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## **Discrimination on the grounds of sexual orientation and gender identity in Ukraine**

The basic principles of preventing and combating discrimination are enshrined in international legal instruments and implemented at the national level, but this does not guarantee the effective implementation of protection of persons against discrimination on the grounds of sexual orientation and gender identity. The lack of a clear and effective mechanism for responding to any manifestations of discrimination, its prevention and counteraction creates new forms of discrimination and further exacerbates the already unresolved problems in society. Given that the LGBT movement is a discriminatory stratum, the need to effectively combat and protect against discrimination on the grounds of sexual orientation or gender identity in order to realize the rights of individuals in various spheres of society is emphasized.

*Keywords: discrimination, gender identity, sexual orientation, equality of rights.*

*Nina Hetmantseva, Oksana Kiriak*

## **Дискримінація на підставі сексуальної орієнтації та гендерної ідентифікації в Україні**

Базові засади запобігання дискримінації та її подолання визначені у міжнародних правових документах та реалізовані на національному рівні, однак не гарантують успішного захисту осіб, які зазнають дискримінації за сексуальну орієнтацію та гендерну ідентифікацію. Відсутність чіткого і успішного механізму реагування на всі види дискримінації, її недопущення та протидія творять нові форми дискримінації і додатково погіршують вже існуючі проблеми в суспільстві. Беручи до уваги, що рух LGBT є групою, яка зазнає дискримінації, наголошено на необхідності успішного подолання та охорони стосовно дискримінації з точки зору сексуальної орієнтації або гендерної ідентичності з метою реалізації індивідуальних прав у різних суспільних сферах.

*Ключові слова: дискримінація, гендерна ідентичність, сексуальна орієнтація, рівність прав.*

## Dyskryminacja ze względu na orientację seksualną i tożsamość płciową w Ukrainie

Podstawowe zasady zapobiegania dyskryminacji i jej zwalczania są zapisane w międzynarodowych instrumentach prawnych i wdrażane na szczeblu krajowym, ale niegwarantuje to skutecznego wdrożenia ochrony osób przed dyskryminacją ze względu na orientację seksualną i tożsamość płciową. Brak jasnego i skutecznego mechanizmu reagowania na wszelkie przejawy dyskryminacji, jej zapobieganie i przeciwdziałanie tworzy nowe formy dyskryminacji i dodatkowo pogarsza i tak już nierozwiązane problemy w społeczeństwie. Biorąc pod uwagę, że ruch LGBT jest warstwą dyskryminującą, podkreślasie potrzebę skutecznego zwalczania i ochrony przed dyskryminacją ze względu na orientację seksualną lub tożsamość płciową w celu realizacji praw jednostek w różnych sferach społecznych.

*Słowa kluczowe: dyskryminacja, tożsamość płciowa, orientacja seksualna, równość praw.*

### Categories “sexual orientation” and “gender identity”.

Usually, in the legal literature one can find the statement that discrimination has two main forms: de jure (or legal), enshrined in law; de facto (or unofficial), rooted in social customs. However, to claim that discrimination is legal in nature is erroneous. Discrimination can be considered as a phenomenon, but not a legal one, despite the fact that it can be manifested both at the law enforcement level and in the content of normative legal acts.

In this context, we should definitely agree with the opinion of such scholars as Lawrence Solotoff and Henry S. Kramer, who emphasized in this year's research, that in cases involving alleged intentional sex based discrimination (disparate treatment), there is the possibility to fall within either of two categories, “pretext” or “mixed motive” claims; because the term “glass walls” refers to the problem of the concentration of managerial persons in fields that generally do not lead to top executive positions.<sup>1</sup>

Discrimination, unfortunately, has its manifestations and forms both in the activities of public authorities and administration, in the person of their officials, and in society. Every state that recognizes itself as legal and democratic proclaims the equality of rights and freedoms of its citizens at the level of national legislation. This is especially true of gender equality, which serves as an indicator of fundamental human rights.

However, it should be noted that people often report that their subjective rights are violated on the basis of their sexual orientation and gender identity, which limits the degree of their life and professional activity in various spheres of society. This is especially evident in labor relations; both when hiring a citizen and in the process of performing, in the future, his labor functions.

<sup>1</sup> Solotoff L., Kramer H. S. *Sex Discrimination and Sexual Harassment in the Work Place. Law Journal Press* 28.02.2020, Ss. 30-31.

Millions of people in Europe are discriminated against, stigmatized and even victims of violence because of their actual or perceived sexual orientation or gender identity.<sup>2</sup> This phenomenon has a globalizing character.

For instance, in Belarus, despite of the fact that homosexual sex was decriminalized in 1994, lesbian, gay, bisexual and transgender rights in Belarus are still severely limited, and, due to the Viachaslau Bortnik's words, LGBT persons are facing harassment, violence and physical abuse nowadays.<sup>3</sup>

Sexual orientation is a typical example of emotional and sexual attraction to women, men, both or neither. Orientation is not related to gender identity, for example, a transgender person may be heterosexual or gay in the same way that another person may be heterosexual or gay. However, these two aspects of identity are often related to each other and affect how lesbians, gays, bisexuals and transgender people (LGBT) are perceived.<sup>4</sup>

It is noteworthy that the representatives of LGBT community in most Eastern European countries have to take the same path of development from complete intolerance to effective legal protection. Researchers from various Eastern European countries agree that in the late 1980s a new era began in the consolidation and practical implementation of fundamental human and civil rights, guaranteeing all levels of freedom regardless of gender, sexual preferences and gender identity.

According to Romiana Stoilova, an important problem faced in the study of sociostructural dimensions of gender is their location within the context of socioeconomic transformations in Bulgaria after 1989. After the collapse of the communist regime and the establishment of a multiparty democratic system, a labor market emerged and institutional differentiation grew stronger in various social spheres of Bulgarian legislation.<sup>5</sup>

Following the collapse of state socialism in 1989, Eastern European nations underwent profound economic transformations, shifting from the security provided by free market economies marked by large scale deregulation in Poland.<sup>6</sup>

At this period, the topics of homosexuality, abortion and prostitution deeply divided Romanian society and sparked heated public debates involving the political class, religion leaders, the local academic community, mass media and the public at large. Discussions generally revolved around the adoption of new laws that would allow Romania to conform to European Union standards and solve the country's most delicate social problems.<sup>7</sup>

<sup>2</sup> *Discrimination on grounds of sexual orientation and gender identity in Europe* Official web-site. Retrieved from: URL: [https://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011\\_en.pdf](https://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf)

<sup>3</sup> Bortnik V Intolerance, discrimination and hate crimes based on sexual orientation and gender identity in the OSCE region, presented at the OSCE Human Dimension Implementation Meeting, Warsaw 2014, S. 319.

<sup>4</sup> *Gender*. Official web-site. Retrieved from: URL: <https://www.coe.int/uk/web/compass/gender>

<sup>5</sup> Stoilova R. *The Influence of Gender on Social Stratification in Bulgaria*. *International Journal of Sociology*. Vol. 42, No. 3, *Aspects of Social Stratification in Bulgaria* (Fall 2012), S. 11.

<sup>6</sup> Mishal J. Z. *Understanding low fertility in Poland: Demographic consequences of gendered discrimination in employment and post-socialist neoliberal restructuring*. *Demographic Research*. Vol. 21 (JULY – DECEMBER 2009), S. 600.

<sup>7</sup> Turcescu L., Stan L. *Religion, Politics and Sexuality in Romania*. *Europe-Asia Studies*. Vol. 57, No. 2 (Mar., 2005), S. 291.

For this moment of time the predominantly institutional and reformist approach used by activists and a focus of discrimination have left many issues out of the debate, especially when they relate to sex. As Michael J. Bosia states, the defence of LGBT rights in Europe has mostly taken the path of identity recognition and the protection from discrimination rather than a more libertarian approach of a promotion of the freedoms to be who you want to be (with a proliferation of sexual identities) and to do as you wish.<sup>8</sup>

From the point of view of official medicine, all three types of sexual orientation – heterosexual, bisexual and homosexual – are normative and do not constitute disease or behavioral disorder in themselves: the official Ukrainian edition of ICD-10 states that “sexual orientation in itself should not be considered as deviation”.<sup>9</sup>

Gender identity refers to the gender to which a person believes he or she belongs, which may or may not be the same as the gender assigned to him or her at birth. This refers to a deep awareness of the inner and individual experience of a person of each sex and includes personal feelings of the body and other expressions such as clothing, language and manners.<sup>10</sup> Of course, this problem exists all over the world. However, it is perceived differently by different generations of people in each country. It depends on many factors, both objective and subjective. In particular, the mentality of the people, the specifics of its historical, ethnic, spiritual, moral development, upbringing and family traditions, religious beliefs, etc. For example, a number of Christian churches and religious organizations in Ukraine have made statements about the inadmissibility of the norm on “sexual orientation”.<sup>11</sup>

But in other words, sexuality is one area where the churches have worked together with, and often against, the post-communist state to impose their views and define acceptable and unacceptable sexual behavior for society, their followers and members of the clergy. In Romania sexual behavior and practices have been a contested territory for church and state throughout the last century. In a traditional society like Romania mores and mentalities have remained close to the conservative villages, which rejected homosexuality, scorned prostitutes, while tacitly accepting adulterous husbands, and denounced abortion, while developing an impressive knowledge of medicinal plants able to induce it.<sup>12</sup> As it was aptly summarized by British scientists William Eskeridge Jr. and Robert Wilson, religious freedom and religious liberty stand for

<sup>8</sup> Bosia M. J. McEvoy S. M. *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*. Oxford University Press, 2020, S. 159.

<sup>9</sup> Herts A. A. *Права чоловіка, орієнтація сексуальна і рівність płci: підручник [Права людини, сексуальна орієнтація та гендерна рівність: навчальний посібник]*. Київ 2018, S. 115.

<sup>10</sup> *Gender*. Official web-site. Retrieved from: URL: <https://www.coe.int/uk/web/compass/gender>

<sup>11</sup> *Кościół ewangeliczny: Ukraina musi zachować tradycyjne wartości rodzinne i moralne poprzez integrację z UE [Yevanbel's's'ki cerkvy: Ukraina maie zberehty tradycijni simejni ta moral's'ni cimosti, intehtuyuchys' do YeS] Rada Ewangelicznych Kościołów Protestanckich Ukrainy: oficjalna strona internetowa. Źródło: URL: <http://repcu.org/?p=433>; *Wystąpienie Świętego Synodu Ukraińskiego Kościoła Prawosławnego w sprawie projektu Ustawy Ukrainy „W sprawie zmian niektórych ustawodawczych aktów prawnych Ukrainy dotyczących zapobiegania i przeciwdziałania dyskryminacji na Ukrainie” [Zvernennya Styrashhennoho Synodu UPC z pryvodu proektu Zakonu Ukrainy «Pro vnesennya zmin do deyakyx zakonodavchyx aktiv Ukrainy shhodo zapobihannya ta protydyi dyskryminaciyi v Ukraini»]* // Ukraiński Kościół Prawosławny: oficjalna strona internetowa. Źródło: URL: <http://orthodox.org.ua/article/>*

<sup>12</sup> Turcescu L., Stan L. *Religion, Politics and Sexuality in Romania*. *Europe-Asia Studies*. Vol. 57, No. 2 (Mar., 2005), S. 291.

nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Christian supremacy, or any form of intolerance.<sup>13</sup>

The specifics of the development of Ukrainian society and its mentality do not provide a definite basis for claiming that it is ready to discuss the problems of people with non-traditional sexual orientation and protect their rights. However, Ukraine, which recognizes itself as a legal, democratic and social state, has made a number of international legal obligations to protect human rights, including anti-discrimination and anti-discrimination.

Given the significant politicization of the problem of preventing discrimination against LGBT people and taking into account the historically conditioned conservative views of the majority of Ukrainian society on issues related to sexual identity, as well as the need to respect equal rights for all citizens, including non-traditional sexual orientation, Ukraine needs a certain transition period in the process of implementation of international legal norms on protection of rights and prevention of discrimination on the grounds of sexual orientation and gender identity, as well as taking into account its own socio-cultural peculiarities when ratifying international instruments.<sup>14</sup>

LGBT people in Ukraine are discriminated against and stigmatized because of their actual or perceived sexual orientation or gender identity. A certain percentage of Ukraine's population is made up of LGBT people (homosexuals, bisexuals and transgender people) who need to settle their de facto family relationships as same-sex family partners. Although the exact proportion of LGBT people in the population is unknown, various studies estimate it at 2-10%. Taking into account that the population of Ukraine over the age of 14 (excluding the occupied Crimea) is about 36 million, we can estimate the total adult LGBT population of Ukraine from 720 thousand to 3.6 million people. According to a very rough estimate, the number of stable same-sex couples in Ukraine may already be at least 100-200 thousand.<sup>15</sup>

At the end of 2016 and in January 2017, the Our World Center conducted an online survey among LGBT people in Ukraine. 1519 people took part in this survey – 1263 men and 250 women; 6 people, answering the question about gender, chose the answer «other». 88.9% of those surveyed cited the problem of «the need to pretend to be someone you are not when communicating with strangers.»

In addition, 15.7% of respondents faced problems with registration of property rights to jointly purchased valuables, and 13.1% of respondents with registration of real estate ownership. 11.2% of respondents emphasized the difficulties in drawing up the inheritance. 13.8% of respondents stated that it is difficult to apply for subsidies due to the uncertain status of same-sex couples. Various government and commercial entities offer certain family-friendly benefits, all

<sup>13</sup> Eskridge W. Jr, Wilson R. *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*. Cambridge University Press 2018, P. 156.

<sup>14</sup> Herts A. A. *Prawa człowieka, orientacja seksualna i równość płci: podręcznik [Prava hudyyny, seksual>na oriyentaciya ta henderna rivnist>: navchal>nyj posibnyk.]*. Kijów 2018, S. 84.

<sup>15</sup> Svyashchuk A. L. *Ochrona prawna społeczności LGBT. Podręcznik sposob. [Pravovyy zaxyst LHBТ: spil>noty]* Kijów 2018, S. 128.

of which are not available to same-sex couples. 24.4% of respondents mentioned this as a problem. 12.3% of all respondents took part in the rejection of adopted children (22.0% of women).

The vast majority of Ukrainian society has a negative attitude towards LGBT people in general and the effective realization of their human rights, in particular, to personal and family life. A poll conducted in early 2016 by the Kyiv International Institute of Sociology at the request of the Our World Center showed that 60% of Ukrainians have a negative attitude towards LGBT people, and only 4% have a positive attitude; 45% believe that there should be certain restrictions on their rights.

However, it should be noted that almost a third of respondents are indifferent to LGBT, that is, neutral; also, a third of respondents, in principle, support equal rights for LGBT people. A large-scale nationwide survey of discrimination conducted by the Maidan Monitoring Information Center and the Sociologist Research Bureau found, in particular, that only 11% of Ukrainians believe that our society is ready to legalize same-sex marriage. However, the modern democratic state has a duty to take into account, as far as possible, the interests of all social groups and to counteract the manifestations of intolerance against vulnerable groups – in particular, homophobia, as stated in many international documents concerning Ukraine.<sup>16</sup>

### **Legislative guarantees of prevention and counteraction of discrimination on the grounds of sexual orientation and gender identity.**

Ukraine, which recognizes itself as a social state governed by the rule of law, supports the ratification of almost all international instruments on the protection of human rights. The course of European integration requires, above all, compliance with international standards in all spheres of public relations, including the protection of the rights of the LGBT community. This requires appropriate national policies.

To this end, Ukraine has adopted a number of legislative acts, including: “On the Principles of Preventing and Combating Discrimination in Ukraine”, “On Ensuring Equal Rights and Opportunities for Women and Men”, “On Preventing Domestic Violence”. Ukraine has a National Human Rights Strategy approved by the Decree of the President of Ukraine of August 25, 2015 № 501/2015, the purpose of which is to ensure the priority of human rights and freedoms as a determining factor in determining public policy, decision-making by public authorities and bodies Local Government. The implementation of the Strategy should result in the introduction of a systematic approach to the implementation of tasks and ensuring coherence of actions of public authorities and local governments in the field of human rights and freedoms, creating an effective: accessible, understandable, predictable mechanism for implementing and protecting human rights and freedoms.<sup>17</sup>

<sup>16</sup> Svyashchuk A. L. *Ochrona prawna społeczności LGBT. Podręcznik sposob. [Pravovij zachyst LHBT: spil>noty]* Kyjów 2018, S. 130.

<sup>17</sup> *Narodowe strategije w dziedzinie praw człowieka*: Dekret Prezydenta Ukrainy z 25 sierpnia 2015 r. № 501/2015/*Nacional>na stratebiji u sferi prav ljudyny: Ukaz Prezydenta Ukrainy vid 25 serpnja 2015 roku № 501/2015*/Oficjalna strona internetowa. Źródło: <http://zakon.rada.gov.ua/laws/show/501/2015>

An important point for the national legislation in the field of hired labor was the introduction of a rule according to which: "Any discrimination in the field of labor is prohibited, including violation of the principle of equality of rights and opportunities, direct or indirect restriction of workers' rights, religious and other beliefs, gender, gender identity, sexual orientation, ethnic, social and foreign origin, age, health status, disability, suspicion or presence of HIV / AIDS, marital and property status, family responsibilities, place of residence, membership in a trade union or other association of citizens, participation in a strike, appeal or intention to appeal to a court or other bodies to protect their rights or provide support to other employees in defending their rights, reporting possible corruption or corruption-related facts offenses, other violations of the Law of Ukraine «On Prevention of Corruption», as well as assisting a person in carrying out so notification, on linguistic or other grounds, not related to the nature of the work or the conditions of its implementation» (Art. 2-1).

On October the 1<sup>st</sup>, 2007, the non-governmental international standard "Social Responsibility (SA8000)" was adopted, which stipulates that a company should not apply or maintain discrimination in employment, remuneration, access to training, promotion, dismissal, or retirement on the grounds of race, nationality, religion, disability, sex, sexual orientation, membership of any organization, political opinion or age" (paragraph 5.1).<sup>18</sup> The provisions of the Standard state that «a company should not interfere with the exercise of the right of employees to adhere to principles or customs or to fulfill their needs related to race, nationality, religion, disability, sex, sexual orientation, membership in any organization or political views» (p.5.1).<sup>19</sup>

On the 31<sup>st</sup> of March 2010, at its 1081<sup>st</sup> meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation CM / Rec- (2010) 5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination based on sexual orientation or gender identity, which is valid for Ukraine.<sup>20</sup> This document, in particular the preamble, sets out the provisions addressed by the Council of Europe on certain issues concerning the fight against discrimination on the grounds of sexual orientation.

In particular, the preamble to the Recommendation recognizes that "lesbians, gays, bisexuals and transgender people have for centuries experienced and continue to experience homophobia, transphobia and other forms of intolerance and discrimination even within their

<sup>18</sup> *Międzynarodowy standard. Społeczna odpowiedzialność (SA8000) [Międzynarodowy standard. Social»na vidpovidal»nist»]* Oficjalna strona internetowa. Źródło: URL:<https://zakon.rada.gov.ua/laws/show/n0015697-07#Text>

<sup>19</sup> *Międzynarodowy standard. Społeczna odpowiedzialność (SA8000) [Międzynarodowy standard. Social»na vidpovidal»nist»]* Oficjalna strona internetowa. Źródło: URL:<https://zakon.rada.gov.ua/laws/show/n0015697-07#Text7-07#Text>

<sup>20</sup> *Zalecenie CM / Rec (2010) 5 Komitetu Ministrów Rady Europy dla państw członkowskich w sprawie walki z dyskryminacją ze względu na orientację seksualną lub tożsamość płciową przyjęte przez Komitet Ministrów w dniu 31 marca 2010 r. na 1081. spotkaniu wice ministrów [Rekomendacija SM / Rec (2010) 5 Komitetu Ministrów Rady Europy dlerzhavam-chlenam «Prozaxodyzborot»byprotydyskryminacyizaoznakamyseksual»noyiorientacyiabohendernoyiidentychnosti» Uxvalenakomitomministriw 31.03.2010r. na 1081-mu zasidannizastupnykiministrw]* Oficjalna strona internetowa. Źródło: URL:[file:///C:/Users/User/Downloads/medpr\\_2014\\_1\\_12.pdf](file:///C:/Users/User/Downloads/medpr_2014_1_12.pdf)



families – including criminalization, marginalization, social rejection and violence. sexual orientation or gender identity, as well as the fact that special actions are required to ensure the full enjoyment of these rights and freedoms by these persons”; stipulates that the European Court of Human Rights, like other international bodies, “recognizes sexual orientation as a ground for prohibiting discrimination”; enshrines “the principle that no cultural, traditional or religious values, nor norms of” dominant culture “may be used to justify... any... forms of discrimination, including discrimination on the grounds of sexual orientation or gender identity”; noted that “discrimination and social exclusion based on sexual orientation or gender identity can best be addressed through measures aimed at both those who experience such discrimination or rejection and at society as a whole.”

The member states of the Council of Europe are instructed: «to review existing legislative and other measures, to review them, and to collect and analyze relevant information in order to track and eliminate direct and indirect discrimination on the grounds of sexual orientation or gender identity» (paragraph 1); «Ensure the adoption and effective implementation of legislative and other measures to combat discrimination on the grounds of sexual orientation or gender identity in order to ensure respect for human rights against and tolerance of lesbian, gay, bisexual and transgender people» (paragraph 2); «Ensure that victims of discrimination (based on sexual orientation or gender identity) are aware of and have access to effective remedies from national authorities, and that measures to combat discrimination include, where appropriate, , punishment for violation and provision of appropriate compensation to victims of discrimination” (paragraph 3).

On June the 17<sup>th</sup>, 2011, Ukraine acceded to the signatory countries of UN Human Rights Committee Resolution A / HRC / 17 / L.9 / Rev.1,<sup>21</sup> which states “that the dynamics of acts of violence and discrimination in all regions of the world committed against persons on the basis of SOGI, needs to study such practices and search for effective mechanisms for international protection of human rights from such violations.” On the basis of the Resolution, the High Commissioner introduced a systematic analysis of the country’s legislation on discrimination on the grounds of SOGI and a dialogue aimed at making appropriate recommendations for the protection of the rights of LGBT people.

Thus, both governmental and non-governmental international standards reaffirm the need to apply the key principle that human rights are inalienable and belong equally to all people. To this end, the need for special action to ensure respect for human rights of LGBT people is emphasized and the appropriate measures required of the governments of the CoE member states are outlined.

Due to the globalization processes caused by digital technologies, the place of each country in the world economic system is changing. This, in turn, leads to a certain type of cooperation

<sup>21</sup> *Правозащитка, орієнтація сексуальної ізоляції. Офіційна сторінка інтернету [Правозащитка, сексуальна орієнтація та гендерна ідентичність. Офіційна сторінка інтернету].* *Зв’язок:* URL: <http://daccess-dds-ny.un.org/doc/UNDOC/UTD/G11/141/96/PDF/G1114196.pdf?..>

between states in certain sectors of the economy. In the last decade, we can note the constant presence of foreign labor in labor markets, which ensures the simultaneous competitiveness and stability of the economy of each developed country. Ukraine is no exception in this respect.

On February the 16<sup>th</sup>, 1994, an Agreement was concluded between the Minister of Labor of Ukraine and the Minister of Labor and Social Policy of the Republic of Poland on cooperation in the field of labor and social policy.<sup>22</sup>

This agreement (Article 2) the parties have established that cooperation will cover, among others, the following areas: the formation of labor relations in a market economy; organization, functioning and management of the labor market; improving the management structure in the field of labor and employment services; system of measures for social protection and social insurance; problems of economic migration; a set of measures to improve working conditions and safety; cooperation with other states and international organizations. However, there is no provision in the Agreement that provides for working conditions and social rights of employees, where the parties could provide that “employees enjoy the rights and benefits provided by the legislation of the Host State, without any form of discrimination on the grounds of race or sex, sexual orientation, marital status, religion, beliefs, etc.». Thus, the parties to the Treaty would make a direct commitment not to discriminate against Ukrainian nationals working in Poland under the terms of the Treaty on the grounds of sexual orientation.

If we consider the adoption of the legal framework as a mechanism for policy-making in the field of prohibition of discrimination on sexual orientation and gender identity, then this mechanism is formed. However, if we talk about the mechanism of its implementation, today it is absent. After all, the validity of international legal standards and, accordingly, national regulations does not mean their practical implementation.

On the occasion of the International Day for the Elimination of Racial Discrimination, the Helsinki Foundation for Human Rights has prepared a short overview of the situation in Poland. According to *Agnieszka Mikulska's report*, this country still remains a relatively homogenous one (ethnically, racially and in gender identification questions). Poland has also failed to establish a special institution that would promote the principles of equal treatment for all irrespective of racial or ethnic origin. In accordance with Directive recommendations, the institution's tasks would include conducting independent research concerning discrimination, publishing independent reports and formulating recommendations as well as assistance to victims of discrimination.<sup>23</sup>

Despite the existence of a system of specialized legal framework in Ukraine, its norms are still deprived of an effective mechanism for implementation in practice and are declarative in

<sup>22</sup> *Umowa między Ministrem Pracy Ukrainy a Ministrem Pracy i Polityki Społecznej Rzeczypospolitej Polskiej o współpracy w dziedzinie pracy i polityki społecznej z dnia 16.02.1994 r.* [Dohovir між Ministrom praci Ukrainy i Ministrom praci ta social'noyi polityky Respubliki Pol'shba pro spivrobitnyctvo v haluzi praci ta social'noyi polityky vid 16.02.1994 r.] Oficjalna strona internetowa. Źródło: [https://zakon.rada.gov.ua/laws/show/616\\_040#Text](https://zakon.rada.gov.ua/laws/show/616_040#Text)

<sup>23</sup> Mikulska A. Ethnic and racial discrimination in Poland – overview. Helsinki Foundation for Human Rights Program Coordinator, 2007. Official web-site. Retrieved from: <https://humanrightshouse.org/articles/ethnic-and-racial-discrimination-in-poland/>

nature. In addition, among the problems of the current legislation of Ukraine in the field of observance and protection of the rights of the LGBT community is the lack of enshrinement of their rights in national law and the lack of a mechanism to protect the rights and interests of the LGBT community in legal practice and national courts.

Indicative in this regard are the court decisions in the case where homosexuality is proposed to be classified as mitigating circumstances, indicating as a physical defect. Thus, in the Decision of the Vinnytsia City Court of the Vinnytsia Region on Case 127/16253/15-k of July 17, 2015 it is stated: manifestations of prejudice against his client, who due to his physical defects – non-traditional sexual orientation has the right to use additional guarantees to protect their rights and legitimate interests, respect for human dignity ».<sup>24</sup>

An analysis of national jurisprudence shows a negative perception of homosexuality and non-gender, and therefore the issue of gender minority rights is virtually no cause of litigation.

The evolution of approaches to the category of gender identity, as well as other changes in society, significantly affect the content and nature of the legal sphere, which should create effective mechanisms to ensure the realization of freedom and human dignity. Important in this aspect is the recognition of gender identity at the official level.

It is important to dwell on the Judgment of the European Court of Human Rights of 5 May 2017 on application № 40296/16 on the admission of the case to consideration “P v. Ukraine ». The case concerns intersex, whose gender is defined in the birth certificate as male, but who identifies himself as female. Medical tests have found that at the level of chromosomes, a person is female.

However, at the 215 level of biological development, her body contains both male and female traits, so she was recognized as intersex. The problem arose when the applicant requested a change in her gender in the identification documents from male to female. She was denied such a request, as the change of the sex marker in the documents under domestic law is possible only after the relevant operation. But this operation, by law, can be performed on a person only if diagnosed with «transsexualism». As for intersexes, such a possibility is not defined.<sup>25</sup>

The European Court of Human Rights has also confirmed that discrimination based on sexual orientation is “the embodiment of heterosexual majority bias against homosexual

<sup>24</sup> *Postanowienie Sądu Miasta Winnicy regionu Winnicy z dnia 17 lipca 2015 r. w sprawie 127/16253/15-k* [Uxvala Vinnyts'ia kohomis' kohosudu Vinnyts'ia koiyoblastivid 17 lypnya 2015 rokupospravi 127/16253/15-k], Oficjalna strona internetowa. Źródło: URL: <http://www.reyestr.court.gov.ua/Review/48165753>

<sup>25</sup> *Wyrok Europejskiego Trybunału Praw Człowiek z dnia 5 maja 2017 r. W sprawie wniosku nr 40296/16 o dopuszczenie do rozpoznania „Przeciwko Ukrainie»* [Rishennya Yevropejs'koho bosoduspravlyudynyvid 5 travnya 2017 roku z azayavoyu № 40296/16 pro dopuskspravny dorozblyadu «P v. Ukraine»], Oficjalna strona internetowa. Źródło: URL: <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-174001&filename=P.%20v.%20UKRAINE.pdf&logEvent=False>; Gerbut V. S. *Prawo do orientacji seksualnej i tożsamości płciowej: podstawowe treści i gwarancje ochrony*, Uniwersytet Narodowy w Użgorodzie. Rozprawa doktorska o stopniu kandydata na prawo (doktor filozofii) w specjalności 12.00.02 „Prawo konstytucyjne; prawo miejskie» [Pravo na seksualnu oriyentatsiyu ta hendermu identychnist' sutnisnyy zmist ta harantyyi zakhystu «Uzhhorod's'kyi natsional'nyy universytet», Uzhhorod – 2018. Dysertatsiya na zdobuttya naukovoho stupenya kandydata yurydychnykh nauk (doktora filosofiyi) za spetsial'nisty 12.00.02 «Konstytutsiynne pravo; munitsypalne pravo»] Uzhhorod 2018, S. 214-215.

minorities, and such a negative attitude cannot be a sufficient basis for a differentiated approach more than a similar or negative attitude towards skin color».<sup>26</sup>

Thus, as argued above, we see that recently the problem of recognizing the rights of the LGBT community is not just a matter of law enforcement and judicial protection in case of violation, but above all a matter of self-identification of each European nation (whether the rights of all without exception of persons, including sexual minorities in all spheres of society).

So that is why we need to agree with Michael J. Bosia, who pointed out that the recognition of LGBT rights is indeed increasingly used to define what it means to be European, both at the national level and more recently at the European level. The new emphasis on LGBT rights intersects with the history of European civilizational rhetoric, which has painted some individuals, groups, and cultures as less civilized and thus locates them behind the European standard. This association between Europeans and non-Europeans and among Europeans. Indeed, the lack of acceptance of LGBT rights or the criticism raised by some groups or individuals is often interpreted as a sign that those who express these views are not European enough (if they belong to Europe) or not European at all (if they are located “outside” of Europe and or want to join).<sup>27</sup>

## Conclusions

1. Ukraine must adhere to and implement its international obligations in the field of human rights protection. When ratifying international documents, take into account the historical, cultural and spiritual heritage of Ukraine;
2. By adopting regulations we need to create an effective mechanism to eliminate any manifestations of discrimination on the grounds of sexual orientation or gender identity in public and private enterprises, in order to ensure and implement equal rights and opportunities in various spheres of society;
3. Given the historical, cultural and spiritual heritage of Ukraine, the mentality of the people, the conservative views of the majority of Ukrainian society on issues related to sexual identity, based on the need to equal rights of all citizens, it is necessary to involve everybody to the public discussions on this issue. Of course, it should be carried out with the participation of scientists, public activists and experts and be based solely on a professional basis in order to find a compromise version of civilized coexistence of all groups of the population that make up the Ukrainian society;
4. It must be acknowledged that the LGBT movement is a relatively large group in Ukrainian society, which is subject to discrimination both by public authorities, officials and society as a whole. This, in turn, requires the creation of an effective

<sup>26</sup> *Zdrowie i prawa człowieka: przewodnik po zasobach. Centrum Zdrowia i Praw Człowieka Francois-Xavier Baryu oraz Fundacja Otwarte Społeczeństwo [Okhorona zdorotshya i prava lyudyny: resursnyy posibnyk. Tsentr zdorotshya ta prav lyudyny imeni Fransua-Ksawerya Baryu ta Fond vidkrytoho suspilstva]* Kyjów 2015, Oficjalna strona internetowa. Źródło: URL: [http://medicallaw.org.ua/fileadmin/user\\_upload/PDF/%D1%80%D0%B5%D1%81%D0%BE%D1%80%D1%81/%D0%A0%D0%B5%D1%81%D0%BE%D1%80%D1%81\\_%D1%80%D0%BE%D0%B7%D0%B4%D1%96%D0%BB\\_8.pdf](http://medicallaw.org.ua/fileadmin/user_upload/PDF/%D1%80%D0%B5%D1%81%D0%BE%D1%80%D1%81/%D0%A0%D0%B5%D1%81%D0%BE%D1%80%D1%81_%D1%80%D0%BE%D0%B7%D0%B4%D1%96%D0%BB_8.pdf)

<sup>27</sup> Bosia M. J. McEvoy S. M. *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*. Oxford University Press, 2020, S. 160.

mechanism for counteracting and protecting against discrimination of these groups at all levels of legal regulation, both by the state and society as a whole.

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