

The Universal Periodic Review

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1. Overview of the situation of LGBT persons in Ukraine

Results from recent public opinion polls show that the Ukrainian society is becoming more homophobic. The number of people who think homosexuals should enjoy equal rights has decreased from 43% in 2002 to 36% in 2011; the number of those that do not think so has increased from 34% to 49% respectively.¹

The Ukrainian government does not view LGBT people as representing a social group with its own problems and needs. Only in the field of HIV/AIDS prevention and treatment are men who have sex with men (MSM) distinguished by classification into a separate “risk group”.

Given the lack of any official stance on LGBT persons and the virtually complete neglect of relevant issues in the national legislation, policy-making is wholly dependent on personal views of decision-makers. As the state has completely distanced itself from the problems of LGBT people and continues to ignore their very existence, increased visibility of LGBT people in the Ukrainian society has led to the increase in the level of homophobia. The situation is further aggravated by a number of factors, among which are growth of the influence of the church and other conservative forces and homophobic utterances made by politicians, government officials, and representatives of local governments.²

1 Nash Mir (Our World) Gay and Lesbian Centre. (2011). *ONE STEP FORWARD, TWO STEPS BACK. Situation of LGBT people in Ukraine in 2010-2011* (English summary), p. 12-13. Retrieved from <http://www.gay.org.ua/publications/report2011-e.pdf>

2 Ibid, p. 8, 14.

2. Equality and protection against discrimination

Absence of public anti-discrimination policy in Ukraine is one of the factors aggravating continued discrimination against LGBT persons. Ukraine lacks a comprehensive anti-discrimination law that would explicitly address sexual orientation and gender identity equal treatment issues. Generally, existent anti-discrimination provisions are scattered throughout the legal system and are mere declarations practically devoid of a clear and effective mechanism for their implementation. Despite recommendations contained in the 2000 PACE Recommendation No. 1474 “Situation of lesbians and gays in Council of Europe member states”³ and the 2010 Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe,⁴ none of these provisions presently provides for explicit protection against discrimination on the grounds of sexual orientation and gender identity. Furthermore, the Ukrainian government persists in the opinion that sexual orientation and gender do not warrant a special mention as they are implied in the category “other grounds”.

Several laws contain provisions that are openly discriminatory towards LGBT persons. For instance, paragraph 21 of Article 10 of the Law “On police”⁵ sets forth an obligation to detain under a number of conditions men who have sex with men (MSM) virtually only on the grounds of their sexual orientation.

The Order of the Ministry of Health Care of Ukraine, No. 385 of 01 August 2005⁶ prohibits persons that “engage in homosexual contacts” (a form of risky behaviour) from donating blood. The prohibition unreasonably includes lesbians that, unlike MSM, are not at higher risk of contracting HIV. Besides, at the stage of blood collection it is practically impossible to verify whether a person “engages in homosexual contacts” or not.

In 2011 several members of the Ukrainian Parliament submitted a bill (Draft law No. 8711⁷) which, if adopted, would prohibit of the “propaganda of homosexuality”. In case of adoption this provision will endanger the very basic principles of a democratic state: the freedom of speech, freedom of peaceful assembly, and freedom from discrimination.⁸ At least one governmental agency – the State Committee for Television and Radio Broadcasting of Ukraine – expressed its support for the draft law.

Furthermore, in March 2012 another similar bill (Draft law No. 10290⁹) was submitted to the Parliament.

The only state institution that is charged with human rights defence, the Verkhovna Rada Commissioner for Human Rights (Ombudsman), follows the same policy line as the rest of the government: it distances itself from LGBT issues.

LGBT people in Ukraine are discriminated against not only in the law, but also in their daily lives. Results from the 2011 poll conducted online by the Nash Mir (Our World) Centre show that 61% of

3 Official English text is accessible on the web site of the Council of Europe at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta00/erec1474.htm>

4 Official English text is accessible on the web site of the Council of Europe at <https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=CM&BackColorIntranet=C3C3C3&BackColorLogged=F5D383>

5 Text of the Law is accessible on the official web site of the Verkhovna Rada (Parliament) of Ukraine at <http://zakon2.rada.gov.ua/laws/show/565-12>

6 Text of the Order is accessible on the official web site of the Ministry at <http://mozdocs.kiev.ua/view.php?id=4781>

7 Text of the draft law is accessible on the official web site of the Verkhovna Rada (Parliament) of Ukraine at http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=40734.

8 Nash Mir, op. cit., p. 6, 8

9 Text of the draft law is accessible on the official web site of the Verkhovna Rada (Parliament) of Ukraine at http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=43007.

the respondents claim to have been discriminated against or to have had their rights violated at least once in the past three years; among those whose “non-traditional” sexual orientation was known or assumed, the figure reaches 89%.¹⁰ This study also demonstrates that discrimination against LGBT people occurs most frequently in the spheres of interpersonal relations, encounters with law enforcement authorities and employment. Meanwhile, Ukrainian law virtually lacks codified legal liability for (and practice of punishment for) discrimination on the grounds of sexual orientation.

It is particularly important to mention rampaging discrimination on the grounds of sexual orientation and gender identity in employment¹¹, and (since 2008) the persistent unwillingness of the Ukrainian government to implement numerous recommendations of the Council of Europe and Ukrainian LGBT organisations concerning the introduction of direct prohibition of discrimination on the grounds of sexual orientation and gender identity in the national labour law. Homophobic harassment by co-workers and superiors as well as termination of employment or refusal to employ on the grounds of sexual orientation are the most common human rights violations in this field.

Recommendations:

- a) Develop state policy in respect to combating discrimination in Ukraine.
- b) Develop and adopt a comprehensive anti-discrimination law that will contain the most extensive yet open list of protected grounds, including sexual orientation and gender identity, as well as precise mechanisms for protection against discrimination.
- c) Introduce a direct and explicit prohibition of discrimination on the grounds of sexual orientation and gender identity to the national labour legislation.
- d) Prevent the Parliament from adopting the two above-mentioned homophobic bills (Draft laws, Nos. 8711 and 10290).

3. Right to freedom and personal inviolability

These rights of LGBT persons in Ukraine are violated principally by law enforcement agencies. The most frequent cases of violations of the rights of LGBT persons, as well as incidents of discrimination against them occur during encounters with the police. According to a study on the situation of LGBT persons in Ukraine, 77% of the respondents who have had close encounters with the police in the past three years and whose sexual orientation was known reported that they were discriminated against or that their rights were violated by the police officers. Most frequently the respondents complained about degrading treatment and unjustified physical violence on the part of police officers, as well as unlawful detainments and personal searches conducted with violations of procedural norms.¹²

Ukraine lacks a mechanism of independent control over the work of law enforcement agencies: complaints about their actions can be submitted only to other law enforcement agencies, which in practice can be not only ineffective but also dangerous for the victims of abuse. Complaints from many victims were dismissed and those whose complaints were accepted received calls with threats

10 Nash Mir, op. cit., p. 16.

11 Ibid, p. 16, 20-21.

12 Ibid, p..9-10, 16, 20.

of physical violence unless they withdraw their claims. Thus, it comes as no surprise that in recent years there have been very few LGBT persons who openly defended their rights.

Recommendations:

- a) Include information on sexual orientation and gender identity within the context of human rights into education and training programs designed for law enforcement personnel, raise awareness and oblige law enforcement authorities to establish links with and heed recommendations from human rights NGOs.
- b) Establish an independent public body for investigation of unlawful actions by law enforcement agencies. The body should be placed outside the jurisdiction of the existing law enforcement agencies and be vested with a broad mandate for public control.

4. Right to privacy

This right of LGBT persons is frequently and brutally violated by the police.

The first type of violation typically occurs when police officers, in one way or another, learn about a person's "non-traditional" sexual orientation and start blackmailing him/her. Threats to disclose the information about the person's sexual orientation to his relatives or colleagues, have been reportedly used to extort money, make LGBT people admit guilt for crimes they had not commit, or force them to collaborate with law enforcement forces or to testify against other people.

Another type of violation is collection of confidential personal information and keeping to create and maintain databases about LGBT persons. The police take photos of and fingerprints from them, copy contacts from cell phones in violation of all established procedural norms and without valid legal reasons for such actions. Although Ukraine has the a Law "On Protection of Personal Data", which prohibits collection and storage of personal information without valid reasons and the person's consent, law enforcement agencies often ignore its requirements in their work.

Ukrainian LGBT organisations (e.g. Nash Mir (Our World) Centre, LiGA, The Gay Forum of Ukraine, etc.) have many indirect evidences of these violations, as well as duly documented testimonies of victims. Such evidence allows us to conclude that the above mentioned unlawful practices are commonplace in all cities of Ukraine.¹³

Recommendations:

- a) Law enforcement agencies should stop the unlawful practices of collecting confidential information about LGBT persons and using it for illegal purposes. All of the information collected in such a way should be deleted.

5. Right to marry and to found a family

The Family Code (FC) of Ukraine (art. 21) provides for marriage only between one man and one woman. Same-sex couples are deprived of any form of legal recognition and, thus, deprived of any rights as a family even if they cohabit and *de facto* constitute a family. The Code, while denying

¹³ Ibid, p. 9-10, and case 7, p.20.

same-sex couples family rights, provides unmarried opposite-sex cohabitants with property rights (art. 74).¹⁴ Also, same-sex couples are not allowed to jointly adopt children (art. 211 of the FC).

Ukrainian law does not recognise any parental or custodial rights and obligations for a partner in a same-sex couple in relation to the child of the other partner and prohibits second-parent adoption of the child. This amounts to restriction of the rights of the child and an unreasonable interference with private and family life by the government.

Recommendations:

- a) Develop and adopt legislation to establish an officially recognised form of same-sex unions and provide same-sex partners with essential marital rights and obligations.
- b) Recognize the right of same-sex partners for step-parent adoption.

6. Freedom of peaceful assembly

Because Ukraine still lacks a law governing mass public events, current policy is wholly dependent on personal views of local decision-makers that have always tried to ban LGBT-related events. The bans have been imposed by heads of the local administrations either as *viva voce* orders or as written proscriptions. Such bans happened either in violation of the law (according to art. 39 of the Constitution of Ukraine such a ban can be imposed exclusively by the court) or in formal compliance with the law, i.e. pursuant to a court decision, which, however, cited unlawful pretexts. Besides, when LGBT events did take place, local governments were reluctant to ensure adequate protection of the participants.¹⁵

For instance, on 14 May 2009 the Central Court of the city of Mykolayiv cited art. 39 of the Constitution of Ukraine to prohibit the Mykolayiv Association for GLB “LiGA” to hold the first LGBT pride-festival “Rainbow Spring“ under the pretext that their notification letter did not indicate the place where the event will take place (Case No. 2a-5 – 4406/09/1426). However, Odessa Administrative Court of Appeals overturned this decision in November 2010.

Recommendations:

- a) The Ukrainian government should guarantee the right to peaceful assembly as well as ensure adequate protection to all groups of people irrespective of how “convenient” such assemblies are for local governments.

14 Text of the Code is accessible on the official web site of the Verkhovna Rada (Parliament) of Ukraine at <http://zakon2.rada.gov.ua/laws/show/2947-14>

15 Short history of violations of the right to peaceful assembly of LGBT persons in Ukraine:

- May 2008 - local government of the city of Mykolayiv issued an order prohibiting the LGBT organization “LiGA” from holding a public street event. Appealing the order in court did not avail LiGA a positive resolution. Although the right of the organization to hold public events was affirmed, the court refused to rule on the unlawfulness of the order. (Case No. 2-a-3342/09/1423).
- May 2009 - participants of the peaceful LGBT picket held by the Lviv organization “Total” were attacked. Although the organizer had warned local police of possible incidents and the chief police officer had promised to provide adequate protection, at the time of the attack only one police patrol of two officers was nearby. The officers did not intervene.
- June 2010 - Kharkiv Administrative Court affirmed the decision of the Kharkiv City Council to ban an LGBT event under the pretext that “there is a possibility that at the time and in the place of the event will be people whose interests differ from those of the participants.” The court also considered justified the notice from the road police inspectorate stating that holding such an event may lead to human casualties.

7. Right of asylum

The Law of Ukraine “On refugees and persons that require additional and temporary protection” recognises the admissibility of applicants that request asylum on the grounds of membership of a social group (art. 1),¹⁶ which theoretically implies LGBT people, too. Art. 3 of the Law prohibits deportation or forceful return of refugees to countries whence they arrived and where their life or freedom are threatened. Scarce administrative and judiciary decisions in respect of this issue demonstrate the absence of a consistent approach in Ukraine: whereas in some cases petitions to grant asylum due to persecutions on the grounds of sexual orientation were granted, in others they were denied. There is evidence that at least one case of such denial happened while the applicant had a well-justified fear of persecution on the grounds of sexual orientation.¹⁷

Recommendations:

- a) The Ukrainian government should provide an explicit legal guarantee of the right to asylum in Ukraine in cases when the applicant has a well-founded fear of persecution on the grounds of sexual orientation and gender identity in his/her country of origin or any other country of previous residence.

8. Transgender rights

The Order of the Ministry of Health Care of Ukraine No. 60 of 03 February 2011,¹⁸ which regulates gender reassignment in Ukraine, provides that a person shall not be allowed to undergo gender reassignment treatment in a case when there are children under the age of 18 in his/her care. This restriction, in our view, is unreasonable interference with private life and therefore constitutes a violation of the rights and freedoms of transgender persons.

Furthermore, pursuant to this Order homosexuality, transvestism and sexual disorders that presuppose the desire to change gender are contraindication to gender reassignment. Despite proper and consistent phrasing of the provision many transgender persons claim that in practice a mere mention of homosexuality leads to refusal to grant permission for gender reassignment treatment regardless of whether there is proof that it is a determinant motive.¹⁹

Recommendations:

- a) Exclude presence of underaged children from the list of preconditions to gender reassignment, and further specify the requirement for the absence of homosexuality as a determinant motive for gender reassignment so as to prevent abuse of power that leads to refusal to grant permissions for the treatment.

¹⁶ Text of the Law is accessible at <http://zakon2.rada.gov.ua/laws/show/3671-17>.

¹⁷ Ponomaryov, S. (2011). Study on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Legal report: Ukraine, item 111. Retrieved from http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

¹⁸ Text of the Order is accessible on the official web site of the Ministry <http://mozdocs.kiev.ua/view.php?id=11441>.

¹⁹ Insight NGO. (2010). Situation of transgender persons in Ukraine. Study report. (in Russian). Retrieved from http://insight-ukraine.org.ua/media/TRP_report.pdf.