



European  
Social  
Charter

Charte  
Sociale  
Européenne



COUNCIL  
OF EUROPE

CONSEIL  
DE L'EUROPE

19/03/2012

RAP/RCha/UKR/IV(2012)Add

## **EUROPEAN SOCIAL CHARTER**

Comments from the  
International Lesbian and Gay Association  
(European Region) on the  
4th National Report on the implementation of  
the European Social Charter

submitted by

**THE GOVERNMENT OF UKRAINE**

(Articles 1§2  
for the period 01/02/2007 – 31/12/2010)

---

Report registered by the Secretariat on 5 March 2012

**CYCLE 2012**



## **European Social Charter**

### **Submission by the International Lesbian and Gay Association (European Region) on the 4th National Report by Ukraine on the implementation of the revised European Social Charter**

#### **Article 1.2: Prohibition of discrimination in employment on the grounds of sexual orientation and gender identity**

### **Contents**

1	Executive Summary .....	2
2	Principal sources of data used in this submission.....	3
3	The general situation of lesbian, gay, bisexual and transgender (LGBT) people in Ukraine .....	3
4	Council of Europe standards on sexual orientation and gender identity discrimination in employment.....	7
5	The obligations of Contracting Parties under Article 1.2 of the Revised European Social Charter .....	9
6	The situation regarding sexual orientation discrimination in employment in Ukraine.....	10
7	The situation regarding gender identity discrimination in employment in Ukraine.....	12
8	Areas of non-conformity with the provisions of the Social Charter .....	12
9	Finding of non-conformity with regard to sexual orientation and gender identity discrimination .....	14
	Appendix I - Accounts of employment discrimination experienced by transgender persons documented in the Situation of Transgender Persons in Ukraine – Research Report – Kiev – 2010.....	15
	Appendix II – Commentary of the Supreme Court’s Legal Department on the proposed anti-discrimination article of the draft Labor Code (2007) .....	17

# **The European Social Charter**

## **Submission by the International Lesbian and Gay Association (European Region) on the 4th National Report by Ukraine on the implementation of the revised European Social Charter<sup>1</sup>**

### **Article 1.2: Prohibition of discrimination in employment on the grounds of sexual orientation and gender identity**

#### **1 Executive Summary**

Opinion polls show that hostility to LGBT people in Ukraine is high, and apparently has increased significantly in the last decade. Basic rights such as freedom of assembly can be subject to interference by the authorities. The Ukrainian Parliament is currently considering the introduction of legislation which would – if enforced – severely curtail the LGBT community's freedom of expression and possibility to advocate for their rights. Hate crimes and hate motivated incidents are a concern, as is the behaviour of the police in some instances towards LGBT people. There is no legislation providing protection from discrimination, and no national policy that is in any way positively concerned with the rights of LGBT people.

Against this background of widespread hostility to the rights of lesbian, gay, bisexual and transgender (LGBT) people in Ukraine, full and effective protection from employment discrimination on the grounds of sexual orientation and gender identity is essential. However, when a new Labor code was under consideration in 2007, the proposal to include a non-discrimination article with sexual orientation as one of the prohibited grounds met with a hostile commentary by the Supreme Court's Legal Department and was dropped.

The Supreme Court Legal Department's commentary used language which was demeaning to LGBT people, and indeed, can be construed as a more or less direct incitement to discrimination. According to the Supreme Court, the proposal

- confused "natural rights and unnatural actions such as, in fact, sexual orientation",
- provided ""sexual minorities" with additional privileges which leads to the undermining of public morals and contributes to the disruption employment relations", and
- would lead "to development of artificially created social conflicts".

Moreover, international law permitted restrictions for the purpose of protecting public health and morality, allowing "proper legal protection from licentiousness that disguises as human rights."

---

<sup>1</sup> This version of the Submission has been revised to include the text of the commentary of the Legal Department of the Supreme Court on the proposed anti-discrimination article of the draft Labor Code - see Appendix II

Council of Europe standards in relation to discrimination on grounds of sexual orientation and gender identity have been much clarified in recent years. The Recommendation of the Committee of Ministers on combating discrimination on grounds of sexual orientation or gender identity discrimination, adopted in 2010, is clear about the obligation of member states to take positive action to combat such discrimination. The Court, the Parliamentary Assembly, and the Commissioner for Human Rights, have all in their different ways underlined the requirement for such measures.

The European Committee on Social Rights ("the Committee") has itself stated that under Article 1 (2) of the revised Social Charter legislation should prohibit discrimination in employment on grounds of sexual orientation. Given the greater knowledge now available regarding the seriousness of gender identity discrimination, it would be a further positive evolution if the Committee were to adopt a similar statement in relation to this ground.

In view of the absence of any effective measures in Ukraine to provide protection from employment discrimination on grounds of sexual orientation or gender identity, and of the situation in which the Supreme Court's Legal Department has even incited to discrimination, we urge that the Committee make a finding of non-conformity in relation to Ukraine's obligations under Article 1.2.

## **2 Principal sources of data used in this submission**

In June 2011 the Council of Europe Commissioner for Human Rights published a report entitled "Discrimination on grounds of sexual orientation and gender identity in Europe". The full-length edition, the so-called "Background Document"<sup>2</sup> ("the Human Rights Commissioner's Report"), and two associated reports commissioned by the Office of the Human Rights Commissioner specifically addressing the situation in Ukraine, respectively, the "Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – Legal Report: Ukraine"<sup>3</sup> ("the Legal Report"), and the similarly titled "Sociological Report: Ukraine"<sup>4</sup> ("the Sociological Report") are the sources of the majority of data used in this submission.

## **3 The general situation of lesbian, gay, bisexual and transgender (LGBT) people in Ukraine**

### **3.1 Public opinion**

Recent opinion polls suggest a high degree of hostility towards LGBT people in Ukraine. In a September 2010 survey of Kiev residents, 65% considered homosexuality to be a perversion or mental disease.<sup>5</sup> In a survey of students in March, 2010 74.7% of those polled consider homosexual relations inadmissible,<sup>6</sup> while in a telephone poll in December 2010

---

<sup>2</sup> Available at: [http://www.coe.int/t/Commissioner/Source/LGBT/BackgroundDocument2011\\_en.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/BackgroundDocument2011_en.pdf)

<sup>3</sup> see: [http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal\\_E.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf)

<sup>4</sup> see: [http://www.coe.int/t/Commissioner/Source/LGBT/UkraineSociological\\_E.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/UkraineSociological_E.pdf)

<sup>5</sup> Survey of the *Socis* sociological center – (<http://www.vsenovosti.in.ua/news/095469>)

<sup>6</sup> 'A family in Odessa students' eyes' survey of the *Gorshenin Institute*, (<http://www.prochurch.info/index.php/news/more/16764>)

72% of respondents indicated a negative attitude towards sexual minorities.<sup>7</sup> These figures show a marked deterioration from earlier surveys – In a March 2007 poll of 1200 people 46.7% of respondents favoured limitations on the rights of homosexual citizens, itself an increase from the 33.8% holding that view in a March 2002 survey.<sup>8</sup>

The Sociological Report notes that: "The general attitudes towards LGBT persons in Ukraine are reported to be strongly negative. This negativity is often explained by the fact that being a homosexual is against Ukrainian moral standards and principles and therefore completely unacceptable. The church is also playing an important role, as the Ukrainian society is very religious and the views and opinions of the different churches are influential for a large segment of the population."<sup>9</sup>

The Sociological Report illustrates the attitude of the main religious organisations to LGBT people in a statement addressed to Parliament by the All-Ukrainian Council of Churches and Religious Organisations:

"The experience of countries which register same-sex marriages or partnerships shows that the process of liberalising public morals by the state **ends in the abyss. Where prostitution and drug addiction, same-sex marriages and euthanasia are legalised, there is already a question of legalising paedophilia... Already in the near future, extinction threatens the native populations** of these countries. We do not want Ukraine to go this way."<sup>10</sup>

It goes on to note that, "in January 2010 the same Council issued an official request to the Ukrainian president, Prime-minister, Minister of Foreign Affairs, the Head of the Supreme Court, the Head of the permanent Ukrainian delegation at PACE and other officials, asking them to be against the proposal of legalisation of same-sex partnerships in Europe "not only at the current session of PACE, but also in the future, during voting for respective draft resolutions." In the end of this open letter the Council underlines that "such a position (...) will indicate the high moral standards in our country and **will protect the future of Ukraine from the self-will of dissipation, immorality, and destruction of the institution of family.**"<sup>11</sup> (Emphasis added)

Regarding transgender persons, the Sociological Report notes that a "high level of ignorance of transgender related issues is reported, but when visible, the general view on transgender community is also mostly negative."<sup>12</sup> It notes a failure by transgender persons to claim their rights, attributing this to the fact that "being a transgender person in Ukraine is associated with so many negative experiences, negative stereotypes, misunderstanding and exclusion, that many transgender persons simply do not want to expose themselves as transgender "more than absolute necessary". Another reason for lack of participation in public actions and events among transgender persons "is reported to be the fear of aggressive confrontations and repressions."<sup>13</sup>

---

<sup>7</sup> *Gorshenin Institute*, December, 2010, - 'Morals in Ukraine' telephone poll - <http://www.unian.net/ukr/news/news-413171.html>

<sup>8</sup> *Ukrainian Homosexuals & Society: a reciprocation* – Nash Mir (Our World) Gay and Lesbian Centre -- 2007 -- Page 65

<sup>9</sup> *op. cit.*, paragraph 1

<sup>10</sup> *op. cit.*, paragraph 26

<sup>11</sup> *op. cit.*, paragraph 27

<sup>12</sup> *op. cit.*, paragraph 31

<sup>13</sup> *op. cit.*, paragraph 53

### **3.2 Effects of discriminatory attitudes on the LGBT community**

The only significant survey of discrimination on the ground of sexual orientation ("The 2005 discrimination survey") was undertaken between January and March 2005, covering some 901 respondents from across Ukraine.<sup>14</sup> This revealed that a high proportion of respondents tried to minimise discrimination by concealing their sexual orientation: 70.7% reported concealing their sexual orientation either completely, or from all but close family and friends. Only 10.7% of respondents were "out to everyone", with a further 18.6% "out to a wide circle of friends".

Taking account of the extent of concealment, the level of discrimination or other prejudiced behaviour reported was very high: overall, 54.4% had experienced discrimination on the basis of their sexual orientation in the previous four years, with 40% experiencing non-violent harassment, 9.1% reporting physical violence, and 6% sexual harassment. The biggest single source of such behaviour was family members (21.7%), closely followed by passers-by (20.1%), friends (current and former) (19.4%) and colleagues (16.5%).

Those who were open about their sexual orientation experienced the highest levels of discrimination -- approximately three-quarters of those in the "out to everyone" and "out to a wide circle of friends" categories.

While this survey information is now somewhat dated, the apparent increase in recent years in hostility towards LGBT people identified by the opinion poll data set out above suggests that levels of discrimination are likely to remain a serious and perhaps even growing concern.

### **3.3 Freedom of assembly**

The Legal Report notes that "On numerous occasions .... legal conflicts, homophobia, hostility, danger of violence, and/or the failure of public authorities to provide adequate protection translated into prohibition of LGBT cause-related assemblies and inhibited the LGBT community from exercising the rights to freedom of assembly in Ukraine."<sup>15</sup>

### **3.4 Freedom of expression**

During 2011 concerns over the exercise of freedom of expression by the LGBT community intensified, with the introduction into the Ukrainian Parliament of a bill "designed to strengthen protection from homosexual propaganda". It would introduce amendments prohibiting "promotion of homosexuality" in four separate laws regulating public morals and the print, broadcasting and publishing media, and also in the criminal code, with penalties for infringing the latter ranging from a fine to five years' imprisonment. On 8 February 2012 the bill took a step towards implementation, when it was debated by two Parliamentary Committees.<sup>16</sup>

### **3.5 Hate crime and hate motivated incidents**

---

<sup>14</sup> Published in: *Gay Rights are Human Rights -- Report about discrimination on the grounds of sexual orientation in Ukraine -- 2005*

<sup>15</sup> *op. cit.*, paragraph 50

<sup>16</sup> ILGA-Europe briefing for PACE Rapporteurs on Ukraine – October 2011; Media release by Insight NGO dated 9 February 2012

55.8% of the 2005 Discrimination Survey respondents reported themselves subjected to verbal harassment, 8.1% to sexual harassment, 19.1% to physical violence, and 2.5% to sexual violence.

The Sociological Report expresses concern: "Hate crime and hate speech are very serious matters. At the moment in Ukraine, the only organizations documenting hate speech and hate crime incidents are the LGBT NGOs and in most cases, they are not able to convince the victims to initiate cases on grounds of physical and verbal attacks. The efforts to conduct awareness raising on these issues are reported to be very challenging as well. In the meantime the hate speech and hate crime incidents have a huge impact on LGBT persons' well being and psychological health and need to be taken seriously by the police enforcement bodies, families and friends of the victims and the society as a whole."<sup>17</sup>

Despite these concerns, the Legal Report notes that "No provision of the Criminal Code can currently be interpreted as protecting LGBT people from hate crimes and/or considering homophobic/transphobic motivation an aggravating factor."<sup>18</sup>

### **3.6 Police behaviour towards LGBT people**

The Legal Report comments that "national LGBT organisations report numerous violations of the rights of LGBT people. For instance, a recent study conducted by "Наш Мир" (Our World) showed that 61.5 per cent of the respondents (gay men and lesbians) have suffered discriminatory treatment, humiliation, psychological pressure, threats, blackmailing and physical violence on the part of police officers. In such cases LGBT people, fearing adverse consequences and further victimisation, are unwilling to report the police's illegal activities to the public prosecutor's office."<sup>19</sup>

The Legal Report also draws attention to cases where the police have carried out mass arrests of people in gay clubs (in one case 80, in another more than 300), allegedly behaving abusively, using force, psychological pressure and illegally taking fingerprints and photographs. In one of these cases a collective complaint to the Ministry of Internal Affairs by LGBT organisations met with the response that there had been "no violations".<sup>20</sup>

In an interview with the authors of the Sociological Report, the Ministry of Interior explained that the police force "very often reflects the general attitudes and values of the population, which is why the level of homophobia, transphobia and non-acceptance of LGBT persons is high among police officers themselves".<sup>21</sup>

### **3.7 Legislation providing protection from discrimination**

Ukraine has no legislation specifically prohibiting discrimination on the grounds of sexual orientation or gender identity.<sup>22</sup>

So far as anti-discrimination bodies are concerned, the Ombudsman has, according to the Legal Report, "paid little attention to the problems faced by the LGBT community and on a

---

<sup>17</sup> op. cit., paragraph 88

<sup>18</sup> op. cit., paragraph 9

<sup>19</sup> op. cit., paragraph 201

<sup>20</sup> op. cit. paragraphs 203 – 206

<sup>21</sup> op. cit. paragraph 74

<sup>22</sup> the Legal Report – paragraphs 1 & 28 – 33



number of occasions the Office of the Representative proved to be homophobic in dealing with pressing LGBT matters.” In 2009, the Ukrainian ombudsperson N. Karpacheva stated that “we cannot and are not obliged to accept all components of the modern human rights concept unreservedly and without their critical conceptualisation. Taking part in worldwide processes we have no right to lose our millenary spiritual gains. For this purpose international standards in the field of human rights and freedoms must be harmoniously combined with traditional moral, cultural and family values of the Ukrainian people”.<sup>23</sup>

### **3.8 Good practices**

The Legal Report notes that "Ukraine does not have any national policy that is in any way positively concerned with the rights of LGBT people"<sup>24</sup>, and adds that "No good practices have been identified. .... there are no legal provisions, legal interpretations or policy practices that could be presented as good practices, directed at combating homophobia and/or transphobia and discrimination on the grounds of sexual orientation and/or gender identity, or providing LGBT people with all rights and necessary protections."<sup>25</sup>

## **4 Council of Europe standards on sexual orientation and gender identity discrimination in employment**

### **4.1 The Committee of Ministers**

In March 2010 the Committee of Ministers adopted a comprehensive Recommendation on combating sexual orientation or gender identity discrimination.<sup>26</sup> Paragraph 2 recommends that member states:

“ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;”

The appendix to the Recommendation sets out principles and measures which member states should follow in implementing the relevant legislation, policies and practices. Paragraph 29 specifically addresses employment:

“Member states should ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimisation.”

---

<sup>23</sup> op. cit., paragraphs 34 – 38

<sup>24</sup> op. cit., paragraph 43

<sup>25</sup> op. cit., paragraph 215

<sup>26</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (*Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies*)

Paragraph 30 of the appendix to the Recommendation goes on to address concerns relating to transgender persons:

"Particular attention should be paid to providing effective protection of the right to privacy of transgender individuals in the context of employment, in particular regarding employment applications, to avoid any irrelevant disclosure of their gender history or their former name to the employer and other employees."

The relevant section of the Recommendation's Explanatory Memorandum provides the following additional information:

"Discrimination in employment and occupation is a particular concern for transgender persons, who are hard hit by unemployment and social exclusion. The number of transgender persons made redundant, particularly during a gender reassignment procedure, who leave their jobs to avoid any forms of harassment or who decide against gender reassignment for the same reasons is also very high. Member states should therefore ensure that measures designed to combat discrimination in employment also apply to gender identity issues, take care to avoid unnecessary disclosure of a transgender person's gender background or previous name, both in recruitment procedures and during working life, and develop programmes focusing specifically on employment opportunities for transgender persons."<sup>27</sup>

#### **4.2 European Convention on Human Rights**

With regard to sexual orientation, the Human Rights Commissioner's Report explains that:

"While the right to work is not directly protected in the European Convention on Human Rights, in the case of *Smith & Grady v. the United Kingdom*, and in the case of *Lustig-Prean & Beckett v. the United Kingdom*, the Court recognised that the dismissal from the army of gay and lesbian personnel based solely on their sexual orientation had been unlawful and had violated Article 8 of the Convention...."

The Court has not addressed discrimination on the basis of gender identity in the context of employment. However, in a recent judgment the Court made it clear that transsexualism is a ground which falls within the scope of Article 14.<sup>28</sup>

#### **4.3 Parliamentary Assembly**

In its Resolution 1728 (2010) on Discrimination on the basis of sexual orientation and gender identity, the Parliamentary Assembly called on member states to:

"adopt and implement anti-discrimination legislation which includes sexual orientation and gender identity among the prohibited grounds for discrimination, as well as sanctions for infringements;"<sup>29</sup>

---

<sup>27</sup> Committee of Ministers Recommendation – Explanatory Memorandum – page 17

<sup>28</sup> In *P.V. v. Spain* (appl. 35159/09, judgment 30 November 2010), the Court indicated that allowing a parent's gender reassignment as such to negatively influence that parent's visitation rights after divorce would amount to discrimination on grounds of transsexualism with regard to family life – in breach of articles 8 and 14 of the Convention.

<sup>29</sup> *op. cit.*, paragraph 16.5

#### 4.4 Council of Europe Commissioner for Human Rights

The Human Rights Commissioner's Report recommends that member states

"Enact comprehensive national legislation on non-discrimination and include sexual orientation and gender identity among the prohibited grounds of discrimination".<sup>30</sup>

It also specifically recommends that states take measures to protect the rights of transgender persons in the labour market:

"Respect the right of transgender persons to access the labour market by guaranteeing the respect of their privacy concerning the disclosure of personally sensitive data related to their gender identity and by promoting measures aimed at ending the exclusion and discrimination of transgender persons in the workplace."<sup>31</sup>

The Human Rights Commissioner's report notes that some 38 member states regard sexual orientation as a prohibited ground of discrimination.<sup>32</sup>

Regarding gender identity, the picture is, as the Human Rights Commissioner's report points out, more complex:

"Nine member states (Albania, Croatia, Czech Republic, Germany, Hungary, Montenegro, Serbia, Sweden and the United Kingdom) have included gender identity specifically in non-discrimination legislation. At least 11 member states treat discrimination on grounds of gender identity or gender reassignment as a form of sex or gender discrimination in comprehensive non-discrimination legislation (Andorra, Austria, Belgium, Denmark, Finland, France, Ireland, Netherlands, Norway, Slovakia and Switzerland), while one member state (Sweden) has chosen multiple formulations to describe the applicable grounds. However, there are significant differences as to the legal scope of these terms and the different laws, even though, as an effect of the Gender Recast Directive, EU member states should recognise discrimination in the field of employment with regard to gender reassignment of the person."<sup>33</sup>

Thus, if obligations under EU law are taken into account, some 33 Council of Europe member states protect, or have an obligation to protect, transgender persons from discrimination in employment either on the grounds of their gender identity, or gender reassignment.

## 5 The obligations of Contracting Parties under Article 1.2 of the Revised European Social Charter

Under Article 1.2 Contracting Parties undertake "to protect effectively the right of the worker to earn his living in an occupation freely entered upon".

Under Article E of the Charter, Contracting Parties undertake that the enjoyment of the rights set forth in the Charter "shall be secured without discrimination on any ground such

---

<sup>30</sup> op. cit., page 11

<sup>31</sup> op. cit., page 15

<sup>32</sup> op. cit., page 166

<sup>33</sup> op. cit., page 167

as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status”.

The Committee has stated that it “considers that under Article 1§2 legislation should prohibit discrimination in employment at least on grounds of race, ethnic origin, religion, disability, age, sexual orientation and political opinion”.<sup>34</sup>

Moreover, it has determined that the discriminated acts and provisions prohibited by this provision are ones that may occur in connection with recruitment or with employment conditions in general (in particular, remuneration, training, promotion, transfer and dismissal or other detrimental action).<sup>35</sup>

Although there is no case law under the European Social Charter in relation to employment discrimination on the grounds of gender identity, the serious and widespread nature of such discrimination, and the existing Council of Europe standards in this regard, leave no doubt that such discrimination should fall within the Article E ground of “other status”.

## **6 The situation regarding sexual orientation discrimination in employment in Ukraine**

The only systematic information available on sexual orientation discrimination in employment is that provided by the 2005 Discrimination Survey. Of the 417 respondents in that survey who had been employed or had tried to find employment in the 4 years preceding the survey, 78.2% reported discrimination and/or prejudiced behaviour in the workplace. 21.1% experienced bias relative to other employees, and 12.9% hindrance in promotion, while 35% reported being subjected to verbal harassment by colleagues. 19 individuals reported experiencing sexual harassment, 20 reported physical violence, and four (males) reported being raped.<sup>36</sup>

Employment discrimination cases continue to be reported to NGOs working for the LGBT community. One organisation, “Nash Mir” (“Our World”) of Kiev reported documenting 27 such cases in a 12 month period in 2010/2011, covering both employer/employee relations (hiring, dismissal, salaries, promotions) and harassment by fellow employees.<sup>37</sup> Their report notes:

“Discrimination in the workplace is difficult to prove. It is unlikely that the employer will publicly admit to having dismissed the employee because the latter is a gay man or a lesbian. Such matters are usually discussed in private, without witnesses. The official reason for dismissal would be quite different, for example, if it involved downsizing or failure to satisfy the requirements of the position. Also, given the peculiarity of Ukrainian labor relations, where many are employed unofficially or receive their salary in envelopes, the employer does not even need to invent a reason: summarily in a blink of an eye people may get cast out without their last paycheck just because their superior is a homophobe.”

Their report also comments on the failure of victims of discrimination to seek redress: “An overwhelming majority of those who were subjected to discrimination on the grounds of

---

<sup>34</sup> Conclusions 2006 Albania

<sup>35</sup> Conclusions XVI-1 – Austria, p. 25

<sup>36</sup> op. cit., page 33

<sup>37</sup> “One Step Forward, Two Steps Back - *Situation of LGBT in Ukraine in 2010-2011*” – page 21

sexual orientation in the workplace took no action to defend their rights, deciding it was best to resign without fanfare, of their own accord, to be able later to get employed elsewhere. In the entire case pool there is only one documented case (Summer 2010) in which the dismissed employee successfully proved in a court of law that his sexual orientation was the true reason for dismissal; he was reinstated in his rights. This was only possible thanks to the exceptional homophobia of his employer who even during the trial was not afraid to say so openly."

The following are examples of employment discrimination cases documented in recent years:

- "At one point the sexual orientation of Maxim, an employee of the executive office in Odessa, became known to his colleagues and soon to his superior. Subsequently, the colleagues' attitude to Maxim turned hostile and disdainful, and his superior was even more straightforward: "Such people as you should not be working here! Do yourself a favor, quit!" he said. In December 2010, Maxim made the decision to resign because, as he said, he did not want to push it."<sup>38</sup>
- "In summer 2011 Yevhen, an employee at a car wash in the city of Donetsk, confided his homosexuality to one of his female colleagues. She then informed the entire staff, whose attitude to Yevhen changed to daily taunts and insults. He had to suffer harassment and abuse for another month as it was hard to find another job that would be as well-paid. However, after his colleagues resorted to threatening him with disclosing his sexual orientation to his parents, he resigned. The owner of the car wash, who was also aware of the causes of conflict, refused to pay Yevhen his salary for the last month. Yevhen decided not to complain as he was employed unofficially."<sup>39</sup>
- In April 2009 a closeted gay man from the Donetsk region was hospitalised with an acute inflammation of respiratory tracts. Following discovery of his sexual orientation, and of his HIV-positive status, a nurse passed on this information to his employer, resulting in his discharge from his job.<sup>40</sup>
- In April 2008 a gay club was raided by the police. Immediately after this incident, one of those taken into custody during the raid was called into his employer's office and informed that the police had sent a request for his personal characteristics. This request contained detailed information on where and how he was arrested. Shortly afterwards he was forced to leave his job.<sup>41</sup>

A case cited in the Legal Report further highlights the vulnerability of LGB people to exposure of their sexual orientation in the workplace. In an incident where more than 300 homosexual men were questioned by the police, officers are reported to have blackmailed some of those questioned by threatening to "out" them to their employer.<sup>42</sup>

---

<sup>38</sup> ibid page 21

<sup>39</sup> ibid page 21

<sup>40</sup> The Legal Report – paragraph 173

<sup>41</sup> The Sociological Report – paragraph 15

<sup>42</sup> op. cit. paragraph 206; this case also referred to in the section above on "Police behaviour towards LGBT people"

The Legal Report also provides evidence of institutionally supported homophobia in the police force, leaving little doubt of the discrimination that LGBT people serving in the force would face if their sexual orientation or gender identity became known:

"Another similar textbook titled "Developing leadership skills and adherence to the healthy way of life in the military and police officers in Ukraine" was published in 2008. The publication was approved by the Academic Council of the Academy of the Ministry of Internal Affairs and recommended by the Ministry of Education and Science of Ukraine. The publication counts homosexuality among sexual perversions and thus the assumption is that using this textbook in educational and training programmes for military and police personnel will promote stigmatisation of and discrimination against LGBT community on the part of the staff of defence and law enforcement agencies."<sup>43</sup>

## **7 The situation regarding gender identity discrimination in employment in Ukraine**

In 2010 the first report on the situation of transgender persons in Ukraine was published. This was based on in-depth interviews with 37 transgender persons. The report included descriptions of the experiences of employment discrimination by individual interviewees, which are set out in Appendix I. They highlight 5 distinct areas of concern:

- (i) overt discrimination in the recruitment process, with individuals initially being accepted for a job, but then rejected as soon as their transgender status becomes apparent.
- (ii) dismissal after a period of work, at the insistence of a transphobic superior.
- (iii) the acute difficulties faced by transgender people in accessing employment where their official documents do not match their appearance.
- (iv) harassment by colleagues or superiors on account of their gender identity.
- (v) exploitation by employers, taking advantage of their vulnerable situation.

## **8 Areas of non-conformity with the provisions of the Social Charter**

The 4<sup>th</sup> National Report by Ukraine makes no reference to Ukraine's obligations in relation to non-discrimination on the grounds of sexual orientation or gender identity.

The Legal Report notes that the Labour Code of Ukraine does not provide explicit protection from discrimination on the grounds of sexual orientation and gender identity. It adds that, although these grounds are in theory covered under the category 'other circumstances' included in the law, such protection is largely hypothetical. The report's author bases this statement both on the absence of effective mechanisms for proving cases of discrimination, and on an official commentary of the Legal Department of the Supreme Court of Ukraine on the non-discrimination article of the (then, in 2007) proposed Labour Code which included

---

<sup>43</sup> op. cit. paragraph 125

sexual orientation as one of the protected grounds. The Supreme Court Legal Department's commentary read as follows:

“Inclusion of protections from discrimination on the ground of sexual orientation in employment is, in our opinion, unreasonable and cannot be justified. First, this [antidiscrimination] article of the Labour Code of Ukraine confuses natural rights and **unnatural actions such as, in fact, sexual orientation**. Second, use of the term ‘sexual orientation’ in this clause in our opinion **provides the so-called ‘sexual minorities’ with additional privileges**, which leads to the **undermining of public morals and contributes to the disruption of employment relations**.

Today, protection of morality, establishment of universal humanitarian values in society, healthy lifestyle, and improvement of the system of spiritual and moral and ethical education of the youth and children [...] are the priorities of all governmental institutions. In this light, the issue [of including ‘sexual orientation’ in the law] does not just contradict the State’s policy, but also leads to development of **artificially created social conflicts** and increase in the number of court cases.

Besides, public morals are not only protected by Ukrainian law, but also by international law. For instance, Articles 19 and 21 of the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966, stipulate the need to limit one’s rights for freedom of expression [...] and freedom of assembly for the purpose of protecting public health and morality.

Therefore, the international community has ensured proper legal protection **from licentiousness that disguises as human rights**”.<sup>44</sup> (Emphasis added)

The non-discrimination article was excluded from the final version of the legislation adopted by the Parliament in 2008, although the Legal Report comments that it is not known whether this article was excluded on the basis of the Supreme Court's commentary or not.<sup>45</sup>  
<sup>46</sup>

The Supreme Court Legal Department's hostile and derogatory advice in relation to the inclusion of sexual orientation in the non-discrimination article goes far beyond neutral legal advice. Not only does it oppose providing employment protection for lesbian, gay and bisexual persons, it encourages the conclusion that discrimination against such persons is justified.

In this context, we would draw attention to the words of the Committee in the case of *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* -<sup>47</sup>. Although the context is different, it is perhaps even more disturbing when officials of a Supreme Court adopt such a position.

---

<sup>44</sup> op. cit. paragraphs 135 – 141. A copy of the Supreme Court's Legal Department commentary is attached at Appendix II. It was sent to an organisation which campaigns against the rights of LGBT people, "Love against Homosexuality". The LGBT organisation Nash Mir advises that the Legal Department of the Supreme Court later confirmed to them that the commentary was their official position.

<sup>45</sup> op. cit., paragraph 133.

<sup>46</sup> It should be noted that, according to the Legal Report, the Labor Code as finally adopted has other provisions which provide protection from discrimination (Article 2 – 1, equality of labour rights of the citizens of Ukraine) and Article 22 (Guarantees in execution, change or termination of labour contracts). Neither however makes any specific reference to sexual orientation or gender identity.

<sup>47</sup> European Social Charter Complaint No. 45/2007, decision of 30 March 2009, paras. 60-61.

"However, the Committee does find that certain specific elements of the educational material used in the ordinary curriculum are manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted..... These statements stigmatize homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the sexual behaviour of all homosexuals....."

It is hardly surprising that, as was noted above, LGBT victims of employment discrimination are reluctant to challenge such discrimination in the courts. Nor is it surprising that officials of the State Department for Monitoring of Honouring of National Legislation on Labour in Ukraine were able to say to the author of the Sociological Report that "that although the scope of work of the Department is quite extensive, no cases of discrimination on grounds of sexual orientation and gender identity has been documented by it."<sup>48</sup>

With regard to gender identity, the Legal Report notes that the "Labour law in Ukraine also does not have any reference to the special needs of transgender persons and therefore contains no provisions in relation to accommodating these needs."<sup>49</sup>

## **9 Finding of non-conformity with regard to sexual orientation and gender identity discrimination**

In our opinion Ukraine's legislation and practices on employment are clearly not in conformity with the provisions of the Social Charter in relation to its obligations under article 1 (2) in relation to discrimination on grounds of sexual orientation and gender identity. Indeed, it is not just a matter of omission, but, in the case of the Supreme Court Legal Department's commentary, actual incitement to discriminate. We urge the Committee to return a finding of non-conformity and to recommend introduction of comprehensive anti-discrimination measures on these grounds.

5 March 2012

---

<sup>48</sup> op. cit., paragraph 113

<sup>49</sup> op. cit., paragraph 142



## **Appendix I - Accounts of employment discrimination experienced by transgender persons documented in the Situation of Transgender Persons in Ukraine – Research Report – Kiev – 2010**

*"Before I changed my documents I was extremely scared. I purposefully was looking for a job where I would not need not show my documents even though I realized that in this case I would not have any social protection" (V., 22, Kharkiv obl.).*

*"There were situations that I would pass three interview stages and at the stage of signing a job contract I would say that I had this peculiarity, and after this the employer would refuse me placement arguing that my documents would not go through the security service or bringing up another reason. And it was not a single case" (S., 23, Kyiv obl.).*

*"I cannot also get a normal job as my appearance is totally male and my documents indicate the female gender. (S., 23, Kyiv obl.). I passed an interview, nobody asked for my documents. They talked to me like to a are are: specialist. Three times I was offered a job when the competition was quite high. Then I left my previous workplace. And then with the documents I would come and say: "Dear colleagues, there is one thing, I am transsexual." I did not see anything difficult or special in introducing such a person as I was to the staff. They turned me down. Once, a famous company "Olymp" told me that they would hire me; at that time I was a bank employee. I checked with them several times, having said that I was transsexual and my documents were in the process of change. They told me it did not matter and everything was OK. After I left my previous workplace and came to that company on the next day they told me: "We are sorry but we cannot take you" " (V., 23, Kyiv obl.).*

*"They would throw me out of the job exactly because of this. I started working at the shopping mall. The senior salesperson responsible for personnel selection was away. I was hired by a senior cashier officer. She told me: "We need a shop assistant, I take you." The woman took me because I could work. I worked there for a week. Then this senior salesperson came and said: "Get out of here." I asked: "Why?" He answered: "I don't need a boy-girl working for me." I did not suit him " (S., 24, Odessa obl.).*

*"For example, while I am selling - this is one thing. People come and ask: "Lady, please show this, turn that on." "Yes, please, how much does it cost?" The pressure started after. When a van came, for instance, and the goods had to be unloaded. And among the goods were refrigerators and gas ovens. My boss said: "Let's go unload." I said: "No, I will not." "I took you, he said, as you are not fully a girl." I asked: "And who am I? A fag, or what? Who do you take me for?" "I don't know who you are, he said. But until you have a penis in your pants do unload the van otherwise I will sack you" " (V., 35, Mykolaiv obl.).*

*"The Director at first... well, he learned the truth from me on the very first day to avoid any misunderstandings. "Well, he said, no problems here. The only thing I care for is that the person would sit and work. This is it. I do not care. I can put even a Kolobok [A protagonist made of bread in a Russian fairy tale], if he works, then it's all right." But these were simply words. In fact they wore me out. They promised I would get the probation period salary for one, maximum for two months. The salary was 600 hryvnas , two years ago. Five months in a row I received 600 hryvnas. And then already at the end of the fifth month I said: "Andrei, as I remember, we had agreed. How can one survive with this money at all?" "It is easier to fire*

you, he said. Your work performance is poor." ...He probably took advantage of the situation, I mean: "Where would you go, dear? Who else will need you?" (V., 35, Mykolaiv obl.).

"For example, a company needs an electronic engineer, with computer skills, technical English, ability to work with the station. I came and asked what they needed. They said. I told them: "I have this and that work experience, I have a university degree." He said: "Give me your documents." I said: "You see, here is the situation. I am a transsexual, I still have documents of a man." He said: "Wait, so you are a man?" I said: "Do I look like a man?" He said: "No. I understand: **there is a man, there is a woman, and there is a fag such as you are.**" Straightforward like this. "Fags never worked for me, do not work, and will never work" (V., 35, Mykolaiv obl.).

"At one job I had a conflict with my co-worker who said that his friends would stop talking to him if they learned he was working with me. Applying to another job I already came not as I\* [but according to my passport gender] in order to avoid problems. Again, the colleagues would rather tolerate gay people but not trans..." (I., 33, Kyiv obl.).

**Appendix II – Commentary of the Supreme Court’s Legal Department  
on the proposed anti-discrimination article of the draft Labor Code  
(2007)**



**ВЕРХОВНИЙ СУД УКРАЇНИ**

01024, м.Київ-24, вул. П.Орлика, 4

28 серпня 2007 року № 11/13-145

**Регіональний інформаційний  
і правозахисний Центр  
для геїв і лесбійок  
“Наш світ”**

а/с 173, м. Київ, 02100

Ваше звернення, що надійшло до Верховного Суду України 21 серпня 2007 року, розглянуто.

Повідомляємо, що лист від 11 травня 2007 року № 11/13-91 за підписом заступника керівника апарату – начальника правового управління Верховного Суду України Хавронюка М.І. відображає позицію правового управління Верховного Суду України.

Додаток: копія листа на 2 арк.

Заступник керівника апарату –  
начальник правового управління  
Верховного Суду України

**М.І. Хавронюк**

**Appendix II Continued – Commentary of the Supreme Court’s Legal Department on the proposed anti-discrimination article of the draft Labor Code (2007)**



**ВЕРХОВНИЙ СУД УКРАЇНИ**

01024, м.Київ-24, вул.П.Орлика, 4

11 травня 2007 року № 11/13-91

**Громадський рух людей з майбутнім  
“Любов проти гомосексуалізму”**

*а/с № 625, м. Київ-23, 01023*

Ваше звернення, що надійшло до Верховного Суду України 28 квітня 2007 року, розглянуто.

З приводу висловленої у ньому пропозиції стосовно розгляду Верховним Судом України підготовленого Громадським рухом людей з майбутнім “Любов проти гомосексуалізму” правового аналізу питання протиправності положень частини першої статті 4 проекту Трудового кодексу України (реєстр. № 0913 від 25 травня 2006 року) в частині встановлення нової форми дискримінації, а саме за ознакою сексуальної орієнтації, повідомляємо таке.

Правове обґрунтування недоцільності включення до переліку обмежень дискримінації у сфері праці і заборони за ознакою сексуальної орієнтації, на наш погляд, є аргументованим і доцільним.

По-перше, у зазначеній статті проекту Трудового кодексу України змішані природні права з неприродними проявами, саме до яких і відноситься нетрадиційна сексуальна орієнтація.

По-друге, використання терміну “сексуальна орієнтація” у запропонованій проектом нормі надає, на нашу думку, додаткові привілеї так званим “сексуальним меншинам”, що зумовлює підрив моральних засад суспільства та сприяє руйнації трудових взаємовідносин.

## Appendix II Continued – Commentary of the Supreme Court's Legal Department on the proposed anti-discrimination article of the draft Labor Code (2007)

На сучасному етапі одним із пріоритетних напрямів діяльності всіх інститутів влади є захист моральності, утвердження в суспільстві загальнолюдських гуманістичних цінностей, здорового способу життя, докорінне вдосконалення системи духовного, морально-етичного виховання перш за все молоді та дітей (Указ Президента України „Про невідкладні додаткові заходи щодо зміцнення моральності у суспільстві та утвердження здорового способу життя” від 15 березня 2002 року № 258/2002). Зважаючи на це, порушена у зверненні проблема є не просто протилежною державній політиці, а і спрямована на штучне створення соціальних конфліктів і зростання кількості судових справ.

Крім того, суспільна мораль захищається не тільки чинним законодавством України, а й нормами міжнародного права. Так, положеннями статей 19 та 21 Міжнародного пакту про громадянські і політичні права, прийнятого 16 грудня 1966 року Генеральною Асамблеєю ООН, закріплена необхідність обмежувати права людини на вільне вираження (поширення) своїх поглядів та проведення мирних зборів з метою охорони здоров'я і моральності населення. Таким чином, міжнародне співтовариство передбачило адекватні правові заходи, спрямовані проти розпущеності, яка маскується під виглядом прав людини.

Заступник керівника Апарату-  
начальник правового управління  
Верховного Суду України



М.І. Хавронюк