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Institute of Public Policy on Human Rights

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purpose of strengthening the protection of the human rights of older persons

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The Institute of Public Policy on Human Rights (hereafter “the Institute”) is a MERCOSUR body that operates as a forum for technical cooperation, research and coordination of public policies on human rights in the countries that make up this regional bloc.

The Institute’s national counterparts are the high-level human rights authorities and ministries of foreign affairs of the States members and associated States of MERCOSUR. In the framework of the meetings of these authorities there is a Standing Committee on Older Persons, established in 2010, which requested the Institute to conduct a study on the overall situation with respect to protection of the rights of older persons in the region, with a view to promoting the conclusion of an international convention under the auspices of the United Nations.

Issues concerning the rights of older persons and the effort to promote the conclusion of an international convention are highly significant for the MERCOSUR States. The conclusion of an international instrument is important in view of the large-scale demographic transition taking place in the countries of the Americas and other parts

of the world. A convention on the rights of older persons should reaffirm the fundamental principle of equality and non-discrimination on the basis of age, as expressly recognized in international norms and human rights bodies.

My presentation will accordingly focus on three key areas in relation to the express recognition of the principle of non-discrimination on the basis of age which we believe should be addressed in the debates on the drafting of an international instrument: first, formal equality before the law and inclusion of age as a vulnerable category for the purpose of preventing negative differential treatment; second, structural or substantive equality and its implications for the positive obligations of States, especially in the area of social policies and services, with particular reference to the situations of multiple discrimination suffered by some older persons; and third, the obligation to protect against various forms of violence affecting older persons, and the principle of due diligence in preventing such violence.

#### **I. Age discrimination and equality before the law**

The express recognition of the principle of non-discrimination on the basis of age is essential for approaching this issue from a human rights perspective. The inclusion in the convention of a prohibition on age discrimination is a vital requirement for protecting older persons' right to equality before the law.

Only two international treaties specifically mention age as a prohibited ground for discrimination: the International Convention on the Protection of the Rights of All

Migrant Workers and Members of their Families and the Convention on the Rights of Persons with Disabilities. While other international human rights treaties do not specify age as a prohibited category, the lists they contain are not restrictive but merely illustrative. Among the categories listed, the open, flexible reference to “other status” has enabled committees to consider it in cases involving age discrimination.

In establishing a general prohibition on discrimination, these international treaties enumerate a series of categories for which there is a *prohibition of negative or unfavourable differential treatment*. These provisions, in establishing such categories, presume that differential treatment by law on the basis of these categories has an adverse impact on the exercise of rights by certain persons or groups of persons. The categories for which differential treatment is prohibited usually involve factors such as race, sex, nationality and social origin, in respect of which, as a result of past practices and patterns of associating such factors with inferior status, there remain de facto inequalities and ingrained prejudices.

When the State, in law or in practice, draws distinctions based on prohibited grounds for discrimination, such treatment will be viewed as suspicious and deserving of close scrutiny; that is, closer scrutiny than that applied to rules or practices that differentiate among persons who do not belong to any of these categories. This more rigorous examination requires that the burden of proof be reversed and that the State be required to show that the object pursued by the rule or act is of significant public interest and that the distinction made is absolutely essential for that purpose because there are no

less restrictive alternatives for the rights in question than those imposed by the regulation concerned.

Thus, while cases of reasonable and objective differential treatment on the basis of age can be permitted, such as the establishment of minimum ages for certain types of work or for access to public office, there are situations in which age serves as a basis for discriminatory treatment. We believe it is necessary to properly identify such situations in an international instrument. In our view, the use of age as a ground for negative differential treatment occurs specifically in situations where State laws and policies set an upper age limit for obtaining benefits, carrying out activities or exercising rights. In such situations, it is important to conceptualize the category of age as one susceptible to discrimination in order to require close scrutiny of the reasonableness of the relevant measures.

The express recognition of age as a prohibited ground for discrimination in these circumstances and the inclusion of age as a vulnerable category have a significant impact on respect for older persons' right to equality before the law.

In the next section, we will consider the evolution from the concept of formal equality to that of substantive equality and the consequences this has for the State's obligations towards groups that suffer from situations of structural inequality.

## **II. Structural discrimination and positive obligations**

One of the most complex aspects of equality is the analysis of forms of discrimination that necessitate the study of historical, social, political and economic

conditions; that is, of the structural conditions that shape the life of a particular community or social group.

It must also be borne in mind that individuals do not belong only to a single social group; rather, their lives encompass various elements of identity that can lead to processes of multiple discrimination, further complicating the analysis of specific cases. This idea of multiplicity consists of the notion that subjectivity is made up of interlocking and mutually reinforcing vectors such as race, gender, class and sexuality. This issue has begun to be reflected in the international human rights system, in particular in general recommendation No. 27 of the Committee on the Elimination of Discrimination against Women.

The disadvantage at which these groups of persons are placed is reflected primarily in lack of access to universally recognized rights and guarantees.

Advancement from the concept of formal equality to that of substantive or actual equality requires the State to abandon its neutrality and develop tools for assessing the social situation and generating information, in order to determine which groups or sectors should, at a given point in time, be the beneficiaries of urgent special measures of protection, taking particular account of their specific characteristics when adopting measures affecting them. This definition of the State's role as an active guarantor of rights has as a corollary, in addition to a general obligation not to discriminate, an obligation to safeguard these subordinated groups' exercise of their rights by adopting countervailing affirmative or positive actions involving differential treatment by the State and recognition of certain prerogatives based specifically on the needs of the members of

a group identified as being disadvantaged and victimized by a situation of structural inequality.

Human rights mechanisms have identified older persons of both sexes as a vulnerable group requiring special measures of protection.

Among the positive State actions that should translate into social policies and actions to protect the rights of older persons, we consider it important to distinguish between two aspects: on the one hand, the design of social policies and services specifically targeting this group, such as social security systems, and on the other, the obligation to adapt and adjust universal social services, such as the health and education systems, to the particular needs and circumstances of older persons.

Of special importance within the first set of measures are those for the design and implementation of a system of social security in the broad sense, including both contributory and non-contributory benefits, aimed at reversing the structural patterns of discrimination that have marginalized this group, and also addressing the situations of multiple discrimination that older persons may experience, such as the situation of women of indigenous or African descent, or older persons with irregular immigration, refugee or displaced person status.

States' obligations with respect to the effective protection of the rights of older persons also include the need to adopt differential treatment and special approaches that take age into account in the design and implementation of all social policies and services for the general population.

Continuing this exploration of the principle of non-discrimination in a context of structural inequality, such as that experienced by older persons as a group, in the following section we will analyse the State's duty to protect life and physical integrity so as to prevent situations of violence that impair the rights of older persons.

### **III. The due diligence obligation to protect**

This robust idea of equality has other consequences for the role of States in terms of their obligations to protect rights, in particular the right to life and to physical integrity, and to provide safeguards against situations of violence, even violent acts or practices committed by non-State actors.

The due diligence obligation to protect requires the State to have an appropriate legal framework for protection, to implement that framework effectively and to institute preventive policies and the means of taking effective action in response to reports of violence. In other words, the prevention strategy should be comprehensive so that it can offset risk factors and strengthen institutions to enable them to respond effectively to cases of violence.

The institutionalization of older persons has been a matter of concern to a number of human rights protection bodies.

International organizations have classified older persons as a group victimized by structural patterns of violence, having identified older women as a group that is especially vulnerable to such situations.

The inter-American system for the protection of human rights has also dealt with this issue, specifically the obligation of protection against non-State actors in cases of violence against women and protection of the right to mental health.

The Inter-American Court of Human Rights has established that the State's liability for acts committed by private individuals which, in principle, are not attributable to the State is based on "the duties *erga omnes* of the States to respect and guarantee protection norms and to ensure the effectiveness of rights". The Court has also held that acts performed by any entity, either public or private, which is empowered to act in a State capacity may be deemed to be acts for which the State is directly liable.

In sum, we consider that in the process of discussing an international instrument on older persons, it is important to give appropriate consideration to the due diligence obligation to protect against forms of violence and abuse that typically affect older persons' right to life and to personal integrity, so as to define its scope and clarify its relationship to other State obligations and the principle of equality and non-discrimination.

## **Conclusions**

The aforementioned legal principles based on equality and non-discrimination should guide the public policies and, especially, the social protection systems designed and implemented by States for the protection of older persons. They should also contribute to the adaptation and adjustment of universal social services and policies to



special needs and should provide a framework for the regulation and supervision of services rendered by private individuals.

In conclusion, an international convention that protects the rights of older persons should reflect this principle of equality and non-discrimination, with States assuming all obligations for eradicating and preventing the situations of structural discrimination that affect this group.