the public and private spheres,⁸ on an extensive list of grounds, including both those listed in the Covenant and those “implied” by the use of the words “other status” in the text of the Article.⁹
10. Despite its obligations under Article 2(2) of the Covenant, protection from discrimination in Tajikistan’s domestic legal framework is extremely limited. Legal provisions related to the rights to equality and non-discrimination can only be found in Article 17 of the Constitution, Article 143 of the Criminal Code, and in a scattering of provisions in certain statutes which are limited in their scope and rarely, if ever, utilised by courts.

Constitutional Provisions

11. As noted in Tajikistan’s initial report to the Committee in 2005,¹⁰ Article 17 of the Constitution guarantees equality before the law, to guarantee “rights and liberties” for all without discrimination, and to guarantee equal rights for men and women:

All people shall be equal before the law and the court of law. The state shall guarantee the rights and liberties for every person irrespective of his nationality, race, sex, language, religious beliefs, political persuasion, education, social and property status. Men and women shall have equal rights.

12. Article 17 falls far short of the requirements set out in Article 2(2) of the Covenant, as interpreted by the Committee. The article makes no explicit reference to discrimination and it neither defines nor provides explicit protection for any of the forms of prohibited conduct recognised by the Committee.
13. In addition, the Article uses a restricted and closed list of grounds upon which “rights and liberties” are to be guaranteed. This list excludes many of the grounds listed in Article 2(2) of the Covenant, such as colour and birth. In addition, by using an exhaustive list, the article denies the possibility for the courts to interpret it so as to provide for protection on other grounds which, whilst not explicitly listed in Article 2(2) of the Covenant, have nonetheless been found by the Committee to fall under the term “other status” such as disability, age, sexual orientation and gender identity, and health status.¹¹
14. Further, we are concerned that the inclusion of “education” as a protected characteristic may be problematic, in the absence of comprehensive anti-discrimination legislation setting out the parameters of its application. Self-evidently, a person’s level of education is a relevant differentiator in a great many situations in life, especially in the areas of employment and education (and therefore in the enjoyment of the right to work and the right to education under Articles 6 and 13 of the Covenant, respectively). Equally, there are situations in which a person’s level of education will be irrelevant and it will therefore

⁷ *Ibid.*, Para 10.

⁸ *Ibid.*, Para 11.

⁹ *Ibid.*, Para 15.

¹⁰ Committee on Economic, Social and Cultural Rights, *Initial Reports Submitted by States Parties: Tajikistan*, UN Doc. E/C.12/TJK/1, 31 May 2006.

¹¹ See above, note 1, Paras 28, 29, 32 and 33 respectively.

be reasonable to prohibit differential treatment on this basis. However, the existence of significant areas of life in which such differential treatment would be justified means that proper application of the law would require further guidance. In the absence of such anti-discrimination legislation, we question whether “education” is an appropriate characteristic to include in a constitutional provision prohibiting discrimination.

15. In addition to the deficiencies in the text of the provision, there is little, if any, evidence of the courts using Article 17 of the Constitution as a means of protecting individuals from discrimination, thus rendering it a largely symbolic, rather than effective, provision.

Legislative Provisions

16. The Committee has made clear in its General Comment No. 20 that “[a]doption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2”.¹²

Criminal Prohibition of Discrimination

17. Article 143 of the Criminal Code of Tajikistan makes it an offence to violate the equal rights of citizens in a discriminatory manner:

(1) Direct or indirect violation or the restriction of rights and freedoms of an individual citizen, depending on sex, race, nationality, language, social origin, personal, financial or official position, place of residence, attitude to religion, convictions, belonging to public units, causing damage to the rights and lawful interests of a citizen, is punishable by a fine in the amount of 200 to 500 times the minimum monthly wage, or deprivation of freedom for up to 2 years.

(2) The same actions, committed by a person:

a) Using violence or threat of violence; or

b) Using his official position, are punishable by imprisonment for a period of 2 to 5 years, with deprivation of the right to hold certain positions or be engaged in certain activities for up to 3 years or without it.

18. While states must prohibit discrimination through appropriate legislation, the Equal Rights Trust believes that in the majority of cases, this should be done through civil liability and not through the criminal law. First, it is a well-established principle of equality law that discrimination does not require intent and may, indeed, be entirely unintentional,¹³ whereas a key principle of criminal law is the presence of intention to commit the offence, or at least negligence or recklessness. Thus, in cases where discrimination is entirely unintentional – and may not even have been foreseeable by the perpetrator – application of criminal liability would not be appropriate. Secondly, a key

¹² See above, note 1, Para 37.

¹³ See above, note 2, Principle 5.

evidential requirement in discrimination cases is the reversal of the burden of proof.¹⁴ As the Committee has made clear in its General Comment No. 20:

*Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.*¹⁵

In criminal law, however, the presumption of innocence is a well-established principle under international law.¹⁶ The reversal of the burden of proof would clearly be entirely incompatible with this principle. Thirdly, the focus of criminal proceedings is on punishment of the offender, whereas a key purpose of anti-discrimination law is to provide the victim with an effective remedy and to promote a culture of equal rights. The application of criminal liability in all cases and concomitant sanctions may prove incompatible with the aim of providing effective remedy to the victim. Criminal liability should be reserved only for the most serious cases of severe intentional discrimination, including discriminatory violence. It would be appropriate to define, in the Criminal Code, which types of discriminatory conduct would be considered crimes, rather than regard as crimes all instances of discrimination.

19. As such, the Equal Rights Trust does not consider that Article 143 of the Criminal Code is an appropriate means of protecting the rights to equality and non-discrimination.

The Law of the Republic of Tajikistan on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights (2005)

20. The only piece of legislation which can properly be considered as anti-discrimination legislation in Tajikistan is the Law of the Republic of Tajikistan on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights, of 2005. As the government of Tajikistan stated in its initial report to the Committee, this law is intended to prevent discrimination on grounds of gender and to establish state guarantees of the rights of both sexes.¹⁷
21. The Law adopts the definition of discrimination contained within the Convention on the Elimination of All Forms of Discrimination against Women and is broad in its scope. Nevertheless, the Law contains a number of gaps and weaknesses, such that it may prove insufficient to effectively prohibit all forms of discrimination against women, including in respect of enjoyment of economic, social and cultural rights. Specifically:
 - (a) The Law contains a strong focus on equality of opportunity between men and women in different areas of life, including areas falling within the scope of the Covenant such as education (Article 6) and employment (Articles 12 to 17), with

¹⁴ See, for example, above, note 2, Principle 21: "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."

¹⁵ See above, note 1, Para 40.

¹⁶ See, for example, Article 14(2) of the International Covenant on Civil and Political Rights.

¹⁷ See above, note 10, Para 47.

guarantees of formal equality. However, the Law neither defines nor makes reference to the various forms of discrimination which are well-established at international law (including direct and indirect discrimination and harassment). As noted above, the Committee has expressly stated that discrimination, within the Covenant, incorporates both direct and indirect discrimination, as well as harassment.¹⁸

- (b) Further, the Law contains only a weak provision permitting positive action measures. Article 3 of the Law provides that “practical measures undertaken for the implementation of provisions of the law” will not be considered as discrimination, a formulation which should be interpreted as permitting *inter alia* positive action measures. However, as the Committee has stated in its General Comment No. 20:

*(...) States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.*¹⁹

The Declaration of Principles on Equality recognises that “the right to equality requires positive action” and that positive action is a “necessary element” of the right to equality.²⁰ As the Declaration makes clear, positive action measures should not be considered as an exception to the principle of non-discrimination, but as a necessary element of the right to equality. Thus, by defining positive action measures only as an exception to the right to non-discrimination, the Law restricts the scope of its application, effectively denying women some of the means of overcoming the more deeply ingrained inequalities which prevent them from enjoying equal access to economic, social and cultural rights.

- (c) There is little, if any, evidence of the Law being implemented so as to ensure its effectiveness. Further, the Equal Rights Trust is not aware of any cases which have been brought to courts on the basis of violations of the Law or of any jurisprudence disseminating from courts on the interpretation of the Law.

Provisions in Other Pieces of Legislation

22. In addition to Article 143 of the Criminal Code and the Law of the Republic of Tajikistan on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights, there exist a small number of laws in specific areas of life which contain general equality provisions. For the purpose of ensuring non-discrimination in the enjoyment of rights protected under the Covenant, the relevant provisions include:

- Article 7 of the Labour Code;
- Article 18 (1) of the Civil Code; and
- Article 1(4) of the Family Code.

23. Article 7 of the Labour Code prohibits discrimination in the field of labour relations, as follows:

¹⁸ See above, note 1, Paras 7 and 10.

¹⁹ See above, note 1, Para 9.

²⁰ See above, note 2, Principle 3.

All citizens have equal opportunities with respect to labour relations. Distinctions, exclusions or preferences, or refusals to hire made on the basis of ethnicity, race, skin colour, sex, age, religion, political beliefs, place of birth, foreign origin or social class that violate the equality of opportunity in the area of labour are prohibited.

Distinctions necessitated by the nature of the work or by the concern of the State for persons in need of enhanced social protection (such as women, young people or disabled persons) shall not constitute discrimination.

24. Article 7 thus prohibits discrimination in the field of “labour relations” and prohibits certain forms of direct discrimination, namely “distinctions, exclusions or preferences or refusals to hire”. Article 7 does not, however, appear to encompass other forms of discrimination such as indirect discrimination, harassment or a failure to make reasonable accommodation, all of which have been recognised by the Committee. Further, the list of grounds of discrimination is closed and omits those such as sexual orientation, gender identity, disability and health status, thus falling short of the obligation under Article 2(2) of the Covenant to ensure the enjoyment of Covenant rights without discrimination on grounds including “other status”. Article 7 also does not provide for any recognition or prohibition of multiple discrimination.
25. When compared with Articles 6 and 7 of the Covenant, which set out the scope of the right to work and the right to just and favourable conditions of work respectively, Article 7 of the Labour Code is vague, making reference only to “labour relations” but not setting out the scope or content of this phrase. Articles 6 and 7 of the Covenant, when read with Article 2(2), provide a much more detailed protection of the right to work without discrimination, the obligations of which Tajikistan’s Labour Code appears not to meet.
26. The Committee’s General Comment No. 18 provides that “pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment”.²¹ Although not listed as a ground of discrimination in Article 7 of the Labour Code, there is some limited protection, offered by Article 159 of the Code, which prohibits the refusal to employ women or the decrease of their salary, on the grounds that they are pregnant; have a child under three years old; or are a single mother with a child under 14 years old or a child with a disability under 16 years old.
27. The second part of Article 7, concerning those persons “in need of enhanced social protection”, may, in addition to permitting (but not requiring) legitimate positive action, provide the basis for discrimination. The Trust is concerned that this provision can be interpreted as permitting distinctions to be made based on assumption that certain opportunities ought not to be permitted for groups considered incapable, unable, or unfit to perform certain roles. Indeed, Articles 160 and 161 of the Labour Code aim to “protect” women from certain forms of employment by prohibiting employers from hiring women in work which requires heavy lifting, work underground, or work in “harmful conditions.” The Committee’s General Comment No. 18 outlines the scope of the right to work, which it states “implies the right not to be unfairly deprived of employment”.²² Paragraph 4 states:

²¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 18: Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, UN Doc. E/C.12/GC/18, 2006, Para 13.

²² *Ibid.*

The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.²³

28. In the view of the Equal Rights Trust, Articles 160 and 161 of the Labour Code deny “individuals their right to freely chosen or accepted work”. Indeed, the Committee on the Elimination of Discrimination against Women has already expressed its concern:

[A]bout the potential negative impact on women of Sections 160 and 161 of Labour Code, which appear to be overly protective of women as mothers and prohibit employers from hiring women for underground work, heavy work and work in harmful conditions, thereby limiting women’s economic opportunities in a number of areas.²⁴

Conclusions and Recommendations

29. The Equal Rights Trust’s assessment indicates that the legal framework in Tajikistan is inadequate to meet the requirements of Article 2(2) of the Covenant, in particular in respect of the obligation to enact specific and comprehensive anti-discrimination law which prohibits all forms of discrimination in the enjoyment of the economic, social and cultural rights protected therein. The Equal Rights Trust would suggest the following recommendations to be made to Tajikistan as part of the Committee’s concluding observations:

Suggested Recommendations

- Tajikistan should introduce specific and comprehensive anti-discrimination legislation which prohibits discrimination in the enjoyment of all economic, social and cultural rights protected under the Covenant. Such legislation should include definitions of the forms of prohibited conduct, including direct discrimination, indirect discrimination, harassment and failure to make reasonable accommodation, include all prohibited grounds listed in Article 2(2) and in General Comment No. 20, and prohibit multiple discrimination.
- Tajikistan should undertake an assessment of the Law of the Republic of Tajikistan on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights and its effectiveness in eliminating discrimination against women in the enjoyment, inter alia, of their economic, social and cultural rights. Such an assessment should include consideration of the cases brought under the Law, judicial interpretation and application of the legislation and the sufficiency of the remedies provided.

²³ *Ibid.*, Para 4.

²⁴ Committee on the Elimination of Discrimination against Women, *Concluding Observations: Tajikistan*, UN Doc. CEDAW/C/TJK/CO/4-5, 29 October 2013, Para 25.

- Tajikistan should review and assess the impact of articles 160 and 161 of the Labour Code, and amend them where necessary to ensure that the provisions are not over-protective of women, thus depriving them of equal opportunities for employment.