

CONTRIBUTION TO THE UNIVERSAL PERIODIC REVIEW
3RD CYCLE, 28TH SESSION, UKRAINE

Introduction

1. This submission is made by Andrii Kravchuk, an expert of LGBT Human Rights Nash Mir Center, within the framework of project "Protecting and Advocating Rights of the LGBT Community in Ukraine" implementing by All-Ukrainian Public Organization Gay Alliance Ukraine for the Universal Periodic Review (UPR) in order to familiarize the UN Human Rights Council on the legal and actual status of lesbian, gay, bisexual and transgender people (LGBT) in Ukraine.

General review

2. Since the previous cycle of the Universal Periodic Review of Ukraine (October 2012) the legal situation of LGBT people in Ukraine has not changed substantially except for the adoption of an amendment to the Code of Labour Laws in November 2015 that explicitly prohibits discrimination on grounds of sexual orientation and gender identity (SOGI).

3. In the previous cycle of the UPR Ukraine accepted 4 and did not accepted 9 recommendations regarding LGBT issues. While we cannot estimate implementation of the rejected recommendations, we still mention them in this document along with our objections to the Ukrainian government's reasoning on their rejection.

Ukraine accepted the following recommendations regarding LGBT issues made in the 2nd circle of the UPR:

4. Recommendation 97.24, United Kingdom. **Ensure that legislation, including the proposed Bill 8711, is fully compliant with Ukraine's international commitments, including under the European Convention on Human Rights** (hereinafter the mentioned recommendations are taken from the 2nd circle of the UPR, A/HRC/22/7 Report of the Working Group on the Universal Periodic Review – Ukraine, paragraph 97).

We do not consider this recommendation implemented since Ukrainian legislation still contains provisions explicitly discriminating on grounds of SOGI (for more details please see paragraphs 12 and 13 of this document).

5. Recommendation 97.30, Portugal. **Adopt a comprehensive anti-discrimination law that addresses the worrying trend of incidents based on gender, sexual orientation, racial and ethnic discrimination.**

We consider this recommendation implemented by adoption of the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine."

6. Recommendation 97.56, Canada. **Remove from the legislation discriminatory provisions based on race, sex or sexual orientation, and adopt comprehensive anti-discrimination legislation.**

We do not consider this recommendation implemented in full. Though comprehensive anti-discrimination legislation was adopted, discriminatory provisions have not been removed from the Ukrainian legislation (for more details please see paragraphs 12 and 13 of this document).

7. Recommendation 97.69, France. **Respect its international commitments on fundamental rights related to non-discrimination, prevent the adoption of a law prohibiting freedom of**

expression with regards to homosexuality and raise awareness of civil society on combating all forms of discrimination, including discrimination based on sexual orientation and gender identity.

We consider this recommendation implemented.

8. Ukraine did not accepted the following recommendations regarding LGBT issues made in the 2nd circle of the UPR:

- 97.18, Slovenia and Norway, **Reject any proposed legislation that would restrict freedom of expression relating to sexual orientation.**

- 97.19, Australia. **Withdraw its draft legislation criminalizing the promotion of homosexuality, and refrain from adopting any other legislation that restricts freedom of expression.**

- 97.25. Ireland. **Enact legislation that explicitly protects LGBT persons from discrimination and ensure that laws that contain discriminatory provisions against LGBT persons are amended.**

- 97.44, Slovenia. **Apply the Yogyakarta principles in policy development** (repeated from the 1st cycle of the UPR, A/HRC/8/45 Report of the Working Group on the Universal Periodic Review – Ukraine, paragraph 58).

- 97.57, Finland. **Step up the efforts to fight against discrimination by refraining from contradictory legislation and by amending the anti-discrimination legislation to include explicit references to sexual orientation and gender identity as possible grounds of discrimination.**

- 97.70, Sweden. **Take an active stance to stop any actions or laws that constitute an infringement of the rights of LGBT persons.**

- 97.71, Switzerland. **Implement the recommendation issued in 2010 by the Committee of Ministers of the Council of Europe on measures to combat discrimination based on sexual orientation or gender identity.**

- 97.72. Uruguay. **Adopt legislative and other measures to correct and prevent discrimination based on sexual orientation, and to ensure full respect for freedom of expression and association of LGBT persons.**

- 97.73, Germany. **Increase efforts to improve the effective protection of LGBT persons, abandon legislation work on draft law no. 8711 on so-called "propaganda of homosexuality" and refrain from other legislation infringing on the human rights and fundamental freedoms of LGBT persons.**

All of them were rejected by the Ukrainian government under the following reasoning: "National legislation establishes the principle of non-discrimination, which provides equal rights and liberties for all persons, groups of persons, and equality before the law, respect for the dignity of every human being, equal opportunities for all individuals and / or groups of individuals. In this regard, the selection of a form of discrimination considers inappropriate. In addition, Article 34 of the Constitution guarantees everyone the right to freedom of opinion and speech, freedom of expression of their views and beliefs. Article 64 of the Constitution says that the constitutional rights and

freedoms of man and citizen may not be restricted, except as provided by the Constitution."¹

9. We consider these arguments wrong because in fact Ukrainian legislation already contains lists of protected grounds – however, except for the Code of Labour Laws since 2015, they do not include sexual orientation and/or gender identity. Though those lists are usually open (i.e. they end with words "and other grounds" or similar), Ukrainian legislation does not provide a legal criterion to decide whether a ground not mentioned explicitly falls within the scope of those provisions. The Constitutional Court of Ukraine is the only institution that may give obligatory official interpretations of Ukrainian legislation's provisions. There is Decision of the Constitutional Court of 16 October 2007 No. 8-пн/2007 which states that "age" (not included explicitly in the anti-discrimination Article 24 of the Constitution of Ukraine) is not a protected ground under "other grounds" in Article 24 of the Constitution. Thus, unless some characteristic is **explicitly** mentioned in Ukrainian laws or decisions of the Constitutional Court, it may not be regarded a priori as protected from discrimination.

10. Of all the recommendations, we should highlight the failure of Ukraine to implement the recommendations that requested the adoption of a comprehensive anti-discrimination law that would explicitly prohibit discrimination on grounds of SOGI. This recommendation was also made to the Ukrainian government by other stakeholders, such as the experts of the European Commission against Racism and Intolerance, and the corresponding provision was even included in the Action Plan on Implementation of the National Strategy for Human Rights. Nonetheless, by the time of completion of this report, this recommendation was not implemented by the Ukrainian authorities, and the Verkhovna Rada (the Ukrainian parliament) did not even consider the explicit inclusion of SOGI as protected grounds in the basic anti-discrimination law (the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine").

Equality and non-discrimination

11. LGBT people in Ukraine keep on suffering both legal and actual discrimination in various spheres of life. In November 2015 the Ukrainian government adopted the Action Plan on Implementation of the National Strategy for Human Rights until 2020, which included most proposals of Ukrainian LGBT and human rights organisations. However, realisation of the Action Plan's components on LGBT issues began with the refusal by the Ministry of Justice to provide explicit inclusion of SOGI grounds in draft amendments to the basic anti-discrimination law despite direct obligation to do it under the Action Plan.

12. Since the previous cycle of the UPR all Ukrainian legislation directly or indirectly discriminating on grounds of SOGI has remained in force, including Articles 74, 91, and 211 of the Family Code.²

13. Recently the Ministry of Health adopted Order 972 from 15.09.2016 that totally changed the procedural rules for gender reassignment and cancelled most of the previous ungrounded and restrictive demands to transgender patients. The Unified Clinical Protocol of Healthcare on Gender Dysphoria, which is a part of this order, provides for that "Patients

¹ A/HRC/22/7/Add.1 Report of the Working Group on the Universal Periodic Review – Ukraine, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, pp. 2-5.

² Article 74 of the Family Code provides the right to common joint property only for de facto different-sex family couples but not to de facto same-sex family couples. Article 91 provides the right to maintenance (for instance, in case of disease or temporary disability of a partner) only for de facto different-sex family couples but not to de facto same-sex family couples. Article 211, part 3, of the Family Code prohibits joint adoption of children by any same-sex couples (joint adoption by different-sex couples is legally permitted even for de facto couples).

with gender dysphoria should not be denied the possibilities of reproduction. And if reproduction is impossible due to medical intervention – even to adopt a child." By the time of this report's completion, Order 479 of the Ministry of Health from 20.08.2008 "On Approving the List of Diseases Having Which Disables a Person to Be an Adoptive Parent", which includes 'transsexualism' among the mentioned diseases, has remained in force thus effectively prohibiting transgender people from adoption of children. However, the Ministry of Health has already drafted a new order to replace Order 479, which was introduced for public discussion. If this document is adopted and come in force, the legal discrimination of transgender persons related to adoption of children in Ukraine will cease.

14. Until 2016 the Ukrainian government had not collected information on discrimination and hate crimes on grounds of SOGI, however, every year monitoring by Nash Mir Center reveals many cases of discrimination against LGBT people in various spheres of life. It is necessary to underline that the Ukrainian authorities did not collect information on such kind of discrimination, so we have to rely on casual and incomplete data that provides only rough qualitative estimation of the situation. For instance, in 2014 Nash Mir Center recorded 3 cases of discriminatory treatment towards LGBT people in employment, 5 cases in provision of goods and services, 1 case in education; in 2015 there were documented 4 cases of discriminatory treatment in employment, 3 cases in provision of goods and services, 3 cases in education, and 2 cases in healthcare; in 2016 – 38 cases in employment, 8 in provision of goods and services, 7 in education, and 2 in healthcare. Most often Ukrainian LGBT people faced discrimination in their relations with law enforcement agencies – thus, in 2015 Nash Mir Center recorded 7 cases of insults and humiliation of human dignity towards LGBT people from the police, and 18 such cases in 2016.

15. Recommendations:

- a) To include explicitly in the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine" sexual orientation and gender identity as anti-discrimination grounds.
- b) To stop legal discrimination of same-sex *de facto* family couples by amending or deleting Articles 74, 91 and Article 211 Part 3 of the Family Code of Ukraine.
- c) To implement in full and in time the LGBTI components of the Action Plan on Implementation of the National Strategy for Human Rights.
- d) To develop and implement public policies against discrimination in Ukraine explicitly mentioning SOGI and taking into account problems and interests of LGBTI people.

Right to liberty and security of person, prohibition of torture or cruel, inhuman or degrading treatment, right to an effective remedy

16. Ukrainian legislation still does not criminalize offences motivated by homophobia as hate crimes. The police and other law enforcement bodies usually investigate such crimes as ordinary hooliganism and refuse to take into account their homophobic motives.

17. In 2012-2014 Nash Mir Center recorded a drastic rise in the number of cases when perpetrators purposefully "hunted" gay men through social networks or dating websites in the internet posing as other gay men looking for a date. When a victim came to the appointed meeting, he was usually beaten and/or robbed. The current level of homophobic aggression remains quite high – thus, in 2016 Nash Mir Center documented 206 hate crimes and incidents (according to OSCE / ODIHR classification). Victims often were afraid to appeal

to the police for protection because of the general fear and distrust towards the police but also because police officers themselves used the same method to provoke them into committing crimes that later could be used for extortion, recruitment as an informer, or improvement of the statistics of solved criminal cases.

18. Recommendations:

- a) To include homophobic motivation as an aggravating circumstance as well as criminalize kindling of hostility and hatred on grounds of SOGI in the Criminal Code of Ukraine.
- b) To include human rights, tolerance and anti-discrimination issues in the training and professional development programs provided to the law enforcement.
- c) To establish a channel of communication between the police and the local communities, particularly the LGBT community.

Right to respect for private and family life

19. This right is infringed towards LGBTI people in Ukraine mostly by failure of the state to respect and protect family life of same-sex couples. In Ukraine they may neither legally register their relations nor have any spousal rights as a *de facto* couple while both options are available for different-sex couples. Nash Mir Center points out that it leads to discrimination and practical problems in numerous spheres of life, from joint property issues to the right to make arrangements in the case of the partner's death.

20. Recommendations:

To adopt legislation on registered partnership available for same-sex family couples, in the main features similar to ordinary marriage.

Right to peaceful assembly

21. The realisation of this right for LGBTI people in Ukraine totally depends on the readiness of the local authorities and police to ensure security of those events. Though recently we saw rather positive developments in this field, it is necessary to indicate quite opposite instances – thus, in August 2015 a local court in Odesa banned the March of Equality under a lawsuit of the city government, and in March 2016 a local court in Lviv banned all public events within the Festival of Equality. In both cases, the city authorities and local police refused to guarantee security of the corresponding LGBT events.

22. Recommendations:

- To ensure the legitimate right to peaceful assembly to all groups of people, including LGBTI persons, with the effective provision of security during public events.

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