

Nash Mir (Our World) Gay and Lesbian Centre

**Discrimination on grounds of sexual orientation or
gender identity in employment, social security, health
care and education in Ukraine**

Alternative Report to the UN Economic and Social Council



Discrimination on grounds of sexual orientation or gender identity in employment, social security, health care and education in Ukraine – *Alternative Report to the UN Economic and Social Council*

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This publication provides information that reflects observance of provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Ukraine towards lesbian, gay, bisexual and transgender (LGBT) people at the beginning of 2013. Herein are given analysis of the legislation, the actual situation, data from sociological surveys, examples of discrimination, and specific recommendations to the Government of Ukraine to address the identified problems and discrimination on grounds of sexual orientation and gender identity.

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About this Report

This report is made by Nash Mir Centre – one of the oldest Ukrainian LGBT organisations. The information in it is collected from open sources – the Internet and print media, and also based on studies of Nash Mir Centre and other Ukrainian LGBT organisations and activists. Wherever possible, the authors strove to indicate the primary source of information, so the report contains few references to the documents of noted human rights organisations for which just Nash Mir Centre serves as the main source of information on discrimination and violation of human rights on ground of sexual orientation in Ukraine. In this field Nash Mir Centre collects data through permanent monitoring of the situation, including by means of its established monitoring network throughout Ukraine. The basic information on transgender issues is derived from studies of NGO "Insight", which is the leading Ukrainian organisation having this focus.

The intention of this report is to show the situation in the field of economic, social and cultural rights of LGBT persons in Ukraine from the viewpoint of these very people. Because the state does not recognize the existence of said citizen's problems and does not collect information on such issues, they did not appear reflected in official government statistics, and are invisible to the authorities as well as to the general public. Despite the Ukrainian legislation's containing formal general prohibition of discrimination and violation of fundamental human rights and freedoms, commensurate legislative provisions remain purely declarative, and an appropriate legal framework and mechanisms for the implementation of the right to equality are virtually absent.

The report draws attention to the existence of both legislative and practical discrimination on grounds of sexual orientation or gender identity in Ukraine, provides examples of such discrimination, describes if possible its topicality and prevalence from the viewpoint of LGBT Ukrainians, and cites their personal testimonies. Particular attention is drawn to the fact that many problems in the life of LGBT people are, in fact, indirect discrimination on grounds of sexual orientation or gender identity. For example, the absence of any legal recognition of same-sex couples automatically deprives them of all social guarantees and benefits intended for spouses. The specific problems arising for Ukrainian transgender persons are mentioned separately. The report concludes with concrete recommendations to the Ukrainian authorities to address priority concerns in the described spheres of life. These recommendations reflect the agreed position of almost all current Ukrainian LGBT organisations united by membership in the Council of LGBT organisations of Ukraine.

1. General prohibition of discrimination

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(Para. 2 of Art. 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR))

As clarified by the UN Committee on Economic, Social and Cultural Rights (CESCR), *“Other status” as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace* (Para. 32 of the General Comment No. 20). The prohibition of discrimination also applies to the private sphere – para. 11 of the General Comment No. 20.

General prohibition on discrimination is contained in Art. 24 of the Constitution of Ukraine, which states that it is forbidden to establish privileges or restrictions *“on grounds of race, colour of skin, political, religious or other beliefs, sex, ethnic or social origin, property, place of residence, language or other grounds.”* Since this list is open, this Article theoretically may also apply to sexual orientation and gender identity, but in Ukraine there is no case law or official interpretation of the provision that would confirm that view. Nor is direct and explicit prohibition of discrimination on these grounds contained in any other piece of legislation of Ukraine. Numerous proposals of human rights and LGBT organisations to include these features in the list of grounds, on which discrimination is prohibited, have been ignored. In particular, in 2011-2012 the Ministry of Justice did not find it reasonable to include references to sexual orientation and gender identity into the draft Strategy to Combat Discrimination in Ukraine and the law *“On Principles of Prevention and Combating Discrimination in Ukraine.”*

Ukrainian state authorities do not carry out any collection and analysis of information on discrimination on grounds of sexual orientation and gender identity. The relevant information collected by NGOs is widely used by international organisations – the UN, Council of Europe, EU, OSCE, etc. – but the Ukrainian government itself does not request and use such statistics. In Ukraine no government programmes aim at preventing and combating discrimination on grounds of sexual orientation or gender identity, except for a narrow segment within the struggle against HIV/AIDS.

However, studies of Ukrainian human rights and LGBT organisations show the ubiquitous presence and prevalence of such discrimination. Thus, a survey of Nash Mir Centre among Ukrainian LGBT people showed that in 2010-2011 61% of the respondents experienced a violation of their rights or discrimination on grounds of sexual orientation or gender identity, and among those whose non-heterosexuality had been known to others, 89%¹. The most common violations and discrimination against LGBT people happened in relations with law enforcement agencies, as well as in the spheres of personal relationships, employment, information, education and health care. 2012 showed an increase of homophobic violence, but not one of the year’s high-profile crimes has yet been publicly denounced and investigated.

The state does not recognize the existence of the problem and is not planning any programmes to combat discrimination and violence owing to widespread homophobia and transphobia. Not a single instance exists of public condemnation by a government official of homophobic statements or initiatives; on the contrary, numerous examples exist of such actions on the part of local officials and members of parliament. For example, an MP from the ruling Party of Regions Serhii Kyi in 2012 said, *“All these gay parades must be scattered, burnt down.”*²

¹ O. Zinchenkov et al., *A step forward, two steps back: The state of LGBT in Ukraine in 2010-2011* (in Russian), (Nash Mir Centre, Kyiv, 2011), p. 64 <http://gay.org.ua/publications/report2011-r.pdf>

² <http://most-dnepr.info/news/society/59536.htm>

To cap it all, several bills have been introduced on "prohibition of propaganda of homosexuality" in the parliament, setting forth what is to be effective censorship and discrimination on grounds of sexual orientation or gender identity. Despite the fact that they have received negative responses from the Ukrainian parliamentary legal service, the Parliamentary Commissioner on Human Rights (Ombudsman), representatives of the UN, Council of Europe, EU and other international organisations, one of these bills has been passed in the first reading and is awaiting further consideration by the Verkhovna Rada (the Ukrainian parliament).

Change of gender and name in documents

Another problem, which creates particular difficulties in realizing the rights of transgender people in the spheres of education, employment, social security and health care, is an applicant's inability to secure official recognition of gender change along with the corresponding changes in the name of a transgender person in his/her documents without complicated and expensive surgery. Although the law ("Fundamentals of Legislation of Ukraine on Health Care", Art. 51) contains no such requirement, an order of the Ministry of Health Care of 03.02.2011 No. 60 "On improving the delivery of health care to those in need of a change (correction) of sex" in para. 13 of the *Procedures for observation of persons in need of change (correction) of sex*, approved by this Order, nonetheless provides for the issuance of a medical certificate on change (correction) of sex only after surgical correction. As a result, a transsexual person who has no desire or the means to carry out such a surgery, or whose health prevented such treatment, is forced to live with documents that do not match his/her psychological gender, appearance, and behaviour. Further, even a transgender person who has received permission and has the means to carry out such procedures is obliged to live for years with documents stating his/her previous gender and corresponding name, because medical procedures effecting sex change are very time consuming. Thus, transgender people are in a desperate and powerless position simply because of the reluctance of the state to establish a mechanism for implementation of the rights provided by the law:

For as long as I have not changed the documents, I was incredibly scared. I deliberately looked for a job without official registration, knowing that I would not have any social security (V., 22, Kharkiv Oblast).

I still cannot get a good job because my appearance is absolutely masculine and documents are feminine. I cannot go abroad because law enforcement bodies question the authenticity of my documents. Accordingly, it creates a reason for the difficulties with the law. I had a couple of cases (S., 23, Kyiv Oblast).³

³ S. Ivanchenko et al., *The Situation of Transgender Persons in Ukraine* (in Russian) (NGO Insight, Kyiv, 2010), pp. 45, 46

2. Right to work

1. *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

2. *The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

(Art. 6 of the ICESCR)

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

(a) remuneration which provides all workers, as a minimum, with:

(i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

[...]

(c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(Art. 7 of the ICESCR)

As clarified by the Committee, "*Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation** [bold emphasis added by this Report's authors], or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality*" (Para. 12 of the General Comment No. 18).

The Code of Labour Laws of Ukraine contains two articles prohibiting discrimination in employment. Art. 2¹ merely declares a general principle of equality: "*Ukraine guarantees equality of labour rights of all citizens regardless of their origin, social and property status, race, nationality, sex, language, political opinions, religious beliefs, type of occupation, place of residence or other factors.*" Specific prohibition of discrimination is found only in Art. 22: "*Ungrounded denial of employment is prohibited. According to the Constitution of Ukraine any direct or indirect restriction of rights or establishment of direct or indirect benefits when concluding, changing and terminating labour contract, depending on the origin, social and property status, race, nationality, sex, language, political opinions, religious beliefs, membership in trade union or other association of citizens, type of occupation, place of residence is not allowed. Requirements regarding age, education, health of workers may be established by the legislation of Ukraine.*" In contrast to a similar list of anti-discrimination provisions mentioned in the Constitution, in Art. 22 the list is closed, and, accordingly, cannot be called even implicit prohibition of discrimination on grounds not mentioned explicitly in this article.

It should be noted that currently the Ukrainian government has submitted to the parliament a bill to add sexual orientation (but not gender identity) to the list of anti-discrimination grounds mentioned in the Code of Labour Laws. However, in 2011 a similar proposal was introduced to the parliament, but was rejected. Also, the prohibition of discrimination on ground of sexual orientation was present in the draft Labour Code of 2007, which is to be adopted to replace the current Code of Labour Laws, however, and in this document it was deleted during a discussion of it in the parliament.

At the same time, a survey by Nash Mir Centre has shown that 34% of respondents, whose non-heterosexual orientation was known or guessed at work, have experienced harassment because of

their sexual orientation⁴. Most frequently LGBT people complained about unfair treatment – for example, arbitrary denial of promotion or receiving wages lower than those of employees equal in status. Often noted were psychological pressure and harassment by the staff and unwillingness of the management to protect LGBT employees from such attitudes; dismissals actually because of sexual orientation; refusals to employ for the same reason. A typical example of such violations is one of the cases used in the preparation of the mentioned study:

Sexual orientation of Maxim, who worked in the executive service of Odessa, has become known to his colleagues, and soon the administration. Since then, Maxim felt hostility and neglect on the part of his colleagues, and the head openly said, "There is no place for such as you in our service! Do yourself a favour – quit!" In December 2010 Maxim was forced to resign, because, according to him, he did not want extremes.⁵

An NGO "Insight" study encompassing transgender persons revealed that two thirds of the respondents experienced discrimination in employment on ground of gender identity. Most frequent were intimidation, bullying, harassment (for about half of the respondents), and refusal to employ (about 40% of the respondents)⁶. NGO "Insight" also cites direct testimonies of the victims of discrimination, for instance:

There were situations when I was going through three main stages of interview, and at the stage of signing the contract I say that I have such a peculiarity; then the employer would refuse me, explaining it by reason that my documents have not passed through the security, or something else. And this is not a single instance (S., 23, Kyiv Oblast).

I was kicked out of work exactly because of this. I got a job in the mall. The chief shop assistant, who chooses the staff, was absent. The person in charge of the checkout counters took me on. She said, "We need a shop assistant, I'm taking you." The woman took me as whoever can work. I worked there for a week. Then came this chief shop assistant and said, "Get out of here." I say, "Why?" He said, "I need either a guy or a girl to work with me. Kind of, you do not suit"(S., 24, Odesa Oblast).⁷

Besides problems already mentioned above concerning execution of state documents specifying new gender and a new name for a transgender person, there often arises an insoluble problem because non-state functionaries are not obliged to change the documents of such persons even after they have officially changed their gender. In particular, no procedures exist for replacement of one's work record book; subsequently after sex change transsexuals can either start their career "from scratch", or opt to make an unwanted disclosure of their gender history.

⁴ O. Zinchenkov et al., supra note 1, p. 73

⁵ Ibid, p. 107

⁶ <http://insight-ukraine.com.ua/images/pdf/Дослідження.pdf> p. 41

⁷ S. Ivanchenko et al., supra note 3

3. Right to social security

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance. (Art. 9 of the ICESCR)

As clarified by the Committee, *the obligation of States parties to guarantee that the right to social security is enjoyed without discrimination (article 2, paragraph 2, of the Covenant), and equally between men and women (article 3), pervades all of the obligations under Part III of the Covenant. The Covenant thus prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation** [bold emphasis added by this Report's authors], and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security (para. 29 of the General Comment No. 19). At the same time, the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from [...] unaffordable access to health care" (para. 2 of the General Comment No. 19).*

Discrimination against LGBT people in Ukraine in the sphere of social security arises from the fact that the Ukrainian legislation does not provide any possibility of same-sex partners to register their relationships and receive social protection provided by the law for married couples. Accordingly, same-sex partners are not subject to any payment for the loss of a spouse, including a pension for the loss of the breadwinner, the right to a leave to care for a sick spouse or a child, the right to a simultaneous leave for the spouses, and any other forms of social assistance or benefits designed for spouses and family members. Such payments and pensions for spouses and family members are provided, in particular, by the laws "On Compulsory State Pension Insurance", "On Pensions for Particular Services to Ukraine", "On Pensions for Persons, Retired from the Military Service, and Some Other Persons" , "On Social and Legal Protection of Servicemen and Their Families", "On the Status and Social Protection of Citizens Who Suffered from the Chernobyl Disaster," "On the Police", "Mining Law of Ukraine", etc. For more about this problem please see section *Protection of the family, motherhood and childhood* below.

It should also be mentioned that transsexuals in Ukraine have to pay all medical expenses related to sex change – hormone therapy, surgery, necessary medicines, etc. Although the public health system in Ukraine is in critical condition and almost all patients have to incur substantial expenses when seeking medical help, transgender people are particularly vulnerable, because in addition to payment of the full cost of medical services, they can only receive any qualified medical aid almost exclusively in the capital. Due to the nearly complete lack of relevant experts outside the capital and a few of Ukraine's bigger cities, transgender persons are forced to seek help in Kiev hospitals, and to pay for travelling and staying there only at their own expense. For more about this problem please see chapter *Right to the highest attainable standard of health* below.

4. Protection of the family, motherhood and childhood

The States Parties to the present Covenant recognize that:

1. *The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.*
2. *Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*
3. *Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.*

(Art. 10 of the ICESCR)

The Family Code of Ukraine defines marriage as *"family union of a man and a woman, registered in the body of civil status state registration"* (Art. 21 para. 1). In accordance with the Code, *"family is constituted of people who live together, linked by everyday life, have mutual rights and obligations"* (Art. 3 para. 2); *"family is created on the basis of marriage, consanguinity, adoption, as well as on other grounds not prohibited by law and not contrary to the moral fundamentals of society"* (Art. 3 para. 4). Thus, the Ukrainian legislation does not recognize the possibility of a marriage between same-sex partners and provides them with no other possibility of formalizing their relationship. Although theoretically para. 4 of Art. 3 of the Code makes it possible to recognize a same-sex partner as a family member, the reservation on unspecified "moral fundamentals of society" under the conditions of prevailing societal homophobia virtually eliminates this possibility. In addition, the Ukrainian laws contain virtually no mention of the rights and obligations of an indefinite family member, but rather list the specific categories of relatives, without ever mentioning same-sex partners.

At the same time, unmarried opposite-sex partners have certain family rights and responsibilities recognized by the law. In particular, Art. 74 of the Family Code provides that jointly acquired property of such partners belongs to them under common joint ownership rights, like joint acquired property of a married couple. Thus, at the termination of partnership between a man and a woman, each of them is entitled to one half of the jointly acquired property, whoever of each would formally own it; and in the case of one partner's death, additionally is entitled to inherit his/her share of the partner's half. In the case of a same-sex partnership's breakup or the death of one of the partners, the other partner is entitled only to the property that is his/her personal belongings. In particular, if jointly acquired housing is registered only by one partner, single-name registration leads to the forced eviction of the second occupant.

Art. 91 of the Family Code recognizes the right of one of the opposite-sex partners, living together for a long time, to the upkeep from the other partner, similar to the rules established for former spouses having dissolved their marriage (Art. 76 of the Code). Same-sex partners are denied this right.

Art. 211 of the Code allows one of the opposite-sex partners to adopt a child of the other partner and also joint adoption of a child, but does not allow it in the case of same-sex partners. In practice, it leads to infringement of the interests of the child who is being brought up by a same-sex couple, inasmuch as when one partner, who is not considered an own or adoptive parent of the child, does not bear any responsibility and is deprived of any rights in relation to the child in question. In particular, that rights-deprived partner cannot take a leave to care for a sick child, or provide financial assistance for his/her treatment or upkeep; in turn, the child, who is not biologically related to or adoptable by one of the same-sex partners, is denied the right to upkeep from him/her in the case of the partnership's termination, and the right to a pension for the loss of the breadwinner in case of the death of that partner. In the case of the death of the biological or adoptive parent of the child, the surviving partner loses any legal relationship to him/her, and the child is considered an orphan, even if he/she has been brought up by both partners together from birth.

Para. 1.8 of Art. 212 of the Family Code prohibits adoption of children by persons having diseases, a list of which is set by the Ministry of Health Care. Order of the Ministry of Health Care No. 479 of 20.08.2008 has approved the list of those diseases, among others mentioning transsexualism. Thus in Ukraine adoption by transsexuals is legally prohibited, regardless of their social adaptation, although after medical procedures for gender reassignment and subsequent replacement of documents the law fully recognizes a transgender person's belonging to the new gender and his/her right to marry a person of the opposite sex. In our view, such a total ban, paying no attention to the personal characteristics and circumstances of a particular transgender person, is completely unjustified interference with his/her private and family life.

Domestic violence

According to Nash Mir Centre's research in 2011, 41% of LGBT respondents said they experienced harassment in the private sphere⁸. In this case, a large part of the harassment concerns relationships with family members and close relatives; in particular, 18% of the respondents indicated that the family tried to drive them out of the home, or, conversely, to limit their freedom⁹. Ukraine has the law "On Prevention of Domestic Violence", but stigmatization of LGBT people in Ukrainian society, widespread homophobia and almost total disregard of LGBT people's interests by the state, lead to the result that the problem of domestic violence against LGBT persons remains invisible and not affected by government programmes for prevention of domestic violence. Special crisis centres' workers, the police, and medical institutions' staffs usually do not have any relevant training and, when faced with cases of domestic violence against LGBT people, act based on their personal, often homophobic and transphobic, beliefs. Victims of violence are often afraid to turn for protection and assistance to the relevant agencies, rightly fearing that assistance would be given not to victims but rather to their oppressors.

Some situations of domestic violence are standard. The most common are attempts of parents (and also siblings) to "cure" or "convince" their homosexual or transsexual child by violent methods.

After my mother found out, she decided to come and make peace between us. But in light of how, not really. Because she ordered a mental hospital admission. She summoned a team from Luhansk Regional Psycho-Neurological Clinic. Agreed with the guys. The brigade arrived, waiting around the corner. She came and said, "Let's make peace. All will be good. Let's go home!" I agreed at first, although I was afraid of her; I knew that this woman could do to me whatever... Nevertheless I went. I was caught, taken to the mental hospital, as if I am schizophrenic... The doctor, who was there, took me around the nuthouse, showed the worst places of the mental hospital, where I can stay for a long time unless I reconcile myself with my mother and throw it out of my head and start living a normal life... Then I had no choice. And, of course, I had cheated him, said OK, I'll go home, and everything will be fine. Afterwards we drove home, then the 4 days... For me, these 4 days were just awful... Because my mother bought a package of vodka and stupidly beat me up for 4 days to throw it all out of my head. And if I do not throw it away, the nuthouse will ever wait for me. On the first call (A., 24, Luhansk Oblast.).¹⁰

I give an example from the life of a homosexual man from Lviv, now 24 years old. His parents are influential business persons, and when he told them that he loves men, they said they do not need a gay son, and started treating him forcibly. They had put him for half a year in a mental hospital, spent huge sums for his treatment, poured into him the newest drugs. In the end, the guy almost turned into "a vegetable." And his orientation has not changed. The parents kicked their son out of home, now he is homeless and cannot adapt to the realities of life. It is especially difficult for him during the harsh winter, and I do my best to help him, trying to find lodging for the night.¹¹

⁸ O. Zinchenkov et al., supra note 1, p. 79

⁹ Ibid, p. 81

¹⁰ S. Ivanchenko et al., supra note 3, page 43

¹¹ <http://fakty.ua/154938-syna-geya-roditeli-polozhili-v-psihbolnicu-paren-prevratilsya-v-ovocsh-a-orientaciya-tak-i-ne-pomenyalas>

Another common cause is violence by the husband to his wife, whom he had caught in homo- or bisexuality.

I was born and raised in a village in Luhansk region, says Natalya, and for a long time did not understand why I was not attracted to men at all. My parents and neighbours used to propose some men to me as husband, and I was scared at the thought of touching a man. As a result, father banged his fist on the table and said that he will knock this nonsense out of me. I decided to submit to him and carry my cross. I was married to promising businessman, and for two years I lived with him in hell. We had a child that somehow brightened up my life. Then my mother became very ill, whom I always loved and did not want to upset. Money has not saved her, she died; and a few months later I lost my temper and left my husband. I departed to the capital and got a job in banking. When I turned 28, I met a woman, and only then realized what desire, tenderness, and depth of feelings mean. My spouse did not interfere, as he changed women like gloves, and my leaving only untied his hands. But a couple of months ago my husband, who was not discomforted with anything for eight years, suddenly became like a mad dog on the loose. Worst of all, he has explained it by the fact that he already has constant problems with the law, so why, he says, this additional risk in the person of his lesbian wife.¹²

Women with children are especially vulnerable, because in the eyes of broader society, including the judiciary, homosexuality is seen as a sign of immorality, leaving the husband able to blackmail his wife with taking away their children.

Cases of domestic violence also occur in same-sex families. However, since no legal act of Ukraine contains an explicit reference that same-sex partners constitute a family the same as the union of a man and a woman, the state totally ignores the problem of domestic violence in same-sex families.

¹² Supra note 11.

5. The right to the highest attainable standard of health

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(Para. 1 of Art. 12 of the ICESCR)

As clarified by the Committee, by virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation** [bold emphasis added by this Report's authors] and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls General Comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes" (Para. 18 of the General Comment No. 14).

While as far back as in 1999 the International Classification of Diseases (10th edition) entered into force in Ukraine, which removed homosexuality from the list of diseases and disorders, Nash Mir Centre monitoring shows that up-to-date Ukrainian medical schools use textbooks that describe homosexuality as illness, mental disorder, sexual abuse, etc.¹³ So it is not surprising that in the medical institutions of the country staff members still sometimes attempt to "cure" homosexuality, although it is not considered officially a disease.¹⁴ Overall, Nash Mir Centre's study from 2011 found that of the respondents whose homosexual orientation was, in their opinion, known or suspected by the medical staff, 28% faced prejudice and harassment from them.¹⁵

Art. 14 of the law "On Combating Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living with HIV" guarantees equality before the law and prohibits discrimination against HIV-infected people and people belonging to groups at risk of HIV infection. The Ministry of Health Care official considers men who have sex with men (MSM) as one of such groups. However, in practice, even medical professionals who are working in the struggle against HIV/AIDS do not always treat gay, bisexual and transgender people with respect:

I have been invited as a representative of a vulnerable group with whom doctors [of AIDS centres] have to work. My experience was very negative. The doctors were driven by human and religious factors. When discussions were about female sex workers and injecting drug users, the debate was not so lively. As I began to present the gay community perspective, a lively criticism and indignation started: "Why have we come here?.." I wanted to tell them that your job is to be professional; customers may be various. It seemed that for the first time they saw a gay man who speaks openly and does not hide his orientation, and it shocked half of the participants. I would not like to use the services of such doctors even just to be tested for HIV.¹⁶

The other laws regulating the health care sector does not contain anti-discrimination provisions, and certainly do not mention sexual orientation nor gender identity. In Ukraine there are also no medical programmes, except in the field of HIV/AIDS prevention, taking into account the specific interests of LGBT people and protecting them from discriminatory treatment.

¹³ O. Zinchenkov, *LGBT Vector of Ukraine* (in Russian), (Nash Mir Centre, Kyiv, 2011), p. 23

http://gay.org.ua/publications/lgbt_ukraine_2012-r.pdf

¹⁴ O. Zinchenkov et al., supra note 1, pp. 91, 92

¹⁵ Ibid, p. 90

¹⁶ Ibid, p. 110

Ukrainian transgenders face particularly difficult challenges in the health sphere. Some of these challenges – the absence of public funding for procedures for sex change (correction) and finding necessary skilled specialists – we have already mentioned in the chapter "Right to social security." Apart from these problems caused by objective circumstances, transgender persons in Ukraine face a number of hurdles of a solely bureaucratic nature; these could be easily solved with good will on the part of relevant state authorities: in first place, by the Ministry of Health Care.

To begin with, it should be noted that many transgender people do not see an urgent need for immediate, costly sex-change surgery. Some of them are quite satisfied with their bodies, others are ready to postpone for a time the surgery they require, but they all need to change the gender designation indicated in their documents.

*I have a loved one, family, and I feel fine; everything is OK in the sexual sphere too. And I need the surgery not so much as other people do... It is **just the documents I want to change**. That, I think, would be sufficient (D., 23, Kyiv Oblast).¹⁷*

The Ukrainian law (please see chapter "Change of gender and name in documents" above) does not require compulsory surgical operation for sex change. However, the order of the Ministry of Health Care No. 60 of 03.02.2011 provides for the issuance of a medical certificate on change (correction) of sex (and solely on the basis of such a certificate it is possible to replace subsequently all documents of transgender persons) only after corresponding surgical correction, including irreversible sterilisation. Besides, the said order No. 60 contains a number of prerequisites for sex change, many of which look completely unreasonable. In particular, change of sex is prohibited in case a transgender person has:

- Children under the age of 18;
- Homosexuality, transvestism against a background of sexual role transformation [**Note of the report's authors:** *this requirement seems completely incomprehensible and absurd for a transsexual person whose biological sex does not correspond to the psychological one*];
- The presence of any sexually perverse tendencies;
- Morphological features that make it difficult to adapt to the desired gender (androgyny, sexual organs development disorder);
- The inability to bear a hormonal or surgical intervention owing to existing diseases;
- Disagreed with the scope of sex change procedures that are recommended by the Commission on change (correction) of sex of the Ministry of Health Care.

It should be emphasized that these requirements apply to persons who have already been given a diagnosis of resistant transsexualism, i.e. to those who anyway cannot change their gender identity, which does not correspond to the gender that is indicated in their documents from time of birth. To solve these problems there is no need to incur any financial expenses or changes to the existing laws, it is enough just to change the relevant order of the Ministry of Health, but for reasons unknown this institution does not want to do this.

¹⁷ S. Ivanchenko et al., supra note 3, p. 37

6. Right to education

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

(Para. 1 of Art. 13 of the ICESCR)

Article 3 of the Law of Ukraine "On Education" states that "*Citizens of Ukraine have the right to a free education in all public schools, regardless of gender, race, nationality, social and property status, type and character of occupation, philosophical beliefs, membership in political parties, religion, creed, state of health, place of residence and other circumstances*". Similar wording to this is also contained in Art. 6 of the law "On General Secondary Education" and Art. 9 of the Law "On Out-of-School education." Art. 5 of the law "On Vocational Education" simply declares that "*Citizens of Ukraine have the equal right to vocational education in accordance with their abilities and inclinations.*" The law "On Higher Education" does not contain anti-discrimination provisions. All of these laws contain no mention of any measures and mechanisms to ensure declared equality in the sphere of education in Ukraine.

Monitoring of Ukrainian LGBT organisations in the sphere of education shows the widespread discrimination and harassment against LGBT people in this field. Thus, Nash Mir Centre's study from 2011 found that nearly a third of respondents (31%), whose homo- or bisexual orientation was known or suspected by the people around them, experienced harassment in educational institutions. The most frequent cases were biased attitude from teachers (34% of the mentioned respondents) and unwillingness/inability of the school administration to protect LGBT students from attacks by other students (25%).¹⁸

In the course of monitoring the implementation of the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2010)5 "On measures to combat discrimination on grounds of sexual orientation or gender identity," the Council of LGBT Organisations of Ukraine sent a request to the Ministry of Education on the existence of any guidelines, programmes, regulatory documents, etc. to combat homophobic and transphobic discrimination and violence in educational institutions. The Ministry has ignored these questions, but according to the words of students known to Nash Mir Centre and other LGBT organisations in Ukraine, such documents and programmes in schools and universities do not exist. Similarly, the Ministry has ignored the question of the presence of any mention of sexual orientation or gender identity in curriculum courses of the general educational institutions. According to testimonies of students and pupils, information on these issues in common educational courses is absent that contributes to the conservation and transfer of homophobic and transphobic stereotypes among students and teachers.¹⁹

As mentioned in the previous chapter, even the information in the specialized medical training courses is often not consistent with accepted modern scientific views on sexual orientation and gender identity; courses repeat information long outdated and rejected by the modern scientific community's notions. A similar situation can be observed in other specialized educational courses. For example, a textbook of 2009 on a healthy lifestyle for training of the armed forces and law enforcement staff, approved by the Ministry of Education, considers homosexuality as a sexual perversion²⁰.

As a result, many LGBT pupils and students of Ukrainian educational institutions have been relegated into a very discriminated-against and vulnerable position, experiencing problems because of their

¹⁸ O. Zinchenkov et al., *supra* note 1, pp. 76, 77

¹⁹ *Summary Report on implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity by Ukraine* (Nash Mir Centre, Kyiv, 2012), pp. 60, 61

²⁰ <http://korrespondent.net/tech/932704-ukrainskij-uchebnik-oficialno-priznal-gomoseksualizm-v-armii-izvrashcheniem>

homosexuality or transgender condition from their fellow students as well as teachers and the administration:

17-year-old Yurii attended a vocational school in Poltava. His classmates had suspicions about his sexual orientation even before, because it was hard not to notice. But last year, in the winter of 2011, when he was seen hugging a guy, Yurii got into a nightmare. He could not study in the normal way – constant insults, ridicules, humiliation, and repeated beatings. His personal belongings were often torn and broken. Teachers took no action, despite his requests, to stand up for him. "Whom do you blame that you have become gay? You have chosen this way yourself, so get it now!", one could hear from the teachers. In addition, they made fun of him themselves because of his sexual orientation. The last few months he almost never attended classes for fear of further inflictions of abuse and violence. According to Yurii, he was able to pass final examinations only because the teaching staff decided that it would be better to get rid of him as soon as possible.²¹

They would not let me into the school, insisting that I change my clothes. I would sneak in through the back door, would be late for the lessons, but entered in my usual clothes. Every morning the director stood at the entrance and checked who was wearing what. And she would let me in. But then some teacher told her that I am a girl. And then it all started. I was not let in anywhere, and in the ninth form they even did not let me take the history exam. They said I must go and change my clothes. And I just could not change my clothes, I only had clothes for boys. I was told to go and borrow my mom's. I came home in tears. My dad went to the school with me, brought me into the classroom. I got a C for the exam. (S., 26, Kyiv Oblast).²²

One specific problem for Ukrainian transgender persons is attempting to change their educational documents after their official change of gender. While basic identity documents like a passport and a birth certificate the state changes according to the order set by law, every educational institution independently decides whether to issue a duplicate diploma or certificate of education indicating the new gender and name of a person who changed his/her gender:

The problem was in the college. They did not want to issue a certificate that I studied there for two years. Why? They could not explain it. I was long tormented, had to go to the rectors, pro-rectors. They just did not want to change my name. The surname remained the same, but they did not want to change the [given] name (N., 24, Kyiv Oblast).²³

²¹ O. Zinchenkov et al., supra note 1, p. 109

²² S. Ivanchenko et al., supra note 3, p. 45

²³ Ibid.

7. Right to take part in cultural life and to enjoy the benefits of progress

1. *The States Parties to the present Covenant recognize the right of everyone:*

(a) *To take part in cultural life;*

(b) *To enjoy the benefits of scientific progress and its applications;*

(c) *To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*

3. *The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*

4. *The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields*

(Article 15 of the ICESCR)

In interpreting this provision, the Committee takes a broad approach to understanding the content of culture (paras. 10-13 of the General Comment No. 21). Thus, *"in the Committee's view, article 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture"* (para. 32 of the General Comment No. 21). Describing the possible restrictions of the right to participate in cultural life, the Committee also notes that *"no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope"* (para. 18 of the General Comment No. 21). The *"limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed"* (para. 19 of the General Comment No. 21).

Violations of this article of the ICESCR against LGBT people arise from attempts to restrict such fundamental human and civic rights and freedoms as the right to free development of one's personality, freedom of speech and expression, equality before the law, freedom of peaceful assembly, etc. in relation to sexual orientation or gender identity.

In particular, in 2009 the Central District Court of Mykolaiv, under the lawsuit of the Executive Committee of the City Council, banned the LGBT cultural and sports festival "Rainbow Spring". The following year Odesa Appellate Administrative Court overturned this decision, but the LGBT cultural events already had been thwarted²⁴.

The National Expert Commission of Ukraine on Protection of Public Morals in 2008 decided that the film *Brokeback Mountain* is likely to harm public morality, especially among young viewers, and therefore the State Television and Radio Broadcasting Committee of Ukraine allowed it to be shown only during late night (after 23:00). In 2009 the Commission adopted a similar decision about the film *Bruno*, in connection with which the Ministry of Culture has totally banned the film's screening in Ukrainian cinemas.²⁵

Another issue is that the authorities do not want to take the measures necessary to prevent homophobic aggression against LGBT events, and in case of such aggression, for effective search and

²⁴ <http://nikvesti.com/news/16872>

²⁵ http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf para. 186

punishment of the perpetrators. So, in 2009 the presentations of the poetic collection *120 pages of Sodom* in Kiev and Lviv were attacked by aggressive young men who proved to be members of far-right organisations²⁶. In these cases, the police arrested the perpetrators after commitment of criminal acts by them, but, according to witnesses, did not try to prevent them from assault. At the same time, those responsible for the arson of art centre *Я Галерея* (I Gallery)²⁷ and the destruction of the photo exhibition *My Room*²⁸ have not been found.

Finally, apparently activists of right-wing organisations in recent years consistently disrupted LGBT cultural events at the National University of Kyiv-Mohyla Academy under a total hands-off policy of the University administration and the police. So, on 20.11.2010 unknown persons in masks thwarted a transgender people's commemoration meeting in the Centre for Contemporary Art, where people suffered from tear gas and beatings²⁹, and likewise at the 17.05.2012 occasion of the screening of the film *Milk* at the American Library of the University.³⁰

At present the Ukrainian parliament is considering the draft law No. 0945 (previously titled No. 8711) "On Amendments to Some Legislative Acts (Concerning Protection of Children's Rights to Secure Information Space)." Despite its name, the document does not mention children at all, and is entirely dedicated to prohibition of so-called "propaganda of homosexuality." This bill received very negative estimations of the Ukrainian Ombudsman, Ministry of Foreign Affairs, the official representatives of the UN, EU, Council of Europe, Amnesty International, Human Rights Watch, Freedom House, etc. In particular, the bill was specifically mentioned and condemned in a statement of UN Secretary General Ban Ki-moon³¹. Despite all this, it was adopted in the first reading in October 2012 and now is in preparation for the second reading. If it comes into force, then actually introduced will be censorship and prohibition against the publication of any information that may be regarded as positive in relation to LGBT people in Ukraine.

²⁶ <http://rus.newsru.ua/ukraine/01oct2009/antygey.html>

²⁷ <http://rus.newsru.ua/rest/30sep2009/gylimov.html>

²⁸ <http://www.pravda.com.ua/rus/news/2012/05/19/6964875/>

²⁹ <http://www.bagnet.org/news/ukraine/84359>

³⁰ <http://news.tochka.net/118205-svobodovtsy-sorvali-pokaz-filma-propagandiruyushchiy-gomoseksualizm/>

³¹ <http://www.un.org/News/Press/docs/2012/sgsm14717.doc.htm>

Recommendations to the Ukrainian authorities

1. To explicitly include sexual orientation and gender identity in the list of anti-discrimination grounds in the law on combating discrimination in Ukraine.
2. To explicitly include sexual orientation and gender identity in the list of anti-discrimination grounds in the Labour Code of Ukraine.
3. To amend Art. 74 of the Family Code of Ukraine (“Right to property of a woman and a man who live as a family together but are not married”) with the purpose of extending its effect to same-sex couples.
4. To amend the Order of the Ministry of Health Care No. 60 of 3.02.2011 “On improvement of medical assistance to persons needing change (correction) of sex” with the purpose of removing contraindications to change (correction) of sex where the individual concerned:
 - *has children younger than 18;*
 - *is a homosexual or a transvestite;*
 - *has any sexual perversions;*
 - *has morphological peculiarities which complicate adaptation to the desired sex (hermaphroditism, sexual organs development disorder etc.);*
 - *has severe somatic diseases which make impossible hormonal or surgical gender reassignment;*
 - *disagrees with the scope of the diagnostic and therapeutic measures for change (correction) of sex which are recommended by the Commission.*
5. Also to amend the Procedures for observation of persons needing change (correction) of sex, set forth by the above-mentioned Order, namely:
 - *to remove from para. 2.2 of the Procedures the requirement for inpatient psychiatric examination in a mental hospital by providing for the possibility of such examination in a day hospital or in an outpatient setting;*
 - *to remove from para. 13 of the Procedures the requirement that a medical certificate on change (correction) of sex can only be issued after gender reassignment surgery, in order to provide for the possibility of issuing the certificate without surgical correction.*
6. To amend the Order of the Ministry of Health Care No. 479 of 20.08.2008 “On establishment of the list of diseases which disqualify a person from being an adoptive parent” by removing from item 9 “Mental and behavioural disorders at a mature age” code F64 (“Gender identity disorders” under ICD-10).
7. To include topics of sexual orientation and gender identity in the school curriculum and initial and in-service training programmes for educational staff.
8. To issue an Order of the Ministry of Health Care on revision of current and proposed medical textbooks, programmes etc. with the purpose of removing any formulations which describe homosexuality or bisexuality as a disease, mental disorder, sexual perversion etc. and/or propose “the cure for homosexuality”.
9. To include topics of sexual orientation and gender identity in initial and in-service training programmes for judges and other members of the legal profession and law enforcement officials.
10. To adopt a medium/long term action plan for combating homophobia and discrimination on grounds of sexual orientation or gender identity.

Information on the authors of this Report – About NASH MIR Centre

OUR HISTORY

“Nash Mir” (Our World) Gay and Lesbian Centre was founded in Luhansk in Southeastern Ukraine in 1998 as a grassroots group. By our initiative we took upon ourselves the responsibility for educating Ukrainian society about homosexuality, toppling recurrent stereotypes and prejudices against gays and lesbians, consolidating lesbian and gay community, and for advocating our rights.

This is the situation in Ukraine we discovered: there “wasn't a problem with homosexuality” as long as it went unseen. At first, local judiciary officials simply did not know what to do with our organization! Interviewed by a national newspaper, one official said, *“How can we recognize them [the organization] on an official level, as a juridical person? There is no legal basis, though this sort of orientation isn't forbidden, but neither are precedents... If I register them, excuse me, wankers will come, and someone else... And what about morality?”* Using far-fetched grounds they refused our registration.

Certainly we did not let ourselves be humbled by such obvious discrimination. Nash Mir was indeed registered at the end of 1999. But successful registration was made possible only as the result of a determined battle by the members of the organization for their legal rights, and the steadfast attention to this issue on the part of some international human rights organizations.

OUR GOALS

- Protection of human rights and freedoms for lesbians, gays, bisexuals and transgender people in Ukraine. Fighting against discrimination based on sexual orientation.
- Improving Ukrainian society's attitudes towards homosexuality by challenging homophobia in the mass media.
- Supporting LGBT people and their self-consciousness and pride as equal and valuable members of Ukrainian society.

OUR CURRENT ACTIVITIES

Our projects are aimed at Ukrainian gay and lesbian community and society in general. At present we focus our activities on the following:

- Monitoring violations of LGBT rights.
- Initial legal help and counselling for victims of discrimination and hate crimes based on sexual orientation.
- Legal education of LGBT community.
- Joint actions with other organizations to advocate for full LGBT rights on the legislative and political levels.
- Supporting grassroots groups in their work of providing social and psychological services to LGBT, HIV/AIDS prevention among MSM, mobilization of the community on local level.
- Activities aimed at improving Ukrainian anti-discrimination legislation and policies.
- Organizing seminars and conferences.

Nash Mir Centre is a founding member of the Council of LGBT Organizations of Ukraine (at present 26 NGOs are members). Olexandr Zinchenkov, leader of human rights programs of Nash Mir, is Chairperson of the Committee on Human Rights and Advocacy, Co-chair of the Council of LGBT Organizations of Ukraine.