

Recommendation 1915 (2010)¹ Discrimination on the basis of sexual orientation and gender identity

Comments of the CDDH: 70th meeting 15 – 18 June 2010; Doc. CDDH(2010)010 E

1. The Steering Committee for Human Rights (CDDH) welcomes Recommendation 1915(2010) of the Parliamentary Assembly on “Discrimination on the basis of sexual orientation and gender identity”, in which positive reference is made to the recent recommendation of the Committee of Ministers (CM/Rec(2010)05) on measures to combat discrimination based on sexual orientation or gender identity and which was drafted by the CDDH as part of its work on the development of human rights standards. The CDDH considers that the above-mentioned recommendation by the Committee of Ministers is a particularly significant step that will contribute to the promotion of a clear message of respect and non-discrimination. In this context, it welcomes the importance of the contribution by the Parliamentary Assembly in this field, as exemplified by its Recommendation 1915(2010) and Resolution 1728(2010)

2. The CDDH also refers to the decision taken by the Ministers’ Deputies, at the moment of the adoption of Recommendation CM/Rec(2010)05, to examine the implementation of the recommendation three years after its adoption. In this respect, it considers that the elaboration of legal standards in this field is an indispensable first step and shares the view of the Assembly that further Council of Europe action in this field will be necessary in order to contribute to the implementation of the Recommendation and of the principles contained therein in all the Council of Europe member state. Legal responses, whilst necessary, are not sufficient and need to be combined with educational and cultural measures likely to eradicate discrimination and intolerance in the long-term.

3. The CDDH therefore considers that, subject to available resources, the elaboration of a project of awareness-raising initiatives and assistance activities in member states, combined with further mainstreaming of issues relating to discrimination on grounds of sexual orientation and gender identity in the activities of the Council of Europe, would facilitate the implementation in the member states of the Recommendation and help prepare the review exercise at the Committee of Ministers’ level, to be carried out in 2013.

4. The CDDH expresses its availability to contribute to this work, and notes that a publication collecting all the relevant Council of Europe standards and documents dealing with this particular form of discrimination is already under preparation.

5. As regards the Assembly’s proposal that a relevant Council of Europe body review and address issues related to discrimination based on sexual orientation and gender identity in member States, the CDDH believes that it itself would not be equipped

¹ *Assembly debate* on 29 April 2010 (17th Sitting) (see [Doc. 12185](#), report of the Committee on Legal Affairs and Human Rights, rapporteur : Mr Gross and [Doc. 12197](#), opinion of the Committee on Equal Opportunities for Women and Men, rapporteur: Mrs Memecan). *Text adopted by the Assembly* on 29 April 2010 (17th Sitting).

to carry out such a task on a regular basis. The Committee of Ministers might wish to explore other avenues by seeking the views of the European Commission against Racism and Intolerance (ECRI) on its possible role in this regard.

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Nota Bene: The Russian Federation dissociated itself with the contents of the comment on Recommendation 1915(2010), for the reasons expressed in the statement appended to the report of the 69th meeting of the CDDH (document CDDH(2009)019, Appendix IV), and did not participate in its adoption.

CDDH(2009)019, Appendix IV:

**Statement of the delegation of the Russian Federation regarding the draft
recommendation
of the Committee of Ministers to Member States on measures to combat
discrimination
on grounds of sexual orientation and gender identity**

From the very beginning and on all levels, this delegation underlined that the Russian Federation is against discrimination in any form and aimed at any social group or individual, in full accordance with the European Convention on human rights and fundamental freedoms and other relevant international human rights instruments.

The draft on the table today goes far beyond that, and beyond the instructions of the Committee of Ministers to combat discrimination, not invent new standards. Not only individual judgments of the European Court on Human rights are used as a basis for universal recommendations, but in fact the position of the Court itself is repeatedly subverted and continuously misinterpreted. We find particularly discouraging the trend to misrepresent the findings of the Court as prohibiting any difference of treatment in all cases, regardless of individual circumstances and possible justification.

Moreover, a number of relevant documents adopted by the Committee of Ministers were not fully taken into account, or, in some outstanding cases, ignored completely in preparation of this text – such as, for example, with regard to provisions on asylum.

On some occasions, danger of positive discrimination is created, encouraging Member States to award more protection to LGBT couples and individuals than to traditional families and couples, despite the fact that protection of traditional family is a fundamental value recognized by the Court.

This delegation pays particular attention to the rights of the child. It is unacceptable to put under doubt the non-negotiable priority of the child's best interests in adoption, guardianship, and education, to label this universal principle, enshrined in the UN Convention on the rights of the child, as possible abuse, and to encroach upon the margin

of appreciation of national legal systems which is clearly established by Article 12 of the European Convention on Human rights.

This delegation spent significant effort, both in this Committee and in the working group, attempting to bring the draft not merely to our eye level, but to synchronicity with the position of the Court, the international obligations of Member States under Council of Europe conventions, the decisions of the Committee of Ministers, and even the position of this Committee itself as expressed in other documents. And yet, the draft falls short of all these benchmarks.

The European Court on Human rights looks upon Council of Europe instruments as indicators of convergence of views of Member States, and is known to alter its position in accordance with emerging state practice. We would therefore like to disassociate ourselves from this draft, which does not reflect any sort of consensus – indeed, does not even approach consensus, and is, in the end, an unrealistic and impractical document.

We would like to call for a vote in accordance with the Resolution of the Committee of Ministers on committees and subordinate bodies, and, in case the draft is approved, to indicate our dissenting opinion on the outlined grounds.

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Recommendation 1915 (2010)¹

Discrimination on the basis of sexual orientation and gender identity

1. Referring to its [Resolution 1728](#) (2010), the Parliamentary Assembly commends the Committee of Ministers for its recommendation on measures to combat discrimination based on sexual orientation or gender identity (CM/Rec(2010)5).

2. The Assembly considers that the Council of Europe has the duty to promote a clear message of respect and non-discrimination. In addition, the Council of Europe is particularly well placed to develop human rights standards, offer expertise and advice and serve as a forum for discussion on issues related to discrimination on the basis of sexual orientation and gender identity.

3. Consequently, the Assembly recommends that the Committee of Ministers:

3.1. monitor the implementation of its recent recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity;

3.2. define further Council of Europe action in this field, in particular:

3.2.1. instruct a relevant Council of Europe body to review and address issues related to discrimination on the basis of sexual orientation and gender identity in member states, and provide it with the necessary resources to carry out this task;

3.2.2. further mainstream issues relating to discrimination on the basis of sexual orientation and gender identity in its activities, and disseminate the case law of the European Court of Human Rights on sexual orientation and gender identity, including through publications and training materials;

3.2.3. in the framework of its work on children and violence, address in particular the issue of homophobic and transphobic bullying at school;

3.2.4. further develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of lesbian, gay, bisexual and transgender people and, in particular, organise a campaign to combat discrimination on the basis of sexual orientation and gender identity;

3.3. instruct the Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) to include in the future Council of Europe convention the severest and most widespread forms of violence against women, in accordance with Assembly [Recommendation 1847](#) (2008) on combating violence against women: towards a Council of Europe convention, and to recognise that lesbian, bisexual and transgender women face an increased risk of gender-based violence (in particular rape, sexual violence and harassment, as well as forced marriages) and provide protection commensurate with this increased risk.

1. *Assembly debate* on 29 April 2010 (17th Sitting) (see [Doc. 12185](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Gross; and [Doc. 12197](#), opinion of the Committee on Equal Opportunities for Women and Men, rapporteur: Mrs Memecan). *Text adopted by the Assembly* on 29 April 2010 (17th Sitting).

<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12185.htm>

<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12197.htm>

Recommandation 1915 (2010)² Discrimination sur la base de l'orientation sexuelle et de l'identité de genre

² *Discussion par l'Assemblée* le 29 avril 2010 (17^e séance) (voir [Doc. 12185](#), rapport de la commission des questions juridiques et des droits de l'homme, rapporteur : M. Gross et [Doc. 12197](#), avis de la commission sur l'égalité des chances pour les femmes et les hommes, rapporteur : M^{me} Memecan). *Texte adopté par l'Assemblée* le 29 avril 2010 (17^e séance).

Commentaires du CDDH : 70^e réunion 15 – 18 juin 2010 ; Doc.CDDH(2010)010F

1. Le Comité directeur pour les droits de l'homme (CDDH) salue la Recommandation 1915(2010) de l'Assemblée parlementaire sur la "Discrimination sur la base de l'orientation sexuelle et de l'identité de genre", dans laquelle une référence positive est faite à la récente Recommandation du Comité des Ministres (CM/Rec(2010)05) sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre, rédigée par le CDDH dans le cadre de ses travaux sur le développement des normes des droits de l'homme. Le CDDH considère que la recommandation précitée du Comité des Ministres est une étape particulièrement significative qui contribuera à la promotion d'un message clair de respect et de non-discrimination. Dans ce contexte, il salue l'importance de la contribution de l'Assemblée parlementaire dans ce domaine, telle qu'illustrée par sa Recommandation 1915(2010) et sa Résolution 1728(2010).

2. Le CDDH se réfère également à la décision prise par le Comité des Ministres, lors de l'adoption de la Recommandation CM/Rec(2010)05, d'examiner la mise en œuvre de cette dernière trois ans après son adoption. A cet égard, il estime que l'élaboration de normes juridiques dans ce domaine est une première étape indispensable, et partage l'avis de l'Assemblée qu'une action supplémentaire du Conseil de l'Europe dans ce domaine sera nécessaire afin de contribuer à la mise en œuvre de la Recommandation et des principes qu'elle contient dans tous les Etats membres du Conseil de l'Europe. Des réponses juridiques, bien qu'essentielles, ne sont pas suffisantes et nécessitent d'être combinées avec des mesures éducatives et culturelles à même d'éliminer la discrimination et l'intolérance à long terme.

3. Le CDDH estime par conséquent que, sous réserve de ressources disponibles, l'élaboration d'un projet d'initiatives de sensibilisation et d'activités d'assistance dans les Etats membres, combiné avec une approche intégrée des questions relatives à la discrimination sur la base de l'orientation sexuelle et de l'identité de genre dans les activités du Conseil de l'Europe, faciliterait la mise en œuvre de la Recommandation dans les Etats membres et aiderait à préparer l'exercice de suivi au niveau du Comité des Ministres, à mener en 2013.

4. Le CDDH fait part de sa disponibilité pour contribuer à ces travaux et note qu'une publication compilant l'ensemble des normes pertinentes du Conseil de l'Europe et documents traitant de cette forme particulière de discrimination est d'ores et déjà en préparation.

5. S'agissant de la proposition de l'Assemblée qu'un organe pertinent du Conseil de l'Europe contrôle et traite des questions relatives à la discrimination fondée sur l'orientation sexuelle et l'identité de genre dans les Etats membres, le CDDH estime qu'il ne serait lui-même pas équipé pour mener une telle tâche sur une base régulière. Le Comité des Ministres pourrait souhaiter explorer d'autres voies en sollicitant l'avis de la Commission européenne contre le racisme et l'intolérance (ECRI) sur son rôle éventuel à cet égard.

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Nota Bene: La Fédération de Russie s'est dissocié du contenu des commentaires sur la Recommandation 1915(2010), pour les raisons exprimées dans la déclaration annexée au rapport de la 69^e réunion du CDDH (document CDDH(2009)019, Annexe IV), et n'a pas participé à leur adoption.

CDDH(2009)019, Annexe IV

Déclaration de la Fédération de Russie sur le projet de Recommandation sur les mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre

From the very beginning and on all levels, this delegation underlined that the Russian Federation is against discrimination in any form and aimed at any social group or individual, in full accordance with the European Convention on human rights and fundamental freedoms and other relevant international human rights instruments.

The draft on the table today goes far beyond that, and beyond the instructions of the Committee of Ministers to combat discrimination, not invent new standards. Not only individual judgments of the European Court on Human rights are used as a basis for universal recommendations, but in fact the position of the Court itself is repeatedly subverted and continuously misinterpreted. We find particularly discouraging the trend to misrepresent the findings of the Court as prohibiting any difference of treatment in all cases, regardless of individual circumstances and possible justification.

Moreover, a number of relevant documents adopted by the Committee of Ministers were not fully taken into account, or, in some outstanding cases, ignored completely in preparation of this text – such as, for example, with regard to provisions on asylum.

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Recommandation 1915 (2010)¹

Discrimination sur la base de l'orientation sexuelle et de l'identité de genre

1. Faisant référence à la [Résolution 1728](#) (2010), l'Assemblée parlementaire félicite le Comité des Ministres pour sa recommandation sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre (CM/Rec(2010)5).

2. L'Assemblée estime que le Conseil de l'Europe a le devoir de promouvoir un message clair de respect et de non-discrimination. De plus, le Conseil de l'Europe est particulièrement bien placé pour élaborer des normes en matière de droits de l'homme, pour proposer une expertise et des conseils, et pour servir de forum de discussion sur des questions liées à la discrimination fondée sur l'orientation sexuelle et l'identité de genre.

3. Par conséquent, l'Assemblée recommande au Comité des Ministres:

3.1. de contrôler la mise en œuvre de sa récente recommandation aux Etats membres sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre;

3.2. de définir de nouvelles actions à mener par le Conseil de l'Europe dans ce domaine, en particulier:

3.2.1. charger un organe concerné du Conseil de l'Europe d'examiner et de traiter les questions liées à la discrimination fondée sur l'orientation sexuelle et l'identité de genre dans les Etats membres, et lui fournir les ressources nécessaires pour mener à bien sa tâche;

3.2.2. mieux intégrer les questions liées à la discrimination fondée sur l'orientation sexuelle et l'identité de genre dans ses activités, et diffuser la jurisprudence de la Cour

européenne des droits de l'homme sur l'orientation sexuelle et l'identité de genre, notamment par le biais de publications et de matériel de formation;

3.2.3. dans le cadre de ses travaux sur l'enfance et la violence, traiter en particulier la question des violences homophobes et transphobes à l'école;

3.2.4. renforcer les programmes antidiscrimination et les programmes de sensibilisation favorisant la tolérance, le respect et la compréhension des personnes lesbiennes, gay, bisexuelles et transgenres, et, en particulier, organiser une campagne de lutte contre la discrimination fondée sur l'orientation sexuelle et l'identité de genre;

3.3. de demander au Comité ad hoc pour prévenir et combattre la violence à l'égard des femmes et la violence domestique (CAHVIO) d'inclure dans la future convention du Conseil de l'Europe les formes les plus sévères et les plus répandues de la violence à l'égard des femmes, conformément à la [Recommandation 1847](#) (2008) «Combattre la violence à l'égard des femmes: pour une convention du Conseil de l'Europe» de l'Assemblée, et de reconnaître que les femmes lesbiennes, bisexuelles et transgenres courent un risque accru de violence fondée sur le genre (notamment le viol, la violence sexuelle et le harcèlement, ainsi que les mariages forcés), et de leur offrir une protection en rapport avec ce risque accru.

1. *Discussion par l'Assemblée* le 29 avril 2010 (17^e séance) (voir [Doc. 12185](#), rapport de la commission des questions juridiques et des droits de l'homme, rapporteur: M. Gross; et [Doc. 12197](#), avis de la commission sur l'égalité des chances pour les femmes et les hommes, rapporteuse: M^{me} Memecan). *Texte adopté par l'Assemblée* le 29 avril 2010 (17^e séance).

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