

Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on the enjoyment of all human rights by older persons; the Special Rapporteur on freedom of religion or belief; and the Working Group on discrimination against women and girls

REFERENCE:
OL HUN 1/2021

22 March 2021

Excellency,

We have the honour to address you in our capacities as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; Independent Expert on the enjoyment of all human rights by older persons; Special Rapporteur on freedom of religion or belief; and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 41/18, 44/10, 42/16, 43/16, 42/12, 40/10 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the abolition of the Equal Treatment Authority ("ETA")**.

According to the information received:

On 10 November 2020, the Parliamentary Committee of Justice Affairs tabled a bill (Bill No. T/13631) that would abolish the ETA and transfer its duties to the Commissioner for Fundamental Rights (Hungary's Ombudsman). The bill was adopted by the Hungarian Parliament on 1 December 2020, and the ETA was abolished as of 1 January 2021.

Functions of the ETA

The ETA, established in 2005 as Hungary's equality body, was an autonomous public administrative body with responsibility for ensuring compliance with the principle of equal treatment. The ETA had a mandate of enforcing Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities ("the Act"), under which it had a comprehensive mandate to address cases of discrimination based on any of the characteristics protected under the Act, including sex, racial origin, colour, nationality, membership of a national minority, disability, state of health, religion or belief, political or other opinions, sexual orientation, gender identity, and age, among other things (Section 8 of the Act). According to the information available to us, it has been considered one of the best functioning rights protection bodies in Hungary.

Under the Act, the ETA was authorised to, *inter alia*, (i) conduct complaint-based or *ex officio* investigations to establish if the principle of equal treatment has been violated; (ii) initiate lawsuits in defence of the rights of aggrieved

persons and groups; (iii) give opinions on drafts of legal acts concerning equal treatment; (iv) make proposals concerning governmental decisions and legal regulations concerning equal treatment; (v) regularly inform the public and the National Assembly concerning the implementation of the principle of equal treatment; and (vi) provide information and assistance for all persons concerned to take action against violations of the principle of equal treatment (Section 14 (1) of the Act).

According to the information before us, the ETA has played an essential role in protecting human rights. It has made important decisions on particularly sensitive cases, such as cases related to the Roma persons or the lesbian, gay, bisexual, trans and gender-diverse (“LGBT”) community. For instance, in its decision of 15 July 2015 (no. EBH/67/22/2015), it found that the municipality of Miskolc violated the ETA (discrimination on the basis of the resident’s social status, financial situation and Roma origin) when it eliminated the town’s segregated Roma neighbourhood without taking any measures to provide the tenants with alternative housing. Also, when the Budapest Mayor’s Office blocked access to LGBT websites from its local network, the ETA found that such conduct amounted to discrimination based on sexual orientation and gender identity. Most recently, it stood up against the Government’s plan to end legal gender recognition for trans and gender diverse people (*See* OL HUN 1/2020).

The Commissioner for Fundamental Rights

Under Bill No. T/13631, the Commissioner took over the functions of the ETA, including the right to render binding decision and sanctions. The complainant can choose whether he/she wants the Commissioner to act in its original capacity as Hungary’s Ombudsman or as the successor of the ETA.

The Ombudsman and the ETA have a few differences in their capacities. First, while the ETA’s mandate was focused on discrimination cases, the Ombudsman investigates violations of fundamental rights of all types upon a complaint or *ex officio*, covering from environmental protection through children’s rights to the monitoring of prisons. Second, the Ombudsman issues recommendations to the concerned authority or its supervisory, but unlike the ETA, such decisions are not binding.

There are several concerns being raised in regard to the transfer of the ETA’s tasks and competences to the Commissioner.

Effectiveness of the national protection framework regarding equality and non-discrimination

We wish to express our concern that abolishing the ETA, which focused exclusively on equal treatment issues, and shifting its duties to the Commissioner for Fundamental Rights, which has a broad mandate to investigate violations of fundamental rights of all types upon a complaint or *ex officio*, may considerably reduce the level of protection against discrimination.

Furthermore, we are concerned that the speed with which the transition process was carried out, in less than two months, may cause delays in the procedures

that are in progress before the ETA and the court reviewing the ETA's decisions.

The transfer also poses questions in terms of procedural efficacy. Under the new legislation, the same institution has to address complaints regarding the right to non-discrimination under two different sets of procedural rules, with each of them having its own outcomes (non-binding recommendation or binding decision, including sanctions). Also, the new legislation enables for the Commissioner (i) to investigate a complaint first in his capacity as Ombudsman, and then, after that examination is completed, (ii) to act as the successor of the ETA if the complainant requests or the Commissioner decides so *ex officio*. This makes it impossible for the Commissioner to fulfil its quasi-judicial role as the successor of the ETA.

Finally, we wish to note that the decision to abolish the ETA takes place at a time where the capacity of the Commissioner for Fundamental Rights to address all human rights is being questioned by United Nations human rights mechanisms, and under the scrutiny of the Sub-Committee on Accreditation of the Global Alliance for National Human Rights Institutions (the Sub-Committee). While the Office of the Commissioner for Fundamental Rights received status "A" accreditation from the Sub-Committee in 2014, the latter decided to defer the review of the Commissioner's status in October 2019 because it "does not demonstrate adequate efforts in addressing all human rights issues, nor has it spoken out in a manner that promotes and protects all human rights".¹ Also, the Sub-Committee noted that the Commissioner "has made limited use of such mechanisms in relation to sensitive issues."² In its decision, it referred among others, to concerns expressed by the Special Rapporteur on the situation of human rights defenders in 2017 (i) that the Commissioner for Fundamental Rights enabling law and the lack of enforceability of its recommendations have weakened its protection mandate in relation to certain rights, and (ii) that, despite its mandate, the Commissioner has been reluctant to refer complaints to the Constitutional Court for review in cases that it deems political or institutional (A/HRC/34/52/Add.2, paras. 92-93). Additionally, the Sub-Committee pointed out that the Committee on the Elimination of Racial Discrimination regretted the lack of information on the work of the Commissioner to prevent racial discrimination and xenophobia against vulnerable ethnic minorities, including migrants, refugees and asylum seekers (CERD/C/HUN/CO/18-2,5 paras. 8-9).

Right to participate in public affairs

As a matter of principle, rights-holders should be given the opportunity to participate in shaping the agenda of decision-making processes in order to ensure that their priorities and needs are included in the identification of the subject matter and content for discussion.³ However, the decision to abolish the ETA does not seem to have been open for consultation, especially in the context of lockdowns, quarantines and other such measures to combat the spread of COVID-19, or subject to an impact assessment.

¹ <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20October%202019%20English.pdf>

² <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20October%202019%20English.pdf>

OHCHR, "Guidelines for States on the effective implementation of the right to participate in public affairs" (available at https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf).

Article 25 of the International Covenant on Civil and Political Rights (ratified by Hungary on 17 January 1974) recognises and protects the right of every citizen to take part in the conduct of public affairs along with the right to vote and to be elected as well as the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.

The Human Rights Committee stressed that Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant (CCPR/C/21/Rev.1/Add.7, General Comment No. 25, para. 1). The Committee also stated that the conduct of public affairs, referred to in paragraph (a) of Article 25, is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers (*Ibid.*, para. 5). Any condition which applies to the exercise of the rights protected by Article 25 should be based on objective and reasonable criteria (*Ibid.*, para. 4).

In light of this, rights holders should be given the opportunity to participate in shaping the agenda of decision-making processes in order to ensure that their priorities and needs are included in the identification of the subject matter and content for discussion, by, for example, through online consultations, public hearings or forums, or working groups or committees composed of representatives of public authorities and members of the society.⁴ Also, rights holders who are directly or likely to be affected by, or who may have an interest in a proposed law should be notified in a timely, adequate and effective manner.⁵

The United Nations Secretary-General stressed that in times of crisis like COVID-19, the right to meaningful participation matters more than ever. He said meaningful public participation in decision-making is a human right that must be defended and enhanced in the face of pushback, an imperative heightened by crises such as the COVID-19 pandemic. According to the Secretary-General, participation is not just to vote but also a permanent interaction between societies and political power and societies having a permanent influence in the way political power decides.⁶

The United Nations High Commissioner for Human Rights reaffirmed the statement made by the Secretary-General and emphasised that protecting and respecting the right to participation is a legal obligation for every Member State. The High Commissioner further continued that when people are prevented from participating in shaping decisions that affect them, the consequences for governance can be severe. In times of COVID-19, successful transformation of society can only be achieved with the meaningful participation of the people whose lives will be affected.⁷

⁴ *Ibid.*, para. 64.

⁵ *Ibid.*, para. 66.

⁶ Secretary-General's remarks at High-level side event, "Participation, Human Rights and the Governance Challenge Ahead" (25 September 2020) (available at <https://www.un.org/sg/en/content/sg/statement/2020-09-25/secretary-generals-remarks-high-level-side-event-participation-human-rights-and-the-governance-challenge-ahead-delivered>).

⁷ UN High Commissioner for Human Rights at the 75th session of the UN General Assembly, "High-Level Side Event: Participation, Human Rights and the Governance Challenge Ahead" (25 September 2020) (available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26298&LangID=E>).

In view of the aforementioned observations, we respectfully urge your Excellency's Government to ensure that the Commissioner provide the same level of protection against discrimination based on the characteristics enshrined in the Equal Treatment Act.

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please explain the rationale for abolishing the ETA, which was considered an effective anti-discrimination body, and the haste for implementing this decision. Also, please provide information on measures that your Excellency's Government has taken to secure participation of relevant stakeholders in the decision-making process and to assess the impact of the abolition of the ETA..
3. Please explain the measures through which your Excellency's Government envisages to continue ensuring the same level of protection against discrimination based on sex, racial origin, colour, nationality, membership of a national minority, disability, health, religion or belief, political or other opinion, sexual orientation, gender identity, age and any other characteristic protected under the Equal Treatment Act in the future.
4. Please provide information on measures that your Excellency's Government has taken or planned to construct a coherent institutional architecture that includes a high-level, well-resourced mechanism whose mandate will be dedicated to the advancement and empowerment of women as a stand-alone goal, in line with the recommendations of the Working Group on discrimination against women and girls as contained in its 2017 country visit report.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration

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