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## INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTION AGAINST DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

*There is a considerable resistance among many people to discuss full enjoyment of universal human rights by LGBT persons. Even if they may not be a popular human rights topic, the time has now come to take the discussion forward and make it concrete.<sup>1</sup>*

Lesbian, gay, bisexual and transgender (LGBT) people<sup>2</sup> are a heterogeneous group of people which is very often subjected to stigmatization and faced with homophobia, transphobia, discrimination and fear of social rejection and exclusion due to their sexual orientation or gender identity. The development of the legal framework and legal prac-

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1 Council of Europe, Discrimination on grounds of sexual orientation and gender identity in Europe, Thomas Hammarberg, 2011 p. 15.

2 Coalition “Sexual and Health Rights of Marginalized Groups”, Glossary of terms related to sex work and LGBT, Skopje 2008. It is an acronym that refers to lesbian, gay, bisexual and transgender people.

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tice in the past decade consistently reaffirms that both sexual orientation and gender identity are recognized as prohibited grounds of discrimination within the most significant agreements and conventions on human rights including the conventions of the United Nations (UN), the European Convention on Human Rights (ECHR) of the Council of Europe and the documents that constitute the legal framework of the European Union. On the other hand, the efforts made by the Republic of Macedonia in the alignment process of the national legislation to the European Union hasn't yet resulted with the necessary protection mechanisms for the lesbian, gay, bisexual and transgender<sup>3</sup> people. The national legal framework for protection against discrimination excludes sexual orientation and gender identity as prohibited grounds of discrimination while in practice the number of verbal and physical assaults on persons, groups and organizations for LGBT rights promotion and protection is on rise. In the absence of a comprehensive national legal framework for protection against discrimination based on sexual orientation and gender identity, it is necessary to implement the international standards within the national procedures so as to provide protection against discrimination based on sexual orientation and gender identity. The Coalition "Sexual and Health Rights of Marginalized Groups" has therefore published *The Handbook of international standards for protection against discrimination based on sexual orientation and gender identity* (hereinafter "Handbook")<sup>4</sup> whose primary objective is to bring the international standards for protection against discrimination based on sexual orientation and gender identity closer to judges, representatives of non-discrimination bodies, lawyers as well as to human rights activists. The following text examines the most important international standards for protection against discrimination based on sexual orientation and gender identity as provided in the Handbook which are legally binding for the Republic of Macedonia, as well as documents that are not legally binding but do represent a standard that all countries should strive for in order to

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3 Transgender persons are people whose gender identity does not fit the binary standards of the society or whose gender identity is opposite of their biological sex. Transgender people can be people with gender non-conforming behavior, transsexuals, cross-dressers, etc. The term transsexual designates any person that has undergone or is planning to undergo a series of medical procedures such as hormone therapy, sex reassignment surgeries and to change one's legal identity documents so as to confirm one's gender identity.

4 Coalition "Sexual and Health Rights of Marginalized Groups", *Handbook of international standards for protection against discrimination based on sexual orientation and gender identity*, Boshkova Natasha, Skopje, 2014.

provide full enjoyment of human rights for everyone irrespectively of the personal context.

The international documents on human rights protection signed by the Republic of Macedonia constitute the legal framework for protection against discrimination on national level and include also the Constitution of the Republic of Macedonia<sup>5</sup>, the Law on prevention and protection against discrimination<sup>6</sup>, the Law on equal possibilities for women and men<sup>7</sup> and all other provisions prohibiting discrimination on different grounds. The adoption of the Law on prevention and protection against discrimination as planned with the Macedonia's program for alignment with the European legislation was justified by the increasing need of protection from discrimination for homosexual persons in all spheres of life. Sexual orientation is defined as an individual's enduring emotional, romantic or physical attraction to the same or opposite sex.<sup>8</sup> As such, the sexual orientation is an important characteristic that determines the most intimate aspect of the individual's private life. Gender identity refers to a person's innate deeply felt psychological identification of oneself.<sup>9</sup> Both categories are part of every individual's intimacy and require protection through provisions that would explicitly prohibit discrimination as well as any other violation or limitation of the enjoyment of the rights by individuals with homosexual or bisexual orientation or with gender identity different than the sex assigned at birth. Nevertheless, no amendment to the provisions has been made to this day and consequently, the rights of the individuals with homosexual orientation and gender identity remain unrecognized by the national legislation.

The following text summarizes the cases that establish the positive obligations of Macedonia in relation to the implementation of policies relevant to human rights protection with focus on protection for LGBT people against discrimination.

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5 Official Gazette of the Republic of Macedonia No 52/92, Constitution of the Republic of Macedonia.

6 Official Gazette of the Republic of Macedonia No 50/2010, Law on Prevention and Protection against Discrimination.

7 Official Gazette of the Republic of Macedonia No 6/2012, Law on Equal Opportunities for Women and Men.

8 Coalition "Sexual and Health Rights of Marginalized Groups", Glossary of terms related to sex work and LGBT, Skopje 2008.

9 Coalition "Sexual and Health Rights of Marginalized Groups", Glossary of terms related to sex work and LGBT, Skopje 2008.

### **Beginnings of the legal practice for LGBT rights protection**

The formal establishment of the equality for individuals with non-heterosexual orientation goes at a slow pace on international level which reflects negatively on the development of national legislations. Namely, various forms of criminalization of same-sex voluntary sexual relationships between adults, primarily between men as women are often discarded in this context, are found to have existed for longer or shorter periods of time in the legal tradition of almost all member countries of the Council of Europe.<sup>10</sup> The presence of provisions in the Criminal Code that criminalize any voluntary homosexual relationship between adult persons can be considered as a discrimination and violation of the right to privacy for people with homosexual orientation.<sup>11</sup> This is stated in the decision from 1981 of the European Court of Human Rights (hereinafter “the Court”) who reaffirmed the Human Rights Committee in 1992 by its own decision to abolish the penal provision sanctioning any voluntary homosexual relationship between adult persons due to its discriminatory nature.<sup>12</sup> After several attempts to challenge penal provisions on regional level, a court decision has confirmed for the first time the violation on the part of the Court whereas the second judicial decision was considered to be precedent within the UN human rights system in addressing discrimination of homosexual, lesbian and bisexual people. In 2003 the Court found the provisions prescribing different legal age for consensual sexual activity to be discriminatory on the basis of sexual orientation. Namely, the Court established that the provisions guaranteeing protection against sexual relationships with adult men for young men in the 14 to 18 age bracket but not guaranteeing protection against relations with either adult men or women for young women in the same age bracket were discriminatory on the basis of sexual orientation.<sup>13</sup> The abolition of the criminalization of any voluntary homosexual intercourse between same-sex persons gave momentum to the development of a legal practice aiming to annul every law or provision considered to violate the rights of or to discriminate individuals with non-heterosexual orientation.

<sup>10</sup> Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, Thomas Hammarberg, 2011.

<sup>11</sup> European Court of Human Rights, *Dudgeon v. The United Kingdom*, Application No. 7525 /76, judgment of 22 October 1981.

<sup>12</sup> Human rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

<sup>13</sup> European Court of Human Rights, *L. and V. v. Austria* Application No. 39392/98 and 39829/98 judgment of 9 April 2003.

### Freedom of expression and assembly of the LGBT community

In practice, hate speech against people with homosexual orientation and gender identity is very often qualified as the enjoyment of the right to expression. In circumstances where the national legislation does not guarantee protection from hate speech against these people and where Macedonia faces increasing presence<sup>14</sup> of hate speech that further leads to hatred and violence, it is of utmost importance to consider the wider framework that covers this issue. To present day, the Court and other quasi-judicial bodies of the UN haven't acted upon a case to establish the limit of freedom of expression of certain groups in Macedonia. Moreover, the legal practice provides examples of cases applicable in our context as well as examples that fill the judicial void of cases of hate speech against LGBT people. Namely, the propaganda against the homosexuals which portrays the homosexuality as abnormality and the homosexual intercourse as the main mode for HIV and AIDS transmission cannot be considered as freedom of expression but rather as a speech that should be condemned and sanctioned.<sup>15</sup> In the process of decision-making whether the propaganda against homosexual individuals transgresses the right to expression, the Court makes reference to its previous case-law related to racist speech and underlines that "the incitement to hatred does not necessarily involve incitement to violence or other criminal deeds. The attacks on persons or groups of people through insults, ridicule or defamation could justify the authorities' decision to give priority to the fight against the racism over the freedom of expression used in an irresponsible manner".<sup>16</sup> The Court's reasoning demonstrates that the State is obliged to sanction the speeches that aim at insulting or humiliating certain group of people. In this regard, another decision of the Court indicates that discrimination based on sexual orientation is as serious form of discrimination as the discrimination based on race, color or national origin.<sup>17</sup> Even though this decision does not refer to Macedonia, the national courts and other institutions for protection against discrimination should bear in mind this reasoning when making

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14 Coalition "Sexual and Health Rights of Marginalized Groups", 2013 Annual report on the rights of marginalized communities, April 2014.

15 European Court of Human Rights, *Vejdeland and Others v. Sweden*, Application No. 1813/07, judgment of 9 February 2012.

16 European Court of Human Rights, *Feret v. Belgium*, Application No. 15615/07, judgment of 16 July 2009, paragraph 73.

17 European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Application No. 3385/96, no. 3389/96, judgment of 27 September 1999, paragraph 97.

a decision i.e. establishing the criminal liability in case of incitement to discrimination on the basis of sexual orientation. It is therefore unquestionably necessary to change and clarify the national legal framework. In the meanwhile, however, this mustn't serve as justification for breeding hatred and intolerance against those who do not fit the hetero-normative matrix of today's society.

On the other hand, the public expression of homosexual orientation mustn't be subjected to limitation or sanction by the State under the pretense of protecting morals and tradition. The UN Human Rights Committee stresses out that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition"<sup>18</sup>. Any such limitation must be understood in the light of universality of human rights and the principle of non-discrimination.<sup>19</sup> In other words, the implementation of any law that sanctions public actions aimed at the propaganda of homosexuality as opposed to propaganda of heterosexuality or sexuality generally comprises also discrimination based on sexual orientation.<sup>20</sup>

The freedom of speech is closely connected with the freedom of assembly, both being guaranteed by the Constitution in Macedonia. LGBT persons run a serious risk of becoming victims of a hate crime or a hate-motivated incident, especially in public places.<sup>21</sup> In the last several years, there have been cases of organization of the LGBT community in Macedonia which has led to violations and limitation of their freedoms of assembly and expression of attitudes related to sexuality and gender identity.<sup>22</sup> Moreover, these cases either haven't yet been acted upon or are being resolved at a slow pace which indicates the lack of political will and strong legal framework that would enable efficient and timely detection and punishment of offenders. When acting upon these cases, the national judicial bodies should consider the Court's findings in regard to the different justifica-

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18 Human Rights Committee. General Comment no. 22 Article 18 (Forty-eighth session, 1993). Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), paragraph 8.

19 Human Rights Committee. General Comment no. 34 Article 19 (102 session, 2011). Adopted by Human Rights Treaty Bodies, CCPR/C/GC/34, paragraph 32.

20 Human Rights Committee. *Irina Fedotova v. Russia*, communication no. 1932/2010 CCPR/C/106/D/1932/2010.

21 Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, Thomas Hammarberg, 2011.

22 Coalition "Sexual and Health Rights of Marginalized Groups", 2012 Annual report on the rights of marginalized communities, June 2013.

tions of the State Parties involved in the process and found by the Court to have violated the freedom of assembly.

In one of the cases, an organization didn't obtain permission to organize a march for raising awareness of sexual minority rights which should have been issued by the Mayor's Office whereas meanwhile the Mayor himself condemned the organization of an event envisioned as "*a public propaganda of homosexuality*". The Court has taken into consideration all circumstances including the publicly expressed views of the Mayor - whose Office is in charge to provide an area for public assembly - which, according to the Court's statement, have influenced the final decision to refuse permission.<sup>23</sup> Politicians' statements given publicly and expressing their personal views on homosexuality should not be dismissed nor analyzed as isolated cases. On the contrary, "the Court is of the view that it may be reasonably surmised that the Mayor's opinions could have affected the decision-making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner."<sup>24</sup> Furthermore, the Court has also found in other circumstances that the State cannot justify the ban on public gatherings for LGBT rights promotion under the pretext of protecting the majority who has negative attitudes towards homosexuality. Namely, the Court's explanations indicate that "if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion".<sup>25</sup>

Thus, the State cannot refer to the majority opinion so as to exclude from or to limit the enjoyment of the rights by minorities. Any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.<sup>26</sup> In the process of argument analysis, the Court defines the criteria to be applied when the State restricts certain right of any group, in this case those of the people with different sexual orientation and gender identity, so as to

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23 European Court of Human Rights, *Baczkowski and others v. Poland*, Application No. 1543/06, Judgment of 3 May 2007.

24 *Idem*, paragraph 100.

25 European Court of Human Rights, *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, Application No. 29221/95 and 29225/95, judgment of 2 January 2002.

26 European Court of Human Rights, *Sergey Kuznetsov v. Russia*, Application No. 10877/04, judgment of 23 October 2008, paragraph 45.

protect another group. According to the Court, the State cannot substitute one legitimate objective guaranteed under the Convention for another one that has never been considered as relevant in the process of striking balance on national level. In that context, the Court underlines that the guarantees of freedom of assembly and association as defined under the Convention apply to all assemblies except to those where the organizers and participants have violent intentions or otherwise deny the foundations of a “democratic society”.<sup>27</sup> In respect of striking the balance among competing Convention rights, the Court allows the national authorities a wide margin of appreciation. For instance, the Court found that there was no breach of the right to manifest religion or belief in the case where the employee was dismissed because she refused to register same-sex partnership due to her Christian religion which disapproves same-sex relationships.<sup>28</sup>

### **Margin of appreciation of the States in cases of discrimination based on sexual orientation**

In several cases the Court has underlined the fact that the difference in treatment on the basis of sexual orientation requires particularly serious reasons by way of justification.<sup>29</sup> Hence, the States have a very narrow margin of appreciation in cases dealing with LGBT rights. Although afforded to the States, the margin of appreciation is seemingly defined as the result of method usage but, in fact, reflects the moral reasoning of the Court. Consequently, apropos homosexuality-related issues, differences can be found in the way the margin of appreciation is being used and determined.<sup>30</sup>

The recent case-law of the Court provides two examples of the Court’s unpredictability in cases with similar fact evidence. In the first case, the Court was to determine whether discrimination based on sexual orientation may have occurred in relation to the right to adoption. According to the plaintiff’s allegations, the legal system in France allows for a single

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27 *G. v. Germany* no.13079/87, Commission decision of 6 March 1989, Decisions and Reports (DR) 60, p. 256, and *Christians against Racism and Fascism v. the United Kingdom*, Commission decision of July 1980, DR 21, p.138.

28 European Court of Human Rights, *Eweida and others v. the United Kingdom*, Application No. 48420/10; 59842/10; 51671/10 I 36516/10, judgment of 15 January 2013.

29 European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, judgment of 24 October 2003, paragraph 98.

30 Paul Johnson, *Homosexuality and the European Court of Human Rights*, Routledge 2013.

non-married adoptive parent to adopt a child but does not allow it to homosexuals or bisexuals without taking into consideration their personal qualities and capacities for child upbringing. However, relying on the wide margin of appreciation, the Court has ruled that the refusal to authorize adoption did not infringe the principle of proportionality and that the justification given by the Government appears objective and reasonable and the difference in treatment complained of is not discriminatory.<sup>31</sup> In another case versus France<sup>32</sup>, the applicant was in a stable lesbian relationship and wanted to adopt a child. She alleged that at every stage of her application for authorization to adopt she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life. The Court made a difference compared to the previous case because of the fact that the applicant was in a stable relationship and therefore did not consider that there would be “difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child”. These two judgments are significant because they demonstrate a change in trend in the Court’s decision-making in relation to certain issue. The Court has once again demonstrated that the ECHR is a live instrument and thus, adaptable to the moral and social developments of the present-day society.

Similar insecurity in the application of the margin of appreciation is demonstrated in cases related to violation of the rights of same-sex partners to legal recognition. Two applicants have commenced a civil proceeding before the Court after the State of Austria did not allow them to conclude a marriage. They argued that the legal obstacle preventing them from getting married constitutes a violation of their right to respect for private and family life as well as of the principle of non-discrimination. In its findings, the Court accentuates that [the Court] still is not ready to provide interpretation of Article 12 (the right to marriage) as a right guaranteed to same-sex couples under ECHR. However, the Court does not eliminate the possibility of change of this conclusion once the majority of European countries<sup>33</sup> include same-sex couples in the national marriage laws. The Court alludes to its previous legal practice relevant to the interpretation of Article 12

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31 European Court of Human Rights, *Fretté v. France*, Application No. 36515/97, judgment of 26 May 2002.

32 European Court of Human Rights, *E.B. v. France*, Application No. 43546/02, judgment of 28 January 2008.

33 At the time when this decision was made, the same-sex marriage in Europe was legal in the following states: Belgium, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden.

and then makes reference to the *Christine Goodwin judgment*<sup>34</sup> according to which the determination of gender cannot be done by purely biological criteria. The Court refers in particular to Article 9 of the Charter of Fundamental Rights of the European Union where marriage isn't strictly defined as union between "a man and a woman", thus meaning that the right to marriage enshrined in Article 12 must not in all circumstances be limited to marriage between two persons of the opposite sex.<sup>35</sup>

The most significant aspect of the judgment regarding the rights of same-sex couples in Europe is the conclusion that Article 14 is applicable in combination with the "respect for family life", mentioned in Article 8 of ECHR. The current practice has supported the attitude that same-sex couples enjoy the right to "private life" but not the right to "family life". Although the majority of judges in this case did not establish infringement of the ECHR, the case itself represents a step forward in achieving legal recognition for people with homosexual orientation as well as full equality for people with non-heterosexual orientation.

In addition, in the case of *Kozak v. Poland*, the Court has found that the applicant had been discriminated against on the ground of his sexual preferences and that he suffered a violation of his right to respect for private life by being denied the right to succeed to a tenancy after the death of his partner. This judgment is of great importance as the Court clearly explains that States should understand the difference in treatment on the basis of sexual orientation. "Sexual orientation is a concept covered by Article 14. When the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference in treatment is based on sex or sexual orientation, the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realizing the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention".<sup>36</sup>

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34 European Court of Human Rights, *Christine Goodwin v United Kingdom*, Application No. 28957/95, judgment of 11 July 2002.

35 European Court of Human Rights, *Schalk and Kopf v. Austria*, Application No. 30141/04, §52, judgment of 24 June 2010.

36 European Court of Human Rights, *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010, §92.

This Court's statement points out to the State Parties that their margin of appreciation concerning the difference in treatment based on sexual orientation is so narrow that it does not even exist. However, subsequent judgments regarding the margin of appreciation in cases of discrimination based on sexual orientation indicate that States do enjoy certain margin of appreciation. The case of *Schalk & Kopf v. Austria* is a clear example where the Court relies on its concept of margin determination in order to disguise the moral reasoning (in this case, of same-sex marriages) by shifting the margin of appreciation to the State.<sup>37</sup> Although this case has been reviewed several months after the case of *Kozak v. Poland*, in the analysis of the arguments regarding the difference in treatment of marital and registered partnerships, the Court once again extends the margin of appreciation afforded to the States. Irrespectively of the fluctuating nature of the margin of appreciation given to them by the Court, the States must not limit the rights of individuals purely on the basis of their sexual orientation and if there is such limitation, the State is obligated to justify its necessity under the circumstances.

### **Development of the legal framework for transgender rights protection**

Over the past several years a legal framework has been developed on international level ensuring the enjoyment of the human rights without any discrimination or social exclusion of transgender people.<sup>38</sup>

The principle of equality has been articulated through several provisions in the international agreements adopted by the General Assembly of the United Nations. The International Covenant on Economic, Social and Cultural Rights<sup>39</sup> was the first document to have recognized the gender identity as prohibited ground of discrimination. The Committee on Economic, Social and Cultural Rights provides interpretation of the meaning of discrimination, stressing the "equal and inalienable rights of all" and

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37 Paul Johnson, *Homosexuality and the European Court of Human Rights*, Routledge 2013.

38 Transgender persons are people whose gender identity does not fit the binary standards of the society or whose gender identity is opposite of their biological sex. Transgender people can be people with gender non-conforming behavior, transsexuals, cross-dressers, etc. The term transsexual designates any person that has undergone or is planning to undergo a series of medical procedures such as hormone therapy, sex reassignment surgeries and to change one's legal identity documents so as to confirm one's gender identity.

39 General Assembly of UN, International Covenant on Economic, Social and Cultural Rights of 16 December 1966, entry into force 3 January 1976.

expressly recognizing the rights of “everyone” to the various Covenant rights such as, *inter alia*, the right to work, just and favorable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.<sup>40</sup> Particularly significant is the interpretation given by the Committee on Economic, Social and Cultural Rights of the expression “other status” according to which the “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 work place.”<sup>41</sup>

The Committee on the Rights of the Child, as per the Convention on the Rights of the Child, establishes that the “list of grounds of discrimination also includes sexual orientation, gender identity and health status, for example HIV status and mental health.”<sup>42</sup> In addition, it establishes the elements to be mainstreamed into national coordinating framework for protection of the rights of the child, particularly of “children in potentially vulnerable situations, groups of children which are likely to be exposed to violence include, but are not limited to, children: [...] who are lesbian, gay, transgender or transsexual [...]”<sup>43</sup>

Ever since the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted, the text has been developed with the interpretation provided by the Committee on the Elimination of Discrimination against Women (hereinafter CEDAW Committee). The commitment of CEDAW to achieve essential equality is also substantial in terms of including specific vulnerable categories of women such as LBT (lesbian, bisexual and transgender persons). The CEDAW Committee indicates in the part referring to older women and the protection of their rights that “the discrimination older women experience is often multidimension-

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40 General Comment no.20 Non-discrimination in economic, social and cultural rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20,2009,§3.

41 Committee on Economic, Social and Cultural Rights, General Comment no.20:Non-discrimination in Economic, Social and Cultural Rights Article 2 paragraph 2, E/C.12/GC/20, 2009 §32.

42 Committee on the rights of the child. General Comment no. 15 (2013) on the right of the child to enjoyment of the highest attainable standard of health (article 24), § 8.

43 Committee on the rights of the child. General Comment no. 13 (2011) on the right of the child to freedom of all forms of violence, § 72.

al, with age discrimination, compounding other forms of discrimination based on sex, gender, ethnic origin, disability, levels of poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds.”<sup>44</sup> Moreover, the Committee states that “intersection is the basic concept of understanding the scope of State Parties’ core obligations enshrined in the Convention. Race and gender discrimination against women are inextricably linked with other factors affecting women such as race, ethnicity, religion or belief, health, status, age, class and caste and their sexual orientation and gender identity. State Parties must legally recognize this intersection of different forms of discrimination and their negative influence on women and prohibit them.”<sup>45</sup>

The Law on prevention and protection against discrimination and the Law on equal possibilities for women and men do not include the gender identity as prohibited ground of discrimination in case of difference in treatment. In order to incite the development of a national legal framework and legal practice in cases of transgender rights protection and thus fill the current judicial void, it is necessary to bring the international framework closer to the national policy and decision-makers.

So far, the Court has found violation of the transgender rights in only seven cases. In one case the Court didn’t establish violation but did however recognize that the gender identity constituted an independent protected ground of discrimination as per the ECHR.<sup>46</sup> The first successful case before the court is against France.<sup>47</sup> The applicant is a transgender person that identifies as a woman who underwent surgery and applied for legal recognition of her gender as it differed from the sex assigned at birth. Once the change of sex was done, she wished to marry her long-term partner. Previously she had applied for recognition of a change of sex as registered in the civil status register but has been systematically refused by the French courts. Having regard to the analysis of the complaint allegations in relation to the possibility of changing forenames, of male by female forename, in accordance with the established legal practice in France, “the Court

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44 Committee on Elimination of all forms of Discrimination Against Women, General Comment no.27 on older women and protection of their rights, § 13.

45 Committee on the Elimination of all forms of Discrimination Against Women, General Comment no.28 on the core obligations of State parties under article 2 of the Convention on the Elimination of all forms of Discrimination Against Women, § 18.

46 European Court of Human Rights, *P.V. v. Spain*, Application No. 35159/09, judgment of 30 November 2010.

47 European Court of Human Rights, *B. v. France*, Application No. 13343/87, judgment of 25 March 1992.

considers that the refusal to allow the applicant the change of forename requested by her is also a relevant factor from the point of view of Article 8<sup>48</sup> as she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual has not been attained, and there has thus been a violation of Article 8. [...]."<sup>49</sup> It was for the first time that the Court found that the State had the obligation to provide legal recognition of the changed sex indication in the identity documents so as to ensure uninterrupted enjoyment of the right to respect for the private life by the person with new identity. Another judgment confirmed the positive obligation of the State Parties to legally recognize the gender identity of a post-operative transsexual person.<sup>50</sup> This decision has been made almost ten years ago and represents a precedent in the Court's case-law as it goes one step further than the previous judgment by imposing obligation on the States to not only give full legal recognition to gender identity but to also provide the possibility of marriage with reassigned sex. By this decision, the Court has established that sex is not an unchangeable category and that State Parties have the obligation to provide sex reassignment surgery according to a procedure regulated by law.

There is a judicial vacuum in Macedonia when it comes to the rights of transgender persons. There is no law, bylaw, strategy or any other document that addresses the transgender issues in terms of legal recognition of gender identity or provision of sex reassignment services. In one of its judgments, the Court has found that the State's failure to adopt the necessary legislation on gender reassignment surgery, which would allow any person to complete one's treatment and have one's new gender legally recognized, constitutes violation of the right to respect for private and family life as guaranteed under ECHR.<sup>51</sup>

In two cases,<sup>52</sup> the Court has considered complaints about unfairness in the reimbursement process of the cost of gender reassignment surgery on

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48 *Idem*, § 58.

49 *Idem*, §63.

50 European Court of Human Rights, *Christine Goodwin v United Kingdom*, Application No. 28957/95, judgment of 11 July 2002.

51 European Court of Human Rights, *L. v. Lithuania*, Application No. 27527/03, judgment of 11 September 2007.

52 European Court of Human Rights, *Van Kück v. Germany*, Application No. 35968/97, judgment of 12 June 2003 and European Court of Human Rights, *Schlumpf v. Switzerland*, Application No. 29002/06, judgment of 9 January 2009.

national level. Having regard to the determination of the medical necessity of gender reassignment measures, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing. Accordingly, there has been a breach of Article 6 § 1 of the Convention.<sup>53</sup> The Court considers that “determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition. Having in mind that gender identity is one of the most intimate areas of a person’s private life, the burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.”<sup>54</sup> The approach taken by the national courts to examine the cause of the applicant’s transsexualism is inappropriate and unreasonable taking into account the following: a) the courts cannot receive sufficient information and medical expert opinion on the assessment of such complex issues; b) absence of conclusive scientific findings as to the cause of transsexualism.

The challenge to protect the human rights of all citizens implies consistent implementation of the human rights standards to all groups without exception. The legal framework in the Republic of Macedonia follows the international standards for protection against discrimination at a slow pace, which leads to adoption of laws that exclude entire groups of people from the protection measures against discrimination. Often heard argument is that the laws provide an open list of prohibited grounds of discrimination which includes the sexual orientation as well. Law and legal matters are living things that evolve and upgrade at once with the development of social conditions and values. However, it is unacceptable that LGBT rights are still on the table in the second decade of the 21<sup>st</sup> century. The Constitution is the highest law, adopted not so long ago, which stipulates that all citizens are entitled to all the rights and freedoms regardless of their race, sex, color, national and social origin, political and religious persuasion, wealth or social status.<sup>55</sup> At the same time, regional and international bodies for human rights protection have been developing legal practice which has established that the difference in treatment based on sexual orientation constitutes discrimination. The denial of the right to protection against discrimination based on sexual orientation has much greater consequences

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53 European Court of Human Rights, *Van Kück v. Germany*, Application No. 35968/97, judgment of 12 June 2003.

54 *Idem*, §54 ¶56.

55 Official Gazette of the Republic of Macedonia, No.52/92, Constitution of the Republic of Macedonia, Article 9, paragraph 1.

than the denial of the right itself. Namely, the exclusion of sexual orientation from the legal framework for protection means non-recognition of the sexuality as an intimate part of every individual's life which further on leads to non-recognition of the remaining rights of the individuals with non-heterosexual orientation and of the possibility of their effective protection.

**Natasha BOSKOVA**

**Резиме**

**INTERNATIONAL LEGAL  
FRAMEWORK FOR  
PROTECTION AGAINST  
DISCRIMINATION BASED ON  
SEXUAL ORIENTATION AND  
GENDER IDENTITY**

**Abstract**

The protection against discrimination represents a significant point in the development of both international and national human rights agenda. The Republic of Macedonia has not yet adopted a comprehensive antidiscrimination legislation that guarantees explicitly the protection against discrimination based on sexual orientation and gender identity. This text is a result of the analysis of the international legal framework for protection against discrimination based on sexual orientation and gender identity, carried out during the preparation of The Handbook of international standards for protection against discrimination based on sexual orientation and gender identity. The Handbook is envisioned as a tool that should incite judges, competent institutions, lawyers and activists to apply the international standards to their work, given that the challenge to protect the rights of all citizens implies consistent implementation of the standards for human rights protection of all groups without exception.

Заштитата од дискриминација претставува значајна точка во развојот на меѓународната, но и на домашната, агенда за човекови права. Македонија сè уште нема донесено сеопфатно анти-дискриминациско законодавство, кое експлицитно штити од дискриминација врз основа на сексуалната ориентација и на родовиот идентитет. Отворената листа на основи во законската рамка, овозможува директна примена на меѓународните документи во кои сексуалната ориентација и родовиот идентитет се признаени основи. Овој труд произлегува од анализата на меѓународната правна рамка за заштита од дискриминација врз основа на сексуалната ориентација и родовиот идентитет, направена при подготовката на Прирачникот со меѓународни стандарди за заштита од дискриминација врз основа на сексуалната ориентација и родовиот идентитет. Прирачникот претставува алатка која треба да ги охрабри судиите, надлежните институции, адвокатите и активистите да ги користат меѓународните стандарди во својата работа, а бидејќи предизвикот да се заштитат правата на сите граѓани, подразбира конзистентна примена на стандардите за заштита на човекови права врз сите групи, без исклучок.

## Bibliography

Committee on Economic, Social and Cultural Rights, General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights Article 2 paragraph 2, E/C.12/GC/20, 2009.

Committee on Elimination of all forms of Discrimination Against Women, General Comment no.27 on older women and protection of their rights.

Committee on the Elimination of all forms of Discrimination Against Women, General Comment no.28 on the core obligations of State parties under article 2 of the Convention on the Elimination of all forms of Discrimination Against Women.

Committee on the rights of the child. General Comment no. 13 (2011) on the right of the child to freedom of all forms of violence.

Committee on the rights of the child. General Comment no. 15 (2013) on the right of the child to enjoyment of the highest attainable standard of health.

Council of Europe, Discrimination on grounds of sexual orientation and gender identity in Europe, Thomas Hammarberg, 2011

Council of Europe, Discrimination on grounds of sexual orientation and gender identity in Europe, Thomas Hammarberg, 2011.

European Court of Human Rights, *B. v. France*, Application No. 13343/87, judgment of 25 March 1992.

European Court of Human Rights, *Baczowski and others v. Poland*, Application No.1543/06, judgment of 3 May 2007.

European Court of Human Rights, *Christine Goodwin v United Kingdom*, Application No. 28957/95, judgment of 11 July 2002.

European Court of Human Rights, *Dudgeon v. The United Kingdom*, Application No. 7525 /76, judgment of 22 October 1981.

European Court of Human Rights, *E.B. v. France*, Application No.43546/02, judgment of 28 January 2008.

European Court of Human Rights, *Eweida and others v. the United Kingdom*, Application No. 48420/10; 59842/10; 51671/10 I 36516/10, judgment of 15 January 2013.

European Court of Human Rights, *Feret v. Belgium*, Application No. 15615/07, judgment of 16 July 2009.

European Court of Human Rights, *Fretté v. France*, Application No.36515/97, judgment of 26 May 2002.

European Court of Human Rights, *Karner v. Austria*, Application No.40016/98, judgment of 24 October 2003.

European Court of Human Rights, *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010.

European Court of Human Rights, *L. v. Lithuania*, Application No. 27527/03, judgment of 11 September 2007.

European Court of Human Rights, *P.V. v. Spain*, Application No. 35159/09, judgment of 30 November 2010.

European Court of Human Rights, *Schalk and Kopf v. Austria*, Application No. 30141/04, §52, judgment of 24 June 2010.

European Court of Human Rights, *Schlumpf v. Switzerland*, Application No. 29002/06, judgment of 9 January 2009.

European Court of Human Rights, *Sergey Kuznetsov v. Russia*, Application No. 10877/04, judgment of 23 October 2008.

European Court of Human Rights, *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, Application No. 29221/95 and 29225/95, judgment of 2 January 2002.

European Court of Human Rights, *Van Kück v. Germany*, Application No. 35968/97, judgment of 12 June 2003.

European Court of Human Rights, *Vejdeland and Others v. Sweden*, Application No. 1813/07, judgment of 9 February 2012.

European Court of Human Rights, *L. and V. v. Austria*, Application No. 39392/98 and 39829/98, judgment of 9 April 2003.

European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Application No. 3385/96, no. 3389/96, judgment of 27 September 1999.

*G. v. Germany* no. 13079/87, Commission decision of 6 March 1989, Decisions and Reports (DR) 60, p. 256, and *Christians against Racism and Fascism v. the United Kingdom*, Commission decision of July 1980, DR 21.

General Assembly of UN, International Covenant on Economic, Social and Cultural Rights of 16 December 1966 entry into force 3 January 1976.

General Comment no. 20 Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20, 2009.

Human rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

Human Rights Committee. General Comment no. 22 Article 18 (Forty-eighth session, 1993). Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

Human Rights Committee. General Comment no. 34 Article 19 (102 session, 2011). Adopted by Human Rights Treaty Bodies, CCPR/C/GC/34.

Human Rights Committee. *Irina Fedotova v. Russia*, communication no. 1932/2010 CCPR/C/106/D/1932/2010.

Paul Johnson, *Homosexuality and the European Court of Human Rights*,

Routledge 2013.

Коалиција за заштита и промоција на сексуалните и здравствени права на маргинализираните заедници, Речник на термини поврзани со сексуална работа и ЛГБТ, Скопје 2008.

Коалиција Сексуални и здравствени права на маргинализираните заедници, Годишен извештај за состојбата со правата на маргинализираните заедници за 2013 година, Април 2014.

Коалиција Сексуални и здравствени права на маргинализираните заедници, Годишен извештај за состојбата со правата на маргинализираните заедници за 2012 година, Јуни 2013.

Коалицијата Сексуални и здравствени права на маргинализираните заедници, Прирачник за меѓународни стандарди за заштита од дискриминација врз основа на сексуалната ориентација и родовиот идентитет, Бошкова Наташа, Скопје, 2014.

Службен весник на Република Македонија бр. 50/2010, 44/14, Закон за спречување и заштита од дискриминација.

Службен весник на Република Македонија бр. 6/2012. Закон за еднакви можности на жените и мажите.

Службен весник на Република Македонија бр.52/92, 1/92, 31/98, 91/01, 84/03, 107/05 и 3/09. Устав на Република Македонија.